The fine flourish of recent contributions by leading Latinists to the textual improvement of the *controversiae* greatly enhances their usefulness as tools for others to use; only in one respect does too eager (as I believe) acquiescence in a view that came into fashion after the second World War create a risk of sending the unwary barking up a wrong tree.

The issue I am concerned with is familiar: what conclusions can be drawn from the *controversiae* about classical Roman law and their relationship to it? That question is part of a whole bunch of questions, such as how far the *controversiae* set out to be a teaching aid to actual court practice and what relation in general forensic advocacy had to jurisprudence. For, it will be recalled, there were two Roman legal professions, not just one: the advocates and the jurists. Each had its own principles and *esprit de corps*, and they glared at each other, mostly, across a great gulf. Yet in the practice of the law they both played essential parts (a fact that tends to be forgotten by Roman lawyers nowadays, to whom Roman law is what stands in the Digest and the Code, not what is in Cicero — much — or the *controversiae* — at all).

Orthodoxy, down to, say, the end of the ’30s, was to hold that the *controversiae* were, in theme, pure fantasy and in treatment quite un-juristic, and hence had nothing at all to contribute to the understanding of Roman law. The legal principles to which they appealed, especially the ‘laws’ with which each one was prefaced and on which their themes were based, smacked more of Greek legal culture than of Roman. That view of the irrelevance of the *controversiae* to actual Roman life and law rested not least upon the famous texts from antiquity itself which castigated them as

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2. *Emblematic the remark of Aquilius Gallus,* ‘*nihil hoc ad ius: ad Ciceronem*. ’ *Cic. Top.* 51. It is not often enough remembered that Cicero is quoting that against himself.
The Controversiae

absurd\(^3\) and gleefully retailed yarns about the ineptitude of their most famous practitioners in the hurly-burly of the real courts.\(^4\) And the connection of the whole artificial business with Greek at least as much as Roman culture has been recently given further exemplification in the marvellous chapter ‘Sophistopolis’ in Russell’s book about the parallel Greek declamatory tradition.\(^5\)

Justifications can be, and often have been, given\(^6\) for the artificiality of the controversiae (for all that the ancient critics of the system would have none of them): students were given stock themes and never-never-land laws to argue on so as not to bog them down in questions of fact or authenticity irrelevant to the training in technique. Not even Quintilian, in his sensible remarks on it all, takes quite this point, but it is entirely valid on a fair estimate.

However, a new trend set in some fifty years ago. It began, I think,\(^7\) with Lanfranchi’s Il diritto nei retori romani of 1938, the date of which gives the clue to why we only find it beginning to influence English-speaking scholars after the war. It was then picked up by Parks in the second half of his The Roman Rhetorical Schools as a Preparation for the Courts (1945),\(^8\) and by Bonner in Roman Declamation in the Late Republic and Early Empire (1949), still often quoted on this subject.\(^9\) Whitehorn in 1969, reviewing work on the Elder Seneca, passed on the torch with some references to other studies reinforcing the new trend;\(^10\) and most recently it has had an impact on the scholars who have been devoting themselves to the text of the controversiae.\(^11\) The desire to contribute to the halting and reversing of this trend is the efficient, as the wish to honour Godfrey is the final, cause of the present paper.

\(^3\) Petron. Satyr. 1–2; Sen. Contr. III Praef. 13 and IX Praef.; Dial. de Oratoribus 31 and 35. We are not concerned here with the ancient and modern theories of the decline of oratory, on which Heldmann, Antike Theorien ... (1982) may be consulted.

\(^4\) Sen. Contr. VII Praef. 6–7; IX Praef. 3; cf. Cic. de or. I, 166ff., the whole speech of Crassus, and the reply of Antonius, 216–7: the ‘real’ practitioners were sometimes inept, too.

\(^5\) Note, however (p.3), ‘Most of our Greek evidence is indeed much later than Seneca’.

\(^6\) See now, for all, Winterbottom’s Minor Declamations, Introd. xvii–xviii.

\(^7\) I don’t mean that nobody had ever opined anything of the sort before.

\(^8\) The first half of that book is excellent and important.

