

HORTENSIUS' SPEECH IN DEFENSE OF VERRES

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IT IS GENERALLY ACCEPTED that Hortensius failed to deliver a speech for the defense in the *actio prima* of Verres' trial, and that his client Verres fled into exile before that part of his trial was concluded.¹ In order to maintain this view, a passage in Quintilian (*Inst.* 10.1.22–23) must be explained away, for when emphasizing the need for students of rhetoric to study opposing speeches in pairs wherever possible, he mentions a speech of Hortensius in Verres' defense:

Illud vero utilissimum, nosse eas causas quarum orationes in manus sumpserimus, et, quotiens continget, utrimque habitas legere orationes. . . . Quin etiam si minus pares videbuntur aliquae, tamen ad cognoscendam litium quaestionem recte requiruntur, ut contra Ciceronis orationes Tiberonis in Ligarium et Hortensi pro Verre.

The explanations which have been given to this passage, however, are not entirely persuasive. Quintilian's comment implies that Hortensius' speech, whatever the occasion on which it was delivered, could in his time be compared with an extant speech of Cicero. If this occasion were the examination of a witness,² or the calculation of damages,³ then one

¹Drumann-Groebe, *Geschichte Roms*² 3 (Leipzig 1906) 87: "... er (Hortensius) mochte sich aber nach einer solchen Einleitung des Prozesses nicht weiter mit ihm befassen. . . ." On p. 88, n. 1, it is simply denied that the statement of Quintilian (quoted below) refers to a specific speech of Hortensius for Verres. E. Ciaceri, *Cicerone e i suoi tempi*² 1 (Milan 1939) 74: "Lo stesso Ortensio, stanco dell'audizione dei testi, che Cicerone gli porgeva incessantemente ad interrogare, non si sentì l'animo di prendere la parola e già sin dal secondo giorno egli abbandonò ogni volontà di difesa." Donald M. Ayers, "The Speeches of Cicero's Opponents: Studies in *Pro Roscio Amerino*, *In Verrem*, and *Pro Murena*" (unpublished Ph.D. dissertation, Princeton University, 1950) 40: "... Hortensius delivered no continuous oration at the trial of Verres and indeed, in the strict sense of the word, provided no defense at all." H. H. Scullard, *From the Gracchi to Nero, A History of Rome from 133 B.C. to A.D. 68*³ (London 1970) 98: "In view of the damning evidence Cicero produced, Verres' counsel Hortensius abandoned his brief and Verres went into exile." D. Stockton, *Cicero, a Political Biography* (Oxford 1971) 44: "5 August 70: The trial begins, and Cicero delivers the *actio prima*. Verres abandons his defense, and leaves Rome." An excellent bibliographic note on the *Verrines* is to be found in *Il processo di Verre*, ed. N. Marinone (Florence 1970) xxxiv–xxxvii.

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²It is possible for separate speeches to arise out of the examination of witnesses, as is probably the case with Cicero's *in Vatinius*; cf. Quint. *Inst.* 5.7.6, and L. G. Pocock, *A Commentary on Cicero in Vatinius* (London 1926) 4, 5.

³So M. Gelzer, "M. Tullius Cicero (als Politiker)," *RE* 7 A 1 (1939) 848 (or *Cicero, Ein Biographischer Versuch* [Wiesbaden 1969] 43): "Erst bei der *litis aestimatio* bemühte

would have to suppose that Quintilian had seen a Verrine *oratio* of Cicero which is no longer extant. But it would surely be preferable, if possible, to avoid making hypothetical additions to the already large corpus of Cicero's *Verrines*. One must also hesitate to charge Quintilian, one of Rome's most eminent students of rhetoric, with having been deceived by a forged speech.⁴ One solution would be to suppose that Hortensius had made a written reply to Cicero's speeches of the *actio secunda*,⁵ which were never actually delivered.⁶ A much more likely possibility is that Hortensius did, in fact, defend his client in the *actio prima* with a speech, and this article will attempt to show that there is no evidence which renders this solution either impossible or implausible.⁷

Several passages from Cicero's five speeches in *Verrines* 2 are sometimes adduced to demonstrate that no one defended Verres. If this interpretation were correct, then one would be forced to conclude that Cicero included in these speeches material which actually indicates that they

sich Hortensius nochmals für seinen Klienten und mag hierbei die dem Quintilian (inst. or. X 1, 23) bekannte Rede gehalten haben." We know of no examples of speeches made in the *litis aestimatio*. See below 50. Also H. Habermehl, "C. Verres (1)," *RE* 8 A 2 (1958) 1630.

