

## CHAPTER, VI.

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1. SINCE every cause, therefore, is comprehended in some *state*,<sup>1</sup> I think that before I proceed to specify how the several kinds of causes are to be managed, I must consider that question which has reference to all of them alike, *what is a state ?* as well as *whence it is drawn*,<sup>2</sup> and *how many* and *what kinds of states* there are? Some have been of opinion, however, that all these questions concern only judicial matters; but, when I

\* I was very much in doubt, for some time, what English word I should adopt for *status*, or *arbitr*, but being able to find no English word exactly equivalent to it, I thought it best, on the whole, to take the derivative from it, *state*, which, whenever it is used for *status* in this chapter, I shall print in italics. The exact meaning of it the learner will perhaps best understand from sect. 6, where it is said to be, not the question itself, but the *genus questionis*, or "nature of the question." See also sections 9, and 73-76. The "*status*," says Turnebus, "is that *in quo stet nitaturque causa quasi cardine aliquot*" The English words "ground" or "position" would express it in many uses, but not satisfactorily in all. Gedoyn was obliged to take the French word *etat*.

t Whether from the accuser or defendant. See sect. 13-22.

have treated of all the three kinds of oratory, the result will make their ignorance apparent. 2.' What I call the *state*, some term the *settlement*;<sup>3</sup> others the *question*; others *that which appears from the question*; and Theodorus styles it the *general head*, *xqdXaiov 7evrxcwrrarov*, to which everything else is referred. But though the names are different, the meaning is the same ; nor is it of any consequence to learners by what term anything is distinguished, so that the thing itself be clear. 3. The Greeks call the *state* *brde* ; : a name which they think was not first given it by Hermagoras, but, as some suppose, by Naucratis,<sup>4</sup> a disciple of Isocrates, or, as others imagine, by Zopyrus + of Clazomenae ; though even Eschius appears to use the term in his oration against Ctesiphon § when he intreats the judges not to allow Demosthenes to wander from the subject, but to oblige him to speak directly to the *state of the case*. 4. The name is said to be derived either from the fact that in it lies the commencement of controversy in the cause, or that the cause rests on it.

Such is the origin of its name ; let us now consider *what it is*. Some have defined the *state* to be the *first conflict of questions*, who, I think, have conceived rightly, but have not expressed themselves with sufficient judgment. 5. For the *state is* not the first conflict ; *You have done, I have not done*, but that which results from the first conflict, that is, the nature of the question, *you have done; I have not done; has he done ? You have done this; I have not done this; what has he done ?* But as it appears from these examples, that the first sort of question depends on conjecture, the other on definition, and as it is on these points that each side will insist, the question will be one either of a *conjectural* or of *definitive state*. 6. Supposing a person should say, *sound is the concussion of two bodies*, lie would be in the wrong, I

\* *Constitutionem*.] This term is used by Cicero de Inv. i. 8 ; Script. ad Herenn. i. 11. Who used the other terms, I have not discovered.

*Spalding*.

+ See Dionys. Halicarn. in Arte, 39, vol. ii. Cicero de Orat. ii. 23; iii. 44; Orat. c. 51. "His funeral orations, especially those on Mausolus, king of Caria, are mentioned by some writers." *Spalding*. See Suidas v. Isocrates and Theodectes. and A. Gellius, x. 68.

Diog. Laert ix. 114.

Ed. Steph. p. 83 ; where, however, *rugs* is now found instead of

o ao&s.

think ; for the sound is not the concussion, but the result of the concussion. This is a mistake, however, of but trifling consequence; for the meaning is understood in whatever way it can be expressed ; but in regard to oratory, an error of vast importance has arisen among students who have imperfectly understood their authors, and who, as they read the words *præsertim conflict*, thought that the *state* was always to be taken from the first question ; a supposition which is altogether unfounded. 7. For there is no question that has not its *state*; since there is none that is not founded on assertion and denial ; but some questions form an integral part of causes, and at these a decision must be pronounced ; while others are introduced *from without*, contributing something, however, like auxiliaries, to the general strength of the cause ; and it often happens that there are said to be several questions in the same suit. 8. Of these the least important often occupies the first place ; for it is a common artifice among us to abandon those points in which we have least trust, after they have been dwelt upon, sometimes conceding them as it were, of our own accord, to the opposite side, and sometimes contenting ourselves with making an ascent from them to stronger grounds of argument.

9. A simple cause, though it may be defended in various ways, cannot contain more than one point on which a decision is to be pronounced ; and hence the *state of the cause will be* that at which the pleader regards as the chief object to be gained, and the judge as the chief object of attention ; for it is on this that the cause *will take its stand*. 10. But of questions there may be different *states* ;\* since, to make this plain by a very plain example, when the accused says, *Even if I did it, I was not in doing it*, he makes the *state* that of *quality* ; but when he adds, *but I did not do it*, he makes it that of *conjecture*. In the defence, *I have not done it*, is always the stronger ; I therefore I shall consider the *state* as lying in that argument which I should use if I were not allowed to use more than one. 11. We therefore rightly say the first conflict *of causes, of questions*. Cicero, in pleading for Itabirius Postumus, makes it his object, in the first part of his speech, to show that the charge could not be brought against a Roman knight ;

Comp. sect. 21.

The first part extends to the end of c. 7. Cicero maintains that

and, in the latter part, he asserts that no money came into his client's hands ; but I should say that the *state* lies in that which is the stronger point. 12. Nor, in his speech for Milo, should I consider that the struggle in the cause\* commences with those early questions which are introduced immediately after the exordium, but where he proceeds to prove, with his whole strength, that Clodius was a Tier-in-wait, and was there, before justly put to death. And that which an orator ought to settle in his mind before everything else, even though he pur- pose to offer many arguments in support of his cause, is what he would wish to, be most apparent to the judge. But though this is the first thing to be considered, it does not follow that it will be the first to be stated.

13. Others have thought that the *state* is the first point of opposition offered by the party against whom you are pleading ; an opinion which Cicero+ expressed in the following words *On which the defence first takes its stand, as if ready to grapple with the opponent to overthrow him*. Hence, again, rises another question, whether he who replies always determines the *state*. To this notion Cornelius Celsus is eminently opposed, saying the *state does not arise from him who denies, but from him who supports his own assertion*; as, for instance, if an accused person denies that a man has been killed, the *state* would come from the accuser, because he would proceed to prove what he had affirmed ; if the accused should say that the man was lawfully killed, the *state* would come from him, and the affirmation be on his side, the burden of proof being transferred from one party to the other. 14. With that writer I do not agree ; for what is said in contradiction to him is nearer the truth, that there is no point of dispute if the party with whom you are going to law makes no reply, and that accordingly the *state* proceeds from the respondent. 15. In my own opinion, however, the case happens sometimes one way and sometimes another, varying according to the nature of the cause ; because the affirmation may be thought some-

by the Julian law *de repetundis* an action could not be brought against a Roman knight who had held no office. *Spaldiny*.

\* *Conflirisse causam*. I Francius would read *constituisse*.

+ All the manuscripts have *ante proamium*, which Spalding retains in his text, but rightly condemns as absurd in his notes. Capperonier and many others read *post proximum* with Aldus.

\$ *Topic. c. 25 init.*

es to determine the *state*, as in corilectural causes ; for it is fier the Plaintiff that uses conjecture ; (some, moved by this sideration, have said that the *state* proceeding from defendant is *a negative state* ;) and in a syllogism' whole of the reasoning proceeds from him who affirms.

But because he who denies appears in those cases also ay upon the opposite party the necessity of determining the e, (for if he says, *I have not done the deed*, he will ge his opponent to use conjecture, and if he says *My onent has not the law on his side*, lie will compel him to e recourse to the syllogism,) let us grant that the *state* coeds from the defendant. Nevertheless, however, the tier will come to the same thing, that sometimes the intiff will determine the *state*, and sometimes the defendant.

