

determine on such repetition, touch but lightly oil facts in his statement, and, contenting himself with relating *what has been done*, promise to explain more fully *how it was done* in the proper place.

129. As to the *commencement* of a statement of facts, some think that it ought to be made with reference to some character, whom, if he is on our side, we are to extol, and, if adverse to us, to attack. This certainly is a very common mode of proceeding, because on each side there are persons between whom the dispute lies. 130. But they may sometimes be introduced with descriptive circumstances, when such a course is likely to be advantageous ; as,\* *Aulus Cluentius llabiti,s, judges, was the father of my client, a -rural who held the highest position, not only in the municipal town of Lariwui, in which he was born, but in all that country and neighbourhood, for his merit, reputation, and respectability of birth* ; sometimes without them : as, *when Quintus Ligarius had set out,t etc.* 131. Sometimes, however, we may commence with a fact, as Cicero in his speech for Tullius :+. *Marcus Tullius possesses an estate inherited from his father in the territory of Thuriuni* ; or as Demosthenes § in behalf of Ctesiphon : *For the Phocian war haring broken out, etc* 132. As to the *end* of the statement, it is a matter of dispute with those who think that the statement itself should be brought down to the point where the question arises :|| *as,f These things having thus happened, Yubilius Dolla.bella the prætor published an edict, as is customary with regard to violence and men appearing in arms, without any exception, only that A +;butius should reinstate Cceci-na in the place from which he had expelled him. He said that he had reinstated him. A sum of money was deposited : and it is conceruiug this deposit that y :ju must decide.* This can always be done on the side of the prosecutor, but not always on that of the defendant.

\* Cic. Pro Cluent. c. b.

t Cic. pro Ligari. c. 1.

A fragment of a lost speech. Another fragment of it is given, v. 13, 21. Iy hat Tullius it was is uncertain.

Pro Coron. p. 230, ed ll.eisk

|| Comp. c 4, sect. 2.

Cic. p : Cawiu. c. 8.

### CHAPTER III.

Of digressions or excursions immediately after the statement, § 1-3. Not always unreasonable, 4-8. Some preparation often necessary before proceeding to proof, 9-11. Digressions may be made in any part of a speech, but those in the middle should be short, 12-17.

1. IN the order of things the *confirmation* follows the statement ; for we must prove what we stated only *that it might be proved*. But before I proceed to treat of this part, I must make a few observations on the opinions of certain rhetoricians.

It is the custom of most speakers, when the order of facts is set forth, to make a digression to some pleasing and attractive moral topic, so as to secure as much favourable attention as possible from the audience. 2. This practice had its rise in the declamatory ostentation of the schools, and passed from thence into the forum, after causes began to be pleaded not to benefit the parties going to law, but to enable the advocates to make a display ; from apprehension, I suppose, that if the stubbornness of argument should immediately follow the dry conciseness of narrative, (such as is often necessary,) and the gratification of eloquent diction should be too long withheld, their whole oration would appear cold and repulsive. 3. To this custom there is this objection, that the speakers indulge in it without making due distinction of causes, and what particular causes require, but as if such displays of eloquence were always expedient or even necessary ; and in consequence they force into their digression matters taken from other parts to which they properly belong ; so that many things must either be said over again, or, as they have been said in a place to which they had no right, cannot be said in their own. 4. I admit, however, that this sort of excursion may be advantageously introduced, not only after the statement of the case, but after the different questions in it, altogether or sometimes severally, when the subject requires or at least permits it ; and I think that a speech is by such means greatly set off and embellished ; provided that the dissertation aptly follows and adheres to what precedes, and is not forced in like a wedge, separating what was naturally united. 5. For no part of *it* speech ought to be more closely attached to any other part

