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978-0-521-51499-6 - Legal Practice and the Written Word in the Early Middle Ages: Frankish Formulae, c. 500-1000

Alice Rio

Excerpt

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## INTRODUCTION

Legal formulae are in an unusual position among early medieval sources. Their study peaked early. It was begun in earnest by the beginning of the seventeenth century, and formulae elicited fairly steady scholarly interest from then on. The nineteenth century was, in historiographical terms, their golden age: rival editions were published, Eugène de Rozière's work was quickly followed and superseded by Karl Zeumer's *Monumenta* edition, and there was a flurry of debate and controversy regarding dating and editing work, in which French scholars usually reached conclusions diametrically opposed to those of their German counterparts.<sup>1</sup> Fustel de Coulanges relied heavily on formulae as a source in his *Monarchie franque*, and his work can in some ways be said to represent the only serious attempt to use them comprehensively in a general history on the same level as, for instance, the law-codes or narrative histories.<sup>2</sup> By the 1930s, formulae looked set to become established as a source for the Frankish kingdoms that could not be dispensed with.

Curiously, however, their use declined sharply thereafter. Modern historians have in general been far less sure about exactly what it is that formulae can really tell us, or indeed whether they can be useful at all, and they are now mostly relegated to footnotes, as back-up for points already made on the basis of different sources.<sup>3</sup> This decline is especially

<sup>1</sup> E. de Rozière, *Recueil général des formules* (Paris, 1859–71); K. Zeumer, *Formulae Merovingici et Karolini Aevi*, MGH *Leges* V (Hanover, 1886). On Franco-German antagonisms, see, for instance, the controversy over the dating of Marculf, which was the object of a debate between Zeumer and Tardif as drawn-out as it was venomous (see below, chapter 4, p. 84, n. 38).

<sup>2</sup> N.D. Fustel de Coulanges, *La monarchie franque*, *Histoire des institutions politiques de l'ancienne France* vol. 3 (Paris, 1888), *passim*, but especially pp. 23–4; see also, for instance, *ibid.* pp. 29, 190, 214, 406, 409, 415–16, 420, 499.

<sup>3</sup> With some exceptions, such as the important articles by I.N. Wood, 'Disputes in late fifth- and sixth-century Gaul: some problems', in W. Davies and P. Fouracre, eds, *The Settlement of Disputes in Early Medieval Europe* (Cambridge, 1986), 7–22 and I.N. Wood, 'Administration, law and culture in

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obvious in the level of attention they receive in textbooks. Until the mid-twentieth century textbooks on the period always devoted a section to them, typically including an inventory of the evidence and a few words on the genre.<sup>4</sup> Formulae then became an increasingly obscure source as the twentieth century progressed, and they are hardly represented at all in modern textbooks. Perhaps the most extreme example is Robert Fossier, who, in a 1999 book entitled *Sources de l'histoire économique et sociale du Moyen Âge occidental*, baldly stated that 'formularies, being mere frameworks to be filled in at a later date, can only be useful in the field of diplomatic'.<sup>5</sup>

This rather startling reversal of fortune for a source that had once been considered important partly has its roots in the change in the way we approach our sources. Whereas nineteenth-century scholars had been happy to shape their view of the medieval world to fit the available evidence, depending on a relatively straightforward assessment of its reliability or otherwise, the sensitivity to the difficult relationship between text and reality that is the hallmark of modern research places a much heavier demand on our sources. We now view texts as self-conscious constructions: where earlier scholars had looked only to evaluate the informative content of a source, we now look for discourse, textual strategies and power relationships. Historians are now keenly conscious of the need to understand first and foremost what a text is for and how it works: its

Merovingian Gaul', in R. McKitterick, ed., *The Uses of Literacy in Early Medieval Europe* (Cambridge, 1990), 63–81; P. Fouracre, "'Placita" and the settlement of disputes in later Merovingian Francia', in Davies and Fouracre, *The Settlement of Disputes in Early Medieval Europe*, 23–43; P. Geary, 'Extra-judicial means of conflict resolution', in *La giustizia nell' alto medioevo (secoli V–VIII)*, Settimane di studio del centro italiano di studi sull' alto medioevo 42 (Spoleto, 1995), vol. 1, 569–601; O. Guillot, 'La justice dans le royaume franc à l'époque mérovingienne', in *La giustizia nell' alto medioevo (secoli V–VIII)*, vol. 2, 653–731.

