Produced and Bottled in Rome – Who Owned the Wine?

The Controversy about *Specificatio*

Tessa LEESEN

(*Université de Tilburg*)

1. Introduction

In the early Principate, there were two law schools in Rome, the Sabinian or Cassian school and the Proculian school. We know that controversies arose between the schools in connection with a number of legal problems. Hitherto, Romanists have always regarded the two schools as academic institutions and they assumed that the controversies developed because of a fundamental difference between the schools[1]. They believed that an examination of the controversies would reveal the nature of this fundamental difference (*e.g.* be it philosophical or political or methodological …). However, Romanists have never been able to find a single fundamental difference that could have been at the root of every controversy. In my view, their believe is due to their false assumption that the schools were fundamentally different. The sources provide no ground for this assumption and the existence of controversies does not necessarily imply that the schools really were basically different. Moreover, there are no references to academic institutions in the legal sources. Another shortcoming of modern research is that the hypothetical

[1] See, for example, P.STEIN, *The Two Schools of Jurists in the Early Roman Principate*, CLJ 31 (1972), pp.8-31; D.LIEBS, *Rechtsschulen und Rechtsunterricht im Prinzipat*, ANRW II.15 (1976), pp.197-286; G.L.FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981; M.G.SCACCHETTI, *Note sulle differenze di metodo fra Sabiniani e Proculiani,* Studi in onore di Arnaldo Biscardi 5, Milano 1984, pp.369-404.

scientific differences do not do justice to the legal character of the controversies.

In my view, the law schools were not academic institutions, but can be better described as sections of the Roman senate. This interpretation has been proposed by Tellegen. Because of the limited scope of this paper, I will not go more deeply into his arguments, but I think he is right[2]. In his view, the law schools can be regarded as sections of the Roman senate, in which legal problems, originating from legal practice, were discussed under the leadership of a prominent senator who was well-versed in the law and who had the *ius respondendi*. A controversy arose when the leaders of each school gave a different, but equally just *responsum* to a particular problem with the authority of the emperor. Since both *responsa* were binding for the judge, they created a legal insecurity and caused a controversy. However, Tellegen did not solve the problem of how it was possible for the leaders of the two schools to give two different answers that were equally just.

The aim of my study is to find a new and better explanation for the controversies between the schools. For this purpose, I examine the legal problems that were at the root of the twenty-three controversies mentioned in the *Institutes* of Gaius and consider the arguments that were adduced by the leaders of the schools in support of their opinion. In my view, these arguments can be linked with rhetoric and, in particular, with the topics described in the *Topica* of Cicero and the *Institutio Oratoria* of Quintilian. The aim of this paper is to demonstrate this link by analysing the controversy about *specificatio*. For this purpose, I will first discuss the texts of Gaius in which he mentions the contradictory opinions of the Sabinians and the Proculians on the subject of *specificatio* and the arguments used to support their opinion. In the second part, I will focus on the most current and characteristic interpretation about *specificatio* in recent literature, namely the philosophical interpretation, and explain why it is inadequate. Finally, in the third part, I will demonstrate that the arguments of the law schools can be linked to one or more particular topics.

---

[2] J.W.TELLEGEN, *Gaius Cassius and the Schola Cassiana in Pliny's letter VII 24.8,* SZ 150 (1988), pp.263-311.

2. The Controversy about Specificatio: the Sources

The controversy about *specificatio* is found in the *Institutes* of Gaius.

Gai., 2.79[3]

In aliis quoque speciebus naturalis ratio requiritur. Proinde si ex uvis <aut olivis aut spicis> meis vinum aut oleum aut frumentum feceris, quaeritur, utrum meum sit id vinum aut oleum aut frumentum an tuum. Item si ex auro aut argento meo vas aliquod feceris, vel ex tabulis meis navem aut armarium aut subsellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum vel collyrium feceris, <quaeritur, utrum tuum sit id quod ex meo effeceris,> an meum. Quidam materiam et substantiam spectandam esse putant, id est ut cuius materia sit, illius et res quae facta sit videatur esse, idque maxime placuit Sabino et Cassio. Alii vero eius rem esse putant qui fecerit, idque maxime diversae scholae auctoribus visum est ; sed eum quoque, cuius materia et substantia fuerit, furti adversus eum qui subripuerit habere actionem; nec minus adversus eundem condictionem ei competere, quia extinctae res, licet vindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.