than the proof is to the statement ; unless indeed the digression be intended either as the end of the statement or as the beginning of the proof. There will therefore sometimes be room. for it ; for instance, if our statement, towards the conclusion, contains something very heinous, we may enlarge upon it, as if our indignation, like our breath, must necessarily have vent. 6. This however ought to be done only when the matter does not admit of doubt ; else it is of more importance to make your charge true than atrocious ; because the enormity of an accusation is in favour of the accused as long as it remains unproved, for belief in the commission of a heinous crime is extremely difficult. 7. A digression may also be made with advantage, if, for example, when you have spoken of services rendered to the opposite party, you proceed to inveigh against ingratitude ; or if, when you have set forth a variety of charges in your statement, you show how much danger in consequence threatens yourself. 8. But all these must be signified briefly ; for the judge, when he has learned the order of the facts, is impatient for the proof of them, and desires as soon as possible to settle his opinion. You must be cautious, also, that your exposition of the case be not forgotten, through the attention of the judge being turned to something else, or fatigued with useless delay.

9. But though such digression is not always a necessary sequel to a statement of facts, it is yet frequently a useful preparation for the consideration of the question ; for instance, if the case appears, at first sight, unfavourable to us ; if we have to uphold a severe law; if we enforce penal infliction; as there will then be room, as it were, for a second exordium, to prepare the judge for our proofs, or to soothe or excite him ; and this may be done the more freely and forcibly in this place, as the case is already known to him. 10. With these lenitives, so to speak, we may soften whatever is offensively hard in our statement, that the ears of the judge may the more readily admit what we may have to say afterwards, and that he may not be averse to concede us justice ;\* for judges are not easily convinced of anything against their will. 11. On these occasions, however, the disposition of the judge must also be ascertained, that we may know whether he is more inclined to

*Ne tua nostruri oderint.] Ne nobis sint adversi propter juris rigorem. Turnebut.*

law or to equity ; for according to his inclination our representations will be more or less necessary.

The same subject may also serve as a kind of peroration after the question. 12. This part the Greeks call the *ragix-βας*, : the Latins the *egresszes* or *egressio*. But such sallies, as I remarked,\* are of several kinds, and may be directed to different subjects from any part of the cause ; as *eulogies of neeit and places, descriptions of countries, recitals of occurrences true or fictitiuus.*<sup>t</sup> 13. Of which sort, in the pleadings of Cicero against Verres, are *the praises of Sicily*, and *the rape of Proserpinc* :<sup>a</sup> in his speech for Caius Cornelius,\* *the well knot' u celebration of the merits of Cneius Pompey*, which the divine orator, as if the course of his pleading had been suspended at the very name of the heroic leader, suddenly turns aside to pronounce, breaking away from the matter on which lie had entered.

14. As to the definition of the *7raoir.San*, it is, in my opinion, *a dissertation on any subject relating to the interest of the cause, digressing front the order of facts.* I do not see, therefore, why they assign it to that part of a speech, above all others, which immediately follows the statement of the case, any more than why they think that name belongs to a digression only when something is to be *stated* in it, as a speech may swerve from the right path in so many ways. 15. For whatever goes beyond those five parts of a speech which we have specified,<sup>11</sup> is a digression, whether it be an expression of *indignation, pitrt, detestation, reproach, apology, conciliation, or reply to invectee.*<sup>¶</sup> Similarly digressive is everything that does not lie within the question ; all *aplification, extenuation, and excitement cf the*

\* Sect. 4.

+ C. 2, . § 19.

III. 7, 27.

5 Of this speech only some fragments remain, which have been preserved with the commentary of Asconius Pedianus. " Caius Cornelius," says Asconius, " when tribune of the people, after incurring the displeasure of the senate by the proposal of certain laws, proposed another law by which no one was to be released from legal obligations except with the sanction of the people ; a law intended to weaken the authority of the senate." Spalding.

¶ See iii. 9, 1.

