

## **MIETMAULE OR ‘THINKING LIKE A LAWYER’**

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**Abstract:** *The paper investigates the origins of the rather ambivalent expression “thinking like a lawyer”. It argues that Cicero strongly influenced the manner in which the classical Roman jurists argued and reasoned. This proposition is supported by the works of Seneca (elder) and Quintilian whose works reflect legal argumentation during an important period of Roman legal development.*

**Keywords:** *Roman law, Cicero, lawyer, Seneca, Quintilian, legal argumentation*

### **1. Introduction**

Many a true word is spoken in jest, and this essay begins with a nightmare derived from an urban legend, featuring a lawyer. The protagonist is chased by three pursuers: a homicidal axe man, a werewolf and a lawyer. Her legs tire and the sand gets softer and deeper; eventually she feels their hot breath in her neck. However, she holds a gun, loaded with two bullets. The answer to the question “who does she shoot?” is: the lawyer, twice.

In spite of the positive impact of Atticus Finch<sup>[1]</sup> on the legal profession,<sup>[2]</sup> this paper will give some examples of notorious historical and fictional jurists. The explanation that these jurisconsults had sold their souls to the devil belongs to another era, but the fact remains that the untranslatable pejorative ‘Mietmaule’ has applied to lawyers since the Roman republic, indicating that their verbal skills are for hire. Thus, the following relates to the importance and influence of rhetoric into Roman law. This paper has no pretension to add new wisdom to the body of knowledge concerning rhetoric,<sup>[3]</sup> but approaches the formidable mountain range of Roman law, rhetoric, legal education and juristische Methodenlehre from a different perspective, namely from the point of view of a mixed legal system. The proposition is offered that the methodology of legal argument in Roman law, and in consequence of legal argument in the Western legal tradition, derives from rhetoric as received and developed in Rome. In consequence a considered choice has been made of Cicero’s *Topica*, Seneca’s *Controversiae* and Quintilian’s *Institutio Oratoria* as the source material for this paper. This does not mean that

these three authors are viewed as the only, or the most important, or equally important, contributors to the process. It is obvious that Cicero's seminal importance for both Roman rhetoric and Roman law make him tower above the others, which is validated by Quintilian's reliance on Cicero's work. Although the contribution of the elder Seneca to the recognition of rhetoric as a determining factor of legal thought has been rather negative, as his *Controversiae* have been the object of ridicule, it will be argued that even his silliest school examples contain a common denominator making them an essential part of legal training.

## 2. Why do lawyers have such a poor reputation?

The story of the untimely demise of the great Papinian used to be well known.<sup>[4]</sup> The most remarkable aspect of this affair is that Caracalla was obviously convinced that the jurist should, would and could exonerate him, and that this was a lawyer's job.

However, this martyr for truth and the integrity of the legal profession cuts a lonely figure in the long list of lawyers leaving their mark in history, mostly by abuse of their legal skills. One random sample from English legal history is Lord Chancellor Jeffreys,<sup>[5]</sup> while another more recent monster is found in the person of Freisler.<sup>[6]</sup> Furthermore, the medieval "Juristen, böse Christen" denotes, as does the portrayal of lawyers in literature - be it by the social commentator Dickens<sup>[7]</sup> or in the spy novel<sup>[8]</sup>, that the popular perception of the legal profession has been by and large negative.

The common denominator of the above is that through history evil regimes, and in literature novelists, have found and created lawyers whose professional training and skills made it possible to serve evil. This leads to questions about the use and abuse of law and this essay wishes to draw attention to what is taught to aspiring lawyers.

## 3. The development of legal science

It is commonly acknowledged that the Western legal tradition of law as a science was developed during the Roman republic and principate.<sup>[9]</sup> The elements of objective, methodical accumulation of knowledge, systematic organisation and impartial analysis thereof, and the transfer of this knowledge by writing and teaching are all found in Roman law.<sup>[10]</sup> The points of interest are legal argumentation and legal theory. It has been proposed that as the Roman jurists were not interested in legal theory, their works did not qualify as legal science,<sup>[11]</sup> which proposition was argued by limiting scientific solving of legal problems to logic, namely deductive reasoning.<sup>[12]</sup> This is not the place to enter into the eternal debate whether law is a science, but it is suggested that the founder of scientific theory, Aristotle, discussed both logic and dialectics.<sup>[13]</sup> Cicero also considers dialectics as the method of arguing developed to reach a decision by persuasion.<sup>[14]</sup> Moreover, Bydlinski mentioned that a large part of legal disputes is simple deduction from an uncontested rule, but this did not mean that he considered this the essence of legal science.<sup>[15]</sup> This leaves legal argumentation or the wider, but untranslatable *Rechtsdenken* as an essential element of legal science.

In his essay 'Legal education as training for hierarchy'<sup>[16]</sup> Duncan Kennedy holds that legal education consists of imparting certain basic knowledge by rote learning, issue spotting, analysis of decisions and a list of *pro* and *contra* arguments used by lawyers to argue whether a certain rule is applicable or not. However, the most important aspect of legal education is that the graduates leave 'thinking like a lawyer.' Kennedy leaves open what this exactly means and how this is achieved, but he states that law teachers convince their students that there exists an analytical process, so-called legal argumentation that is taught and enables the adept to find the correct legal solution. This is made possible by the fact that the teacher decides which arguments are valid in certain cases and *vice versa*.<sup>[17]</sup>

## 4. Predominance of procedure

It is trite that during the late republican and early classical period of Roman law the law of procedure, *in casu* the procedure *per formulam*, constituted the engine of legal development.

The same observation holds regarding the English common law.

Striking commonalities between both procedural systems are the oral courtroom tradition, the jury and the role of the judge. It may be argued that the late-republican Roman law of procedure had more in common with the law of procedure in the Anglo-American common law tradition than with modern European procedural law, the so-called inquisitorial system. During her formative period Roman law was characterised by the adversarial law of procedure, which means that the courts of Rome and Westminster operated in a way, which differed from their continental equivalents. For example, in the common law the parties control the legal question in the absence of *ius curia novit*.<sup>[18]</sup>

Thus, a common law barrister would feel at home in late republican and early classical Rome and would be in the position to plead before the courts. It should, however, be remarked that in the Anglo-American legal world the trial lawyer is and has always been recognised as a lawyer and has never been denigrated as a mere orator with no or minimal legal knowledge.

Common sense dictates that in oral litigation courtroom presence, presence of mind and in particular oratorical skills are of paramount importance. These qualities are not essential in a procedure characterised by the exchange of documents. In consequence, in a system of litigation characterised by the predominance of oral argumentation the oratorical skills of the barrister rather than abstract legal knowledge, determine the outcome of cases, the resulting taking of silk, and an eventual elevation to the bench. It comes therefore as no surprise that symbiosis of rhetoric and Roman law has been identified by an English academic, Stanley F. Bonner, whose work on Roman education and in particular the integration of Roman law within the teaching of rhetoric has been illuminating.<sup>[19]</sup> Prior to Bonner's work the relationship between rhetoric and law had been noted by Stroux<sup>[20]</sup> and Lanfranchi.<sup>[21]</sup> However, in spite of or maybe on account of the limited scope of their propositions,<sup>[22]</sup> Romanists did not accept these views.<sup>[23]</sup> Viehweg<sup>[24]</sup> suffered an identical fate<sup>[25]</sup> and the ruling paradigm continued to consider Roman law as a panzer train, impenetrable to all outside influence,<sup>[26]</sup> in steady pursuit of the correct legal solution. Nevertheless, this essay argues that the importance of the role of rhetoric in the development of Roman legal science has been undervalued and that the propositions of Stroux and Lanfranchi were too modest and specialised. This paper argues that the oratorical training of the educated Roman was during the late republic and early principate the only higher education available and as such left it's imprint on legal argumentation, in other words has been responsible for "thinking like a lawyer."

