

## Stases: A Classical Theory of Argument

Pseudo-Cicero, *Rhetorica ad Herennium*, 1.10.18-1.17.27 (translated by Caplan)

18

Now let me pass to Proof and Refutation. The entire hope of victory and entire method of persuasion rest on proof and refutation, for when we have submitted our arguments and destroyed those of the opposition, we have, of course, completely fulfilled the speaker's function.

We shall, then, be enabled to do both if we know the Type of Issue which the cause presents. Others make these Types of Issue four. My teacher thought that there were three, and intending thereby to subtract any of the types they had discovered, but to demonstrate that one type which they should have taught as single and uncompounded they had divided into with distinct and separate types. The Issue is determined by the joining of the primary plea of the defense with the charge of the plaintiff. The Types of Issue are then, as I have said above, three: Conjectural, Legal, and Juridical.

The Issue is Conjectural (στοχασμός) when the controversy concerns a question of fact, as follows: In the forest Ajax, after realizing what in his madness he had done, fell on his sword. Ulysses appears, perceives that Ajax is dead, draws the bloody weapon from corpse. Teucer appears, sees his brother dead, and his brother's enemy with bloody sword in hand. He accuses Ulysses of a capital crime. Here the truth is sought by conjecture. The controversy will concern the fact. And that is why the Issue in the cause is called Conjectural.

19

The Issue is Legal (στάσις νομική) when some controversy turns upon the letter of a text or arises from an implication therein. A Legal Issue is divided into six subtypes:

- Letter and Spirit
- Conflicting Laws
- Ambiguity
- Definition
- Transference
- and Reasoning from Analogy

A controversy from Letter and Spirit arises when the framer's intention appears to be at variance with the letter of the text, as follows: Suppose a law which decrees that whoever [sic] have abandoned their ship in a storm shall lose all rights of title, and that their ship, if saved, and cargo as well, belong to those who have remained on board. Terrified by the storm's violence, all deserted the ship and took to the boat — all except one sick man who, on account of his illness, could not leave the ship and escape. By sheer chance the ship was driven safely to harbour. The invalid has come into possession of the ship, and the former owner claims it. Here is a Legal Issue based on Letter and Spirit.

20

Controversy results from Conflicting Laws when one law orders or permits a deed while another forbids it, as follows: a law forbids one who has been convicted of extortion to speak before the Assembly. Another law commands the augur to designate in the Assembly the candidate for the place of a deceased augur. A certain augur convicted of extortion has designated the candidate for the place of a deceased augur. A penalty is demanded of him. Here is a Legal Issue established from Conflicting Laws.

A controversy is created by Ambiguity when a text presents two or more meanings, as follows: The father of a family, when making his son his heir, in his will bequeathed silver vessels to his wife: "Let my heir give my wife thirty pounds' weight of silver vessels, 'such as shall be selected'." After his death the widow asks for some precious vessels of magnificent relief-work. The son contends that he owes her thirty pounds' weight of vessels "such as shall be selected" *by him*. Here is a Legal Issue established from Ambiguity.

21

A cause rests on Definition when the name by which an act should be called is in controversy. The following is an example: When Lucius Saturninus was about to introduce the grain law concerning the five-sixths as, Quintus Caepio, who was city quaestor during that time, explained to the Senate that the treasury could not endure so great a largess. The Senate decreed that if Saturninus should propose that law before the people he would appear to be doing so against the common weal. Saturninus proceeded with his motion. His colleagues interposed a veto; nevertheless he brought the lot-urn down for the vote. Caepio, when he sees Saturninus presenting his motion against the public welfare despite his colleagues' veto, attacks him with the assistance of some Conservatives, destroys the bridges, throws down the ballot boxes, and blocks further action on the motion. Caepio is brought to trial for treason. The Issue is Legal, and is established from Definition, for we are defining the actual term when we investigate what constitute treason.

22

A controversy is based on Transference when the defendant maintains that there must be a postponement of time or a change of plaintiff or judges. This subtype of Issue the Greeks use in the proceedings before judges, we generally before the magistrate's tribunal. We do, however, make some use of it in judicial proceedings. For example, if some one is accused of embezzlement, alleged to have removed silver vessels belonging to the state from a private place, he can say, when he has defined theft and embezzlement, that in his case the action ought to be one for theft and not embezzlement. This subtype of Legal Issue rarely presents itself in judicial proceedings for the following reasons: in a private action there are counterpleas accepted by the praetor, and the plaintiff's fails unless he has had a cause of action; in public investigations the laws provide that, if it suits the defendant, a decision is first passed on whether the plaintiff is, or is not, permitted to make the charge.