¶ *Maledictorunt refutatio.*] Since *maledicta* have no proper connexion with the matter in question. So Cie. pro Cluent. c. 23. *Doce-quid-, a nao0h in criminis, sed in matcdicti loco sit objectum.* See c. 2, sect 27. *J'puldbig.*

*passions* ; all those moral observations concerning *luxury, avarice, religion, duty*, which\* contribute so much to the agreeableness and ornament of a speech, but which, however, as they are attached to cognate subjects, and naturally cohere with them, do not appear to be digressions. 16. But there are numbers of remarks introduced into matters that have no connexion with them, remarks by which the judge is excited, admonished, appeased, intreated, or commended, Instances of them are innumerable; some we carry with us ready prepared ; some we utter on the spur of the moment, or from necessity ; if, for instance, anything extraordinary occurs while we are speaking, as an interruption, the sudden arrival of any person, or a disturbance. 17. From such a cause Cicero was obliged to make a digression in his exordium, when lie was speaking for Milo, as appears from the short speecht which he pronounced on the occasion. But lie that prepares something to precede the question, and he that adds something to his proofs as in support of them, may make a somewhat longer digression. He, however, who makes a sally from the middle of his speech, ought soon to return to the point from which he started.

#### CHAPTER IV.

Of propositions preparatory to proof ; not always necessary, § 1, 2. Sometimes very useful, 3, 4. Various kinds of propositions, and remarks on them, 5-9.

1. THERE are some writers who place the *proposition* after the statement of facts, as a division of a speech on any matter for judgment.§ To this notion I have already replied. In my opinion the commencement of any proof is a *proposition*, which may be advanced not only in stating the principal question, but sometimes even to introduce particular

\* It is to be observed that I read *ea maxime quae jucundam et ornatam faciunt orationem*, with Rollin. In Spalding's and other texts the *que* is omitted.

*f Oratiuncula.* This was the speech that he really delivered on behalf of Milo, and which was extant in the time of Asconius Pedianus, having been taken down on the occasion. The more elaborate speech, which we now have, was never delivered.

§ See iii. 9, 5; 11, 27.

§ *Judicialis materice.* *Orationis, quae versetur in genere judiciali.* Capperonier.

¶ III. 9, 2.

arguments, especially those which are called *imXEigicitara.* 2. But I shall now speak of the formert kind. ; It is not always necessary to use it ; for sometimes what the point in question is, is sufficiently manifest without any proposition whatever ; for instance, if the statements of facts ends where the question begins ; so that that which in arguments is commonly the recapitulation,\$ is sometimes immediately subjoined to the statement of the case : *These things & occurred, judyes, just as I have related them; the Tier-in-wait was cut off; violence was overcome by violence; or rather audacity was subdued by valour.* 3. But at times it is extremely useful ; especially when the fact cannot be denied, and the question is about the definition : as, in pleading for him who took the money of a private person from a temple, you would say, *The consideration is about sacrilege; it is concerning sacrilege that you have to decide; so that the judge may understand that his only duty is to ascertain whether that which is charged against the accused is sacrilege.* 4. It is also of use in causes that are obscure or complex, not only that they may be rendered more lucid, but also, occasionally, that they may be more striking. A proposition will produce this effect, if there be immediately subjoined to it something that may support our pleading : as, *A law has been made expressy, that whatever foreigner mounts the wall is to be punished with death; that you are a foreigner is certain; that you mounted the wall there is no doubt; what remains, then, but that you undergo the penalty?* For such a proposition enforces a confession from the opposite party, and prevents, in a great measure, delay in giving judgment, not only explaining the question, but supporting it.

5. Propositions are *single, double, or complex*; a distinction which results from more than one cause : for several charges may be combined, as when Socrates was accused *of corrupting the youth and introducing new superstitions;* or one charge may be established by several proofs, as when it was alleged against ZEcliues that he had acted dishonestly in his em-

\* See v. 14, 14.

t That which concerns the principal question, or *state* of the cause. Spalding.

\$ *Summa collectio.* 'AvasfOaXaiwQis. Pithaau. In French "recapitulation." Capperonier.

