Documentary and procedural engineering of judicial sources in Italy (9th-11th c.)

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Introduction

Italian judicial sources,[1] included for the most part in the category of *notitiae iudicati*, are well known thanks to the corpus assembled and edited by Cesare Manaresi (1880-1959) in the 1950s and completed by Raffaello Volpini in 1975. The corpus stretches the period running from the conquest of Italy by Charlemagne (774) to the end of the eleventh century, and covers the geographic space of the kingdom.[2] For the earlier period, they have been edited in the *Codice diplomatico longobardo*, which also covers the duchy of Benevento.[3]

In 1887 the Monumenta Germaniae Historica projected a *Corpus placitorum* concerning the territories that were part of the Carolingian empire. Work was entrusted to Rudolf Hübner (1864-1945), then to Michael Tangl (1861-1921). But the project was never completed, and only preparatory lists – Italy until 1150, and France, Germania and Septimania until 1000 – were published based on material already available in print.[4] The work of Manaresi, even if it is based on other scientific premises, is indirectly the fruit of the initial MGH project. The database *Procesos Judiciales en las sociedades medievales del norte peninsular (siglos IX-XI)*, which furnishes the pretext for the present volume, is a comparable undertaking.

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[1] I thank Patricia Stirnemann for the translation of this article and the exchange of stimulating remarks that accompanied it. This paper cannot avoid being largely self-referential, but I will try to avoid repetition and incorporate the critical reflections in recent work. A selection of my publications can be found in the bibliography. The abbreviations used in this paper for editions of charters and of legal texts are also listed in the bibliography.

[2] Cesare Manaresi, ed., *I Placiti del "Regnum Italiae"*, 3 t. in 5 vols (Roma: Tipografia del Senato, 1955-1960); Raffaello Volpini, "Placiti del *Regnum Italiae* (secc. IX-XI). Primi contributi per un nuovo censimento", in *Contributi dell'Istituto di storia medioevale [dell'Università cattolica del Sacro Cuore]*, ed. Paolo Zerbi, III (Milan: Vita e pensiero, 1975), 245-520.

[3] *Codice diplomatico longobardo*, vol. III/1, ed. Carlrichard Brühl (Rome: Istituto storico italiano per il medio evo, 1973); vol. IV/1, ed. Brühl (Rome, 1981) for the duchy of Spoleto; vol. IV/2, ed. Herbert Zielinski (Rome, 2003) for the duchy of Benevento. See Bougard, "Tempore barbarici?", 336-37.

[4] Rudolf Hübner, "Gerichtsurkunden der fränkischen Zeit" [1891-1893] (Aalen: Scientia, 1971).

If Manaresi was able to finish his project, it is because the judicial sources produced in the kingdom of Italy benefited from a homogeneity that did not exist elsewhere. During the Lombard period, the documentary production for the royal tribunal or that of the dukes of Spoleto and Benevento can be compared to that of the kings and mayors of the Merovingian palace, but Merovingian Gaul had no ducal *placita*.[5] The Carolingian conquest signaled the end of the ducal courts at Spoleto (after 787) and the promotion of hearings presided over either by the king's *missi*, or by the count, the bishop or their representatives, as was the custom north of the Alps. As in the north, this more hierarchical structure depends upon a theoretical calendar: within the county, there were three *placita* each year, which lasted several days and were also the occasion for a gathering of free men. However, the sessions were in reality spread throughout the entire year, because one could request an independent hearing outside the three prescribed sessions, and there were also meetings presided over by the *missi* autonomously or by the king himself on his itinerary.

The Italian homogeneity is less a question of the general institutional framework than of the sources, at least in the way Manaresi considered it. He decided to limit his corpus to the assemblies held by those whom he called "the authorities of the realm". The Italian judicial institution was, in fact, equipped from an early date with professional, lay notaries who were often professional judges. These were the *scabini*, who appear from 780 on, then the *iudices*, who were attached to the palace in Pavia, whose activity can be followed from the closing years of the eighth century, but who became a properly structured group during the reign of Louis II (840-875). In the tenth century, the names *scabinus* and *iudex* become fused into a single title, that of *iudex domini imperatoris*, a way of emphasizing their link with the central authority, even if it is not always sure that their nomination came from above.[6] These are the judges and notaries who gave the court records their relative uniformity.

Unlike Hübner, Manaresi excluded the sector that pertained to ecclesiastical power when it alone settled a dispute between two ecclesiastics, as well as the "feudal" court, namely those pertaining to seigneurial justice.[7] These are limits that would not be fixed today between the "public" and "private" spheres. With such a selection of sources, how

[5] Bougard, "*Tempore barbarici*?", 336-37; W. Bergmann, "Untersuchungen zu den Gerichtsurkunden der Merowingerzeit", *Archiv für Diplomatik* 22 (1976), 1-186.
[6] Bougard, *La justice*; Andrea Castagnetti, *Note e documenti intorno alla caratterizzazione professionale dei giudici (secoli IX-inizio X)* (Verona: Università degli studi di Verona, 2008).
[7] Manaresi, 1: Introduction.

are we to understand clearly when and why the clergy resorted to secular courts or to episcopal or synodal tribunals for conflicts of similar nature, or during the progression of the settlement of a conflict?[8] In addition, these barriers are even less justified with regard to diplomatic form, because comparable records are virtually indistinguishable from one another.

In order to improve our notions concerning the judicial settlement of disputes, the corpus ought to be enlarged, and encompass assemblies of all kinds, regardless the presiding authority. The enquiry undertaken for Tuscany, which is by far the most richly documented region in the kingdom, augmented the number of records concerned by almost a third, bringing the total number to nearly 600.[9] To widen the perspective, Roman records and those written in pontifical territories should be included, if they pertain to sessions excluded by Manaresi on the grounds that the emperor or his representative was not present.[10] And finally, we should add the records of the Lombard principalities of Salerno and Capua-Benevento, as well as those in Latin from Byzantine Puglia (around 200 documents for these three regions).[11]

As elsewhere, Italian court records concern disputes over ownership and property – land, rights, and persons. Conflicts concerning liberty are characteristic of the ninth and early tenth centuries, but rarely surface later.[12] Criminal justice is only indirectly present, appearing essentially when the sanctioning for murder, theft, or adultery entails consequences affecting possessions and must be documented. But the criminal procedure itself, for which we have very little information except for the Iberian Peninsula and Anglo-Saxon England,[13] was not documented by a written record at that time.

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[8] See Michael W. Heil, *Clerics, Courts, and Legal Culture in Early Medieval Italy, c. 650 - c. 900*, unpublished PhD thesis, Columbia University, 2013.

[9] Bougard, "Les plaids pour destinataires toscans".

[10] Pierre Toubert, *Les structures du Latium médiéval: le Latium méridional et la Sabine du début du IX^e^ siècle à la fin du XII^e^ siècle*, 2 vols (Rome: École française de Rome, 1973), 2:1191-313; Chris Wickham, *Roma medievale. Crisi e stabilità di una città, 950-1100* (Rome: Viella, 2013), 442-52; Giovanni Chiodi, "Roma e il diritto romano," in *Roma fra Oriente e Occidente*, Settimane di studio del CISAM 49 (Spoleto: CISAM, 2002), 1149-254; Francesca Santoni, "*Orta fuit intentio et litis calumpnia*. Processi e documenti nella Roma medievale," in *Roma e il suo territorio nel medioevo. Le fonti scritte fra tradizione e innovazione*, ed. Cristina Carbonetti, Santo Lucà, and Maddalena Signorini (Spoleto: CISAM, 2015), 365-94.

