MUNIFICENCE AND *MUNICIPIA*: BEQUESTS TO TOWNS IN CLASSICAL ROMAN LAW*

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I. INTRODUCTION

Extensive epigraphic evidence, juristic discussion, and mention in the letters of Pliny combine to show that testamentary munificence during the principate was a phenomenon of both social and economic importance.[1] Beyond a few introductory remarks, however, this paper is not concerned with the social background and functions of philanthropy.[2] Rather, how was munificence regulated? On what conditions for the use of their bequests would benefactors insist? And on what terms would towns accept them? These questions raise a whole complex of further issues such as the ability of benefactors (or their descendants) to enforce the conditions of an endowment, and the extent to which variation of the object of the endowment by the town might be possible. Previous discussions of towns and their capacities in relation to the law of succession have been concerned largely, if not exclusively, with issues of juristic personality. While some understanding of those issues is essential for any useful discussion, they are left aside here so far as possible.[3]

What prompted munificence? The Greek horoscopes are suggestive: 'then later, getting an inheritance and improving his means by shrewd enterprises, he became ambitious, dominant, munificent ... and he provided temples and public works, and gained perpetual remembrance'.[4] Munificence has a curious mixture of motives: religious sentiment, regard for fellow citizens, posthumous prestige.[5] To function it demands both prosperous times and dedication to (principally) local communities. Consequently it is in the Antonine period that Roman munificence peaks; by the last two decades of the second century munificence in Italy appears to be in decline.[6] But the history of the Antonine period is not simple: even while endowments were at their highest level, there was clear financial difficulty among some members of the curial classes. Differences of wealth were strikingly displayed among local aristocracies. Peter Brown emphasizes the social functions of munificence at this critical time: 'Faced by tensions that were clearly pulling the local community out of shape, urban élites all over the empire appear to have strenuously mobilized the resources of their traditional culture, their traditional religious life, and for those who had good reason to afford it, their traditional standards of generosity in order to maintain some sense of communal solidarity'.[7]

Posthumous glory and civic regard are two incentives to munificence. Power was a third. Promises (*pollicitationes*) of rendering a service to, or building a monument for, a city could be made by people seeking election to municipal office. It is *pollicitatio* that

* I should like to thank, but not to implicate in my views, Professors John Crook, Peter Stein and Averil Cameron, and Mr Michael Crawford who have read and commented on this paper; the Editorial Committee which has made some valuable suggestions, and John Vallance who has given a good deal of help and encouragement.

[1] All abbreviations are standard, as used by M. Kaser in *Das römische Privatrecht*. *D.* stands for *Digest*; *C.* for Justinian's *Code*; G. for Gaius' *Institutes*. Laum followed by a number refers to the section of Latin inscriptions in volume II of B. Laum, *Stiftungen in der griechischen und römischen Antike* (1914). The following works are cited by author and date only: R. P. Duncan-Jones, *The Economy of the Roman Empire* (2nd ed., 1982); G. Grosso, *I legati nel diritto romano* (2nd ed., 1962); S. di Salvo, *Il legato modale nel diritto romano* (1973); F. Messina Vitrano, 'La convertibilità del modo eretto su legato o fedecommesso nel diritto romano classico e giustinianeo', *Studi Riccobono* III (1936), 97–110; M. Amelotti, *Il testamento romano* (1966); A. D'Ors, *Epigrafía jurídica de la España romana* (1953).

[2] On the social role of munificence, see esp. Paul Veyne, *Le pain et le cirque* (1976), ch. 4 (on the Roman empire); J. Andreau, 'Fondations privées et rapports sociaux en Italie romaine (Ier-IIIe s. ap. J.-C.)', *Ktema* 2 (1977), 157–209; E. F. Bruck, *Über römisches Recht im Rahmen der Kulturgeschichte* (1954), ch. 2.

[3] P. W. Duff, *Personality in Roman Law* (1938), ch. 3, esp. 86 ff.; for more general discussion of these concepts, R. Feenstra, 'Le concept de fondation du droit romain classique jusqu' à nos jours: théorie et pratique', *RIDA* 3 (1956), 245–63; v. also L. Schnorr von Carolsfeld, *Geschichte der juristischen Person* I (1933, repr. with addenda, 1969).

[4] O. Neugebauer and H. B. van Hoesen, *Greek Horoscopes* (1959), 97.

[5] In Greek inscriptions *philotimia* is commonly used to express this: *TAM* II. 905; *IG* IX. 1107; *SIG* (3rd ed.) 850, etc.

[6] This is suggested by the evidence of inscriptions relating to foundations and *sportulae* collected by Duncan-Jones (1982). See also the excursus to Section II below.

[7] Peter Brown, *The Making of Late Antiquity* (1978), 36.

occupies the middle ground between the obligatory payment of a *summa honoraria* and the purely voluntary legacy to a city; not compulsory, it is at the same time more structured and more closely implicated in local politics than any legacy.[8] Pliny mentions promises of the sort, although it may be that the institution itself was formulated only in the late second century.[9] At any rate the promise could by then be sued on in *cognitio*.[10] *Pollicitatio* will not often be touched on here. Although there are many, and not insignificant, instances of *pollicitatio*, the vast mass of munificence was less formalized.[11] An awareness of *summae honorariae* and *pollicitatio*, of public burdens and duties (*munera*[12]) in general, is important for us here only in forming the background against which the level and significance of bequests to towns at different historical periods can be judged.

The range of objects bequeathed to municipalities was limited.[13] The main group was that of bequests of money or income-bearing land to support one of a number of purposes. Most common were games,[14] periodical *sportulae*,[15] *alimenta*,[16] dinners on specified annual occasions, usually the anniversary of the testator's birth.[17] Buildings to serve some public purpose also feature prominently.[18] The other main category is that of public services, such as paving roads[19] or providing free baths.[20] Money is occasionally left in order to relieve citizens of tax burdens.[21] It is very rare to find either money or land left without indication of a specific purpose.[22] Further, in none of the juristic texts where no purpose appears to be indicated is the emphasis of the text on the purpose of the endowment. All are concerned with the validity or value of the endowment rather than what the testator intended it for. We need not, therefore, take it that no intention was expressed. It would after all be odd, since posthumous remembrance or even commemoration was one of the incentives to munificence, to find that the benefactor had little interest in how his benefaction was used.

II. ON THE CAPACITY OF TOWNS TO TAKE LEGACIES: ULPIAN, *EPITOME* 24. 28

Evidence on the capacity of towns to take legacies is of greater complexity than is usually recognized.[23] A passage (24. 28) from the *Epitome* of Ulpian raises the main difficulties.[24]

[8] By this I do not mean, of course, that bequests operated entirely outside politics. Clearly it was of advantage for a local political career if one's father had been notably munificent. Nor were fathers with dynastic ambitions blind to this: see, e.g., Philostratus, *vitae* 548 (on Herodes Atticus).

[9] Pliny, *ep.* 1. 8. 10 and 5. 11. The predominance of references by Ulpian to 'imperator noster cum divo patre' in passages of *D.* 50, 12, *de pollicitationibus*, may suggest a very late second-century origin. Cf. Buckland, *Textbook* (3rd ed., 1963), 458. On *pollicitatio* in general see, e ➞ P. Garnsey, *JRS* 61 (1971), 116–29 with further references.

[10] Ulp., *D.* 39. 5. 19 *pr.*

[11] The relative proportions of legacies and *pollicitationes* in the total of munificence can be conveniently assessed using the lists in Duncan-Jones (1982).

[12] Lists of *munera* are given in *D.* 50. 4, *de muneribus et honoribus*. Duties such, for example, as maintenance of roads or buildings might be involved. On *excusatio* from *munera* ➞ F. Millar, *JRS* 73 (1983), 76–96.

[13] Objects changed over the years, particularly when *munera* came to occupy an important place in the local economy (which is not only in the late empire). For example, when the building of roads becomes a public *munus*, it is hardly likely that legacies for road building will continue to be left.

[14] *CIL* II. 4514; III. 6835; VIII. 1495; XIV. 350; Scaev., *D.* 33. 2. 17, *D.* 33. 1. 21. 3; Pap., *D.* 31. 77. 33; Marc., *D.* 33. 1. 24; Mod., *D.* 33. 1. 6, *D.* 33. 2. 16.

[15] *CIL* V. 1978; III. 6998; X. 5654, 5657, 5853; VIII. 1495; XIV. 2827; Marc., *D.* 33. 1. 23.

[16] *CIL* V. 5262; X. 5056, 6328; VIII. 1641; XIV. 350; XI. 5272; II. 1174; Scaev., *D.* 34. 1. 20. 1.

[17] *CIL* V. 4015, 5262; XII. 4393; XIV. 2793.

[18] *CIL* V. 5262; XI. 1602; XIII. 4132; XIV. 2934.

[19] *CIL* X. 3851; Cels., *D.* 31. 30.

[20] *CIL* V. 6522; IX. 5074, 5075; XIV. 2978, 2979; Scaev., *D.* 32. 35. 3.

[21] *CIL* II. 3664; V. 5128.

[22] A few cases where no object is specified are found: Scaev., *D.* 31. 88. 8; *D.* 32. 101 *pr.*; Ulp., *D.* 30. 71. 5. The juristic texts that provide for individuals to forfeit property to a municipality if they fail to comply with stated conditions also specify no object for the town's use of the property: Scaev., *D.* 32. 38. 5; *D.* 33. 2. 34 *pr.*; Pap., *D.* 36. 1. 59 *pr.* Epigraphic evidence involving forfeiture, however, (which is mostly from one town to another) normally envisages that the conditions of use are to attach to the beneficiary of the forfeit as well: *CIL* XI. 1436; XIV. 367; 431; 2795, etc.

[23] Pliny, *ep.* 5. 7. 1, 'nec heredem institui nec praecipere posse rem publicam constat', is not included here since clearly it is a case of incapacity to take *per praeceptionem* (which presupposed capacity to be instituted heir: G. 2. 218; cf. Voci, *DER* I (2nd. ed., 1967), 421 n. 83; and n. 33 below). Equally, it should not be taken as implying by omission that ordinary legacies were possible; that issue is not to the point in the letter.

[24] This work is cited henceforth as Ulp., *E.* The standard edition is by F. Schulz, *Die epitome Ulpiani des Codex Vaticanus Reginae 1128* (1926). The text is also in *FIRA* II. 261 ff.

civitatibus omnibus quae sub imperio populi Romani sunt legari potest: idque a divo Nerva introductum postea a senatu auctore Hadriano diligentius constitutum est.

There are three problems in this text. (1) The statement that Nerva introduced the right of all *civitates* in the Roman empire to take legacies is ambiguous. Did some towns already have a right to take, now extended to all? Or was the measure new to all? (2) What was 'diligentius constitutum' by Hadrian? Why did the matter need further attention? (3) Did all towns from Nerva's measure onwards have an absolute and unrestricted right to take legacies? So much for the problems. We may now cast around for possible solutions.