\(^9\) He was on the same tack nearly thirty years later, in Education in Ancient Rome (1977), Ch. XXI.


\(^11\) See, e.g., the reference to Bonner’s ‘important study’ in Winterbottom’s Introduction to Vol. I of the Loeb Elder Seneca, p.xiii.
Of what, then, does it consist? It asserts that the *controversiae* are not as remote from the actualities of Roman substantive law and procedure as has hitherto, in antiquity and subsequently, been supposed.\(^{12}\) Correct Roman legal terminology crops up in them from time to time: pirates, kidnapping and the rest of the paraphernalia of Sophistopolis were not unknown in the Roman age; some of the ‘laws’ on which the themes of the *controversiae* are based were, if not actually Roman statutes or edicts, at any rate more or less like principles that we can glimpse being stated by the jurists or observe in the practice of the Roman courts; provincial practice was not always on all fours with the rules as stated by the metropolitan jurists. On such arguments, of *controversia* after *controversia* we are nowadays told that it has such-and-such a feature ‘not altogether unlike’ the Roman legal rule of so-and-so, and are offered quasi-parallels from the Digest or the Code.

My contention is that *none of that will do*, for several reasons. The first is that what I have called the new trend had its origin in another new trend that was for a time high fashion amongst modern Roman lawyers. That one began with the paper of Stroux ‘Summum ius summa iniuria’ (1926),\(^ {13}\) under the influence of which the continental Roman lawyers took to claiming that rhetoric had a massive influence on Roman law: *aequitas*, especially, became all the rage, and that was supposed to have originated as a topic of rhetoric, and *Statuslehre* began to be detected behind every jurisprudential bush. It was under the influence of that Strouxian euphoria about rhetoric in the law that the philologists were induced to find law in the rhetoric. But the tide of Strouxianism has receded,\(^ {14}\) leaving the belief in ‘law in the rhetoric’ gasping on the shore.

That is by no means the only reason for finding flawed the case for authentic Roman law in the *controversiae*. The identification of correct legal phrases would only be significant if they were used in equally correct and appropriate contexts; and the discovery of the odd alleged rule or principle that looks a bit like a known rule of Roman law is *not* good at all unless it forms part of an appropriate context in which it plays its full Roman part.\(^ {15}\) Bluntly: not a single one of all the *controversiae* could have come up in a real court of classical Roman law in all respects as it stands.

\(^{12}\) See, e.g., M. L. Clarke, *Rhetoric at Rome* (1953) 92: ‘... fairly closely related to contemporary Roman law’.

\(^{13}\) Repr. in *Römische Rechtswissenschaft und Rhetorik* (1949).

\(^{14}\) See, e.g., in Horak’s *Rationes Decidendi* I (1969), 74-75, the attack on what he regards as the shallow verbal battles of rhetoric compared with real *disputatio fori*.

\(^{15}\) And it’s no good if the parallels are to later Roman legal sources, since it now seems to be agreed that the *controversiae*, unlike the Greek declamations, are all contemporary with high classical jurisprudence.
The Controversiae

The search for nuggets of 'proper' Roman law in the *controversiae* has, in any case, dredged up mostly marginal items; the proper comparison is of whole range with whole range, and when that is done it is as apparent now as it always was how the overall tone and 'feel' of the rhetorical sources remains quite different from that of the juristic ones, even in the most imaginary cases put up in the Digest.16

And then in the end, if the *controversiae* were so much less remote from daily legal practice than used to be believed, why were the strictures of contemporaries so severe? Quintilian is the man to listen to, for the sake of his moderation and practical good sense. He gives, first, a realistic defence of current practice:17 *narratio*, *laus* and *vituperatio* are needed daily in the courts, and students must learn to handle them. Subjects, for sure, ought to be 'quam simillimae ueritati', but we must not keep the fantasy of the young on too tight a rein. In another passage18 he asserts there to be a reasonable degree of relationship between some topics 'in scholis' and some real legal rules and situations: between *abdicatio* in the *controversiae* and real-life disherison and *querela inofficiosi*, or *mala tractatio* in the *controversiae* and divorce and the *actio rei uxoriae*, and so on. (But, *nota bene*, he knows the difference: he is not claiming that the *controversiae* in these cases are quoting Roman law — exactly not.) Thirdly, in the course of his own *Institutes* he not infrequently takes examples from actual legal practice.19 Quintilian is, then, an apostle of the best rhetorical practice: the objections and jibes were elicited by the prevalence of shoddier standards.

