So-called Fictitious Trial in the Merovingian *Placita*

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Nineteen examples of the judicial decisions of the Frankish royal tribunal have come down to us from the Merovingian period. This pool of charters, dating from mid and late seventh century, is made up of sixteen originals and three genuine copies; it can be supplemented with three or four specimens from the Marculf formulary, plus, from the same source, a similar number of examples of auxiliary orders of the king that help explain how the royal tribunal worked.¹ The charters and formulae as a whole provide us with an invaluable body of evidence for the court practice of the late Merovingian kings and the character of Frankish procedure in general. To distinguish these charters from other enactments of the royal will, namely the broad mass of diplomas comprising royal grants of property and privileges of various sorts, scholars have dubbed the decisions of the royal court *placita*, a term now apparently unavoidable, if misleading, since it was never used in the Merovingian period to record the findings of the king’s court.² The legal substance of the *placitum* (*dispositio*, as we now define it) is the royal command in the present tense, but the king does not sign his name, as in other diplomas. The *placitum* typically bears simply the signature of the referendary and the royal seal.

On the basis of their contents, the nineteen surviving *placita* can be divided into two broad categories: thirteen *placita* dealing with various stages of dispute process and six *placita* recording royal confirmations of private law conveyances – sales and donations brought by the parties before the royal tribunal.³ For almost

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¹ The charters are in the new edition of the MGH Diplomata, edited by Theo Kölzer, vol. 1 [items henceforth abbreviated DM]. The edition also contains two other *placita*, DM 103 and 118, classed respectively as spurious and interpolated. Neither is of value for the theme of this paper. The formulae are in the MGH edition of Karl Zeumer: Marculf I 25, 37, 38 [henceforth abbreviated FMarc]. Auxiliary commands of the king are FMarc I 26, 27, 28, 29. The Supplement to Marculf (no. 2) also contains a formula that could be classed as a *placitum*, or, since it is addressed to a count, as an auxiliary executive order. It is Carolingian but almost certainly a copy of a Merovingian model.

² There is no *arenge* in the surviving genuine examples, though FMarc I 25 suggests that is not a definitive trait.

³ Disputes: DM 79 (copy), 88, 93, 94, 95, 126, 135, 137, 141, 149, 156, 157, 167. The earliest is dated 642, but this is a copy; the earliest original is 657/78. Add to this group FMarc
a hundred and forty years, however, our understanding of the nature of the *placita* and the processes they embody has been complicated by a misapprehension about the procedures underlying both the conveyances and the disputes. There is a widespread conviction that the same procedure lies behind both disputatious suits and the confirmations of consensual conveyances. As a consequence, it is commonly said that the parties to the confirmations – namely the seller or donor on one hand, and the buyer or beneficiary on the other – resort to a fictitious trial before the court in which they play out the roles of defendant and plaintiff as in a real contended action. Conversely, it seems to follow, that if a confirmation can take the form of a suit, then a suit can disguise a legal process that actually confirms a conveyance, where plaintiff and defendant are really consensual participants in transactions that have already been completed – from one to three of the ostensible disputes have been identified as not really disputes at all, but disguised confirmations carried out in the form of a trial.

One or both of these interpretations – that the conveyance *placita* on one hand and select dispute *placita* on the other record fictitious trials (*Scheinprozesse* in German) – have now become entrenched fixtures in the literature of the *placita* and have insinuated their way into political evaluations of late Merovingian politics. The new MGH edition of the diplomas, for instance, has incorporated the concept of fictitious procedure directly into summaries of the relevant *placita*, identifying all six charter confirmations and two of the dispute charters as containing *Scheinprozesse*, though no *placitum* ever so characterizes itself; a seller in one of them is even said to be ‘condemned’ to hand over property to the buyer, though the language of judicial condemnation is never actually used. The MGH is in line with the classification of the leading authority on the diplomatics of the *placita*, who regards the confirmations and two of the disputes as based on fictitious trials, though with incidental reservations on his part that make one marvel at the inertia of received opinion. Even scholars sceptical of reclassing dispute