(1) First, the question of capacity before Nerva. It is the view of Mitteis that Roman (and perhaps also Latin) towns were already able to take legacies and that Nerva did no more than extend the right to take to peregrine communities.[25] This view is also followed by Voci.[26] In its support is cited Suetonius, *Tiberius* 31:

iterum censente [Tiberio] ut Trebianis legatam in opus novi theatri pecuniam ad munitionem viae transferre concederetur, optinere non potuit quin rata voluntas legatoris esset.

The case seems quite good: no difficulty is expressed about money being left to the town (probably a *municipium*[27]). On the other hand, we must ask why the matter is being discussed in the senate, and also bear in mind that we cannot necessarily rely on Suetonius for precise use of legal language: this could, therefore, be a *fideicommissum*.[28] The use of 'concederetur' to refer to the change in function does imply, however, that the object of the senate's deliberations has been the legitimacy of amending the function, as opposed to the validity of the legacy in the first place. The text, therefore, does appear to suggest that *municipia* had capacity to take legacies, although we cannot quite rule out the possibility that this is a special privilege. Equally, it is just possible that it is a case of a freedman leaving his estate to the town, his patron, a situation which was subject to special rules.[29]

Another text used by Mitteis to support his view that Roman towns could take 'von alters her' is an inscription from Atina,[30] which dates from the reign of Claudius or of Nero. It is plainly not a case of freedman and patron. The main part of the disposition reads: 'legavit ut liberis eorum | ex reditu, dum in aetate[m] | pervenirent, frumentu[m] et postea sesterti[um] | singula millia darentur'.[31]

A further case is cited by Voci:[32]

tunc tractatae Massiliensium preces probatumque P. Rutilii exemplum; namque eum legibus pulsum civem sibi Zmyrnaei addiderant. quo iure Vulcacius Moschus exul in Massiliensis receptus bona sua rei publicae eorum et patriae reliquerat (Tacitus, *Annals* 4. 43).

An exile is given permission in A.D. 25 to leave *bona sua* to Massilia. Presumably what is meant is the whole estate, rather than only a legacy. That fact, and the context

[25] Mitteis, *RP* (1908), 377.

[26] Voci, *DER* I. 421.

[27] See e.g., *Der kleine Pauly*, s.v. *Trebiae*.

[28] But for Suetonius as a precise user of technical terms see A. Wallace-Hadrill, *Suetonius* (1983), 20, etc. Yet the fact that Suetonius wrote in the time of Hadrian, when the first gradual steps towards the assimilation of legacies and *fideicommissa* were being taken, may make us wonder whether the difference would then have been regarded as very significant.

[29] Ulp., *E.* 22. 5; *D.* 38. 16. 3. 6; *D.* 40. 3. 1–2; *D.* 38. 3. 1. 1.

[30] *CIL* X. 5056 (= *FIRA* 3. 55c).

[31] The precise wording of the text ('legavit ut') is important here since the Roman jurists distinguished between conditional legacies and modal legacies (legacies *sub modo*). In modal legacies the beneficiary acquires the object legated (or a right to acquire it) immediately on the death of the testator, whereas in conditional legacies the object is acquired only once the condition has been satisfied (Kaser, *RP* I. 259 ff.; admittedly this statement applies strictly only to suspensive conditions, but in classical law resolutive conditions are rare for strict obligations). The beneficiary under a modal legacy is supposed to use it in the prescribed manner, but since ownership passes to him in any case there are difficulties in providing secure remedies. The point is discussed fully below.

[32] Voci, *DER* I. 421.

(discussion in the senate of the property of an exile) strongly suggest that this is a case of special favour.[33] It is as well not to draw general conclusions from it.

To this evidence cited by Mitteis and Voci more might be added. First, a text of Iavolenus (*D.* 35. 1. 39. 1, *lib. 1 ex post. Labeonis*).

> When it had been written in a will 'that something should be built in the forum' (*ut aliquid in foro fiat*) and it had not been specified in which forum, Labeo says that if the intention of the testator is not apparent then it should be built in the forum of the *municipium* in which the testator had his *domicilium*. I agree with this view.

Plainly the issue is an administrative rather than a private-law one. But the capacity of *municipia* to take bequests seems to be presumed; although the text is laconic, its position in the title *D.* 35. 1, *de condicionibus et demonstrationibus et causis et modis eorum, quae in testamento scribuntur* makes it extremely likely that it is a legacy *sub modo*.[34] Not many facts are given, so that we do not know the identity of the testator (a municipal freedman?) or whether a *fideicommissum* might be involved. But on the whole the case for the capacity of *municipia* seems good.

To this we can add a number of inscriptions, all from Italian towns of the status of at least *municipium,* some of them in fact *coloniae*.[35] Together they strengthen the impression that *municipia* had capacity to take *mortis causa* long before Nerva.

This evidence suggests the following: it was originally possible to leave legacies to *municipia* (both Trebiae and Atina were *municipia*) but not to peregrine towns. It was perhaps *fideicommissa* which were used to benefit peregrine communities, since they were almost entirely free until the reign of Vespasian. He, however, placed restrictions on leaving *fideicommissa* to peregrines [36] and so made doubtful the validity of leaving them to peregrine towns. (The heirs would no doubt have found a challenge to such a bequest easy to sustain.) What Nerva seems, then, to have done is to regularize the position by making it clear that dispositions in favour even of peregrine towns were valid.[37] But did he mean all peregrine towns?

(2) The second problem is what is meant by the reference to Hadrian and 'diligentius constitutum'. A text of Paul mentions a Hadrianic *senatusconsultum*:

> Omnibus civitatibus quae sub imperio populi Romani sunt restitui debere et posse hereditatem fideicommissam Apronianum senatus consultum iubet (Paul, *D.* 36. 1. 27).

The dating is not quite secure: 117 and 123 are the most likely candidates.[38] Voci suggests, comparing the wording of this text and Ulp., *E.* 24. 28 (which begins 'civitatibus omnibus quae sub imperio populi Romani sunt'), that this *SC Apronianum* is the measure referred to by the epitome's 'diligentius constitutum'.[39] That is possible. He suggests too

[33] Towns could not inherit, but for other exceptions to the rule see Mitteis, *RP*, 378 n. 12. It is as well to point out here that in Roman law there is a sharp distinction between inheritance and legacy and so also between relative capacities to acquire them: a legatee acquires a single object; an heir is a 'universal successor' who acquires not only the estate, but the duty to pay the legacies, and liability for debts of the estate. It was consequently necessary to circumscribe the right to be heir more than that to be legatee.

[34] cf. n. 31.

[35] *AE* 1926, 143 (Sinuessa); *CIL* x. 3851 (Capua, *colonia*); *CIL* xi. 720 (Bononia, imperial *colonia*); *CIL* xi. 5745 (Sentinum); *CIL* x. 1416 (Herculaneum). I am grateful to Michael Crawford for pointing out to me the evidence for ownership of land in Cisalpine Gaul by Italian communities (Arpinum and Atella, both *municipia*) under the Republic: Cicero, *ad fam.* 13. 11. 1; 13. 7. 1–3). As he suggests (*Coinage and Money under the Roman Republic* (1985), 340), this property was most likely acquired by bequest.

[36] *Gnomon of the Idios Logos* 18 (*FIRA* 1. 469 ff.). Admittedly, this refers only to *fideicommissa hereditatis*. But I think the argument in the text can still stand, since this must have introduced new difficulties.

[37] The evidence could perhaps be explained in another way: while it was not until Nerva possible to leave legacies to towns in the sense that an obligation to pay them thereby arose and that obligation became actionable, it could be argued that our pre-Nervan evidence reflects cases where legacies left were in fact paid by the heirs in spite of the absence of an obligation. (I owe this point to a discussion with Prof. Crook.) This is the sort of position envisaged in Pliny, *ep.* 5. 7. None the less, I am inclined, particularly on the basis of Iav., *D.* 35. 1. 39. 1, and on that of arguments produced from the statistical material used in the excursus to this section, to believe that given the extent of pre-Nervan munificence in Italy a legacy to a *municipium* must have been actionable before Nerva.

[38] If the *SC* is to be dated to A.D. 117, it is of course scarcely Hadrianic; although Trajan died in August of that year, Hadrian returned to Rome from the East only in 118.

[39] Voci, *DER* 1. 421 n. 85.

that the *SC Apronianum* is the measure (referred to in G. 2. 287) which deprived *incertae personae* of the power to take *fideicommissa,* but argues that an exception was made from this rule in favour of *municipia*.[40]

What are we to make of the expression 'restitui debere et posse'? It is perhaps useful to compare an earlier passage, part of a letter of Pliny to Trajan discussing the estate of Iulius Largus from Pontus:[41]

> In his will he asked me to accept his estate and then, after retaining 50,000 sesterces for myself, to make the rest over to the towns (*civitatibus*) of Heraclea and Tium on the understanding that it would be for me to decide whether public works should be undertaken which would be dedicated in your honour or five-yearly games established which would be known as the Trajanic games.

Pliny's concern appears to be which option to choose, not whether either is valid. Nor does the reply of Trajan make any reference to validity or invalidity; it too addresses (albeit unhelpfully) only the question how best to commemorate the testator. This being so, it is plain that at the highest level there was no objection to letting even peregrine towns obtain *fideicommissa hereditatis*. Presumably, then, the significance of Hadrian's *SC* was to allow towns for the first time to sue for them; until then they would have been dependent on the goodwill of the fiduciary. (All the same, Pliny would be likely to have laid himself open to charges of extortion at the hands of aggrieved provincials had he accepted the estate without carrying out the *fideicommissum*.)

With this in mind, it is worthwhile to return to *D.* 36. 1. 27 and the odd phrase 'restitui debere et posse': it is only the 'debere' that appears to be new. Yet if we recall the *Gnomon,* this seems curious, since there it is expressly stated that Vespasian confiscated *fideicommissa hereditatis* left to peregrines:[42]

> The divine Vespasian confiscated estates placed on trust (τὰς κατὰ πίστιν γεινομένας κληρονομίας) by Greeks to Romans or by Romans to Greeks. But those who admitted to these trusts retained half [of the estates].

Pliny does not appear to be operating under these rules. The most plausible solution to this difficulty is to suppose that towns were exempt from the provision introduced by Vespasian. On the other hand, the fact that it was left to Hadrian to introduce a *SC* on the matter suggests that until then towns would have had difficulties in suing for their *fideicommissa hereditatis*.