For let this be the assertion of the accuser, *You have ed a man*, if the accused deny the charge, it is the accused t will determine the *state*; but if he admits the truth of it, says that the man *was an adulterer*, and *was lawfully ed*, (and it is certain that there is a law which gives per- sion to kill an adulterer,) then, unless the accuser makes ie reply, there will be no case. But if the accuser rejoins, *was not an adulterer*, refutation then commences on the t of the accuser, and it is he that will determine the *state*; ich will thus indeed have its origin in the first denial, but t denial will be made by the accuser, not by the accused.

It may happen, too, that the same question may make the ae person either *accuser* or *accused*; for instance, the law s, --Let not him who has exercised the profession of an or sit in the first fourteen rows of seats ;" but a man who l appeared as an actor before the praetor in his garden, but l not exhibited himself on the public stage, seated himself

A syllogism is *a status legalis*, in which we bring under the meaning the written law something which is not actually included in the ressed letter of the law. It is so called because a syllogism is used, which the law is given in the major proposition, and the minor the to be brought under the signification of the law. *Turnebus*. intilian furnishes an example in b. vii. c. 9 : if a man had killed his ther, his accuser might use the syllogism against him in this way he law says, that he who kills hi: father is to be sewn up in a sack, . ; you have been guilty of an equally great crime by killing your ther; therefore, &c." *Capperonicr*. See Herrnogenes, irfpi *araofivr*, 16 ; Cicero de Inv. i. 13 ; ii. 50 ; Script. ad Hereun. i. 13. *Spalding*. h 11k.] In conjecturalibus causis et in syllogismo. *Spalding*.

on one of those fourteen rows;\* 19. the, charge then brought against him is, *You have exercised the profession of an actor*, the denial is, *I have not exercised it*, and the question, *What it is to 'exercise the profession of an actor!* If he be accused under the law respecting the theatre, the denial will proceed from the accused; but if he be expelled from the theatre, and demand reparation for unjust expulsion, the denial will be on the part of the accuser. 20. But that which is laid down by the majority of writerst will certainly be of more frequent occurrence.

Those have escaped these difficulties who have said that the *state is*' that which resu'\_rs from the affirmation and the denial ; as, *You have done the deed, I have not done it*, or *I was right in doing it*. 21. Let us consider, however, whether *that* is the *state*, or whether it is in *that* that the *state* lies. Hermagoras calls that the *state* from which the matter in question is understood, and to which also the proofs of each party are directed as their object. My own opinion has always been, as there are frequently different *states* of questions in a cause, to regard that as the *state of the cause* which is the strongest point in it, and on which the whole matter chiefly turns. If any one profess to call this the *general question*, or the *general head*, *I* shall not dispute with him on that point, (any more than if he should invent yet another name by which the same thing might be signified, although I know that many rhetoricians have devoted whole volumes to this discussion,) but I am satisfied to let it be called the *state*. 22. As there is the greatest dissension among writers, however, on all other matters, so, in regard to this, there appears to me to have been extraordinary eagerness to advance different opinions ; insomuch that it is neither agreed what number of *states* there are, nor what are their navies, nor which of them are general and which special.

23. Aristotle, first of all, specifies ten elements,+ to which

+ Which were assigned to the knights by the law of Lucius Otho *Roscius*. *Sic placuit vano, qui nos distinxit, Othoni*. Spalding observes that it would appear from Cicero, Philipp. ii. 18, that *infames* were excluded from those fourteen rows; and actors were *infames*.

4. Namely, that the respondent makes the *status*. Compare sect. 13. *Spalding*.

• The ten categories or predicaments of Aristotle : *substance, quahti, quantity, relation. Ieace, tine, doinig, sujjeriuii, habit, position.*

every possible question appears to have some reference : *ouQix*, which Flavius calls *essentia*,~ (nor indeed is there any other Latin word for it,) and to which belongs the question "whether a thing is;" *quality*, of which the signification is plain enough; *quantity*, of which a twofold distinction has been made by later writers, in reference to the questions "how great?" and "how many?"<sup>t</sup> *relation to something*, whence are drawn considerations concerning "exception"<sup>u</sup> and "comparison;"<sup>§</sup> 24. next come *where* and *when*; then *doing*, *suffering*, *condition*, which has regard to a person's "being armed" or "clothed;" and last of all *xsib0a*, *position*, which is a comprehensive sort of category, having reference to "sitting," "standing," "lying." But of all these, the first four only appear to concern the *states* of causes; the rest seem to concern only topics for argument. 25. Others<sup>il</sup> have specified nine elements: *person*, in respect to which inquiry is made concerning the mind, the body, and external circumstances; an element which, I see, refers to the means of establishing *conjecture* and *quality*; *time*, which the Greeks call *y5ovos*, in regard to which arises, for example, the question "whether he whom his mother brought forth when she was given up to her creditors was born a slave?"<sup>¶</sup> *place*, in connection with which

\* See ii. 14, 2.

<sup>t</sup> *Quodm marlaum et quitm multum.*] The first denoting *magnitude*, of which the parts are connected; the second *multitude*, of which the parts are unconnected. *Turnebus*.

<sup>u</sup> *Translatio.*] As an equivalent for this word, I have adopted "exception," not because I am satisfied with it, but because I cannot find anything better. The Latins, besides *trap latio*, called it *exceptio judicii declinatoria*, or sometimes *prwscriptio*; the Greeks *praxil; iis* or *aapaypao;l*. Gedoyn has rendered it *competence*, the question being whether it is *competent* to a person who appears as an accuser, to bring an action against the person whom he accuses, (as in the accusation against Rabirius Postumus mentioned in sect. 11,) or to bring it at that particular time, or in that particular manner. See sect. 52, 6:), and 84-86.

<sup>§</sup> *Comparatio.* <sup>1</sup> *Comparatio* among rhetoricians is generally a species of *qualitas* or *status judicialis*, in Greek *hvrtaats*, when the accused person confesses that he has been guilty of a crime, but attempts to show that the ill which he slid was the cause of some greater good; Comp. vii. 4, 12 Cicero de Invent. i. 11; ii. 24. *Spalding*.

<sup>¶</sup> Who they are, I have not discovered. *Spalding*. This appears to have been the opinion of Theodorus, who calls *circumstances* elements, as we learn from Fortunatianus. *Turnebus*.

<sup>¶</sup> *burn addicta est mater.*] This question is settled by distinction; for *addicti* are not properly *serri*, but were said *else is servitute*, or *pro* *~* *„n+ n'rcirc serritatem*, See vii. 3, 26--28; v. 10, 60. *13urmann*.

arises such a question as "whether it was lawful to kill a tyrant in a temple," or "whether he who lay hid in his own house underwent his term of exile;"<sup>~</sup> 26. *time* in another sense, which the Greeks call *xargo5*; and which they' would have to mean a portion of time in a more general sense, as summer, or winter; under this falls the question about "the reveller during a pestilence;"<sup>t</sup> *act*, or *rga5r5*, to which they refer the question "whether a man did a thing knowingly or unknowingly; from compulsion or by chance;" *number*, which may be regarded as a species of quantity, as "whether thirty rewards were due to Thrasybulus for having cut off thirty tyrants;"<sup>27</sup> *cause*, from which proceed many trials, as whenever a deed is not denied, but defended, as having been clone with justice; *rgolros*, or *manner*, when what the law allowed to be done in one way is said to have been done in another; hence arises the question about "the adulterer scourged or starved to death;"<sup>+</sup> and *opportunity for action*, which is too well understood to need any explanation or example; the Greek term however is *r'goguai'gywv*. 28. These writers, like Aristotle, think that no case can occur that does not connect itself with some of these *elements*. Some take away two of them, *number* and *opportunity*; and for what I called *act* substitute *things*, that is, *rgayaara*. These doctrines I have thought it sufficient just to notice, that I might not be supposed to have purposely omitted them. But I neither consider that *states* of causes are properly determined by these categories, nor that all topics for argument<sup>§</sup> are included in them; and this will be apparent to those who read with attention what I am going to say oil each of these heads; for there will be found to be many particulars that are not comprehended under these *elements*.