§ Cie. pro Mil. c. 11.

bassy, because he had spoken falsely ; because he had done nothing in conformity with the directions given him; because he had tarried ; because he had accepted presents. 0. The defence may also contain several propositions ; as, in an action to recover a debt it may be said, *You have no right demand it ; for it was not in your power to become an agent* ;\* nor had he, in whose name you act, a right to have an agent ; nor are you the heir of him, from whom I am said to have borrowed ; nor was I indebted to him. 7. Such examples maybe multiplied at pleasure; but it is sufficient to have pointed out that such is the case. If these allegations are stated singly, with proofs subjoined, they are so many distinct propositions ; if they are combined, they come under the head of partition.<sup>t</sup>

8. A proposition is sometimes, also, entirely *bare*, as is generally the case in conjectural causes : *I accuse of murder* ; *I charge with theft* ; sometimes it is accompanied with a reason ; as, *Caius Cornelius+ has been guilty of treason against the dignity of the tribunate ; for he himself, when tribune of the people, read his own law before the public assembly.*<sup>s</sup> The proposition which we bring forward, too, is sometimes our own ; as, *I accuse this man of adultery* ; sometimes that of our adversary ; as, *The charge against me is that of adultery* ; sometimes affecting both parties ; as, *The question between my opponent and me is, which of the two is the nearer of kin to a person who has died intestate.* Sometimes, moreover, we may couple opposite propositions ; as, *I say thus, my adversary thus.*

9. There is a way of speaking which has, at times, the force of a proposition, though it is in reality not one ; when, after having made our statement of facts, we add, *It is upon these points that you are to decide* ; this being a kind of admonition to the judge to direct his attention more earnestly to the case, and, being roused as by a touch, to observe that the statement is ended and the proof commenced ; so that, as we

\* *Procuratori tibi esse non licuit.*] He that was *infamid notatus* could not be a *procurator*. Turnebus.

t Partition, with Quintilian, is not properly a portion of the pleading, but an appendix to the proofs, or preparation for them. See the next chapter. Capperonier.

§ C. 3, sect. 13.

§ Contrary to the custom, which was, that the *pneco* should recite the law, the *seriba* supplying him with the words. Turnebus.

enter upon the establishment of our allegations, be may commence, as it were, a new stage of listening.

## CHAPTER V.

Partition of our matter generally useful, § 1-3. When it should be omitted, 4-9. Examples from Cicero, 10-12. As to *states of conjecture and quality*, 13-17. Artifices that may be used, 18-21. Utility of partition, and the proper qualities of it, 22-28.

1. PARTITION is the enumeration, according to their order,\* of our own propositions, or those of our adversary, or both ; an enumeration which some think that we should always make, because, by its aid, the cause is rendered clearer, and the judge more observant and attentive, if he knows exactly on what point we are speaking, and on what points we intend to speak afterwards. 2. Some, on the other hand, think it dangerous to a speaker, for two reasons : that some things, on which we promise to speak, may escape our memory, and others, which we may have omitted in our specification, may occur to us ; but nothing of this kind can happen except to one who is utterly deficient in ability, or one who brings to his pleading nothing settled or premeditated. 3. Otherwise, what method is so plain and clear as that of a proper division of our matter ? for it follows nature as a guide, so as to be the greatest aid to the memory, to prevent us from straying from our proposed course in speaking. I cannot, therefore, agree with those who think that our partition should not exceed three propositions. Doubtless, if it be too multifarious, it will escape the recollection of the judge, and perplex his attention ; but it is not to be confined, as by a law, to this or that number, when a cause may possibly require more.

4. There are other reasons why we should not always adopt a partition ; first, because most observations please better when they appear to be conceived on the moment, and not to be brought from home, but to spring from the subject itself as we are discussing it; and hence the common expressions, *I had almost forgotten*, *It had escaped me*, *You aptly remind me*,

\* *Ordine collata.*] That is, regularly following one another ; not separate. Spalding.

