In the first number of *Prudentia* Mr J.E.G. Whitehorne provided a most useful introduction to the modern study of the *controversiae* and *suasoriae* of the Elder Seneca, together with some notice of their fate in medieval times. The existence of an interest in declamatory practice in the middle ages, indeed the whole question of the study of classical rhetoric down to the sixteenth century, is a subject of some fascination, even if it be taken as merely another instance of the community of intellectual attitudes that characterised the ancient and medieval centuries. That 'the complex terminology of classical rhetoric' (Whitehorne p.19) should have continued to fascinate thinkers in the Middle Ages is certainly remarkable, but given that it did, it is perhaps no surprise to find that on occasions medieval understanding of the precise significance of some of the antique rhetorical categories tended to falter. This is a theme that lies beyond the scope of *Prudentia*, but it is important for students of ancient intellectual life to keep in mind that medieval uncertainties in the field of classical rhetorical theory were to some extent foreshadowed by a degree of confusion on the part of the antique rhetoricians themselves. One such instance of confusion, or apparent confusion, in antiquity, I have thought worthy of a short investigation, not only because it reveals in microcosm the nature of the task the ancient rhetoricians set themselves and the deficiencies of their approach, but also because it serves to remind us of the nether regions of a subject for which the Elder Seneca is in many ways a deceptively persuasive advocate.

During the second half of the twelfth century, in northern Europe, the *Ad Herennium*, which had been in fairly common use south of the Alps for over a century, supplanted the *De Inventione* of Cicero as the principal rhetorical textbook in the cathedral schools and incipient universities. Since both works were held to be by Cicero, the latter an 'early' work, the former a 'mature' one (spoken of as Quintilian speaks of the *De Oratore*, Q.3,6,60), puzzling discrepancies between the two lead to problems of
interpretation. The most striking of these discrepancies concerned the different system of 'issues' (status, stases, constitutiones) to be found in each work. The tripartite scheme of the Ad Herennium appears to be a streamlined version of the quadripartite De Inventione scheme (which goes back at least to Hermagoras), but the author of the anonymous treatise makes no explicit reference to the problem of reconciling his own scheme with that found in the De Inventione (cf. Ad Her.1,11,18; on the development of the system of rhetorical stases, see the references at n.5 below, and J. Cousin, Études sur Quintilien, I (Paris, 1936), pp.176ff). The problem is particularly acute only in the case of the constitutio negotialis which, as such, simply did not exist in the Ad Herennium. The questions that arise from this, for us as for the medieval scholar, are as follows: what type of causa did the ancient rhetoricians include under the heading negotialis, and why was the term dropped from the Ad Herennium and Quintilian's Institutes? Finally, why does the category reappear in the works of the later latin rhetoricians? Unfruchtbaren Tifteleien (Kroll) to be sure, but an aspect nevertheless of the intellectual apparatus of scholars as diverse in time and temperament as Cicero and Thierry of Chartres. The pages that follow, it should be added, make no claim to a professional treatment of the subject; they are more in the nature of a plea for enlightenment by one whose research interests lie in another period.

In the De Inventione, the issue negotialis is one of the two principle subdivisions of the third main type of rational issue (or point of controversy from which a judicial case arises): the issue of 'Quality' (covering cases in which the act, admitted and defined, is justified in some way). The first subdivision is the issue iuridicialis, 'in qua aequi et recti natura aut praemii aut poenae ratio quaeitur'. It has two parts: absoluta 'is that case which contains in itself a question of right and wrong, not obscurely and by implication as in the case of negotialis, but clearly and obviously' (De Inv.1,11,14; 2,23,69). The example given is whether it was right for one Greek nation to set up a permanent memorial of its victory at the site of a battle, in place of a temporary one. The issue would appear to hinge upon the interpretation of custom. Assumptiva (De Inv.1,11,15; 2,24,71) is the case in which an act and its implications are admitted, but defended by reference to some external plea.

The second subdivision of the issue of Quality is the
constitutio negotialis, 'in qua quid iuris ex civili more et aequitate sit consideratur' (De Inv. 1,11,14). Cicero adds that decisions on such matters are at Rome the province of the jurisconsults. Later, at 2,21,62 he rephrases his definition of the issue as that 'in which a controversy about the bearing of civil law on the subject-matter of the case is implicit'. The example given at this point is a complex testamentary situation, which may be set out thus: A man (A) dies, leaving his property to a ward (C) who had already inherited the property of his father (B). The ward himself then dies. The reversionary heirs named in the father's will (D,E) secure the property the father left his son (C), but possession of the goods (C) inherited from (A) is disputed between these reversionary heirs and the agnates of (C) who would normally inherit by intestacy. The question thus is whether the property (C) inherited from (A) came within the same category as that he inherited from (B); that is to say, what power has the father to stipulate the succession to the goods of his minor son who becomes a ward? The question would be solved by reference to the civil law of testamentary succession, in particular as it related to substitutio (or subinstitutio) pupillaris. In the Empire the right of the father to stipulate a reversionary heir in the event that his son, after his own death, should die before coming of age, was considered to cover the child's whole estate (see the Loeb De Inventione p.226 n.'b' (the pagination of the 2nd and 3rd editions of Buckland being at this point identical), W. Smith (ed.) Dict. of Greek and Roman Antiq., 2nd. ed. p.599b1).

