

weight of a speech ; and those who are eager for the praise of such distinction, are apt, that they may be thought to have made nice and numerous divisions, to introduce what is wholly superfluous, and to cut asunder what is naturally united ; they make their parts, not so much *more in number*, as *less in bulk* ; and, after a thousand partitions, fall into that very obscurity against which partition was invented.

26. The proposition of a cause, whether divided or single, ought, whenever it can be introduced with advantage, to be, above all, plain and clear ; (for what can be more disgraceful than to make that *obscure* which is adopted for no other purpose than that other parts may *not* be *obscure* ?) and it should also be brief, and not loaded even with a single useless word ; for we must remember that we have not to show what we are saying, but what we are going to say. 27. We must be cautious, too, that nothing may be deficient in it, and nothing redundant. The most frequent cause of redundancy is, when we divide into species what it would be sufficient to divide into genera ; or when, after mentioning the genus, we add species to it, as if we should speak of *virtue, justice, temperance*, when justice and temperance are but species of virtue.

28. The first step in partition is, to distinguish what is admitted and what is disputed. Next, in regard to what is admitted, to distinguish what our adversary admits, and what we admit ; and, in respect to what is disputed, to specify what our propositions are, and what those of our opponent. But what is most culpable, is, not to treat of your several points in the order in which you have arranged them.

BOOK V.

INTRODUCTION.

Some rhetoricians have thought that the only duty of an orator is to *teach* ; others have called this his chief duty. The necessity for this book.

1. THERE have been authors,-* and some, indeed, of high reputation, who have thought that the sole duty of an orator is to *inform*.† Excitement of the feelings, they considered, was to be prohibited, for two reasons ; first, because all perturbation of the mind is an evil ;+ and, secondly, because it is inexcusable for a judge to be diverted from the truth by pity, anger, or any similar passion ; and to aim at pleasing the audience, when the object of speaking is to gain victory, they regarded not only as needless in a pleader, but scarcely worthy evbn of a man. 2. Many, too, who doubtless did not exclude those arts from the department of the orator, considered, nevertheless, that his proper and peculiar office was to establish his own propositions and to refute those of his adversary. 3. Whichsoever of these opinions is right, (for I do not here offer my own judgment,) this book must appear, in the estimation of both parties, extremely necessary, as the entire subject of it is proof and refutation ; to which all that has hitherto been said § on judicial causes is subservient. 4. For there is no other object either in an introduction or a narrative than to prepare the judge ; and to know the *states*¶ of causes, and to contemplate all the other matters of which I have treated above,¶ would be useless, unless we proceed to proof. 5. In fine, of the five parts" into which we have distinguished judicial pleading, whatever other may occasionally be unnecessary in a cause, there certainly never occurs a suit in which proof is not required.

As to directions regarding it, I think that I shall make the

" The commentators rightly refer to Aristotle, Rhet. i. 1, 4. *Spalding*.

* See iv. 5, 6.

§ According to the Stoics.

¶ *B. iii. c. 9, seqq*

† See b. iii. c. 6.

¶ lie refers especially, I consider, to the whole of the eleventh chapter of the third book. *Spalding*.

* See iii. 9, 1 ; iv. 3. 15.

h st division of them, by first showing what are applicable to all kinds of questions, and next, by enlarging on what are peculiar to the several sorts of causes.*

CHAPTER I.

Inartificial proofs. Eloquence not inefficient in regard to them.

1. IN the first place, then, the division which has been laid down by Aristotlet has gained the approbation of almost all rhetorj-ans ; namely, that there are some proofs which an orator adopts that are *unconnected with the art* of speaking, and others which *he himself extracts*, and, as it were, produces, *front his cause*. Fence they have called the one sort *urgxvor*, in-artificial," and the other avrexvor, << artificial." 2. Of the former kind, are *precognitions, public reports, evidence extracted by torture, writings, oaths, and the testimony of witnesses*, with which the greater part of forensic pleadings are wholly concerned. But though these species of proof are devoid of art in themselves, they yet require, very frequently, to be supported or overthrown with the utmost force of eloquence ; and those writers, therefore, appear to me highly deserving of blame, who have excluded all this kind of proofs from the rules of art. 3. It is not, however, my intention to collect all that is usually said for and against these points ; for I do not design to lay down common places, which would be a task of infinite labour, but merely to point out a general method and plan. The way being shown, each must exert his ability, not only to follow it, but to find out similar courses, as the nature of particular cases may require ; since no one can speak of all kinds of causes, even among such as have occurred, to say nothing of such as may occur.

* That is, of judicial causes. There is no reference here, as Spalding observes, to the division mentioned in iii. 3, 15, and iii. 4, 15. t Rhet. i. 1, 2.

CHAPTER II.

Previous judgments. The authority of those who deliver them to be considered. Similitude in cases ; how to be refuted.

