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Abstract;

Contrary to a generally accepted idea, the legal use of topics within the framework of late scholastic, did not have as a function to introduce indecisiveness or relativism into the treatment of particular cases. On the contrary, its function was to obtain unquestionable conclusions, based on the logical properties of a classification of genus and species, it constituted deductively, inductively and analogically by the examination of substantive law and ratio legis.

Keywords

- Legal argumentation
- Topics
- Scholastic
- Casuistry
- Legal rationalism
- Viehweg
- Villey
- Everhardus
- Gammarus
- Cantiuncula
- Leibniz
- De Casibus Perplexis
- Mos italicus

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In an article entitled “Modes classiques d’interprétation du droit”,[Footnote1] written on the occasion of a congress on the legal reasoning, Michel Villey summarized his research on jurisprudential technique, while endeavouring to find the methods of roman jurisconsults, glossators and bartolists who, according to him, “ressuscitèrent le droit Romain de la manière la plus fidèle” until the XVI°. For that, he distinguished three possible models in the representation of legal reasoning, namely: the scientist, rhetoric and dialectical models. The first consists in the use of a formal step copied on the method of mathematicians and logicians, and proceeds in a deductive way. It has the advantage of rigour but in same time, the disadvantage of altering the true nature of legal reasoning really used by Romans jurisconsults, because it hides the fact that this reasoning was accompanied by a casuistry and a dialectical art in the invention of solutions. The second model insists

on the bond connecting the art of persuasion aiming at true and the treatment of legal controversies, but it does not hold account of the fact that the "style" of rhetors basically differed from that of Romans jurisconsults, because its purpose was the formulation of particular solutions while that of jurisconsults tended to the expression of general precepts taking the form of laws. The third models at last, that of dialectic, according to Mr. Villey has as an essential characteristic to be used in the works of scholastics and lawyers of Middle Ages, and to be quite unfamiliar with analysis of cases, because it lays in a search of singular solutions for particular cases, whereas the undertaking of roman jurisconsults aimed at the expression of general solutions. Thus, none of these models corresponds to roman jurisprudential art, because this art was a "quasi dialectical method", intermediate between the particularism of rhetoric and the abstract universality of logic. It relied on semantic analysis of legal statements to extract the definitions necessary to the construction of an argumentation by topics, and led thus to an art of controversy based on the distinction of *casus, causae* and *quaestiones*.

These thesis of Michel Villey raise some interrogations, especially when we recognize in them a conception of original roman law, defined as an *art quasi dialectique*, of which we can wonder whether it does not express an irrational conception of legal argumentation. Indeed, even if old roman law finds indeed its origin in the *observation of the societies, customs and habits of ancestors*, nothing allows to transform this origin into a criterion of purity and to present the *quasi-dialectique* processes of this old right or of its version, hypothetically reconstituted by glossators, as the indisputable models of any *authentique* processes. More, if it is true that *it is from the true reality, completely considered, that juridical solutions are extracted,* [Footnote2] nothing allows to condemn a priori the rationalization attempted of the *décadente* scholastic[Footnote3] and of the legal humanism supporters, if they aim to perfect the logical instruments of dialectic to make them able to rationally express the complexity of social relationships. And this impossibility would increase if it was proved that one of the principal objectives of this *décadente* scholastic was precisely to constitute a logic for the evaluation of the degrees of probability of opinions, especially in the theory of the legal proof, for avoiding the risk of approximate judgements. One could not then support that *the dialectical reasoning are constituted on dubious opinions; they could only lead to dubious results, precarious, and problematic themselves* [Footnote4] because that would come down to transform a circumstantial incapacity into an essential impossibility and to limit the use of the *quasi-dialectical* method to the sole research of dubious solutions.

These interrogations increase when we discover the inaccuracy of the concept of topic in the article of Mr. Villey. Indeed, this word is successively used to indicate a fragile opinion,[Footnote5] a general standard,[Footnote6] an argument,[Footnote7] or a standpoint.[Footnote8] However, this mixture of different thesis is prejudicial in a theory of legal argumentation for two reasons: it confuses in the same relativism, this

which belongs to the category of factual statements (flimsy opinions and standpoints) and this which concerns the judgement (the arguments). It finally reduces the logical properties of the calculation of probable to the relational objectives of an art focused on the discussion of irremediably dubious proposals.
In fact, this convergence of debatable thesis in the article of Mr. Villey has its explanation, both in an excessive valorization of the irrational components of legal rhetoric, and in a certain ignorance of the scholastic theory of topics.

Indeed, Michel Villey builds his argumentation by opposing on a side the quasi-dialectic reasoning of the jurisconsults previous to Justinian and of the partisans of the *mos italicus*, and on the other side, both the syllogistic deduction which he ascribes to the *scolastique décadente*, and its *représentation euclidienne* by the partisans of legal humanism. Then, he draws an inevitable conclusion from it: this quasi-dialectical reasoning has a true fruitfulness[Footnote9] because it fulfil a perpetual mixing of various opinions, released from the constraints of systematicity[Footnote10] and rules of rational coherence.[Footnote11] But then, in spite of his well-known hostility to kelsenian thesis, he is inevitably led to support a strictly positivist conception of law, since the absence of rational criterion of validity makes all the opinions also probable or also improbable, and justifies eventually that we leave to the argument of authority to favour a solution.[Footnote12] *A contrario*, the syllogistic deduction and the *Euclidean* reconstruction of the system of laws receive the defects of theoretical artificiality, without obtaining in compensation the recognition of the rational validity of their conclusions, since their logical nature basically prevents them from expressing the changing nature of legal reality. For Michel Villey, only an art of perpetual calling into question of opinions can therefore express the complexity of a legal reality where positions never be definitively acquired. Because if *le Droit se tire en dernière instance … de la nature de chaque rapport d'affaire (natura rei)*, this observation cannot lead to an unquestionable knowledge of natural reports, since *la nature n'offre qu'un reflet, obscur, caché au fond des choses, qu'il est besoin d'interpréter*, and because there is not absolute criterion for the validity of interpretations.
But rather than to limit us to a very general criticism of the relativism of opinions raised to the legal criterion of authenticity, or the refusal of rational speech aptitude to understand legal reality by means of definitions, classifications and rules, it's better to concretely refute the main thesis of Michel Villey by showing that the method of some casuists of the *décadente* scholastic had nothing to do with the *déduction syllogistique unilatérale l'emportant sur l'art polyphonique de la discussion.* [Footnote13] For that, we must necessary leave the simplifying representation of the methods of *mos italicus*, and return to the basic works of the lawyers who leaned on the methods of the Bartolist school to constitute a casuistry founded at once on topics use, aristotelician analytic and systematic classification. In other words, we must prove that this *décadente* scholastic, criticized by Mr. Villey, did not

leave the advantages of the *discussion* of cases to the benefits of logical processes constraints, and that she did not think that we had to find antinomy between such requirements, because she estimated that universality of reason and complementarity of deductive, inductive and analogical topics, prevented that there could be. We must also necessary underline that this methodological and doctrinal position was not the lonely expression of a small group of logician-lawyers, unfamiliar to legal art of the Doctors of *mos italicus* and that we could not reduce it to the research of the *prémisses sûres … fournies, dans l'école rationaliste (chez un Leibniz ou chez un Wolff) par des évidences rationnelles quasi cartésiennes,* [Footnote14] because the true function of the inductive and analogical topics is precisely to allow the adaptation of legal reasoning to the diversity of concrete cases and to obtain an unquestionable knowledge, although presupposing a normative innermost depth, from incomplete or different data. We must finally demonstrate the two following facts: there is no fundamental difference between the partisans of this so-called *scolastique décadente* applied to the research of topics, and the protagonists of the *mos italicus* since even a logician as Leibniz builds his legal work by systematically supporting on post-glossateurs and bartolists works in the whole. We don't neither need to lay into logical deduction to defend the originality of legal reasoning (if necessary, while supporting that it can free from the non-contradiction rules in accordance with its *quasi-dialectique* nature), because the theorists of topics never claimed to deal with legal cases by a priori deduction, but defend on the contrary an a posteriori conception of topics use.