23

The controversy is based on Analogy when a matter that arises for adjudication lacks a specifically applicable law, but an analogy is sought from other existing laws on the basis of a certain similarity to the matter in question. For example, a law reads: "If a man is raving mad, authority over his person and property shall belong to his agnates, or to the members of his gens." Another law reads: "He who has been convicted of murdering his parent shall be completely wrapped and bound in a leather sack and thrown into a running stream." Another law: "As the head of a family has directed regarding his household or his property, so shall the law hold good." Another law: "If the head of a family dies intestate, his household and property shall belong to his agnates, or to the members of his gens." Malleolus was convicted of matricide. Immediately after he had received sentence, his head was wrapped in a bag of wolf's hide, the "wooden shoes" were put upon his feet, and he was led away to prison. His defenders bring tablets into the jail, write his will in his presence, witnesses duly attending. The penalty is exacted of him. His testamentary heirs enter upon their inheritance. Malleolus' younger brother, who had been one of the accusers in his trial, claims his inheritance by the law of agnation. Here no one specific law is adduced, and yet many laws are adduced, which for the basis for a reasoning by analogy to prove that Malleolus had or had not the right to make a will. It is a Legal Issue established from Analogy.

I have explained the types of Legal Issue. Now let me discuss the Juridical Issue.

24

An Issue is Juridical (κατ' ἀντίθεσιν) when there is agreement on the act, but the right or wrong of the act is in question. Of this Issue there are two subtypes, one called Absolute, the other Assumptive.

It is an Absolute Issue when we contend that the act in and of itself, without our drawing on any extraneous considerations, was right. For example, a certain mime abused the poet Accius by name on the stage. Accius sues him on the ground of injuries. The player makes no defense except to maintain that it was permissible to name a person under whose name dramatic works were given to be performed on the stage. The Issue is Assumptive when the defense, in itself insufficient, is established by drawing on extraneous matter. The Assumptive subtypes are four:

- Acknowledgement of the Charge
- Rejection of the Responsibility
- Shifting of the Question of Guilt
- Comparison with the Alternative Course

The Acknowledgement is the defendant's plea for pardon. The Acknowledgement includes the Exculpation and the Plea for Mercy. The Exculpation is the defendant's denial that he acted with intent. Under Plea of Exculpation are three subheads: Ignorance, Accident, and Necessity; accident, as in the case of Caepio before the tribunes of the plebs on the loss of his army; ignorance, as in the case of the man who, before opening the tablets of the will by the terms of which his brother's slave had been manumitted, exacted punishment of the slave for having slain his master; necessity, as in the case of the soldier who overstayed his leave because the floods had blocked the roads. It is a Plea for Mercy when the defendant confesses the crime and premeditation,

yet begs for compassion. In the courts this is rarely practicable, except when we speak in defense of one whose good deeds are numerous and notable; for example, interposing as a commonplace in amplification: "Even if he had done this, it would still be appropriate to pardon him in view of his past services; but he does not at all beg for pardon." Such a cause, then, is not admissible in the courts, but is admissible before the Senate, or a general, or a council.

25

A cause rests on the Shifting of the Question of Guilt when we do not deny our act but plead that we were driven to it by the crimes of others, as in the case of Orestes when he defended himself by diverting the issue of guilt from himself to his mother.

A cause rests on the Rejection of the Responsibility when we repudiate, not the act charged, but the responsibility, and either transfer it to another person or attribute it to some circumstance. An example of the transference of responsibility to another person: if an accusation should be brought against the confessed slayer of Publius Sulpicius, and he should defend his act by invoking an order of the consuls, declaring that they not only commanded the act but also gave reason why it was lawful. An example of attribution to a circumstance: if a person should be forbidden by a plebiscite to do what a will has directed him to do.

A cause rests on Comparison with the Alternative Course when we declare that it was necessary for us to do one or the other of the two things, and that the one we did was the better. This cause is of the following sort: Gaius Popilius, hemmed in by the Gauls, and quite unable to escape, entered into a parley with the enemy's chiefs. He came away with consent to lead his army out on condition that he abandon his baggage. He considered it better to lose his baggage than his army. He led out his army and left the baggage behind. He is charged with treason.

I believe that I have made clear what the Types of Issue are and what are their subdivisions. Now I must illustrate the proper ways and means of treating these, first indicating what both sides in a cause ought to fix upon as the point to which the complete economy of the entire speech should be directed.