#### 4. Distinction between jurists and orators

The person of Cicero has been central in the divide between rhetoric and law. Cicero himself wrote how Gallus<sup>[27]</sup> used to say that 'this is not a matter for the law, but for Cicero, when anyone came to him with a case revolving around facts'.<sup>[28]</sup> As a result Cicero has been denigrated as a mere pleader and a theory regarding the dichotomy between law and rhetoric has been build upon this text. The Tellegens have clearly and definitely dealt with this question.<sup>[29]</sup> Two observations may be added. First, that Cicero was foremost a politician, who saw himself as a philosopher, but being a *homo novus*, was obliged to make his money in the courts, which aided his political career. The second point is a small aside to the argumentation in *Nihil hoc ad ius, ad Ciceronem*, namely that the next letter to Trebatius<sup>[30]</sup> is also worth reading. Cicero writes a short note to Trebatius saying that the latter made fun of him when they were having drinks for saying that it was a moot point whether an heir can institute the *actio furti* for a theft committed from the *hereditas iacens*. Once back at home he looked it up, noted the answer, which he sent to Trebatius, so the latter would know that the opinion, of which he had claimed that it was held by no one, was in fact held by Sextus Aelius, Manius Manilius, and Marcus Brutus . However, Cicero agreed with Scaevola and Testa.<sup>[31]</sup> It is submitted that this short, informal note to a friend convinces more that Cicero was indeed a politician, philosopher, advocate and jurist than black-letter lawyering pointing out that he had made a mistake somewhere and/or overstated the importance of equity.

Cicero had followed tradition and had gone to Greece to learn at the feet of the masters. His works on rhetoric are many<sup>[32]</sup> and span his lifetime and Quintilian advises to read them with this in mind.<sup>[33]</sup> However, as Quintilian in his *Institutio Oratoria* assimilated the essence of Cicero's works on rhetoric, this essay will concentrate on Cicero's *Topica*, an essay especially written for the legal profession and as such deserving of attention. Cicero was a man of many talents and as a result has been the subject of many opinions.<sup>[34]</sup>

#### 5. Cicero's *Topica*

The *Topica* was written mostly during a sea voyage, within a week, from memory, towards the end of his life, to explain to his friend Trebatius the system for the discovery of (legal) arguments found in Aristotle's ?? ??????.<sup>[35]</sup> This treatise has served as a textbook of legal argumentation, without having been recognised as such and without the deserved recognition.

Cicero defines *topica* as the seats of argument<sup>[36]</sup> and explains every type of argument by way of examples. Thus, the topics of definition,<sup>[37]</sup> partition,<sup>[38]</sup> division,<sup>[39]</sup> the meaning of words,<sup>[40]</sup> *genus*,<sup>[41]</sup> *species*,<sup>[42]</sup> etymology,<sup>[43]</sup> analogy,<sup>[44]</sup> distinction,<sup>[45]</sup> *a contrario*,<sup>[46]</sup> corollary,<sup>[47]</sup> the topic of antecedent,<sup>[48]</sup> consequence,<sup>[49]</sup> and inconsistency,<sup>[50]</sup> followed by cause,<sup>[51]</sup> effect,<sup>[52]</sup> comparison<sup>[53]</sup> and authority<sup>[54]</sup> are first summarily introduced, and further developed in the chapters that follow. The examples are all taken from the law and the interaction between advocates and consulting jurists is emphasised.<sup>[55]</sup> Cicero continues with an explanation of horses for courses,<sup>[56]</sup> using the status theory of Hermagoras in the search for the best topics. He concludes with some practical hints relative to equity,<sup>[57]</sup> judgment<sup>[58]</sup> and the most useful topics in criminal cases.<sup>[59]</sup>

It is generally accepted that Cicero's memory deceived him about Aristotle's *Topics*, or that he possessed a work, which differed from what is currently accepted as this work. However, Cicero's adaptation and condensation provide a concise classification and explanation of the different types of legal argument. Although the finer distinctions made by Cicero have been blurred in legal argument, it is submitted that paraphrasing Burckhardt is justified,<sup>[60]</sup> and jurists see with the eyes of Cicero and speak with his expressions. In other words, for every case there is a ready supply of arguments for either side. Time and space prevent a more detailed exposition, but the discussion on Quintilian will deal with the pervasive influence of the *Topica*.

## 6. Seneca's *Controversiae*

Lucius Annaeus Seneca, a Spaniard of equestrian family arrived in Rome during the year of Cicero's death.<sup>[61]</sup> His generation attended local declamation schools, where schoolteachers or professors taught; these professors also declaimed in public as a form of advertising. Seneca can best be described as an enthusiastic amateur and aficionado of rhetoric, who in his old age mused over the stars of his youth and their memorable words. His importance is found in the fact that he is the only source of the schoolwork of this period.

In his inaugural lecture at the University of Cape Town, Gero Dolezalek stated the obvious, namely that most cases are decided on the facts.<sup>[62]</sup> In order to find some interesting points of law one must read one's way through thousands of pages of mere fact finding.<sup>[63]</sup>

Franz Bydliniski mentioned that a large part of legal disputes is simple deduction from an uncontested rule.<sup>[64]</sup> He held that in virtually every serious legal problem both sides can raise good legal arguments,<sup>[65]</sup> and states: "Tatsächlich geht es in der Jurisprudenz, wie sie praktisch betrieben wird und betrieben werden muss, weithin um die Erarbeitung und Abwägung von Rechtsgewinnungargumenten, die ergeben, dass die eine der möglichen Problemlösungen rechtlich vorzuziehen ist, weil sie relative besser dem Recht (den vorfindlichen Rechtsnormen und dem vorfindlichen sonstigen Rechtsgewinnungmaterial) entspricht<sup>[66]</sup>."

It is unnecessary to repeat Bonner's work on the elder Seneca and the close relationship between Roman law and rhetoric.<sup>[67]</sup> The above citation from Bydliniski supports the hypothesis of this essay, namely that the oratorical training of the educated Roman during the late republic and early principate determined legal argumentation in the sense that it created the mould for 'thinking like a lawyer.'