<sup>4</sup> The classic synthesis on formulae is H. Brunner, *Deutsche Rechtsgeschichte* vol. 1 (Leipzig, 1906, 2nd edn), pp. 575–88; see also H. Bresslau, *Handbuch der Urkundenlehre für Deutschland und Italien*, 2nd edn by H.-W. Klewitz (Berlin/Leipzig, 1931), vol. 2, pp. 225–41. T. Sickel, *Acta regum et imperatorum Karolorum digesta et enarrata. Die Urkunden der Karolinger*, vol. 1: *Urkundenlehre* (Vienna, 1867) also includes a discussion of some formularies (pp. 112–25). R. Buchner, *Deutschlands Geschichtsquellen im Mittelalter: Vorzeit und Karolinger. Beiheft: Die Rechtsquellen* (Weimar, 1953), pp. 49–55, is still the most recent general overview on the subject.

<sup>5</sup> R. Fossier, *Sources de l'histoire économique et sociale du Moyen Âge occidental: questions, sources, documents commentés* (Turnhout, 1999), p. 44: 'simples cadres qu'on remplira ensuite, [les formulaires] n'apporteront de données que dans le seul domaine de la diplomatique'. In the same vein, see also R. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 6th edn by E.V. Künssberg (Berlin, 1922), p. 294: 'Der Wert der Sammlung [the *Collectio Flaviniacensis*] ist den wesentlichen nur ein literarhistorischer' (cited in P. Depreux, 'La tradition manuscrite des "Formules de Tours" et la diffusion des modèles d'actes aux VIIIe et XIe siècles', in P. Depreux and B. Judic, eds, *Alcuin de York à Tours: Écriture, pouvoir et réseaux dans l'Europe du Haut Moyen Âge* (Rennes/Tours, 2004), 55–71, p. 56, n. 13).

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use, its context of production, what kind of project it was part of. The idea that we should never take anything for granted when it comes to evaluating the purposes and representativeness of a source, even when it purports to be straightforward, had its greatest impact on historians' reading of written law. This was revolutionised in an even more dramatic way than our reading of literary texts, the ulterior motives and deliberate distortions of which had always to some degree been a concern to scholars. The limits imposed by the codes' prescriptive nature are now emphasised, and historians no longer take them as a straightforward reflection of society: they are now examined more in relation to what they can tell us about royal power, or what value system they convey.

This has had a strong impact in the decline of formulae as a source. Their heyday was associated with the deep interest in law and legal texts characteristic of nineteenth-century German scholarship. As a result, formulae have essentially been approached from the angle of legal and institutional history. It is symptomatic in this respect that interest in them should have been curiously concentrated, along with technical studies of the manuscript tradition,<sup>6</sup> on the problem of the replacement of lost documents and the *apennis* procedure, almost to the exclusion of any other subject.<sup>7</sup> Historians have been most interested in using formulae as evidence for legal structures, or for the information they can give us on those directly involved in the technical aspects of drawing up documents and their level of professionalisation, and not for what they can tell us about the stories of the people these documents were drawn for. As far as formulae are concerned, it is assumed, perhaps a little too pessimistically, that these stories are beyond all hope of recovery. As a result the potential of formulae as a source for social history has remained largely untapped.

The need to determine context, both of production and of use, is the most significant obstacle. In this respect formulae are at a unique disadvantage due to their non-specific nature. A large proportion of what

<sup>6</sup> See W. Bergmann, 'Die Formulae Andecavenses, eine Formelsammlung auf der Grenze zwischen Antike und Mittelalter', *Archiv für Diplomatik* 24 (1978), 1–53; W. Bergmann, 'Verlorene Urkunden nach den *Formulae Andecavenses*', *Francia* 9 (1981), 3–56; Depreux, 'La tradition manuscrite des "Formules de Tours"'

<sup>7</sup> K. Zeumer, 'Über den Ersatz verlorener Urkunden im fränkischen Reiche', *ZSSRG GA* 1 (1880), 89–123; L. Gobin, 'Notes et documents concernant l'histoire d'Auvergne. Sur un point particulier de la procédure mérovingienne applicable à l'Auvergne: "l'institution d'*apennis*"', *Bulletin historique et scientifique de l'Auvergne* (1894), 145–53; and, most recently, C. Lauranson-Rosaz and A. Jeannin, 'La résolution des litiges en justice durant le haut Moyen-Âge: l'exemple de l'*apennis* à travers les formules, notamment celles d'Auvergne et d'Angers', in *Le règlement des conflits au Moyen-Âge, XXXIe Congrès de la SHMES (Angers, juin 2000)* (Paris, 2001), 21–33; W. Brown, 'When documents are destroyed or lost: lay people and archives in the early Middle Ages', *Early Medieval Europe* 11 (2002), 337–66.