29. I have read in many authors that some rhetoricians are

\* The question being whether his housed could be called *a place of* <sup>/</sup> *exile*.

<sup>t</sup> Quintilian, by saying *ille commissator*, intimates that the subject was well known, but I have found no allusion to it in any other writer on rhetoric. *Spalding*.

<sup>§</sup> The question is, whether the *mode of* punishment was lawful. that to kill an adulterer was permitted by law is agreed. Gesner cites Bynkershoek's *Observat. Jur. Rom.* v. 8, p. 142, ed. Genev. 1761, who says that it was lawful to scourge an adulterer, (referring to Val. Max. vi. 1, 13,) but not to starve him to death, which was not <sup>¶</sup> *infliction of sudden anger*. *~palding*.

<sup>§</sup> *Locos.*] *Sc argumentorum*, as in c. 24.

of opinion that there is in reality but *one state*, namely, the *-onjec,tural*; but who the rhetoricians that held this opinion were, those authors have not told us, nor have I been able iuywhere to discover. They are said, however, to have formed their notions on this ground, that our knowledge of everything is the result of indications.\* But from similar reasoning they might say that the only *state is* that of quality, as a question may always arise about the quality or nature of anything about which we speak. 30. From either mode tito greatest confusion will result; nor will it make any difference, indeed, whether we admit one kind of *state* only, or none at all, if all causes are of the same nature. *Conjecture is* derived from *conjicere*, "to throw together," that is, from making all our reasonings converge towards truth; whence also interpreters of dreams and omens are called *conjectores*, "conjecturers." But this sort of *state* has received various names, as will appear from what follows.

31. Some have made two kinds of *states*. Archidemus,t for instance, admitted the *conjectural* and the *definitive*, excluding that of *quality*; because lie thought that we imagine about quality thus :+ "What is unjust? what is iniquitous? what is it to be disobedient?" questions which he terms *de eodem et alio*,§ "about identity and difference." 32. With this opinion theirs is at variance who would make indeed two kinds of *state*, but one *negative*, and one *juridical*; the *negative is* the same as that which we call the *conjectural*, to which some have given the term *negative* absolutely, others partially, because they considered that the *accuser* employs *conjecture*, and the *accused*, *denial*. The *juridical* is that which in Greek is called *btxatoXoytxob*, "treating of right." :33. But as *quality is* set aside by Archidemus, so by these writers is rejected *definition*, which they make dependent on

\* *Signis.* See b. v. c. 3. But perhaps *aigna* is used in a rather wider sense here than there, where he distinguishes *rmptia* from rFpKi/pta. *Spalding*.

† An eminent Stoic. Arrian. Epict. iii. 2. He is called *princeps dialecticorum* by Cicero, Quxst. Acad. iv. 57.

§ He thought that we inquire about quality in such a way that we always have at least recourse to definition. *Spaldiny*.

§ *Itipi rov* ajrov *Kai rov* iripov, Aristotle, Topic. i. 5, where the question is -about supporting or overthrowing a definition. *Capperonirr*. See sect. 37, 49; vii. 3, 8; Cie. Topic. c. 22; Partit. Or. c. 19.

the juridical *state*, and think that we must imagine "whether it is right that what is charged against a person sliould be called sacrilege," for example, "or theft, or madness." 34. Of this opinion was Pamphilus,\* but he distinguished quality into several kinds.

Many succeeding writers, altering only the names, have divided *states* of causes into two kinds by saying that they are either *about something that is doubtful*, or *about something that is certain*; for such indeed is the case; nor can it be otherwise than *either, certain* that a thing has been done, or *uncet tain*; if it is uncertain, the *state is conjectural*; if it is certain, there is room for *other kinds of states*. 35. Indeed, Apollodorus says the same thing, when lie observes that the question lies either in *things external*,} by which conjecture is settled, or in *our own opinions*; calling the former sort of questions '-gay-14aTxov, "practical," the latter *xggi ivvofas*, "dependent on iudgment." Those also say the same who make the two kinds of *state*, uTgoXnerrov and irgoXnrrrtiv,+ *dubious* and *presumptive*, the latter meaning *what is evident*. 36. Theodorus, too, expresses himself similarly, as he thinks that the question is either as to *whether a thing has happened*, or as to *particulars relating to what is admitted to have happened*, that is, sEgi ov6Fas xai 6v,aaCECnxoTww. For in all these distinctions the first kind of *state* belongs to conjecture, the second to other matters. But these other matters Apollodorus makes to be two, *quality* and *de nomine*, that is *definition*; Theodorus four, *existence*, *quality*, *quantity*, and *relation*. 37. There are some also who make the question *de eodem et alio*, "about identity and difference," belong sometimes to *quality* and sometimes to *definition*.

Posidonius, too, ranges *states of* causes under two heads, *words* and *things*. With respect to a word} he thinks that the

" mentioned by Aristotle, Rhet. ii. 23. Whether he is the same that is mentioned by Quintilian xii. 10, 6, by Pliny in several places., and by Cicero, de Orat. iii. 21, is, says Spalding, very uncertain.

+ As circumstances, indications, writings, evidence. In speaking of things lying in opinions, he means that it rests with the judges in causes to determine whether any particular thing is to be called just or unjust, &c. *Tumebus*.

§ The first means that which we do not comprehend by any rp6Xn-4nc or conception of our own, and concerning which we are therefore in doubt, until it is established by facts or proofs; the latter, that which is settled in our minds, and consequently appears certain to us. *Spalding*.

questions are, "Whether it has any meaning? what? how many meanings? and how it has such meaning?" With respect to things, he notices *conjecture*, which he calls *xar' ala9rlcrv*, "assumption from perception," *quality, definition, rar' vuorav*, "rational induction," and *relation*. Hence also comes the distinction into *things written and unwritten*." 38. Cornelius Celsus himself, too, makes two general *states*: "Whether a thing is," and "of what nature it is." Under the first he includes *definition*, because it is equally a question *whether a man* who denies that he has stolen *anything* from a temple, or who owns that he stole from it the money of a private individual, *ie guilty of sacrilege.* *Quality* he divides into *fact* and *what is written*; to *what is written* he assigns four legal questions, setting aside *exception*; § *quantity* and *intention* ~ he puts under *conjecture*.¶

39. There is also another method of division into two *states*, which tells us that a question must relate either to *substance* or to *quality*; and that quality is considered either *in its most general sense*, or with regard *to particulars*."\* 40. To substance belongs *conjecture*; for inquiry may be made concerning any *thing* "whether it has been, is, or will be;" and

\* Questions as to the written letter of the law are *quæstiones legales*. Questions as to other matters, not written, are decided *by conjecture, quality, and definition*. Turnebus.

† Because there is a denial, observes Turnebus, in both cases. In the first case the accused denies that he took anything at all from the temple; in the second, he denies that he took anything belonging to the temple. See sect. 41 and 49. "This is an example much used by other writers on rhetoric as well as Quintilian; as by Hermogenes, by the writer ad Herenn. i. 12, and by Aristotle." Spalding.

§ Concerning writing and the intention of the writer; ambiguity; contradictory laws; and the syllogism. Capperonier.

¶ See sect. 23.

|| *Mentis questionem*] That is, *cum quæritur quo animo fecerit*, when it is inquired with what intent a person did a thing. Turnebus. See vii. 2.

¶¶ That is, under the *status conjecturalis* or *quæstio de facto*. Capperonier.