[11] Paolo Delogu, "La giustizia nell'Italia meridionale longobarda", in *La giustizia nell'alto medioevo (secoli IX-XI)*, 257-308.

[12] Antonio Padoa-Schioppa, "Processi di libertà nell'Italia altomedievale" [2011], in *Giustizia medievale italiana. Dal* regnum *ai comuni* (Spoleto: CISAM, 2015), 93-136; Giuseppe Albertoni, "Law and the peasant: rural society and justice in Carolingian Italy," *Early Medieval Europe* 18 (2010), 417-45. For a late example, Manaresi, 3/1: no. 323 (Lucca, 1025).

[13] Wendy Davies, *Windows on Justice in Northern Iberia 800-1000* (Abingdon: Routledge, 2016), 235.

In order that the Italian corpus be fully comparable to that assembled by the PRJ project, we should include all the indirect information pertaining to the exercise of justice and the resolution of conflicts present in the many private charters. But most importantly, it must be remembered that a judicial document speaks to a specific moment, and only one, in the unfolding of the conflict: the moment when the case is submitted to an assembly *ad (iustitias) deliberandas*. A limitation of our different corpuses, whatever they include, is the extraction of these pieces from their more general documentary context. When consulting these ensembles, and when the sources lend themselves, it is not only a question of hoping to reap a better understanding of the actors and places. The aim is to reconstruct the entire documentary chain engendered by a single affair.

II. In what consists a judicial dossier?

If one mixes, a bit artificially, the elements belonging to the ninth century and others that are not attested before the eleventh century, a judicial dossier would thus be likely to present all or some of the following elements:

(a) Before the court is assembled, it is not rare for a written complaint be submitted to the authority. These *querimoniae,* characteristic of the eleventh century emanate most often from monastic communities, and sometimes from canonical chapters.[14] Usually they take the form of a letter. Some are styled as a lamentation and a call for justice more or less rhetorically couched, others already furnish detailed legal arguments, as in a letter of around 1000 addressed by the abbot of S. Salvatore al Monte Amiata to the local count Ildebrandus denouncing the tithing abuses of the bishop of Chiusi. In an effort to convince the count to intervene, the abbot of this royal monastery invokes pontifical privileges and imperial diplomas carefully reminding of the clauses mentioning spiritual and pecuniary sanction, as well as Lombard and Frankish legislation.[15] Likewise, in 1026-1027, a complaint addressed by the abbey of Farfa to Conrad II is studded with a series of legal axioms in praise of written contracts.[16] The grievances can also take the form of lists in *brevia*, like the "polyptych of misdeeds" drawn up around 1040 by the canons of Reggio

[14] Paolo Cammarosano, "Carte di querela nell'Italia dei secoli X-XIII," *Frühmittelalterliche Studien* 36 (2002), 397-402; Bougard, *La justice*, 241-42; "*Falsum falsorum judicum consilium*".

[15] Wilhelm Kurze, ed., *Codex diplomaticus Amiatinus*, 2 vols (Tübingen, Max Niemeyer, 1974-1982), 1: no. 225; Armando Petrucci et al., eds., *Lettere originali del Medioevo latino (VII-XI sec.)*, 1. *Italia* (Pisa: Scuola Normale Superiore, 2004), 33-47 (Ernesto Stagni). François Bougard, "Jugement divin, excommunication, anathème et malédiction: la sanction spirituelle dans les sources diplomatiques," in *Exclure de la communauté chrétienne: Sens et pratiques sociales de l'anathème et de l'excommunication*, ed. Geneviève Büher-Thierry and Stéphane Gioanni (Turnhout: Brepols, 2015), 215-38, at 215-16.

[16] Ugo Balzani, ed., *Il Chronicon Farfense di Gregorio di Catino*, 2 vols (Rome: Istituto storico italiano per il medio evo, 1903), 1:73-77. Bougard, "*Falsum falsorum judicum consilium*", 310-11.

Emilia in support of a complaint against the vassals of the marquis of Canossa.[17] In this last case, one imagines that the document was submitted in support of an oral declaration, along with the pieces justifying the rights of the canons over the lands and prerogatives that had been usurped. Such lists could also be drawn up at the suggestion of the authority, when a change in regime is marked by an initiative meant to show the new prince's commitment to his judicial duties. Such was the case in 1014 when Henry II was crowned emperor, according to the testimony of Abbot Hugh of Farfa.[18]

Certain abbots used other means. The abbot of S. Antimo in Val di Starcia, who brought suit in the same affair as the abbot of Monte Amiata, resorted to a more prosaic and costly procedure. According to the terms of a settlement made in 1005 with the same count Ildebrandus, he surrendered by *libellum* half of a monastery and its appurtenant assets, amongst which a castle, and in exchange the count was to escort the abbot and his successors on horseback in the dioceses of Florence, Lucca and Pistoia and provide assistance when necessary before the royal *curia*.[19] The formulation of the terms is general, without any allusion to the misdeeds of the bishop of Chiusi, but takes all its weight from the context. The drawing up of a contract of this type, like the aforesaid *querimoniae*, was the province of a certain elite, since it presupposed a cultural refinement and economic foundation not within everyone's reach, as well as direct access to the recipient.

(b) The preparation of the hearing could also necessitate an inventory of possessions, when the affair is of general importance. This is the rationale behind certain inventories and lists, like those drawn up at Lucca for Bishop Petrus II (896-936) at the beginning of his government, some months before the convocation of a judicial assembly of great importance, of which more will be said later.[20]

(c) If the authority solicited was the prince, he might entrust the affair to his *missi* either orally or with a written mandate (*indiculum, iussio*), which also assured safe

[17] Gloria Casagrande, "Il ritrovamento del testo completo del 'polittico delle malefatte', anno ca. 1040," in *Reggiolo medievale. Atti e memorie del Convegno di studi matildici, Reggiolo, 9 aprile 1978*, ed. Gino Badini (Reggio Emilia: G. Bizzocchi, 1979), 101-32.
[18] Balzani, ed., *Chronicon Farfense*, 1:68; Bougard, "*Falsum falsorum judicum consilium*", 306.
[19] Lucca, archivio arcivescovile, ++ I 72, ed. Simone Collavini, "I Conti Aldobrandeschi e la Valdinievole. Una nota sulla situazione politica in Tuscia nei primi anni del secolo XI," in Atti del convegno *Signori e feudatari nella Valdinievole dal X al XII secolo* (Buggiano: Comune di Buggiano, 1992), 101-27, at 123-5; seeidem, Honorabilis domus et spetiosissimus comitatus. *Gli Aldobrandeschi da "conti" a "principi territoriali" (secoli IX-XIII)* (Pisa: Edizioni ETS, 1988), 101; Amleto Spicciani, *Protofeudalesimo. Concessioni livellarie, impegni militari non vassallatici e castelli (secoli X-XI)* (Pisa: Edizioni ETS, 2001), 155-7.
[20] See n. 56 below.

conduct while travelling in the designated region. The order could be generic, if the mission covered more than a single dispute. In the few cases that have come down to us, the text of the mandate may be preserved separately or copied at the beginning of the corresponding record.[21]

(d) If the judicial authority decided to treat a complaint and convoked an assembly to rule on it, at least one of the two parties may have had to be summoned if they had not previously reached an agreement to appear together before the judges. This entailed the sending of letter(s) (*epistolae*) which were delivered by the *missi*. This was the case especially in the tenth century, when the procedure of *investitura salva querela* developed, meant to establish the plaintiff's rights for an asset after the absence of the defendant is recorded.[22]