The nature of this case, taken together with what Cicero says generally of the issue negotialis and with his observation that such cases were normally the province of the jurisconsults, suggests that he had in mind those cases that seem in the later Republic to have been brought before the court of the centumviri. These are referred to in the De Oratore (1,38,173) as those 'in quibus saepe non de facto sed de aequitate ac iure certetur' (cf. also De Or. 1,42,188 'in iure civili finis legitimae...'). They were traditionally complex from the point of view of the relevant civil law and frequently of considerable juristic interest (Brutus 53,197 (ed. Douglas lines 30-1) and see too De Or. 1,38,175 'sed saepe maxima...'; 1,56,238 'maximas centumvirales causas in iure positas...fuit inter peritissimos homines summa de iure dissensio'). Problems of inheritance appear to have predominated and the centumviri, according to one
suggestion, were able to develop greater practical consistency of decision than the ‘multiplicity of single iudices whose cases concerned all branches of the law’ because of the stability of the court’s composition and its narrower field of jurisdiction.

Centumviral status does not serve, however, to distinguish cases which Cicero — or his teacher(s) or source(s) — classified under the issue negotialis from those they classified under other issues, in particular, the controversies which arise ‘ex scriptionis genere’ (De Inv. 1,12,17). Cases which turned upon the interpretation of a written document (or law, or contract etc.) were grouped in the De Inventione (after Hermagoras) under five heads. One of these, the controversy between the literal meaning of the document as drafted, and the actual intention of the legislator or drafter (referred to subsequently as Letter and Intent), is clearly the category into which Cicero fits the most celebrated of the centumviral cases, the causa curiana (Brutus 39,52,194; De Inventione 2,42,122; De Oratore 1,39,180; 1,56,238; 1,57,242ff; 2,32,141; Topica 10,44; Q.7,6,9ff).

As later authority acknowledged, the ‘legal’ cases or controversies over documents did not readily lend themselves to precise subdivision (Q.7,10,1-2; and see 7,3,11; 7,8,1-2; 7,9,15 and Vonglis pp.140-1). In all for instance, as generally in the issue of Quality, equity was a dominant consideration (Q.3,6,43; 7,6,7 and Vonglis p.166). It is, however, not impossible to distinguish Cicero’s negotialis from the issues ambiguitas (De Inv. 2,40,116), Letter and Intent (2,42,121) and ex contrariis (2,49,144); but real difficulty arises in the case of the controversia ex ratiocinazione (2,50,148). The word ratiocinatio has a number of meanings in the De Inventione (see e.g. 1,34,57; 2,5,18), but here it represents the use in a court case of a method whereby pertinent legal rulings on a case on which specific rulings cannot be found are deduced from a case which is analogous and on which rulings can be found (Vonglis p.134, and compare De Inv. 2,50,148 ‘ex eo quod uspiam...’ with J.V.384,25 and Q.7,8,6 ‘ex eo quod manifestum...’). The example given is another complex testamentary situation (2,50,149) which turns on whether a convicted parricide has testamentary capacity. By analogy with the si furiosus est law (2,50,148) he has not. Such an ‘analogous’ law, however, if accepted, conflicts with the apparently relevant law paterfamilias uti super familia (ibid.). The si pater familias intestato law can only be relevant if the
question of the parricide's legal capacity is decided. Vonglis stresses (p.144) that it is the very question of the similitude between the status of a parricide and a *furiosus* that is at stake (see also p.135; *Ad Her.* 1,13,23; Q.7,4,24,29 (where Verginius includes cases of lunacy under *qualitas*); 7,8,6; Fort.100,14). The case would come before the *centumviri* (cf. Buckland p.327, F. Schulz *Classical Roman Law* (Oxf.1951) pp.277-8, Justinian *Institutes*, ed. Moyle (5th ed.) p.355. Cicero at *De Inv.* 2,50,148 is citing a law of the Twelve Tables: P.Voci *Modi di Acquisito della Proprietà* (Milan 1952) p.52).

Cicero’s description of the issue *negotialis* suggests a methodology appropriate to *ratiocinatio* and in fact his language at this point was subsequently woven into descriptions of that *status* (compare *De Inv.* 2,22,68 ‘his ergo ex partibus iuris, quod cuique aut ex ipsa re aut ex simili aut maiore minoreve nasci videbitur...’ with Q.7,8,4,7 (and cf.7,10,3) etc; J.V.385,3,5; Fort.100,11). It is, in fact, difficult to imagine how a case handled as an instance of the issue *negotialis* could avoid the analogical method of *ratiocinatio*. Certainly the topic of similitude seems fundamental in the example Cicero gives of the issue *negotialis*. Vonglis (p.143) distinguishes between the *causa curiana* and the case of Malleolus (*De Inv.* 2,50,148) on the grounds that similitude cannot be at stake, at least initially, in the former. Cicero however, in *Topica* 10,44 mentions the *causa curiana* under *similitudo*, a synonym for *ratiocinatio* (*De Inv.* 2,50,151).

Vonglis points to an analogous ‘slip’ on Cicero’s part. A law of the Twelve Tables is handled in the *Pro Caecina* as if its interpretation came within the province of Letter and Intent. In *Topica* 4,23, however, it is cited as an example of reasoning a *pari* ‘normalement utilisé dans un *status legalis* différent, la *ratiocinatio*’ (Vonglis p.133; the situation is similar to many of the verbal quibbles Quintilian includes under *syllogismus* or *ratiocinatio*: Q.7,8,4-7; Q.7,6,7 (under Letter and Intent) alludes to analogy — ‘ex aliis legibus exempla ducamus’). Vonglis’ resolution of this apparent discrepancy is too elaborate to deserve more than a drastic (and possibly unfair) abridgment here. It involves recognition of two categories of Letter and Intent issues at Cicero *De Invenzione* 2,42,122; a restrictive, where ‘la volonté du rédacteur, toujours constante dans son objet et dans son but, ne peut subir une exception motivée par le caractère restrictif des *verba* qui on servi à
l'exprimer'; and an extensive, where 'on doit au contraire admettre une exception au sens littéral des verba pour l'adapter à la conjoncture' (Vonglis p.120).