"Regarding a change of species also[4], we have recourse to *naturalis ratio*. If, therefore, you have made wine or oil or grain from my grapes,

[3] Regarding *specificatio*, see P.SOKOLOWSKI, *Die Lehre von der Specification,* SZ 17 (1896), pp.252-311; A.MOZZILLO, *Note in tema di specificazione,* Scritti giuridici: raccolti per il centenario della casa editrice Jovene, Napoli 1954, pp.711-733; F.WIEACKER, *Spezifikation. Schulprobleme und Sachprobleme,* FS Rabel, Tübingen 1954, pp.263-292; Th.MAYER-MALY, *Spezifikation: Leitfälle, Begriffsbildung, Rechtsinstitut,* SZ 33 (1956), pp.120-154; J.PLESCIA, *The Case of Specification in Roman Law,* IVRA 24 (1973), pp.214-221; G.THIELMANN, *Zum Eigentumserwerb durch Verarbeitung im römischen Recht,* De iustitia et iure. Festgabe für Ulrich von Lübtow zum 80. Geburtstag, Berlin 1980, pp.187-232; G.L.FALCHI, *op. cit.,* pp.121-132; M.G.SCACCHETTI, *op. cit.*, pp.381-386; M.J.SCHERMAIER, *Materia. Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht,* Wien 1992, pp.191-240; O.BEHRENDS, *Die Spezifikationslehre, ihre Gegner und die media sententia in der Geschichte der römischen Jurisprudenz,* SZ 112 (1995), pp.195-238; B.C.STOOP, *Non solet locatio dominium mutare. Some Remarks on Specificatio in Classical Roman Law,* TR 66 (1998), pp.3-24; M.BRETONE, *I fondamenti del diritto romano. Le cose e la natura*, (3rd ed.), Roma 1999, pp.81-90; A.PLISECKA, *Accessio and Specificatio Reconsidered,* TR 74 (2006), pp.45-60; C.KRAFT, *Bona fides als Voraussetzung für den Eigentumserwerb durch specificatio,* TR 75 (2006), pp.289-318.

> olives or ears of corn, the question is asked whether this wine, oil or grain is mine or yours. In like manner, if you have made some vase from my gold or silver or if you have constructed a boat or a cupboard or a bench from my planks. In like manner, if you have made a garment from my wool or if you have made mead from my wine and honey or if you have made a plaster or an eyesalve from my drugs, the question is asked, whether what you have thus made from my material is yours or is mine. Some think that the material and the substance have to be taken into consideration; that is that the manufactured article is considered to belong to the owner of the material. And this opinion is above all preferred by Sabinus and Cassius. Others, however, think that the object belongs to him who created it; this is the view held above all by the authorities of the other school. However, they[5] also think that he who owned the material and the substance has the *actio furti* against him who stole it and also a *condictio* against the same person because, although things that have perished cannot be vindicated, they may be the object of a *condictio* against thieves and certain other possessors."

This text is found in the second book of Gaius' *Institutes* and, more precisely, in the part on law of property (Gai., 2.1-2.96). In the preceding paragraphs, Gaius has already discussed two cases of acquisition of ownership based upon *naturalis ratio*, namely *occupatio* and *accessio*, and in Gai., 2.79 he mentions a third case.

In this text, Gaius provides us with a series of concrete examples which are nowadays covered by the term *specificatio*. Although this term is mediaeval Latin, I will use it throughout this paper for the sake of convenience[6]. The first example has become classic. When

---

[4] "Regarding a change of species…" is a free translation of *"in aliis quoque speciebus…"*. For a more literal translation, see U.MANTHE, *Die Institutionen des Gaius,* Darmstadt 2004, p.137: "Auch in anderen Fällen …"

[5] According to SCHERMAIER, *op. cit.,* p.195, Gaius' assertion that the *dominus materiae* could no longer vindicate his perished materials, but could be indemnified for his materials by means of a *condictio*, did not reflect the opinion of the Proculians only. Schermaier maintains that Gaius has articulated this view on his own behalf and, at the same time, on behalf of both the Sabinian and Proculian law school. However, I think that the opinion of Schermaier is incorrect. Gaius' assertion that, in case of theft, the *dominus materiae* has an *actio furti* or a *condictio ex causa furtiva* against the thief represents the opinion of the Proculians only, for the words *"eum … habere actionem"* and *"condictionem ei competere"* are instances of an *accusativus cum infinitivo* and depend on the words "*putant"* in the principal sentence.

[6] The term *specificatio* appears for the first time in a student manual of the 12th century, the so called *Corpus legum sive Brachylogus iuris civilis*. E.BÖCKING,

somebody (A) makes wine for himself by processing the grapes of somebody else (B) without mutual agreements, a problem of ownership arises: does the owner of the grapes (B) or the maker of the wine (A) become owner of the wine? The owner of the grapes will claim ownership of the wine by means of a *rei vindicatio* from the maker who is in possession. Apparently, the Sabinians and the Proculians take up opposing positions. Whereas the former argue that the owner of the grapes (B) has acquired the ownership of the wine, the latter attribute the ownership of the wine to its maker (A). The Proculians acknowledge that, if the grapes have been stolen, the owner of the grapes (B) has an *actio furti* against the thief. Because the grapes have perished *(quia extinctae res)*, it is not possible for B to vindicate them from any possessor through a *rei vindicatio*. Yet, he can be indemnified for his material by means of a *condictio (ex causa furtiva)*. Both positions seem to be fair and just.