For we must not be blind to the importance and utility of the rhetorical training, given the adversarial system of Roman law: let it be repeated that both professions, both modes of thinking and arguing, were structurally part of the legal system, and complementary. But that is no reason why we should mix them up; and the consequence for the present argument is that the search for Roman law in the rhetoric, as hitherto conducted, has not succeeded in getting to the real interface and relationship between them. How did they both contribute to the law? Have we really

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17 Quint. *Inst.* II.1,10-11 and II,10, esp. 4f. Not, as we noted, quite the justification given nowadays.

18 Ib. VII,4,11.

19 Mitteis offered a list in *Reichsrecht und Volksrecht* at p. 191, n.1, though with words of terrible scorn.
only got Cicero’s speeches and the *de oratore* to show us? Won’t the *controversiae* tell us anything?

I adumbrate (no more, here) a different strategy, namely, to take the tiny handful of *controversiae* where in my judgment most, or enough, of the matter and ‘feel’ correspond reasonably well to the matter and ‘feel’ of the juristic sources, and see whether anything useful emerges from examining them with that comparison in mind.\(^{20}\) I propose a principal list of fourteen items and a secondary list of a further six, and I list them with, in each case, an indication of their subject-matter in Roman law-ish terms.\(^{21}\)

### Principal list

<table>
<thead>
<tr>
<th>Sen.</th>
<th>1V,8</th>
<th>Claim for <em>opeiae</em></th>
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<tbody>
<tr>
<td></td>
<td>IX,3</td>
<td>Petition for return of exposed son</td>
</tr>
<tr>
<td>Maj.</td>
<td>XIII</td>
<td><em>Actio iniuriarum</em> for defamatory behaviour</td>
</tr>
<tr>
<td>Min.</td>
<td>308</td>
<td><em>Dannum</em> by poisoning</td>
</tr>
<tr>
<td></td>
<td>311</td>
<td>Whether <em>addictus</em> counts amongst <em>serui</em> in a will</td>
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<tr>
<td></td>
<td>318</td>
<td>Testament</td>
</tr>
<tr>
<td></td>
<td>325</td>
<td><em>Fideicommissum contra bonos mores</em></td>
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<td></td>
<td>341</td>
<td>Goods not declared for customs</td>
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<td></td>
<td>353</td>
<td>Evidence of slaves under torture</td>
</tr>
<tr>
<td></td>
<td>359</td>
<td>Customs duty</td>
</tr>
<tr>
<td></td>
<td>360</td>
<td>Priority of claims on return of <em>dos</em></td>
</tr>
<tr>
<td></td>
<td>364</td>
<td>Murder (cf. Sen. X,1 above)</td>
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<tr>
<td></td>
<td>388</td>
<td>Identity of exposed child (cf. Sen. IX,3 above)</td>
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</tbody>
</table>

### Secondary list

<table>
<thead>
<tr>
<th>Sen.</th>
<th>VI,4</th>
<th><em>Veneficium</em></th>
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</thead>
<tbody>
<tr>
<td>Min.</td>
<td>264</td>
<td>Inheritance</td>
</tr>
<tr>
<td></td>
<td>273</td>
<td>Action against a surety</td>
</tr>
<tr>
<td></td>
<td>312</td>
<td><em>Actio depositi</em> by an heir</td>
</tr>
<tr>
<td></td>
<td>332</td>
<td><em>Hereditatis petitio</em></td>
</tr>
<tr>
<td></td>
<td>336</td>
<td><em>Vindicatio</em> of a <em>hereditas</em></td>
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</table>

In this little list some general things are at once apparent. To begin with, these chosen items are not, except in degree of ‘actuality’, different from the ones not chosen, which shows that, from the standpoint of

\(^{20}\) Some marginally different choices might be made, and there is room for argument, but I do not think that matters.