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historians usually like to find in a source is simply unobtainable from them because, in a bid to give them general value, scribes removed all names of the persons involved, and most places and dates. Even when the point of origin is securely identified and dated, which is extremely rare, the shelf-life of any collection remains unknown. Formulae therefore have a loose anchorage in space and time, and historians have been reluctant to rely on them, some even rejecting them entirely, explicitly or in practice. The problem partly stems from a tendency to approach formulae from the perspective of charters, to which historians have turned with renewed enthusiasm since the discrediting of laws and legal material as evidence for social history. Comparison with charters, with their wealth of specific, localised information, has led to a very unfavourable view of formulae, which lack such information almost completely. As a result, formulae tend to be treated as poor cousins of charters: the general opinion seems to be that although they often contain interesting information, it is made virtually useless because it cannot be tied down to a specific time and place in the way that charters can. Formulae are thus usually approached only as a second-rate source, and have become something historians turn to in the absence of the documents they would have been based on (or the documents that would have been based on them): the *placita* and charters we wish we had, but do not. As a result, despite their continued copying and reworking down to the tenth century, formulae tend to be studied as evidence for the Merovingian period, for which we lack these actual documents almost completely, far more than for the Carolingian period, for which our surviving record is more extensive. The idea that the study of formulae and that of charters should go hand in hand is so dominant in the historiography as to have remained unquestioned, and all in all, it seems fair to say that historians have been less interested in formulae as a distinct source in their own right than in the lost actual documents of which they preserve a trace. And yet surely it is interesting in itself that such collections of models were devised and used at all. Somehow we must allow a place for them in the medieval world that produced them.

The methodological adjustment which heralded a new departure in our understanding of so many other medieval sources has thus left formulae in something of a limbo. Like other sources, they have become the object of increased suspicion. Although diplomatists continue to use them for their own purposes,<sup>8</sup> historians, now wary of overconfident

<sup>8</sup> See for instance T. Kölzer, ed., *Die Urkunden der Merovinger*, MGH *Diplomata regum Francorum e stirpe merovingica* (Hanover, 2001).

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generalisation and alive to the risks of making assumptions on the meaning and purpose of even the most outwardly utilitarian of early medieval sources, have expressed doubt as to whether they were really used in the way they purported to be, or even whether they were used at all: no one is quite sure of the context in which they should be considered, whether in terms of when, where, or how.<sup>9</sup> In this sense there has been a profound rethinking of the way formulae work as a source, but essentially in a negative sense: the stripping away of prior assumptions has made historians more keenly aware of their deficiencies as a source, but these assumptions have not yet been replaced with anything more positive. Formulae have thus been rather hard done by, and in most modern work they have remained relatively under-exploited. This looks to be about to change: formulae currently seem to be on the verge of a revival, and more articles are being devoted to them, in particular with the important work of Warren Brown.<sup>10</sup> But there has been no general reappraisal in any language of their nature as a source or of the manner in which they should be approached, and the possibilities and problems involved in their use by historians have not yet been re-examined systematically in the light of the developments in the field of early medieval history of the past fifty years. The aim of this book is to attempt precisely such a systematic study, and to propose a methodology which could allow us to approach these texts in a more fruitful way. I hope to demonstrate that formulae offer great possibilities when given the proper attention.

<sup>9</sup> Brown, 'When documents are destroyed or lost', pp. 339–40.

<sup>10</sup> Brown, 'When documents are destroyed or lost'; Depreux, 'La tradition manuscrite des "Formules de Tours"'; D. Liebs, 'Sklaverei aus Not im germanisch-römischen Recht', *ZSSRG RA* 118 (2001), 286–311; Lauranson-Rosaz and Jeannin, 'La résolution des litiges en justice durant le haut Moyen-Âge'; see also the unpublished PhD thesis in legal history by A. Jeannin, *Formules et formulaires: Marculf et les praticiens du droit au premier Moyen Âge (Ve–Xe siècles)* (Lyon, 2007). See also A. Rio, 'Freedom and unfreedom in early medieval Francia: the evidence of the legal formularies', *Past & Present* 193 (2006), 7–40; A. Rio, 'Les formulaires mérovingiens et carolingiens: tradition manuscrite et réception', *Francia*, 35 (2009), 327–48; A. Rio, *The Formularies of Angers and Marculf: Two Merovingian Legal Handbooks* (Liverpool, 2008).

