CHAPTER THREE

THE CHARACTERISTIC OF ELEVENTH-CENTURY LAW

3.1. Notarial Practice

Up to this point we have mainly considered normative ‘records’ handed down from the past and variously reproduced so as to preserve and promote their use in a culture rooted in the written word that persists to the present day. The marked tendency to record legal transactions was already evident in Lombard law (Rotari, end of chapter 224), where the use of the written record was advised as ‘propter futuri temporis memoriam’; a way to preserve information for the future. But record-keeping was mostly reserved for decisions of some significance, and thus (apart from legislative and judicial acts), tended to concentrate on juridical provisions concerning private individuals that would have enduring effects. These included individual judgements, dowries and long-term agricultural agreements (most typically, those covering ‘emphiteusis’, or long leases). In fact, according to archives dealing with the official conservation of written records, provisions for decisions of this kind were already in existence, in principle, at the normative level. Such procedures were already in place in Carolingian legislation.

The written record sometimes designated for contracts of conveniência or stantia (accord) was a munimen, a kind of bulwark defending the

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1 A classic study is Francesco Schupfer, Il diritto privato dei popoli Germanici con particolare riguardo all’Italia (1908–13). Other important works now are Vera von Falkenhausen–Mario Amelotti, ‘Notariato e documento nell’Italia meridionale Greca (X–XV secolo)’ and Alessandro Pratesi, ‘Il notariato latino nel Mezzogiorno medievale d’Italia’ (1987).
2 This is followed by ‘et si cartolam non fecerit tamen libertas ei permaneat’.
3 At times these were only oral agreements (Silvio Pivano, Contratti agrari in Italia nel Medioevo (1904), p. 275 and fn. 38); a written record could then be drawn up at a later date in the form of a notitia or breve.
4 Cod. 1.4.30 stipulates that the bishop together with other officials should nominate the ‘tutor dativus’, or individual chosen to exert public authority over minors; it offers clear evidence of the supremacy of the church and the trust invested in it.
5 But in Italy the Frank legislative texts have not received the same attention as that directed to the edicts. It is thus important, for example, to consult Arnold Bühler, ‘Capitularia relecta. Studien zur Entstehung und Überlieferung der Kapitularien Karls des Grossen und Ludwigs des Frommen’ (1986).
transaction and intended to insure the *firmitas* of the deed (whether public or private). It was to this end that the *firma* or signature was also included.6 This established the permanence and inviolability of the agreement, rather than acting as proof of the completed transaction.7 Evidence of that was provided by individuals who were called in to witness the event.8 Despite this, it was recognized that there were many false documents in circulation; the *Donation of Constantine* being the most famous. As a result, the written document was sometimes an object of suspicion and there was a desire for it to be corroborated by witnesses. It was also often the case at this time that the highest available authorities were called upon to confirm ownership of property or pre-existing rights, as a safeguard against possible invalidation of earlier documents. Numerous examples of such practice are preserved in ecclesiastical archives, above all, in those maintained by the abbeys. Obtaining such confirmation from a new emperor or pope added particular force to pre-existing claims based on old titles. This was in effect a *superaddere auctoritatem*, a new authorization at the highest level. The attestations frequently registered by notaries that individuals were indeed the proprietors ‘*et canonico ordine et legibus*’ under both kinds of law must have had a similar effect.9

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6 See Cortese, *Il diritto*, I, pp. 345–350, and also for the complex historiographical problem. When involved in non-typical contracts, such as ‘peace’, acts that imposed ‘non-action’, between nobles but also between other members of the society, and which were affirmed with oaths and *fides*, the obligation was enforced ‘per convenientiam’ or perhaps above all ‘per chartulam convenientiae’ (p. 349). For France see Paul Ourliac, ‘La ‘convenientia’ (1979), p. 251, where ‘convenence loi vault’ and indeed feudal arrangements assumed the guise of customs. Subsequently, non technical terms referring to agreement between the parties, such as *convenientia*, were no longer adopted; the word was used only generically, as in *convenientia regum*: it was because of this, according to Marinus of Caramanico (Francesco Calasso, *I glossatori e la teoria della sovranità. Studio di diritto comune pubblico* (1957), p. 199), that Roman law prevailed in Southern Italy.


8 The courts required ‘firmaates aut homines’, in other words, clear evidence of witnesses (*I placiti del Regnum Italiae*, I (1955), p. 196 f., no. 56, year 851–2), and that ‘ullam firmitatem de sua libertate’, or ‘he who bids for his own freedom cannot provide witnesses’ (*I placiti*, I, p. 321 no. 89, year 880). Some doubts must thus be raised about Heinrich Brunner’s theories (in his classic *Zur Rechtsgeschichte der römischen und germanischen Urkunden* 1880) concerning the transferring of power exercised by the early medieval *charta*, whereby its *traditio* was enough to transfer the ‘incorporated’ law, with the result that the document became an *ante litteram* ‘title for the bearer’, somewhat like the modern title of credit: Cortese, *Il diritto*, I, pp. 326–329.

9 For example, Cortese, *Il diritto*, I, p. 329, for the emperor who in 870 confirmed the immunity offered by his predecessors to the monastery of Prüm.