

in the republic; having not only this evil in itself, that it has destroyed so many citizens in a most atrocious manner, but that through habituating them to sights of distress, it has even taken away clemency from the hearts of most merciful men. For when every hour we see or hear of something very cruel being done, even we who are by nature most merciful, through the constant repetition of miseries, lose from our minds every feeling of humanity.

## THE SPEECH FOR QUINTIUS ROSCIUS THE ACTOR.

### THE ARGUMENT.

AFTER the last speech, which was delivered A. V. C. 674, Cicero went to Athens, where he remained eighteen months; and after his return he did not employ himself at first as an advocate, but devoted himself rather to philosophical studies. But in the third year, A. V. C. 677, when his friend Roscius, the comic actor, was interested in a cause, he returned to the bar. The subject of the action in which this speech was delivered was this:—A man of the name of Fannius Chærea had articed a young slave to Roscius, on condition that Roscius was to teach him the art of acting, and that he and Fannius were afterwards to share his earnings. The slave was afterwards killed, and Roscius brought an action against the man who had killed him, Quintus Flavius by name, and received as damages a farm worth 100,000 sesterces—for his half-share in the slave, according to his own account, but as the full value of the slave according to Fannius; but the fact was that Fannius also had brought an action against Flavius, and had recovered similar damages. Fannius sued Roscius for 50,000 sesterces, as his share of the damages which he, (Roscius,) had received from Flavius, suppressing the fact of his having obtained a similar sum himself. The beginning of this speech is lost, and also a considerable portion at the end.

I. . . . HE, forsooth, excellent man, and of singular integrity, endeavours in his own cause to bring forward his own account-books as witnesses. Men are accustomed to say. . . .<sup>1</sup> Did I endeavour to corrupt such a man as that, so as to induce him to make a false entry for my sake? I am waiting

<sup>1</sup> There is a hiatus here, so that though there are some words more in the Latin text, which I have omitted, it is impossible to make any sense of them.

till Chærea uses this argument. Was I able to induce this hand to be full of falsehood, and these fingers to make a false entry? But if he produces his accounts, Roscius will also produce his. These words will appear in the books of the one, but not in those of the other. Why should you trust one rather than the other? Oh, would he ever have written it if he had not borne this expense by his authority? No, says the other, would he not have written it if he had given the authority? For just as it is discreditable to put down what is not owed, so it is dishonest not to put down what you do owe. For his accounts are just as much condemned who omits to make an entry of the truth, as his who puts down what is false. But see now to what, relying on the abundance and cogency of my arguments, I am now coming. If Caius Fannius produces in his own behalf his accounts of money received and paid, written at his own pleasure, I do not object to your giving your decision in his favour. What brother would show so much indulgence to a brother, what father to a son, as to consider whatever he entered in this manner proof of a fact? Oh, Roscius will ratify it. Produce your books; what you were convinced of, he will be convinced of; what was approved of by you, will be approved of by him. A little while ago we demanded the accounts of Marcus Perperna, and of Publius Satrius. Now, O Caius Fannius Chærea, we demand your accounts alone, and we do not object to the action being decided by them—Why then do you not produce them? Does he not keep accounts? Indeed he does most carefully. Does he not enter small matters in his books? Indeed he does—everything. Is this a small and trifling sum? It is 100,000 sesterces. How is it that such an extraordinary sum is omitted?—how is it that a hundred thousand sesterces, received and expended, are not down in the books? Oh, ye immortal gods! that there should be any one endowed with such audacity, as to dare to demand a sum which he is afraid to enter in his account-books; not to hesitate to swear before the court to what, when not on his oath, he scrupled to put on paper; to endeavour to persuade another of what he is unable to make out to his own satisfaction.

II. He says that I am indignant, and sent the accounts too soon; he confesses that he has not this sum entered in his book of money received and expended; but he asserts that it

does occur in his memoranda. Are you then so fond of yourself, have you such a magnificent opinion of yourself, as to ask for money from us on the strength, not of your account-books, but of your memoranda? To read one's account-books instead of producing witnesses, is a piece of arrogance; but is it not insanity to produce mere notes of writings and scraps of paper? If memoranda have the same force and authority, and are arranged with the same care as accounts, where is the need of making an account-book? of making out careful lists? of keeping a regular order? of making a permanent record of old writings? But if we have adopted the custom of making account-books, because we put no trust in flying memoranda, shall that which, by all individuals, is considered unimportant and not to be relied on, be considered important and holy before a judge? Why is it that we write down memoranda carelessly, that we make up account-books carefully? For what reason? Because the one is to last a month, the other for ever; these are immediately expunged, those are religiously preserved; these embrace the recollection of a short time, those pledge the good faith and honesty of a man for ever; these are thrown away, those are arranged in order. Therefore, no one ever produced memoranda at a trial; men do produce accounts, and read entries in books.