\*\* *Aut in summo genere consistere, aut in succedentibus*.] *Qualitas de summo genere, or infinita*, is when it is inquired what is the nature and form of anything in general; but such questions are chiefly confined to the philosophers, entering very rarely into legal discussions, though sometimes into deliberative addresses. Turnebus. *In succedentibus*, is "in *subalternis*, ut aiunt, *speciebus, generi summo subjectis*." Capperonier.

sometimes concerning the *intention* of it; and this method is better than their's who have named the *conjectural state a state of fact*, as if inquiry could be made only concerning the *past* and concerning *what has been done*. 41. As to the consideration of quality in its most general sense, as "Whether that is honourable which is everywhere commended," it rarely occurs in judicial proceedings; but with reference to particulars, questions arise either about some common term, as "Whether he has committed sacrilege who has stolen a private person's money from a temple," or about a name given to some particular act, when it is certain that an act has been done, and there is no doubt what the act that has been done is. Under this head are included all questions about what is *honourable, just, expedient*. 4Q. In these *states*, too, are said to be comprehended others, because *quantity* is sometimes referred to *conjecture*, as in the question, "Is the sun greater than the earth?" and sometimes to *quality*, as when it is asked, "What degree of punishment or reward it is just that some particular individual should receive;" because, also, *exception* has relation to quality, and definition is concerned with *exception*;+ 43. and because, moreover, contradictory laws, and the ratiocinatory *state*,§ that is, the syllogism, and questions in general, regarding writings and the intention of the writer, depend on considerations of equity; (except that this last case sometimes admits of *conjecture*, as when we inquire *what the legislator meant*;) but ambiguity must necessarily be explained by *conjecture*, because, as it is plain that the words may be understood in two ways, the question is solely about the *intention*.

44. By a great number of writers there are recognised *three* i-general *states*, a division which Cicero also adopts in his

\* *Qualitatis de summo genere*.] See note on sect. 39; and vii. 44. 1. F See sect. 38 and 11.

† As in the case of the person accused of sacrilege, sect. 38, who will say to his accuser, *translationem utens*, "you cannot proceed against me for sacrilege, but only for simple theft;" and then arises a question about the definition of sacrilege. Capperonier.

§ That *status legalis*, in which we endeavour to make a law apply to some case which is not included in the letter of it. See b. vii. c. 8 Capperonier. On the syllogism, see sect. 15.

¶ From sect. 31 he has been speaking of *th.*sP who admit only two.

Orator,\* expressing his opinion that everything that can become a subject of controversy or dispute is comprehended in the questions *Whether it is, what it is, and of what particular nature it is*; the names+ are too well known to make it necessary to mention them. Patrocles § is of the same opinion. 45. Marcus Antonius|| also made three *states*, as in the following words: The questions from which all pleadings arise are but few: whether a thing has been done, or has not been done; If whether it is right or wrong;\*\* whether it is good or bad."tt But since that which we are said to have done *rightly, is* understood in such a sense that we appear to have acted, not merely in conformity with the law, but in accordance with equity, those who have followed Antonius have been inclined to distinguish those *states* more exactly, and have in consequence called them the *conjectural*, the *legal*, and the *juridical*; a distinction which is approved by Virginius.++ 46. Of these they then made several species, so as to put under the *legal* state *definition, as well as other states* which have their name from what is written; as that of *contradictory laws*, which is called *avrvop,la*: that of *writing and meaning or intention*, that is, *xar& ~27rl v xal biuvo,av*: that of *ceTUX -4~-5,§§* which we distinguish by different terms, as *translative, transumptive, transpositive*; the *sylogism,III* which we call the *ratiocinatory* or *collective state*; and that of *ambiguity*, which is called in Greek *ep~r\$oaia*: all which I have enumerated,

\* C. 15. See also De Orat. i. 31; ii. 24 and 26.

t *Omnia quæ in controversiam aut in contentionem veniant.*] By *controversia* is properly meant *genus orationis judiciale*, opposed to *suasurice*, as is evident from b. vii. c. 2, and from Cicero de Orat. ii. 24.... The word *contentio* probably alludes to the *philosophise contentiones*, which Cicero, de Orat. ii. 24 and 26, calls sometimes *disputationes*, and sometimes *disceptationes*. Capperonier.

§ The first is the *status conjecturalis*; the second the *status defenitres*; and the third *qualitas*. Capperonier.

|| II. 15, 16.

tt In that book, I suppose, which he left unfinished. See c. , sect. 19. *Tumebus*.

*Status conjecturalis*, or *quæstio de facto*. Capperonier.

\*\* *Status legalis*, or *de scripto*. Capperonier.

+ *Status qualitatatis*, Capperonier.

++ See c. i. sect. 19.\_

See sect. 23.

iii See sect. 15.

because they are called *states* by most writers, though some would prefer that they should be called *legal questions*.

47. Athemeus has made four *states*, the *rgor e'rTrx~;or ,ragoe-4criArrxn c 'C61g*, that is, the *exhortative*, which belongs properly to the *suasory*; the *6uvTeXxi,* by which it appears from what follows, rather than from the name itself, that the *conjectural* is signified; the *um~aXXaxTCxi7*, (which is the *definitive*,) for *it* consists in a change of terms;\* and the *juridical*, which he distinguishes by the same Greek name t as other writers. For there is, as I said,\* great variation as to names. 48. There are some who think the *b,7raX%axTrx?) 6Tu6is* is the *exceptional*, § looking to the notion of change contained in the name. Others, as Cwecilius and Theon, have made the same number of *states*, but of a different kind: *Whether a thing is I what it is? of what species it is? low great it is? 49.* Aristotle in his Rhetorical [divides the whole matter into three parts: *What is true, what is to be sought or avoided*, (which belongs to the deliberative department of oratory,) and the consideration *de eodlrn atque alio*, "about identity and difference;" but, by division, he arrives at such a conclusion that he] thinks we must examine, as to any thing, *whether it is, of what nature it is, how great it is, and of what parts it consists.-IT* In one place, however, he notices the force of definition, where he says that some charges are thus met: "I have taken, but I have not stolen; I struck, but I did nothing wrong." 50. Cicero also in his books of rhetoric\*\* had enumerated four *states* regarding *fact, name, kind, and action*; so that *conjecture* should refer to *fact, definition* to *name, quality* to *kind, and right*

\* Because the name, which is given to the charge by the accuser, is changed by the defendant, and another put in its place; as, "I grant that it is theft; I deny that it is sacrilege." *Tumebus*.

t nLKaL.OXOyIK7j.

§ C. 22.

f Because, in *exceptions*, we change either the judge, or the prosecutor, or the time, or the mode of proceeding: *inraXXdrruv*, "to change." *Tumebus*.

|| Spalding observes that it is scarcely possible to find any passage in Aristotle's Rhetoric to which Quintilian can be thought to refer. He then proposes to omit the original of the words which I have included in brackets, and refers for what follows to Arist. Rhet. iii 17, 1, and i. 13, 9.

¶ *Quadm multum.*] *Quantitas discreta*. Capperonier. See sect. 23.

\*\* De Inv. i. 8.

to action. Under *right* he had included *exception*. But in another place\*— he treats legal questions as species of actions.+

51. Some writers on rhetoric have made five *states*, those of *conjecture*, *definition*, *quality*, *quantity*, and *relation*. Theodoros also, as I remarked, § adopts the same number of general heads, *whether a thing is*, *what it is*, *of what species it is*, *how great it is*, and *to what it has reference*. The last he regards as having most concern with comparison, since better and worse, greater and less, are terms that have no meaning unless they refer to something. 52. But relation, as I observed before, † affects questions of legal right, such as, "Has this man a right to go to law?" or "Is it fit that such a person should do such a thing?" or "May he proceed against a particular person," or "at a particular time," or "in a particular manner?" for all such inquiries must have reference to something.

53. Others think that there are six *states*: *conjecture*, which they call *yivetr5* † quality, *peculiarity*, that is, *Ti r*; a term in which *definition* is implied; *quantity*, which they call *t:c*; ~\* *comparison*; *exception*, for which, also, a new name, *asru-er.ee* § has been found; new, I mean, as applied to *state*, for it had been previously used by Hermagoras in a different way, to denote one of the various sorts of juridical questions.

54. Others have been of opinion that there are seven; by whom neither *exception*, nor *quantity*, nor *comparison* were admitted; but, in the place of those three, were substituted four sorts of legal questions, and added to the three++ *states* to be determined by reasoning.

55. Others have gone so far as to make eight, adding *exception* to the other seven.

\* Partit. Orat. c. 31 and 38.

† Those noticed in sect. 46.