The extensive sense is relatively rarely expounded in the manuals and usually only the causa curiana and the Pro Caecina are cited to illustrate it (Vonglis 138-9). Thus Quintilian's attempted 'clearance' at 7,8,1 and 7,10,3 (Vonglis 142) fails to distinguish between Letter and Extent (extensive) and ratiocinatio (though, in fact, the causa curiana and the Malleolus case are themselves quite distinguishable, Vonglis 143). Citing Q.7,8,5 and De Inv.2,48,142 and the omission of ratiocinatio in the Topica, Vonglis then asks (p.145) whether ratiocinatio was absorbed into Letter and Intent (with Definition — Ad Her.1,11,19; De Inv.2,51,153-4; Vonglis 147; note incidentally that Albutius also dropped ratiocinatio, Q.3,6,62). Vonglis dismisses this supposition and (p.147) claims that Cicero, less schematically minded, particularly in his maturity, than the later rhetoricians, envisaged 'des cas où une référence à la voluntas vient compléter opportunément une démonstration conduite selon les règles de la ratiocinatio, et, en outre, des cas où l'emploi des deux status s'avérant également efficace, l'orateur les utilisera successivement dans une même plaidoirie'. Clearly, the Malleolus case, where similitude must first be established, and the causa curiana, where similitude is not initially in question, are relevant here. Vonglis (149ff) feels he can see in the work of the Roman jurisconsults evidence of this peculiarly Ciceronean approach.

Intriguing as this reasoning may be, it does not touch upon the example with which Cicero illustrates his issue negotialis; nor is it possible to apply the arguments that serve to distinguish the causa curiana and the Malleolus case to the problem of distinguishing between the negotialis and the ratiocinatio of the De Inventione. In fact, it must be confessed that the rhetorical boundaries between all three legal causae under discussion are difficult to discern, and perhaps, in view of Cicero's later silence on negotialis, not worth discerning. The causa substitutionis at De Inv.2,21,62 appears to be analogous to the extensive aspect of Letter and Intent, but the issue negotialis perhaps was intended to cover a situation that required a wider ranging search of civil law and equity than the narrower interpretations required in the 'legal' stases. Contrasted with iuridicalis, which also involved equity, negotialis embraced those cases in which civil law was more particularly at stake.
Certainly, if Vonglis is right in attaching such importance to De Inv. 2,42,122, it would not be unrealistic to expect Cicero at this early, 'technically minded', stage of his rhetorical career, to include provision for situations for which the civil law in question was obscure.

To what extent was Cicero in his description of negotialis keeping within the limits of Hermagoras' pragmatikê, of which the term negotialis was ostensibly a translation? Unfortunately, it is not at all clear what Hermagoras meant by this fourth division of his issue of Quality5. Nor has scholarly opinion succeeded in determining how faithfully Cicero intended to adapt pragmatikê (the majority view seems to be that Cicero did not intend to adapt pragmatikê: Matthes p.151 n.1, Jaeneke (Matthes p.150) and Kroll, Philologus 91 p.205, Matthes p.150). Our only explicit ancient text on the question is Q.3,6,57. Discussing Hermagoras' status system, Quintilian comes to 'negotialem, quam pragmatikên vocat, in qua de rebus ipsis quaeritur, remoto personarum complexu, ut sitne liber qui est in assertione, an divitiae superbiam pariant, an iustum quid, an bonum sit. (cf. De Inv. 1,6,8; 1,9,2 and Q.7,4,1-2). luridicialem, in qua fere eadem sed certis destinatisque personis quaerantur: an ille iuste hoc fecerit, vel bene'. Quintilian adds (3,6,59) that Cicero mistook Hermagoras' pragmatikê either because Hermagoras illustrated it initially with exempla ex quaestionibus iuris, or because the iuris interpretes among the Greek were called pragmatikoi. The first suggestion receives support from the fact that Quintilian's own illustration from Hermagoras (qui est in assertione) is a legal question which would probably have come before the centumviri (Buckland p.615; in J.V.379,34 the example is found under negotialis, iniectio qualitatum ('epibolên poiòtêon - Fort.95.1); in Q.7,7,9; 7,3,26 (and cf. also 3,6,25) other cases involving personal status are included under the 'legal' stases). On Quintilian's evidence, it could be suggested that Hermagoras (and therefore Cicero) conceived of negotialis-pragmatikê as the sort of legal crux that was referred as a general problem irrespective of any particular legal suit, to the jurisconsults or their equivalent.