1. As to *precognitions*, the whole matter of them ranges itself under three heads ; first, *cases* which have been already decided *under similar circumstances*, and which may morn properly be termed *precedents* ; as *about wills of fathers which have been ~~undoubtedly~~ or ratified in opposition to their children* ; secondly, *relative to the cause itself*, (from which also is derived the name,) such as those which are said to have been pronounced upon *Oppianicus*,* and those of the senate upon *IMilo* ;† or, thirdly, when sentence has already been given on the same affair, as in the case of persons that have been sent out of the country, : of appeals in regard to personal liberty,§ and of divisions in the judgments of the centumviri, when they have been separated into twoparties.‡ 2. Precognitions are established chiefly by two things ; the *authority* of those who have given judgment, and the *similitude* of the cases in question ; as for the annulling of them, it is rarely obtained by reproaching the judges, unless there be a manifest error in them ; for each of the judges wises the sentence of another to stand firm, remembering that he himself is also to pronounce a sentence, and being unwilling to offer a precedent which may recoil upon himself. 3. The pleader must have recourse,

* Cicero pro Cluent. c. 17, *seqq.* See also iv. 5, 11.

† Cie. pro Mil. c. 5.

§ Regius and Gesner very properly refer to Digest. xlvi. 22, *tit. de interdictis, et relegatis et deportatis* ; also *xxiii. de sententiam passis et restitutis*. Spalding.

‡ *Assertion secunda.*] Whoever thought that he was unjustly detained in slavery might procure an *assertor* to make application for his liberty by a judicial process, he himself being unable to plead his own cause. This was called *causa l'beralis*. If the *assertor* was unsuccessful on the first occasion, he might apply a second and a third time ; Comp. xi. 1, 78 ; but this privilege of repeating the application was abolished by Justinian, Codic. vii. 17, 1, 1. Spalding.

¶ *Partibus eentumviralium, quce in duos hastas divine runt.*] With *centumviralium* understand *causarum*. *Hasta*, a spear, the mark of authority, is here put for *judicium*, a company of judges. See xi. 1, 78. Pliny speaks of *quadruplicia centumvivalia*. Epist. i. 18, 3 ; vi. 33, 2. These several divisions or *hastw* gave judgment on the same cause. Spalding.

therefore, in the first two cases, if the matter allow, to the discovery of some dissimilarity in the cases ; (and there is scarcely one exactly like another in all particulars;) or, if that course be impossible, or the cause be the same, some negligence in the pleadings must be exposed, or we must complain of the weakness of the parties against whom judgment was given, or influence that corrupted the witnesses, or of public odium, or ignorance ; or we must find something that has since occurred to affect the cause. 4. If none of these allegations be possible, we may observe that many motives on trials have led to unjust sentences, and that through such influence *Rutilius* was condemned, and Clodius and Catilinet acquitted.* The judges may also be solicited rather to examine the question themselves than to rest their faith on the verdict of others. 5. But against decrees of the senate, and the ordinances of princes or magistrates, there is no remedy, unless some difference, however small, be discovered in the cases, or some subsequent determination of the same persons, or personages of the same dignity, at variance with the former. If nothing of the kind be discoverable, there will be no case for judgment.

* See xi. 1, 12. Publius Rutilius Rufus was found guilty of extortion, A.u.c. 662, in consequence of a conspiracy of the *publicani* against him, he having defended Asia from their injustice. His property, being confiscated, was found to be too small to pay the fine laid upon him, and, at the same time, to have been obtained by the most honourable means. He went into voluntary exile at Mitylene, and afterwards at Smyrna, where he received the highest honour from all the people of Asia, and was presented with greater wealth than he had previously possessed. See Dion Cass. p. Reim. 44. He was a Stoic, and pupil of Panwtius, and Seneca frequently mentions him in conjunction with Socrates as an example of wisdom and fortitude in enduring adversity. See Sen. de Prov. c. 3 ; do Trauq. Anim. c. 15 ; de Vit. Beat. c. 18 ; do Benef. v. 17, 37 ; Epist. 24, 67, 79 ; also Duker ad Flor. iii. 17, 3 ; Vell. Pat. ii. 13, 2. Eruesti Clav. Cic. v. Rutilius ; Schneider ad Cic. Brut. e. 30. *Spalding*

t Cicero joins the same three names together in his speech against Piso, c. 39. See iv. 2, 88. Catiline was accused of connexion with a vestal virgin, a.u.c. 682, and of extortion, A.U.C. 688. From the tir t charge he escaped by the influence of Terentia, the wife of Cicero, whose sister Fabia is said to have been the vestal with whom lie was concerned ; of the second he was acquitted through the prevarication of Clodius the accuser ; see Cic. in Fragm. apud Ass Pedian. in Orat. Cic. contra Anton. p. 145, 151. *Spalding.*

CHAPTER III.

Of public report.

COMMON *fame* and *report*, one party will call the consent of the whole people, and a sort of public evidence ; the other will term it mere talk without any certain authority, to which malignity has given rise, and credulity augmentation ; **an evil** which may affect every man, even the most innocent, through the artifice of enemies spreading falsehood. Examples will not be wanting to support either representation.

CHAPTER IV.

Of evidence exacted by torture.