These demonstrations suppose the preliminary resolution of the following difficulty: the thesis Michel Villey presents in his article in a simplified way, are the same that Theodor Viehweg details in *Topik und jurisprudenz,* [Footnote15] justifying the interpretation according to which the topics would be simple *standpoints*, by the fact that theories of topics similar to thoses that Matteo Grimaldi Moffa <1506-1562> expose in his *De methodo ac ratione studendi libri tres*, are a matter for problematic and no apodictic, i.e. of demonstration, because they are based in different degrees, on aristotelician or ciceronian theories of dialectical argumentation. And he claims to confirm this thesis by quoting like similar examples[Footnote16] to the treaty of Moffa, the theories of topics worked out by lawyers of the same time, like Everhardus, Gammarus or Cantiuncula. However, the examination of these theories we will proceed further, shows that their authors precisely uphold the opposite since their thesis come within a rationalist context and aim to formulate the rules allowing to reach indubitable conclusions. Thus, there is here an amazing contradiction we must try to eliminate, not only because it comes within a general research about the nature of legal reasoning, but also because it results from a recurring criticism of the *deduction* applied to Law, that we always tries to justify by leaning on the presupposition of an intrinsically no-deductive nature of the theories of legal reasoning worked out by the lawyers-logicians of the late scholastic. Indeed, Bobbio and Bovero (2002) repeat the same

ideas in a recent article,[Footnote17] explicitly referring to the works of Viehweg and Perelman,[Footnote18] whose Villey made usually the praise, and they basically draw from them two conclusions which we will find in him: (1) the development of jusnaturalism was accompanied by the progressive disappearance of the theories of topics, in same time as the demonstrative speech focused on certainty took the place of the argumentative speech devoted to the analysis of probability. (2) The authentic legal argumentation must proceed above all in a rhetoric and probabilist way, and not in a deductive way.[Footnote19]

The refutation of this position defended by such authorities obviously force to return to the texts of these logicians-lawyers who were Everhardus, Gammarus and Cantiuncula, to try to reach the following targets: (1) to understand the reasons why their respective theories of topics were interpreted in a relativistic way, while all the topics are stated there as rules imposing an indisputable conclusion. (2) to see whether the analysis of topics has only developed in the context of the *mos italicus* or if it is necessary to recognize in this processes, a method which exceeds the opposition *mos italicus/mos gallicus*. (3) to understand the function of the various topics in a general theory of argumentation, and their connexion with classification.

The position of Viehweg appears to find an indisputable justification in the two acknowledgment of the heterogeneous feature of the various collections of topics carried out by Everhardus, Gammarus et Cantiuncula, and in the frequency of use of the term *probabilis.*

The first point results from a convergence of several factors, because all these collections rest on a mixture of different theoretical contributions where we recognizes obviously the aristotelician doctrines, but where we also guess the ciceronian influence in the multiplication of topics, and sometimes the ramist and melanchtonian additions. In the same way, if there is a kind of agreement about the initial acceptance of common bibliographical sources,[Footnote20] notable divergences next appear in the detail of argumentation because Cantiuncula quotes first classical authors and the humanistic ones, while Everhardus and Gammarus remain faithful to the tradition of *mos italicus* by highly using the contribution of bartolists and the postglossators.[Footnote21] All these authors also differ on the number of topics, because Everhardus counts 130 in his *Loci argumentorum legales,* [Footnote22] while Gammarus enumerates 81 in his *Dialectica legalis* [Footnote23] and Cantiuncula, 62 in his *Topica legalia.* [Footnote24] Moreover, quite an arbitrary seems to be the rule in the differentiation of topics, because Everhardus is satisfied with the introduction of only one (generic) topic *a simili*, while Gammarus distinguishes 34 and Cantiuncula 28. In the same way, Everhardus and Gammarus propose only one topic *a verisimili*, while Cantiuncula distinguishes 8 different forms. The same obvious arbitrary could be finally recognized in the various presentations that the same author proposes for his topics, in several times, because the 130 cases of the *Loci argumentorum* legales become 143 in the *Synopsis locorum legalium.* [Footnote25] whose

function however is to summarize the *Loci argumentorum*, and are reduced to 100 in the *Centum modi argumentandi* [Footnote26] of the same Everhardus, like if the basically subjective nature of *standpoints*, prohibited to define an objective criterion allowing to draw up the exhaustive and definitive list of topics. Finally, all these presentations differ or seem to differ on the criterions for classification. Indeed, Gammarus points out the existence of several[Footnote27] principles for ordering topics, before distribute them in three categories, according to that they *come from that we debate, or are born from something else who is connected to that which we debate, or are completely extrinsic.* [Footnote28] Everhardus, who is however the most precise in his analysis of topics and in his recall of their basic rationality, uses as for him a more complex classification where intervene the syntactic and logical criterions, the diversity of people, institutional mechanics and rights, and the multitude of special cases. At last, Cantiuncula mainly based himself on aristotelician categories (*whole, genus, species, specific difference, definition, cause, form*), to which he adds the logical properties justifying the arguments (*conjunction, connection, correlation, contrariety, similarity*).
The second point, is due to the fact that the share of uncertainty, and thus of relativism in the expression of *standpoints*, grows partly with the frequency of use of the word *probabilis*. However, the case of Everhardus shows that this frequency is important, since a census of the terms which he uses and combines to summarize the properties of each 143 topic of his *Synopsis locorum legalium*, give the following results: 103 are named *useful*, 98 *frequent*, 84 *probable*, 26 *strong*, 14 *valid*, 8 *necessary* and 2 *effective*. On the other hand, the most employed combination of terms which we find in 65 cases, does not introduce any deductive necessity since it consists in the trio *useful, probable and frequent*. Thus, we can be tempted to see in these heterogeneous collection of topics, as much collections of pragmatic statements containing a share of uncertainty excluding the undeniable knowledge which we would obtain by the application of a deductive method. But that means in same time the end of the skeptic position of Mr. Villey, according to whom *dialectical reasoning are constituted on dubious opinions* and *can only lead to dubious and precarious results, themselves problematic*, since the label of topics by their respective degrees of probability (and in certain cases, of certainty), forbid to regard them as simple and indefinitely debatable *standpoint'.* [Footnote29] Thus, the true question is not to know if the proposals contained in the Topics of Everhardus, Gammarus and Cantiuncula are purely subjective, but to determine if their *objectivity* results from a simple institutional consensus, or on the contrary, of from the acknowledgement of their argumentative validity. In other words, it's to know if we can leave a purely rhetoric conception of topics and substitute a logic of certainty for a logic of conviction.
A precise return to the texts will make it possible to answer by showing that in spite of their respective particularisms, all these authors have as a characteristic to use a common corpus of presuppositions and methods which exceeds the opposition

between *mos italicus* and *mos gallicus*, because it tackles the question of topics by combining the general principles of legal rationalism and the particularisms of casuistry.[Footnote30]

Thus, the preamble of the *Loci argumentorum legales* that Everhardus composed to summarize the essentials of the lawyer's method, state a whole of nonrelativistic definitions of topics, whose contents are as follows: (1) in spite of the ambiguity of the word *probabilis*, which means at once: probable, provable and agreedable, topics are aids for argumentation, proceeding by deduction, induction or analogy, and whose function is to provide indubitable or convincing conclusions (*fidem facere*), from legal, rational or factual data.[Footnote31] (2) They make up for the generality and/or the inaccuracy of laws[Footnote32] while allowing to complete Law[Footnote33] by a tidy call to its sources and the respect of both the requirements of justice and reason.[Footnote34] (3) They provide this function when we proceed in accordance with the principles of rational exegesis, for interpret the terms according to the *ratio legis,* [Footnote35] and when we respect the common rules of syllogism, *enthymem*, induction and example, namely, when we fit the range of the conclusions obtained by these arguments, to the generic or special nature[Footnote36] of the legal cases we consider. The same conclusions could be obtained in Gammarus, from his *Dialectica legalis* or the *De veritate ac excellentia legalis scientiae libellus* who follows it in the edition of 1522, and where we find a summary of legal rationalism principles inspired by Cicero,[Footnote37] but that we would read also well in an aristotelician, ramist or melanchtonian context. And we could finally discover this same intimate connection between the theory of topics and legal rationalism, by resting also on the *Topica legalia* of Cantiuncula, i.e. be by taking for support of demonstration the text of this author not guilty of unmotivated sympathy for rational exegesis principles, since he was largely influenced by German and French humanists, and wrote a *De ratione studii legalis paraenesis* [Footnote38] where the rational exegesis method of the *mos italicus*, applied to the analysis of Roman Law, was rejected with the profit of the historical and philological step of the humanistics. However, the method he uses in his argumentation is opposes to the idea of standpoints relativism. Because if we examine an ordinary topic, like *a partibus,* [Footnote39] who however has this advantage on deductive topics like *a genere, a definitione, a conjugatis* or *a toto*, to be potentially interpretable in a relativistic way since it is inductive, we are confronted with a classification of cases, aiming to obtain rational certainty by the exhaustive enumeration of all the possible ones, the taking into account of exceptions, and the formulation of constraining reasoning. Indeed, Cantiuncula formulates the rules of use of this topic by proposing a classification of cases resting on the relation of the parts to the whole, considered according to essence, quality and quantity. Thus, he obtains the arborescence of valid arguments, affirmative or negative, we find in the two tables below, that allows to apply to the whole what is noted for some parts.