In his *Institutes*, Gaius does not explicitly mention the arguments used by the Sabinians and the Proculians, but they have come down to us in the Digest, namely in the second book of the *"Res cottidianae sive aurea"* (Gai., D.41.1.7.7):

> GAIUS *libro secundo rerum cottidianarum sive aureorum*
>
> *Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nervae et Proculo placuit. Ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. ...*

Corpus legum sive Brachylogus iuris civilis, Berolini 1829, p.36. Gaius, on the other hand, uses the words *"speciem facere"*.

> "When someone has made for himself something from another's material, Nerva and Proculus think that the maker owns that thing, because what has been made previously belonged to no one. Sabinus and Cassius rather think that the *naturalis ratio* requires that the person who has been owner of the material also becomes owner of what is made from this material, since nothing can be made without the material: if, for example, I make some vase from gold, silver or bronze, or a garment from your wool, or mead from your wine and honey, or a plaster or an eyesalve from your drugs or wine, oil or grain from your grapes, olives or ears of corn. Nevertheless, there is also a *media sententia* of those who correctly think that, if the thing can be returned to its material, the better view is that propounded by Sabinus and Cassius. If it cannot be returned, Nerva and Proculus are sounder. Thus, for example, a finished vase can be returned to its raw mass of gold or silver or bronze. It is not possible, however, to return wine, oil or grain to grapes and olives and ears of corn. Neither can mead be returned to honey and wine or plasters or eyesalve to drugs. …"

While Gaius mentions only individual and concrete cases to illustrate the principle of *specificatio* in his *Institutes,* the *Res Cottidianae* commence with a description of *specificatio* in general terms: *Cum quis ex aliena materia speciem aliquam suo nomine fecerit*. Next, Gaius mentions the view of the Proculians. They favour the maker, *quia quod factum est, antea nullius fuerat* (because what has been made, previously belonged to no one). This sentence requires some explanation. By the creation of a new thing (*e.g*. wine), the materials (*i.e*. the grapes) have perished and can no longer be taken into account. Therefore, the Proculians consider the wine as a new and autonomous thing without a previous owner (a *res nullius*) that is acquired by the maker through *occupatio*[7]. According to the Sabinians, on the other hand, it stands to reason *(naturalis ratio)* that the ownership of the wine is granted to the owner of the grapes, *quia sine materia nulla species effici possit* (since nothing can be made without the material). This means that the Sabinians emphasise the

[7] See also M.KASER, *Natürliche Eigentumserwerbsarten im altrömischen Recht,* SZ 65 (1947), p. 243; M.KASER, *RPR I,* (2nd ed.), München 1971, p.431; PLESCIA, *op. cit.,* p.219; FALCHI, *op. cit.*, p.129 and PLISECKA, *op. cit*., p.46. This opinion is refuted by THIELMANN, *op. cit*., pp.193-194 and by SCHERMAIER, *op. cit*., pp.228 and 235. According to these Romanists, the *res nullius* is not acquired by *occupatio*, but by "einem eigenständigen Erwerbstatbestand".

importance of the grapes as a prerequisite for the wine and that they do not consider the grapes as perished. Because the grapes are still present within the wine, the owner of the grapes is considered to be owner of the wine. The text of the *Res Cottidianae* ends with the same casuistic examples as were mentioned in the *Institutes*.

According to this text, the Sabinians use an extra argument by referring to the *naturalis ratio*[8]. However, it is probable that the Proculians used the same argument in this connection. The reason for the Proculian view, granting the property of the wine to its maker, was: *quia quod factum est, antea nullius fuerat*. Because the grapes have perished, the wine has become a new thing without previous owner or, in other words, a *res nullius*. On the basis of the *occupatio*-principle, expressed in Gai., D.41.1.3*pr*, the *res nullius* becomes the property of the maker, who is the first taker:

> *Quod enim nullius est, id ratione naturali occupanti conceditur.*
> "Certainly, what belongs to no one, is conceded by *naturalis ratio* to the first taker."

Thus, the *naturalis ratio* as ground for *occupatio* also contains the ground for the Proculian view on *specificatio*[9]. In the case of *occupatio*, *naturalis ratio* can be defined as "in correspondence to common sense of all men"[10]. It is "in correspondence to common sense of all men" that a person who takes possession of a *res nullius*, becomes its owner. Since the opinion of Sabinus and Cassius in favour of the material-owner is also based on the *naturalis ratio* (see Gai., D.41.1.7.7), two conflicting opinions are derived from the application of one and the same concept, namely *naturalis ratio*.