⁴This is the suggestion of H. Malcovati, *ORF*³ 1 (Pavia 1967) 318 n. ix, arguing that Hortensius, as the cause of his client's downfall, would not have wanted to publish his speech.

⁵Ayers (above, n. 1) 51–53, following Von der Mühl, "Hortensius (13)," *RE* 16 (1913) 2480, maintains that Hortensius published his speech after Cicero had published his, in order to regain some of the prestige that he had lost at the trial.

⁶C. Höeg maintains that Cicero possibly did deliver *Verrines* 2 ("The Second Pleading of the Verres Trial," in *ΔΡΑΓΜΑ Martino P. Nilsson A. D. IV Id. Iul. MCMXXXIX Dedicatum* [*Acta Instituti Romani Regni Sueciae* series altera I] 264–279). He claims that Tacitus thought that the speeches were actually delivered, interpreting a rhetorical question in the *Dialogus* (20) as implying that Tacitus thought that a Republican audience had actually listened through the five speeches: *Quis quinque in Verrem libros expectabit?* Pliny's explicit testimony that the speeches appeared only in written form (*Ep.* 1.20.10) outweighs this doubtful inference. For a refutation of Höeg's views see M. Gelzer, "Das erste Consulat des Pompeius und die Übertragung der grossen Imperien," *AbhBerl* (1943) 24 n. 124 (= *Kleine Schriften* 2 [Wiesbaden 1963] 168–169 n. 124).

⁷I have found two scholarly works which state that Hortensius spoke for Verres. A. D. Leeman, in *Orationis Ratio, The Stylistic Theories and Practice of the Roman Orators, Historians, and Philosophers* 1 (Amsterdam 1963) 107, without any discussion, simply states, "... Cicero desires to surpass his rival Hortensius in the modern kind of eloquence introduced in Rome by him. This was all the more necessary because Hortensius stood with Verres and actually defended him in the *Actio Prima*. When this took place, however, Verres' case was so hopeless that Hortensius could do nothing about it." J. Humbert, *Les plaidoyers écrits et les plaidoiries réelles de Cicéron* (Paris 1925) 206, wrongly places Hortensius' speech on the second day of the trial on the basis of 2 *Verr.* 1.20 (below, n. 8) rather than after Cicero's speech and calling of witnesses. (See below, nn. 12 and 23.) For a useful summary of the relationship between the spoken and written speeches, see A. C. Clark's review of the book, *CR* 41 (1927) 74–76.

were never delivered. This conclusion seems unlikely but, it must be admitted, not impossible. Cicero might have been unable to maintain the (fictional) supposition stated at the very outset of these speeches (2 *Verr.* 2.1) that Verres had returned to face his accuser in the second hearing of the trial. The passages mentioned above are four in number. First, Cicero says that Verres, during the first part of the trial, was so overwhelmed by the witnesses for the prosecution that on the second day of testimony his friends lost the desire to support him, and that on the third day he feigned illness, and thought how he might avoid replying at all.⁸ But Cicero does not say that his opponent actually stayed away on the following days, and it seems unlikely that Cicero in *Verrines* 2 would have missed the opportunity to report such an absence. Second, Cicero is said, on the basis of 2 *Verr.* 1.3, to claim that no one had dared defend Verres. But an examination of this passage and the previous chapter shows that Cicero's statement is entirely dependent on the fictional assumption on which the speech is based.⁹ Verres had been expected, says Cicero, to stay away from the trial during the second hearing, and, had he been absent, neither the prosecutor nor the jurors would have received much credit for a condemnation by default. "Nor does the Roman people hope for this from you, nor can they be content with it . . . namely, if that man were condemned who did not want to be present, and if you were firm with him whom no one dared defend. But by all means let him be present and answer; let him be defended . . . let my carefulness contend. . . ." As the last three clauses show, the preceding clauses contain unreal and ideal conditions.