Validity or invalidity of the argument proceeding from the parts towards the whole, according to the parts are:

Heterogeneous								**Homogeneous**			
Secondaries				**Main**							
Relating to essence		**Relating to quality**		**Relating to essence**		**Relating to quality**		**Relating to essence**		**Relating to quality**	
Affirm. arg.	Negat. arg.	Affirm. arg.	Negat. arg.	Affirm. arg.	Negat. arg.	Affirm. arg.	nEgat. arg.	Affirm. arg.	Negat. arg.	Affirmg. arg.	Negat. arg.
+	–	–	–	–	+	–	–	+	+	–	–

Thus, in the case of an argument introducing heterogeneous and secondaries parts (like the furniture of a house, which belongs to the house but are not identical to it, nor essential to its existence), he can declare:

While considering the parts which are secondary, we will introduce a distinction to know if we argue about the essence of the thing, or about its qualities. In the first case, the argument will be valid in an affirmative way, and not in a negative way. Indeed, the reasoning is correct in: it's the foot of a man, so it's a man … In the second case, consecution will be necessary neither in an affirmative way, nor in a negative way. Thus, when we say: some furniture of the house are bequeathed to me, so the house is bequeathed to me, we conclude wrongfully. Idem, we doesn't conclude anything necessary in the opposite case when we say: the furniture are not bequeathed, by consequent the house is not so. indeed, it can happen that what we say about a part is true, even if what we say of the whole cannot be so. And that mainly occurs if we speak about these things which are in such a ratio with the whole, that they can be missing without any affects on its essence.[Footnote40]

The processes is the same one when we aim to a conclusion relating to the whole from the consideration of some main heterogeneous parts, (i.e. of an other nature that the whole, but essential for its existence), or from some homogeneous parts (of the same nature as the whole), since in this last case, and by supposing that the whole is considered from the viewpoint of the extension, we arrives at the following conclusion:

We will never obtain anything valid while reasoning affirmatively or negatively concerning parts of a whole considered from a quantitative standpoint, either by regarding the whole as a universal proposal, or like a discontinuous quantity. Indeed in this case, we will have such an argument like: the action which is born from a contract is a personal action, by consequent any action is personal. Or in the opposite way: the complaint in justice is an action which is not personal, by consequent no action is personal.[Footnote41]
But to be exhaustive, this classification must be supplemented by a whole of exceptions who result either of dissensions about the concept of part, either of the introduction of additional norms. Indeed, in the first case the invalids affirmative and negative inferences consisting in concluding for the whole, starting from heterogeneous parts, secondaries and defined by their matter, yield the place to valid affirmative and negative inference, when we define these parts by their formal identity,[Footnote42] since this one makes the part and the whole conceptually equivalent. Likewise, the definition of the parts as a *total part* [Footnote43] or a *no total*, will have the same discriminating effect on the reasoning, since the validity of the affirmative and negative arguments is ensured when the *total part* becomes equivalent to the whole, and that it's necessary in the other hand to observe the rules of *quantification* [Footnote44] when the parts are *no total* ones. Lastly, in the second case, the main principle of invalidity of the affirmative or negative inferences, by which we want to go from some quantitatively definite homogeneous parts, to the whole they make, will allow the three following exceptions: the negative inference turning on discontinuous quantity[Footnote45] is valid; the affirmative and negative inferences turning on parts indicated in a generic way[Footnote46] are valid; and the affirmative inference turning on parts exhaustively named[Footnote47] is also valid.
If we now examined the texts of Gammarus and Everhardus, we would find the same classifying processes, only changed by these secondary constraints which are the brevity of the talk in the first and the abundance of jurisprudential details in the second. But, even if the validity rules of the inference using the topic *a partibus* are reduced in the first to two fundamental statements,[Footnote48] and are unliked multiplied in the second due to his casuistic of particular rules and due to his different[Footnote49] classification of the topics components, the identity of their processes is obvious and allows to completely reject any relativistic interpretation of the topics. And this is all the more indisputable that where the relativism of opinions seemed to be able to be defended, every three agree on the principle[Footnote50] according to which common opinion can be used when a strictly rational solution proves to be impossible and doubt still exist, because this resort gives authority to the permanency of collective uses and not to brittleness of personal opinions.
Thus, the true defects[Footnote51] we discovers in the treaties of these three authors, do not have to occult a basic fact which was not really understood by Th. Viehweg and M. Villey. Topics are not subjective *standpoints*, endlessly debatable, because they

are inference rules, joined together in a *naturalist* type classification where the relationship between the genus and their respective species is the expression of a conditional necessity, because they allow a deduction *a posteriori* [Footnote52] when species is juridically included in the genus, and do not authorize it when there is an exemption to the rule.
The following data allow to establish this fact and the consequences which result from it:

1. 1.
   A reading, even superficial, of the very teaching text of Gammarus, reveals immediately the importance of the rules since he systematically uses this means to summarize the essence of each one of his topics. Thus, he obtains 43 principal rules[Footnote53] to which he adds 40 other rules by the play of the negation, the reciprocal and the *converse*. This report would be identical if we considered the texts of Cantiuncula or Everhardus, because each of the two, with his respective style, proceeds in the same way and summarizes the argumentative function of topics by proposing a rule of inference affirmatively illustrated by the enumeration of the cases where it is applied, and negatively, by that of the exceptions.
2. 2.
   The very title of the founder work of Everhardus, the *loci argumentorum legales*, clearly shows that the *loci legales*, i.e. the topics, are general categories allowing to classify the arguments used in laws. But the function of these arguments is to solve a case by determining how a norm can be applied to it. Formation of topics is consequently the result of an abstraction and classification process, where we start from positive laws to establish the reasoning which they contain, to gather them in very precise categories, and to synthesize each one of them in a general rule of inference.
3. 3.
   As in the case of any empirical classification, topics are mainly obtained by induction since it is necessary to gather similar cases according to the arguments which they contain, and for each class obtained in this manner, to formulate the abstract rule (the topic), which summarizes its way of argumentation. But in same time, the function of topics is to provide inference rules allowing to obtain an indubitable conclusion. This difference, which we can change into an opposition when we estimate that the classification obtained by induction is the simple registration of subjective convictions (cf. the intuitivism of Mr. Villey and his opposition to the *deductivism* of logicians), can be easily explained within the framework of a rationalist approach of legal argumentation, as soon as we precisely examine the list of topics named *necessary* and *probable*. Indeed, the word *necessaries* [Footnote54] which is used by Everhardus to define some of his

topics, either express a purely normative relationship of absolute constraint (cf. the topic *ab autoritate*), either a logical relationship of identity, implication or inclusion. In this case, are named *necessary*, not only the topics in which there is an equivalence between the terms connected by the inference,[Footnote55] but also those in which there is a strict implication between the first term and the second.[Footnote56] In all other cases, the topics could be named both *probable* and *not-necessary*, because they exist and that existence supposes the preliminary acceptance of some norms. However, the use which is made of these terms in the treaties of Everhardus, Gammarus and Cantiuncula, only corresponds partly to that, because the inductive character of the mode of formulation and classification of topics lead to define each one of them by a hierarchical organisation of logical properties and institutional constraints, that is to confer a conditional validity to the rules of inference which characterize them. A very simple proof is still once given by the superficial reading of some *Topicae*, since we see that all necessary topics have their exceptions, and that there are intrinsically not-necessary topics (i.e. proceeding by analogy or induction), which are however named as necessary ones owing to their institutional valorization. Thus, in the case of the topic *a minori*,[Footnote57] where the inference goes from the whole to the part, Everhardus says in his *Synopsis locorum legalium*: *This locus a minori, that is a fortiori, provides in profusion a frequent, useful, very solid and necessary argument*, but he adds also:

This locus does not apply … when the least is not contained in the most by the way of species or part (thus, that which refuses to give a goat can give a horse); in the cases derogating from ordinary law, as in the case of someone which would argue proceeding from the allowed cases to the weaker not-allowed cases; in the cases where the rule does not apply. (And which is four, as we will see it in the locus: a ratione legis larga), and in all the cases with restrictive function." Similarly, he says in the Loci argumentorum legales about the locus "a simili"[Footnote58]: "However, I want that one does not remain without knowing that the similarity is sometimes probable and necessary, namely, when law defines the assimilation, see D.9.1.4,[Footnote59] and that it is sometimes only probable, when it is a judge or a lawyer who defines the assimilation of a person to an other, or of a thing to an other, or of a fact to an other. And it is precisely that, that Balde quotes in his comment of C.9.1.11, by declaring that when there are two similar, it is necessary to choose that which is most similar.