The *Controversiae* of Seneca illustrate that the essence of rhetorical exercises is the conflict between two norms. The students have to argue both sides of the case. Rhetorical success is the result of many factors; hard work, personality, luck. Cicero's career was built on hard study and practice.<sup>[68]</sup> The essence of the rhetorical studies was to make a reasoned choice of topics and by way of inductive reasoning argue one side of a case, for which juristic legitimate arguments exist on both sides. Analysis of the *Controversiae* shows that under the follies and extravagance of the

rhetorical showroom, these test cases<sup>[69]</sup> suited their purpose as they caused the student to consider ambiguity and conflicting rules and principles. Quick-witted argument, careful interpretation, weighing-up of the relative value of arguments and logical and effective arrangement of important points were the hidden objectives of the romantic and wildly improbable subjects.<sup>[70]</sup>

## 7. Quintilian's *Institutio Oratoria*

Quintilian<sup>[71]</sup> was the first Regius professor since he was the first teacher of rhetoric to have a public school and receive his salary from the state. He was also a successful advocate and should above anything else be remembered and respected for his common sense. This respected professor of the only available higher education integrated the earlier works on the subject and was concerned about the development of his discipline. The elaborate exposition of his manual and his quest for completeness have kept knowledge of his work limited to a narrow field of specialists.<sup>[72]</sup> However, Quintilian teaches how to structure a legal argument; where to find arguments and above all that hard and fast rules do not exist, but that an advocate should be guided by common sense. After elimination of educational and psychological theory, embroidery, theatricals and other filler, his textbook should be the bible for legal argumentation.

Quintilian was well aware that rhetoric is generally considered to be the power of persuading.<sup>[73]</sup> In his discussion of the various definitions of rhetoric he remarks that Socrates and/or Plato link rhetoric with justice,<sup>[74]</sup> with which he agrees. He refers to the critics who denounce rhetoric as snatching criminals from the penalties of the law, securing the condemnation of the innocent and making falsehood prevail over truth.<sup>[75]</sup> He accedes the point that oratory may be used for either good or evil and that rhetoric sometimes substitutes falsehood for truth,<sup>[76]</sup> and identifies that most criticism of rhetoric derives from the fact that orators argue both sides of a case.<sup>[77]</sup>

After an historical survey<sup>[78]</sup> and general introduction to rhetoric<sup>[79]</sup> Quintilian arrives at his field of expertise in chapter nine of the third book, forensic oratory, the essence of which he describes as the formulation of what is asserted and the rebuttal thereof.<sup>[80]</sup> This process consists of the following five parts: introduction, statement of facts, proof or evidence, refutation, and closing statement.<sup>[81]</sup> Quintilian warns, however, that after all material has been collected the nature of the case, the question at issue and the arguments *pro* and *contra* must be considered; after this must be decided which points must be made and refuted and how the facts are to be stated.<sup>[82]</sup> When pen is put to paper the introduction is the first step.<sup>[83]</sup> After determination of the type of case, the status must be decided upon.<sup>[84]</sup> Both Quintilian's work and personality are characterised by his comment at the end of his explanation of the status theory and the diverse forms thereof, when he concludes that such subtlety about labels is an ambitious display of superfluous knowledge. He opines that the shorter, more lucid method to determine status is to identify the main issue in dispute.<sup>[85]</sup>

Quintilian offers helpful advice on writing a good introduction: target the audience,<sup>[86]</sup> catch their attention<sup>[87]</sup> and goodwill<sup>[88]</sup> and pass in a smooth and easy transition to the statement of facts.<sup>[89]</sup> When drawing the line between relevant and irrelevant facts the purpose of the narrative, namely to instruct the judge, but even more so to persuade him,<sup>[90]</sup> must be kept in mind and the exposition of the facts should be lucid, brief and plausible.<sup>[91]</sup> The statement ends where the legal question begins.<sup>[92]</sup> The transition from the statement of facts to substantiation is usually in the form of propositions and partition.<sup>[93]</sup> Substantiation or corroboration turns out to be a mixture of evidence,<sup>[94]</sup> authority<sup>[95]</sup> and arguments. The latter are discussed in depth in chapter 10 and the following chapters. To enter into detail here is not possible, but the all-pervading influence of Cicero should be remarked upon, as well as the fact that the practical Quintilian was no slave to hard rules<sup>[96]</sup> and used his own discretion and system.<sup>[97]</sup>

Of particular interest is chapter fourteen of book five where Quintilian expresses his own views on the authors of the textbooks, who try to prescribe fixed topics for argument and also binding rules for conclusions.<sup>[98]</sup> In consequence, he dissects *enthymeme*,<sup>[99]</sup> *epichereime*<sup>[100]</sup> and syllogism<sup>[101]</sup> and concludes that the difference between *epicheireme* and syllogism is found in the fact that the latter deducts truth from true premises and the former is usually used to infer from probable premises. He continues that if it was always possible to solve disputed questions from generally admitted premises, the advocate would be of little use.<sup>[102]</sup>

Quintilian aims to write the definitive textbook, which leaves no stone unturned. The result is a comprehensive work, difficult to master, which demonstrates the lack of common ground among the “professors” of rhetoric, who each had their own method, divisions, definitions, explanations and followers. Nevertheless, Quintilian’s own common sense prevails and he succeeds in showing the origin and essence of this art and rebuts many prejudices, established practices, beliefs and ideas, encouraging independent thought and advising abandonment of book- rules if the circumstances so demand. Another golden thread throughout his work is the influence and authority of Cicero, who is continuously cited and held as example.

## 8. Conclusion

It is obvious that Roman legal science developed before Seneca, Cicero and Quintilian wrote their books on rhetoric.<sup>[103]</sup> Nonetheless, it is submitted that these authors represent definite stages in the development of the Roman legal method. Regarding the previous oral tradition the African proverb applies that the death of an old wise man is comparable to the burning down of a library. Cicero lived during a transitional period, not only in politics, but also in legal development and the maxim *Litera scripta manet* was etched in his ambitious and vain mind. His deserved fame covers many areas of his wide field of expertise, but he remains unappreciated for his most important contribution, namely the consolidation of a method of thinking, which had begun its absorption into Roman law.<sup>[104]</sup> His work remained at the core of the education for generations of legal scholars and practitioners, until the recent rationalisation of education.

This method, today known as thinking like a lawyer, determines the way we think, reason and argue, and is an amalgam of inductive and deductive reasoning. As stated, Cicero’s contribution in this respect has not been acknowledged, while Seneca has been ignored or ridiculed by jurists as part of the disdain displayed towards rhetoric by this profession. Quintilian gave an honest account of the only law school available at the time and patiently analysed a variety of legal arguments, the colour to be given to questions, answers or statements. The fact that a good advocate can successfully argue both sides of a case explains the scepticism and antagonism towards lawyers experienced by the public throughout the ages. It is a popular belief that the substitution of (the myth of<sup>[105]</sup>) the objective truth with truthiness<sup>[106]</sup> is the work of lawyers.

In conclusion, the premise that the view from a mixed legal system, *in casu* the South African jurisdiction, in which the law of procedure plays a different role, may lead to different results regarding the relationship between rhetoric and Roman law, legal education in Rome as well as the absence of legal theory, appears to have kept its promise. During a crucial phase of the development of Roman law, her lawyers were taught to argue and think by professors of rhetoric; Roman law had no need for legal theory, because an over-abundance of theories concerning logic, dialectics and rhetoric was available and had been etched into their minds. Legal science was more than positivistic deduction of abstract rules of law, and the ‘correct legal solution’ was not the be-all and end-all of Roman law. Paulus’ *regula est quae rem quae est breviter enarrat. Non ex regula ius summat, sed ex iure quod est regula fiat*<sup>[107]</sup> clearly indicates that the rule was a dialectical tool, which could be applied or not, or be applied in a modified version. “Thinking like a lawyer” meant thinking like an advocate, which meant thinking like a rhetor, that is ‘how do I win this case’ and using all available means of persuasion, be it logic, dialectics, inductive or deductive reasoning and whatever common sense dictated.