§ *Species actionis.* *Aetionem paullo latius aecipimus, ut jus agendi significet et legis actionem.* Turuebus.

§ Sect. 36.

‡ See sect. 23. We must read *incidit*, not *incidunt*, as Capperonier and Spalding observe.

¶ Because the question in it is respecting the origin or cause; as whether a thing was done, and by whom. Turuebus.

\*\* Because it relates to quantity to show the *worthiness* or *unworthiness*, the *sufficiency* or *insufficiency*, of a thing. Turuebus.

‡‡ The four mentioned in sect. 46: *scripti et voluntatis*; *ambiguity*; *legum contrariarum*; *sylogism*.

:§ Conjecture; definition; quality.

By some writers another distinction has been introduced, that of giving the name of "states" only to the *status rationales*, and calling the *status legales*, as I said\* before, "questions;" as in the former the question is about *fact*, in the latter about *the written letter*. Others, on the contrary, have preferred that the *status legales* should be called "states," and the *status rationales* "questions." 56. But others have thought that there are only three *status rationales*, *whether a thing is*, *what it is*, and *of what kind it is*; Hermagoras is the only one who has made four, *conjecture*, *peculiarity*, *exception*, *quality*, to which latter he applies the expression, *xaru auwf3s(3r;xora*, "according to accidents," † adding as an explanation, "whether it happen to a person to be good or bad." 57. Quality he then distinguishes into four species, as relating *to things to be sought or avoided*, which fall under the *deliberative* department of oratory; *to persons*, to whom the *panegyric kind* applies; *to things in general*, a department which he calls *7rgayparixj*, and in which the question is about things themselves, without any reference to persons, as "whether he is free who is under trial about his liberty; § whether riches beget pride; whether a thing is just or good;" ‡ adding *to judicial questions*, in which similar inquiries are made, but with regard to certain definite persons; as, "whether a certain person acted justly or well in a particular transaction?" 58. Nor am I ignorant that in the first book of Cicero on Rhetoric there is another explanation of the part *relating to things in general*, as it is there said that "it is the department in which it is considered what is fought according to civil usage and according to equity; a department with which lawyers are thought by us to be specially concerned." 59. But what the judgment of Cicero himself was respecting

\* Sect. 46, fin.

† See Aquila Romanus, in Ruhnk. ed. Leips, p. 155: *statts quern qualitatis aut ex accidenti appellant secundum Hermagoram.* Spalding.

‡ Regardant, sans doute, le vice et la vertu comme des qualites accidentelles.' *Gedoy's version.*

§ *Qui est in assertioe.* On which subject a law was made by Marcus Antonius, as we learn from Lampridius, c. 9. *Pines.* *Assertio* is a trial about the liberty of any person; as, when a free man was called to judgment with the object of making him a slave; ut in *servitutem asseretur*. This was termed *causa liberalis*. Turuebus. The phrase *asserere in servitutem* occurs twice in Livy.

|| Dc Inv. i. 11.

these books, I have already mentioned ;<sup>4</sup> for into their pages were thrown the various portions of knowledge which he had brought from the school when a young man,t and if there is any fault in them, it is that of his instructor ;\* whether he was moved by the circumstance that Hermagoras places first under this head examples from questions of right, or by the consideration that the Greeks call interpreters of the law *grayu.arixot*. 60. Cicero, however, substituted for these books his excellent dialogues *de Oratore*, and, therefore, is not to be blamed as if he had delivered erroneous precepts.

I return to Hermagoras. He was the first of all rhetoricians that made *exception* a distinct *state*,§ though some advances towards it, but not under that name, are found in Aristotle. 11 61. As to legal questions, he has specified these four : that which relates to *what is written and what is intended*, (which he designates by the phrase *xaru jnh xai varc al eiv*, that is, " the expression and the exception," the former of which terms is common to him with all other writers, the latter, " exception," has been less used,) that which is *ratiocinatory* or *dependent on reasoning*, that of *ambiguity*, and that which concerns *contradictory laws*. 62. Albutius,f adopting the same division, withdraws *exception*, putting it under the *juridical* department. In legal questions also he thinks that there is no *state* which is properly called *ratiocinatory*.

I am aware that those who shall read the ancient writers

\* C. v. Sect. 15.

t *Sunt enim reystce in hos commentarios, quos adolescens deduxerat, schola.* Burmann observes that *scholce*, if the text be correct, is to be taken in the sense of *disputationes*, but would rather read *Sunt enim velut res digests in loos commentarios, quos adolescens deduxerat scholcf* ; which differs very little from the reading of Stephens's edition, adopted by Capperonier, *Sunt enim velut yes reystce in hos commentarios, quas adolescens deduxerat schold.* Compare Cic. Tuse. Quaest. i. 4, and Quint. ii. 11, 7.

§ *Tradentis est.* Who he was, we do not know. *Spaldinq.*

§ Cic. De Inv. i. 11 : *Hujus constitutiones* [translativa] Hermagoras *inventor esse existimatur.*

¶ Capperonier refers to Rhet. ii. 15, 8.

T Albutius differs from Hermagoras, in removing *exception* from the *questiones rationales*, and putting it under the *questiones legates*, including it in *quality* ; while from the *legates questiones* he excludes *ratiocinatio* as superfluous. This also Cicero appears to do in his De Orat. b. ii, and Part. Orat. *Tumebus.*

with attention will find still more *states* ; but I am afraid that what I have said on this subject has exceeded due bounds.

63. For myself, I confess that I am now inclined towards an opinion somewhat different from that which I formerly held ; and perhaps it would be safest for me, if I regarded *only* my own reputation, to make no change in that which for many years I have not only thought but have sanctioned with my approbation. 64. But I cannot endure to be guilty of dissimulation in any point on which I give judgment, especially in a work which I am composing with a view to being of some profit to well-disposed young men ; for Hippocrates,x so celebrated in the art of medicine, is thought to have acted most honourably in acknowledging some mistakes that he had made, in order to prevent posterity from erring with him. Cicero,t too, did not hesitate to condemn some of his published works and others which he wrote afterwards, as his *Catullus* and *Lucullus*, and those books on Rhetoric to which I just now alluded. 65. For longer perseverance in study would be superfluous, if we were not at liberty to find out something better than what was advanced before. Nothing however of what I then taught was useless, for what I shall now teach will recur to the same principles, so that no one will repent of having learned from me. All I intend to do, is to re-produce the same materials, and to arrange them with somewhat better effect. But I wish every one to be satisfied that I communicate new light to others as soon as I have gained it myself.

60. According to the system of most authors, then, I ad- tiered to three *ratiocinatory states*, those of *conjecture*, *quality*,

\* Hippocrates, as he was dressing the wound of a man who had been struck with a stone on the head, found that he had been deceived with regard to the sutures of the skull, and confessed his mistake. /This is mentioned to his honour by Celsus, viii. 4, who contrasts his noble-mindedness with the meanness of little men, who, *quia nihil habcut, nihil sibi detrahunt.* See Hippoc. Epid. v. 14.

t See Cicero, Ep. ad Attic, xiii. 12, 13, 16, 19. Having at first composed the *Disputationcs Academicce* in two books, giving the first the title of *Lucullus* and the second that of *Catullus*, he afterwards produced another edition in four books, in which he made Varro the chief character. Of the second edition, only the first book has descended to us ; of the first edition, the second book, entitled *Lucullus*, is extant. The rest *is lost.* *Spaldiny.*

and *definition*, and one *legal*." These were my general *states*. The legal .1 divided into five species, those relating to *writing and intention, contradictory laws, induction, ambiguity, and exception*. 67. I now see that the fourth+ of the general *states* may be withdrawn from them ; for the primary division is sufficient, by which I pronounced§ some *states* to be *rationatory*, others *legal*; thus the fourth will not be a *state*, but a species of question ; otherwise it would be a *rationatory state*. 68. From those also, which I called species, I withdrew *exception*; having frequently indeed observed, (as all who listened to my instructions can remember,) and having asserted even in those lectures which were published without my consent, 11 (but in which I however included this remark,) that the *state of exception* can scarcely be found in any cause, so evidently that some other may not seem to be rightly named in that cause instead of it; and that in consequence that *state* had by some writers been wholly set *aside*. 69. Yet I am not ignorant that many cases are treated under this *state of exception*, as in almost all causes in which a person is said to have failed from irregularity in *for ¶*, such questions as these arise : " Whether it was *lawful for* such a person to bring an action at all, or against some other particular person, or before some particular judge, or at some particular time," and whatever other similar questions may be asked. 70. But persons, times, suits, and other matters, are considered under the *state of exception for some pre-existent cause* ; so that the question lies, not in the *state of exception* itself, but in the cause for which recourse is had of the *state of exception*. " You

\* See c. v. sect. 4.