This remarkable conjunction of probable and necessary we find for the aforesaid reason in topics where the reasons of inference depend on the only institutions (*ab auctoritate,* [Footnote60] *a defectu formae* [Footnote61]), is also found in the topic *a specie ad genus*, that is in a topic which, apparently, should not be described as *necessary*, since nothing guarantees that the species to come will not be different from the preceding ones and will not invalidate a rule defined by induction. However, the

thesis which is stated in the beginning of the text, is without ambiguity: *The argument of the locus a specie ad genus is not probable, but necessary, and will be formed in this way: when the species is stated, the genus which rules this species is affirmed, but not the opposite. Or thus: the statement of the genus results from the statement of the species, but not the opposite.* So, all the question is here to know how Everhardus can call necessary, an inference that we would qualify at best a probable one when the future exceptions to the rule are in low number, and an improbable one in the opposite. To tell it in another way, the question is to know by which means the logical no-necessity of the inductive inference proceeding from the species to the genus can be transformed into pure necessity, in order to reach the degree of certainty we obtain in the case of inferences based on the previous admission of criteria like authority or formal validity.
There too, the reply of Everhardus is strictly in accordance with the principles of legal rationalism as far as based on the logical properties of classification, that is, on a hierarchy of categories defined by extension or comprehension, and on the implicit use of quantification in the delimitation of the inclusion or exclusion relationships (case of the exemption), between species and genus. Indeed, he distinguishes two modalities in the relationship[Footnote62] between part and whole: according to extension (relationship of inclusion[Footnote63]), and according to comprehension (relationship of *belonging* [Footnote64]), and he summarizes their respective properties in the following way: when the relation of the species to the genus is characterized by the extension of categories, two cases are possible: the very general case where species is included in genus (*semper specialia generalibus insunt*) and confirms the rule, and the exceptional case where it is not included in the genus (*generi per speciem derogatur*), because an exemption enables it not to respect the hierarchical order and the logical properties of no-symmetry and transitivity which result from it.[Footnote65] Conversely, when the relationship of the species to the genus is defined by the comprehension, the species is defined by the genus and the specific difference, and it implies then the genus,[Footnote66] like $p.q \supset p$.
This distinction allows him first to solve cases similar to those stated in D.32.47 §.1 and D.32.49 §.3, where the main question is to know if categories are defined by extension or comprehension. Indeed, when a husband decides to bequeath to his second wife goods put at the disposal of his first wife, and when those are composed with goods specifically bought for her and goods only reserved for her use, the legacy of the genus (i.e. *goods put at the disposal of the wife*), involve that of the species (*goods bought for the wife*) and not the opposite,[Footnote67] while if he names them in *comprehensive way*, it's the opposite which will occur[Footnote68] since the genus will be: *put at the disposal* and the species: *put at the disposal and bought*.
It also enables him to obtain a necessary inference from a topic which is potentially dubious for being possibly inductive, and to allow to obtain unquestionable solutions in this type of case, by applying the two following principles (whose

equivalents are easily found in the texts of Gammarus[Footnote69] and Cantiuncula): (1) the topic *a specie ad genus* will be used each time that the categories implied in a legal case will be conceived in comprehension (that is, each time that the definition of the species will contain that of the genus), and conversely, the topic *a genus ad speciem* [Footnote70] will be used each time that the categories implied in a legal case will be conceived in extension (that is, each time that it will be possible to enumerate the species composing the genus). (2) This principle will be employed each time that it will be necessary to rectify a classification by correcting the errors[Footnote71] in the arrangement of genus and species, that is, in a rationalist and no-relativistic viewpoint.

At last, it gives him a means allowing to logically deal with the discriminating effect that the introduction of the *causa,* the *ratio,* or the *intentio* can have in a hierarchy of categories. Indeed, when he says *it follows that the things the paterfamilias wanted him to obtain by an other way, will not be included in the legacy of the only bought things,* [Footnote72] or: *we can be easily misled by an error proceeding from what is known secundum quid to what is simply known*, he introduces the consideration of what the scholastics lawyers called *the circumstances*, to modify the relationships of *belonging* or inclusion (that is the *ordering* relations), between the categories of genus and species. Thus, he based on this logic inspired by Aristotle, and revised by scholastics, that the humanistic Cantiuncula presented in the following way in his *Methodica dialectice ratio ad jurisprudentiam adcommodata* [Footnote73]:

The jurisconsult enumerates seven circumstances in the law 'aut facta' of D.48.19 [(law 16)], that is: the cause, the person, the place, the time, the quality, the quantity, the event. Others are summarized by the following expression: who, what, where, how, why, while, when. … "These circumstances have as a function to introduce differences into property, obligation and all that is stated in laws. [So] the cause [(that is the legal intent)] transform the property. The one who transfers his good to an other in accordance with a sale or a donation, makes of the one who receives, an owner. But the one who does it in accordance with a 'commodatus' or a deposit, doesn't make the same thing, because the causes of these two transfers are not the same ones and that the first wants a complete transfer while the second does not want it, argument of C.4.6.6.

But, it is obvious that donation, sale, *commodatus* and deposit can be considered on one hand as species numerically constitutive of the genus *transfer*, and in the other hand, as differences added to the indetermination of a common genus. In the first case, the inference from the genus to the species will be valid (as in the case exposed in the beginning of D.32.47.§.1), while in the second case, and according to what is related at the end of this law, only will be valid the inferences from each species to the common genus, or the inferences from each cluster of species having a common property, to this genus (since we can constitute subcategories like

the *complete transfer* or the *costly transfer*, to gather together some of these methods). Thus, we are inevitably led to propose different possible classifications, according to the *circumstances* we favour for the attribution of rights, in other words, according to the norms these circumstances imply.
So, it's not in the true topics level that can lie the share of *uncertainty* claimed by the supporters of the relativistic interpretation, since we are ensured to obtain indisputable inferences when we proceed *a posteriori* like in *a simili* or *ab exceptione*, by the very fact that these topics summarize institutionaly established inferences, or *a priori* like in *a toto ad partem, a genere ad speciem, a specie ad generem*, etc., when the extensive or comprehensive relationships between genus and species are conceived in such a way that they can only succeed to an undoubted conclusion. In fact, it's on the level of the norms introduced by the account of circumstances that the possibility of a choice lies, since the true question in a classification finally based on the precariousness of norms, is to define the reasons of the privilege granted to one circumstance more than to another (like for the *quid* more than for the *quantum* in the above mentioned cases). And this question is so much important that we find it as a watermark in the true text of Everhardus, as in all those of scolastic lawyers who will try, like Gammarus and Cantiuncula, to join together in the same theory of legal reasoning the two traditional and contradictory rules: *semper specialia generalibus insunt* and *generi per speciem derogatur*, that is, to define the criteria of an indisputable hierarchy of general norms and their exemptions, from the evaluation of their circumstances.
This will clearly appears in the usual *processing* of *ordering safeties questions*, where the difficulty does not come like above, of the interference of the *quantity* and *quality* circumstances (*simpliciter* and *secundum quid*), in the delimitation of the part/whole or species/genus relationships, but of the interference of the circumstances *time* and *person* in the *order* of privileges. Indeed, the true fact that several creditors can compete claiming to override the others in accordance with different priority rules, justified, either by temporal circumstances (*the setting up time of mortgages*), either by personal circumstances (the holding of a lien), impose to define a *priority order* within these rules. However, that cannot be obtained by the consideration of topics, since their *formation way a posteriori* and the conditions of their relevant use, presuppose the true existence of this order, as we clearly see it in the Leibniz's *De Casibus Perplexis* where are examined all the perplexed cases of concurse between creditors, successively appeared in the roman, canonical and saxonic laws, and where the jurisconsults arguments and their vain attempts of resolution of these cases by the only use of topics, are discussed.
Indeed, let us examine the case n°19 where there is a concurse between a former creditor holder of an anterior mortgage, an intermediate creditor holder of an express mortgage, and a widow holder of a dowry lien. The first overrides the second in accordance with the rule: *prior tempore potior jure* already stated in the