A similar sentence (2 *Verr.* 1.31) presents an even more complicated mass of subjunctives:

Hoc si ego non vidissem, si me non omnes noti ignotique monuissent id agi, id cogitari, in eo elaborari ut res in illud tempus reiceretur, credo, si meis horis in accusando uti voluissem, vereretur ne mihi crimina non suppeterent, ne oratio deesset, ne vox viresque deficerent, ne, quem nemo prima actione defendere ausus esset, eum ego bis accusare non possem.

Here Cicero is defending himself against the possible charge that he delivered such a short speech at the first hearing because he feared that,

⁸ . . . *id sum adsecutus . . . ut alter dies amicis istius ac defensoribus non modo spem victoriae sed etiam voluntatem defensionis auferret, ut tertius dies sic hominem prosterneret ut morbo simulato non quid responderet, sed quem ad modum non responderet, deliberaret* (2 *Verr.* 1.20).

⁹ *Nam si iste id fecisset quod prius statuerat, ut non adesset, minus aliquanto quam mihi opus esset cognosceretur quid ego in hac accusatione comparanda constituendaque elaborassem; vestra vero laus tenuis plane atque obscura, iudices, esset. Neque hoc a vobis populus Romanus exspectat neque eo potest esse contentus, si condemnatus sit is qui adesse noluerit, et si fortes fueritis in eo quem nemo sit ausus defendere. Immo vero adsit, respondeat . . . defendatur; certet mea diligentia. . . .* (2 *Verr.* 1.2-3).

had he made a long one, he would be incapable of making another at the second hearing. The passage is mockingly tongue-in-cheek, as one can see not only from the ironic parenthetical *credo*, but also from Cicero's treatment of his opponents' strategy. Whereas in the first *actio* he had pictured it as a cunning ploy (1 *Verr.* 26–31), in this speech it appears to have been a transparent trick, which anyone (*omnes noti ignotique*) could, and did, see through. The irony obscures the meaning of a key phrase, the relative clause *quem nemo prima actione defendere ausus esset*, which can be taken either as containing a generic subjunctive, or as a contrary-to-fact apodosis with the protasis omitted. In the first case it would mean, "... I would fear, I suppose, ... that I could not accuse a second time the sort of man whom no one had dared defend at the first hearing." This interpretation would imply that no one had defended Verres. Even so, Cicero might merely be refusing to recognize Hortensius' speech as a real defense. By the second interpretation the clause would imply that no one *would have* defended him—if his supporters had not been so confident of the success of their plan, or if Cicero had gone ahead with a full-scale attack in the first *actio* which would have devastated and silenced his opponents. (Admittedly, he says in the next sentence that everyone agreed that no strategy other than the one which he actually used could have worked.) In short, the passage is too vague to allow any firm conclusion to be drawn from it.

Fourth, and finally, is a sentence adduced by Halm¹⁰ to show that Cicero taunted Hortensius with the charge that he had deserted his client in the first *actio*.¹¹ But Cicero is only saying that Crassus and Antonius never placed themselves in a position where they would run the risk of being thought disloyal to their client if they refused to make a shameless defense.

A passage from another work of Cicero, the *Orator* (129), provides the best evidence for the generally accepted view: *nobis pro familiari reo non respondit Hortensius*. This is one of three *exempla* which Cicero gives to show how a great rhetorical attack can annihilate the opponent. But the other two *exempla*, Catiline's reply to him in the Senate, and the elder Curio's in court, raise doubts about his reliability when describing his own happier days. It appears both from Sallust (*Cat.* 31) and Cicero himself (*Mur.* 51) that Catiline made some reply to Cicero's speech, and stopped speaking only when other senators shouted him down. Similarly, the statement in the *Orator* that Curio only began his response to him is not entirely borne out by his account of the same incident in the *Brutus*

¹⁰K. Halm, *Ciceros Ausgewählte Reden*¹⁰ 2 (ed. G. Laubmann, Berlin 1900) 11 n. 73.