(3) Our last question on the text of Ulp., *E.* 24. 28 is whether all towns thereafter had unrestricted rights to take legacies. This is generally assumed unquestioningly. But there is reason to doubt it: an inscription from Thugga dedicated to Marcus Aurelius records his bestowal on the *pagus* of Thugga of the right to receive legacies.[43] This is described as a *caeleste beneficium*. Yet what call for *caelestia beneficia* if Nerva's law had settled the matter finally? The obvious answer to this is that *pagi* were not covered by Nerva's law.[44] But there is some oddity in this view: Thugga was a dual community of *civitas* and *pagus*; the *civitas* was the original unit, by whose side a *pagus* of immigrant Romans grew up.[45] Many large landowners, including Romans, lived in the *pagus*.[46] 'Der pagus ging an Ansehen der Stadt voran'.[47] Might we not then expect that it would have been the *pagus* rather than the *civitas* which was empowered to take legacies? Or at least that the discrepancy in their capacity *mortis causa* should not have persisted so long?

[40] The question whether towns were really regarded as *incertae personae* is in fact more doubtful than is usually assumed: the term is rarely found in that context. I hope to investigate this question at a later date.

[41] Pliny, *ep.* 10. 75. 2.

[42] *Gnomon* 18.

[43] *CIL* VIII. 26528b: '. . . M. Aurelio . . . pagus Thugg. caelesti beneficio eorum auctus iure capiendorum legatorum d.d.p.[p.]'.

[44] *RE* XVIII. 2 (esp. cols. 2327 ad fin.–2331), s.v. *pagus* (Kornemann). For other discussions of the question, L. A. Thompson, *Latomus* 24 (1965), 150–4; J. Gascou in *ANRW* 10. 2 (1982), 201, 207.

[45] Kornemann, ibid.

[46] *RE* Suppl. VII, cols. 1567–71, s.v. *Thugga* (Windberg).

[47] ibid.

We can safely assume that the *pagus* would not have applied for a *beneficium* had it been of the opinion that it could safely take without further ado.[48] Therefore the *pagus Thuggensis* had no *ius capiendi*; to find an important community without this right is striking.

A few other communities were also omitted from Nerva's law: Antoninus Pius allowed *vici* to take, while Ulpian speaks of a legacy to a *pars civitatis*.[49] But these measures are no more than elaborations of the position which had been established under Nerva.

EXCURSUS: SOME FIGURES

A study of inscriptions makes it possible to examine empirically the question of the capacity of towns to take *mortis causa*. Naturally it is not practicable to attempt to cover a large number of inscriptions comprehensively. The method selected has therefore been to analyse all those collected by R. P. Duncan-Jones in *The Economy of the Roman Empire*[2] (1982). His evidence is drawn from Africa and from Italy. Given the aim of his work—quantitative studies—there is plainly a bias in this collection towards inscriptions which include sums of money, but otherwise the collection appears to be representative. Duncan-Jones arranges his material by category of bequest (buildings, *sportulae*, etc). In this examination, those distinctions have been ignored, and an inscription making two types of disposition is treated as only one case. The result is to produce for analysis a total of 74 cases from Italy, of which 32 cannot be securely dated, and 41 cases from Africa, of which 12 cannot be securely dated.

There are several methodological problems. Firstly, a relatively high proportion of evidence (43·2 per cent for Italy; 29·3 per cent for Africa) is thus unavailable for the present purpose, which is to obtain some idea of the distribution of these inscriptions chronologically. An attempt to quantify can therefore be successful only within very rough limits. We have, however, no reason to suppose that there should, within the period examined, be an uneven distribution of the undated inscriptions: it is a question not of the survival rates of inscriptions, but of a particular part of their text. So it still seems worthwhile to try to obtain some idea of a pattern statistically.

Secondly, there is clearly a certain disjunction between legal theory and legal practice, and since we hope to use our evidence to reflect on law, not just upon practice, we must take this into account. For inscriptional evidence, however, this disjunction is likely to be mitigated by two factors. (1) Heirs might well be expected to discover with less than enthusiasm that a testator had left a sum in favour of a town, rather than leaving it to them. If towns had no capacity to take, then it is likely that relatively few bequests to them would succeed. The (probably) few philanthropic heirs who made over what they were asked to, in spite of the lack of a legal obligation, might be expected to make a virtue out of their public spirit (as Pliny does, *ep.* 5. 7) and to inscribe it in large letters. But this we do not find. (2) Inscriptions clearly only commemorate 'successful' bequests to towns. But since rates of success are likely to be low if there is no legal obligation, then if there is in any period a high rate of inscriptional commemoration, we may cautiously take it that towns were entitled to take *mortis causa*, and that an heir therefore had a legal obligation to pay a bequest.

Finally, there is a problem common to all use of epigraphic material, the difficulty of determining whether extant evidence is an accurate guide to the likely contents of that now lost. We are relatively fortunate in the period with which we are dealing: no civil wars caused substantial loss; none of the emperors who are of the greatest concern for present purposes underwent *damnatio memoriae*. While these circumstances seem favourable, caution is still required.

The tables demand some explanation. Column A and column H give the numbers of inscriptions making bequests to towns in each period. In both cases, evidence after A.D. 235 (the end of the reign of Severus Alexander) is omitted. The table for Italy is more

[48] On the mechanism of *beneficia* see F. Millar, *The Emperor in the Roman World* (1977), 420 ff. Cf. also R. Saller, *Personal Patronage under the early Empire* (1982), 41 ff.

[49] Gai., *D.* 30. 73. 1; Ulp., *D.* 30. 32. 2.

complicated owing to the difficulty of precise dating of some inscriptions. For example, only six inscriptions are without doubt from the period before the reign of Nerva (i.e. before A.D. 96), although a further eleven are from before A.D. 100 and may be from the period before his reign. But clearly it cannot be assumed that they belong on one side or the other. We might argue for a great expansion during his reign—but that would be to twist the epigraphic evidence to fit the mould of the legal. In the case of Africa, no inscriptions can be securely dated before A.D. 96, although there are two possible cases. The limitations of the evidence from both areas are therefore reflected in the design of the tables given below.

Columns B and I give the percentages of the evidence that fall within the stated periods, while columns C and J attempt to give a clearer idea of the rate of bequests to towns by expressing the total as an average per year.

The next three columns of each table provide exactly the same data, but for the total of all inscriptions from Italy and Africa. These figures are compiled and adapted from a table given in Appendix 11 to the book by Duncan-Jones referred to above. The point of this second set of figures is that it allows us to place the figures for bequests to towns in perspective against a general background of inscriptional commemoration. We can therefore judge whether the figures for bequests are unusually high or low.

TABLE 1. ITALY: DISTRIBUTION OF INSCRIPTIONAL EVIDENCE OF BEQUESTS TO TOWNS

	A	B	C	D	E	F
	Number	per cent	Average per year	Number	per cent	Average per year
pre-Nerva	6	14·3	—	416	44·3	—
pre-A.D. 100	11	26·2	—	—	—	—
Trajan	2	4·8	0·1	85	9·0	4·5
post-A.D. 100	4	9·5	—	—	—	—
Hadrian	1	2·4	0·05	78	8·3	3·7
A.D. 138–93	12	28·6	0·22	167	17·8	3·0
pre-A.D. 200	4	9·5	—	—	—	—
A.D. 193–235	2	4·8	0·05	194	20·7	4·6
Total	42	100	—	940	100	—

TABLE 2. AFRICA: DISTRIBUTION OF INSCRIPTIONAL EVIDENCE OF BEQUESTS TO TOWNS

	H	I	J	K	L	M
	Number	per cent	Average per year	Number	per cent	Average per year
pre-Hadrian	2	6·9	—	80	7·6	—
Hadrian	2	6·9	0·1	78	7·4	3·7
A.D. 135–80	9	31·0	0·2	257	24·5	6·3
A.D. 181–93	7	24·1	0·6	62	5·9	5·2
A.D. 193–235	9	31·0	0·2	571	54·5	13·6
Total	29	100	—	1,048	100	—

The most striking feature of the table for Italy is the high proportion of munificence before A.D. 100. Similar proportions are found in the evidence for bequests and in the rate of general commemoration. As was pointed out earlier, we cannot easily identify this as an increase in commemoration as a consequence of Nerva's law. Equally it is important to bear in mind the status of possible recipient towns in Italy: *civitas* was not likely to be the term applied to them. There is some difficulty in determining the precise proportions that should be allocated to the respective reigns of Trajan and of Hadrian, given that some of the evidence can only be dated 'post-A.D. 100'. None the less, it is clear that there is

relatively little from this period, and probable that the low point was reached in the reign of Hadrian. This must make us wonder about the effect of his 'constitution'. On the other hand, the peak of testamentary munificence falls in the reigns of Antoninus Pius and Marcus Aurelius, as we might have expected.

For Africa, the bulk of both types of evidence is found in the Severan period. This is unsurprising: munificence there was slower to develop, while the impact of an African emperor on the throne from A.D. 193 must have been quite considerable. Rates of both bequests to towns and commemoration generally are relatively depressed up to and including Hadrian; a sharp rise is clear in both figures from Antoninus Pius onwards. Clearly there was no rush to leave money to towns either after Nerva's disposition or after Hadrian's measure.

To conclude. The most interesting result from the epigraphic evidence relates to the question of the capacity of towns in Italy before A.D. 100. Just over 40 per cent of the Italian material comes from this period; in Africa, none can be securely dated before A.D. 100, and less than 7 per cent might possibly come from before that date. This fits well with our proposition on the differing capacities of towns at that time: since it was argued that *municipia* were already able to take, high figures in Italy are not surprising. On the other hand, in Africa not much evidence would be expected, since there was, for the ordinary *civitas*, no right to take. These figures, therefore, do a good deal to support the view that *municipia* had a formal right to take before Nerva. The alternative view, which regards legacies of that period as giving rise to no obligation and sees attested legacies, therefore, as cases in which a virtuous heir has performed in spite of the absence of an obligation, is in the face of such extensive evidence to be rejected.

Other conclusions are less far-reaching. While the low rate of bequests at the time of Hadrian is striking, it does not appear to be possible to relate it to any changes in the law. We must conclude that it reflects more general economic or social factors.

III. TERMS AND THEIR ACCEPTANCE

On what terms would a town accept a bequest? The first question is how the decisions for acceptance or rejection of a legacy were made. Most useful in this context is an inscription of A.D. 140 from Gabii, *CIL* XIV. 2795, in which money is offered to the *res publica* under a number of conditions, in particular the celebration of the birthday and memory of the donor's daughter. The manner of acceptance is indicated in these lines:

> It was unanimously resolved according to the above-cited motion that the money be accepted and paid out in perpetuity to celebrate the birthday and memory of Domitia the daughter of Corbulo and that from the income on 10,000 sesterces distributions should be made and a public dinner held . . .

A decree is promulgated, accepting the terms of the bequest. As we would expect, it appears to be normal for the decurions to discuss and, if appropriate, accept offers.[50] The various terms which might be imposed by the donors on their gifts will be considered below. Here we shall deal with a few points only.