26

Immediately upon finding the Type of Issue, then, we must seek the Justifying Motive. It is this which determines the action and comprises the defense. Thus Orestes (for the sake of clarity, to adhere to this particular action) confesses that he slew his mother. Unless he had advanced a Justifying Motive for the act, he will have ruined his defense. He therefore advances one; were it not interposed, there would not even be an action. "For she," says he, "had slain my father." Thus, as I have shown, the Justifying Motive is what comprises the defense; without it not even the slightest doubt could exist which would delay his condemnation.

Upon finding the Motive advanced in Justification we must seek the Central Point of the Accusation, that is, that which comprises the accusation and is presented in opposition to the Justifying Motive of the defense which I have discussed above. This will be

established as follows: When Orestes has used the Justifying Motive: "I had the right to kill my mother, for she had slain my father," the prosecutor will use his Central Point: "Yes, but not by your hand ought she to have been killed or punished without a trial." From the Justifying Motive of the defense and the Central Point of the Accusation must arise the Question for Decision, which we call the Point to Adjudicate and the Greeks the *krinomenon*. That will be established from the meeting of the prosecutor's Central Point and the defendant's Justifying Motive, as follows: When Orestes says that he killed his mother to avenge his father, was it right for Clytemnestra to be slain by her son without a trial? This, then, is the proper method of finding the Point to Adjudicate. Once the Point to Adjudicate is found, the complete economy of the entire speech ought to be directed to it.

27

The Points to Adjudicate will be found in this way in all Types of Issue and their subdivisions, except the conjectural. Here the Justifying Motive for the act is not in question, for the act is denied, near is the Central Point of the Accusation sought, for no Justifying Motive has been advanced. Therefore the Point to Adjudicate is established from the Accusation and the Denial, as follows: Accusation: "You killed Ajax." Denial: "I did not." The Point to Adjudicate: Did he kill him? The complete economy of both speeches must, as I have said above, be directed to this Point to Adjudicate. If there are several Types of Issue or their subdivisions in one cause, there will also be several Points to Adjudicate, but all these, too, will be determined by a like method.

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Cicero, *De Inventione*, I.VIII-XIV (translated by Yonge)

### **Bold added**

VIII.

Every subject which contains in itself any controversy existing either in language or in disputation, contains a question either about a fact, or about a name, or about a class, or about an action. Therefore, that investigation out of which a cause arises we call a **stating of a case**. A stating of a case is the first conflict of causes arising from a repulse of an accusation; in this way. "You did so and so;"--"I did not do so;" --or, "it was lawful for me to do so." When there is a dispute as to the fact, since the cause is confirmed by conjectures, it is called a **conjectural statement**. But when it is a dispute as to a name, because the force of a name is to be defined by words, it is then styled a **definitive statement**. But when the thing which is sought to be ascertained is what is the character of the matter under consideration because it is a dispute about violence, and about the character of the affair; it is called a **general statement**. But when the cause depends on this circumstance, either that that man does not seem to plead who ought to plead, or that he does not plead with that man with whom he ought to plead, or that he does not plead before the proper people, at the proper time, in accordance with the proper law, urging the proper charge, and demanding the infliction

of the proper penalty, then it is called a **statement by way of demurrer**; because the arguing of the case appears to stand in need of a demurrer and also of some alteration.

And some one or other of these sorts of statement must of necessity be incidental to every cause. For if there be any one to which it is not incidental, in that there can be no dispute at all; on which account it has no right even to be considered a cause at all. And a dispute as to fact may be distributed over every sort of time. For as to what has been done, an inquiry can be instituted in this way--"whether Ulysses slew Ajax;" and as to what is being done, in this way--"whether the people of Tregellae are well affected towards the Roman people; "and as to what is going to happen, in this way--" if we leave Carthage uninjured, whether any inconvenience will accrue to the republic."

It is a **dispute about a name**, when parties are agreed as to the fact, and when the question is by what name that which has been done is to be designated. In which class of dispute it is inevitable on that account that there should be a dispute as to the name; not because the parties are not agreed about the fact, not because the fact is not notorious, but because that which has been done appears in a different light to different people, and on that account one calls it by one name and another by another. Wherefore, in disputes of this kind the matter must be defined by words, and described briefly; as, for instance, if any one has stolen any sacred vessel from a private place, whether he is to be considered a sacrilegious person, or a simple thief. For when that is inquired into, it is necessary to define both points--what is a thief, and what is a sacrilegious person,--and to show by one's own description that the matter which is under discussion ought to be called by a different name from that which the opposite party apply to it.