[8] In de context of this controversy, the *naturalis ratio* is also mentioned in: Gai., 2.79: *In aliis quoque speciebus* ***naturalis ratio*** *requiritur. …* Gai., D.41.1.7.7: *Sabinus et Cassius magis* ***naturalem rationem*** *efficere putant, …* Inst., 2.1.25: *Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum* ***naturali ratione*** *dominus sit, utram is qui fecerit, an ille potius qui materiae dominus fuerit. …*
About the term *naturalis ratio,* as applied by the Sabinians, see S.SOBOTTA, *Der Begriff der naturalis ratio. Seine Verwendung in den Texten der klassischen Juristen,* Frankfurt 1969, pp.32-37; 77; P.STEIN, *The Development of the Notion of Naturalis Ratio,* Daube Noster, Edinburgh - London 1974, pp.305-316, esp. pp.306-307; P.A.VANDER WAERDT, *Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural law*, ANRW IV.36 (1990), p.4881.
[9] WIEACKER, *op. cit*, pp.266-267; SOBOTTA, *op. cit*., p.34.
[10] SOBOTTA, *op. cit*., p.77 defines the *naturalis ratio* as „Ausdrucksmittel der natürlichen, menschlichen Einsicht offenstehenden Gegebenheiten".

The *naturalis ratio* is the basis for the Proculian opinion and, at the same time, for the opposite opinion of the Sabinians. This confirms that there is no fundamental difference between the Sabinians and Proculians.

Finally, Gaius mentions a *media sententia* in this text. Because of the limited scope of this article, I refrain from discussing this opinion here.

3. The Controversy about Specificatio*: Modern Theories*

At the end of the 19th century, Sokolowski gave a philosophical interpretation of the *specificatio*-controversy between the Sabinians and the Proculians[11]. In this article, I will only discuss this theory, since it is the most characteristic and interesting for the *specificatio*-controversy and has been followed, revised and corrected by many other Romanists[12].

According to Sokolowski, the Proculian view in favour of the maker is influenced by the Peripatetici. These followers of Aristotle take the view that every object consists of material (ὕλη) and form (εἶδος) and that the form is the more essential and superior. If a new thing is created, the form (*eidos* or – in Latin – the *species*) is predominant. The material or the *hylè* is no longer present in the *nova species*: it is consumed by the latter. Because of the inferiority of the material or *hylè* and its absorption into the *nova species*, the Proculians decided to attribute the property of the *nova species* to the maker. The Sabinians, on the other hand, attributed the ownership of the *nova species* to the *dominus materiae*. According to Sokolowski, this opinion may have been influenced by the Stoics. This philosophical movement takes the substance or material to be something concrete and corporeal and calls it "das Seiende" (οὐσία). For the Stoics, it is not the form, but the material that is brought to the fore. While the Peripatetici hold that the *hylè* disappears together with the creation of the *eidos* (or the *nova species*), the Stoics are

[11] SOKOLOWSKI, *op. cit.*, pp.252-311.

[12] KASER, *Die natürlichen Eigentumserwerbsarten, op. cit.,* pp.219-260; esp. pp.242-243; H.COING, *Zum Einfluss der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts,* SZ 69 (1952), pp.24-59; esp. pp.56-57; WIEACKER, *op. cit.*, pp.279-292; F.DE ZULUETA, *The Institutes of Gaius. Part II: Commentary*, (2nd ed.), Oxford 1963, pp.78-80; H.HAUSMANINGER - W.SELB, *Römisches Privatrecht,* (9th ed.), Wien 2001, p.228; BRETONE, *op. cit.,* pp.81-91.

convinced that the οὐσία subsists. Because the transformation of the external form does not influence the true existence of a thing, the Sabinians granted the ownership of the *nova species* to the owner of the material (or substance).

Although the philosophical interpretation of this controversy seems plausible at first sight, it is not convincing. Neither Gaius nor Pomponius mention the Peripatetics or Stoics in their works. If these philosophical movements had so much influence in Roman society that they could bring two opposing law schools into being, one might expect to find some references to them in the sources. Moreover, it does not seem plausible that jurists used only philosophical arguments to solve a legal problem[13].

4. A New Interpretation: the Link between Specificatio *and Topics*

Since the preceding theory is not successful, I want to propose a totally new and original theory to explain the controversies between the two schools. As I said before, a controversy arose when a legal problem, which originated from legal practice, was presented to the leaders of the schools by particular citizens and when they each gave different *responsa*.[14] I believe that the controversy about *specificatio* arose in the same way.