1. THE case is similar with regard to evidence exacted *by torture*, which is a frequent subject of discussion ; as one side will call torture an infallible means for discovering truth, the other will represent it as a cause of the utterance of falsehood ; because to some persons ability to endure makes lying easy, to others weakness renders it necessary.* To what purpose should I say more on this subject? The pleadings of the ancients and the moderns are alike full of instances. 2. Yet under this head there will be circumstances peculiar to certain cases ; for if the question be about applying the torture, it will make a great difference *who it is that demands it, and whom he demands or offers for it, and against whom, and from what motive ; or, if the torture has been applied, who presided at it, who it was that was tortured, and how ; whether he uttered what was incredible or consistent ; whether he persisted in his first assertions, or made any change in them ; whether he confessed at the commencement of the torture, or after it had proceeded for some time ; questions which are as numberless as the variety of cases.*

* Comp. c. 10, sect. 70.

CHAPTER V.

Of the refutation of written testimony.

1. AGAINST *writings*, too, pleaders have often spoken, and must often speak, as we know that it is common for documents not only to be set aside, but to be charged with being forged. As there must, in the latter case, be either *guilt* or ignorance on the part of those who signed them, ignorance will be the safer and lighter charge ; because the number of those whom we actually accuse will be smaller. 2. But the whole of such a proceeding* must rest on arguments drawn from the particular case ; if, for example, it is *difficult* to prove, or even incredible, that what the writing states occurred ; or if (as more frequently happens) it may be overthrown by proofs equally inartificial ; if he to whose prejudice the deed was signed, or any one of those who signed it, can be said to have been absent at the time, or to have died before it ; if dates disagree ; or if anything that occurred before or after is at variance with what is written. Even a mere *inspection* is often sufficient to discover forgery.

CHAPTER VI.

On offering to take an oath, and receiving that of the opposite party, 1, 2. Arguments on the subject, 3- 5. Judgment of the experienced respecting it, 6.

1. As to an *oath*, parties going to law either offer their own, or refuse to receive that of their adversary when offered ; or they require one from him, or refuse to take one when required from themselves. For a person to offer to take an oath himself, without allowing his opponent to take his, is commonly a sign of bad faith. 2. He, however, who shall do so, must either shelter himself under such purity of moral conduct as to make it incredible that he will commit perjury, or under the influence of religion ; (in regard to which he will gain more credit if he act in such a manner as not to appear to come forward

* *Hoc ipsum.*] By these words he means *omne refellendi et accusands tabulas negotium.* Spalding.

r

with eagerness to take his oath, and yet not to shrink from taking it ;) or on the small importance of the cause, should such be its nature, for the sake of which he would hardly incur the divine displeasure ; or if, in addition to other means of gaining his cause, he offers his oath, superabundantly, as it were, as the testimony of a pure conscience.

3. He who shall be unwilling to receive the oath of his adversary, will allege the inequality of the terms, and remark that the fear of taking an oath is lightly regarded by many, as even philosophers have been found to deny that the gods pay any attention to human affairs ; and that he who is ready to swear without any one putting him to his oath, is disposed to give sentence himself in his own cause, and to show how light and easy a thing he considers the obligation by which he offers to bind himself. 4. But he who offers to accept his adversary's oath, besides appearing to act with moderation, as he makes his opponent the arbiter of the cause, relieves the judge also, to whom the decision belongs, from a heavy responsibility, since he would certainly rest rather on another man's oath than on his own. 5. Hence the refusal to take oath becomes the more difficult, unless the affair in question happens to be such that it cannot be supposed to be known to the party. If this excuse be wanting, there will be but one course left for him, which is to say that odium is sought to be excited against him by his opponent, whose object is to make it appear that he has ground for complaint in a cause in which he cannot obtain victory ; and, accordingly, though a dishonest man would have eagerly availed himself of such a proposal, he himself would rather prove what he asserts than leave it doubtful in the mind of any one whether he were guilty of perjury.

6. But, in my younger days, men who had grown old in pleading used to lay it down as a rule that *we should never give our opponent the option of taking his oath* ; as also that he should never be allowed the choice of a judge ;+ and that a judge

* If he himself is at the pains of bringing forward many argument) and proofs, and the other party is excused from doing anything more than taking his oath. *Spalding.*

+ For the judges took an oath to give just judgment, and whatever sentence they pronounced was pronounced on their oath. *Spalding.*

\$ In the appointment of the judges by lot, we ought not to yield to the wish and option of our adversary ; nor in choosing an arbiter in case. *Turnebua.*

should not be taken from the counsellors*- of the opposite party ; since, if it was thought dishonourable in an advocate to speak against his client, it should assuredly be considered more dishonourable to do anything that would injure him.

CHAPTER VII.

Written evidence ; how to be refuted, § 1, 2. Modes of proceeding with regard to witnesses that appear in person, 3-6. An intimate knowledge of the cause necessary, 7, 8. How voluntary witnesses should be produced, 9-11. Caution requisite in respect to them, 12-14. How a pleader must act with regard to a witness whom he knows to be adverse or favourable to the accused, 15-19. How he must act in regard to one whose disposition he does not know, 20, 21. Of the interrogation of witnesses, 22-32. Of the collision between written and oral testimony, 32-34. Of supernatural testimony, 35-37.