A similar structure for acceptance emerges from a papyrus of the Severan period. In this case, however, a proposal has been made to the emperor, and acceptance is indicated by a rescript.[51] There are many examples of imperial involvement in endowments, which goes back to the early principate:[52] the subject is too extensive to discuss here. Equally, it seems that the bulk of imperial involvement was concerned with the publication and implementation of sanctions imposed by testators, rather than with the provision of new remedies.[53] We need not, therefore, diverge from our discussion of ordinary remedies.

[50] G. 2. 195.

[51] *P. Oxy.* IV. 705 of A.D. 202.

[52] The referral to Severus is therefore not to be explained as an exception due to his presence in Egypt: he had left the province by A.D. 202.

[53] For discussion of the imperial supervisory role over endowments, a question that is largely avoided here, see K. M. T. Atkinson in *RIDA* 1962, 261–89, esp.

It appears to have been normal to seek a guarantee (*cautio*[54]) that anything that had been paid in excess of the amount permitted by the Lex Falcidia would be returned. This emerges from a text of Paul:[55] 'cautiones ... quae interponi solent ut quod amplius cepissent municipes quam per legem Falcidiam licuisset redderent'. Contravention of terms would, therefore, result in the possibility of an action on the *cautio*. On the other hand, a text of Ulpian indicates that it is unlikely that the *cautio* would be secured;[56] instead, exceptionally, a praetorian stipulation without security (*repromissio*) was regarded as sufficient. The fact that it could be dispensed with in public affairs is to be taken as a decision of purely administrative convenience, prompted no doubt by the perception of the oddity of having human sureties guaranteeing the obligations of juristic persons.

This is the basic procedure for the acceptance of bequests. We shall now turn to a consideration of the terms on which towns would accept them. Several texts purport to give general guidelines for the content of acceptable bequests;[57] their emphasis is on the aesthetic or financial value provided for the town by the bequest. Ulpian and Paul express broadly similar views. Marcian's list is more problematic:[58]

> Si quid relictum sit civitatibus, omne valet sive in distributionem relinquatur sive in opus sive in alimenta vel in eruditionem puerorum sive quid aliud.

The generalization 'omne valet' is a little surprising. This text in particular is thought to have been 'generalizzato dai compilatori':[59] admittedly more or less all the elements specified are paralleled in the text of Paul; even 'eruditio puerorum' has its parallel in the juristic arguments on the question whether alimentary legacies included education.[60] But 'sive quid aliud' is a problem, in spite of its absence from the *Index interpolationum*. Is this list perhaps a summary of acceptable contents of legacies to towns which the compilers decided to copy no further? Its undiscriminating 'sive quid aliud' would be acceptable, however, in a period in which variation of endowments was easy: an inappropriate bequest would be no problem if it could be transformed without difficulty into something useful. For this reason, we must return to this text later, when dealing with the limitations on varying endowments.

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285 ff., who argues that it goes back to Augustus, using *CIL* III. 7124, an endowment of Vedius Pollio at Ephesus, and its parallel Greek text which states that the διάταξις was συνφυλαχθεῖσα by Augustus. I am not inclined, however, to follow her argument (287 ff.) that imperial involvement was brought about by fiscal interest, in the shape of fines payable to the fisc; it seems more probable that involvement was requested as an aid to securing endowments from misuse. J. H. Oliver, 'The Ruling Power', *TAPS* 43 (1953), 963 ff., discusses a procedure of registering endowments with provincial or imperial authorities which appears to be limited to Greek cities. Since the form taken is generally the prescription of a penalty for interference (often of twice the value of the endowment), this procedure forms an exception to the view expressed in the text that imperial involvement tended to confirm existing, rather than establish new, sanctions. P. Veyne, *Le Pain et le cirque* (1976), 731 n. 9, also mentions imperial protection of foundations: infringement would be an impiety towards the emperor. (He cites C. Dunant and J. Pouilloux, *Recherches sur l'histoire et les cultes de Thasos* (1954–7) II. 78. Unfortunately vol. II has not been accessible to me.)

[54] The term *cautio* denotes a contractual obligation assumed in order to guarantee performance of an act, whether already protected by law or (as here) not. The usual method was to use the standard verbal contract (*stipulatio*) and to take security that the act would be performed.

[55] Paul, *D.* 22. 6. 9. 5 (*lib. sing. de iuris et facti ignorantia*).

[56] Ulp., *D.* 36. 3. 6. 1 (*lib. 6 fideicommissorum*). In the text there is some oddity about 'intercedat' (Lenel, *Pal.* col. 925) but the substance seems acceptable. On *repromissio* in general, Kaser, *RZ*, 336.

[57] Paul, *D.* 30. 122 *pr.* (*lib. 3 regularum*), 'Towns can also be left by legacy objects which bring them esteem (*honos*) or embellishment (*ornatus*). Examples of embellishment are what has been left for the forum, theatre or stadium; of esteem, what has been left for games, hunting, drama, circus, for division among the citizens or for a dinner. Moreover money left for maintaining the infirm (whether old people or children) is said by jurists to contribute to the esteem of a town.'

Ulp., *D.* 30. 32. 2 (*lib. 20 ad Sabinum*), 'If something which contributes to the embellishment (*ornatus*) or profit (*compendium*) of a town has been left to a part of the town, then the legacy is certainly owed.'

[58] Marc., *D.* 30. 117 (*lib. 13 institutionum*). In the texts cited in the previous note, Ulpian's *ornatus* and *compendium* are matched by Paul's *honos* and *ornatus*. The fact that Marcian's list is rather different is not in itself problematic, since the Digest (in spite of Justinian's boast to the contrary: *Const. Tanta* 15) contains a mass of divergent and sometimes contradictory statements. My grounds for going on to argue against the genuineness of 'sive quid aliud' in the text of Marcian are therefore not belief in total consistency in the Digest but belief that, given certain basic facts about the law concerning variation of endowments, the position expressed by Marcian is unlikely to reflect classical law. The point recurs (see nn. 130, 131 and the text there): it is misguided to force fluid or tentative or particular texts into universal harmony.

[59] On interference with the texts, Voci, *DER* I. 424 n. 96; di Salvo (1973), 164 n. 225.

[60] R. Astolfi, *Studi sull'oggetto dei legati in diritto romano* III (1979), 104 ff.

In his collection of imperial constitutions, Papirius Iustus quotes a rescript of M. Aurelius and L. Verus which raises further terms relating to the acceptance of bequests by towns:

> The emperors Antoninus and Verus also established by rescript that conditions imposed on gifts made to a *res publica* are to be upheld only if this is in the public interest. But if they are harmful (*damnosae*) they are not to be observed. Consequently in a case in which the testator has left a certain sum by legacy but forbidden tax to be exacted from it the condition is not to be observed. Long-established exceptions are admissible.[61]

Both the language and the content of this rescript are rather peculiar. We have seen that the mechanism of acceptance of bequests was a vote by the council on whether to accept the legacy on the terms offered. But here it seems to be intended to accept any legacy and to ignore any conditions that do not appear to serve public utility.

It is hard to accept that this text reflects principles of classical Roman law. There are certainly classical instances of administrative decision-making without particular regard for the *voluntas testatoris*, but there is never any hint of a principle of systematic ignoring of conditions. In fact the existence of later, *ad hoc* rulings on various matters (such as using money for new buildings on the maintenance of old ones) suggests that there was no such principle. Although the mention of *utilitas publica* is unobjectionable, the draconian manner in which it is proposed to gratify it cannot be accepted as classical: the received form and content of the rescript are rather to be attributed to the compilers, and abbreviation has probably removed any original subtlety.

None the less it is interesting to consider the question of the *condicio damnosa* in the light of a late-second-century inscription from Barcino in Spain which offers the town a *spectaculum pugilum*:[62]

> . . . And I want these to be provided on condition that my freedmen and the freedmen of my freedmen and freedwomen who attain to the office of the sevirate should be exempt from all the duties (*munera*) associated with it. But if any of them is summoned to perform these duties then I demand that the 7,500 denarii be transferred to the *res publica* of Tarraco for giving there the same kind of games as detailed above.

We might well wonder whether this is a *condicio damnosa*. According to d'Ors, the *munus seviratus* amounted to 500 denarii. Here the town is only offered 7,500 denarii, and asked to excuse all freedmen of the testator plus their freedmen. How many were there? That is not stated, but it is interesting to note that if there were more than 15 the town would stand to make a loss from this bequest. It may strike us as less than generous. But the offer was evidently accepted, and the decurions decreed in what place the commemorative inscription might stand.[63]

Perhaps, rather than being a *condicio damnosa*, this negotiated exemption from the *munus seviratus* could be regarded as one of those *tolerabilia* which Papirius Iustus tells us had been approved by *vetus consuetudo*? Although he does not explain his terms, it sounds as if he is speaking of local, customary rulings. In that case it is not improbable that seeking exemption from the *munus seviratus* was an (honourable?) Barcelonan custom.

The general principle that seems to emerge from these texts is that public utility was the criterion for the acceptance of a bequest by a town. The consideration of what 'utilitatis publicae interest' is explicit in Pap. Iust., *D.* 50. 12. 13. 1. A further, and earlier, text that supports this view is provided by Marcellus:[64]

[61] Pap. Iust., *D.* 50. 12. 13. 1 (*lib. 2 de constitutionibus*). The language of the text is odd: it speaks first of *donationes*, then gives an example concerning legacy; gifts with *in* followed by the accusative are inelegant; the last sentence ('esse enim tolerabilia quae vetus consuetudo comprobat') is mysterious, its 'enim' particularly unusual (we might expect 'autem'). For views on interpolation: Beseler, *Beiträge* III (1913), 67; Albertario, *RIL* 60 (1927), 608; Longo, *Labeo* 18 (1972), 39 ff.

[62] *CIL* II. 4514. On this inscription see Amelotti (1966), 24, 132; d'Ors (1953), 420–2. I translate *dicta* here, following d'Ors. Hubner (editor in *CIL*) suggests *lecta*. The question at issue here is in any case not affected.

[63] By this I do not mean that acceptance necessarily involves a positive decision about economic viability. The point will be discussed below.

[64] Marcel., *D.* 34. 2. 6. 2 (*lib. sing. responsorum*).

> Lucius Titius wrote in his will 'I want and I entrust to my heir that he should build in my home town a public portico in which I want silver and marble images to be placed'. I ask whether the legacy is valid. Marcellus replied that it was valid and that the legacy of the building and of the objects which the testator wanted to be placed in it should be understood to be due to the town; for it could add some embellishment (*ornamentum*) to the town.