are by no means ill received. If you lay down your course of proof before-hand, all pleasure of novelty is cut off from the sequel of your speech. 5. Sometimes, too, the judge must be misled, and wrought upon by various artifices, that he may suppose something else to be intended than what is really our object. A proposition is sometimes startling, and a judge, if he sees it prematurely, dreads it as a patient dreads the surgeon's instrument before an operation is performed ; but if, without any proposition being advanced before-hand, our observations come upon him when off his guard, and penetrate his mind, without any warning, when wrapt up, as it were, in itself, they will make him believe that which he would have distrusted if we had advanced it at first. 6. Occasionally, too, we should avoid not only the distinction of questions, but the mention of them altogether ; the judge should have his feelings strongly moved, and his attention diverted ; for to instruct is not the only duty of an orator ; the power of eloquence is best shown in producing excitement. But, to such an effect, that minute carefulness in division, scrupulously separated into parts,\* at a time when we should endeavour to deprive the judge of the power of deciding against us, is directly opposed. 7. Are not arguments, also, that are light and weak when detached, often of great force in a body? Such arguments, accordingly, should rather be collected in a mass, and we should make a sally with them, as it were, upon the judge; an expedient which should rarely, however, be adopted, and only in case of necessity, when reasoning forces us to that which seems contrary to reasoning.<sup>t</sup> 8. In addition, it is to be considered that there is, in every division of a case, some one point of more importance than the rest, and when the judge has become acquainted with it, he is apt to disdain other points as requiring no notice. Consequently, if more charges than one are to be established or overthrown, a partition is both advantageous and agreeable ; in order that what we have to say on each head may distinctly be shown ; but if we have

\* *Tenuis illa et scrupulosa in partes secta divisionis diligentia.* Such is the reading of Spalding, who observes that all the manuscripts, and all editions before that of Badius Ascensius, have *secta*. Cal. peronier, and most of the later editors, have adopted *sectw* from Badius. *Secta diligentia* is an expression with which we can hardly feel content, but, as Spalding asks, if you read *secte*, what will you do with *tenuis*?  
t Comp. c. 2, sect. 85.

to combat one charge by various arguments, it is needless 9. Thus, if you should make such a division as this, *I shall show that the accused, for whom I plead, is not of such a character that he can be thought to have committed murder ; I shall show that he had no motive for committing murder ; I shall show that at the time the murder was committed he was beyond the sea*, all that you might prove before that which you place last, must necessarily appear useless ; 10. for the judge is anxious to come to the strongest point of all ; and if he is of a patient temper, lie will silently hold the advocate bound to adhere to his stated division, or, if lie be pressed with business, or be a man of some dignity, or of rude manners, will call upon him, with some reproachful remark, to adhere to it. 11. Some have been found, accordingly, to disapprove of Cicero's partition in his speech for Cluentius, where he promises, first of all, that *he will show that nre man was ever brought to judgment for greater crimes, or on stronger evidence, than Oppianicus* ; next, that the preliminary inquiries\* were conducted by those very judges by whom *Ice* was condemned; lastly, that the judgment was influenced by money, not on the side of Cluentius, but by the opposite party; such a division being needless, because, if the third point could be proved, there was no necessity for introducing the first or second. 12. On the other hand, no one will be so unjust or foolish as not to admit that Cicero adopted an excellent division in his pleading for Murieno : *T perceive, judges, that of the whole accusation there are three heads ; one concerned with censure of my client's nvrals; another with his competition for horwurs ; and a third with charges against him for bribery* ; for he thus exhibits the cause with the utmost clearness, and does not render one head useless by another.

13. Most writers also hesitate respecting the following mode of defence : *If I killed the man, I killed him justly; but I did not kill him* ; for " to what purpose," it is asked, " is the first proposition, if the second can be proved? they are at variance with one another, and while we advance both, credit is given to neither." This is indeed partly true ; as we Ought to rest on the second only, provided it be incontrovertible. 14. But if we have any apprehension as to the

\* *Praejudicia.*] See book v. c. 1 and 2, and *Smith's Diet. of Gr. and Rom. Ant. Art. Praejudicium.*  
t Comp. iii 6, 10.