¹¹... *ad causam non accederent neque in alterius impudentia sui pudoris existimationem amitterent. Liberi enim ad causas solutique veniebant, neque committebant ut, si impudentes in defendendo esse noluissent, ingrati in deserendo existimarentur* (2 *Verr.* 2.192).

(217).¹² These parallels suggest not that Hortensius failed to respond, but rather that his response was quite short, and not equal to Cicero's (as Quintilian says it was not).

Nor can Plutarch's assertion be trusted that Hortensius did not dare to defend Verres and only spoke for him in the *litis aestimatio*,¹³ for his account is full of errors. He completely misunderstands Cicero's strategy in delivering a short speech, saying that the praetors, who were *favorable* (*sic*) to Verres, put off the trial until the last possible day. An anecdote which he relates shows not only his unreliability as to detail, but also that he distorts his story to fit his assumption. He tells us that when Hortensius said he could not understand Cicero's riddles, Cicero rejoined that he should have understood them, since he had a sphinx at his house which he had received as a reward from Verres (Plut. *Cic.* 7.8).¹⁴ Plutarch places this exchange at the *litis aestimatio*, evidently since he has no other place to put it in the context of his account of the whole trial. But Quintilian, relating the same story (but about a bronze sphinx!) specifically mentions that Cicero was questioning a witness.¹⁵ Quintilian, as a specialist in rhetoric, is more likely to have his facts correct than Plutarch, who in this case is primarily interested in, and perhaps dependent on, anecdotal material, which he distorts to fit his preconceptions.¹⁶

Finally, the Pseudoasconian scholiast is said to show that Hortensius never defended Verres. But the relevant passage says that Hortensius was so overwhelmed by the testimony which Cicero produced that he laid aside the *plan* of his defense, not that he made none at all.¹⁷ This state-

¹²This passage cannot be explained away as referring to Hortensius' failure to reply in writing to *Verrines* 2 (so Schanz-Hosius 1⁴ [1927] 387), or to his simple failure to defend Verres during an *actio secunda* (so Humbert [above, n. 7] 206 n. 2). Cicero is clearly discussing situations where a strong rhetorical attack overwhelms any immediate counter-attack.

¹³τοῦ δὲ ῥήτορος Ὀρτησίου τὴν μὲν εὐθείαν τῷ Βέρρῃ συνειπεῖν μὴ θελήσαντος, ἐν δὲ τῷ τιμήματι πεισθέντος παραγενέσθαι καὶ λαβόντος ἐλεφαντίνην Σφίγγα μισθόν, εἰπέ τι πλαγίως ὁ Κικέρων πρὸς αὐτόν. τοῦ δὲ φήσαντος αἰνιγμάτων λύσεως ἀπείρως ἔχειν, "καὶ μὴν ἐπὶ τῆς οἰκίας" ἔφη "τὴν Σφίγγα ἔχεις." If *τολήσαντος*, found in some manuscripts, is read, instead of *θελήσαντος*, the parallel to 2 *Verr.* 1.3 and 2 *Verr.* 1.31 is quite striking.

¹⁴The ivory sphinx appears as silver in Plut. *Mor.* 205b.

¹⁵. . . ut Cicero fecit cum ei testem in iudicio Verris roganti dixisset Hortensius: "non intellego haec aenigmata;" "atque debes," inquit, "cum Sphingem domi habeas;" acceperat autem ille a Verre Sphingem aeneam magnae pecuniae (*Inst.* 6.3.98; cf. Pliny *HN* 34.48).

¹⁶See H. Peter, *Die Quellen Plutarchs in den Biographien der Römer* (Halle 1865) 133: ". . . einen besonders dürftigen Eindruck aber macht dasjenige, was er über den Process des Verres (c. 7) und die Verwaltung der Prätur sagt; die Hauptsache sind ihm da einige ioci, von dem eigentlich Wichtigen gibt er kaum mehr, als zum Verständniss jener notwendig ist."