The last clause of this text, with its *enim*, suggests that Marcellus followed an interpretative principle of public utility in deciding the case. What we have to try and understand, however, is what question was being raised by the petitioner. In the time of Marcellus (who was a member of the *consilium* of Antoninus Pius, and then that of Marcus[65]), it seems most improbable that there would have been any doubt about the validity of a legacy to a town in principle. (And *a fortiori*, no problems with *fideicommissa* to towns.[66]) Yet terms might have been open to dispute. Here it is possible that the town—reluctant to have yet another portico—is attempting to have the legacy commuted for cash. Or it is possible that the heirs are attempting to avoid payment of the legacy. Given that the wording of the question is 'an legatum valeat', it seems preferable to take it that this is a case of a challenge by the heirs on the validity of the legacy, on the ground that it is not of an object proper for public acceptance.

It seems clear, at any rate, that no town would accept and undertake responsibility for a legacy unless it was of some public value (however defined). This, however, has been denied by Voci.[67] He cites the case in Scaev., *D.* 34. 1. 20. 1, in which land is left to a town and from its income *alimenta* are to be paid to the testator's freedmen, 'donde risulta che l'onore non deve necessariamente attenere a utilità pubblica'. Perhaps the maintenance of the testator's freedmen is not in the public interest (unless they qualify otherwise as *infirmae aetatis*). But it is not clear that the *alimenta* exhaust the entire content of the income from the lands. Clearly they do not once the relevant freedmen have died. This does not, therefore, appear to be a convincing counter-example.[68]

Considerations of the definition of public utility also emerge from a text of Paul, which provides a relatively comprehensive account of a bequest to the town of Cirta.[69] Here money for an aqueduct has been left to the town, but the heirs later realize that its cost (together perhaps with other legacies) is going to exceed three-quarters of the total estate and therefore fall under the Lex Falcidia. They attempt to reclaim some money, but are rebuffed by a rescript of Severus and Caracalla which describes the aqueduct as an 'opus quod totum alienae liberalitatis gloriam repraesentet'. This is an extraordinary description of an aqueduct, particularly in a part of the empire where it could well be thought to be of extreme utility: Numidia.[70] The impression is strong that this is a case of special pleading. The harshness of the language (the petitioners are described as *stulti*) also goes some way to confirming this. From the discussion above, it seems most improbable that a town would accept a legacy that it regarded as a piece of pure egotism; an awareness of the concept of public utility persisted. The impression must be that a decision of administrative convenience is being made, to prevent the town having to apply its own funds.

There are few cases in which local restrictions on the terms for accepting legacies emerge. One is presented by Modestinus,[71] who is asked for advice when a legacy has been left to a town in order to provide for a 'spectaculum ... quod illic celebrari non licet'. What the illicit spectacle was we shall never know. But the interest of the case for present purposes is that it demonstrates a bye-law: clearly it was this particular town (*illic*) which found the show unacceptable. This is a rare case in which a local competence is

[65] SHA, *Antoninus Pius* 12. 1; Marcel., *D.* 28. 4. 3; Kunkel, *Herkunft*, 213; *RE* IXa, col. 570 (Mayer-Maly).

[66] The mixed language of the text is notable: the wording is that of a *fideicommissum*, yet it is described by both petitioner and jurist as a legacy.

[67] Voci, *DER* I. 424 n. 96.

[68] The case of Pliny provides an interesting comparison (*CIL* v. 5262 = Laum, 85). Here the legacy to Comum is intended in the first instance to provide *alimenta* for Pliny's freedmen and subsequently to be spent on a dinner for *municipes*. Some similar arrangement could apply in Scaev., *D.* 34. 1. 20. 1, in which case Voci's argument would be even weaker.

[69] Paul, *D.* 22. 6. 9. 5.

[70] Water was after all a valuable commodity in those parts; valuable enough to make possible a *fideicommissum* of water: Ulp., *D.* 34. 1. 14. 3.

[71] Mod., *D.* 33. 2. 16 (*lib.* 9 *responsorum*).

demonstrated. It is perhaps also seen in *D.* 50. 12. 13. 1 where local custom appears to be relevant. But in most respects it is plain that these bequests were a matter for imperial competence. In all of the following sections reasons will emerge why this was so.

How carefully towns examined the terms of legacies before acceptance or rejection is hard to determine. Apart from the issue of public utility, which is relatively straightforward, there is the question of sufficiency of funds and also that of maintenance.

Whether funds were sufficient is a question that is now hard for us to assess. In many cases not much difficulty will have arisen. Since money was generally left for a specific purpose, such as putting up a statue, and since there were fairly clear ideas about the cost of statues of various materials, it will often have been clear whether a given bequest was of a realistic amount.[72] It is likely that the greater problems arose when it came to maintenance of monuments.

There was extraordinary concern in Rome about derelict, unfinished, and dilapidated buildings.[73] So it is important to consider whether bequests of buildings were liable to be rejected if provision for maintenance was not also offered. If *utilitas publica* is of concern, it is plain that expensive white elephants cannot be acceptable unless their fodder is also provided. Several texts provide evidence on this point; one of the more interesting is the case of a house in Prusa left to Claudius, which is mentioned in a letter of Pliny:[74]

> This is the state of the house: Claudius Polyaenus left it by legacy to the Emperor Claudius and ordered that a temple to the emperor should be built in the courtyard, and the remainder of the house leased. For a while the town received an income from the house but then, in part despoiled and in part neglected, the whole house and courtyard gradually fell down, and now practically nothing but the site is left.

Here it seems that a legacy of an amount for maintenance would have made all the difference; plainly the intended temple has lasted a matter of only fifty or sixty years. While the legacy is not to the city itself, the city is clearly involved, since it draws income in the form of rent from the unconsecrated part of the building. It may be that the rent was intended for maintenance, although this cannot be determined from the text.

A further case is provided by an inscription from Trier of A.D. 198 where L. Ammius Gamburio is the giver of a *proscenium cum tribunali* and in addition 50 denarii, from the interest on which *tutela prosceni* is to be provided, as well as annual games on the last day of April.[75] If, however, we calculate how much is provided for maintenance, which is the interest at 6 per cent on 50 denarii,[76] then we find it is only 12 sesterces (= 3 denarii) per annum. Most theatre managers would find this insufficient. The burden of maintenance would fall, therefore, on the town of Treveri.

Several inscriptions dealing with *tutela* are discussed in an article by Mrozek,[77] who argues that frequently the fund was intended to provide only for annual sacrifices, or perhaps also for the wages of a watchman. Certainly many of the sums left appear insufficient for substantial maintenance work.[78] Significant sums are found from time to time, but most often in the context of baths, where they are intended to cover heating costs.[79] Road upkeep is also sometimes favourably treated,[80] but the sums left for maintenance of buildings are frequently derisory: we are forced, therefore, to adopt a solution such as that argued for by Mrozek, in which case we must recognize that these funds have often nothing to do with maintaining the fabric of monuments.

[72] The figures in Duncan-Jones (1982) show that in spite of great fluctuation there were 'normal' cost levels for items.

[73] On dilapidated buildings: several *SCC* from the *SC Hosidianum* of A.D. 44 onwards affirm that buildings are not to be demolished; there is an exception from this in favour of a town in Ulp., *D.* 30. 41. 5. Other texts showing concern for the state and appearance of the city: Jul., *D.* 43. 8. 7; Ulp., *D.* 43. 8. 2. 17; *D.* 1. 16. 7. 1; SHA, *Hadrian* 18. For further details, B. Ward-Perkins, *From Classical Antiquity to the Middle Ages* (1984), 12 f.

[74] Pliny, *ep.* 10. 70. 2.

[75] *CIL* XIII. 4132 (= Laum, 96).

[76] The normal rate of interest on foundations (which usually had their funds invested in land) was 6 per cent: Duncan-Jones (1982), 133 ff., although large foundations with a capital over 100,000 sesterces may have had a rate closer to 5 per cent.

[77] S. Mrozek, 'Zur Frage der *tutela* in römischen Inschriften', *Acta antiqua Academiae Scientiarum Hungaricae* 16 (1968), 283–8.

[78] See costs, nos. 1143a–1160 in Duncan-Jones (1982).

[79] ibid., nos. 1143c and d.

[80] ibid., no. 1143a.

Examination of this material suggests that the acceptance or rejection of bequests was dictated by social rather than economic considerations. The question asked was 'Is this object appropriate?' rather than 'Is this object affordable?'. While there does not seem to be any infringement of the principle of public utility, there is no evidence of an economic approach to the question whether a town could afford to take responsibility for another building. 'Economic rationalism' is not to be expected in antiquity.[81] But the failure of municipal authorities to take into account the future expenses which new buildings necessarily entailed must have been one of the factors that led, from the time of Antoninus Pius, to the need for central authoritarian measures such as those on variation of endowments for building purposes.

IV. CONDITIONS AND ENFORCEMENT

Before we look at the methods which were used to safeguard legacies, it is as well to see what problems benefactors had to face. Town councils simply could not be relied on. This was nothing new, to judge from Cicero's comment:[82] 'mira erant in civitatibus ipsorum furta Graecorum quae magistratus sui fecerant'. Pliny too is open about his doubts and his reluctance to part with capital.[83] His remarks to a would-be benefactor are blunt: 'numeres rei publicae summam: verendum est ne dilabatur. des agros: ut publici neglegentur'. Pliny's doubts are serious enough to have led him to devise a 'safe' method of munificence towards Comum, which he goes on to describe in the same letter. He mancipated some land to the town and rented it back as *ager vectigalis*.[84] The method is able to overcome municipal mismanagement, and the rent paid, 30,000 sesterces, represents 6 per cent of the value of the alimentary endowment Pliny had promised, which is what the town would most likely have received had he set up an ordinary foundation. None the less, unless he takes a *stipulatio*,[85] Pliny can have no guarantee that his 30,000 will go to the purpose he intended. We shall return to this point later.

Yet it was not merely neglect that was a problem: the extravagance of local councils was also worrying for potential benefactors. From Trajan onwards *curatores reipublicae* were appointed in an attempt to impose restraint, while Pliny's mission to Bithynia was aimed principally at cutting waste.[86]

An obvious means of control was to prevent the council holding the capital itself. Possible methods would be usufruct and periodic payment; a third option—Pliny's recommendation—a form of perpetual rent charge on land. But it is surprising how little we hear about these. Periodic payments of the sort we find in the juristic texts were regarded as perpetual, precisely because of the permanence of the juristic person.[87] Yet they do not seem to have been very popular. Considerably more common are inscriptions which indicate that a sum of money (or, also quite frequently, some land) has been left to a town, and which then make provisions for the disposal of the income. This sort of disposition is characterized by an *ex reditu* clause,[88] which specifies the object on which income is to be spent. The presence of such a clause at once makes plain that the town has been given control of the capital, and is not simply paid an annual sum.

Usufruct seems *a priori* an excellent method for a nervous benefactor to retain control of a property while still giving a town the use of it. Under a usufruct of land the town would not acquire ownership (which would remain vested in the heirs of the testator), but

→ G. Mickwitz, 'Economic rationalism in Graeco-Roman agriculture', *English Historical Review* 52 (1937), 577–89.