stronger, we may very well use the support of both ; for different judges are moved by different arguments ; and he who believes that the deed was done, may think it just ; while he who will not allow it to be just, will perhaps feel convinced that it was not done. An unerring hand may be content with one javelin, but, by an uncertain band, several should be thrown, in order that chance may have its influence. 15. Cicero, in defending Milo, shows admirably, in the first place, that Clodius was a *Tier in-wait*, and then adds, superabundantly as it were, that even if he had not been so, a citizen of such a character might have been slain with great merit and honour on the part of the slayer. 16. Yet I would not altogether condemn that order which I just now mentioned ;\* because some arguments, though hard in themselves, may yet be of use to soften others that are to follow. The common saying, that *we must ask more than what is just in order to get what is just*,<sup>t</sup> is not without foundation in reason. 17. No one, however, is to take it in such a sense as to suppose that everything may be attempted ; for the Greeks very wisely instruct us that *what cannot be accomplished ought not to be tried.* But whenever we adopt that double mode of defence of which I am speaking, we ought to make it our object to draw from the first head confirmation for the second ; for he who might even have confessed without danger, may appear to have no motive for speaking falsely when he denies.

18. We must also take good care, whenever we suspect that the judge desires some other proof than that which we are advancing, to promise that we will fully and speedily afford him satisfaction on the point ; especially if it affects our client's honour. 19. But it frequently happens that a cause, in itself far from honourable, is supported by the letter of the law ; and, in this case, that the judges may not listen with unwillingness or disapprobation, they must be often reminded that *the vindication of the integrity and honour of our client will follow ; that they have but to wait a little, and allow its to proceed in order.* 20. We may pretend also, occasionally, to say some things against the wish of our client, as Cicero does

• Sect. 13.

} See Erasmus, Chiliad. ii. 3, 26, who thinks that the saying was originally used of people offering goods for sale.

\$ Diog. Laert. i. 70.

in his speech for Cluentius, in regard to the law respecting the duties of judges ;\* sometimes we may stop, as if we were interrupted by our client ; sometimes we may address ourselves to him, and entreat him to allow us to take our own course. 21. Thus we shall gradually make an impression on the mind of the judge ; who, while he trusts that the honour of our client is going to be vindicated, will listen with less reluctance to our more startling arguments ; and, when he has received some impression from these, the maintenance of our client's honour will be the easier for us. Thus the two points will support each other ; and the judge, trusting to our vindication of character, will be more attentive to the point of law, and, the point of law being established, will be more disposed to listen to our vindication of character.

22. But though partition is not always necessary, or even advantageous, yet, when it is seasonably adopted, it contributes great lucidity and agreeableness to a speech ; for it not only causes what is stated to become clearer, by drawing certain particulars out of the crowd, as it were, and placing them full in the sight of the judges, but relieves the attention by fixing a definite termination to certain parts, as distances on a road, marked by inscribed stones, appear greatly to diminish the fatigue of travellers. 23. For it is a gratification to learn the measure of the labour which we have accomplished ; and to know how much remains, encourages us to proceed with greater spirit to the conclusion ; nothing, indeed, need seem long, when it is understood where the end is. 24. It was not without justice that Quintus Hortensius gained great praise for his exactness in division ; though Cicero<sup>+</sup> sometimes gently laughs at his partitions as being counted upon his fingers ; for, as there is moderation requisite in gesture,\* so we should, even with greater reason, avoid a too precise, and, as it were, ointed, division of our matter. 25. Minute sections, which, instead of being *members*, are *bits*, detract greatly from the

\* This law, observes Gesner, respecting the bribery of judges, was directed against the senators, and Cluentius might have defended himself from the charge of bribery by saying that he was not a senator.

<sup>t</sup> Cie. Brut. c. 88 ; pro Quintio, c. 10 ; Divinat. in Cœcil. c. 14, where he says *membra dividere caper it* (Hortensius) *et in digitis suis singulas partes causre constituere.*

<sup>+</sup> This touch on gesture is in allusion to Hortensius's counting on his fingers. *Spalding.*