rhetorical training, including training for court practice, it didn’t matter. The authentic and the inauthentic could serve the same end equally well, just as could the real and the imaginary cases in the juristic literature. There was nothing bogus, therefore, about the rhetorical training for the bar. And another thing to notice is that the chosen set — which is random in respect of this feature — includes subject-matter from all main branches of the law, civil, criminal and administrative, the last being represented by the two customs cases and the criminal law by Min. 364 on murder and Sen. VI.4 on *veneficium.*

Thirdly, it is best not to be put off by the way that in these chosen cases just as much as in the other *controversiae* an un-Roman ‘feel’ is created at the outset by their beginning with one or more alleged ‘laws’ (which are quite bogus even when they look vaguely reminiscent of actual Roman statutes). That is not the way the Roman jurists worked, because it is not the way classical Roman law worked; and it would, if taken at face value, give a quite wrong notion of the Roman ‘sources of law’. No: we must treat this feature as a convention of the genre and turn a blind eye to it, otherwise we should have in the *controversiae* no subject-matter for our enquiry at all.

What follows is the merest preliminary sounding, not covering even all the items in our minimal list.

Sen. IX.3, along with some others we shall come to, displays a feature of importance: in §§ 8-9 there is some real jurisprudential argument, attributed to Porcius Latro, ‘an in reuis aut necessitas sit’. Its importance lies in drawing our attention to the fact that it is *not* the case that in the two well-known parts into which Roman civil procedure was divided the part in *jure* was confined to law and the part *apud iudicem* to fact, nor that the jurists dealt exclusively with law and the advocates exclusively with fact, nor that advocates only appeared in the stage *apud iudicem.* A judge or jury in Roman law judged mixed law and fact, and the advocates were expected to engage effectively in ‘proper’ legal argument as and when needed, and the rhetorical training, as we see, did not neglect it. The point emerges equally well from Sen. X.1, the famous theme about the poor man who believed the rich man had killed his father and followed him about, in mourning, to force him to take him into court, and succeeded, for the rich man sues him for *iniuria.* Themes similar to that are found in the Greek declamations, and the level of oratorical argument in this *controversia* is low; but at § 9 there is an effective discussion of the situation, again from

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22 As Winterbottom says, Cicero gets it right, *de or.* II, 99-100: what matters for the orator is to get to grips with the *causa* properly, whatever its nature.

23 The small representation of criminal law in the sample may be due to the generally more evidentiary and less jurisprudential character of the Roman criminal law.
Latro, from a jurisprudential standpoint. Min. 308, one of the best ones from our point of view, exhibits the same feature: the whole of its first declamatio, §§ 1–15, is a perfectly sensible bit of legal argument whether a prior will, superseded by a second, revives or not if the second will is invalidated: you can see what an advocate makes of an argument we usually associate with the jurists. The remainder of the controversia is then interesting to compare, because it moves from the uerba legis to the uoluntas, which we are always encouraged to think of as pure rhetors' ground. But wait: Min. 311 also has a good piece of legal discussion: and though the theme is, as usual, vitiated in a sense ab initio by being based on a 'rule' that was not really Roman, the declamatio takes correct Roman points, and the part about uoluntas is soberly and jurisprudentially presented.

With Maj. XIII we come to bees — not in the context of animus reuertendi, where students of Roman law usually meet them, but in a theme of damnnum iniuria datum by poisoning them. That theme is also handled in a juristic source, the Collatio, with references to the opinions of the jurists Proculus and Celsus, which gives us another good point of comparison. The juristic source lacks the absurd element in the alleged 'facts' that ground the controversia — that the rich man has poisoned the poor man's bees because they were feeding on his flowers ('decerpi ab apibus') (!), and it does orient its discussion towards animus reuertendi, by raising the question whether, if my bees have flown onto your land, they have not thereby become yours, so that I have no right to an action on the ground of their destruction. The controversia (in the mouth of the plaintiff, the owner of the destroyed bees) begins with a long narratio under strong Virgilian influence and a poor-versus-rich topos emphasising the destruction of a livelihood. Half way through § 7 the plaintiff says defendant has argued two quaestiones, whether the facts amount to damnnum and whether they amount to iniuria datum; and that is really more sensible and practical as legal argument than the very 'schooly' question of animus reuertendi, the latter only coming in § 9 in passing. The argumentation as to the defendant's two quaestiones is intelligently carried out, and, by a kind of 'double-take', in § 12 the plaintiff counters the absurd allegation that the bees did damage to the flowers. The last part of the speech reverts to the epideictic — a eulogy of bees — and emotional mode, which is fair enough!