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[1] Harper Lee, *To kill a mockingbird*, (New York, 1960).

[2] Impact on the legal profession, Atticus Finch at en.wikipedia.org/wiki/Atticus\_Finch (last accessed on 30-5-2012).

[3] Cf. Tobias Reinhardt, *Marcus Tullius Cicero, Topica*, (Oxford, 2003); Sara Rubinelli, *Ars Topica: The classical technique of constructing arguments from Aristotle to Cicero*, (Dordrecht/Cambridge, 2009).

[4] Edward Gibbon, *The Decline and Fall of the Roman Empire*, vol. I, Ch. 6 at www.ceel.org/g/gibbon/decline/volume1/chap6.htm (last accessed on 14-5-2012). The original source material is found in the *Historia Augusta*.

- [5] Sir George Jeffreys, afterwards Lord. For his life and legal career see: Thomas Babington Macaulay, *The History of England*, 2 vols. (London, 1871), vol. 1, 165 note, 219ff, 240, 311, 313ff, 324, 344, 360, 374, 470, 483, 488, 503, 510, 535, 576, 587, 603, vol. 2, 76ff, 139, 307.
- [6] Roland Freisler (1893-1945), prominent Nazi lawyer, State Secretary of the Reich Ministry of Justice and President of the Volksgericht. en.wikipedia.org/wiki/Roland\_Freisler (last accessed on 12-8-2012).
- [7] Joseph Tartokovsky, *Dickens v. Lawyers* at www.nytimes.com/2012/02/06/opinion/dickens-v-lawyers.html (last accessed on 25-6-2012)..
- [8] In his novel *Winter a Berlin Family 1899-1945* (London, 1987) Len Deighton's Paul Winter legalises the execution of the SA leaders (311f), advises to leave the presidency vacant at Hindenburg's death, devices the loopholes to draft the Waffen SS (359f), and gave the opinion, which caused extermination camps to be built outside the borders (395f). Although Winter is a fictitious character, it does not need an overactive imagination to realise that other, real lawyers were indeed responsible for these and similar decisions.
- [9] Joachim Hengstl, 'Gab es Rechtswissenschaft in der ausserrömische Antike?', in Rena van den Bergh and Gardiol van Niekerk (eds.), *Libellus ad Thomasium Essays in Roman law, Roman-Dutch law and Legal History in honour of Philip J Thomas*, (Pretoria, 2010), 164-183; Nicolaus Benke, 'In sola prudentium interpretatione. Zu Methodik und Methodology römischer Juristen,' in B. Feldner and N. Forgó (eds.), *Norm und Entscheidung. Prolegomena zu einer Theorie des Falls*, (Vienna-New York, 2000), 1-85.
- [10] Hengstl, 165, 165 n. 3, 182f.
- [11] Olga Tellegen-Couperus, 'Cicero and Ulpian, Two Paragons of Legal Practice', *Revue Internationale des droits de l'Antiquité*, XV (2008), 486 at 486 and 497.
- [12] Franz Bydlinski, 'Bewegliches System und juristische Methodenlehre', in Franz Bydlinski, Heinz Krejci, Bernd Schilcher, Viktor Steininger (eds.), *Das Bewegliche System im geltenden und künftigen Recht*, (Wien-New York, 1986), 21 at 29: Nur in einem zwar durchaus relevanten, aber eben unproblematischen Bereich routinemässiger Rechtsanwendung führt bereits blasse deduktive Ableitung aus den vorfindlichen Rechtsnormen zu eindeutigen und zureichenden Ergebnissen. Es ist der Grundfehler der üblichen rechtspositivistischen Ansätze, dass sie nur diesen Bereich und darüber hinaus nur die rechtlich freie Entscheidung des zuständigen Rechtsorgans kennen und kunstvoll alle argumentative Rechtsgewinnung dazwischen wegdefinieren. Horak, 57f.
- [13] Derek van der Merwe, 'Regsmetodologie: 'n Terreinverkenning in historiese perspektief', *Tydskrif vir Suid-Afrikaanse Reg*, (1987), 133.
- [14] *Topica*, II. See also X where he describes the use of similarities and comparison to reach a conclusion by way of induction, the favorite method of Socrates. Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator. Haec ex pluribus perveniens quo vult appellatur inductio, quae Graece ??????? nominatur, qua plurimum est usus in sermonibus Socrates.
- [15] Bydlinski, 20-42.
- [16] In D. Kairys (ed.) *The politics of law. A progressive critique* (New York, Pantheon Books, 1982) 38-58. Kennedy's essay has been chosen on account of the fact that it accentuates certain universal aspects of legal education. However, this does not mean that all Kennedy's propositions and conclusions are unconditionally acceptable and/or universal.
- [17] Philip Thomas, 'Fin de siècle of funksionele Romeinse reg?', *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 60 (1997) 202 at 204-205.
- [18] Detlef Liebs, *Lateinische Rechtsregeln und Rechts-Sprichwörter*, (4th ed., München, 1986), 103; O. M?ller, "Jura novit curia", *ZBJV* (Zeitschrift des bernischen Juristenvereins), 91 (1955), 41-58. I Meier, *Jura novit curia*, (Zurich, 1975). D. Hesselberger, *Die Lehre vom Streitgegenstand, Geschichtliche Entwicklung und gegenwärtiger Stand*, (Köln-Berlin-Bonn-München, 1970).
- [19] Stanley F. Bonner, *Roman Declamation in the late republic and early empire*, (Liverpool, 1949).
- [20] J. Stroux, 'Summum Ius Summa Iniuria. Ein Kapitel aus der Geschichte der interpretatio iuris', in *Festschrift Paul Speiser-Sarasin*, (Leipzig, 1926) 46.
- [21] F. Lanfranchi, *Il diritto nei retori romani*, (Milan, 1938).
- [22] Stroux held that the influence of Greek rhetoric had led to the adoption of a system for free interpretation of statutes and documents on the basis of the famous *causa Curiana*. Lanfranchi gave the works of the rhetors a very high rating as evidence for the law.

[23] Cf. H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, (2nd ed. Cambridge, 1952), 576f; Olga Tellegen-Couperus, 'Quintilian and Roman Law', *Revue Internationale des droits de l'Antiquité*, XLVII (2000), 167 at 167ff.

[24] Theodor Viehweg, *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung*, (München, 1953). Viehweg made a case for "topical", problem-orientated argumentation as opposed to axiomatic, systematic-deductive legal reasoning.