(e) The parties involved had to prepare the hearing as well as possible. When property titles, which usually constitute sufficient argument, were lacking, one had to fall back on witnesses. Either the witnesses were designated by the respective parties, or they were arbitrarily selected by the judges in the context of an *inquisitio*, which proliferated in the ninth century.[23] In either case, it was essential for the success of the plaintiff or the defendant that the testimonies corroborate his case and not contradict each other. The prospective witnesses could thus be solicited by a written engagement, drawn up by a notary, stating what they would say under oath. We have four examples from the county of Piacenza, dating from the years 823 to 915.[24] They can be considered the precursors of the agreements *de placito et bisonnio*, which were common in Tuscany in the eleventh century, in a very different social context, where judicial assistance was reinforced by military support.[25]

(f) Either of the parties might not have an *advocatus*, which prevented the trial from being held. He had then to be appointed, which required the drawing up of a special

[21] Bougard, *La justice*, 185.
[22] See below, Vb.
[23] Bougard, *La justice*, 194-203.
[24] François Bougard, "L'église de Varsi et son chartrier: pouvoirs, territoires, communauté, VIII^{e}-X^{e} siècle," in *La fabrique des sociétés médiévales méditerranéennes. Les Moyen Âges de François Menant*, ed. Diane Chamboduc de Saint-Pulgent and Marie Dejoux (Paris: Publications de la Sorbonne, 2018), 421-31.
[25] Piero Brancoli Busdraghi, "Patti di assistenza giuridica e militare in Toscana fra XI e XII secolo," in *Nobiltà e ceti dirigenti in Toscana nei secoli XI-XIII: strutture e concetti* (Monte Oriolo: F. Papafava, 1982), 29-55; Amleto Spicciani, "Forme giuridiche e condizioni reali nei rapporti tra il vescovo di Lucca e signori laici (secolo XI)" [1996], in *Protofeudalesimo*, 81-139.

document, of which there are a few examples in the eleventh century. There even exists a proper formulary[26].

(g, h) The inquest procedure (*inquisitio*), carried out by the imperial *missi*, was meant to register the testimony in written form (g). It is not rare that investigators also made an inventory of all or part of the assets of the plaintiff (h).[27]

(i) The judicial assembly, however, usually submitted only one record, which came at the conclusion: a *notitia iudicati*, written in indirect discourse in the kingdom; a *memoratorium* often beginning in direct discourse and in the name of the winning party in Roman territory and, until the end of the tenth century, in the southern Lombard principalities. Court records were written because they concluded with a sentence, or more rarely with a *convenientia* or a "friendly" *pactuicio* or *pactum* pronounced before the judges.[28] The content of previous hearings was sometimes recalled, which allows us to follow the geographic and judicial itinerary of the affair: from its opening before a first assembly until its conclusion, including a trip to the disputed locations. The whole process could involve three and sometimes four successive hearings.

However, sometimes the account was truncated by the failure of one of the parties to appear, and his absence was registered in writing, as in a session presided over by the duke of Spoleto in 813, where the abbot of Farfa waited in vain until the "third hearing".[29] It could also happen that the record was interrupted at an intermediary stage in the procedure, for example: (1) after a commitment, with presentation of *wadia*, to appear again with written titles, witnesses, guarantors or a champion for a duel;[30] (2) after the taking of the witnesses' declarations, especially in the *inquisitio* procedure;[31] (3) after the taking of an oath;[32] (4) to record the stonewalling of one of the parties who remained

[26] *Manaresi*, 3: no. 338 (near Tortona, 1035); Volpini, no. 36 (Florence, 1055). Formulary: MGH LL 4, 650-51 (Lomello, 1018). Bougard, *La justice*, 268.
[27] Bougard, *La justice*, 378-88.
[28] Volpini, 447-51 = *ChLA*^{2} LXVIII 20 (county of Piacenza, 832); Manaresi, 1: no. 28 (Spoleto, 814); no. 97 = *ChLA*^{2} LXVI 30 (county of Piacenza, 891 or 890); Manaresi, 2/1: no. 250 (Gaeta, 999); 3/2: 480-81 (Gesino, 1051: *sponsio et perdonatio*). For *amicae pactuiciones* outside the court, or so it seems, see Chris Wickham, "Land disputes and their social framework" [1986], in *Land & Power. Studies in Italian and European Social History, 400-1200* (London: British School at Rome, 1994), 229-56, at 252-53.
[29] Manaresi, 1: no. 27: expectavit ipse abbas secondo et tertio placito.
[30] Witnesses: Manaresi, 1: no. 135 (Parma, 935). Oath for guarantors: Manaresi, 2/2, no. 220 (near Vicenza, 995). Battle: *Placiti*, 2/2: no. 274 (near Arezzo, 1010). On the oath for the guarantors and on the duel, Bougard, *La justice*, 331-39; "Prêter serment"; "Rationalité et irrationalité des procédures".
[31] Examples even at the end of the tenth and beginning of the eleventh century: Manaresi, 2: 669-75.
[32] Manaresi, 2: 674-75 (in Tuscany, 1008); 3/2: 447-49 (Flesso, 1046-1047). In Lucca in 1077, the formula *Et hoc modo finita est lis* follows the taking of a sermon, but without allowing to determine the outcome of the decision (Manaresi, 3/2: 451-52).

obstinately silent;[33] (5) to record the powerlessness of the judges, who suspended the hearing after waiting for one of the two parties present at the first hearing to reappear, and whose abstention allowed that party to avoid recognizing its defeat or having to engage in a duel;[34] (6) as an indication of the doubts of the judges themselves, who refused to take a decision, as in the famous *placitum* held in Garfagnolo (Reggio Emilia) in 1098.[35] An exceptional case took place in Rome in 829. The imperial *missi* pronounced in favour of the abbey of Farfa against the Church of Rome concerning five *curtes*. But the pope stopped the trial, declaring that he "did not believe" in the judgment so long as the affair had not been treated before the emperor;[36]

Consequently, the same affair treated by the same tribunal is likely to produce several records until it is finally resolved; sometimes it ends with the absence of a ruling, in extreme cases where the losing party refuses to recognize that it has lost. At other times, the ruling in the dispute may be split according to the points treated. A record from 822 in Lucca resolves a land dispute substantively, designating a victor, then puts off until a later date the taking of the oath related to a possible indemnification for the use of land during the time that passed between the submission of the complaint and the conjoining of justice.[38] The hearing where the oaths were to be taken would have had little chance of being documented because it did not establish rights over the land.

(j) In the case of an *inquisitio*, the decision was theoretically taken by the royal authority, if the entire procedure had not been delegated to its representatives. The testimonies of witnesses were then sent to the sovereign, who pronounced his sentence in a diploma, as was customary north of the Alps.[39]

(k) Lastly, the written record of the rights of the victor did not automatically close the conflict. It only inaugurated a new legal relation between the parties – but that is what made it essential. The execution of the sentence might engender the establishment of a

[33] Manaresi, 1: no. 133 (Pavia, 927): the defendant categorically refused to respond to the plaintiff and judges, and left the assembly.
[34] Manaresi, 1: no. 48 (Milan, 844) = *ChLA*[2] XCIV 33; Manaresi, 1: no. 135 (Parma, 935); Marta Calleri, ed. *Codice diplomatico del monastero di Santo Stefano di Genova, I*, (Genova: Società ligure di storia patria, 2009), no. 20 (Genova, 1006).
[35] Manaresi, 3/2: no. 478 = MGH DD MT, 482-84. See Francesca Santoni, "Fra *lex* e *pugna*: il placito di Garfagnolo (1098)," *Scrineum Rivista* 2 (2004), 5-45, at<https://oajournals.fupress.net/index.php/scrineum/article/view/8758/8756> (accessed 10 January, 2019).
[36] Manaresi, 1: no. 38.
[38] Volpini, no. 2 = *ChLA*[2] LXXV 8.
[39] MGH DD L I 176, for Piacenza; MGH DD Lo I 25, for Cremona; 35, for San Salvatore of Brescia; 157, for Como; etc.