† *Collektivum* statum. The same as the *sylogismus*. Compare sect. 46.

§ Quintilian justly blames his own division, for it was a division into three *species* and one *genus*; all the members of it were, therefore, not of the same order. *G'apperonier*.

¶ The *status legalis*.

|| See the Proem, c. 7.

¶ [Cecidisse form.uld.] It was customary among the Romans, that if any one brought an action irregularly, or demanded anything more than he was justified in demanding, he lost his cause, and was said either *formula cadere* or *causa cadere* ; and thus in these cases they were obliged to have recourse to *exception*. Turnebus. See Torrent. id Suet. Claud. c. 14. *U'ipperonier*. See sect. 52 ; and Cicero de Inv. l. 8.

ought not to seek restitution of this deposit before the praetor, but before the consuls ; for the sum is too great to come under the cognizance of the praetor;" the question then is, " whether the sum is too great for the praetor's cognizance;" and this is a question as to fact. 71. " It is not lawful for you to proceed against me, for you could not become agent for the opposite party ;" here the question for judgment is, whether he could become agent. " You ought not to have proceeded by interdict, but to have made a demand ;" the matter in doubt is, " whether the proceeding by interdict was right." 72. All these points come under the head of legal questions. Do not prescriptions,!\* also, (even those in which *exception* appears most manifest) lead to the same sorts of questions as those laws under which the action is brought, so that the inquiry will be either about the *name* of an act, } about *what is written and the intent of the writer*, or about *something to be settled by argument*. The *state* then springs from the question ; the *state* of exception does not embrace the point *for* which the pleader contends, but the question *because of* which he contends,+ 73. This will be made plainer by an example: " You have killed a man ; I have not killed him ;" the *question* is « whether the accused did kill the man," the *state* is the *con- lectural*.§ The following case is different : " I have a right to proceed against you ; you have not ;" when the *question* will be, " whether he *has a right*," and hence the *state* ; for whether he be allowed to have a right or not, belongs to the event, not to the cause, and to that which the judge may decide, not to that because of which he may give such decision. 74. This is similar to it: " You deserve to be punished ; I do not deserve to be punished ;" the judge will see whether he *does* deserve to be punished ; but here there will not be either *question* or *state*: where then ? " You deserve to be punished, for you have killed a man ; I have not killed a man : " here then is a question " whether he *did kill a man*?" " I ought to be honoured ; you ought. not ;" is there here any *state* ? I think not. " I ought to be honoured, for I have killed a tyrant ; you

[Prescriptions.] Compare b. vii. c. 5. They are the *exceptiones* of the Jurisconsulti, as Lexicons will show ; in Greek *ἱραπαγ* *Ycait Spalding*. See sect. 23.

+ As whether a man has committed sacrilege or simple theft.

Compare sect. 70.

§ *Vulg* >, *7uwstio de facto*. *Capperonier*.

have not killed a tyrant;" here there is both question and *state*. . . 75. In like manner, " You have no right to proceed against me ; I have a right," has no *state*; where is it then?

You have no right to proceed against me, because you are infamous ;" here the question is " whether he is infamous," or " whether an infamous man has a right to proceed against another.," and here are both questions and *states*.<sup>t</sup> The kind of cause + is therefore exceptional, like the comparative, and that of recrimination.

76. But, you will say, " I have a right; you have not," is similar to " you have killed ; I did right in killing;" I do not deny that it is so ; but this does not make a *state* ; for these are riot propositions, (if they were, the cause would receive no explanation from them,) as propositions must be accompanied with reasons. " Iloratus committed a crime, for he killed his sister ; he committed no crime, for he had a right to kill her who mourned at the death of an enemy;" the *question* here will be, " whether this was a sufficient reason for killing her;" and thus the *state* will be that of *quality*. 77. In like manner with regard to exception : " You have no right to disinherit § your son, for an infamous person is not allowed to engage in any legal process ; I have a right, for disinheriting is not a legal process;" the question is, " what is a legal process ?" here we shall use *definition* you are not allowed to disinherit;" here will be the *sylogism*.¶ The case will be similar with regard to all matters concerning the ratiocinatory and legal *states*. 78. I am not unaware, however, that some have included exception under the ratiocinatory kind of *states*, in this way : " I have killed a man, but by order of the emperor;" " I gave up the offerings in the temple to a tyrant, but he compelled me to do so;" " I quitted my post, but through being harassed by bad weather, floods, ill-health ;"

• *Status conjecturæ*, or *facti quæstio*. Capperonier.

+ Of two kinds ; first, the *status conjecturalis* or *definitivus*, whether the man was really infamous ; secondly, the *status qualitatis*, whether an infamous person has the right of going to law. Capperonier.

<sup>t</sup> *Genus causes*, not *status* ; see sect. 67; also iii. 10, iii. 4, respecting the *genus comparativum* and *mutua accusatio*. Also vii, 2, 9, and 22; vii. 4, 12. Sjallding.

A father could not disinherit his son without taking him before the judges, and proving his unworthiness by a regular legal process.

¶ I iniewnus.] *Erit status defanitus*. Capperonier.

Ti Th, the *status* called *sylogisimus*. See sect. 16. Capperonier.

that is, it was not my fault, but the fault of those circumstances. 79. From these authors I differ still more widely;\* for it is not the act that is brought under the exceptional *state*, but the cause of the act, as happens indeed in almost every defence ; and besides, he who adopts such a mode of defence, does not depart from the *state of quality*,<sup>t</sup> for he says that he himself is free from blame; so that two kinds of quality+ are rather to be distinguished; one, by which the act and the accused party, the other, by which the accused only, is defended.§

80. We must therefore adhere to those writers whose authority Ciceroll has followed, and who say that there are three points about which there is a question in every cause ; *whether a thing is,¶ what it is,\*\* and of what species it is ;††* a distinction which even nature herself teaches us ; for there must first of all be something which is the object of the question ; concerning which it certainly cannot be determined *what* and *of what species it is*, until it be settled that it really exists ; and *this, therefore, is* the first question. 81. But as to that which is proved to exist, , it does not immediately appear *what it is*. When this point is also decided, there remains, last of all, the *quality*; and, when all these particulars are settled, nothing further is left.

82. Under these heads are contained indefinite"++ and definite ( ) questions ; some of these heads are considered in whatever kind of matter we discuss, whether demonstrative, deliberative, or 'udicial; and they comprise also suits at law,

• *Liberizls*.] Than from those to whom he alludes in sect. 66.

1 *A formæ qualitatis*. That is, from the *status qualitatis* assumptionis, which the Greeks call *per aractæ*, and the Latins *remotio criminis*, or sometimes *purgatio*. Capperonier.

§ *Quality* is twofold ; *absolute*, when we contend that a deed is in itself just and right ; *assumptive* or *presumptive*, when we attempt to palliate, by assumed arguments, that which we cannot prove to be right in itself, and to show that the agent is not to be blamed.

**Turnebus.**

§ When we throw the blame upon circumstances, as in sect. 78.

¶ Compare sect. 44. Spalding.

¶ *Status conjecturalis*.

• *Status definitivus*.

ft *Status qualitatis*.

++ Theses, or general questions.