[25] Max Kaser, *Zur Methode der römischen Rechtsfindung*, (Göttingen, 1962); Franz Horak, *Rationes decidendi Entscheidungsbegründungen bei den älteren römischen Juristen bis Labeo*, (Aalen, 1969), 45-65. The latter acknowledges the influence of Cicero's *Topica* in Roman law, but denigrates this as *Rechtspolitik*, which falls outside his dogmatic and outdated concept of *Rechtswissenschaft*. For example, p. 48: Schliesslich gibt es in dem Büchlein (=Cicero's *Topica*) so manches an Argumentationslehre, was spätere Jurisprudenz ausgiebig verwendet hat und heute noch verwendet. Aber der römische Jurist scheint zu sehr in den Schranken seines Fachs befangen gewesen zu sein, als dass er so Ungewohntes hätte in seine in seine Wissenschaft integrieren können.

[26] J. Harries, *Law and Empire*, (Cambridge, 1999), 4: the separateness of law as a discipline, with its own assumptions and intellectual tradition.

[27] The jurist Gaius Aquilius Gallus (c. 116-44 BC), a pupil of Quintus Mucius Scaevola. Gallus was a friend of Cicero and *praetor* during the same year as the latter (66 BC).

[28] *Topica* XII: Nihil hoc ad ius; ad Ciceronem, inquebat Gallus noster, si quis ad eum tale quid retulerat, ut de facto quaereretur. The edition by M. Nisard, *Oeuvres de Cicéron*, (Paris, 1840) has been used.

[29] Olga Tellegen-Couperus et Jan Willem Tellegen, 'Nihil Hoc ad Ius, ad Ciceronem', *Revue Internationale des droits de l'Antiquité*, LIII (2006) 381-408 and 382 n. 2 for their earlier publications on the topic.

[30] That is the letter following *Ad familiares* 7.21 analysed in 'Nihil hoc ad ius, ad Ciceronem'.

[31] *Ad familiares* VII, 22. Illuseras heri inter scyphos, quod dixeram controversiam esse, possetne heres, quod furtum antea factum esset, furti recte agere. Itaque, etsi domum bene potus seroque redieram, tamen id caput, ubi haec controversia est, notavi et descriptum tibi misi: ut scires id, quod tu neminem sensisse dicebas, Sex. Aelium, M. Manilium, M. Brutum sensisse. Ego tamen Scaevolae et Testae assentior.

[32] *De Inventione, De Oratore ad Quintum fratrem libri tres, De Partitionibus Oratoriae, De Optimo Genere Oratorum, Brutus, Orator ad M. Brutum* and *Topica*.

[33] For example in *Institutio Oratoria*, III, 11 Quintilian mentions how Cicero had been inconsistent and how his views in the *Rhetorica* (*Rhetorica ad Herrenium*, formerly attributed to Cicero) differed from what he propounded in the *Topica* or the *Partitiones Oratoriae* regarding the status theory. See also III, 6, 58-61 and 64.

[34] The opinion of Theodor Mommsen, who earmarked Cicero as a translator and simplifier, popularising the Greek cultural heritage for a Roman audience –still visible in Horak, 47f)- is under revision. Philip Thomas, 'Bona fides, Roman values and legal science', *Fundamina A Journal of Legal History*, 10 (2004). 188 at 191; Marcia Colish, *The Stoic tradition from Antiquity to the early Middle Ages*, (Leiden, 1985), Vol. 1, 65-152.

[35] *Topica*, I; Olga Tellegen-Couperus et Jan Willem Tellegen, *RIDA*, LIII (2006) 381 at 382ff.

[36] *Topica*, II. Itaque licet definire, locum esse argumenti sedem.

[37] *Ibid.* Ius civile est aequitas constituta eis qui eiusdem civitatis sunt ad res suas obtinendas; eius autem aequitatis utilis cognitio est; utilis ergo est iuris civilis scientia; Civil law is equity made into law to settle the rights of the citizens; knowledge of this is useful; thus knowledge of the civil law is useful. Cf. *Topica*, VI. Sic igitur veteres praecipunt: cum sumpseris ea quae sint ei rei quam definire velis cum

aliis communia, usque eo persequi, dum proprium efficiatur, quod nullam in aliam rem transferri possit. Ut haec: Hereditas est pecunia. Commune adhuc; multa enim genera pecuniae. Adde quod sequitur: quae morte alicuius ad quempiam pervenit. Nondum est definitio; multis enim modis sine hereditate teneri pecuniae mortuorum possunt. Unum adde verbum: iure; iam a communitate res diiuncta videbitur, ut sit explicata definitio sic: Hereditas est pecunia quae morte alicuius ad quempiam pervenit iure. Nondum est satis; adde: nec ea aut legata testamento aut possessione retenta; confectum est. The definition must after having described the commonalities with other things continue until the particular characteristic, which does not apply to anything else, has been expressed. For example, an inheritance is money (common), which by someone's death comes to another (no definition yet) lawfully (no longer general), without being a legacy in a will or held in retention.



[38] *Topica*, II. Si neque censu nec vindicta nec testamento liber factus est, non est liber; neque ulla est earum rerum; non est igitur liber; If a slave has not been manumitted by the censor, praetor or by his master's will, he is not free. None of these apply, so this man is not free. ut si quis ius civile dicat id esse quod in legibus, senatus consultis, rebus iudicatis, iuris peritorum auctoritate, edictis magistratuum, more, aequitate consistat; Civil law consists of statutes, *Senatus Consulta*, precedents, opinions of jurists, edicts of magistrates, customs and equity.

[39] *Topica*, VIII. non dico quae sint postlimini; nam id caderet in divisionem, quae talis est: Postliminio

redeunt haec: homo, navis, mulus clitellarius, equus, equa quae frenos recipere solet; *Postliminium* applies to man, ship, mule, horse and bridled mare. Philip Thomas, 'The vicissitudes of the application of *postliminium* to movable property in 17th century international law', *THRHR*, 71 2 (2008), 272 at 273ff.

[40] *Topica*, III. Si compascuus ager est, ius est compascere; If the grazing is common, everyone is entitled to graze his cattle on it.

[41] *Topica*, III. Quoniam argentum omne mulieri legatum est, non potest ea pecunia quae numerata domi relicta est non esse legata; forma enim a genere, quoad suum nomen retinet, nunquam seiungitur, numerata autem pecunia nomen argenti retinet; legata igitur videtur; As all money has been left to his wife, it is impossible that the ready money in the house was not left to her. For species is never excluded from genus as long as it retains the same name. Ready money is called money and is thus part of the legacy.

[42] *Topica*, III. Si ita Fabiae pecunia legata est a viro, si ei viro materfamilias esset; si ea in manum non convenerat, nihil debetur. Genus enim est uxor; eius duae formae: una matrumfamilias, eae sunt, quae in manum convenerunt; altera earum, quae tantum modo uxores habentur. Qua in parte cum fuerit Fabia, legatum ei non videtur; If an amount of money was left to Fabia by her husband on condition that she was *materfamilias*; if she had not been under his marital power, she would get nothing. The *genus* is wife, of whom there are two species, namely, the *materfamilias* married *cum manu* and the wife without *manus*. Since Fabia belonged to the latter group, she did not get the legacy. Also IX dealing with rainwater.