breve for the local investiture of the property, and this might happen years later, if the loser is obstructive.[40] Some sought out the additional authority of a diploma in order to confirm what they had obtained and reinforce the authority of the *notitia pro securitate*.[41] Others reignited the controversy through an appeal, at their risk and peril.[42]

Yet others persevered until a compromise settlement was obtained outside the courts, in the form of a property transaction or a waiver of the financial compensation decided upon by the judges against a promise to respect the decision that had barely been pronounced.[43] The historian is fortunate when the corresponding documents state what motivated them. But many mundane contracts (donations, sales, exchanges, rentals, divisions) were drawn up in response to situations of this kind about which we know nothing. But here we leave the strictly judicial terrain for the more general arena of the "settlement of conflicts".

III. Standardisation and diversity of the records

The foregoing overview illustrates the wide variety of documentation linked with the exercise of justice, especially in the kingdom, where the *notitia* can be surrounded by many less formal pieces, for the most part *brevia*.[44] However, it must be admitted that often the treatment of a conflict by an assembly probably elicited only the writing of a

[40] Manaresi, 1: 566-568 (Ostiglia, 827); see Andrea Castagnetti and Antonio Ciaralli, *Falsari a Nonantola.I placiti di Ostiglia (820-827) e le donazioni di Nogara (910-911)* (Spoleto: CISAM, 2011), 22-33. Other examples: Volpini, 458-459 (Ravenna, 1037); Manaresi, 3/2: 484-486 (near Ferrara, 1067).

[41] MGH DD L I 298: confirmation for S. Vincenzo al Volturno of four *iudicata* resulting from hearings where the monastery was opposed by the *servi* in the valley of *Trita*; MGH DD L II 31: confirmation for Bobbio of several properties gained through judicial cases

[42] Manaresi 1: no. 26 = *ChLA*[2] LXXIII 50 (Lucca, 813: reopening of a trial against the priest Alpulus, excommunicated in 803, but who then brought the affair before Adalhard of Corbie, *missus* of Charlemagne in Italy). Manaresi, 1, no. 112 (Milan, 901: reopening of an affair adjudged the previous year, which opposed the tax authorities and several men whose liberty was contested). See also Garfagnolo, 1098 (n. 35 above).

[43] Examples: CDL II 168 = *ChLA* XXIX 871 (Ceneda, 762: restitution of *omnes res vel pecunia* first attributed to the plaintiff by the ducal plea); CDL V 16 and 38 (Rieti, 751 and 764; see Marios Costambeys, "Disputes and courts in Lombard and Carolingian central Italy", *Early Medieval Europe* 15 [2007], 265-289); Manaresi, 3/2: 486-488 (Rovereto, 1067), partial payment of the sum due for the *rapina* of one hundred fifty bulls. See also, in 877, the *amica pactuicio* by virtue of which the son of Sisenandus receives a horse and one hundred *solidi* from S. Clemente a Casauria in exchange for his renunciation of all action concerning the properties that had been confiscated from his father as a result of a trial for adultery: Laurent Feller, *Les Abruzzes médiévales. Territoire, économie et société en Italie centrale du IX^e^ au XII^e^ siècle* (Rome: École française de Rome, 1998), 671.

[44] Attilio Bartoli Langeli, "Sui 'brevi' italiani altomedievali," *Bullettino dell'Istituto storico italiano per il medio evo* 105 (2003), 1-23; Giovanna Nicolaj, *Lezioni di diplomatica generale, I. Istituzioni* (Rome: Bulzoni, 2007), 180; Michele Ansani, "Appunti sui *brevia* di XI e XII secolo," *Scrineum Rivista* 4 (2006-2007), 107-52, at <https://oajournals.fupress.net/index.php/scrineum/article/view/8771/8769> (accessed 1 September, 2017).; idem, Caritatis negocia *e fabbriche di falsi. Strategie, imposture, dispure documentarie a Pavia fra XI e XII secolo* (Rome: Istituto storico italiano per il medio evo, 2011), 40-53.

single document. It would therefore be abusive to think that an "ideal-type" can be drawn from that enumeration, which, moreover, is made up of many rather isolated examples.

The Italian originality resides less in this than in the formal transformation of the court record as a documentary genre. Until the second half of the ninth century, court records followed a schema shared with the rest of the Carolingian Europe. The presentation of the tribunal is followed by the submission of the complaint, then by an exchange in direct discourse between the plaintiff and the defendant (*altercatio*), by the search for and administration of the proof, by the admission of defeat by the losing party, and finally by the order given by the president to record in writing the content of the debates and the procedure. Up to this point, the *notitiae iudicati* can be analyzed in the same way as elsewhere, not only for matters concerning procedures and proofs, but also for everything that concerns the exchange of responses between parties, directly or through the *advocati*, especially in disputes where large landowners oppose peasants whose status is contested.[45]

In the years 870-890, new ways of recording judicial sessions began to take effect under the impetus of judges and notaries in Pavia, encouraged by the knowledge and experience they had gained in the company of the *missi* during their judicial rounds in the kingdom.[46] The formal palette of the *notitiae iudicati* widened over time, until the closing years of the eleventh century, but it leaves less and less space for an explanation of the origin and unfolding of the conflicts, favoring instead the choice between standardized solutions with immediately recognizable forms, easy to produce serially with minor adaptations (the names of the parties, descriptions of the property) and, consequently, easy to group in a corpus. For the period between the mid-tenth century and 1100, the number of records written according to ancient criteria becomes a minority.

The downside of such a documentary innovation is a considerable impoverishment of the information concerning the nature of conflicts, which notaries were no longer meant to recollect. To have access to this, the investigation must be widened to include information from other sources.[47] Otherwise, comparison with other corpuses of judicial

[45] See n. 12 above; Ross Balzaretti, "Spoken narratives in ninth-century Milanese court records," in *Narrative and History in the early Medieval West*, ed. Elizabeth M. Tyler and Balzaretti (Turnhout: Brepols, 2006), 11-37; Costambeys, "Disputes and courts;" Aneta Pieniądz, "Literacy and the legal culture of the early Middle Ages. Old research – new questions," in *Právní kultura ve středověku*, Colloquia mediaevalia Pragensia 17, eds. Martin Nodl and Piotr Węcowski (Prague: Filosofia, 2016), 13-25 (on Manaresi, 1: no. 71, Lucca 870 = *ChLA*[2] LXXXII 42).

[46] See below, V.