Sexte[Footnote74] (that is, in accordance with the time circumstance). The second overrides in turn the widow in accordance with the fact that the Constitution *Assiduis* [Footnote75] which gives her priority on all the holders of tacit mortgage, does not concern the holders of an express mortgage. However that means, as Johannes de Ripa[Footnote76] points it in his comment of this Constitution, that the lien of the woman applies only *secundum quid* and no *simpliciter*. Therefore, it gives her priority on the sole species of the creditors holders of tacit mortgages, and no on the whole genus of creditors holders of tacit and expresses mortgages. The third at last, that is the widow, overrides the first in accordance with the Constitution *Assiduis* and the rule *generi per speciem derogatur* that it illustrates, since the priority that this Constitution gives her departs from the general rule *prior tempore, potior jure*. In this case, the circularity of the relation of order is obvious, and the perplexity which results from it is all the more serious since it's due to the gathering of legal rules whose function is precisely to solve cases, and that it cannot be abolished when we try to restore a transitive relation of order between the three terms, by means of the only logical properties of a topic like *a primo ad ultimum*, or of its traditional expression *si vinco vincentem te, vinco te ipsum* [if I overcome the one who overcomes you, I overcome you too]. Indeed, in this perplexed case (and in all others cases of perplex concourse), each competitor is overcome by the precedent and overrides the following. Calling them by the letters A, B, C, we do obtain the following series: A>B. B>C. C>A, and some Doctors thought then that a competitor as A could claim to overcome on C despite everything, by the means of the victory that B (which he overcomes in other respects), obtained over C. The use of the rule *si vinco vincentem te, vinco te ipsum* would thus hypothetically allow, to restore a transitivity (and so a hierarchy of safeties), by a conclusion *a primo ad ultimum* and by neglecting the fact that the relation of order is opposite in the intermediate phase. But we immediately see the invalidity of their attempt, since each competitor could invoke this rule to his own benefit. Moreover, it's completely contestable, since it amounts to disguise a normative choice[Footnote77] behind a logical rigour appearance. Indeed, as Leibniz said ironically[Footnote78]:
I admired the genius of the Doctors who venerate this axiom they state as follows: 'if I overcome the one who overcomes you, etc.', in each time it's in favour [of them], and who depreciate it in each time it's opposite [to them]; and they doesn't less overuse this rule when they demonstrate that [the privilege of] the dowry must be preferred to the others. Because they start where they want in their reasoning, that is obviously from what they think better, as if that did not make any difference, but that much imports in these circular relations.

In fact, the solution comes once more from a use of topics combining the respect of logical laws and the delimitation of the normative context of their use. Because the use of the topic *a primo ad ultimum* or of the rule *si vinco*, is only justified when we complete the logical writing of the connector by the account of the

circumstances, that is in this case: the *ratio* and the *personae* determining the *secundum quid*. And this has been clearly stated by Everhardus[Footnote79] when he declared by quoting all those which had previously upholded the same idea:
However, to decide clearly and lucidly on this common statement: if I overcome the one who overcomes you, etc., it's necessary to make a distinction following Petrus de Ancharano and Cynus de Pistorio in their comments of the Authentique 'Licet patri' of C.5.27, as Johannes Andreae in his comment of the Authentique 'Autoritate Martini' of the Sexte, Petrus de Ancharano about the same passage, and Lambertus de Ramponibus about the law 16, 'Claudius Felix', of D.20.4, as Ludovicus Romanus at the beginning of his advice n°436. Either we ask the question about different cases, or we ask it about the same case. In the first situation, the rule if I overcome the one which overcomes you, therefore I overcome you too, does not have any justification to be applied, and it's in this way that speaks the Authentique 'Licet patri' of C.5.27.8, and also the §.15 of D.38.17.2, the §.3 of D.38.17.5 et the §. 'his consequens' of the Authentique 'De aequalitate dotis' [Novel 97]; in the second situation where we speak about the same case, it's necessary to introduce the following distinction: either the reason which makes that I overcome you is the same one as that which makes that I overcome the one who overcomes you, and so the rule stated above is true, because I must overcome you still more easily, according to D.44.3.14 §.3, or the reason which makes that I overcome you is not the same one as that which makes that I overcome the one which overcomes you, and then this rule does not have grounds for being.

This syntactic and semantic distinction, does not affect the validity of the inferences we obtain; on the contrary, it creates their conditions of possibility by subordinating the use of topics to an increased precision in the formulation of circumstances. But by imposing that, it highlights still more the function of norms in the delimitation of the scope of topics since it's finally considerations of public utility,[Footnote80] introduced by the circumstances, which found the superprivilege of the dowry and restore an uncontested order of priorities between safeties.
Thus, topics are prototypes of inferences producing arguments, gathered by the synthesis of positive laws and which are always accompanied by exceptions (including in the case of topics logically necessary as those which proceed from the *definiens* to the *definiendum* or from the whole to the part, etc.), because the effectivity of inferences is here subordinated to normative choices concerning the scope of each topic and the importance of the exemptions (plea and fictions) that the consideration of circumstances introduces. We could therefore estimate that they all are inductive in a certain way, since they are all the result of an empirical classification of arguments. And we could also uphold that they are all deductive, because each one of them allows, within the precise limits of its scope, to reason from universal to particular (since any particular proposal is universal for the individuals to which it corresponds, in the same way that the rule of an exception

applies to all the concrete cases corresponding to the criteria of this exception). In fact, the differences between these extreme topics or all those which are distributed on intermediate levels, are obtained by the conciliation of the two following constraints, partly independent: (1) the basic precariousness of the norm which prohibits to apply the *déduction a priori* criticized by Mr. Villey, for both the reasons that there is no universal statement to which we cannot derogate by a plea, and that there is not two similar cases joined together by the topic *a simili*, which we cannot separate in two distinct classes by considering them *simpliciter* and *secundum quid*. (2) the two necessity of simplifying the laws system by formulating statements as general as possible, and consolidating their social effectivity by giving them a rationally constraining shape.

So, the specific difficulties of topics theories don't result from the dubious handling of a quasi dialectical art, because the advantage of the way in which they are formed is precisely to exclude uncertainty. They do result from the true consequences that this a posteriori way of formation can have on the questions of rational coherence and foreseeability of the system of laws. Indeed, as we have tell it above, a topic such that *a specie ad genus*, allows to obtain an unboubted inductive inference when we ensures the conformity of the species to the law of the genus by defining a recognition criterion of these last excluding on principle any exception. But we cannot limit the topics function to the repetition of usually received arguments, since they must be also used to facilitate the application of these arguments to new cases. However, we known that the introduction of a new norm can be in contradiction with the legal system of a pre-existent classification and lead to the formation of perplexed cases. Thus, the application of topics in the processing of new cases, can only be ensured if we admit the continuity of *causa* or *ratio* between the former laws and the laws to come, and so, the main question asked by their use in legal argumentation is to know how to transpose a whole of inferences made up a posteriori, and to confer them a creative function in the same time. More precisely, it's to know: (1) *why* the provisions of common law can be extended to the new particular cases in accordance with the logical rule *generi per speciem non derogatur*. (2) Under which conditions a relation of total or partial similarity allows the inclusion of a new term in a pre-existent category, with accordance to a principle of institutional coherence (cf. the case of the topics *a praesumptione eiusdem facti* and *a simili*). (3) By which normative constraints the reorganization of a classification and the introduction of a new category are authorized in accordance with the principle *generi per speciem derogatur*. However, the answers to these questions are systemic and suppose a work of classification, codification, abstraction and comparison that perhaps could not completely fulfil the Doctors of *mos italicus*, on account of the true semi-empirical character of their approach. They were satisfied on this point, to build a theory of the argumentation combining aristotelician logic and grammatical analysis. But some of these Doctors and those which applied their methods within the framework of romano-saxon Law, had

however three basic merits we must recall in conclusion, since they are too often unknown: (1) they knew to connect casuistry to classification, that is to ensure the treatment of concrete legal cases within the framework of a general theory of reasoning. (2) They often achieved[Footnote81] to combine the techniques of cases discussion of *mos italicus* with the contractualist analysis of norms hierarchy (and so, to exceed a traditional opposition), by giving greater place to the *classifying aspect* of problems. (3) They finally tried to rationalize the creative use of inductive or analogical topics, *while allowing* the distinction of the various *rationes, intentiones* and *causae* we can call upon thanks to a logical theory of predication.