[43] *Topica*, VIII. Scaevola autem P. F. iunctum putat esse verbum, ut sit in eo et post et limen; ut, quae a nobis alienata, cum ad hostem pervenerint, ex suo tamquam limine exierint, hinc ea cum redierint post

ad idem limen, postliminio redisse videantur. Quo genere etiam Mancini causa defendi potest, postliminio redisse; deditum non esse, quoniam non sit receptus; nam neque deditionem neque donationem sine acceptione intellegi posse; Scaevola, the son of Publius, holds that *postliminium* is a compound word, made from *post* and *limen*: in this way property lost to the enemy, which has as it were left our doorway, will become ours again by the law of *postliminium* when it comes back in our doorway. This can be used as a defence in the case of Mancinus, arguing that he returned according to *postliminium*; he has not been handed over, because he had not been accepted, since it is inconceivable that something is delivered or donated, if it has not been accepted. Cicero refers to the consul Caius Hostilius Mancinus, who after losing a battle negotiated a surrender of his troops and concluded a peace treaty with an Iberian city. Rome refused to accept this treaty and in order to invalidate it, handed Mancinus over to the Spaniards. The latter, however, returned him to Rome. See also Thomas, *THRHR*, 71 2 (2008), 272 at 273ff.

[44] *Topica*, III. Si aedes eae corruerunt vitiumve faciunt quarum usus fructus legatus est, heres restituere non debet nec reficere, non magis quam servum restituere, si is cuius usus fructus legatus esset deperisset; If a house over which you had usufruct collapsed or fell into disrepair, the heir is under no duty to rebuild or repair, just the same as he is not obliged to replace a slave subject to usufruct, if the slave died. Also X. Si tutor fidem praestare debet, si socius, si cui mandaris, si qui fiduciam acceperit, debet etiam procurator. Haec ex pluribus perveniens quo vult appellatur inductio, quae Graece  $\text{\$pagv\textcircled{g}o}$  nominatur, qua plurimum est usus in sermonibus Socrates; If a guardian, a partner and a mandatee and a *fiduciarius* have to act in accordance with good faith, an agent should do the same. In chapter X Cicero refers to the use of similarities by Crassus in the *causa Curiana* and the frequent use of analogies by the jurists in their opinions.

[45] *Topica*, III. Non, si uxori vir legavit argentum omne quod suum esset, idcirco quae in nominibus fuerunt legata sunt. Multum enim differt in arcane positum sit argentum an in tabulis debeat; Where a husband had left his wife all his money, it does not follow the money owed to him was part of the legacy; because there is a big difference between cash money in the safe and debt written up in a ledger.

[46] *Topica*, III. Non debet ea mulier cui vir bonorum suorum usum fructum legavit cellis vinariis et oleariis plenis relictis, putare id ad se pertinere. Usus enim, non abusus, legatus est. Ea sunt inter se contraria; Where a husband left his wife the usufruct over his estate and he died leaving cellars and stores full of wine and oil, she must not consider that this belongs to her; for he left her the use and not the right of consumption or alienation and these two are contrary. Also XI. Si

hoc est, illud non est; If this is the case, that is not.

[47] *Topica*, IV. Si ea mulier testamentum fecit quae se capite nunquam deminuit, non videtur ex edicto praetoris secundum eas tabulas possessio dari. Adiungitur enim, ut secundum servorum, secundum exsulum, secundum puerorum tabulas possessio videatur ex edicto dari. If a woman who has never changed status has made a will, it appears that *bonorum possessio* cannot be granted in terms of the praetorian edict on the basis of this will. Otherwise the corollary would be that *bonorum possessio* should also be granted in accordance with the wills of slaves, exiles or boys. In XII Cicero returns to this topic: Sed locus hic magis ad coniecturales causas, quae versantur in iudicii, valet, cum quaeritur

quid aut sit aut evenerit aut futurum sit aut quid omnino fieri possit. Ac loci quidem ipsius forma talis est. Admonet autem hic locus, ut quaeratur quid ante rem, quid cum re, quid post rem evenerit. 'Nihil hoc ad ius; ad Ciceronem,' inquit Gallus noster, si quis ad eum quid tale rettulerat, ut de facto

quaeretur. .... Est igitur magna ex parte locus hic oratorius non modo non iuris consultorum, sed ne philosophorum quidem. This topic is more suited to conjectural cases in court, when it is sought to establish either what is or what happened or what will be or whether something could be possible. He refers to Gallus' comment in this context and states that questions of fact are mostly important to barristers and not to jurists or philosophers. See Tellegen-Couperus and Tellegen, *RIDA*, LIII (2006) 381-408 for a detailed analysis.

[48] *Topica*, IV. Si viri culpa factum est divortium, etsi mulier nuntium remisit, tamen pro liberis manere nihil oportet; If the divorce was caused by the fault of the husband, even if the wife had asked for divorce, she does not have to forfeit to him a part of her dowry on account of the children.

[49] *Topica*, IV. Si mulier, cum fuisset nupta cum eo quicum conubium non esset, nuntium remisit; quoniam qui nati sunt patrem non sequuntur, pro liberis manere nihil oportet; If a woman married a man with whom she had no *conubium* and asked for divorce, the father has no right to retain anything of her dowry for the children, because they do not follow him. Also XIII where he defines consequences as the necessary results of an action: Ea enim dico consequentia quae rem necessario consequuntur.

[50] *Topica*, XIII. Cum tripertito igitur distribuatur locus hic, in consecutionem, antecessionem, repugnantiam, reperiendi argumenti locus simplex est, tractandi triplex. Nam quid interest, cum hoc sumpseris, pecuniam numeratam mulieri deberi cui sit argentum omne legatum, utrum hoc modo

concludas argumentum: Si pecunia signata argentum est, legata est mulieri. Est autem pecunia signata argentum. Legata igitur est; an illo modo: Si numerata pecunia non est legata, non est numerata pecunia argentum. Est autem numerata pecunia argentum; legata igitur est; an illo modo: Non et legatum argentum est et non est legata numerata pecunia. Legatum autem argentum est; legata igitur

numerata pecunia est? Even if we divide this topic in three parts, antecedent, consequence and inconsistency, the place to find an argument is simple, as there are three ways to handle it. Because what does it matter if you have assumed that a wife is entitled to the coined money, when all money has been left to her, if you argue in the following way: if coined money is money, it has been left to the wife. Coined money is money, thus it has been left to her; or, if ready money was not included in the legacy, ready money is not money. Ready money is money, thus it was included in the legacy; or, it is impossible that money has been left in a legacy and ready money not. Money has been left, thus the ready money was left. In chapter XIV Cicero refers to the use of a *contrario* arguments by jurists, and briefly sets out the seven modes of conclusion developed by the dialecticians.

[51] *Topica*, IV. Omnibus est ius parietem directum ad parietem communem adiungere vel solidum vel fornicatum. Sed qui in pariete communi demoliendo damni infecti promiserit, non debet praestare quod fornix viti fecerit. Non enim eius vitio qui demolitus est damnum factum est, sed eius

operis vitio quod ita aedificatum est ut suspendi non posset; All owners have the right to add to a common part wall, solid or arched; but he who has promised to pay for any damages caused to the party wall, will not be liable for accidents sustained by the arch. For such damage is not due to the fault of the person demolishing the party wall, but the result of the architect's fault, because he did not support the arch enough. In chapter XV the *conditio sine qua non* is presented as well as intention, and reference is made by hitting somebody by accident and the weapon that flew from his hand instead of having been thrown.