§§ Referring to certain times, places, circumstanced.

whether regard with reference to ratiocinatory or to legal questions ; for there is no legal dispute which is not to be resolved by the aid of definition, consideration of quality, or conjecture. 83. But to those who are instructing the ignorant, a plan more extended at first, and a road, if not marked out by the straightest possible line, yet more easy and open, will not be without advantage. Let students learn, therefore, before all, that there are four modes of proceeding in every cause ; which four modes he who is going to plead ought to make it his first business to consider. For, to begin first of all with the defendant, by far the strongest mode of defence is, *if the charge which is made can be denied*;\* the next, *if an act of the kind charged against the accused can be said not to have been done* ; the third, and most honourable, *if what is done is proved to have been justly done*.\* If we cannot command these methods, the last and only mode of defence is that of eluding an accusation, which can neither be denied nor combated, by the aid of some point of law, so as make it appear that the action has not been brought in due legal form. 84. Hence arise questions referring either to the general action or to exception ;§ for there are some things objectionable in their own nature, yet allowed by law, as it was permitted, for instance, by the twelve tables, that the body of a debtor might be divided among his creditors ¶ but public feeling has set aside that law ; and some things may be equitable in themselves, but prohibited by law, as liberty in making wills."

85. By the accuser nothing more is to be kept in view than that he must prove that *something was done*; that *a particular thing was done*; that *it was done wrongfully*; and that *he brings his action according to law*. Thus every cause will depend upon the same sorts of questions, only the allegations

\* *Status iuftialis*, otherwise *conjecturalis*, vulgo *quæstio facti*. Capperonier.

† *Status defenitivus*. Capperonier.

\* *Status qualitatis*, vulgo *juris gæcectio*. Capperonier.

§ *Status ptraXitIewc* or *7rapaypaçitc*, *exceptio fori*, or *exceptio iudicii declinatoria*, which is sometimes called *prescriptio*. Capperonier.

¶ See Aul. Gell. xx. 1.

\*\* Of the restraints laid on testamentary disposition of property, see Smith's Diet. of Gr. and Rom. Ant. Art. *Legatum*. The most effective law was the *lex Falcidia*, passed B3.c. 40, which provided that a testator should not give more than three-fourths of his property in legacies, and thus secured at least one-fourth to the legal heir.

of the different parties will sometimes be interchanged;\* as in those causes in which the question is about a reward, it is for the plaintiff to prove that what was done was right.

86. These plans, as it were, and forms, of proceeding, which Y then called *general states*, resolve themselves, as I showed, into two general kinds, the one dependent on reasoning, the other on legality. The one dependent on reasoning is the more simple, as it consists merely in the contemplation of the nature of things ; and it is sufficient, therefore, in respect to it, to mention *conjecture, definition, quality*. 87. Of legal questions there must necessarily be more species, as laws are numerous, and have various forms. We rest on the words of one law, and on the spirit of another; when we find no law ready to support us, we press some one into our service ; we compare some, one with another; we interpret some in a manner different from that in which they are usually understood. 88. Thus from those three *states* spring the following resemblances as it were of states, sometimes simple, sometimes mixed,§ yet always wearing their own peculiar appearance, as that which refers to *what is written and what is intended*, which, without doubt, is included under *quality* or *conjecture*; that which is treated by *sylogism*, which has regard especially to *quality*; that which respects *contradictory laws*, which belongs to the same *states* as *what is written and what is intended*; and that referring to *ambiguity*, which is always settled by conjecture 89. *Definition* also is common to both kinds ¶ of questions, those which depend on the consideration of matters of fact, and those which are to be decided by adherence to the written letter.

All these questions, though they fall under those three *states*, yet since they have severally, as I said, ¶ something

\* Thus, in accusations, the complainant is to prove that something is/wrong; but, in cases of claiming reward's, the complainant has to prove that something is right. Turnebus.

— See sect. 67 ; also c. v. sect. 4.

§ Those of conjecture, definition, and quality. Capperonier.

¶ Because there is sometimes in one cause one *state of scriptum et voluntas*; sometimes several *scripta* and several *voluntates*; or sometimes *scriptum et voluntas* is mixed with *leges contraries* and *ambiguitas*; and there are similar combinations in other causes. Turnebus.

¶ He alludes to the two general questions, *de re* and *de scripto*. See c. 5. Capperonier.

¶ He alludes, if I mistake not, to sect. 87 Spalding.

peculiar, appear necessary to be explained to learners ; and they may be allowed to call them either *legal states* or *questions*, or *secondary heads*, if they but understand that nothing is sought in them but what is contained under the three general heads which I have before mentioned.\* 90. But

Sect. 80!

In these sections, 87-89," says Capperonier, "is shown the later system of Quintilian concerning *status oratorii* ; and, that it may be the better understood, I have thought it well to compare it, not only with his former system, but with those of Cicero, the writer *ad Herennium*, and Hermogenes.

Quintilian at first admitted four *general states*

1. The conjectural.
2. The definitive.
3. That of quality.
4. The legal.

He then divided the legal into five species

1. That of *scriptum et voluntas*.
2. That of contradictory laws.
3. The syllogism.
4. That of ambiguity.
5. That of exception.

But in his later system he admits only three *general states*

1. The conjectural.
2. The definitive.
3. That of quality, which in b. vii. c. 4, he divides in the same manner as other rhetoricians ; for, in his retraction, he endeavours to prove that *exception* is not properly a *state* ; and that his *first four species of the legal state* may be referred to some one of the three *general states*.

The system of Cicero respecting *states* is to be found in his first book *de Invention Rhetorical*, near the commencement.

He acknowledges four *ratiocinatory states*

1. The conjectural, or that concerning fact.
2. The definitive, or that concerning the name of a fact
3. That of quality, which he divides into
  1. The judicial which is either *absolute* or *assumptive*; and the *assume*.  
 time he divides into
    1. Concession.
    2. *Remotio criminis*, or averting of the accusation.
    3. *Relatio criminis*, or retorting on the accuser.
    4. Comparison.
4. Exception.

And five *legal states*

1. That of *scriptum et voluntas*.
2. That of contradictory laws,
3. That of ambiguity.

with questions referring to *quantity*, to *a whole as consisting of parts*, to *relation*, and, as some have thought, to *comparison*,

4. The ratiocinatory, or syllogism.
5. The definitive.

But in his *de Orators*, ii 24, 26, Topic. c. 21, 24, and Part. Orat. c. 29, he mentions only the three most common *states*

1. The conjectural.
2. The definitive.
3. That of quality.

The system of the writer *ad Herennium* concerning *states* is that which follows, b. L c. 11, 13.

He first of all lays' down these three general *states*

1. The conjectural.
2. The legal. /,
3. The judicial, or that of quality.

He then divides the legal into six species

1. That of *scriptum et voluntas*.
2. That of contradictory laws.
3. That of ambiguity.
4. That of definition.
5. That of exception.
6. The ratiocinatory, or syllogism.

The judicial he divides into two species

1. The absolute.
2. The assumptive ; which he subdivides into four
  1. Concession.
  2. *Remotio criminis*.
  3. *Relatio criminis*.
  4. Comparison.

The system of Hermogenes, as given in his books *de Partitionibus*, is this

Of every rhetorical question the *status* is either

1. One of conjecture, or,
2. One of definition, or,
8. One of quality.

Quality is either

1. Ratiocinatory, about something done, or,
- ~ Legal, about something written.

Ratiocinatory quality is either

1. Practical, about something to be done, or,
2. Juridical, about something done.

Juridical quality is either

1. Absolute, or,
2. Presumptive, or assumptive.

Assumptive juridical quality is divided into

1. *Relatio*, that is, retorting on the accuser.
2. Comparison.
3. *Remotio*, or repelling of the accusation.
4. Concession.

the case is, not the same ; for they are to be regarded, not as concerning differences in the laws, but as dependent on reasoning alone, and are, therefore, always to be placed under conjecture or quality ; as when we ask *with what intentions* a person did anything, or *at what time, or in what place.* 91. *But I* shall speak of particular questions when I proceed to treat of the rules for division.\*

This is agreed among all writers, that in every simple cause there is but one single *state* ; but that many questions, which, as secondary points, are referred to that in which the main point for judgment is contained, may be comprised in one and the same cause ; (92. I also think that it is sometimes doubtful what *state* we ought to adopt, as many means of defence are employed against one accusation ; and as it is said with regard to the colour\* of a statement of facts, that that is the best which a speaker can best maintain, so it may be said in this case also, that that *state* should be chosen, in support of which the orator can put forth most strength ; 93. and accordingly, in settling a mode of defence for Milo, one course found favour with Cicero, when he pleaded the cause, and another with Brutus, when he composed a speech for Milo by way of exercise ; § as Cicero maintained that *Clodius had been killed deservedly, as a Tier-in-wait, yet without intention on the part of*

Legal quality is divided into questions respecting

1. *Scriptum et voluntas.*
2. Contradictory laws.
3. The syllogism.
4. Ambiguity.