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## PART I

### *Formulae, Charters and the Written Word*

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IN FRANKISH SOCIETY

Dexterous Ghost handed over the gourd and Skilful Beast produced the vase. When they gave them both to Monkey he gave them his imitation gourd. The exchange had now been made, but Monkey wanted it to be final, so he plucked a hair from under his navel, blew a magic breath on it, and turned it into a copper coin. 'Boys,' he said, 'take this coin and buy a sheet of paper.' 'Why?' they asked. 'We'll write a legal contract for the exchange of your two man-holding treasures for my sky-holder,' said Monkey. 'We each need a written agreement to prevent later regrets with the passage of time.' 'But there's no brush or ink here to write a contract with,' said the two little devils. 'Let's swear an oath instead.' 'What sort of oath?' asked Monkey. 'We exchange our two man-holding treasures for your sky-holder,' said the devils, 'and if we ever have any regrets may we be struck by pestilence in all four seasons.' 'I certainly won't have any regrets,' chuckled Monkey. 'If I do, may I too be struck with pestilence in all four seasons.' Having sworn this oath he leapt up, his tail in the air.

Wu Cheng'en, *Journey to the West* (tr. W.J.F. Jenner), ch. 33

A dilemma common to all historians of pre-modern societies is that they are inevitably dependent on written sources, while at the same time facing deep unease as to how far it may be legitimate to rely on them: if writing and the written word can be shown to have only remained marginal to a given culture, any hope of building a representative picture on the basis of the writings it produced would be severely compromised. This issue of representativeness is crucial to judging how far it may be legitimate to extrapolate and generalise from the available evidence. On the other hand, the degree of centrality or marginality of the written word is itself bound to remain in doubt, precisely because it cannot be supplemented by alternative, predominantly oral systems, since by definition no trace of them survives unless mediated through the written word: the choice between maximalist and minimalist evaluations of the extent

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of the use of the written word therefore rarely avoids boiling down in some sense to an article of faith. Following one or the other approach fundamentally alters our understanding of the world we are studying, and of how much we can ever hope to know about it.

This is an especially important problem for social history, since its vocation is to encompass society from the widest possible perspective, and it is therefore especially vulnerable to distortions created by literary texts, which were always produced by persons benefiting from both leisure and education: for early medieval Francia, this means mostly men, mostly churchmen, and mostly members of the elite. Their writings present limits beyond obvious considerations of conscious bias: much they reconstructed to fit their particular understanding of their own world (usually characterised by an unsympathetic attitude to the lower echelons of society); much also simply fell below their notice. Founding social history on such accounts may be likened to trying to reconstruct British social relations in the inter-war period exclusively on the basis of the writings of Evelyn Waugh or P.G. Wodehouse. Even saints' lives, which could place their characters in a more diverse social milieu, tend to present large sections of society, such as women or the poor, only as passing stereotypes. Attempts at generalisation are therefore always bound to be hindered by the unavoidable problem that we cannot access the vast majority of Frankish society in its own words.

Documentary sources, on the other hand, are potentially more promising in this respect. Charters, when they can be shown to be authentic, offer us a chance to access less fundamentally distorted data, since their context of production was by definition the same as that of the actions they described, and, whatever symbolic and ideological purposes they may also have served, their essential purpose was to define these particular actions in such a way as to reduce any risk of ambiguity to a minimum. Admittedly, they too give us an interpretation of events rather than a straightforward description: this would for instance be a problem if, as has been argued, traditional documentary practices followed rules that were formally too archaic, restrictive or formulaic to give a representative account of what had taken place.<sup>1</sup> This is an important point, to which I will return; but although formal idiosyncrasies of this kind do present us with a difficulty, they do not create an insuperable obstacle, since these documents were after all still clearly acceptable to their

<sup>1</sup> As has been argued, regarding formal charters, by D. Barthélemy, *La société dans le comté de Vendôme de l'an mil au XIV<sup>e</sup> siècle* (Paris, 1993), pp. 19–64; D. Barthélemy, *La mutation de l'an mil a-t-elle eu lieu? Servage et chevalerie dans la France des Xe et XI<sup>e</sup> siècles* (Paris, 1997), pp. 30–56. See chapter 5 below, pp. 175–7.



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intended users, which implies that they did more or less manage to communicate the essence of what it was that these users wanted to put across. Although they undoubtedly held their own share of ideological baggage and creative interpretation, the *raison d'être* of documents was nevertheless to give a detailed contemporary record of particular agreements, which, although they were not put in participants' own words, were at least verified by them: it remains therefore the case that a document was defined by the event it recorded to a much greater extent than a literary text.