[82] Cicero, *ad Att.* 6. 2. 5.

[83] Pliny, *ep.* 7. 18. 1.

[84] 7. 18. 2. Similar methods are found in *CIL* X. 5853 (Laum, 23) and *CIL* XI. 419 (Laum, 55).

[85] The *stipulatio* is the standard Roman verbal contract. Although formal, it is flexible in the sense that it can be used to encompass any kind of obligation. Here a *stipulatio poenae* would be a possibility: the contract would set a penalty to be paid by the town if it failed to perform its obligation (cf. Kaser, *RP* I. 519 ff.; R. Knütel, *Stipulatio poenae* (1976), 45 ff., etc.).

[86] On Pliny in Bithynia, A. N. Sherwin-White, *The Letters of Pliny: a historical and social commentary* (1966), 527; Duncan-Jones (1982), 304–5. For further examples of misuse of funds, mainly at Ephesus, → C. P. Jones, *JRS* 73 (1983), 116–25.

[87] Periodic payment: Marc., *D.* 33. 1. 23 (*divisiones* to decurions on testator's birthday); *D.* 33. 1. 24; Scaev., *D.* 33. 1. 20. 1; Paul, *D.* 35. 2. 3. 2; *FIRA* 3. 118 with Arangio Ruiz 383 n. 4 and Amelotti (1966), 24; di Salvo (1973), 162 n. 219.

[88] *Ex reditu* clauses: (e.g.) *CIL* X. 5809; XIV. 2795; II. 3167; X. 3851. Similarly, *ex usuris* clauses: III. 6998; V. 1978; X. 107; 5657.

would have the right to use the land and derive income from it. This would afford the benefactor more security.[89] Yet usufruct too appears to have been of limited significance compared with these *ex reditu* endowments. There are very few juristic cases in which a usufruct is left to a town;[90] there are, on the other hand, several texts in which general questions are treated, such as the length of time a usufruct to a town can last or the way in which it is to be valued. The matter is unlikely, therefore, to have been of no practical importance.[91] Yet it is obvious that it was not the preferred method. Nor was any method in which the benefactor retained control of the capital wide-spread. Instead, capital was regularly made over, and it was restriction in the form of conditions and sanctions which formed the staple security for uncertain testators.

How could a town be forced to comply with the terms on which it had accepted a bequest? The difficulty is that the form of bequests was regularly the legacy *sub modo*. In this type of legacy, as explained above,[92] ownership (or a right to acquire ownership) of the object legated passed to the beneficiary immediately on the death of the testator. It was not in suspense until a condition had been satisfied, as was the case in an ordinary conditional legacy. This has various significant consequences,[93] the most important of which is that reclaim of the legacy on the ground that the beneficiary had failed to satisfy the *modus* was impossible.[94] Enforcement too was generally not possible, although conceivable in a case of public interest; it would certainly operate *extra ordinem*.[95] The usual means of guaranteeing satisfaction of a *modus* was taking a *cautio* for its satisfaction.[96] The praetor generally made it possible for a *cautio* to be obtained. This he did either by refusing to give an action to claim the legacy to a person who would not give the *cautio* (*denegatio actionis*), or else by allowing the heir to plead in defence that the plaintiff, in trying to sue for the legacy without giving the *cautio*, was not acting in good faith (*exceptio doli*).[97] But plainly these were remedies of use only at the time when the initial claim was brought.[98]

Two texts of Scaevola provide the best opportunity for assessing the workings of legacies *sub modo* left to towns under the principate. It will be necessary to comment on these in some detail. Consequently both texts must be cited in full, and some legal technicality is unavoidable. The first is from book 22 of Scaevola's *digesta* (*D.* 33. 1. 21. 3).

> In his will Lucius Titius left a legacy of one hundred to his home town, Sebaste, so that from the interest games could be celebrated in alternate years under his name. He added 'but if the town does not wish to receive the legacy on the above condition, then I do not want my heirs to be under any obligation to it, but to have the money for themselves'. Later the provincial governor selected and assigned suitable debts of debtors to the estate to pay the legacy to the town. After this the town acquired money from some of these debtors. It was asked whether, if the town should later not observe the conditions in the will, the legacy should belong to the testator's sons and heirs. Scaevola replied that the town must be compelled to observe the testator's wishes, and that unless it did so the heirs must be given an equitable reclaim (*repetitio utilis*) of money paid over or re-assigned (*novatio*) to the town. As for debts which had neither been paid to the town nor re-assigned to it, the heirs must not be prevented from suing for them.

[89] On the other hand satisfactory treatment of property under a usufruct depended also on taking a *cautio* (see n. 54), here the *cautio usufructuaria*; and on problems with *cautiones* see below.

[90] There are examples of usufructs in the context of foundations, but not with towns as beneficiaries. For instance, Mod., *D.* 34. 1. 4; the inscription of Iunia Libertas (with F. de Visscher in *Studi Solazzi* (1948), 542–53).

[91] Gai., *D.* 7. 1. 56; *D.* 33. 2. 8; Pap., *D.* 31. 66. 7; Mod., *D.* 7. 4. 21; Macer, *D.* 35. 2. 68 *pr.*, all with P. G. Stein, 'Generations, lifespans and usufructs', *RIDA* (1962), 347 ff.

[92] Kaser, *RP* I. 259. See also n. 31.

[93] For example, the validity of the legacy was not at all affected by either initial or supervening impossibility of the *modus*: Voci, *DER* II. 620 ff.

[94] Mitteis, *RP*, 200.

[95] Mitteis, *RP*, 198; di Salvo (1973), 186.

[96] On *cautio* see n. 54.

[97] Kaser, *RP* I. 259; Grosso (1962), 469.

[98] The *cautio* would be more than an initial remedy if it were possible to obtain a *condictio incerti* for it. This is disputed (for references see 'Prohibitions and perpetuities' in *SZ* 102 (1985), 255 n. 121). In none of the texts under consideration, however, does there appear to be any hint of one. Texts such as Paul, *D.* 22. 6. 9. 5 seem to depend on the non-availability of a *condictio* in those circumstances. The most interesting text in this connection is Ulp., *D.* 35. 3. 3. 10 in which Pomponius' view that a *condictio* for a *cautio* is possible, in the form of a *condictio interponendae satisdationis gratia*, is approved by Ulpian. The remedy appears, therefore, to have been early known in this 'disguised' form in which clearly a set sum for *satisdatio* would be sought. On the other hand, *satisdatio* is not normal for public bequests (Ulp., *D.* 36. 3. 6. 1), so the *condictio* would have to be for the much less tangible *repromissio*. The question cannot be covered thoroughly here. I hope to deal with it subsequently.

Two options are mentioned. First, compulsion of the town to satisfy the *modus*.[99] Second, a possibility for the heirs to reclaim the money. The option of compulsion is removed if we follow Beseler's restoration, in which Scaevola's *responsum* reads 'respondit utili repetitione heredes adiuvandos'.[100] This is in strong contrast to the view of Pernice, who believes that the primary remedy here is 'auf Erfüllung des Modus' and that the *repetitio utilis* is subsidiary.[101]

Which view is more plausible? The questioners are interested in the chances of reclaiming the legacy, not in enforcing the *modus*. It is the clause quoted from the will ('quod si condicione . . . pecuniam') that raises the difficulty. While we have seen that there was generally no right to reclaim on failure to satisfy a *modus*, all the same the clause quoted might give some such right. Further, here there is no mention of a *cautio*. If one has not in fact been obtained, then it is too late:[102] we are told explicitly that this question arises *postea*.

To this we may add part of a well-known text of Pomponius, in book 8 of his commentary *ad Quintum Mucium* (*D.* 33. 1. 7). The context is a discussion of legacies *sub modo*:[103] 'ad auctoritatem scribentis hoc quoque pertinet, cum quis iussit in municipio imagines poni: nam si non honoris municipii gratia id fecisset sed sua, actio eo nomine nulli competit'. The second sentence is generally recognized as interpolated, together with the last sentence of the whole fragment, 'sed interventu iudicis haec omnia debent, si non ad turpem causam feruntur, ad effectum perduci'.[104] The motivation for the interpolation is clearly the first Novel of Justinian, of 535, which provided for heirs, fideicommissaries and legatees 'necessitatem habere quaecumque testator et honorans eos disposuerit ex omni modo complere' (1. 1. *pr.*). If, then, we turn to the classical part of Pomponius' text, it is notable that the view stated is that only a moral obligation for performance of the *modus* arises, in the absence, that is, of a co-heir to compel performance [105] and in the absence of *cautiones* for fulfilment.[106]

To return to Scaevola. These considerations suggest the view that it is the conditional revocation (*ademptio*[107]) of the legacy ('if the town does not wish to receive the legacy on the above condition, then . . .') that enables the heirs to sue for return in the event of non-compliance by the town. Otherwise there would normally be no right of reclaim. As for enforcement, the evidence we have just discussed makes it plain that that is something to be associated with Justinian. It remains possible to regard the words 'rem publicam voluntati testatoris parere compellendam' as genuine, and to believe therefore that this is a case of a remedy *extra ordinem*. But I should be more inclined to view the words as interpolated.

The second text is from book 3 of Scaevola's *responsa* (*D.* 33. 2. 17).

> A certain man left to a town a legacy of land from whose income he wanted annual games to be given. He added 'I request, decurions, that you should not put the money to another object (*alia species*) or to other uses'.[108] For four consecutive years the town did not hold the games. I ask whether the town should return to the heirs the income it received during those four years or whether it should use it for another object ('compensare in aliam speciem') under a legacy in the same will. Scaevola replied both that the fruits acquired when possession had been taken against the heirs' wishes should be returned and that the amount that had not been spent in accordance with the testator's will should be used for other things which were owed.

[99] 'Legavit uti' shows that it is a *modus*. The use of *condicio* in the text is untechnical: di Salvo (1973), 103 ff.

[100] Beseler, *Beiträge* IV (1920), 290.

[101] Pernice, *Labeo* III. 1, 47.

[102] But see n. 98.

[103] For further discussion, *SZ* 102 (1985), 252 ff.

[104] di Salvo (1973), 214 ff., 321 ff.; Pernice, *Labeo* III. 1, 39; cf. Mitteis, *RP*, 196 n. 5.

[105] As Pomponius says later in *D.* 33. 1. 7, enforcement by a co-heir would be achieved by an action for division of the estate (*iudicium familiae erciscundae*).

[106] See *SZ* 102 (1985), 254 ff.

[107] On conditional *ademptio*: Grosso (1962), 468; Pernice, 47. In containing this clause this text is clearly exceptional, presumably the reason the questioners quote it in the first place. But cf. *CIL* V. 5134 (Laum, 84).