1. THE greatest efforts of pleaders, however, are employed about *evidence*. Evidence is given either in *writing*, or by *witnesses present in court*. The opposition to writings is the more simple ; for shame may seem to have had less preventive power in the presence of only a few witnesses,t and absence may be unfavourably represented as intimating self-distrust. If the character of the writer is open to no reflection, we may perhaps throw some discredit on that of the witnesses to it.
2. Besides, a secret feeling is entertained unfavourable to all who offer evidence in writing, as no man gives it in that way unless of his own free-will, and thus shows that he is no friend to the party against whom he deposes. Yet a pleader on the opposite side should not be ready to admit that a friend may not speak truth on behalf of a friend, or an enemy against

* *Ex advocatis.*] By this word we are not to understand pleader, but those persons whom Asconius, in *Divinationem*, p. 20, mentions as attending their friends on trials, either to assist them in legal difficulties, or to support them by their presence and countenance. *Spalding.*

t Less than it would have in an open court where testimony is given orally.

t Other witnesses were summoned, and obliged to give evidence at a certain time : those who gave their testimony in writing gave it voluntarily. *Turnebus.*

an enemy, if the credit of either be unimpeached. But the subject, in both its bearings, furnishes much matter for consideration.

3. With witnesses who are *present* there may be great contention, and we accordingly engage, whether against them or for them, with the double force of regular speeches* and interrogatories. 4. In *regular speeches*, we commonly offer observations, first of all, for and against witnesses in general. This is a common topic for argument ; one side maintaining that there is no evidence stronger than that which rests on human knowledge, and the other, to detract from the credit of such knowledge, enumerating every cause by which testimony is rendered false. 5. The next step is, when pleaders make special attacks, though on bodies of men ; for we know that the testimonies of whole nations have been invalidated by orators, as well as whole classes of evidence ; as in the case of bear-say witnesses, for pleaders maintain that they are not in reality witnesses, but mere reporters of the words of unsworn individuals ; and in cases of extortion, those who swear that they have paid money to the accused, are to be regarded as parties in the prosecution, not as witnesses. 8. Sometimes a pleader's remarks are directed against individual witnesses ; a kind of attack which we find in many pleadings, sometimes combined with a defence, and sometimes given separately, as that of Cicero on the witness Vatinius.t

7. Let me therefore consider the whole subject, as I have taken upon myself to attempt the entire education of an orator ; otherwise, the two books composed on this head by Domitius Afer\$ would have been sufficient, a rhetorician whom I attended with great respect when he was old and I was young, so that the contents of his books were not only read by me, but learned from his own mouth. He very justly makes it a rule that it is the great business of an orator, in regard to this part of his cause, to gain a thorough knowledge of the whole of it ; but it is a rule to be observed in' regard to every part.

" *Actionum*-.1 Compare sect. 8, where *oratio perpetua* is used as equivalent to *actio*. *Spalding.*

+ He had given evidence against Publius Sextius when **defended** by Cicero, who, *Epist. ad Lentulum* i. 9, and *ad Q. Frat. ii* 4, observes that he attacked him with great vehemence on that occasion. **But the speech is extant.** *Qæmer.*

See i. 5, 24.

8. How this knowledge may be attained, I shall show when I arrive at the part of my work destined for that subject.* Such knowledge will suggest matter for questions, and supply, as it were, weapons to the hand ; and it will also show us for what the mind of the judge should be prepared by our speech ; as it is by a regular address that the credit of witnesses should be either established or overthrown ; since every judge is affected by testimony just as he has been previously influenced to believe or disbelieve it.

9. Since, then, there are two sorts of witnesses, those who appear voluntarily, and those whom the judge commonly summons on public trial according to law, (of the first of which kinds either party may avail themselves, while the latter is conceded only to accusers,) let us distinguish the duty of the pleader who produces witnesses from that of him who refutes their testimony.

10. He that produces a *voluntary* witness, may know what he has to say, and consequently appears to have the easier task in examining him. But even this undertaking requires penetration and watchfulness ; and we must be cautious that the witness may not appear timid, or inconsistent, or foolish ;

11. for witnesses are confused, or caught in snares, by the advocates on the opposite side, and, when they are once caught, they do more harm than they would have done service if they had been firm and resolute. They should therefore be well exercised before they are brought into court, and tried with various interrogatories, such as are likely to be put by an advocate on the other side. By this means they will either be consistent in their statements, or, if *they* stumble at all, will be set upon their feet again, as it were, by some opportune question from him by whom they were brought forward.

12. But even in regard to those who are consistent in their evidence, we must be on our guard against treachery ; for they are often thrown in our way by the opposite party, and, after promising everything favourable, give answers of a contrary character, and have the more weight against us when they do not refute what is to our prejudice, but confess the truth of it.

13. We must inquire, therefore, what motives they appear to have for declaring against our adversary ; nor is it sufficient to know that they *were* his enemies ; we must ascertain

• B.xiLc.&

whether they have ceased to be so ; whether they may not seek reconciliation with him at our expense ; whether they have been bribed ; or whether they may not have changed their purpose from penitential feelings ; precautions, not only necessary in regard to witnesses who know that which they intend to say is true, but far more necessary in respect to those who promise to say what is false.* 14. For they are more likely, to repent, and their promises are more to be suspected; and even, if they keep to their word, it is much more easy to refute them.