[52] *Topica*, IV. Cum mulier viro in manum convenit, omnia quae mulieris fuerunt viri fiunt dotis nomine If a woman marries *cum manu*, everything she owns becomes the property of her husband under the name of dowry.

[53] *Topica* IV. Quoniam usus auctoritas fundi biennium est, sit etiam aedium. At in lege aedes

non

appellantur et sunt ceterarum rerum omnium quarum annuus est usus. Valeat aequitas, quae paribus in causis paria iura desiderat; Since *usucapio* of a piece of land takes two years, it should be the same in respect of houses. But houses are not mentioned in the statute and so they are supposed to fall under all other things, for which the term is one year. Equity must prevail which demands similar law in similar cases.

[54] *Topica*, IV. Quoniam P. Scaevola id solum esse ambitus aedium dixerit, quod parietis communis tegendi causa tectum proiceretur, ex quo tecto in eius aedis qui protexisset aqua deflueret, id ambitus videri; Publius Scaevola asserted that there was no right of carrying that roof. See also chapters XIX and XX.

[55] *Topica*, XVII. Privata enim iudicia maximarum quidem rerum in iuris consultorum mihi videntur esse prudentia. Nam et adsunt multum et adhibentur in consilia et patronis diligentibus ad eorum prudentiam confugientibus hastas ministrant. [66] In omnibus igitur eis iudiciis, in quibus ex fide bona est additum, ubi vero etiam ut inter bonos bene agere oportet, in primisque in arbitrio rei uxoriae, in quo est quod eius aequius melius, parati eis esse debent. Illi dolum malum, illi fidem bonam, illi aequum bonum, illi quid socium socio, quid eum qui negotia aliena curasset ei cuius ea negotia fuissent, quid eum qui mandasset, eumve cui mandatum esset, alterum alteri praestare oporteret, quid virum uxori, quid uxorem viro tradiderunt. Licebit igitur diligenter argumentorum cognitio locis non modo oratoribus et philosophis, sed iuris etiam peritis copiose de consultationibus suis disputare; Cicero is of the opinion that in important civil cases the decision appears to depend to a large extent on the sharpness of the jurists, whose advice is constantly sought. He refers to their expertise on what is meant by 'in accordance with good faith', 'reasonable man', 'most equitable'; how they have developed the duties of partners and the *negotiorum gestor*, the rights and duties of mandator and mandatee, as well as husband and wife. See Tellegen CHECK

[56] *Topica*, XXI. Expositis omnibus argumentandi locis illud primum intellegendum est nec ullam esse disputationem in qua non aliquis locus incurrat, nec fere omnis locus incidere in omnem quaestionem et quibusdam quaestionibus alios, quibusdam alios esse aptiores locos; In every discussion one or more topics will apply, but different topics are suited for different questions. He further develops this point in chapter XXIII. In chapters XXI and XXII Cicero had explained the differences between hypothesis and proposition, theoretical and practical questions; how each theoretical question has three parts and how conjecture, definition and the distinction between right and wrong deal with the existence, nature and qualities of a thing. Practical questions deal with duties or emotions. Cf. Tellegen-Couperus and Tellegen, *RIDA*, LIII (2006), 384: The correct status had to be determined methodically before a *topos* could be found and standard arguments could be produced. The status doctrine of Hermagoras therefore involved a search for the correct *topos*.

[57] *Topica*, XXIII. Cum autem de aequo et iniquo disseritur, aequitatis loci colliguntur. Hi cernuntur bipertito, et natura et instituto. Natura partes habet duas, tributionem sui cuique et ulciscendi ius. Institutio autem aequitatis tripartita est: una pars legitima est, altera conveniens, tertia moris vetustate firmata. Atque etiam aequitas tripartita dicitur esse: una ad superiores deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia iustitia aut aequitas nominatur; For questions of right and wrong the topics of equity apply. These are divided into two classes: the first derive from nature and the second from human conventions. From nature two rights are derived, the right of self-preservation and the right to revenge. Conventional justice has three parts: the first rests on the laws, the second on agreements and the third on old customs. From another perspective we can also distinguish between three types of justice: the first relating to the gods, the second to the souls of the deceased and the third to men, respectively named piety, sanctity and justice or equity.

[58] *Topica*, XXIV. Nam iudici finis est ius, ex quo etiam nomen. Iuris autem partes tum expositae, cum aequitatis; The purpose of each judgment is the law, *jus*, from which the name is derived.

[59] *Topica*, XXIV. quae in accusationem defensionemque partitae;

in quibus existunt haec genera, ut accusator personam arguat facti, defensor aliquid opponat de tribus: aut non esse factum aut, si sit factum, aliud eius facti nomen esse aut iure esse factum. Itaque aut infialis aut coniecturalis prima appelletur, definitiva altera, tertia, quamvis molestum nomen hoc sit, iuridicalis vocetur. The prosecutor makes an accusation. The defence can raise one of the following three: first that the action of which he is accused has not taken place; or, if it did take place, it does not deserve the name given to it; or, finally that it was justified. Thus the first question is denial or conjectural; the second is a question of definition and the third, even if the name is not popular, is judicial. XXV. Refutatio autem accusationis, in qua est depulsio criminis, quoniam Graece *stasiw* dicitur appelletur Latine *status*; in quo primum insistit quasi ad repugnandum congressa defensio. Refuting the accusation is called *stasis* in Greek and *status* in Latin. Sed quae ex statu contentio efficitur, eam Graeci *krinomenon* vocant, mihi placet id, quoniam quidem ad te scribo, qua de re agitur vocari. Quibus autem hoc qua de re agitur continetur, ea continentia vocentur, quasi firmamenta

defensionis, quibus sublatis defensio nulla sit. Once position has been taken the Greeks call it *krinomenon*, but for you I will call it the legal question... Sed quoniam lege firmius in controversiis disceptandis esse nihil debet, danda est opera ut legem adiutricem et testem adhibeamus. In qua re alii quasi status existunt novi, sed appellantur legitima disceptationes. Tum enim defenditur non id legem dicere quod adversarius velit, sed aliud. Id autem contingit, cum scriptum ambiguum est, ut duae sententiae differentes accipi possint. Tum opponitur scripto voluntas scriptoris, ut quaeratur verbane plus an sententia valere debeant. Tum legi lex contraria affertur. Ista sunt tria genera quae controversiam in omni scripto facere possint: ambiguum, discrepantia scripti et voluntatis, scripta contraria. Iam hoc perspicuum est, non magis in legibus quam in testamentis, in stipulationibus, in reliquis rebus quae ex scripto aguntur, posse controversias easdem existere. Horum tractationes in

aliis libris explicantur. And since to settle a discussion nothing is more powerful than the law, we must have the law on our side. Here new choices on legal questions must be made. Sometimes it is submitted that the law is not as the adversary claims it to be, but different; this happens when the expression is ambiguous or may have different meaning. At other times the intention of the legislator is contrasted to the letter of the law, and the question is raised whether the letter should prevail. Other times a rule of law is opposed to another conflicting rule. Thus, in regard of each document three points can be raised: ambiguity, contradiction between *verba* and *voluntas*, and conflict between documents.