The author of the Ad Herennium (or more precisely his teacher6) has made certain alterations to the status system found in the De Inv. by abolishing the distinction between issues in ratione and in scripto and grouping all issues under three general heads. Definitio and translativa (1,13,23; 2,12,18) retain their
status (under the second head, *legitima*) as ‘legal’ issues, as does *ratiocinatio* (1,13,23; 2,12,18) which is beginning to move closer to Cicero’s *negotialis* (cf. *Ad.Her.* 2,12,18 ‘ecquid in rebus maioribus aut minoribus aut similibus similiter scriptum aut iudicatum sit’). The ratiocinative issue is beginning to look more like a genuine ‘gap’ in the laws, rather than an apparent one. *Negotialis* has been dropped as a separate issue from the *Ad Herennium* (Kroll, *Philologus* 90 p.211, *negotialis* ‘der bei Cornificius die *iuridicialis* entspricht’; and *Philologus* 91 p.198, ‘Cornificius hat die *negotialis* ganz fallen lassen’). At first sight, as Kroll suggests, *iuridicialis absoluta* in the *Ad Herennium* appears to embrace *negotialis* (2,13,19; cf. 1,14,24; Cousin I. p.365 and n.8): ‘*in ea convenit quaeri iurene sit factum*, *ius* being derived from *natura, lex, consuetudo, iudicatum, aequum et bonum, pactum*. Cicero, as has been seen, admits the possibility of confusion between *absoluta* and *negotialis* and is prepared, under *negotialis* (*De Inv.* 2,22,65ff) also to derive written law from *natura, consuetudo, pactum, par (quod in omnes aequabile est), iudicatum* etc. Cicero’s definition of *absoluta* is certainly inadequate and later rhetoricians were compelled to supplement it and occasionally to add defining qualifications of their own (see Halm *RLM*, 92,12ff; 345,9; 380,26-32). Indeed, in a slightly more precise form, the example of *absoluta* in the *Ad Herennium* (1,14,24) appears in Hermogenes under *syllogismos* (Ray Nadeau in *Speech Monographs* p.417 and cf. Caplan’s Loeb *Ad Herennium* p.44 note ‘a’).

Quintilian amplifies the category *absoluta* (7,4,4-6 and, presumably, much of 7,4,21-44; on which see Cousin I,365, Bonner 108-9 (on 7,4,37), 115 (on 7,4,32) etc.), though one should not assume that the legal points Quintilian discusses in the later sections of 7,4 could not also occur in *assumptiva* (cf. for instance 7,4,10 and 20, disininheritance, a stock ‘legal’ theme)7. A precise conclusion is not possible, but a perusal of Q.7,4 (and especially 7,4,11 where centumviral *causae* are mentioned, and 7,4,36 where reference is made to *controversiae* dealing with ‘gaps’ in the law) confirms the impression one derives from the *Ad Herennium* that *negotialis* has been absorbed into *Qualitas (iuridicialis) absoluta*.

This development is at first sight difficult to comprehend for it coincides with the rise in importance of the *centumviri* which, from being a somewhat specialist tribunal for problematical civil law issues became, by Pliny’s day, the principal civil law court in
the forum. It may be that the rhetors under the principate, because they had far more regular contact with the centumviri than had the republican orators, no longer felt the sort of centumviral crux Cicero classified under negotialis to be sufficiently exceptional as to warrant a category of its own.

The principle feature of the later Latin discussions of this area of rhetorical theory, however, is the return of the term negotialis into currency, together, on occasions, with a Latinized form of its Greek equivalent, pragmatica (e.g. J.V.379,3). This was in large part due to the popularity of Hermogenes’ On Stases which does not intend to deal exclusively with judicial rhetoric and hence is able to arrive at a broader definition of negotialis. Hermogenes divided the qualitative status into that which concerned things done (rational, logike) and that which concerned written documents (legal, nomike: see Nadeau p.393-4 and Hermogenes ed. Rabe p.37-8, ed. Kowalski pp.11-12). The former was divided into cases ‘about something to be done in the future’ and was called deliberative or pragmatike (cf. Q.7,4,2 in suasorias...de futuris) and cases about something already done, or in the past (dikaiologia, cf. Q.7,4,2 in controversiis...de factis). The example Hermogenes gives of pragmatike recalls absoluta in the Ad Herennium. The category nomimon (one of the six subdivisions of pragmatike, Nadeau 411, Rabe 76, Kowalski 51) draws on custom, as does absoluta in the De Inv., the Ad Her. and Quintilian.

The later Latin rhetoricians, heavily influenced by later Greek rhetorical theory, attempted to solve the problems of overlap and confusion inherent in the rhetorical system by excessive subdivision and the introduction of new categories.

Fortunatianus, for instance, accepting a tripartite status system (conjecture, definition and quality, the latter divided into juridical (absoluta and assumptiva) and negotialis) subdivided absoluta into qualitas facti (drawing on natural law, cf. J.V.380,24-5, antilepsis (Bonner 108), Q.7,4,37) and ratiocinatio, whereby a defendant adduced some justifying law, custom, religious or philosophical belief, or the canons and license of ‘art’ to excuse his action. Ratiocinatio, as Cicero defines it, is out of place in this context, but Fortunatianus is not at a loss, for he clearly envisages the use of the analogical method at this point and employs a post-Ciceronean term (collectivus status) with slightly different implications, for Cicero’s
ratiocinatio. Fortunatianus' *negotialis* (which, as we will see in a moment, is not adequately distinguished from other issues), after Hermogenes, has two divisions, *in scripto* and *extra scriptum* (Fort.94,17-8; 106,5-19; Hermog., Nadeau 411, Rabe 76, Kowalski 51, Lausberg sect. 196). Presumably Hermogenes' six subdivisions of *pragmatikē* would be called upon in the solution of Fortunatianus' *in scripto*, but the legal basis of the issue is clear. Priscian, in his translation of Hermogenes' *Progymnasmata*, under the heading *de legislatione* (ch.12, *RLM*, 559,34, trans. C.S. Baldwin, *Medieval Rhetoric and Poetic*, repr. Gloucester (Mass.) 1959, p.37f, and cf. J.V.389,19) refers to the practice of legislation (*in negotiali*) and its treatment as a school topic (*in praexercitatione*) in language strongly reminiscent of Fortunatianus' *negotialis in scripto*. The distinction is not between practical legislation and school exercise, for actual debates about proposed legislation would take place only in the rarefied atmosphere of the imperial council or some similar organ of government, but between the rhetorical category as a 'controversia' or hypothesis and the deliberative exercise or *suasoria* (in effect) or thesis (in this case, 'should government positions be put on sale'?).