III. You, O Caius Piso, a man of the greatest good faith, and virtue, and dignity, and authority, would not venture to demand money on the strength of memoranda. I need not say any more about matters in which the custom is so notorious; but I ask you this, which is very material to the question, How long ago is it, O Fannius, that you made this entry in your memoranda? He blushes; he does not know what to answer; he is at a loss for anything to invent off-hand. "It is two months ago," you will say; yet it ought to have been copied into the account-book of money received and paid. "It is more than six months." Why then is it left so long in the memorandum-book? What if it is more than three years ago? How is it that, when every one else who makes up account-books transfers his accounts every month almost into his books, you allow this sum to remain among your memoranda more than three years? Have you all other sums of money received and expended regularly entered, or not? If not, how is it that you make up your books? If

you have, how is it that, when you were entering all other items in regular order, you leave this sum, which was one of the greatest of all in amount, for more than three years in your memoranda? "You did not like it to be known that Roscius was in your debt." Why did you put it down at all? "You were asked not to enter it." Why did you put it down in your memoranda? But, although I think this is strong enough, yet I cannot satisfy myself unless I get evidence from Caius Fannius himself that this money is not owed to him. It is a great thing which I am attempting; it is a difficult thing which I am undertaking; yet I will agree that Roscius shall not gain the verdict unless he has the same man both for his adversary and for his witness.

IV. A definite sum of money was owed to you, which is now sought to be recovered at law; and security for a legitimate portion of it has been given. In this case, if you have demanded one sesterce more than is owed to you, you have lost your cause; because trial before a judge is one thing, arbitration is another.<sup>1</sup> Trial before a judge is about a definite sum of money; arbitration about one which is not determined. We come before a judge so as either to gain the whole suit or

<sup>1</sup> Professor Long's explanation of the difference here laid down is little more than a translation of and comment on this passage. He says, "The following is the distinction between *arbitrium* and *judicium* according to Cicero. (Pro Rosc. Com. 4.) In a *judicium* the demand was of a certain or definite amount, (*pecunie certae*); in an *arbitrium* the amount was not determined (*incertae*.) In a *judicium* the plaintiff obtained all that he claimed or nothing, as the words of the formula show, "Si paret H. S. 1000 dari oportere." (Compare Gaius, iv. 50.) The corresponding words in the formula *arbitraria* were "Quantum æquius melius, id dari;" and their equivalents were "ex fide bonæ; ut inter bonos bene agier." (Top. 17)... If the matter was brought before a judge, properly so called, the *judicium* was constituted with a *pæna*, that is *per sponsionem*; there was no *pæna* when an arbiter was demanded, and the proceeding was by the formula *arbitraria*. The proceeding by the *sponsio* then was the strict one, "Angustissima formulasponsionis," (Cic. pro Rosc. Com. 14); that of the *arbitrium* was *ex fide bona*, and the arbiter, though he was bound by the instructions of the formula, was allowed a greater latitude by its terms. The engagement between the parties who accepted an arbiter, by which they bound themselves to abide by his *arbitrium*, was *compromissum*. (Pro Rosc. Com. 4.) But this term was also employed, as it appears, to express the engagement by which parties agreed to settle their differences by arbitration, without the intervention of the prætor. Smith, Dict. Ant. p. 53f. v. *Judex*.

to lose it ; we go before an arbiter on the understanding that we may not get all we asked, and on the other hand may not get nothing. Of that the very words of the formula are a proof. What is the formula in a trial before a judge ? Direct, severe, and simple ; "if it be plain that fifty thousand sesterces ought to be paid." Unless he makes it plain that fifty thousand sesterces to a single farthing are due to him, he loses his cause. What is the formula in a cause brought before an arbiter ? "That whatever is just and right shall be given." But that man confesses that he is asking more than is owed to him, but that he will be satisfied and more than satisfied with what is given him by the arbiter. Therefore the one has confidence in his case, the other distrusts his. And as this is the case, I ask you why you made an agreement to abide by arbitration in a matter involving this sum, this very fifty thousand sesterces, and the credit of your own account-books ? why you admitted an arbitrator in such a case to decide what it was right and proper should be paid to you ; or secured to you by bond, if it so seemed good to him ? Who was the arbitrator in this matter ? I wish he were at Rome. He is at Rome. I wish he were in court. He is. I wish he were sitting as assessor to Caius Piso. He is Caius Piso himself. Did you take the same man for both arbitrator, and judge ? Did you permit to the same man unlimited liberty of varying his decision, and also limit him to the strictest formula of the bond ? Who ever went before an arbitrator and got all that he demanded ? No one ; for he only got all that it was just should be given him. You have come before a judge for the very same sum for which you had recourse to an arbiter. Other men, when they see that their cause is failing before a judge, fly to an arbitrator. This man has dared to come from an arbiter to a judge, who when he admitted an arbitrator about this money, and about the credit due to his account-books, gave a plain indication that no money was owing to him. Already two-thirds of the cause are over. He admits that he has not set down the sum as due, and he does not venture to say that he has entered it as paid, since he does not produce his books. The only alternative remaining, is for him to assert that he had received a promise of it ; for otherwise I do not see how he can possibly demand a definite sum of money.