[108] There appears to be a lacuna after this sentence, since facts are assumed in the *responsum* which are not stated in the *quaestio* (cf. Lenel, *Pal.* ad loc.). Mommsen suggests the addition of 'invitis heredibus praedia possedit et'.

There is some oddity here. After an explicit request not to use the funds for the provision of *alia species* it is curious to find the petitioner asking whether this is a possibility for compensation (even if the *alia species* is mentioned in the same will). Biondi therefore deletes all reference to this.[109]

The *responsum* is not altogether clear, since it states both that the fruits should be returned and that the money that was not spent in accordance with the testator's will should be compensated against other objects due. But these statements should not be regarded as two incompatible options for disposal of the same sum of money. The point is that there was a dispute over possession, and the fruits deriving from that disputed period are to be returned; subsequent fruits are to be used to compensate 'in alia quae deberentur'. The two proposed remedies therefore relate to two distinct situations; presumably this was recognized by Biondi, and led to his deletion of all reference to the dispute over possession as well.

From earlier arguments, we will not expect the heirs to be able to enforce the *modus*. In fact they do not try. Their concern here is simply to have the income from the land either returned to them, since it has not been used as requested in the *modus*, or else used for another purpose laid down by the testator in his will. Scaevola distinguishes between the fate of the fruits in the two ways outlined above. The main question raised by the text is whether the clause 'rogo ne in aliam speciem aut alios usus convertere velitis' has any effect on the decision. This in fact is hard to determine. We are clearly faced with an unusual will, which makes it an option for the town to satisfy the heirs by compensating against other legacies in the same will.[110]

Some indication of the effect of the clause may be derived from a text of Paul which has already been discussed in another context. It shows that guarantees were sometimes taken for performance of the *modus*: Paul, *D.* 22. 6. 9. 5, 'Gargiliani heredes ... verum etiam stipulati sunt ne ea summa in alios usus converteretur'. The interest of this text is that it at the same time demonstrates, as we saw above, an unsympathetic attitude towards failure to take a *cautio* on excess paid over the Falcidian quarter. This suggests that if the heirs had been similarly careless in their *stipulationes* for the *modus*, they would have had little remedy. It appears likely, therefore, that clauses requesting that endowments should not be varied were significant only if backed by a *cautio*. This in turn suggests that in *D.* 33. 2. 17 the reason compensation *in aliam speciem* was so readily allowed was that no security had been taken that the property would not be put to other uses; the clause 'rogo ne ... convertere velitis' generated therefore only a moral obligation such as Pomponius describes (in *D.* 33. 1. 7).

In the Severan period, there was a tendency to treat *modus* as *fideicommissum*.[111] In view of the unsatisfactoriness of the remedies possible under modal legacies, this is not surprising. The availability of fideicommissary remedies would mark an enormous improvement in the powers the heirs had to enforce the *voluntas testatoris*. But until then private law remedies were of the greatest inadequacy.

Public law, therefore, had to play a most important part in the guaranteeing of endowments. A brief review of the evidence for the competence of central institutions in relation to bequests to towns is in order. In a number of texts the senate is involved. Suetonius mentions an episode in which a legacy to Trebiae was discussed in the senate.[112] It is not stated how the case came to the senate; presumably on request of the council or people of Trebiae.[113] Tiberius was in favour of the motion for allowing variation, but the majority of the senate voted against. Similarly, from a later period (probably the reign of

[109] Biondi, *La compensazione nel diritto romano* (1927), 260 ff.: he also expunges 'et invitis heredibus possessione adprehensa' and inserts 'non' before 'restituendos'.

[110] I do not, however, mean to imply by this that multiple bequests to towns were uncommon: Pliny is only one (unusually generous) example; others may be found in Duncan-Jones (1982), e.g. nos. 468 + 646 + 653 + 654.

[111] On *modus* as *fideicommissum*: for the literature *SZ* 102 (1985), 284 n. 224. Mod., *D.* 33. 2. 16 (quoted in Section III) is an interesting example. The confused terminology of the text is notable. It is probably because the *modus* is treated as a *fideicommissum* that the *responsum* is concerned with the *voluntas testatoris*, and that the heirs have more say in variation than otherwise.

[112] Suetonius, *Tiberius* 31. 3.

[113] Mitteis, *RP*, 198 n. 12.

Antoninus Pius) there is a text of Valens in which the senate is said to have ordered that money left for games should be turned to purposes of greater public utility.[114]

Imperial involvement is illustrated in other texts: Antoninus Pius' rescript on legacies for building and maintenance;[115] a text that speaks of the rule against varying the object of a bequest 'citra principis auctoritatem';[116] rescripts of Severus which decide points of interpretation.[117]

The development appears to be from an essentially senatorial to an imperial competence. The same trend is observed in the registering of endowments by Greek cities, which tended to gravitate from decision by provincial authorities to decision by the emperor.[118] But senatorial and imperial competences co-existed; both were still involved in the time of Antoninus Pius. Equally, other signs of senatorial competence, such as the embodiment in *senatus consulta* of legislation, and provincial embassies to the senate rather than the emperor, show that the role of the senate was completely superseded by the emperor only in the late second or early third century.[119]

Some conclusions and consequences may be drawn. Firstly, it was the lack of powerful private-law remedies which led to the drift of petitions, from both heirs and beneficiaries, to the emperor. Secondly, this drift led to the drawing up of guidelines for acceptance of bequests and therefore to restriction on their possible content. This was a mixed blessing for the individual testator: while no doubt gratified by the availability of central, essentially public-law, protection of his endowment against misuse by local authority, he would be frustrated by the increasing number of general regulations and prohibitions.

All this was not a direct consequence of the weakness of the remedies available for enforcing satisfaction of a *modus*. In the course of the principate towns became accustomed to despatching embassies to the emperor, individuals to sending petitions, both to asking for *beneficia*. Justice was increasingly administrative and increasingly to be sought at the imperial centre.[120] But in the context of bequests to towns this tendency was exaggerated and accelerated by the slowness of juristic thought in providing satisfactory methods of protecting *modus*. It was only in the late classical period of Roman law (the Severan age) that a new standard interpretation of *modus* as *fideicommissum* developed, and that the private law showed itself strong enough to support the testator without the need for recourse to central administrative remedies. But by then the conception of justice as firmly rooted at the imperial centre was immutable.

V. VARIATION OF ENDOWMENTS

Varying the object of a bequest is a problem which must now be discussed more comprehensively. It is an issue, clearly, that is fundamentally related to the level, and the sorts, of endowment we find in the sources. A fine line must be drawn. While ease in variation of endowments is plainly advantageous to the beneficiary (here the town), disregard for the testator's intentions may easily inspire a decline in future giving, since there can be no guarantee that a testator's intended purpose will be carried out. We may therefore expect the evidence to be subtly balanced.

Although it is difficult to assess the extent to which variation of the object of a bequest was allowed, one fact appears to emerge clearly: there was a trend towards greater ease in varying the trust. This is clear enough in the contrast between the obstacles Tiberius met when advocating alterations to the object of a legacy[121] and Antoninus Pius' liberal interference with the last wishes of the testator.[122]

In many cases the testator provides that the money left is not to be turned *in alios usus*. Often this is followed by the prescription of a penalty. It is notable that the assumption is that any interference will be on the part of the town council; consequently the penalty is payable into other hands, often outside the locality. Sometimes the endowment is forfeit to

[114] Val., *D.* 50. 8. 6.
[115] Call., *D.* 50. 10. 7 *pr.*
[116] Val., *D.* 50. 8. 6.
[117] Marc., *D.* 33. 1. 23 and 24.
[118] J. H. Oliver (op. cit., n. 53).
[119] F. Millar (op. cit., n. 48), 341–55.
[120] Millar, 507 ff., 528 ff., etc.
[121] Suetonius, *Tiberius* 31. 3.
[122] Call., *D.* 50. 10. 7 *pr.*

the fisc;[123] sometimes to another town.[124] The juristic sources, however, rarely state the consequence of failing to comply with the terms of a bequest. But they do make general statements on the admissibility (or not) of varying the object of an endowment.

> Legatam municipio pecuniam in aliam rem quam defunctus voluit convertere citra principis auctoritatem non licet ... (Val., *D.* 50. 8. 6, *lib. 2 fideicommissorum*).

> Quod ad certam speciem civitati relinquitur in alios usus convertere non licet (Ulp., *D.* 50. 8. 1, *lib. 10 disputationum*).

The first text has met with considerable objection.[125] It is the main evidence used by Messina Vitrano in his argument that variation of endowments is a Justinianic conception and is foreign to the classical view (except in the case of *venatio*, mentioned at the end of the text). His reconstruction involves substantial deletions.[126] With the exception of removing 'citra principis auctoritatem', these amendments have not generally been accepted.[127]

There is a good textual reason for removing 'citra principis auctoritatem'. It introduces confusion as to the subject of 'iusserit' in the following sentence: the emperor or the late philanthropist? But the deletion hardly corresponds with the realities of the principate. There are examples, and this does not surprise us, of emperors providing for the variation of endowments. If we retain the words 'citra principis auctoritatem', the sentence surely provides a more accurate account of the position: no variation is the rule, but rules are made to be bent by emperors. A firm refusal to alter the objects for which endowment income was to be used might well have been compromised for administrative or economic convenience.

As we have seen, Messina Vitrano proceeds to re-write the whole text on grounds of syntactical difficulties. The Latin is undoubtedly ungrammatical. But the argument of Grosso is surely preferable, that even if Valens' basic position is that of invariability of endowments, the examples in the text, on the effect of the Lex Falcidia, are perfectly consistent with classical (as opposed to Justinianic) law.[128] The syntactical problems are explicable on the view that the text has been abbreviated, so that it contains elements of cases in which imperial permission was required as well as of those in which it was not required, all in a short space.

There is no inconsistency in stating that towns are not to be allowed to vary the objects of bequests and then allowing them to do so if the Lex Falcidia makes variation unavoidable. As we have seen, legacy and *modus* operate to a large degree independently, so a legacy remains valid even if its modal purpose is rendered impossible after application of the Lex Falcidia. Variation then becomes a matter of necessity rather than expediency. In such cases it is fair to allow towns to decide what to do with the money, since they clearly cannot follow the *voluntas testatoris*. But this still gives them no general power to decide policy issues (whether, and in what circumstances, to recommend variation). That power appears to be reserved to the emperor.

A similar instance in which variation is essential, and in which the decision about it remains at a local level, is provided by Modestinus: it is 'the case of the illicit spectacle' (mentioned above in Section III). The prohibition on this spectacle (never described) is evidently a local one; it is a spectacle that 'illic celebrari non licet'. Since variation is unavoidable, imperial intervention is unnecessary. This appears to confirm the impression that towns were limited to decisions in a narrow area, and that policy was the preserve of the emperor.

[123] *CIL* XII. 4393; XIV. 2934; a fine has to be paid to the fisc in three cases cited by J. H. Oliver (op. cit., n. 53) (his numbers 1, 5 and 6).