[60] Jacob Burckhardt, *Griechische Kulturgeschichte*, Erster Band, Einleitung. Wir sehen mit den Augen der Griechen und sprechen mit ihren Ausdrücken. At [www.zeno.org/Geschichte/M/Burckhardt,+Jacob/Griechische+Kulturgeschichte/Erster+Band/Einleitung](http://www.zeno.org/Geschichte/M/Burckhardt,+Jacob/Griechische+Kulturgeschichte/Erster+Band/Einleitung) (last accessed on 7-8-2012).

[61] Tacitus, *Annales*, 14, 53. Bonner, 31.

[62] At 18: All experienced lawyers know from practice that most cases do not pose any problem of law so that only the facts of the case need to be disputed. Evidence is brought to prove the contested facts and the judge merely has to decide whether the evidence was or was not satisfactory.

[63] *Ibid.*

[64] *Supra* note 12.

[65] Bydlinski, 28.

[66] At 28f.

[67] *Supra* note 19.

[68] Plutarchus, *Vie de Cicéron* (traduit par Amyot), in M. Nisard, *Oeuvres complètes de Cicéron*, (Paris, 1840), Vol. 1, i-xciiij.

[69] Bonner, 83.

[70] Encolpius in Petronius' *Satyricon*, c. 1. For ancient criticism see: Bonner, 71-83.

[71] Marcus Fabius Quintilianus (c. 35 AD – c. 100 AD). Tellegen-Couperus, *RIDA*, XLVII (2000), 171.

[72] The reason for this disregard by Romanists and the importance of his work for our knowledge and understanding of Roman law is explained by Tellegen-Couperus, *RIDA*, XLVII (2000), 167-177.

[73] *Institutio Oratoria*, II, 15.

[74] II, 15, 27-32.

[75] II, 16, 2.

[76] II, 17, 19.

[77] II, 17, 30.

[78] III, 1 and 2.

[79] III, 3-9.

[80] III, 9, 1. Nunc de iudiciali genere, quod est praecipue multiplex, sed officiis constat duobus intentionis ac depulsionis.

[81] III, 9, 1-6. Quintilian explains that partition, proposition and digression are sometimes added, but explains this and other additions are nonsense.

[82] III, 9, 6. sed ante omnia intueri oportet, quod sit genus causae, quid in ea quaeratur, quae

prosint, quae noceant, deinde quid confirmandum sit ac refellendum, tum quo modo narrandum.

[83] III, 9, 8. antiquam dicere aut scribere ordiamur, ita incipiendum ab iis, quae prima sunt. Nam nec pingere quisquam aut fingere coepit a pedibus. (nobody starts a portrait or a statue with the feet.)

[84] III, 10, 5. Cum apparuerit genus causae, tum intuebimur, negeturne factum, quid intenditur, an defendatur, an alio nomine appelletur, an a genere actionis repellatur; unde sunt status. In III, 10, 1-5 he has distinguished simple, complex and comparative cases. In III, 11 the status theory of Hermagoras is explained at the hand of the example of the killing of Clytemnestra. Also III, 6 for a general exposition of status theories and III, 6, 66ff for his own views in this respect.

[85] III, 11, 21. Verum haec adfectata subtilitas circa nomina rerum ambitiose laborat. III, 11, 24. Neque est vere quisquam modo non stultus ....., quin sciat, et quid litem faciat, (quod ab illis causa vel continens dicitur) et quae sit inter litigantes quaestio, et de quo iudicari oporteat, quae omnia idem sunt. (Since anybody but a fool knows that the main issue (or what they call it) and the legal question and the point on which the judge must decide are all identical.

[86] Judge or jury.

[87] IV, 1, 5 and IV, 1, 34.

[88] IV, 1, 6. Benevolentiam aut a personis ducimus aut a causis accipimus. Also IV, 1, 16 and IV, 1, 33

[89] IV, 1, 76. In the next paragraph Quintilian refers to the fashion in the schools to mark this transition with some epigram, which the elder Seneca liked so much.

[90] IV, 2, 21.

[91] IV, 2, 31. lucidem, brevem, verisimilem. For what to do if the facts are against us, see IV, 2, 66ff. The use of euphemisms is advised in IV, 2, 77. If you lie, do it consequently and persistently, IV, 2, 89ff.

[92] IV, 2, 132.

[93] IV, 4 and 5.

[94] V, 4. Evidence extracted by torture; V, 7. Documentary and oral evidence. V, 9. Circumstantial evidence.

[95] V, 2. Previous decisions, precedents, *praeiudicia* and judgments passed on the actual case.

[96] V, 10, 100ff; V, 13, 59f; V, 14, 27 and 31f.

[97] V, 10, 20ff.; V, 11 and 12. V, 10, 91. Ergo, ut breviter contraham summam, ducuntur argumenta a personis, causis, locis, tempore (cuius tres partes diximus, praecedens, coniunctum, insequens), facultatibus (quibus instrumentum subiecimus), modo (id est, ut quidque sit factum), finitione, genere, specie, differentibus, propriis, remotione, divisione, initio, incrementis, summa, similibus, dissimilibus, pugnantibus, consequentibus, efficientibus, effectis, eventis, comparatione, quae in plures diducitur species.

[98] V, 13, 60.

[99] V, 14, 4. Optimum autem videtur enthymematis genus, cum propositio dissimili vel contraria ratio subiungitur.

[100] V, 14, 6. Mihi et pluribus nihilominus auctoribus tres summum videntur. Nam ita se habet ipsa natura, ut sit, de quo quaeratur et per quod probetur; tertium adiici potest velut ex consensu duorum antecedentium. Ita erit prima intentio, secunda, adsumptio, tertia connexio. Nam confirmatio primae ac secundae partis et exornatio eisdem cedere possunt, quibus subiiciuntur.

[101] V, 14, 14. Epichirema autem nullo differt a syllogismis, nisi quod illi et plures habent species et vera colligunt veris, epi chirematibus frequentior circa credibilia est usus.

[102] V, 14 14f. In V, 14, 18ff Cicero's *Pro Milone* is used to exemplify.

[103] Quintilian, V, 10, 120. Neque enim artibus editis factum est, ut argumenta inveniremus, sed dicta sunt omnia, antequam praeciperentur, mox ea scriptores observata et collecta ediderunt. Also V, 10, 121.

[104] Cf. Horak, 48: Schliesslich gibt es in dem Büchlein (=Cicero's *Topica*) so manches an Argumentationslehre, was spätere Jurisprudenz ausgiebig verwendet hat und heute noch verwendet. At 57: Niemand wird bestreiten, dass in der Jurisprudenz heute wie eh und jemit diesen "Gesichtspunkten" argumentiert wird. Es sei also rundweg zugegeben, dass die

Jurisprudenz tatsächlich topisch arbeitet.

[105] The archetype of the correct legal solution. For the latter see Thomas, *THRHR*, 60 (1997) 202 at 207ff.

[106] Richard Lacayo, 'True Lies. A new show explores art in the age of Stephen Colbert', *Time*, August 20, 2012, 48. The word truthiness was coined by Stephen Colbert in 2005 to denote the increasingly seductive plausibility of dubious "facts."

[107] *Dig.* 50,17, 1.