V. Did you receive a promise of it? When? On what day? At what time? In whose presence? Who says that I made such a promise? No one. If I were to make an end of speaking here, I appear to have said enough to acquit myself as far as my good faith and diligence are at stake—to have said enough for the cause and dispute, enough for the formula and bond; I seem to have said enough to satisfy the judge why judgment ought to pass for Roscius. A definite sum of money has been demanded; security is given for a third part of it; this money must either have been given, or set down as paid, or promised. Fannius admits it was not given; the books of Fannius prove that it has not been set down as paid; the silence of witnesses proves that it was never promised. What do we want more? Because the defendant is a man to whom money has always seemed of no value, but character of the very highest, and the judge is a man whom we are no less anxious to have think well of us than to decide favourably for us, and the bar present is such, that on account of its extraordinary brilliancy we ought to feel almost as much respect for it as for another judge,—we will speak as if every regular trial, every honorary arbitration, every domestic duty were included and comprehended in the present formula. That former oration was necessary, this shall be a voluntary one; the other was addressed to the judge, this is addressed to Caius Piso; that was on behalf of a defendant, this is on behalf of Roscius; the one was prepared to gain a victory, this one to preserve a good character.

VI. You demand, O Fannius, a sum of money from Roscius. What sum? Is it money which is owed to you from the partnership? or money which has been promised and assured to you by his liberality? One demand is important and odious, the other is more trifling and easy to be got rid of. Is it a sum which is owing from the partnership? What are you saying? This is neither to be borne lightly nor to be defended carelessly. For if there are any private actions of the greatest, I may almost say, of capital importance, they are these three,—the actions about trust, about guardianship, and about partnership. For it is equally perfidious and wicked to break faith, which is the bond of life, and to defraud one's ward who has come under one's guardianship,

and to deceive a partner who has connected himself with one in business. And as this is the case, let us consider who it is who in this instance has deceived and cheated his partner. For his past life shall silently give us a trustworthy and important testimony one way or other. Is it Quintus Roscius? What do you say? Does not, as fire dropped upon water is immediately extinguished and cooled, so, does not, I say, a false accusation, when brought in contact with a most pure and holy life, instantly fall and become extinguished? Has Roscius cheated his partner? Can this guilt belong to this man? who, in truth, (I say it boldly,) has more honesty than skill, more truth than learning; whom the Roman people think even a better man than he is an actor; who is as worthy of the stage because of his skill, as he is worthy of the senate on account of his moderation. But why am I so foolish as to say anything about Roscius to Piso? I suppose I am recommending an unknown man in many words. Is there any man in the whole world of whom you have a better opinion? Is there any man who appears to you more pure, more modest, more humane, more regardful of his duty, more liberal? Have even you, O Saturius, who appear against him, have you a different opinion? Is it not true that as often as you have mentioned his name in the cause, you have said that he was a good man, and have spoken of him with expressions of respect? which no one is in the habit of doing except in the case of either a most honourable man, or of a most dear friend. While doing so, in truth, you appeared to me ridiculously inconstant in both injuring and praising the same man; in calling him at the same time a most excellent man and a most dishonest man. You were speaking of the man with respect, and calling him a most exemplary man, and at the same time you were accusing him of having cheated his partner. But I imagine the truth is, your praise was prompted by truth; the accusation by your duty to your client. You were speaking of Roscius as you really thought; you were conducting the cause according to the will of Chærea. Roscius cheated him.

VII. This, in truth, seems absurd to the ears and minds of men. What? If he had got hold of some man, rich, timid, foolish and indolent, who was unable to go to law with him, still it would be incredible. But let us see whom he has

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