IX.

The **dispute about kind** is, when it is agreed both what has been done, and when there is no question as to the name by which it ought to be designated; and nevertheless there is a question of what importance the matter is, and of what sort it is, and altogether of what character it is; in this way,--whether it be just or unjust; whether it be useful or useless; and as to all other circumstances with reference to which there is any question what is the character of that which has been done, without there being any dispute as to its name. Hermagoras assigned four divisions to this sort of dispute:

- the deliberative
- the demonstrative
- the judicial
- and the one relating to facts

And, as it seems to us, this was no ordinary blunder of his, and one which it is incumbent on us to reprove; though we may do so briefly, lest, if we were to pass it over in silence, we might be thought to have had no good reason for abandoning his guidance; or if we were to dwell too long on this point, we might appear to have interposed a delay and an obstacle to the other precepts which we wish to lay down.

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XI.

This statement of the case then, which we call the general one, appears to us to have two divisions,--one **judicial** and one relating to **matters of fact**. The judicial one is that in which the nature of right and wrong, or the principles of reward and punishment, are inquired into. The one relating to matters of fact is that in which the thing taken into consideration is what is the law according to civil precedent, and according to equity; and that is the department in which lawyers are considered by us to be especially concerned.

And the judicial kind is itself also distributed under two divisions,--one **absolute**, and one which takes in something besides as an addition, and which may be called **assumptive**. The absolute division is that which of itself contains in itself an inquiry into right and wrong. The assumptive one is that which of itself supplies no firm ground for objection, but which takes to itself some topics for defense derived from extraneous circumstances. And its divisions are four, --**concession, removal of the accusation from oneself, a retorting of the accusation, and comparison**.

**Concession** when the person on his trial does not defend the deed that has been done, but entreats to be pardoned for it: and this again is divided into two parts,--purgation and deprecation. Purgation is when the fact is admitted, but when the guilt of the fact is sought to be done away. And this may be on three grounds,--of ignorance, of accident, or of necessity. Deprecation is when the person on his trial confesses that he has done wrong, and that he has done wrong on purpose, and nevertheless entreats to be pardoned. But this kind of address can be used but very rarely.

**Removal of the accusation from oneself** is when the person on his trial endeavors by force of argument and by influence to remove the charge which is brought against him from himself to another, so that it may not fix him himself with any guilt at all. And that can be done in two ways,--if either the cause of the deed, or the deed itself, is attributed to another. The cause is attributed to another when it is said that the deed was done in consequence of the power and influence of another; but the deed itself is attributed to another when it is said that another either might have done it, or ought to have done it.

**The retorting of an accusation** takes place when what is done is said to have been lawfully done because another had previously provoked the doer wrongfully.

**Comparison** is, when it is argued that some other action has been a right or an advantageous one, and then it is contended that this deed which is now impeached was committed in order to facilitate the accomplishment of that useful action.

In the fourth kind of statement of a case, which we call the one which assumes the character of a demurrer, that sort of statement contains a dispute, in which an inquiry is opened who ought to be the accuser or pleader, or against whom, or in what manner, or before whom, or under what law, or at what time the accusation ought to be brought forward; or when something is urged generally tending to alter the nature of, or to invalidate the whole accusation. Of this kind of statement of a case Hermagoras is

considered the inventor: not that many of the ancient orators have not frequently employed it, but because former writers on the subject have not taken any notice of it, and have not entered it among the number of statements of cases. But since it has been thus invented by Hermagoras, many people have found fault with it, whom we considered not so much to be deceived by ignorance (for indeed the matter is plain enough) as to be hindered from admitting the truth by some envy or fondness for detraction.

## XII.

We have now then mentioned the different kinds of statements of cases, and their several divisions. But we think that we shall be able more conveniently to give instances of each kind, when we are furnishing a store of arguments for each kind. For so the system of arguing will be more clear, when it can be at once applied both to the general classification and to the particular instance.

When the statement of the case is once ascertained, then it is proper at once to consider whether the argument be a **simple** or a **complex one**; and if it be a complex one, whether it is made up of many subjects of inquiry, or of some comparison. That is a simple statement which contains in itself one plain question, in this way:--"Shall we declare war against the Corinthians, or not?" That is a complex statement consisting of several questions in which many inquiries are made, in this way:--"Whether Carthage shall be destroyed, or whether it shall be restored to the Carthaginians, or whether a colony shall be led thither." Comparison is a statement in which inquiry is raised in the way of contest, which course is more preferable, or which is the most preferable course of all, in this way:--"Whether we had better send an army into Macedonia against Philip, to serve as an assistance to our allies; or whether we had better retain it in Italy, in order that we may have as numerous forces as possible to oppose to Hannibal." In the next place, we must consider whether the dispute turns on general reasoning, or on written documents; for a controversy with respect to written documents, is one which arises out of the nature of the writing.