[47] As noted by Marios Costambeys, *Power and Patronage in Early Medieval Italy. Local Society, Italian Politics and the Abbey of Farfa, c. 700-900* (Cambridge: Cambridge University Press, 2007), 110-31;

documents can henceforth lead only to an impasse, given the abyss that separates Italy from the rest of Europe. And this black hole is all the more profound in that French *scriptoria*, for example, develop at the same moment what are called "narrative" *notitiae*, which distance themselves from the relative sobriety of the Carolingian schema, and wax volubly on all aspects of the disputes. The inflation of the "monastic trial records", overblown with adjectives, exclamations, psychological and moral considerations, and maledictions, is a feature of writing style, not institutionalized form, as has often been thought. It is also an excellent indication of the fact that lands north of the Alps had not adopted the notarial system put into place in the ninth century. The Carolingian reform, which ought to have applied to the entire empire, only took hold in places where the cultural terrain was favorable, and not in those where the mastery of documentary writing remained, for lack of anything better, in the hands of the clergy.[48] Confirmation of this is found in the fact that even in Italy, but outside the kingdom, certain records written by ecclesiastical scribes adopt the same tone and the same vocabulary as those in the north.[49]

The foregoing affirmation should be nuanced, lest it be considered too cut and dried. The Po valley and Tuscany are not alone in the movement that comes to favour the documentation of the resolution of a conflict rather than the stages by which one arrives at the ruling. The phenomenon is also seen in Sabina in the eleventh century, with the many *refutationes* in favour of the abbey of Farfa, behind which one can often implicitly imagine the existence of a dispute and an assembly for treating it, independently of knowledge of whether it was presided over by the count, by the abbot, or by his provost and whether or not in the presence of professional judges.[50] We see it also in France, notably at Cluny, with the *notitiae werpitionis* which appear at the beginning of the tenth century and are related to property, to disputes (*querelae*), and to *malae consuetudines*. Sometimes they look like records of hearings before a public authority and in which is simply said that the defendant recognizes the rights of the abbot; sometimes they describe a *werpitio* ("déguerpissement", public renunciation of rights or land) before the abbot; in yet others, the *werpitio* is written in direct discourse, in the name of those who renounce

"Disputes and documents in early medieval Italy," in *Making Early Medieval Societies. Conflict and Belonging in the Latin West*, ed. Kate Cooper and Conrad Leyser (Cambridge: Cambridge University Press, 2016), 125-54.

[48] Bougard, "Notaires d'élite;" Ronald G. Witt, *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy* (Cambridge: Cambridge University Press, 2012), 61-6.

[49] E.g. Manaresi, 2/2, no. 285 (a. 1014); Bougard, "Écrire le procès," 37.

[50] Toubert, *Les structures du Latium médiéval*, 1274-313; Chris Wickham, "Justice in the kingdom of Italy in the eleventh century," in *La giustizia nell'alto medioevo (secoli IX-XI)*, 179-250, at 222-34.

property, without any further explanation or simply declaring an end to the dispute. In the last case, it is impossible to know if the settlement comes after one or several judicial hearings have been held, or whether it is a comparable "private" transaction, as was the case of the *refutatio* made by the count of Sabina in favour of Farfa in 998 in compensation for the abusive occupation of a castle, and in order to avoid a *reclamatio* by the abbot to the emperor.[51]

The *werpitio* certainly spreads further than the small Cluniac world.[52] But the correspondences between the Cluniac sources and those of Farfa make one think that the two abbeys, which were in close contact, shared documentary knowledge. More generally, it is a form of documentation that fits well with the development of monastic seigneurial justice, which is as exceptional in Italy as it is common in the north.

IV. Controlling the legal implications of the written document

North of the Alps, the tendency in Cluny to erase the conflict does not contradict the development of narrative records that give an exacerbated account. In the kingdom of Italy the apparent simplification is accompanied by the very close attention given to documentary writing and its potential. Efforts are made to control the production of charters, or rather what charters imply in possible litigation.

The control of the written document, which characterizes the ninth century, begins with the preoccupations of the large landholders for guaranteeing the free disposition of their properties. In the zones of Lombard law, which inherited the Roman legal tradition, this was already the purpose of the long-term leases, which were limited to 29 years; after 30 years, ownership devolved on the tenant.[53] Moreover, it is not rare that bishops and abbots obtained from the king annulation of the documents by which property over which they had rights was alienated during the tenure of their predecessor, especially by rental or exchange. The corresponding diplomas, which stretch from the mid-ninth to the mid-eleventh century, are sufficiently numerous to show the universality of the procedure.[54] These reclamations, often justified by criticisms of bad or iniquitous management by the preceding bishop or abbot in charge, was a convenient way for prelates who had just arrived to take control of an often dispersed patrimony; furthermore, the rentals had often

[51] The abbot, for his part, regularized the situation by drawing up a contract in the name of the count for the castle. The details of the affair are described by Abbot Hugh: Balzani, ed., *Chronicon Farfense*, 1:74.
[52] Paul Ourliac, "La tradition romaine dans les actes toulousains des X^{e} et XI^{e} siècles," *Revue historique de droit français et étranger* 60 (1982), 577-88, at 583-84 (sur la base des actes de l'abbaye de Lézat).
[53] Grimoald 4, Liutprand 54, Aistolf 18 (MGH Fontes iuris 2: 75, 106, 168-9).
[54] Bougard, "Actes privés et transferts patrimoniaux," 553-57.

been sub-let by the tenants, thus running a risk that the existence of the eminent owner be forgotten.

Cancellation allowed the plaintiff to terminate *de facto* situations, to "reactivate" his rights, to personalize the contractual relation between contemporaries rather than with generations that had sometimes disappeared. This applied not only to the contracting parties, but also to the witnesses whose presence would be required in case of dispute. If the operation proceeded without incident, the lease was renewed immediately, once the former lease was returned. One has to imagine a procession of tenants at the episcopal palace, at the monastery, or in the rural estates belonging to them. In 874 the bishop of Volterra told Louis II how much he deplored the *invasiones atque demineraciones* to which his church had been subjected *sub occasione libellorum*. The emperor declared null and void all that had been established in the name of the preceding bishop – who, it is carefully noted, had been weakened by sickness – in the form of donation, provisional contract, *libellum* or exchange, with the obligation of the holders of *libelli* to return them to the church.[55]

But the general calling into question of contracts can also unfold in a tenser atmosphere. In 852 Bishop Jeremias of Lucca, who had barely been consecrated, demanded that all *libelli* previous to his installation be nullified. But in the spring of the following year, a court had to be convened presided over by the *missi* in order to force a recalcitrant tenant accused of poor maintenance of his rental property to make restitution. The *missi* required that the imperial diploma for the nullification of contracts be "recited" and reproduced in the court record.[56]

At the end of the century, another bishop of Lucca, Petrus II (896-932), used another strategy. He began his tenure by making an inventory of all the property belonging to his church. He also drew up a list of properties that had been ceded by *libellum (cartulae ad censum persolvendum)*, and those ceded as benefice *(feora)*. Then in 897 he began court proceedings against the holders of *libelli* (about 100 people), with a hearing before the imperial *missi*, the marquis of Tuscany and several other bishops. Already convoked several times, the defendants did not appear that time either, which allowed the bishop to obtain an investiture *salva querimonia* for all of the property. Without resolving the case as to the substance, since this type of investiture does not rule

[55] MGH DD L II 69.
[56] Manaresi, 1: no. 57 = *ChLA*^{2} LXXX 26.

on the rights that can be invoked against it, the judges gave Petrus II the legal advantage which allowed him to renegotiate in a stronger position with the tenants.[57]

The examples cited show that among the "risky" documents, the *libelli* are those that are targeted most often. Italy alone uses these instruments, and their very existence did not fail to surprise, indeed horrify, men coming from other legal worlds. Among them, men like Gerbert of Aurillac spearheaded the battle and his letter sent to Otto II in 983, shortly after he became abbot of Bobbio, is famous: the *libelli*, according to him, lead to an alienation of property equivalent to a sale and are the road to ruin for the church's patrimony.[58] Simone Collavini has suggested that it is also possible that those who had fiscal responsibility for property, who were furthermore protected by a prescription of 60 years,[59] carefully refrained from managing them in writing, preferring to retain the northern practice of oral land concessions, thus avoiding the worries faced by bishops, canons and abbots.[60] This was probably one of the rationales behind the success of the *inquisitio* in the ninth century, which can be considered as a measure that complements the cancellation of leases. By placing the property of certain accredited churches and monasteries under the legal regime reserved for fiscal land, the litigation procedure that applied to them consisted of a hearing of *idonei et credentes homines*,[61] rather than the examination of written titles.