At the beginning of the 1st cent. AD, a conflict had arisen between an owner of grapes (B) and the person who had made wine from them (A) about the ownership of the wine. The owner of the grapes put this legal problem to Sabinus (and Cassius)[15] and expected a *responsum*

[13] VANDER WAERDT, *op. cit.*, pp.4851-4900 acknowledges that the jurists were acquainted with Stoicism, but denies that this knowledge led the jurists to revise their legal doctrine in the light of philosophical considerations.

[14] O.E.TELLEGEN-COUPERUS, *La controverse dans Gaius, Inst., 1.196, entre Proculiens et Sabiniens : theorie ou pratique de droit?*, TR 61 (1993), pp.472 has already defended this position : « Nous voulons essayer de prouver que les controverses concernaient des questions de droit d'origine pratique, pour lesquelles il n'y avait pas de normes claires … »

[15] In Gai., 2.79 and Gai., D.41.1.7.7, Gaius refers to *"Sabinus et Cassius"* and to *"Nerva et Proculus"*. Since the owner of the grapes could not have consulted two successive leaders simultaneously, I presume that he has addressed himself to the first head. When I refer to Sabinus (and to Nerva), I mean the entire Sabinian (or Proculian) school, which they represent.

that would be to his advantage[16]. The maker of the wine, on the other hand, seems to have consulted Nerva. Sabinus had no doubt that the action to be used was a *rei vindicatio*, whereas Nerva denied that the owner of the grapes could use this action. However, the heads of the law schools had to base their *responsa* on convincing arguments and, for this purpose, they used rhetoric and, in particular, the topics. In his *Topica*, Cicero confirms that the jurists were acquainted with rhetoric and topics. He asserted that a careful study of the topics of arguments would enable orators, philosophers and also jurisconsults to argue fluently about questions on which they had been consulted[17]. According to Cicero, jurists supplied weapons to diligent advocates who sought succour in their wisdom[18]. In other words, jurists provided advocates with appropriate actions and with arguments.

For jurists, the main information on rhetoric and topics was contained in the *Topica* of Cicero and the *Institutio Oratoria* of Quintilian.[19] The former work was written by Cicero in 44 BC for his friend Trebatius, who was a jurist. The *Topica* consists of three parts.[20] In the first part, Cicero enumerates about twenty topics and illustrates each of them with an example from private law. In the second part, Cicero provides some additional information about the topics themselves and their subdivisions. In the third part, Cicero describes various ways of finding topics. The *Institutio Oratoria*, on the other hand, is a textbook for students that was published in 94 or 95 AD and covers the entire study of rhetoric.

---

[16] A text of Cicero (*De or.,* I.239-240) demonstrates that it was not uncommon for jurists to give advice that would benefit a citizen who consulted them: When a citizen from the country consulted Publius Crassus on a legal problem, the jurist gave him a *responsum* that was not to his advantage. Servius Galba noticed that the man was disappointed and he asked him what he had consulted Crassus about. The man presented his legal problem to Galba and the latter gave him another *responsum* that did serve his purpose.

[17] Cic., *Top.,* 17.66: *"… Licebit igitur diligenter argumentorum cognitis locis non modo oratoribus et philosophis, sed iuris etiam peritis copiose de consultationibus suis disputare."*

[18] Cic., *Top.,* 17.65: *… (Nam et adsunt multum et adhibentur in consilia) et patronis diligentibus ad eorum prudentiam confugientibus hastas ministrant.*

[19] The *Topica* of Aristotle are of use only to a minor extent, since Aristotle focuses on dialectical topics rather than on rhetorical topics.

[20] I) Cic., *Top.,* 2.6-4.24; II) Cic., *Top.,* 4.25-20.78; III) Cic., Top., 21.79-22.86.

In rhetoric, the method which is used for the systematic discovery of arguments is called *inventio*. The most renowned system of *inventio* is ascribed to Hermagoras and dates from about 150 BC. In the system of *inventio,* Hermagoras focused his attention on the *status* doctrine. Cicero and Quintilian probably based their *status* doctrine on that of Hermagoras[21]. When the leaders of the schools had determined the *status* of any question pertaining to private law, they could look for arguments by consulting the lists of topics that were particularly suitable for that specific *status*.

Let us now return to the case dealing with *specificatio*, where Sabinus had argued that the owner of the grapes acquired the ownership of the wine and Nerva had argued that the maker of the wine became owner. First of all, I will examine whether the argument in support of Sabinus' advice can be found under a topic by means of the rhetorical *status* doctrine and, secondly, I will do the same for the Proculian argument.

a) The Sabinian view

The owner of the grapes put the following legal question to Sabinus: "When somebody else (A) has made wine from my grapes without my consent, who becomes the owner of this wine?" Sabinus answered that the owner of the grapes should be considered owner, *quia sine materia nulla species effici possit* (Gai., D.41.1.7.7). I will now try to reconstruct the way in which Sabinus found this argument. For this purpose, I will use the *status* doctrine of Hermagoras as described.