Documentary sources, like any other, obviously still have their own limits; the question is where to situate them. In terms of their ability to reflect the realities of Frankish society at large, the main questions are who used them, and what for: that is, how representative this evidence is of the whole range of the population, and of the whole range of transactions made. If most people used them to record most of their transactions, documents could constitute evidence wide-ranging enough to allow broad analyses of social relations; if only a few people used them, or if they were used only in exceptional circumstances, they would again pose problems on a similar scale to literary sources. This issue is deeply entangled in the wider debate over the fall of the Roman empire, and the extent of continuity from the late antique to the early medieval world: that is, the question of how far the disappearance of a complex system of government, relying extensively on the written word to fulfil its major secular functions, such as administration, law and taxation, may have entailed a reduced demand for the written word and a marginalisation of its use across the board. The possibility of a retreat of the written word into ecclesiastical spheres, long put forward as one of the fundamental changes marking the break from late antiquity to the early middle ages, forms an important part of this question.

#### WHO USED DOCUMENTS, AND WHAT FOR? THE EVIDENCE OF CHARTERS

The question of who used written documents essentially relates to the social status of users, as well as whether they were lay or ecclesiastical. The basic fact that documents were written down, and written in Latin, could have created two obvious possible obstacles to their access by a large proportion of the population: this brings us into the much-debated areas of language and literacy.

The extent of literacy in this period has been the object of much discussion, precisely because it is so crucial to evaluating the impact and

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representativeness of the surviving written evidence.<sup>2</sup> The issue is clouded by a significant distortion in patterns of survival, since most manuscripts and charters only survive through ecclesiastical libraries and archives. If lay people also owned libraries and archives, these did not benefit from the same level of institutional continuity as those of religious houses, and would therefore have had a much lower chance of being preserved. In the case of documentary evidence, this means that the vast majority of surviving examples only deal with the business of the church: the question is whether this reflects a real imbalance in the use of documents between the lay and ecclesiastical spheres, or whether it is essentially a trick of the light resulting from accidents of survival. Some historians have concluded from the relative scarcity of surviving books and documents that can be shown to have been owned by lay people that the written word in this period was merely a sickly remnant of the Roman and Christian tradition, only kept up by churches, far removed from lay concerns, and so unable to shed much light on the wider world.<sup>3</sup> This view was put forward most forcefully by Michael Richter, but there are a number of problems to his treatment, many of which have been pointed out since.<sup>4</sup> Although this approach could in a way be considered hyper-critical, it is so only of written sources, while at the same time relying on a number of unwarranted assumptions in order to boost the case for alternative oral systems, for instance in defining 'barbarian' identity and the written word as mutually exclusive even after the formation of the successor-states, without providing much by way of supporting evidence apart from an estimation that the barbarian kingdoms produced fewer written sources than the Roman empire (a point which is itself debatable: although we certainly do not have as many early medieval sources as we would like,

<sup>2</sup> J. Goody and I. Watt, 'The consequences of literacy', in J. Goody, ed., *Literacy in Traditional Societies* (Cambridge, 1968), 27–68, constituted an important starting-point for this debate; for medieval history, the way was opened by Michael Clanchy's *From Memory to Written Record: England 1066–1307*, 2nd edn (Oxford, 1993).

<sup>3</sup> M. Richter, "'*Quisquis scit scribere, nullum potat abere labore.*" Zur Laienschriftlichkeit im 8. Jahrhundert', in J. Jarnut, U. Nonn and M. Richter, eds, *Karl Martell in seiner Zeit* (Sigmaringen, 1994), 393–404; M. Richter, *The Formation of the Medieval West: Studies in the Oral Culture of the Barbarians* (Dublin, 1994): '[written sources were] of rather marginal importance to much of early medieval life, the output of the expertise of some individuals and groups possessed of no great social prestige' (p. viii); 'writing was throughout the early medieval centuries the domain of a small circle of specialists for rather narrowly circumscribed purposes' (p. 262). For a similar argument, see also F.L. Cheyette, 'The invention of the state', in B.K. Lackner and K.R. Philip, eds, *Essays in Medieval Civilization: The Walter Prescott Webb Memorial Lectures* (Austin, 1979), 143–76, at pp. 149–56.

<sup>4</sup> See, for instance, M. Innes, 'Memory, orality and literacy in an early medieval society', *Past & Present* 158 (1998), 3–36, at pp. 7–8; M. Innes, *State and Society in the Early Middle Ages: the Middle Rhine Valley (400–1000)* (Cambridge, 2000), pp. 111–12 and 117–18.