V. In search of legal certainty: new formularies, new procedures

Conversely, the distrust of written forms of concession was coupled with the search for appropriate solutions for avoiding, as much as possible, situations of judicial uncertainty, which led to an inflation of written documents in the judicial context. Care was taken to avoid imprecision in matters of possession by increasing recourse to the notarial act and

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[57] Manaresi, 1: no. 102 = *ChLA*[2] LXXXVI 45; Paolo Tomei, "Un nuovo 'polittico' lucchese del IX secolo: il *breve de multis pensionibus*," *Studi medievali* ser. 3ª, 53 (2012), 567-602.

[58] Gerbert d'Aurillac, *Correspondance*, ed. and tr. Pierre Riché and Jean-Pierre-Callu, 2 vols (Paris: Les Belles lettres, 1993), 1:4: *Nescio quibus codicibus, quos libellos dicunt, totum sanctuarium Dei venundatum est*. Cinzio Violante, "Fluidità del feudalesimo nel regno italico (secoli X e XI). Alternanze e compenetrazioni di forme giuridiche nelle concessioni di terre ecclesiastiche a laici," *Annali dell'Istituto storico italo-germanico in Trento* 21 (1995), 11-39.

[59] Liutprand 78, Ratchis 6 (MGH Fontes iuris 2: 114-5, 156).

[60] Simone Collavini and Paolo Tomei, "Beni fiscali e 'scritturazione'. Nuove proposte sui contesti di rilascio e falsificazione di D. OIII. 269 per il monastero di S. Ponziano di Lucca". In *Originale – Fälschungen – Kopien. Kaiser- und Königsurkunden für Empfänger in Deutschland und Italien (9.-11. Jahrhundert) und ihre Nachwirkungen im Hoch- und Spätmittelalter (bis ca. 1500) / Originali – falsi – copie. Documenti imperiali e regi per destinatari tedeschi e italiani (secc. IX-XI) e i loro effetti nel Medioevo e nella prima età moderna (fino al 1500 circa)*, edited by Nicolangelo D'Acunto, Wolfgang Huschner and Sebastian Roebert, 205-216. Leipzig-Karlsruhe: Eudora, 2017.

[61] See MGH DD L II 69, pour l'église de Volterra (874): *Ubicunque* [...] *ecclesiae oeconomis necessarium visum fuerit, ita de rebus seu familiis episcopii ipsius tamquam de dominicatis rebus nostris per idoneos et dredentes homines inquisitionem fieri iubemus*.

its presentation before the judges. Even before the written document was considered as a proof in the full sense, its creative power for rights was such that it was simultaneously sought out and feared by all. This was the rationale which affected the *notitiae iudicati* at the end of the ninth and in the tenth century, with the creation of new formularies: (a) *investitura salva querela* (investiture of contested properties in favour of the plaintiff, in the absence of the defendant); (b) *finis intentionis* (affirmation of possession of a property, of rights, or of a person, with a demand of confirmation); (c) *ostensio cartae* (presentation of a charter before judges with a demand of confirmation of its content; the document is summarized or, more often, copied out in full in the *notitia*). At the end of the tenth century there was added the (d) *notitia de banno*, which declares the placement of the property under the protection of the royal or imperial *bannum*, at the initiative of the judges. These innovations have been analyzed frequently since the nineteenth century, without completely exhausting the subject, which is why I return to it once again.[62]

(a) As we said earlier, the initiative for these modifications came from the judges and notaries in Pavia. It is thus of more than passing interest that the investiture *salva querela* made one of its first appearances at a trial in 897 very carefully prepared by Petrus II of Lucca, when we know that the new bishop was trained in the capital, where he had acquired a mastery of chancery writing practices.[63] The investiture *salva querela* brings something truly new, since it resolved the aporia created by the obstinate default of the defendant. With this procedure all rights related to property could momentarily be attributed to a plaintiff, leaving it up to the absent defendant to produce contradicting evidence at a later date.[64] In the reverse situation the risk was great that the provisional investiture would become definitive. In Roman lands, where it is attested from around the year 1000, the investiture *salva querela* could also give rise to an exegesis and application based on the examination of Justinian law.[65]

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[62] See, e.g., Guido Mengozzi, *Ricerche sull'attività della scuola di Pavia nell'alto medio evo* (Pavia: Tipografia Cooperativa, 1924); Antonio Padoa Schioppa, "Aspetti della giustizia milanese dal X al XII secolo" [1989], in *Giustizia medievale italiana*, 137-227; "La scuola di Pavia. Alle fonti della nuova scienza giuridica europea," in *Almum Studium Papiense. Storia dell'Università di Pavia*, Vol. 1, *Dalle origini all'età spagnola*, ed. Dario Mantovani, 2 tomes (Pavia: Università di Pavia, 2012), 1:143-64; Bougard, *La justice*, 307-31; Giovanna Nicolaj, "Formulari e nuovo formalismo nei processi del *regnum Italiae*" [1997], in *Storie di documenti, storie di libri: quarant'anni di studi, ricerche e vagabondaggi nell'età antica e medievale* (Dietikon-Zurich: Urs Graf, 2013), 230-46; Michele Ansani, "I giudici palatini, le carte, le leggi. Pratiche documentarie e documentazione di placito sullo scorcio del secolo IX," in *Almum Studium Papiense*, ed. Mantovani, 1:171-86.

[63] Tomei, "Un nuovo 'polittico' lucchese," 579.

[64] An example of reinvestiture after a judgment on the legal foundation: Manaresi, 1: no.127 (Lucca, 915).

[65] Chiodi, "Roma e il diritto romano," 1190-201.

(b) As for the *finis intentionis* and the *ostensio cartae*, their elaboration was interrelated to the capitulary promulgated at Pavia by Wido of Spoleto in 891.[66] One of the two articles that the text devotes to the *cartae* is copied word for word from the clause of a diploma of Charles the Fat addressed to several churches in the kingdom (Verona, Arezzo, Cremona, Bergamo) in 882.[67] It provides for the obligation of a court appearance for those who had sold or given away a property without, "notoriously", having the *vestitura legitima,* thus making the recipient of the document of sale or donation run the risk of a lawsuit when he took possession of the property in question (*res invadere*, understood here without the pejorative connotation that the translation 'usurper' gives to it).[68] The formulary for private charters already provides that the *auctor cartulae*, unless explicitly stated to the contrary, agrees to "defend" the document if its beneficiary is faced with any dispute. Here the measure is reinforced by soliciting from the *auctor cartulae* that he publicly "claim" the property (*eas [res] vendicet*), so as not to weigh down the new holder of the property rights with the possibility of his ownership being called into question.