Notes

1. 1.
   Archives de Philosophie du Droit, t.XVII (1979), *'L'interprétation'*, p. 72–88.
2. 2.
   Op. cit. p. 86.
3. 3.
   Op. cit. p. 88: "Ensuite, dans la scolastique décadente, la déduction syllogistique unilatérale l'emporte sur l'art polyphonique de la discussion; les Analytiques d'Aristote, sur sa Rhétorique et sur ses Topiques; la méthode encore dialectique des postglossateurs (mos italicus) se voit bientôt contestée par les humanistes... "
4. 4.
   Op cit. p. 82. Idem p. 83: "Les sentences des juristes consultés (sententiae et opiniones), étant le fruit d'un travail de dialecticien, sortes d'opinions seulement plausibles, ne sont elles-mêmes que des opinions."
5. 5.
   Op. cit. p. 83: "... le Digeste n'est qu'un catalogue de topoi, d'opinions fragiles... Il faut bien qu'il en soit ainsi si la méthode est dialectique..."
6. 6.
   Op. cit. p. 84: "On y voit les postglossateurs, ces successeurs authentiques des jurisconsultes, user selon les circonstances parfois du texte des statuts écrits des communes, des textes romains ou coutumiers, ou bien des lieux en sens divers que fournissent la philosophie et la littérature commune comme l'équité, le droit naturel ou l'utilité..."
7. 7.
   Op. cit. p. 84–85: "Il ne s'agissait pas d'une suite déductive de normes, mais d'un classement des genres de cas ou parfois des types de sources, ou des topoi, des arguments applicables à chaque problème."
8. 8.
   Op. cit. p. 87: "…ainsi nous autres sur le monde, les rapports justes dans le monde, n'avons jamais que des points de vue d'où naissent les topoi, les opinions particulières, point de départ de la dialectique." The standpoints would only be in fact

the preliminary material of the *topoi* (themselves assimilated to particular opinions), if M. Villey did not add then quoting Viehweg (*Topik und jurisprudenz.* München. 1953) "les topoi sont des points de vue".

9. 9.
   Op. cit. p. 84: "Le droit du Moyen Âge non plus n'est pas un ni plusieurs systèmes mais une incessante dialectique entre sources hétérogènes; d'où sa grande fécondité..."

10. 10.
   Op. cit. p. 85: "Le droit à Rome ne possède pas de forme achevée; il n'a pas d'existence actuelle; il n'est qu'en puissance. Il est une recherche, un art; disposant..., d'un lot disparate d'instruments (de règles, de topoi)..."

11. 11.
   Op. cit. p. 83: "...Il apparaît que le jus civile Romain n'est pas fait de règles certaines et nécessairement consolantes … Nées de la dialectique elles demeurent dans la dialectique; elle sont encore soumises au feu de la discussion dialectique. Et rien n'empêche qu'elles ne discordent: on peut alléguer contre Labeon l'opinion de Sabinus..."

12. 12.
   Op. cit. p. 83: "Les sentences des jurisconsultes étant le fruit d'un travail de dialecticien, sortes d'opinions seulement plausibles, ne sont elles-mêmes que des opinions. On doit sans doute leur reconnaître une autorité supérieure, à cause du prestige de leurs auteurs et du long travail de recherche dont elles ont été le résultat., cette autorité cependant demeure relative." Idem p. 87: "Et, comme il est de l'essence de la dialectique de ne pouvoir jamais accéder à des solutions démontrées, il faut qu'au terme de sa recherche, ayant pesé le pour et le contre, le jurisconsulte prononce sa sentence autoritairement…La dialectique ne conclut que grâce à l'intervention d'un maître."

13. 13.
   Op. cit. p. 88.

14. 14.
   Op. cit. p. 85.

15. 15.
   Theodor Viehweg. *Topik und Jurisprudenz*. Mûnchen (1953), (the Italian translation which is used here, has been published under the title *Topica e Giurisprudenza*. Giuffrè editore, 1962. Milano). Indeed, we find in this book he same judgment on the "unilateral syllogistic deduction" principle (*"..sembra esistere un nesso, che non consente di esser ridotto, semplificato in un nesso logico, sicché noi veniamo ad occuparci soltanto, in definitiva, di costruzioni che sono ancora isolate ed indifferenti."* p. 40), the concomitant valorization of a pluralist and no-verifonctional approach of the diversity of practical cases (*"...le premesse vengono qualificate come 'rilevanti' o 'irrilevanti', 'accettabili' o 'inaccettabili', 'da condividere' o 'da non condividere', 'sostenibili' o 'non sostenibili' e così via e che anche delle posizioni intermedie, come 'appena sostenibile', 'ancora sostenibile'*, p. 43–44), and the

assertion of the antinomy between deductive logic and the art of topic (*“la topica presuppone la mancanza di un sistema di tal genere... Se tuttavia si riesce a costruire un sistema deduttivo, verso il quale ogni scienza, considerata dal punto di vista della logica, deve tendere, la topica viene in larga misura abbandonata.”* p. 45).

16. 16.
Op. cit. p. 84: “Il suo lavoro, già piỳ volte citato, De methodo ac ratione studendi libri tres, non costituisce un fatto particolare, ma si pone accanto ad altri lavori consimili.” (with the following note added for the term ‘consimili’: “Si tratta della cosiddetta letteratura topica. Ȇ vero che essa si ha nell’età dell’Umanesimo (per es. Gammarus, 1507, Everhard, 1516; Cantiuncula, 1520; Apel, 1533; Oldendorf, 1545), ma contiene in larga misura spirito medioevale.”

17. 17.
Bobbio N and Bovero M (2002). *El caracter del Iusnaturalismo*, in *Sociedad y estado en la filosofia moderna* (article diffused on Internet by http://www.sociologia.de.

18. 18.
Op. cit.: “Como el lector entendió, me refiero a la obra de Ch. Perelman tan vasta que no puede ser exhaustivamente presentada en una nota ... No debe olvidarse en la misma dirección el libro de Th. Viehweg, Topik und Jurisprudenz ... que si bien partiendo de supuestos diferentes llega a resultados similares.”

19. 19.
Op. cit.: “Con el avance de la ‘escuela’ van desapareciendo los tópicos y las dialécticas, todas las ‘regulae docendi et discendi’, que se refieren a la lógica de lo probable. El redescubrimiento de la retórica como técnica del discurso persuasivo, opuesta a la lógica como técnica del discurso demostrativo, y el reconocimiento de que las operaciones intelectuales efectuadas por los juristas en su función de intérpretes pertenecen a la primera, puede servir para explicar el carácter específico del iusnaturalismo, con una claridad de la que en general no hay huella en la historia de la escuela. Si bien con una cierta simplificación, es válido sostener que el iusnaturalismo fue la primera (y también la última) tentativa de romper el nexo entre el estudio del derecho y la retórica como teoría de la argumentación, y de abrirlo a las reglas de la demostración.”

20. 20.
See the preamble of the *Loci argumentorum legales* (p.8 of the edition of Francfort, 1591) where Everhardus declares: “The pieces of writing on ‘loci legales’ are not only useful for students in law, but mostly necessary (and it’s on this subject that wrote Balde in his comment of C.1.3.15, the Speculator [Guillaume Durand] in his ‘De disputationibus et adlegationibus’, Alberic de Rosate in his ‘Dictionarium juris tam Civilis quam Canonici’ and Arnold of Rotterdam in his ‘Tractatus de Dialecticis graecorum principalibus’. But Ciceron spoke of that more exactly in his Topics, and after him, Boece, Quintilien in his book ‘Institutiones oratoriae’, and Rodolphe Agricola in his book ‘De inventione Dialectica libri tres’. See also the §. ‘Divisio locorum’ of the *Topica Legalia* where Cantiuncula says “Others have differently classified the loci and difficulty agree between them. Thus, Rodolphus Agricola, which follows the opinion of le Great Erasme, is in disagreement with Aristote, Ciceron and Boèce… But Ph. Melanchton differently deals with topics in his pieces of writings on rhetoric… and a long time before that, lawyers like Alberic of Rosate, the

Speculator, Balde and some others, have put together a great number of arguments from the interpretation of laws."