Fortunatianus' *negotialis*, however, includes much more than this. It includes (under *extra scriptum*, which in Hermogenes covers cases of appeal to custom) cases involving 'change of status' (where the defendant claims that the 'letter' of the agreement, or original situation, precludes by definition the case of the plaintiff). A commonly cited case is that of the rapist who subsequently flees the district of his crime. His victim marries, after which he returns. The victim demands his death (by virtue of the law allowing the raped to demand the hand or death of the rapist). The rapist replies that the law is no longer applicable because the victim is now married (Fort.95,5, Seneca *Contr.* 1,5; 2,3, Bonner 89, and cf. the case at J.V.390,6, *negotialis*). The same example however, is found in S.V. and Q. under syllogism (J.V.385,1; Q.7,8,4, and for an impossibly similar case, under Contrary Laws, see J.V.383,32 and Q.7,7,3). On the other hand, under *qualitas* Q. includes the topic of cruelty to a wife which serves as another illustration of this subject for Fort. (Q.7,4,24; Fort.95,10ff). Cases of equity or natural law or expedience (close to *absoluta* Fort.92,12, but cf. Hermogenes' subdivision of *pragmatikē*, N411, R75, K51, Q.3,6,57 and S.V.342,18) fall within the category (96,17-25), though unjust
disinheritance for Hermogenes is *aperistaton*, a question incapable of *status* (N.391, R.33, K.7; Bonner 101, Seneca *Contr.* 2,4; Sherwin-White *Letters of Pliny* 399 (as a centumviral *querela inofficiosi testamenti*); Aurel.August. *RLM.* 144,26; Q. includes disinheritance (7,4,24,27) and unjust divorce (7,4,38) under *qualitas*. The status of individuals (of slaves Fort.96,20; of women J.V.394,35 — under syllogism—; of children J.V.389,27) has already been associated with the centumviral court and, by Quintilian, with Hermagoras’ *pragmatikē*.

More controversial under this head is Fort.96,25, a variant of the ubiquitous *vir fortis* theme, in which the law ‘a brave man may seek a reward from the state’ (Bonner 88; Seneca *Contr.* 1,4; J.V.387,37; 385,35; Q.7,4,43; Fort.95,10; S.V.344,17; and *RLM.* 587,5) leads a man to choose something scarcely allowable. Under Contrary Laws this theme is found in J.V.383,36; Q.7,7,3; 7,7,6; 7,7,8 and Cicero *De Inv.* 2,49,144; it is found under *collectio* in J.V.385,19 and Fort.100,21; under *negotialis* in Grillius 68,9 and Victorinus 190,17. Equally confusing is the topic of number (J.V.379,10; Q.7,4,41): how many times can a punishment be inflicted for the one offence; how often is a person liable under a certain provision; how many people can claim rewards under the tyrannicide act; if four judges decree death, two exile and two innocence, what is the verdict? (Fort.96,7, with which, it seems to me, could be placed J.V.384,29 and Q.7,8,3 (Bonner 92) — classed under *syllogismus/collectio* —; Fort.97,15). Of these cases, the most time-honoured *topos* was the claiming of rewards under the tyrannicide act (for which see Bonner 104; Seneca *Contr.* 1,3; Q.7,7,5; M.C.461,33). *Petitio praemiorum* ‘ad *negotiale* pertinet statum’ wrote Fortunatianus (99,15, though cf.100,26) and this presumably explains Q.7,4,21ff, though Victorinus (190,3-4) and Cicero himself (*De Inv.* 1,11,14) attach the topic of reward and punishment (cf. Q.7,4,3, but J.V.379,17ff) to *iuridicialis*. Fortunatianus’ *dictum* would cover Fort.96,28, where the killer of two tyrants demands (not unnaturally) two rewards. The more arresting feat, whereby an unarmed woman slays thirty tyrants on the one day and claims as a consequence (again with justification) thirty rewards is classed quite correctly by Grillius (p.6) as ‘an impossible situation’! Quintilian is quite happy to admit the case under *qualitas* (*negotialis*? Q.7,4,44). Reasoning appropriate to Letter and Intent is relevant here, and there is in fact a
parallel case at Q.7,6,2 under that heading. At 7,7,3, under
Contrary Laws, we find two tyrannicides claiming a reward.

On the classification of some *topoi*, other rhetoricians agree
with Fortunatianus ('motives for suicide': Fort.96,32; J.V.379,32;
Q.7,4,39; S.V.343,24, though cf. S.V.350,9; on ‘equal right to
prosecute’ see Fort.97,1 and Q.7,4,33; 7,1,37; on ‘comparisons of
worth’ see Fort.97,6; Q.7,1,38; 7,4,3; 21,39-40; though note
Grillius p.8).

Fortunatianus admits overlap among the issues (105,23;
106,18-9 and see S.V.342,15-6) but one cannot help feeling that
he has not adequately distinguished *ratiocinatio* from *negotialis*.
He has a ratiocinative juridical issue, his *negotialis* contains
illustrations Quintilian places under *ratiocinatio*, and in addition he
has a *collectio-ratiocinatio*, a legal question, illustrated by an
example perilously similar to one of his illustrations of *negotialis*
(96,24)11.

Fortunatianus’ contemporary, Sulpitius Victor, more closely
approximates Hermogenes’ deliberative *pragmatike* (342,3) in his
discussion of *negotialis*. There is much, too, in common with
Fortunatianus. The leading feature of Sulpitius’ *negotialis* is its
preoccupation with questions *circa rem* (*negotium, pragma*) as
distinct from questions *circa personam* (318,23, and Q.3,6,57).
Such questions require solution by reference to equity or law and
are matters of future time (344,5; 350,10). The technical
distinction between *negotialis rationalis* and *qualitas absoluta*
is obscure, though the examples themselves are distinct (344,17=Fort.
92,12; J.V.380,24). *Absoluta*, it could be stressed, is *circa
personam, negotialis is circa rem*.