By fixing this procedure within the framework of a *legalis et iudicialis diffinitio*, the property holder is assured of all required publicity. Silence is consent: those who, knowing that a landholding has been occupied illegally (*sine lege*), but do not take this opportunity to oppose the alienation (by sale, donation, or concession), perhaps lacking themselves the necessary titles, would accept the holder ipso facto. The very occupation of land "without legitimate investiture" has every chance of having been relatively frequent, by virtue of unclaimed legacies, gradual appropriation of public lands, or because of the vagaries of the management of large properties made up of many scattered parcels. Whence the importance, also, of the *brevia* and the *notitiae vestitoriae*, which are limited to recording the actual taking possession of property, its investiture, after a donation or a sale: such *brevia* and *notitiae* document the 'implementation' of the legal transaction. Some of these records imply a visit to the land-site itself; others, written for individuals following Salic law, go so far as to be written on the same piece of parchment after the actual sale, to which they give a legal translation in conformity with the Frankish

[66] MGH Capit. 2 224; Bougard, *La justice*, 312-14; Ansani, "I giudici palatini".
[67] MGH DD K III, nos. 49-52.
[68] MGH Capit. 2 224, c. 5 (p. 108): *De cartis vero interdicimus nemini alienas res praesumtive invadere occasione cartulae ab eo factae, qui vestituram legitimam non habens dinoscitur invasisse. Sed si quis adquisitor extiterit, non ante invadere alienas res, ecclesiae vel cuiuspiam liberi hominis, praesumat, antequam auctor cartulae legali iudiciali diffinitione eas vendicet, et tunc demum cui vult liberam tradendi habeat facultatem*.

investiture rites.[69] Either can be considered as useful precautions for avoiding future conflicts.

In other words: the non-opposition to a public declaration of possession entails the "legitimacy" of the occupation of the land by the declarer. It is certainly doubtful that the judicial claim on land by someone occupying it *sine lege* is a spontaneous action. The occasion was most probably sparked by the existence of a local opposition, overt or latent, confronted by the *auctor cartulae* in a puppet role of plaintiff rather than that of defendant. The potential buyer of property of doubtful origin could also require a judicial guarantee for it before concluding the transaction. Nonetheless, by enacting this new ruling, the capitulary of 891 widened the scope of action of the tribunals into a form of voluntary jurisdiction because, in the absence of an opponent, the judges had just to confirm with their authority the affirmations of the "plaintiff".

(c) While the *finis intentionis* responds exactly to what was prescribed by the capitulary of 891, this is not totally the case of the *ostensio cartae,* which would correspond rather to a later moment in the judicial affirmation of property rights. The law is, however, easily applicable to the *ostensio cartae*. In the absence of the *auctor cartulae*, he who holds the document can, for example, be obliged to present it before judges, in order to eliminate all uncertainty concerning possession. Especially since once the essential point of law resides in the fact that he who makes the claim is he who concretely holds a property, the way is open to use the judicial assembly as a validation chamber for any document that was liable to be challenged, whether or not the possible adversaries are known or not. Whence the need to install guarantees that would allow anyone contesting the claim the possibility of appearing during a judicial session.

The motivations of recourse to the *ostensio cartae* can be many and have evolved. As said earlier, this will sometimes remedy the absence of the *auctor*, or a loss of local memorial documentation occasioned, for example, by the destruction of an archive. This was probably the reason for the presentation before the judges in 892 of five *cartulae* related to the church of Varsi, in the diocese of Piacenza, where the archives were partially

[69] Trip to the land site to invest the beneficiary of a donation: *ChLA*[2] XCV 9 (Gninano, near Milan, 856; see Ansani, "I giudici palatini," 181); to invest the beneficiary of a diploma: Ettore Falconi, ed., *Le carte cremonesi dei secoli VIII-XII*, 4 vols (Cremona: Biblioteca Statale di Cremona, 1979), 1: no. 18 (Guastalla, 864). *Notitiae vestitoriae* after a sale: see Cristina Mantegna, "Tra diritto romano e riti germanici: il caso del documento piacentino del IX secolo," *Nuovi annali della Scuola speciale per archivisti e bibliotecari* 19 (2005), 5-19; see also *ChLA*[2] XCIV 34 (844).

destroyed some years earlier.[70] At other times a tense political and social context can provoke the need to affirm rights before an assembly, regardless the intrinsic authority of the document, such as a royal diploma. Whence the willfully "performative" aspect associated with the procedure. Solemnly played out before a hearing who supports the presenter of the document, it can be sufficiently intimidating that those who are less well armed will avoid taking the risk of denouncing. This is particularly true for diplomas issued at a change in political regime, which mark the link between local powers and the new regime, and for those, more generally, that jeopardize the balance of power within a territory or city. Examples include the *placita* held in 898 at the creation of the county of Modena; or in 964 to seal the strong position accorded the church of Reggio by Otto I; or the hearing in 998 that affirmed the rights of the bishop of Cremona in the face of the *cives* and reduced to nothing what they had obtained from the emperor two years before.[71] These three examples are demonstrations of power, and their staging is meant to mark the collective memory, in an exercise of symbolic communication.[72]

The public presentation of a document can also correspond to the final step in economic operations like those linked with credit, which were voluntary operations staggered over time and guaranteed by a charter of sale or donation issued by the debtor. The charter would be made definitive or nullified according to whether the sum that had been lent was reimbursed.[73] In the eleventh century other particularly complex affairs related to patrimonial successions, and whose comprehension remains clouded, are also guaranteed by the writing of a chain of charters among which *cartulae promissionis* and several documents of *ostensio cartae*, according to a procedure agreed upon in advance by the "partners".[74] Would these, in the absence of mutual confidence, use a judicial

[70] Manaresi, 1: 355-59 (no. 99) = *ChLA*[2] LXX 36. Ansani, "I giudici palatini," 182-83; Bougard, "L'église de Varsi et son chartrier".

[71] Manaresi, 1: no. 106 (Modena); 2: nos. 152 (Reggio) and 207. Tiziana Lazzari, "La creazione di un territorio: il comitato di Modena e i suoi 'confini'," *Reti Medievali Rivista* 7, no. 1 (2006), at <http://www.rmojs.unina.it/> (accessed 1 September, 2017); Hagen Keller and Stefan Ast, "*Ostensio cartae*. Italienische Gerichtsurkunden des 10. Jahrhunderts zwischen Schriftlichkeit und Performance," *Deutsches Archiv* 53 (2007), 99-121; Bougard, "Diplômes et notices de plaid," with other examples; Bougard and Morelle, "Prévention," 28-30.

[72] Keller and Ast, "*Ostensio cartae*"; Hagen Keller, "The privilege in the public interaction of the exercise of power: forms of symbolic communication beyond the text," in *Medieval Legal Process: Physical, Spoken and Written Performance in the Middle Ages*, ed. Marco Mostert and Paul S. Barnwell (Turnhout: Brepols, 2011), 75-108, at 77.

[73] Bougard, *La justice*, 323-25; "*Falsum falsorum judicum consilium*", 301; and, on the mechanisms of credit, "Le crédit dans l'Occident du haut Moyen Âge: documentation et pratique," in *Les élites et la richesse au haut Moyen Âge*, ed. Jean-Pierre Devroey, Laurent Feller, and Régine Le Jan (Turnhout: Brepols, 2010), 439-78.

[74] Antonella Ghignoli, ed., *Carte dell'Archivio Arcivescovile di Pisa. Fondo arcivescovile, I (720-1100)*(Pisa: Pacini, 2006), no. 102 (Mantova, 1034); Bougard, "*Falsum falsorum judicum*

context so that the progress of their transaction, secured with unassailable documents, could not be undercut by the questioning of a previous stage? Perhaps things should not be seen in this light. The preliminary agreement is certainly an act of "collusion", as is noted in the documents themselves. They implicate, moreover, the judges and notaries who are the first to counsel their clients in the meanders of the documentation. But the intent is not to deceive or pretend, but to provide a written document which, when presented in public, is unassailable and incontestable.