21. 21.
The classification of authors quoted in the *Dialectica legalis* of Gammarus, according to their frequency of call, gives: Bartole, Balde, Aristote, Abbas Panormitanus, Dynus Mugellanus, Johannes Andreae, Boece, Jason of Mayno, Imola, Butrio, Paul of Castro, Gambilionibus, Geminianus, Pistoriensis and various postglossators incidentally used. Quite the same classification would be obtained from the *Loci argumentorum legales* of Everhardus, with the three following specificities: the number of references to postglossators works is considerable there; the quotations of Balde are more frequent than those of Bartole; and the references to the topics of Aristote are negligible, owing to the more 'casuisitic' character of the Everhardus processes. On the other hand, the classification of the authors quoted in the *Topica legalia* of Cantiuncula reveals his membership of legal humanism since we obtain: Cicero, Zasius, Alciat, Agricola and Boece, to which Bartole, who is practically the only one representative of the *mos italicus*, finally succeeds.

22. 22.
Loci argumentorum legales, Francfort (edition of 1591).

23. 23.
Petri Andreae Gammari Bononiensis Dialecticae legalis sive topicorum libri III (edition of 1522).

24. 24.
The *Topica legalia* which was consulted, follows the *Methodica dialectice ratio ad jurisprudentiam adcommodata* in the edition of Bâle (edition of 1545).

25. 25.
Synopsis locorum legalium, Darmstadt (edition of 1610).

26. 26.
Centum modi argumentandi, Venise (edition of 1539).

27. 27.
(1)According to the arguments can be obtained by deduction, induction or analogy; (2) according to they can be necessary and provable, only necessary, only provable; (3) according to they can be obtained by syllogism, induction, enthymem or by one example. (op. cit. p. 8).

28. 28.
Gammarus, op. cit. p. 10.

29. 29.
The comprehension of the relationships between logic and norms in the use of topics is no more ensured when Th. Viehweg uses the words 'cliché' and 'standpoint', to join together and confuse in the same category, contents as different as legal topics, 'literary topic' and 'musical topics' (p.38). Because the indisputable fact that the word *Topica* was used in a generic way to indicate as well "rules" of reasoning as criteria of empirical classification (cf. the *'medical Topics'*), or of taste, doesn't imply the argumentative identity of these various collections.

30. 30.
Everhardus, *Loci argumentorum legales, 'Preambula'*, §.7: "We must know that it is easy to solve all legal difficulties if we pay attention to what contain the following terms: the cause, the place, the time, the person... Because law changes if they are added... See also what Odofredus and Balde say in their 'Proemium' of the Digeste,

when they skilfully teach us that the force of any misleading argument can be invalidate in three ways: by the consideration of modalities, people and relations...".

31. 31.
Everhardus, op. cit. §. 1: "We call places [locos], some positions [sedes] immediately available, by which we build necessary or probable arguments, about matter of points which it is necessary to confirm or invalidate"… "An argument consists of all this which give a conviction [fidem facere], in whatever way, about a doubtful thing we discuss." … "It's arguing and disputing that we find the truth." We must finally underline that Everhardus quotes only one very 'dubious locus': "a tractatu sive perplexis aut implicitis", and that his argumentation aims to remove this uncertainty by analyzing the implicit one.

32. 32.
Op. cit. §. 7: "We know by argument what we cannot notice in an obvious way."

33. 33.
Op. cit. §.14: "What somebody tell be true according to law,, he must prove it by putting forward an express text or by leading to a text thanks to an argument using one of the legal loci… Whe argue in law, in three different ways, namely: by law, by reason, and by one example… We argue thanks to the reason, when an express law is missing, but however natural reason imposes something… And here Balde says in his comment of D.27.1 that we don't be astonished to see the reason receiving such a force, since reason is the soul of law and that it represents a kind of inner tacit law in the spirit of men, and his text says that reason, truth and God are equivalent… But we argue by an example when we proceed from a particular case to an other, owing to something similar we recognize in them. And there is not any way of argumentation which cannot be reduce to one of these three modes."

34. 34.
Op. cit. §. 13: "The jurisconsult looks after what is just and unjust"; §. 16: "The reason is quite a tacit law which is inscribe in the spirit of men"; §. 17: "In discussions, it's necessary to finally refer to the most valid and most constraining argument."

35. 35.
Op. cit. §. 16: "The reason is a kind of tacit law inscribed in the mind of men."

36. 36.
Op. cit. §. 27: "Who studies law must be humble, and must not foresee to be able to judge according to the law if he did not examine the totality of laws, since the terms which follow sometimes clarify or sometimes depart from those which precede."

37. 37.
Gammarus, *De veritate ac excellentia legalis scientiae libellus,* pp. 160–161: "In his book De republica, Ciceron elegantly spoke about it in this way: the true law is the right reason, congruent with nature, present in everybody, eternal and constant... And there will not be a law for Rome, an other for Athens, an other now, an other afterwards, but only one eternal law for all and in any time... The law is the highest

reason inscribe in nature, which orders the acts having to be done and prohibits the others."

38. 38.
    De ratione studii legalis paraenesis, Bâle (1522).
39. 39.
    Cantiuncula, *Topica legalia*, pp. 28–30.
40. 40.
    Op. cit. p. 28.
41. 41.
    Op. cit. p. 30.
42. 42.
    Op. cit. p. 29: "The argument proceeding from the parts to the integral whole is valid in an affirmative way when we consider the shape of the thing as an integral part of this thing. Indeed, since this part exists and disappears at the same time as the whole (as we will teach it in the place "a forma"), we can reason in an affirmative and negative way from a part of this type."
43. 43.
    Op. cit. p. 29: "There is indeed parts... which take the name of the whole only when they are joined together. Thus, since the foundations, the walls and the roof constitute a house, they form a house when they are joined together. But alone, the foundations cannot be named by the name of house... It's not the same in the case of species whose all receive the whole name of the genus, like when man and horse receive the name of animal."
44. 44.
    Op. cit. p. 29: "In the enumeration of the parts which do not receive the name of the whole, unless being all joined together, we will follow the Boece's doctrines in the following rules. If we want to destroy an argument, it will be enough to find one missing element. If we want to confirm it, it will be necessary to find them all joined together."
45. 45.
    Op. cit. p. 30: "But [this invalidity] is not accepted in three different cases. Firstly, if we speak about a discontinuous quantity, such as a promised or bequeathed species. As when we indicate this money which is in this coffer. Indeed, if this money is destroyed, we can infer that no discontinuous quantity is due, since the promisor is released by the destruction of the species, when there is neither fault nor fraud from him."
46. 46.
    Op. cit. p. 30: "Secondly, if the statement turn on a matter which give the same substance to the part and the whole, like when we say: an action in rem is in conformity with law, so any action is in conformity with law. And it's the same thing when we reason in a negative way, like when we say: the action 'ex empto' comes

from a contract and is not an action in rem, so, no action coming from a contract is an action in rem."

47. 47.
Op. cit. p. 30: "Thirdly, each time that we reasons starting from all the parts joined together at the same time, to go towards the whole, as we will underline it in the locus 'a specie'. We argue then affirmatively proceeding from a part so conceived, towards the whole, as follows: somebody has the intention of a good faith owner, thus he possesses in good faith. When we argue negatively, we do not create any right."

48. 48.
These rules are stated in the topic *a specie ad genus* as: "De quocunque dicitur species, de eodem dicitur genus"; "Si in hac universali quaelibet singularis non est vera, tota oratio reditur falsa."
49. 49.
Indeed, Everhardus distributes the properties of the topic *a partibus*, in two relatively minor topics: *ab enumeratione partium* and *a minori*, and in the basic topic: *a ratione legis larga ampla seu generali ad extensionem ipsius legis* (to which he devotes the pages 481 to 540 of his *Loci argumentorum legales*), distinguishing the argumentation rules according to whether they apply to cases rectifying a previous law (*casus est correctorium*), derogating from common law (*casus est exorbitantium a jure communi ac regulari*), coming under criminal law (*casus est poenalium, ubi locum habet extensio*), or simply expending this law (*casus est de extensione, in non correctoriis, nec exorbitantibus, nec poenalibus*).
50. 50.
We find it especially in the §. 3 of the topic *ab opinione vulgi* of Everhardus's *Loci argumentorum legales*. (p. 113).
51. 51.
Cf. the disputable feature of the mixture of categorization criteria proposed by Cantiuncula in the case of the topic *a partibus* (according to the nature of the parts and the way of reasoning that we apply to them).
52. 52.
For this reason, the Topics are both argumentation treaties and interpretation treaties whose target is to constitute a grammar of laws. This find expression in the presence of 'necessaries' topics like *a definitione, ab etymologia, ab allusione vocabuli*, etc, and the frequent compiling of works mixing logical, grammar and law (cf the opuscule *Particularis juris* of the Leibniz's uncle, J. Strauch).
53. 53.
This number is obtained by counting for only one genus of topic the various species of the topic *a simili*.
54. 54.
We could perhaps reproach him to have confused necessity and obligation. However his interpretation is justify by the fact that all topics are naturally obligatory since the laws of which they summarize the way of reasoning (including those which derogate from the rule), have this character by definition.