15. Of witnesses who are *summoned* to give evidence, some are willing to hurt the accused party, and some unwilling and the accuser sometimes knows their inclination, and is sometimes ignorant of it. Let us suppose for the moment that he knows it ; yet, in either case, there is need of the greatest circumspection on the part of him who examines them. 16. If he find the witness disposed to prejudice the accused, he ought to take the utmost care that his disposition may not show itself; and he should not question him at once on the point for decision, but proceed to it circuitously, so that what the examiner chiefly wants him to say, may appear to be wrung from him. Nor should he press him with too many interrogatories, lest the witness, by replying freely to everything, should invalidate his own credit ; but he should draw from him only so much as it may seem reasonable to elicit from one witness. 17. But in the case of one who will not speak the truth unless against his will, the great happiness in an examiner is, to extort from him what he does not wish to say ; and this cannot be done otherwise than by questions that seem wide of the matter in hand ; for to these he will give such answers as he thinks will not hurt his party ; and then, from various particulars which he may confess, he will be reduced to the inability of denying what he does not wish to acknowledge. 18. For as, in a set speech, we commonly collect detached arguments, which, taken singly, seem to bear but lightly on the accused, but by the combination of which

* Rollin wishes Quintilian to be thought guiltless of tolerating, or rather recommending, dishonesty and fraud, referring us to sect. 32 of this chapter. But I fear that Rollin has no just ground for what he says ; for in all that Quintilian here remarks about witnesses, (see especially sect. 26,) there are not many indications of a desire to adhere to strict probity. *Spalding.*

we succeed in proving the charge, so a witness of this kind must be questioned on many points regarding antecedent and subsequent circumstances, and concerning places, times, persons, and other subjects ; so that he may be brought to give some answer; after which he must either acknowledge what we wish, or contradict what he himself has said. 19. If we do not succeed in that object, it will then be manifest that he is unwilling to speak; and he must be led on to other matters, that he may be caught tripping, if possible, on some point, though it be unconnected with the cause ; he may also be detained an extraordinary time, that by saying everything, and more than they case requires, in favour of the accused, he may make himself suspected by the judge; and he will thus do no less damage to the accused than if he had stated the truth against him. 20. But if (as we supposed in the second place) the accuser be ignorant of the witness's disposition, he must sound his inclination cautiously, interrogating him, as we say, step by step, and leading him gradually to the answer which is necessary to be elicited from him. 21. But as there is sometimes such art in witnesses, that they answer at first according to an examiner's wish, in order to gain greater credit when they afterwards speak in a different way, it is wise in an orator to dismiss a suspected witness before he does any harm.

22. For advocates that appear on behalf of defendants, the examination of witnesses is in one respect *more easy*, and in another *more difficult*, than for those who are on the side of the prosecutor. It is *more difficult* on this account, that they can seldom or ever know, before the trial, what the witness is going to say; and it is *more easy*, inasmuch as they know, when he comes to be questioned, what he has said. 23. Under the uncertainty, therefore, which there is in the matter, great caution and inquisition is necessary, to ascertain what sort of character he is that prosecutes the defendant ; what feeling he entertains against him ; and from what motives : and all such matters are to be exposed and set aside in our pleading, whether we would have the witnesses appear to have been instigated by hatred, or by envy, or by desire of favour, or by money. If the opposite party, too, produce but few witnesses, we may reflect on their *small number*; if they are extraordinarily numerous, we may insinuate that they are *in conspiracy* ; if they are of humble rank, we may speak with contempt of their

meanness ; if persons of consequence, we may deprecate their *influence*. 24. It will be of most effect, however to expose the motives on which the witnesses speak against the defendant, which may be various, according to the nature of causes and the parties engaged in them ; for to such representations as I have just mentioned, the opposite party can answer with common-place arguments ; as, when the witnesses are few and humble, the prosecutor can boast of his simple honesty, in having sought for none but such as were acquainted with the case in hand ; while to commend a large number, or persons of consideration, is a somewhat easier task. 25. But occasionally, as we have to commend witnesses, so we have to decry them, whether their testimony be read in our pleading, or they be summoned to give it personally.* Such attempts were more easy and frequent in the times when the witnesses were not examined after the pleading was ended. As to what we should say against the witnesses respectively, it can only be drawn from their individual characters.

26. The manner of questioning witnesses,* remains to be considered. In this part of our duty, the principal point is to know the witness well ; for if he is timid, he may be frightened ; if foolish, misled ; if irascible, provoked ; if vain, flattered ; if prolix, drawn from the point. If, on the contrary, a witness is sensible and self-possessed, he may be hastily dismissed, as malicious and obstinate ; or he may be confuted, not with formal questioning, but with a short address from the defendant's advocate; or he may be put out of countenance, if opportunity offer, by a jest; or, if anything can be said against his moral character, his credit may be overthrown by infamous charges. 27. It has been advantageous, on certain occasions, not to press too

* *Aid recitatis in, actions ant no'nnwtzs testibus.* Gesner hesitates how to interpret this passage ; Spalding observes that it is manifestly corrupt. Gesner inquires whether *recitatis testibus* may be equivalent to *recitatis eorwna testimoniis*; but for such interpretation there is no authority. Spalding thinks that we should read *aut recitatis in actions testationibus, aut nominatis testibus*.