Sabinus had to determine the *status* of the conflict. The term *status* refers to the nature of the *quaestio* that results from the confrontation between the claim and the defence. Since the claim always has the same factual character, the *status* is determined by the changing contents of the defence. In the case of *specificatio*, the owner of the grapes claims ownership of the wine by means of a *rei vindicatio* against the maker who is in possession. In his defence, however, the maker (A) denies that B is the owner. The *quaestio* which results from this confrontation is: "Is B the owner of the wine or not?" In the *status* doctrine of Hermagoras there are four possible *status*: 1) is it?

[21] Cic., *Top.,* 21.82; Quint., *Inst. Or.,* 3.5.10.

(sitne?); 2) what is it? *(quid sit?)*; 3) of what kind is it? *(quale sit?)* and 4) to what does it relate? *(ad aliquid?)*. These four groups refer respectively to the *status coniecturalis*, the *status definitivus*, the *status qualitatis* and the *translatio*[22]. The *quaestio* that resulted from the confrontation between claim and defence, namely "Is B the owner of the wine or not?" corresponds best to the question *"Sitne?"* of the *status coniecturalis*.

Once the *status* had been determined, Sabinus consulted the lists of the topics that were particularly suitable for the *status coniecturalis*. In the third part of the *Topica*, Cicero mentions various ways of finding topics and arguments. For *coniectura* he mentions three topics in Cic., *Top.,* 23.87:

> *… Ad coniecturam igitur maxime apta quae ex causis, quae ex effectis, quae ex coniunctis sumi possunt.*
>
> … Then, for conjecture the topics that can be drawn from causes, effects and conjuncts are best suited.

Especially the *locus ex causis, ex effectis* and *ex coniunctis* could be used by Sabinus as a lead to find an argument that would be to the advantage of the owner of the grapes. I believe that Sabinus found the argument *"quia sine materia nulla species effici possit"* under the *locus ex causis*. In order to demonstrate this, I will first discuss what Cicero stated about this topic earlier in the *Topica* and then make the connection with the Sabinian argument[23].

In the first discussion on the *locus ex causis* (§ 22), Cicero gives an example of an argument that can be found under this topic[24]. In the second discussion (§58-66), the notion of cause itself is examined. Cicero (§ 58) makes a distinction between the two main kinds of

---

[22] A.D.LEEMAN - A.C.BRAET, *Klassieke retorica: haar inhoud, functie en betekenis,* Groningen 1987, pp. 76-90, esp. pp. 81-83. Cicero (*Top.,* 21.82) and Quintilian (*Inst. Or.,* 3.5.10) do not mention the fourth *status* of *translatio*.

[23] The relevant sections are Cic., *Top.,* 4.22 and 14.58-17.66.

[24] Between the estates of A and B, there was a party wall and A had built a new wall, which touched the party wall at right angles and rested on arches. When B wanted to demolish the party wall, he gave guarantees that he would cover any damage he might cause. However, while demolishing the party wall, B did do damage, but the damage was caused by an arch. In this case, B would not be bound to cover the loss, for the damage was not caused by his building actions, but by the fact that the wall on the side of A could not stand without the support of the party wall. This argument is found under the *locus ex causis*.

causes: 1) those which inevitably produce an effect and 2) those without which the effect cannot be produced:

> *Causarum enim genera duo sunt; unum, quod vi sua id quod sub eam vim subiectum est certe efficit, ut: ignis accendit; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere, quod sine eo non possit effici.*
>
> In fact, there are two kinds of causes: one which certainly effects by its own force what is subjected to this force, for example: fire burns. The other which does not have the nature of producing an effect but without which an effect cannot be produced, for example if someone wanted to call bronze the cause of a statue, because it cannot be produced without it.

In this connection, the second group of causes *sine quo effici non possit* is relevant; some of them are passive, while others provide a certain preliminary to the effect and carry with them certain factors which are helpful, but not necessary (§ 59):

> *Huius generis causarum, sine quo non efficitur, alia sunt quieta, nihil agentia, stolida quodam modo, ut locus, tempus, materia, ferramenta, et cetera generis eiusdem*[25]*. …*
>
> In this class of causes without which something is not produced, some are quiet, passive, and in some way inert, such as place, time, material, iron tools and other things of that kind. …

In § 60-61 Cicero cautions that an argument that is based on causes *sine quo effici non possit* is not irrefutable and in the subsequent paragraphs (§ 62-64) other distinctions between causes are made. Since these are of no relevance here, I will refrain from discussing them.

Let us now compare the argument of the Sabinians, mentioned in the *Res Cottidianae,* with the *locus ex causis* mentioned by Cicero.