¹⁷[Asc.] in Act. 1 *finis* 223 St: *Multis autem diebus prima Actio celebrata est, dum testes Verris producuntur criminum diversorum, dum recitantur publicae privataeque litterae:*

ment accords well not only with the *Orator* passage, but also with Cicero's statement that Hortensius decided not to cross-examine the prosecution witnesses,¹⁸ though exceptions to this decision occurred.¹⁹ In fact, the scholiast specifically says that Verres was defended in the first *actio*.²⁰

Indeed, there are passages in *Verrines* 2 which indicate that the defendant stayed in Rome well after the end of the first *actio*, and therefore that the defense had not yet forfeited the case.²¹ It must be admitted that Cicero could have put these into his final speeches to strengthen the impression that there existed an occasion on which they might have been given. On the other hand, Cicero was writing them for an audience well versed in public affairs, and Verres' trial had been an eminently public affair. Cicero would have only discredited his case by the pure invention of incidents from before the start of the *actio secunda*, if his audience knew that one figure could not possibly have been present. (The possibility of misrepresentation, subtle or substantial, cannot, of course, be excluded.) The whole first hearing took place in nine days, starting on August 5 (2 *Verr.* 1.156, 1 *Verr.* 31). Cicero explains that in the interests of extending the trial into the following year his adversaries wanted to begin their defense *secundum binos ludos*, that is, after Pompey's *Ludi Volivi* (Aug. 16–Sept. 1) and the *Ludi Romani* (Sept. 5–19). What Cicero, on the other hand, wanted, was *ut ante primos ludos comperendinam* (1 *Verr.* 34). One might wonder whether this clause implies that Cicero wished to finish only his own part of the *actio prima*, or whether he wanted the statutory adjournment (*comperendinatio*) to be reached by this time; the latter must be the case, as is shown by 2 *Verr.* 1.20: . . . *ut his ludorum diebus interpositis nemo istum comperendinatum, sed condemnatum iudicaret*.²² With this chronology in mind, an anecdote which Cicero relates *quibus rebus adeo stupefactus Hortensius dicitur, ut rationem defensionis omitteret, adeo percussus Verres, ut abiret in exilium sua sponte*.

¹⁸. . . *quoniam priore actione,—ut patroni tui dictitant, nova quadam sapientia, ut omnes intellegunt, conscientia tua atque auctoritate meorum testium,—testem nullum interrogasti* (2 *Verr.* 5.155; cf. 2 *Verr.* 1.71).

¹⁹2 *Verr.* 1.71; 2 *Verr.* 1.151; 2 *Verr.* 2.156.

²⁰[Asc.] in Act. 2 *Arg.* 224 St: *Ergo cum prima Actione accusatus sit ac defensus Verres, nunc velut defensus iterum (sic enim mos erat) in altera Actione accusatur ad ultimum rursus oratione perpetua*.

²¹This point has been fully argued by N. Marinone, *Quaestiones Verrinae, Cronologia del processo di Verre* (Torino 1950) in *Università di Torino, Pubbl. della Facoltà di lettere e filosofia* vol. 2 fasc. 3, 8–14. Other works dealing with the chronology of the *Verrines* are Th. Zielinski, "Verrina. (Chronologisches. Antiquarisches. Juristisches.)," *Philologus* 52 (1893) 248–294; B. Kübler, "Zur Chronologie des Prozesses gegen Verres," *Philologus* 54 (1895) 464–473; and C. Bardt, "Zur Chronologie des Verresprocesses," *Hermes* 39 (1904) 643–648.

²²The number and person of *comperendinam* is, by this interpretation, surprising, since it is the court as a whole that adjourns, but the structure of the sentence (*tua ratio est ut incipio, mea ut comperendinam*) demands the first person singular.