† What times those were, it is not easy to say. That witnesses were examined in the age of Cicero, either before or during the pleadings, is not apparent either from his speeches or from the testimony of any other writers. *Spalding*.

§ On the side of the defendant. Quintilian has already made many observations concerning the examination of witnesses, but with respect to the side of the prosecutor. *Spalding*.

severely on men of probity and modesty ; for those who would have fought against a determined assailant are softened by gentle treatment.

Every question is either about some point within the cause or on some point without it. On matters within the cause, the advocate of the accused, as we also directed the accuser, may frequently, by putting questions a little widely, and on subjects from which no suspicion will arise, and by comparing previous with subsequent answers, reduce witnesses to such a dilemma as to extort from them against their will what may be of service to his own cause. 28. On this point there is certainly no instruction or exercise given in the schools ; and excellence in it depends rather on natural acuteness, or experience, than anything else. If any model, however, ought to be pointed out for imitation, the only one that I can recommend is that which may be drawn from the dialogues of the Socratic philosophers, and especially Plato, in which the questions are so artful, that, though the respondent answers correctly to most of them, the matter is nevertheless brought to the conclusion which the questioner wishes to establish. 29. Fortune sometimes favours us, by causing something to be said by a witness that is inconsistent with the rest of his evidence; and sometimes (as more frequently happens) she makes one witness say what is at variance with the evidence of another ; but an ingenious mode of interrogation will often lead methodically to that which is so frequently the effect of chance.

30. On matters *without the cause*, also, many serviceable questions are often put to a witness; as concerning the character of other witnesses ; concerning his own ; whether anything dishonourable or mean can be laid to the charge of any of them whether they have any friendship with the prosecutor, or enmity against the defendant ; in replying to which they are likely to say something of which we may take advantage, or may be convicted of falsehood or malevolence. 31. But all questioning ought to be extremely circumspect, because a witness often utters smart repartees in answer to the advocates, and is thus regarded with a highly favourable feeling by the audience in general. Questions should be put, too, as far as possible, in familiar language, that the person under examination, who is very frequently illiterate, may clearly under-

stand, or at least may not pretend that he does not understand ; an artifice which throws no small damp on the spirit of the examiner.

32. As to those disgraceful practices of sending a suborned witness to sit on the benches of the opposite party, that in being called from thence he may do him the more damage, either by speaking directly against the person on whose side he had placed himself, or by assuming, after having appeared to benefit him by his evidence, airs of impudence and folly, by which he not only discredits his own testimony, but detracts from the weight of that of others who may have been of service; I mention them, not that they may be adopted, but that they may be shunned.

There is frequently a collision between written attestations on the one side and the witnesses who appear in person on the other ; and this furnishes matter of debate for both parties ; the one resting their arguments on the oaths of the witnesses, and the other on the unanimity of those who signed the depositions. 33. There is often a question, too, between the witnesses and the arguments ; it being argued, on the one side, that there is in the witnesses knowledge of facts and regard for their oaths, and in the arguments nothing but mere subtlety ; on the other side, that witnesses are procured by favour, fear, money, malice, hatred, friendship, or solicitation, while arguments are drawn from the nature of the subject ; that in hearing witnesses the judge trusts to himself, in listening to arguments, to another. 34. Such questions are common to numbers of causes ; they have always been, and always will be, subjects for violent discussion.

Sometimes there are witnesses on both sides, and the question arises, with regard to themselves, *Which of them are the most respectable ?* with regard to the cause, *Which of them have given the most credible evidence ?* and, with regard to the litigating parties, *Which may have had most influence over the witnesses ?*

35. To these kinds of evidence, if any one wishes to add what are called supernatural testimonies, from responses, oracles, and omens, let him be reminded that there are two modes of treating them, the one *general*, in respect to which there is an eternal dispute between the Stoics and Epicureans, *whether the world is governed by a divine providence;* the other *special*, in

reference to* certain parts t of supernatural evidence, as they happen severally to affect the question. 36. For the credit of *oracles* may be established or overthrown in one way, and that of *soothsayers, augurs, diviners, and astrologers*, in another, as the nature of the things themselves is entirely different.

In supporting or demolishing such circumstances in a cause the voice of the pleader has much to do ; as if, for instance, expressions have been uttered under the effects of wine, or in sleep, or in madness, or if information has been caught from the mouth of children ;\$ for in regard to all such individuals, one party will say that they do not feign, and the other that they mean nothing.

37. The mode of proof by witnesses may not only be offered with great effect, but may also be greatly missed where it is not produced : *You gave me the money : who counted it ? where ? whence did he come ? You accuse me of poisoning : where did I buy the poison ? front whom ? for how much ? by whose agency did I administer it ? who had any knowledge of the deed ?* Almost all these points Cicero discusses in his speech for Cluentius under a charge of poisoning.

Such are the remarks which I have ventured to offer, as briefly as I could, concerning *inartificial* proofs.