> Gai., D.41.1.7.7: *Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex*

[25] The second kind of causes *sine quo effici non possit* are those which provide a certain preliminary to the effect and carry with them certain factors which are helpful, but not necessary. Cicero gives the following example: a meeting was the cause of love and love of crime. Cicero also states that the Stoics wove their doctrine of Fate from this type of cause. This reference to the Stoa is only mentioned in passing and it applies only to the second kind of causes *sine quo effici non possit* and not to the first kind that is relevant to us.

eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: …

Cic., *Top*., 15.58: *Causarum enim genera duo sunt; unum, … ; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere*[26], *quod sine eo non possit effici.*

In my view, the similarity in the wording of Gai., D.41.1.7.7 and Cic., *Top*., 15.58 demonstrates incontestably that Sabinus made use of the *locus ex causis* to find an argument that would favour the owner of the grapes[27]. Cicero considered it useful to enumerate the various kinds of causes. The search for an argument could be guided by browsing through this list of types of causes. When Sabinus considered the first distinction between the two main kinds of causes, he probably acknowledged that the grapes were not a cause which inevitably effected the wine. However, the second kind of cause, *sine quo effici non possit*, was pertinent: without the grapes the wine could not be produced. In this category of causes a further distinction is made between causes that are passive and others that furnish a preparation for producing something (see *supra*: Cic., *Top*., 15.59). Sabinus regarded the material (*i.e.* the grapes) as a passive cause for the creation of the wine. This way of thinking is confirmed in Cic., *Top*., 15.59, where *materia* – together with place, time and iron tools – is mentioned as a passive cause without which no effect can be produced.

We can now reconstruct the argumentation which the owner of the grapes used in the *rei vindicatio*:

- Since nothing can be made without the material,

[26] The fact that the example of bronze as the cause of a statue, without which the statue could not be made, is found in the text of Paul (D.41.1.24) on the *media sententia* affirms the close link between the school-controversies and the topics.

[27] Although SCHERMAIER, *op. cit*., pp.232-233 noticed the similarity between the argument of the Sabinians and Cic., *Top*., 58, he disregards the fact that the Sabinians used the *Topica* in order to find arguments. According to this Romanist, "die Vorstellung, dass ohne Stoff nichts enstehen könne, is in dieser Form beispielhaft für ein Vulgärphilosophem. Schon in klassischen griechischen und auch in der zeitgenössischen römischen Philosophie ist sie als Teil der Prinzipienlehre Gemeingut verschiedenster Schulen und Richtungen und wurde wohl früh als allgemeiner naturwissenschaftlicher Grundsatz angesehen." In order to demonstrate that the idea "nothing can come into existence without material" was a widely accepted "Vulgärphilosophem", Schermaier refers to different sources, such as Cic., *Top*., 58; Ar., *Phys*., 190b 10-11; Sen., *Nat*., 2.3.1; Sen., *Epist*., 65.4.

- Ownership of a *nova species* (*e.g.* wine, oil or grain) is granted to the owner of the *materia* (*i.e.* grapes, olives or ears of corn),
- B is owner of the material,
- Thus: B is owner of the *nova species*.

b) The Proculian view

When the owner of the grapes claimed the wine from the maker, the latter turned to the jurist Nerva for advice: "I have created wine for myself with the grapes of somebody else without his consent and now he claims to be the owner of the wine. How can I defend myself?" Nerva answered that ownership of the wine had to be granted to the maker, *quia quod factum est, antea nullius fuerat*. While reconstructing how Nerva found this argument, we may assume that he also made use of the *status* doctrine which was current in his day.

Since we have already demonstrated that the *status* of the conflict about *specificatio* was that of *coniectura*, we can move on to the finding of arguments. Nerva may also have consulted Cicero's list of topics, which were particularly suitable for *coniectura*. As we have already stated, the list consisted of the *locus ex causis, ex effectis* and *ex coniunctis*[28]. By the latter, Cicero probably means the *locus ex adiunctis*[29]. These topics could guide Nerva to find an argument to support the claim of the maker. In my view, the Proculians found their argument under the *locus ex adiunctis*. Cicero himself does not give an example that fits the position of the Proculians. Quintilian, however, does[30].

Quintilian discusses the *locus ex consequentibus* together with the *locus ex adiunctis* in book V.10 on arguments after he had already

[28] Cic., *Top.,* 23.87.

[29] A few indications point in that direction:
Cicero has not included the *locus ex coniunctis* in his enumeration of topics. Therefore, it is likely that the term *"locus ex coniunctis"* refers to another topic which Cicero does mention in the first two parts of his *Topica*.
In Cic., *Top.,* 3.11, some manuscripts give *(loci) ex adiunctis*, others *(loci) ex coniunctis*. Apparently, the terms are interchangeable.
In Cic., *Top.,* 11.50, the *locus ex adiunctis* is explicitly said to be valuable in conjectural issues. So it is highly likely that the term *locus ex coniunctis* can be read as *locus ex adiunctis*.