*Collectio* is mentioned at 325,16 but does not appear to have
been otherwise illustrated – a sure sign of its redundancy.

Two quotations illustrate Julius Victor’s conception of *negotialis*. 379,15: ‘quaecumque controversia versatur in aestima-
tione litis vel pretii vel quantitatis vel numeri vel alicuius huiusmodi
rei (cf. Q.7,4,16; 21,41,44), ea cadit in statum negotialem’. 380,7:
‘omnis negotialis status neque facti defensionem habet
neque conjecturam futuri, sed tantum suadet quid oporteat fieri’.
The specific concern with law is not made explicit until 389,19ff
(389,25-6 (cf. Q.3,6,57) has the subdivisions of Hermogenes’
pragmatikē, but they are applied more strictly to law or the background of equity to law; at 390,2 J.V. admits negotiales 'quae nec in legum neque rogationum lationibus erunt', though the example at line 6 concerns the nature of pactum). Victor cites under negotialis an example built on the law 'liceat occidere indemnatos liberos' (Bonner 94). Another appears in Fort.92,20 under qualitas absoluta.

Julius Victor manages to find room for a status collectivus (384,25ff), drawn in the main from Quintilian and Fortunatianus, or his sources (cf. also M.C.461,26ff). For the most part these authors see the ratiocinative status as dealing with nuances of verbal interpretation, relying heavily on Definition and Letter and Intent: does the term 'house' cover the word 'tent', does a law forbidding the export of wool cover the export of sheep (cf. the law from the Twelve Tables in the Pro Caecina (Vonglis 132-3), another example that hovers between ratiocinatio and Letter and Intent)? It is not surprising therefore to detect a degree of uncertainty surrounding the location of certain 'ratiocinative' issues; an example is the type of case in which someone causes another harm, indirectly, without intention and by accident. Compare the following: a girl is raped; her blind father, whom she had been leading, falls and dies: Fort.96,15, negotialis. A man, blinded for a first offence in adultery, is led unwittingly by his parasite into another adulterous situation and apprehended by the husband: Fort.100,15, collectio. A wife who will not return to a divorced husband is accused of murder when the husband hangs himself as a consequence: Q.7,8,2, syllogismus. A raped girl hangs herself: Q.7,4,42, qualitas (absoluta?). Youths on a beach in fun erect a tomb for a friend who is a little late for the merry-making. The latecomer's father passes by, sees the tomb and expires: Q.7,3,31, Definition. Finally, one may ask, how do these cases differ from those normally cited under qualitas absoluta (S.V.344,17; Fort.92,17,30; J.V.380,24)?

The commentators on the De Inventione do not really clarify the disputed categories. Victorinus suggests a satisfying distinction between absoluta and negotialis, which may be very literally translated as follows:

'In negotialis is sought what there ought to be of the law; in absoluta, what there is of the law...for negotialis does not have definitely relevant ius.
but seeks from that *ius* what ought to be (promulgated) in the present business (*negotio*) ....In the *negotialis*, *ius* is brought about by the decision of the judge, in *absoluta*, which is a question of well-known positive *ius*, it is simply drawn upon by the orator...*absoluta* is distinct from *negotialis* because the latter draws upon *ius* that it might discover how new law (*ius*) ought to be concerning that which is in question; *absoluta*, however, draws upon the laws (*iura*) themselves, to prove the (justice of the) deed' (281,17-31).

One could well ask, however, how this is to be distinguished from *ratiocinatio* which is 'cum ex eo quod scriptum est, id, quod scriptum non est, colligitur' (299,11-12, Grillius 76,23 and compare 76,27 with Q.7,8,6). The definition of *negotialis* deepens the confusion by suggesting the ratiocinative method in the words 'cum aliquid generatim iure cautum ad speciem devocamus (when we apply something ordained as a general rule in law to the particular instance: is there similitude between the present situation, and that envisaged by the framer of the law?)...ex aequitate praecedentis iuris nova iura firmantur' (190,17 and cf. Grillius 68,7). The next few lines ('quod etiam iuris periti...adfirmant' and Grillius 68,10) are noteworthy also in suggesting the analogical method. *Negotialis* in Victorinus has thus to do with the future: it relates to the drafting of new law (compare Fortunatianus' *negotialis in scripto*), or the solution of a case which, though legal, implicitly contradicts the principles of equity. As such, it involves Letter and Intent, Contrary Laws (statute and natural), Definition and Ambiguity — quite apart from *ratiocinatio*.

Grillius is of little help: how do we distinguish between 68,3 and 26 (=Fort.92,20), both cases of equity versus the law 'liceat occidere indemnatos liberos'. Grillius' material is on the whole too derivative to warrant further independent attention. Martianus Capella is at first sight more systematic. Despite Fortunatianus' identification of *qualitas absoluta* with cases that draw upon natural law (92,16) and Sulpitius Victor's notion that *negotialis rationalis* related to equity, Martianus (458,31ff and cf. Kroll Philologus 91,199) sees in both *negotialis* and *iuridicialis* an *assertio legis* ('in iuridiciali naturae, in negotiali legis aut consuetudinis') in matters of present and future, or past time (cf. 462,16). This still leaves *absoluta* ('quae factum ipsum sui naturae et iure defendit') insufficiently explicit when measured against examples previous authors include under the two categories.