CHAPTER VIII.

Artificial proofs too much neglected, § 1-3. There are certain particulars common to all kinds of proofs, 4-7.

1 THE other sort of proofs, which come wholly under the head of *art*, and consist in matters adapted to produce belief, is, for the most part, either altogether neglected, or very lightly touched upon by those rhetoricians who, avoiding argu-

* All the texts have *contra*, but we ought evidently to read, as Spalding observes, *circa*.

t As when we inquire, for example, whether a knowledge of the future can be obtained by inspecting the entrails of victims, or not. *Turnebus*.

\$ The relative quo*, which Quintilian here uses, does not refer only to *parvulos* immediately preceding it, but also to people intoxicated, sleeping, &c. *Spalding*.

ments, as repulsive and rugged, repose themselves in more agreeable spots, and, (like those who are said by the poets, on being charmed with the taste of a certain herb among the Lotophagi, or with the song of the Sirens, to have preferred pleasure to security,) while pursuing an empty semblance of glory, fail to obtain that success for which eloquence is exerted.

2 But other efforts of oratory, which run through the continued course of a speech, are designed as aids or embellishments to the arguments of a cause, and add to those sinews, by which it is strengthened, the appearance of a body, as it were, superinduced upon them ; so that if anything is said to have been done, perchance, through anger, or fear, or covetousness, we can expatiate somewhat fully on the nature of those passions ; and, in similar accessory parts, we praise, blame, exaggerate, extenuate, describe, deter, complain, console, exhort.

3. Such oratorical efforts may be of great service in treating matters which are certain, or of which we speak as being certain ; and I would not deny that there is some advantage in pleasing, and very much in exciting the feelings ; but pleasure and excitement have the most effect when the judge thinks that he has acquired a full knowledge of the cause ; knowledge which we cannot convey to him but by arguments and by every other means in support of facts.

4. But before I distinguish the different sorts of artificial proofs, I think it necessary to intimate that there are certain qualities common to all kinds of proof. For there is no question which does not relate either to *a thing* or to *a person* ; nor can there be any grounds for argument, except respecting matters that affect things or persons ; and these matters are either to be considered by themselves or referred to something else ; 5. nor can there be any proof except from things *consequent* or *opposite*,* which we must seek either in the time that *preceded* the

* *Aut ex consequentibus aut ex repugnantibus.*] Regius thought that in this passage ought to be inserted *ex antecedentibus* in conformity with Aristotle *Analyt. prior. i. 27* ; and we may observe that Quintilian himself, vi. 3, 66, in speaking of the topics from which laughter may be elicited, specifies consequents, antecedents, and opposites. So, too, Cie. *Topic. c. 4 and 12, and De Orat. ii. 39* ■ But the omission of *ex antecedentibus* is supported by two other passages of Quintilian, v.

alleged fact, in the time at which it took place, or in the time that followed it ; nor can anything be proved but from some other thing, which must either be greater or less than it, or equal to it. 6. As for *arguments*, they arise either from *general questions*, which may be considered in themselves, apart from from any connexion with things or persons, or from *the cause itself*, when anything is found in it not derived from common reasoning,* but peculiar to that point on which the decision is to be pronounced. Of all conclusions, moreover, some are *necessary*, some *probable*, some *not impossible*.

7. Of all proofs, too, there are four forms. Because one thing is, another is not : as, *It is day, therefore it is not night*; because there is one thin ", there is also another : as, *The sun is above the earth, therefore it is day*; because one thing is not, another is : as, *It is not night, therefore it is day* ; because one thing is not, another is not : as, *He is not a rational being, therefore he is not a man*. Having premised these general remarks, I shall proceed to particulars.

CHAPTER IX.

Difference of signs, indications, or circumstantial evidence, from proofs, § 1, 2. Of conclusive signs or indications, 3-7. Inconclusive signs are of weight when supported by others, 8-11. Of mere appearances, 12-14. Of prognostics, 15, 16.

1. ALL artificial proof, then, depends on *indications*, or *arguments*, or *examples*. I am aware that *indications* are thought by many a species of arguments ; and I had, in consequence, two motives for distinguishing them ; the *first*, that indications generally, almost always, belong to inartificial proofs ; for a *blood-stained garment, a shriek, a livid spot*, and similar particulars, are circumstances of the same nature as *writings, reports, and depositions*; they are not invented by the orator, but communicated to him with the cause itself ; 2. the *second*,

10, 2, v. 14, 1, 25 ; and he appears to make it sufficiently evident that **he** intended to include *antecedentia* in *consequentia*, (see v. 10, 76,) as Regius himself indeed thought likely to be the case. *Spalding*.

- Not from reasoning common to all causes. *Capperonier*
t Cicero Topic. c. 4, 12.

that neither can *indications*, if they are *certain*, be arguments, because, where there are certain indications, there is no question, and there can be no room for argument except upon a controverted point; nor, if they are *uncertain*, **can** they be arguments, but have themselves need of arguments.