No doubt a precise knowledge of the context of each case would enrich that functional logic. But things must also be seen from a strictly documentary point of view, paying attention to the chronological relation between the different pieces. *Notitiae* which were established *pro securitate,* sometimes express the opinion of the parties concerning an inserted document that is much earlier in time. It is necessary to delete from the document all wording that could be attacked, not on form but on content. Sometimes it is from the debate in court that the document was born: either because a charter (sale or donation) terminates a transaction carried out step by step under the eyes of the judges-notaries who dictated how to proceed to avoid legal incertainty; or because the charter is the end point of the contradictory debates between the parties. One then integrates into the formulary of *ostensio* the settlement of a conflict, such a phase of which the adversaries had not perhaps foreseen at the begenning.

As with the *finis intentionis*, the question is not to know if there has been a former conflict when the claimant enquires about a possible opponent or asks a named and present adversary whether he intends to oppose the document whose content is being made public. This is sometimes the case, and sometimes not, but we must keep in mind that the formulary will not record the debates, if there were any. The formularies were meant not only to express in different words what the judges had said, by adopting models close to those used for a private charter and its voluntary clauses of obligation, or by allowing the insertion of the full charter in a judicial record. They were also meant to widen the social influence of a legal situation, affirmed unilaterally or as the result of an agreement between two parties, by submitting the validation to a tribunal and requesting that written record assure future memory of the court.

consilium", 301-02; Ghignoli, "*Repromissionis pagina*. Pratiche di documentazione a Pisa nel secolo XI", *Scrineum Rivista* 4 (2006-2007), 38-107. Accessed 1 September, 2017. https://oajournals.fupress.net/index.php/scrineum/article/view/8770/8768.

The debates that have stirred historiography on whether or not there are "apparent lawsuits" hidden behind the formularies invented in the late ninth century have no foundation. These lawsuits are neither visible nor fictive – no more than were the pseudo "Scheinprozesse" of the Merovingian seventh century[75] – but, depending upon the case, their development does or does not include an adversarial party. Sometimes the affirmation of possession is validated with indifference, sheltered from any conflict right to the end, having failed to find someone with the legal weapons that would have stymied the so blatantly illegitimate *vestitura*, whence such historiographical characterizations as "declaratory judgment" or "undefended case".[76] Other times opponents did exist, who are named. In this case, the *altercatio* recovers its rights, even if it is exceptional that details are given of the arguments exchanged or of the nature of the proof. In 1054 in Zurich, before Emperor Henry III, the bishop of Cremona obtained public recognition of his rights over two properties that, it is said in an interpolation, had just been the object of a duel; but nothing is said about the proceedings. Again one must be content that at least an allusion was made, because in 1014, in Pavia, another document says nothing of a judicial duel that decided a dispute, but the fact that it took place is known through a diploma.[77] With the *ostensio cartae*, if there is an element to be judged as apparent of fictive that is not the trial itself, but the charter of sale or donation that is the result of the dispute and which says nothing of the conditions for which, nor under which, it was drawn up.

In any case, it would be wrong to oppose the formulary and the procedure. The formulary is certainly a "documentary representation",[78] the most efficient way of validating publicly recognized rights. It is certainly the result of an abstraction. But its invention corresponds no less to a real procedure, that of committing to writing, which supplanted all others. There is no reason to doubt that the words exchanged between the judges and the party or parties were not pronounced, right up to the final declaration of closure of the *causa*. It is a judicial action in its own right, in a trial where one awaits the announcement of the winner. If the way it is recorded is simplified by comparison to the

[75] Alexander C. Murray, "So-called fictitious trial in the Merovingian *Placita*," in *Gallien in Spätantike unf Frühmittelalter: Kulturgeschichte einer Region*, ed. Steffen Diefenbach and Gernot Michael Müller (Berlin: De Gruyter, 2013), 297-327.
[76] "Declaratory": Jon N. Sutherland, "Aspects of continuity and change in the Italian *placitum* 962-972," *Journal of Medieval History* 2 (1976), 89-118; "undefended": Costambeys, "Disputes and documents".
[77] *Placiti*, 3/1: no. 391 (Zurich, 1054); *Placiti*, 2/2: no. 283 (Pavia, 1014). Bougard, "Rationalité et irrationalité des procédures".
[78] Ansani, "I giudici palatini," 185.

altercationes, the proceedings of the judicial hearing are often more complicated than before, because the debating time, if it takes place, adds a new ritual.

(d) A final word on the *notitia de banno*, which documents the putting in escrow of a property by placing it under the protection of the royal, imperial or ducal (in Tuscany) *bannum*. This threatens with a financial sanction anyone trying to appropriate the property, a sanction which will be split between the royal, imperial or ducal *camera* and the injured person or institution. Here again the tribunal responds to the action of the plaintiff, who makes his request after having made a declaration of ownership. The formulary for the imposition of the ban, attested first in the 990s and widely diffused after the mid-eleventh century, looks like an element detached from the text of the *finis intentionis* or the *ostensio cartae*, where it sometimes occurs as an appendix, but which now becomes autonomous. Henceforth, any evidence related to a possible conflict likely to justify the demand is absent. It must be emphasized that the financial sanction, drawn up in *mancosi, bizantei* or pounds, is directly copied in the royal diplomas. There is no fundamental difference between what is said in a diploma granting the protection of the king (*mundeburdium*) and a court record documenting placing a plaintiff and a court record documenting the fact that the plaintiff has been placed under protection of the ban. One can see here a sort of judicial "democratization" of the diploma, the content of which is now accessible to those not having easy access to the prince and who have little chance of ever obtaining an act on quality parchment, ruled, regularly sized, written in chancery script and bearing a seal. But it is also a supplementary weapon, without being redundant, in the eyes of those who have access to the written favour of the same prince. The very gesture of the ban, by which the president of the tribunal poses the *baculus*, the sign of his power, on the head of the appellant, can only reinforce the symbolic importance of the request.[79]

Conclusion

By their variety, the Italian judicial sources in the ninth, as in the eleventh century, show first the attachment to preserving written records of everything that passes before the judges and notaries, whatever the importance for the resolution of the conflict. In this, Italy offers an array of possibilities unequalled elsewhere. From the end of the ninth century, judges and notaries in Pavia lead an autonomous movement, indifferent to the political upheavals, which profoundly renovates the judicial practices and has an

[79] Keller, "The privilege," 87.

immediate spillover effect. Its spectacular success is surely due to its favorable reception by those answerable to the law, for whom the corresponding documents — responding to a wider range of situations — carried as many if not more guarantees than before. It also reveals the documentary and procedural engineering of practitioners of law, who probably benefitted most materially. Regardless the situation, or the importance of the actors, or the weight of the context, what is key is the written document and what it certifies, in a time when, not yet equipped with the probationary force that it will receive in the twelfth century, the written document is always liable to be questioned. With these innovations, courts and court records become ever more effective legal tools, reinforcing the written word, because judges are not content simply to supervise the debates, they also guarantee their outcome. Efficiency is the main worry: the judicial document records up to the execution of the court's decision — the "chose jugée" —, something that was unknown before.[80]

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Abbreviations: Primary Sources

CDL: *Codice diplomatico longobardo*. Vols I-II, edited by Luigi Schiaparelli, 1929-1933; Vols III/1 and IV/1, edited by Carlrichard Brühl, 1973-1981; Vols. IV/2 and V, edited by Herbert Zielinski, 2003 and 1986. Rome: Istituto storico italiano per il medio evo.

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[80] The margin of difference with certain Roman *refutationes*, which sometimes enclose the account of a judicial hearing in a private transaction, is not great (Santoni, "*Orta fuit intentio*"). The process of documentation is just inversed.

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