The present-future/past distinction, however, if we can allow
Boethius the honour of final comment¹², does emerge as late antiquity's answer to the problem we have been considering (Boethius, De Differentiis Topicis IV, Migne, Patrol.Lat.vol.64 col.1209D). There can be little hope of achieving a conclusive definition of negotialis that will hold for Cicero as well as for Boethius, nor can the ancient rhetoricians be expected to display unanimity in their location of the different exempla they use to illustrate their categories: many of the exempla contained a number of issues. One line of thought in medieval times stressed the idea that negotialis covered a situation 'cum deficit lex': new law was derived (if possible by analogy) from custom, natural law and equity, precedent, statute law and the like.¹³ If we take the view that where this was the dominant issue in a case that could contain other issues, some sense can be made of the bewildering panorama of illustrations and examples surveyed in the previous pages.

There will, however, continue to be many loose ends, and I would, as a last point, draw attention not so much to the solution of the negotialis problem, as to its continued existence. Why did the later latin rhetors prefer the over-elaborate Greek status system which included negotialis, to the simplified systems of Quintilian and the Ad Herennium, which did not? Why, to put the question another way, was the De Inventione honoured with commentaries when Quintilian was used extensively and the Ad Herennium was known at least to the later rhetoricians? My knowledge of the scholarship surrounding the Rhetores Latini Minores is too slender to do more than hazard a guess.

The preoccupation of the later latin rhetoricians with judicial invention (which may be associated with the decline of the oral procedure in the courts of the Empire — Jolowicz p.470) has been frequently discussed.¹⁴ The debate on the relationship between declamation and law has been continuous (cf. Prudentia 1,1 pp.21-3); scholars are coming round to the view that the distinctions of the rhetors were of some use to the jurists and, arguably, the advocates. Cicero, it is true, scornfully dismisses the school causae (cf. De Or.2,24,100 on the lex peregrinum vetat theme, a staple of the schools—Vonglis 121) and certainly the later rhetoricians treat or speak of the rhetorical system as if it were an end in itself, rather than a preparation for the courts (see J.V.389,24; Fort.113,6 (compare Q.4,1,3-4), Q.4,2,97; 4,2,128; 7,3,30;
Yet Quintilian (7,4,11,36; 7,6,1) tells us that cases involving ‘gaps’ in the law and the variety of legal themes actionable before the centumviri were commonly debated in the schools. That there was, in fact, a considerable legal demand for rhetorically trained advocates under the Empire cannot be doubted. Given the increasing role that the ‘legal’ or ‘centumviral’ issues came to play in the daily life of the advocate, it is only to be expected that the rhetorical manuals would eventually ‘specialise’ in the tortuous legal cases that came within the purview of the issues iuridicialis, negotialis, Letter and Intent, and the like. The stock laws that formed the materia of the rhetoricians’ illustrations were not always of the greatest substantive relevance in court (Bonner 131, Lustrum 7(1962)320, Cousin I.685ff, esp. 716-732) but they did provide, perhaps, the best methodological training for advocates earning their living from cases of civil law. Julius Victor, in fact, tells us that in his day an understanding of the issue of qualitas was of particular importance ‘propterea quod multiformis ac varius est et in plerisque forensibus negotiis magis quam in pragmatibus scholasticis assiduus’ (378,35-6). Elsewhere Victor uses the word pragma (385,9; 382,13) in the sense of negotium, or ‘factum dictumve personae propter quod in judicium vocatur’ (Boethius, De Diff.Top. P.L.64,1212A). It is difficult to resist the special flavour of the word (but cf. RLM.562,28) as referring to those debates under the heading of negotialis—pragmatica, especially since the latter term appears in Julius Victor as a fully latinised synonym for its usual latin translation (is Victor a pioneer here?). Quintilian, as we have already seen, thought that Cicero’s interpretation of pragmatica was influenced by the fact that the Greek pragmatici, like their more elevated Roman counterparts, the jurisconsults, had charge of the legal issues involved in debates under that heading. Can the increasing elaboration of the issue negotialis and related legal issues be taken as reflecting in any way, the increased prominence in the life of the Roman advocates of the pragmatici, who provided day to day legal assistance in the increasingly overcrowded forum? Such a suggestion presupposes that the pragmatici ceased to be a peculiarly Greek phenomenon (cf. Juvenal Sat. III, 60-1 ‘non possum ferre, Quirites, Graecam urbem’), that the jurisconsults after Cicero’s day concerned themselves more and more with teaching, writing, giving responsa and
handling only the more lucrative, or significant cases at the bar, and that the relatively increasing involvement of the orators in those legal cases requiring the assistance of *pragmatici* (together with a probable decline in the specifically legal aspects of their education) led to the re-labelling of the more tortuous and pointedly ‘legal’ cases as *pragmatica vel negotialis*. Such a development was presumably not complete much before Julius Victor’s day (by which time the *centumviri* had disappeared — Wlassak 1949-50) because Quintilian, like Cicero, is clearly still able to dismiss the *pragmatici* as low-paid Greek hacks, although, if I interpret Q.12,3,4 aright (with Nörr 641 and Duff on Juvenal *Sat*.7,123 (Cambridge, 1932)15), the term in his day was already current as a loan word describing a Roman practice rather than a specifically Greek one. Nörr, in his account of the *pragmatici*, is worried by the fact that the term itself is not commonly met with in the sources, and occurrences after 100 A.D. are extremely rare, so rare as to suggest that the term was not normally in use. Nörr attributes this in part to the low social status of the *pragmaticus*, who seems to have been almost an advocate’s functionary (Q.12,8,4 ‘sequester ille et media litium manus et quidam interpres’, Nörr 644,31). Orators worth their while dispensed with the aid of the *pragmaticus* (Nörr 646). Two factors, however, worked in favour of the continued and even increased employment of the *pragmaticus*: the *causa*e the advocates came increasingly to deal with, required the advice of those with some specialised knowledge of the civil law, and the advocates themselves became less and less familiar with the details of the civil law in daily use as their education came to concentrate on methodology, the invention of arguments and the handling of situations built up from stock themes and frequently outmoded laws. There is even the hint that it was below the advocate’s dignity to pay much attention to the *materia* of the civil law (Q.12,3,9).