3. All artificial proofs, then, as I say,* are distinguished, first of all, into two kinds, one in which the conclusion is *necessary*, the other in which it is not *necessary*. The former are those which cannot be otherwise, and which the Greeks call *Terpti;gra*, or *ciXaira βμε?α* ; these scarcely seem to me to come under the rules of art ; for when there is an irrefutable indication, there can be no ground for dispute. 4. This happens whenever a thing must be, or must have been ; or cannot be, or cannot have been ; and this being stated in a cause, there can be no contention about the point. 5. This kind of proofs is considered with reference to all times, past, present, and future ; for *that she who has had a child must have lain with a man* regards the past ; *that there must be waves when a strong wind has fallen on the sea*, concerns the present ; and *that he whose heart is wounded must die*, relates to the future.' In like manner it is impossible *that there can be harvest where there has been no sowing ; that a person can be at Rome when he is at Athens ; or that he who is without a scar can have been wounded with a sword*. 6. Some have the same force when reversed ; as, *a man who breathes must be alive*, and *a man who is alive must breathe* ; but others are not reversible; for it does not follow that, because *he who walks must move*, therefore *he who moves must walk*. 7. It is consequently possible that *she who has not had a child may have had connexion with a man ; that where there are waves, there may yet be no wind on the sea ; that the heart of him who dies may not have been wounded ; and, in like manner, that there may have been sowing, when there was no harvest ; that he who was not at Athens, may not have been at Rome ; and that he who is marked with a scar may not have been wounded with a sword*.

- Sect. 2.

t The reader may think it a whimsical observation, but I cannot help thinking that the *three examples* here brought are strong evidences, or, to speak in our author's terms, presumptions [signa, " indications "] of the *antiquity* of the gospel history ; unless we suppose, contrary to all credibility, that Quintilian stumbled upon them by chance. We here see the facts of our Saviour's birth, his miracles, and his resurrection, *attacked* in the strongest manner. *Guthrie*.

8. The other sort of indications are those from which there is no absolutely *necessary* conclusion, and which the Greeks call *4Wra*: these, though they are not sufficient of themselves to remove all doubt, yet, when they are combined with others, are of great weight.

9. That from which something else is inferred, as from *blood* is suspected *murder*, the Greeks term, as I said, *Q4, cce?ov*, that is, *signum*, "a sign;" though some of our writers have used the word *indicium*, "an indication," and others *vestigium*, "a trace." But as the blood that stained a garment may have proceeded from a sacrifice or may have flowed from the nose, it does not necessarily follow that he who has a blood-stained garment has committed a murder. 10. Yet, though it is not a sufficient proof of itself, still, when combined with other circumstances, it cannot but be regarded as evidence; as *if the man with the blood-stained garment was the enemy of him who was killed; if he had previously threatened his life; if he was in the same place with him; to which circumstances when some presumptive proof is added, it makes what was suspected appear certain.* 11. r.ong such indications, however, there are some which either side may interpret in its own way, as *livid spots*, and *swelling of the body*; for they may seem to be the effects either of poison or intemperance, and *a wound in the breast*, from which people may argue that he in whom it is found has perished either by his own hand or by that of another. The strength of such indications is proportioned to the support which they receive from other circumstances.

12. Of indications, which are presumptions indeed, but from which no necessary conclusion follows, Hermagoras thinks the following an example: *Atalanta is not a virgin, because she strolls through the woods with young men.* If we admit such a circumstance as a presumption, I fear that we shall make everything that has any reference to a fact a presumption. Such circumstances are however treated by rhetoricians as presumptive proofs. 13. Nor do the Areopagites, when they condemned a boy to death for picking out the eyes of quails,[^] appear to have had any other thought than that such an act was

* This story I have not seen mentioned elsewhere. The boy might have bred the quails for the game called *ortygocopiu*, which was much practised among the Greeks. and concerning which Gesuer refers to Pollux Onomast. vii. 136, ix. 108. *Spalding.*

the indication of a cruel disposition, likely to do mischief to many if he should be allowed to reach maturity. Hence also the popularity of Spurius Maelius and Marcus Manlius was regarded as an indication that they were aspiring to sovereignty.

14. But I am afraid that this mode of reasoning would carry us too far; for if a woman's bathing with men is a sign that she is an adulteress, it will be a sign of the same nature if she takes her meals with young men, or if she enjoys the intimate friendship of any man; as a person might perhaps call a depilated skin, a sauntering walk, and a delicate dress, signs of effeminacy and unmanliness, if he thinks that they proceed from corrupt morals, as blood flows from a wound; a sign being properly that which, proceeding from a matter about which there is a question, falls under our own observation. 15. Those appearances, also, which, as they are constantly noticed, are vulgarly called signs, such as prognostics of the weather, *The golden moon is red from the approach of wind*, and *The mischievous crow calls for rain with a loud voice*,* may, if they have their causes from the state of the atmosphere, receive that appellation; 16. for if the moon is red from the influence of wind, its redness is a sign of wind; and if, as the same poet infers, a condensed or rarefied atmosphere gives rise to a chattering of birds,^t we shall consider such chattering also a sign. We may likewise observe that small things are sometimes signs of great, as this very chattering of the crow; that greater things are signs of less, nobody wonders.

Yirg. Georg. i. 431, 388.

^t Virg. Georg. i. 419.