[124] *CIL* XIV. 2793, 2795; II. 4514.

[125] Messina Vitrano (1936), 97–110; Beseler, *Beiträge* II (1911), 49; *TR* 10 (1930), 199; *SZ* 45 (1925), 487. The text goes on to discuss cases where the incidence of the Lex Falcidia causes insufficiency of funds. That discussion begins 'et ideo', decidedly odd since no apparent logical connection links that sentence with the first (quoted here). Similarly, the last sentence cannot be connected at all with the sentence that precedes it.

[126] Messina Vitrano, 107.

[127] Grosso (1962), 473; di Salvo (1973), 165 n. 229.

[128] Grosso, ibid.

In this context we may return to the text of Marcian which states that all legacies to towns are valid, lists a number of purposes and concludes with 'sive quid aliud' (*D.* 30. 117). Examination above of the terms on which bequests were acceptable (public utility was important); the apparent difficulty in varying endowments without imperial permission; the oddity of having a list of specific objects which tails off 'sive quid aliud': all these factors suggest that rather than seeking the explanation of the text in a new liberality either of terms of acceptance or of powers of variation, we should presume that 'sive quid aliud' has been interpolated.

Some further points concerned with variation require separate discussion of buildings and games. In the case of buildings, it is a rescript of Antoninus Pius that provides the starting point:[129] money left for new buildings ('opera nova') is to be used instead for maintenance of existing buildings, if the town has enough buildings and difficulties in finding money to maintain them. Krueger proposes the deletion of 'nova', so that it is only money that has been left for unspecified building purposes that will be put to repair costs. The motivation for the deletion of 'nova' is clear: desire to harmonize this text with a text from the first book of Paul's *Sententiae* (*D.* 50. 8. 7. 1): 'Nisi ad opus novum pecunia specialiter legata sit vetera ex hac reficienda sunt'.

That reasoning is explicit in Messina Vitrano's discussion of the text, which also proposes the deletion of 'nova' in *D.* 50. 10. 7 *pr.*[130] But what is the justification for reconciling the texts? We should, given the great amount of Antonine building, be wary of regarding the rescript cited by Callistratus as a universal ruling.[131] Equally, the nature of the rescript system was essentially to dispense answers and *beneficia* on request, not from the blue.[132] It is, therefore, most likely that this represents a local request for a ruling, rather than a general norm. The texts relate in any case to entirely different periods: we could, for example, suggest that the first is from a period in which too much largesse was being poured in the wrong directions, too little being spent on essentials such as maintenance; the second from a period where this problem had been mitigated considerably by the fact that *munera* had taken over the satisfaction of essentials. This being so, the case for the deletion of 'nova' is weak.

As for the text of Paul, it seems, as often in the *Sententiae*, to be no more than a simplification. It recognizes at the same time some consideration of the *voluntas testatoris* and the need for funding of maintenance. But quite what its significance is is unclear: it was argued above that, given the nature of munificence, testators are very likely to have expressed a precise purpose to which they wanted their benefaction to be put. The more so, if there was something to fear from negligent or even dishonest local administration. Besides, what glory in contributing to repair works? (The newer Oxford and Cambridge colleges, for example, are modern illustrations of a preference for commemorating oneself by starting something new, rather than by subscribing to the incessant demands of fabric appeal funds.)

The text is laconic. If it refers at all to legislation then it must be to an imperial guideline instructing towns to use bequests for unspecified building on repair work. Perhaps Macer throws further light on these issues:[133] in his discussion of the terms on which new works at private expense are acceptable he expressly rules out a work 'si ad aemulationem alterius civitatis pertineat'. This awareness of the temptations of *aemulatio* is important.[134] It could no doubt lead to great wasting of public resources. This, I would suggest, is the context in which we are to take the text of Paul quoted above; even where a testator had not expressed his determination to have a new building sporting his name, local authorities could feel the urge to keep up with, or go one better than, a nearby rival city. Hence preference for new buildings, and neglect of old ones.

[129] Call., *D.* 50. 10. 7 *pr.* (*lib. 2 de cognitionibus*).

[130] Messina Vitrano, 108 ff.

[131] There are plenty of examples of building: see, for instance, Marcel., *D.* 34. 2. 6. 2 where there is no objection to using the money for an 'opus novum'. Since Marcellus was a member of the *consilium* of Antoninus Pius, and later that of M. Aurelius (see n. 65), his evidence is contemporary with or, more likely, later than this rescript. On more general grounds for treating this as a particular rather than a general case, see n. 58.

[132] Millar, loc. cit., n. 48.

[133] Macer, *D.* 50. 10. 3. *pr.* (*lib. 2 de officio praesidis*).

[134] cf. Millar, 451–2.

It is in the context of neglect that we should place these imperial guidelines on the use of money left for building. As we have seen, there was no regular provision for maintenance of existing buildings; local rivalries (*aemulatio*) could exacerbate the position and result in the collapse of untended buildings. In this situation it was appropriate for there to be a more dispassionate, imperial assessment. Our Severan evidence shows us that it was a function of imperial constitutions to regulate these matters; earlier, however, the senate had been concerned with building legislation.[135]

Games must also be considered. We have already seen that in a text of Valens (*D.* 50. 8. 6) it is stated that the senate did not allow money bequeathed for games to be used for that purpose, but insisted that it be put to another purpose that seemed particularly necessary to the citizens. It sounds, from the mention of an inscription of the benefactor's munificence, as if a building is being envisaged. This prohibition has been much discussed. It is, firstly, contradicted by several other texts.[136] Further, it is true that this (the time of Hadrian) is an odd time for such a prohibition.[137] It is even odder if we are prepared to believe the *Historia Augusta*'s comments on Hadrian's obsession with games.[138]

There seems, all the same, to have been some sort of ambivalence towards games. While there is plenty of evidence for their celebration, there are occasional hints of a more puritanical attitude and a preference for spending money in less frivolous ways.[139] In a letter to the Ephesians in A.D. 145, Antoninus Pius praised a man who preferred to offer his fellow-citizens the long-term gains of building rather than the short-term pleasures of games.[140]

Apart from this, unless we are to exclude games from the *certa species* mentioned by Ulpian in *D.* 50. 8. 1—and for that there is no evident justification—then it appears that they were protected in as good or bad a manner as any other objects of legacy. In Scaev., *D.* 33. 1. 21. 3 there is talk even of enforcing games: 'respondit rem publicam voluntati testatoris parere compellendam', and the *voluntas* here is to have games celebrated every other year. Although these words are likely interpolations, it is notable that Scaevola expresses no concern about the giving of games, and there is no hint in the text of suggesting variation to a more suitable object. It is not possible therefore to accept that games were banned. Most likely is that the senate allowed, rather than compelled, variation of the endowment.[141] That would in itself have been a concession; Tiberius had after all been unable to secure any variation in the object of the bequest at Trebiae to which Suetonius refers.

VI. CONCLUSIONS AND EPILOGUE

Bequests to towns illustrate the interplay of private and public law remedies and the tension between the desires of individuals and of local government. Individuals are reluctant to relinquish property unconditionally; municipalities are keen to acquire it with no strings attached. It is this tension that provokes the interest of the emperor. On the part of the individual the appeal to the emperor is a reflection of the hopelessness of available private-law remedies and a recognition of the need for administrative justice. On the part of the municipality the appeal fits in the structure of *beneficia* and is an attempt to

[135] Much imperial legislation on destruction and dereliction of buildings is found in *SCC*. The best known is perhaps the *SC Hosidianum* of A.D. 44, whose principles were restated in both the *SC Volusianum* (A.D. 56) and the *SC Acilianum* (A.D. 122).

[136] These include Paul, *D.* 30. 122 *pr.*, one of the texts purporting to list possible objects for bequests to towns (see n. 57) and also Mod., *D.* 33. 2. 16, 'the case of the illicit spectacle' which envisages only that a licit *spectaculum* be chosen instead. Other cases: Scaev., *D.* 33. 2. 17; *D.* 33. 1. 21. 3, etc.

[137] Biondi, *Il diritto romano cristiano* II (1952), 279; di Salvo (1973), 165 n. 229.

[138] SHA, *Hadrian* 19. 2–4; cf. 2. 1; 7. 12; 14. 10; 20. 13.

[139] Early Republican instances of variation to avoid games are listed by Duncan-Jones (1982), 149. Later examples are *CIL* XI. 5276 (pre-A.D. 100) and X. 1491 (post-A.D. 100). Duncan-Jones, 136 ff. points out that there are only three large foundations for games attested in Italy, and that this is because of attempts to divert such legacies to more useful public purposes. Cf. also the tentative inscription *CIL* V. 7637 (Laum, 62).

[140] *SIG* (3rd ed.), 850. While this is really an example of *pollicitatio* (ἐπαγγελία), the principles of gifts favoured and gifts discouraged are likely to be the same where bequests are concerned.

[141] Messina Vitrano, 106 ff.; di Salvo (1973), 165 n. 229.

overcome the awkwardness of imposed conditions by obtaining an imperial dispensation from them. A third factor that necessitates imperial intervention from time to time is the need to impose restraint from above when grandiose municipal schemes or local rivalries have led to unrealistic projects.

Once this complex structure is identified, it is immediately clear that we must expect to find more than one type of rescript. Attempts to eliminate their differences by ingenious assertion of interpolation are misguided when they fail to recognize the heterogeneity of these sources. Varied rescripts reflect varied petitions; munificence towards towns provides a clear example of the differing motivations of imperial involvement, and of the superseding of private-law regulation by central administration.

Munificence towards towns was predominantly a second-century phenomenon; reaching a peak, it then declined together with many crumbling buildings. The decline, however, is scarcely to be connected with a lack of funds throughout the community. It was in part the result of the attentions of the ambitious being turned towards the imperial centre, where they were to remain right through late antiquity. In part too it was the consequence of a gradual direction of munificence towards the Church, once authorized by Constantine.[142] And in part it was the effect of a new approach to glorifying the city: 'the glory of a late antique town lay in its private palaces'.[143] It was the town that suffered as money came to be spent to serve the needs of a central bureaucratic career or to gratify private indulgences or the demands of a personal religion.

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[142] Constantine, *C.* 1. 2. 1. (321). We cannot now enter on the details of the changes forced by Christianity. Much had been left in a non-Christian empire for pagan purposes, or for purposes (such as *venatio*) of which the church did not approve. Equally, Christian morality favoured alms-giving rather than the pagan glories of conspicuous consumption (P. Veyne, *Le pain et le cirque*, 51 ff., etc.). The church began by affecting the amount and purposes of bequests to towns; it ended by stifling the largesse almost entirely. Cf. Ward-Perkins (op. cit., n. 73), 14 ff.; and on churches, esp. 65 ff.

[143] Peter Brown, *The Making of Late Antiquity*, 49.