## XIII.

And of that there are five kinds which have been separated from statements of cases. For when the language of the writing appears to be at variance with the intention of the writer, then two laws or more seem to differ from one another, and then, too, that which has been written appears to signify two things or more. Then also, from that which is written, something else appears to be discovered also, which is not written; and also the effect of the expressions used is inquired into, as if it were in the definitive statement of the case, in which it has been placed. Wherefore, the first kind is that concerning the written document and the intention of it; the second arises from the laws which are contrary to one another; the third is ambiguous; the fourth is argumentative; the fifth we call definitive.

But reason applies when the whole of the inquiry does not turn on the writing, but on some arguing concerning the writing. But, then, when the kind of argument has been duly considered, and when the statement of the case has been fully understood; when you have become aware whether it is simple or complex, and when you have ascertained

whether the question turns on the letter of the writing or on general reasoning; then it is necessary to see what is the question, what is the reasoning, what is the system of examining into the excuses alleged, what means there are of establishing one's own allegations; and all these topics must be derived from the original statement of the case. What I call "the question" is the dispute which arises from the conflict of the two statements in this way. "You have not done this lawfully;" "I have done it lawfully." And this is the conflict of arguments, and on this the statement of the case hinges. It arises, therefore, from that kind of dispute which we call "the question," in this way:--" Whether he did so and so lawfully." The reasoning is that which embraces the whole cause; and if that be taken away, then there is no dispute remaining behind in the cause. In this way, in order that for the sake of explaining myself more clearly, I may content myself with an easy and often quoted instance. If Orestes be accused of matricide, unless he says this, "I did it rightfully, for she had murdered my father," he has no defence at all. And if his defence be taken away, then all dispute is taken away also. The principle of his argument then is that she murdered Agamemnon. The examination of this defence is then a dispute which arises out of the attempts to invalidate or to establish this argument. For the argument itself may be considered sufficiently explained, since we dwelt upon it a little while ago. "For she," says he, "had murdered my father." "But," says the adversary, "for all that it was not right for your mother to be put to death by you who were her son; for her act might have been punished without your being guilty of wickedness."

#### XIV.

From this mode of bringing forward evidence, arises that last kind of dispute which we call the judication, or examination of the excuses alleged. And that is of this kind: whether it was right that his mother should be put to death by Orestes, because she had put to death Orestes's father?

Now proof by testimony is the firmest sort of reasoning that can be used by an advocate in defence, and it is also the best adapted for the examination of any excuse which may be alleged. For instance, if Orestes were inclined to say that the disposition of his mother had been such towards his father, towards himself and his sisters, towards the kingdom, and towards the reputation of his race and family, that her children were of all people in the world the most bound to inflict punishment upon her. And in all other statements of cases, examinations of excuses alleged are found to be carried on in this manner. But in a conjectural statement of a case, because there is no express evidence, for the fact is not admitted at all, the examination of the defence put forward cannot arise from the bringing forward of evidence. Wherefore, it is inevitable that in this case the question and the judication must be the same thing. As "it was done," "it was not done." The question is whether it was done.

But it must invariably happen that there will be the same number of questions, and arguments, and examinations, and evidences employed in a cause, as there are statements of the case or divisions of such statements. When all these things are found in a cause, then at length each separate division of the whole cause must be considered. For it does not seem that those points are necessarily to be first noticed, which have been the first stated; because you must often deduce those arguments which are stated

first, at least if you wish them to be exceedingly coherent with one another and to be consistent with the cause, from those arguments which are to be stated subsequently. Wherefore, when the examination of the excuses alleged, and all those arguments which require to be found out for the purpose of such examination have been diligently found out by the rules of art, and handled with due care and deliberation, then at length we may proceed to arrange the remaining portions of our speech. And these portions appear to us to be in all six; the exordium, the relation of the fact, the division of the different circumstances and topics, the bringing forward of evidence, the finding fault with the action which has been done, and the peroration.

At present, since the exordium ought to be the main thing of all, we too will first of all give some precepts to lead to a system of opening a case properly.