To all these he subjoins exception, or *μὴν Ἀγοίῃ*, which he sometimes calls *ἑραπαγοίῃ.*"

I have extracted this tabular view of *states* from Capperonier, because, though it has not escaped the sarcasm of Burmann, as indicating ostentatious diligence, it may be of great service to such as would thoroughly understand, not only this chapter, but many other parts of Quintilian.

\* Book vii.

+ To speak properly, there *is* in every simple cause but one principal *state*, though many other *states*, which we may call *incidental, occur*, and which are referred to the principal *state*. Capperonier.

f See iv. 2, 88.

§ See x. 1, 23 ; 5, 20. I have found no mention of this speech, of Brutus in any author except Quintilian. To a speech of Brutus for Deiotarus there is an allusion in Cicero Brut. c. 5, ad Att. xiv. 1, and in the writer of the Dialogue de Or. c. 21 ; it was delivered, however, at a different time from that of Cicero for Deiotarus. The writer of the

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*Milo* ; but Brutus even gloried on behalf of Milo. that he had killed a bad citizen;) 94. but that in complex causes, two or three *states* may be found, either of different kinds, as when a person denies that he did one thing,\* and maintains' that he **was in** the right in doing another,t or of the same kind, as when a person denies two charges, or all the charges brought against him. 95. This happens, also, when there is a question about some one thing which several persons are trying to obtain, either all relying on the same kind of claim, as that of relationship ; or some on one kind and some on another, as some on a will and some on relationship. But whenever there are several claimants, and one kind of defence is made against one and another against another, there must necessarily be several kinds *of states*; as in the following subject of controversy, the law standing thus : 96. *Let wills made according to the laws be valid. Let the children of intestate parents be heirs. Let a disinherited son possess none of his father's property. Let an illegitimate son, if born before one that is legitimate, be so his father as legitimate ; if born after, only as a citizen.* § *Let it be lawful for every father to give his son in adoption. Let it be lawful for every son given in adoption to return into his own family if his natural father dies without children.* 97. A father, who, having two sons, had allowed one to be adopted by another man, and had disinherited the other, had afterwards an illegitimate son, and then, after appointing the disinherited son his heir, died. All the three laid claim to the estate. (Let me observe that the Greeks call an illegitimate son *υἱόθετος*; we have no Latin term exactly corresponding to

Dialogue shows that the eloquence of Brutus was different from that of Cicero, see c. 17, 18, 25, and more fitted for philosophical discussion than for pleading causes, as also appears from Quintilian x. 1, 123. Compare Cie. ad Att. xiv. 20 ; xv. 1. *Spalding.*

\* Here will be the *status conjecturalis, or facti questio*.- Capperonier.

t Here will be the *status qualitatis absolutes*. Capperonier.

§ Whether there really was such a law among the Romans, (among the Greeks it is certain that there was,) or whether it was merely assumed in the schools for the purpose of exercise in declamation, is a matter of dispute with the *jurisconsulti*. See vii. 4, 11 ; viii. 47, 6. *Spalding.*

§ Nor can I say whether this was law beyond the walls of the schools. We find something very different in Pypini, mus. See Schul. %ingius, Jurisprud. Ante Just. D. Ayrieri 848. *Spalding.*

it,\* as Cato remarks in one of his speeches, and, therefore, adopt the Greek word. But let us attend to our subject.) 98. "To him who was named as heir in the will was opposed the -law, *Let a disinherited son possess none of his father's property*; and hence arose the *state* referring to *what is written and what is intended*, it being inquired "whether he could inherit in any way? whether according to the intention of the father? whether as being named as heir in the will?" As to the illegitimate son, there arise two considerations, that he was born *after* the legitimate sons, and was *not* born *before* a legitimate one. 99. The first consideration goes into the *sylogism* or inference, "whether sons alienated from the family; are in the same condition as if they had never been born?" § The other is that regarding *what is written and what is intended*; for it is admitted that he was not born before a legitimate son; but he will rest his cause on the intention of the law, which he will say was, that an illegitimate son, born when there was no longer a legitimate son in the family, should be considered as legitimate. 100. He will also set aside the written letter of the law, by saying that "it is certainly no detriment to an illegitimate son if a legitimate one was not born after him," and will insist on this argument: *Suppose that an illegitimate son only be born; in what relation will he stand to his father? only as a citizen. Yet he will not be born after a legitimate son. Will he be as a son in every respect? yet he will not be born before a legitimate one. If, therefore, we can conclude nothing from the words of the law, we must take our stand on the intention of it.* 101. Nor let it perplex any one that two *states* arise from one law; the law is two-fold,

\* Among the Greeks *nothos* meant one who was born of a reputable father and a disreputable mother; the Latin *spurius*, on the contrary, meant one who was born of a reputable mother and disreputable father. See Isidore, Orig. ix. 5. Various derivations are given of the word *spurius*, but all doubtful.

t The first question will be treated under the *status legalis* which is called the *sylogism*, as it does not rest on the express words of the law, but infers from some part of the law something favourable to the matter in hand. *Capperonier*.

§ Whether by adoption or by being disinherited. *Capperonier*.

If so, he was, though not *formally*, as they say, yet *virtually*, born before legitimate children. *Capperonier*.

|| *Status legates*; one, the *sylogism*; the other, *de scripto et voluntate*. *Capperonier*.

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and has accordingly the form of two laws. To the son wishing to return into the family, it will be said, in the first place, by him who is named as heir in the will, "Though it be lawful for you to return, I am still heir;" and the *state* will be the same\* as in regard to the claim of the disinherited son; for the question is "whether a disinherited son can be heir?" 102. In the next place, it will be said by both, (as well by the one who is named heir as by the illegitimate one,) "It is not lawful for you to return into the family, for our father did not die without children." But, in saying this, each of the two will rest his case on his own peculiar ground; for the disinherited son will assert, "that a disinherited son is also one of the children," and will draw a proof of his assertion from the very law by which it is pretended that he is set aside; as it would be superfluous, he would say, for a disinherited son to be forbidden to inherit the property of his father, if he were to be accounted as a stranger, but, as he would have been, by law right as a son, the heir of his father if he had died without a will, the law is now brought against him, which, however, does not prevent him from being a son, but from being an heir. The *state*, then, will be that of *definition*: the question, "what is a son?" 103. The illegitimate son, on his part, will allege that his father did not die without children, resting on the same arguments which he used in making his claim at first, to show that he was a son; unless he also have recourse to the *state* of definition, and ask, "whether illegitimate children are not children?" There will thus be in this one cause either two special legal *states*, those of the *letter and intention* and the *sylogism*, besides one of *definition*, or those three which are the only real and natural *states*, that of *conjecture*, with regard to the writing and intention of the writer, that of *quality* in the *sylogism*, and that of *definition*, which sufficiently explains itself.

In every kind of legal controversy, too, must be comprehended *a cause, a matter for judgment, and the containing point*, for there is nothing brought into question in which

\* Namely, *de scripto et voluntate*. *Capperonier*.

t See sect. 82.

\* See sect. 88.

§ The *continens*, ἡ ἀντικειμένη, that which contains the very substance of the cause; that which is the chief matter in the cause to be pleaded,