[30] Quint., *Inst. Or.,* 5.10.74-75.

discussed a number of other topics or "places" of arguments. The relevant text is Quint., *Inst. Or.,* 5.10.74:

> *.... Ex consequentibus siue adiunctis: 'si est bonum iustitia, recte iudicandum': 'si malum perfidia, non est fallendum': idem retro. Nec sunt his dissimilia ideoque huic loco subicienda, cum et ipsa naturaliter congruant: 'quod quis non habuit, non perdidit': 'quem quis amat, sciens non laedit': 'quem quis heredem suum esse voluit, carum habuit, habet, habebit'. Sed cum sint indubitata, vim habent paene signorum inmutabilium.*
>
> "... From Consequences or Adjuncts: 'If justice is good, then we must judge rightly'; 'if dishonesty is bad, we must not deceive.' Likewise in reverse. Not dissimilar to these and therefore brought under this topic, because they themselves naturally belong to this group: 'What someone has never had, he has not lost'; 'Someone will not knowingly hurt a person whom he loves'; 'Someone who has wanted a person to be his heir, held him dear, holds him dear and will continue to hold him dear.' But since these are indubitable, they almost have the force of irrefutable Signs."

In this connection, only the expression *"quod quis non habuit, non perdidit"* is relevant. Let us now compare the information which Quintilian gives about the *locus ex consequentibus sive adiunctis* with the argument of the Proculians mentioned in the *Res Cottidianae* of Gaius.

> Gai., D.41.1.7.7:
> *Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. …*

It is clear that the formulation of Quintilian differs from to the argument of the Proculians. Although differently worded, both formulations seem to form part of the same reasoning. In order to demonstrate this, it may be useful to have another look at the *formula* of the *rei vindicatio*:

> *Si paret rem qua de agitur ex iure Quiritium Ai. Ai. esse neque ea res restituetur, quanti ea res erit, tantam pecuniam iudex Nm. Nm. Ao. Ao. condemnato, si non paret, absolvito.*

The thing at stake *(res qua de agitur)* was the wine and the owner of the grapes vindicated it, *quia sine materia nulla species fuerat*. By way of reply, Nerva used the same words as Quintilian did later

(*Inst. Or.,* 5.10.74): *"Quod quis non habuit, non perdidit"* or "What someone has never had, he has not lost". The plaintiff has never owned the wine and, as a consequence, he could not have lost it. According to Nerva, the owner of the grapes could not vindicate the ownership of the wine when he had never had it. Nerva has even refined and elaborated this argument: not only has the owner of the grapes never been owner of the wine, no one else has either. In other words, the wine (*i.e. quod factum est*) was a *res nullius* before it was occupied by the maker. This thought is formulated in the argument in Gai., D.41.1.7.7: *quia quod factum est, antea nullius fuerat*[31].

We can now reconstruct the argumentation of the maker in which he refutes the claim of the owner of the grapes, as follows[32]:

- Ownership of the wine cannot be vindicated by the owner of the grapes (B),
- *Quod quis non habuit, non perdidit,* in general, and *quia quod factum est, antea nullius fuerat*, in particular,
- B is the owner of the grapes,
- Thus: B cannot vindicate ownership of the wine.

5. Conclusion

How was it possible that the leaders of the two schools gave two different answers that were equally just? In this paper, I have tried to answer this question by connecting the arguments that the Sabinians and Proculians used to support their opinions with the topics that were described in the rhetorical literature of the time. Both jurists probably used the *status* doctrine which was current at the time to determine the *quaestio* and used the topics to find arguments in support of the person who consulted them. In the controversy about *specificatio*, Sabinus found the argument for the owner of the grapes *"quia sine materia nulla species effici possit"* under the *locus ex causis* and Nerva found the argument *"quia quod factum est, antea nullius*

[31] See also F.DE ZULUETA, *Commentary, op. cit.,* pp.78-79 and STEIN, *Naturalis ratio, op. cit.*, pp. 306-307 for a similar idea.

[32] After the maker refuted the claim of the owner of the grapes, he probably claimed the ownership of the wine himself as follows:

- Ownership of the wine falls to the first taker by way of *occupatio*,
- *Quia quod factum est, antea nullius fuerat*.
- The maker (A) is the first taker.
- Thus: A is the owner of the wine.

fuerat" under the *locus ex adiunctis*. The formulation of the arguments show that in trying to resolve legal problems the jurists applied methods which were characteristic for rhetoric to resolve legal problems. A reconstruction of their way of reasoning has made it clear that the problem in question did not allow for a fundamental difference of opinion.