(2 *Verr.* 4.33) becomes quite important. Verres had carefully inspected some silver at the house of Sisenna, his *defensor* (2 *Verr.* 2.110, 4.43), thus confirming the charge that he was infatuated with artistic works. This event occurred . . . *posteaquam est comperendinatus, cum iam pro damnato mortuoque esset, ludis circensibus*. . . . Thus, Verres must have remained in Rome after the end of the first *actio*.

Hortensius' speech must have been short, and probably not as effective as Cicero's. But there were significant arguments to be made in defense of his client, and, in particular, in protest against Cicero's procedure in the first hearing, and it seems quite likely that Hortensius made them in his speech.²³ Cicero makes a long, and unsatisfactory, rebuttal to Hortensius' complaint that by not giving full argumentation to the charges in the first speech he (Cicero) had violated the provisions of the law; Cicero tries to maintain that if he has done so, it should work to the advantage of the defense (2 *Verr.* 1.24–27).²⁴ It is easy to see why Cicero's procedure was unfair to the defense. Cicero treats the testimony at least as clear, if not as self-explanatory (1 *Verr.* 55), needing only some explanation, whereas in fact various points might demand some legal argument. It is possible that Hortensius maintained in his speech that the extorted monies were not actually paid to Verres, and while Cicero might have been right in maintaining that Verres could be held liable for money extorted by his orders, the point might have required some discussion.²⁵ (The question, whether Verres was responsible for all the offenses committed by officials in Sicily while he was governor there, must have been a moot point.) Furthermore, the defense was put in the invidious position of having to reply to charges that had not been fully argued, and while Hortensius probably had a good idea of the arguments which Cicero would be making at the second hearing, he would not have wanted to give credence to them by stating them himself, and then trying to refute them. Two repeated lines of defense which Cicero puts in Verres'

²³Humbert (above, n. 7) 206, n. 2, seems to imply that Hortensius hoped that the court would disallow Cicero's procedure: "Hortensius a essayé d'obtenir du tribunal la condamnation du dispositif cicéronien, et c'est après l'échec de cette tentative qu'il a fait mine de se désintéresser du débat." It hardly seems likely that the court could have forced Cicero to use up the maximum amount of time permitted him. For a reconstruction of Hortensius' arguments, see Ayers (above, n. 1) 53–87.

²⁴An echo of Hortensius' own words is perhaps to be found here: . . . *dicat me, si multa dixissem, sublevaturum fuisse eum quem contra dicerem, quia non dixerim, perdidisse*. . . .

²⁵*Tu mihi ita defendas, "Non est ista Verri numerata pecunia?" . . . nego tibi ipsi ullum nummum esse numeratum; sed cum ob tua decreta, ob edicta, ob imperia, ob iudicia pecuniae dabantur, non erat quaerendum cuius manu numerarentur, sed cuius iniuria cogerentur* (2 *Verr.* 2.26). This statement of principle might have given Hortensius a grand opportunity for counter-attack.

mouth (that he had sold the tithes at a great price,²⁶ and that he had bought rather than stolen the artifacts in Sicily²⁷) may also stem from Hortensius' speech.²⁸ It is possible that Hortensius had called before the jury during the first hearing the Mamertine delegation sent to praise Verres (2 *Verr.* 2.13). This testimony would have been given after Hortensius' speech, so that (if it was actually given) it too would show that Verres and his defenders were still present and active during their part of the first hearing.

It may be concluded that Cicero did not win his case by default; nor did Verres give up until his side had made an effort to defeat the prosecution. Far from deserting his client, the veteran Hortensius made perhaps the best possible effort to defend him from a cunning attack. He was not the cause of Verres' downfall, and need not have been ashamed to publish his speech.

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²⁶"*Magno*," *inquit*, "*decumas vendidi*" (2 *Verr.* 3.40, and *passim*).

²⁷"*Emi*," *inquit* (2 *Verr.* 4.8, and *passim*).

²⁸It is not possible to tell from the wording whether Cicero is imagining a hypothetical defense, or whether either Hortensius or Verres had expressed these lines of defense in court. Cf. 2 *Verr.* 5.22, where Cicero is clearly rebutting an argument that Hortensius might make.