The rhetorical lily has become heavily gilded, and formal conclusions would only worsen the situation. The medieval scholar can be pardoned for his occasional lapses: the world of the antique latin rhetoricians is a peculiar and difficult no man’s land between law, dialectic and eloquence; different ages were to take from it what suited best their needs. In the twelfth century, in northern Europe, it was the interrelationship between the categories themselves, and their successive ‘imposition’ on the *materia* of the
art, that exercised clerical minds. This was at once a projection of late antique interests and a necessary consequence of them. The ‘history’ of the issue *negotialis* should help to make this clear.

**NOTES**


1. The civil law relating to wills and inheritance was a rich source of tortuous problems for *controversiae* and illustration in the rhetorical manuals; cf. Cicero, *De Oratore* 2,24,104; Q.3,6,96ff; 7,4,11; S.F. Bonner *Roman Declamation in the Late Republic and Early Empire* (Liverpool, 1949) chs. 5 and 6; J. Cousin *op.cit.* l.p.717. The *De Inventione* is the earliest and largest of Cicero’s technical works on rhetoric. His later views on the *status* system, which are less relevant here, may be found in *De Oratore* 1,31,139; 2,25-6; 2,27,117; *Topica* 21,79ff; *De Partitio Oratoria* 28,98ff. I have not had access to Ch.Causseret’s *Etude sur la Langue de la Rhetorique et de la Critique Litt. dans Cic.* (Paris 1886), nor to the works by Laurand, Riposati, Heinicke, Sapienza, Michel and Peters cited in B. Vonglis *La Lettre et l’Esprit de la Loi dans la Jurisprudence Classique et la Rhétorique* (Paris 1968) p.146, nn.1-3.


3. The *causa curiana* was also a case of *substitutio pupillaris*, but the problem related to the validity of the *substitutio* rather than to its scope. The decision, which went in favour of the *secundus heres* on the grounds of *aequum et bonum*, hinged on the will of the testator as implied by the words of the testament. See *De Oratore* ed, Wilkins (Oxf.1895) l.pp.11-2, *Brutus* ed. Douglas p.116 and Vonglis pp.126ff.

4. G. Gandolfi’s *Sulla Interpretazione degli Atti Negoziali nel Diritto*
Romano does not appear to include negotialis in its discussion either (see the review in Z. der Savigny-Stift.f. Rechtsg. Roman. Abt. 83(1966), 436ff.

5. For suggestions see Ray Nadeau in Greek Roman and Byzantine Studies, 2(1959) p.60 and in Speech Monographs 31(1964) pp.377-8; G. Kennedy, The Art of Persuasion in Greece (Princeton 1963) pp.310-11 (where the reader is referred in particular to Kroll in Philologus 91 pp.197-205, and Matthes in Lustrum 3(1958 pp.150ff); Hubbell in the Loeb De Inv. p.346. Kennedy's suggestion (that pragmatikê = 'utility') would mean an overlap with comparatio (De Inv. 1,11,15; 2,24,72); Nadeau's explanation (S.M.p.377) is nearer Cicero's negotialis. On Hermagoras' syllogismos, see: Kennedy 313, Matthes 186, Kroll Philologus 91, p.198.

6. The status theory of the Ad Herennium appears to be that of the followers of M. Antonius (born 143 B.C.: Q.3,6,45-6).

7. One move would bring Quintilian's status system into line with that of the Ad Her.: the merging of the definitive (rational) issue with the legal questions (=Ad Her. constitutio legitima) which form a fourth group of issues for Quintilian. See Q.3,6,15; 43,61-90 and Cousin 1,176ff. On Quintilian's qualitas, Letter and Intent and syllogismus see Cousin 1,364ff; 374ff; 384ff.

8. On the centumviri and the growing volume of litigation under the Principate see Bonner 44-5; E.P. Parks (see Prudentia I, 1 p.22), pp.19ff, 55-6; A.N. Sherwin-White, The Letters of Pliny (Oxf.1966) pp.181,302,398-9,506; M. Hammond The Antonine Monarchy (1959) p.418; Bauman in Antichthon 2(1968) pp.86-7. The principal contemporary references, apart from the letters of Pliny, to the centumviri are: Tacitus Dial.38; Q.4,1,57; 5,2,1; 7,4,11,20; 11,1,78 (presumably such cases as De Inv. 2,50,149 would, under the principate, occasion 'double centumviral judgments').


10. One legal topic can, of course, be included under many issue heads in accordance with the circumstances of the case.

11. It is interesting to note that Fortunatianus has reproduced the simpler scheme of the Ad Herennium in regard to translatio (89,30), but not in regard to definitio.

12. For other floating exempla see: De Inv.2,51,153; Fort.100,29 (Def.); Ad Her.1,11,19 (Lett. & Int.); De Inv.2,42,124; Q.7,4,36; Ad Her. 1,11,20; Q.7,6,3 (cf. S.V.344,17 and Bonner 105).

13. These ideas are already present in Isidore's Etymologiae (5,3,3), although there is no reference to the status negotialis. Elsewhere (RLM.509,16) Isidore accepts the De Inv. on iurid. and negot., or else Cassiodorus (RLM.496,29). See Cousin 1,386-7 on ratiocinatio in the work of the jurists, and Vonglis etc.