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24 Argument from point of view of heres defending against claim for freedom by an addictus (for debt) of testator, who had manumitted 'omnes seruos'.

The *Controversiae*

It is just worth noting Min. 325, which does not lend itself particularly to juristic argument, for its interesting parenthesis at § 5, which I paraphrase:

'One of the disadvantages of *controversiae scholasticae* is that the speaker may ask a question but there is nobody to answer it [i.e. all questions are necessarily rhetorical, J. A. C.]. However, some difficulties of that kind sometimes occur in actual practice ('in forum descendunt'), so declamation should give practice even of the difficulties'. Here is the rhetorical training-system taking stock of itself. The mixture, too, of elements of competent legal analysis with others at which the jurists would have turned up their noses is further illustrated in this *controversia*, where the orator turns at the end to casting suspicions on the defendant, and in Min. 336 (quite a sober one except for the implausible *nouae tabulae* element in the theme), where competent legal argument gives way at the end to some heavy sober-stuff. But then, is not that the technique of which Cicero was the supreme master?

The theme of Min. 318 (heir required by the will to give a sum to 'whichever of two *liberti* he chooses': one *libertus* has sued for the legacy and been turned down, so the other sues, assuming he's bound to get it; heir defending) invites, and gets, some perfectly jurisprudential but nevertheless very sophistical argument: as we know still today, when barrister and jurist are one, not all 'tricky stuff' is alien to the law, and the jurists must not be allowed to pitch too high their claim to a monopoly of concern with the eternal verities.

Just two more observations fall to be made even in this briefest of surface-scratchings. Min. 359, very short, gives, in an amusing and highly plausible dispute about the powers and duties of customs officers, simply a list of the *quaestiones* involved in the situation (there being no dispute as to the facts). It is excellent, and illustrates both exactly what advocacy was for in the Roman courts, i.e. to make sure no stone of argument was left unturned, and also how the training for such advocacy, though it found usefulness and value in the fantastic and the operatic, did not disdain and was not incompetent to bring in the sober and the jurisprudential.26

Which leads us finally to Min. 264, as to which the first thing to be insisted on is that the claim, explicit in its 'heading' and implicit in its *lex* and its material discussion, to be based on genuine Roman law is false: there was *no* rule 'ne liceat mulieri nisi dimidiam partem bonorum dare', and the

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26 And the rhetors had their own laughs, as well they might, at the solemn coxcombries of some of the jurisprudential discussions: Gellius gets a rise out of the jurists at *NA* XVI, 10, 1–8: 'But, dear boy, isn't it your thing?'
real rules were different. That is why I have relegated it to the secondary list. But if you accept the *lex* for the sake of argument, the *declamatio* itself is a very competent example of truly legal advocacy, with, in §§ 7-8, a remarkable piece of abstract jurisprudential discussion of the perennial problems involved in invoking the intention of past legislators and the perennial dangers involved in purporting to interpret the wording of statutes.

And the conclusion to be drawn is, I think, that we can see again how it didn’t matter from the point of view of training in forensic argument whether the envisaged circumstances were plausible or fantastic.27 There is nothing the matter, in fact (indeed, it is well-nigh an impertinence to refer to that excellent piece in this way), with Winterbottom’s conclusion to his *Introduction to the Minor Declamations*,28 except for his overvaluation, as I believe, of the amount of ‘real law’ they contain. But from the handful of *controversiae* discussed above (rather for their argument than for their content) some small additional harvest can, I submit, be gained for the understanding of how the two Roman legal professions contributed jointly to the one system of Roman law.

*St John’s College, Cambridge*

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27 Whether we ought to go further and make a virtue of the improbabilities on the ground that it’s good to stretch the fantasy, as Quintilian seems to suggest, need not be tackled here.

28 Introd. xvi-xix.