55. 55.
That is the *definiens* and the *definiendum* in *a definitione*, the *demonstrans* and the *demonstrandum* in *a descriptione*, the sum of the parts of a thing and the thing

itself in *ab enumeratione partium*, the single species of a genus and this genus in *a specie ad genus*.

56. 56.
Cf. the topic *a defectu formae* where the no-respect of legal procedures implies the nullity of the act, and those in which there is inclusion of the second in the first (like the species in the genus in *a genere ad speciem*).

57. 57.
Op. cit. pp. 43–44.

58. 58.
Op. cit pp. 120–131.

59. 59.
The 'Assimilation', i.e. the analogical extension about which speaks D.9.1.4, is that by which the 'actio noxalis' defined by the 'Leges XII tabularum' and that we can exert against the owner of a quadruped which caused a damage, is extended to any animal. (*"And this action can be usefully brought if it's not a quadruped but an other animal which caused the damage"*).

60. 60.
p.95 of the *Synopsis* and pp. 637–655 of the *Loci argumentorum legales*.

61. 61.
p.10 of the *Synopsis* and pp. 86–92 of the *Loci argumentorum legales*.

62. 62.
Loci argumentorum legales p. 50: "I don't want not more to let you be unaware of that species forms part of genus and that genus forms also part of species, but in a different way. This is why, so that you would not be misled by the ambiguity of the word 'to form part', I informed you that something can be said 'to form part of something else' in two different ways."

63. 63.
It's indicated in Latin by the expression: *contentive sive comprehensive*, who does not mean *comprehensively*, but well *inclusively* (*continere* and *comprehendere* with the meaning of: to be materially included or intellectually understood in something).

64. 64.
The latin sentence says: *illative, positive, consecutive seu per consequentiam*.

65. 65.
Op. cit. p.51: "The first way is done in inclusion, and in this case, the species forms part of the genus, that is, the species is contained or included in the genus, and it's in this way that speak the end of the §. 'but if the fact of defrauding', when we say that the fraud is understood in the deceit, according to the first interpretation of the glose, see what say Bartole, Balde and the Doctors about this matter." … "And its in this way that speaks D.50.17.80" [*"In toto jure generi per speciem derogatur et illus potissimum habetur quod ad speciem derectum est*"], see Dino de Mugello, [on this rule] in the Sexte [rule 34: *"generi per speciem derogatur"*], and the rule "plus semper" [rule 35: "plus semper in se continet quod est minus"], with its note and the glose turning on the same title of the same book. But in this case, the exception forms part of the rule, in other words, is included or contained in the rule, as say it perfectly the glose turning on the rubric 'De regulis juris' of the Sexte, and Dino de Mugello, Albericus Roxiati and the Doctors, about D.50.17.1. And in a general way, the special categories or which are less common, form part of the most general or most common,

in other words, are included or understood in them, see D.50.17.147 [*"Semper specialia generalibus insunt "*].

66. 66.
Op. cit. p. 52: "In the second way, something is said to form part of something else, not in comprehension as I said, but by implication, or consecution, i.e. by the consequence; because the second term is implied or follows when the first term is stated; and thus, the genus, i.e. what is more common, is a part of the species, i.e. what is less common, because once the species is stated, the genus is stated; and once the least common is stated, the most common is stated, as with: it's a man, consequently it's an animal."

67. 67.
Op. cit. p. 53: "The genus or the most common, implies its species or the least common, by inclusion; thus, when the husband bequeaths to the wife the things which are at the wife's disposal, then the things which were bought for she are supposed to be bequeathed to her."

68. 68.
Op. cit. p. 53: "But [from a comprehensive standpoint] the genus or the most common, does not imply the species, or the least common, because we have not the following consecution... it's at the woman's disposal, so, it is bought, because there can be another way of acquisition". See also the conclusion of D.32.47 §.1: "If the husband bequeathed to the second wife the goods [not bought] which had the first wife, these goods are at the second wife's disposal, even if the husband has bought nothing to her, and the legacies are obtained, even if they are not specifically allocated to her. But the goods which are bought for the first wife and which are at her disposal, are only due to the second wife if they are specifically allocated to her, because the husband did not think of the second when he bought them."

69. 69.
See in Gammarus: "De loco a toto universali, seu a genere ad speciem" and "De loco a specie ad genus", op cit. pp. 23–28, and in Cantiuncula: op. cit. pp. 31–32.

70. 70.
Op. cit. p. 47: "There exists in Law an other locus of frequent use, which we call a genere ad speciem, and which allows to obtain an argument which is not probable, but necessary."

71. 71.
Op. cit. p. 54. "The glose ... rightly says that the fact of declaring that the whole is in the part secundum quid [i.e. comprehensively], because the whole is not simply in the part [i.e. extensively], must always be understood... by the consequence and not by the contents. And this must be kept in memory, because if not, we can be easily deceive because of an error proceeding from what is said secundum quid to what is said as simply; see what I said in the former locus [*a genere ad speciem*] and what I will say in the next [*a toto ad partem*]."

72. 72.
Op. cit. p. 53.

73. 73.
 Cantiuncula C.: *Methodica dialectice ratio ad jurisprudentiam adcommodata* (edition of Bâle, 1545), Chapter 7 (pp. 159–160). The *Proemium* of this book refers to the precursors of Cantiuncula, and especilally quotes Petrus Andreas Gammarus Bononiensis. Once more, it proves that the opposition *mos italicus*/*mos gallicus* is quite *secondary* when the thing to do is to elaborate a theory of legal reasoning.
74. 74.
 Sexte, book 5, *De regulis juris*, rule 54.
75. 75.
 Constitution *Assiduis* stated in C.8.17.12: "We were disturbed by the constant taking away [made on the goods] of women, whose they deplore that they make lose their dowries and [*which are made*] by creditors former [to the marriage], on the goods possessed by the husbands. This is why we examined the ancient laws which provide in personal actions, an important prerogative with the action for a claim for dowry, so that women have a privilege against almost all personal actions and that they come before the other creditors, even if they were former."
76. 76.
 Johannes Franciscus de Ripa Papiensis, *Commentaria primae and secundae left digesti novi and infortiati and postremo in primam codicis*, fol.58 and 59, Lyon (edition of 1538): "It is said that the woman is preferred with all the creditors, by a special provision, for the things given by way of dowry. Consequently, she is not preferred with the other creditors for the rest of the husband's goods and so, she is not preferred with those which have an express mortgage by the only fact that she comes before those which have a tacit mortgage in accordance with the Constitution Assiduis. And this opinion opposite to that of Bartole is more veracious and more common."
77. 77.
 "Thus, every time that this is objected to them, from an other standpoint (i.e. when themselves argue as follows: the posterior dowry precedes the former tacit mortgage and this one [precedes the] middle express [mortgage], an so, the dowry [precedes] the latter; and that we object: start rather from the express mortgage in the following way: the middle express mortgage precedes the posterior dowry, the [posterior] *dowry* [precedes] the tacit former [mortgage], so, the first precedes the latter; or as follows: the former tacit mortgage precedes the middle express [mortgage], this one [precedes] the posterior dowry, so, the first precedes the latter), they immediately retort: this rule, 'if I overcome, etc', make a mistake in the two last relations. Thus, why doesn't it mistaking in the same way (in the first relation) when you are in favor of the dowry?"
78. 78.
 Leibniz, *De Casibus Perplexis*, Chapter 22. Akademie der Wissenschaften, VI.2. (1990).
79. 79.
 Loci argumentorum legales, p. 729.
80. 80.
 Cf. D.24.3.1: "The cause of dowries is everywhere and always in favour. Because it's the public interest to preserve the women's dowries because it's very necessary that women be provide with dowries to have children and to fill the city of them."
81. 81.

Cf. the works of Cantiuncula, but also and especially those, posterior, of Berlich, Carpzov and Leibniz.

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