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4 The impression of Brown 2001, 83, that the concept of fictitious disputes in Merovingian law derives from Ian Wood and Paul Fouracre (in Davies and Fouracre 1986) is doubly wrong. Barbara Rosenwein’s perception in Rosenwein 1999, 91 that *Scheinprozesse* were first identified and analysed by Bergmann 1976 is only marginally better.
5 DM 156, 157. Gerberding 1987, 103–104 has also argued that DM 149 is fictitious, but he has not been widely followed. Cf. n. 55, 57.
6 Summary of DM 155. The summary to DM 136 erroneously suggests conflicting claims between the parties. The ChLA characterization of the conveyance confirmations waives equally between seeing them as confirming or awarding ‘definitivement’ the property claims brought before the court.
7 Bergmann 1976, 1–186; reservations: p. 98, esp.: “Vom rechtshistorischen Standpunkt aus erscheint der Begriff des Scheinprozesses nicht unbedingt treffend, da weder Kläger noch Beklagte, Klage oder sonst irgend etwas, was einen Prozeß charakterisieren, vorhanden
processes as disguised confirmations have nevertheless embraced the conveyance confirmations as lawsuits, ‘fake disputes’ as one historian calls them, displaying plaintiffs, defendants, and royal judgments. These characterizations are usually presented as if sound, undisputed facts of charter study.

Criticisms challenging the aptness of fictitious trial as a category for interpreting the *placita* have for a long time been few and far between. The Romanist Ernst Rabel in 1905 rejected in passing the concept for Frankish law as he did in exhaustive detail for archaic Roman procedure, seeing the conveyances for what they are, not mock trials. Rabel’s seminal work, which appeared in the *Zeitschrift der Savigny-Stiftung* was located, it seems, in the wrong *Abteilung* to make an impact on the study of Frankish law, for, as far as I can tell, early medievalists have passed it by. In 1934, again in passing, the Romanist Henri Levy-Bruhl, who is credited incidentally as being the founder of legal anthropology in France, in a study of archaic Roman procedure rejected the fictitious, dispute character of one of the Frankish conveyances that had incidentally come to his attention. In 1950, Cesare Manaresi turned the issue on its head: in a study of Italian *placita* from the ninth to the eleventh century, he claimed that a procedure there (generally called an *ostensio chartae* in the literature), which seems analogous to the Frankish conveyance procedure, was not a fictitious trial because it was always part of a real dispute processes. In more recent times, the pace of criticism has quickened somewhat but generally in passing and without systematic examination of the evidence. From a Germanist perspective, Jurgen Weitzel repudiated the
value of the concept of *Scheinprozesse* for Frankish law, apparently to little avail, in 1985 and returned to the subject in 2006. In 1994, Mauricio Lupoi, surveying assemblies as the locus of general confirmations of legal relations, rejected the concept of ‘fictitious trial’ for the Frankish conveyances, linking them to the Italian *ostensio chartae* procedure, which he saw (in complete contrast to Maneresi) as non disputatious. Olivier Guillot in 1995, while claiming to be agnostic on whether the Frankish conveyances are fictitious or not, offered an alternative to what he classified as the ‘classic interpretation,’ considering them as possibly real disputes, much in the fashion of Manaresi, in which a defeated party was forced to acknowledge his cession of property. In 2005, in reviewing the new edition of the Merovingian diplomas, I devoted a few paragraphs to disputing the allegedly fictitious character of the *placita* marked out there as *Scheinprozesse*, seeing them simply as conveyances. I would like to thank the organizers of the present conference for the opportunity to expand and clarify those remarks.

‘Legal fiction’ is an important subject in European and comparative law whose literature stretches across various languages outfitted with assorted conceptual and terminological conventions. If the *placita* fitted comfortably into this complicated framework, the theoretical dimensions of the concept might be worth exploring. But since they do not, my remarks will mainly be concerned with exploring the context in which the concept of fictitious procedure entered the study of Frankish law and in asking in what sense the procedures in the relevant *placita* could have been considered fictitious to begin with. For reasons of both priority and time I am going to concentrate on the conveyance confirmations, but

All write from the general perspective of the validity of the concept of fictitious trial. Kano has important observations modifying the views of his predecessors. Weitzel 1985, vol. 2, 839ff., 844–847; 2006, 307–311. Lupoi 2000, 215–222, esp. 219, 221. The original Italian edition was published in 1994. Lupoi deals with unilateral and bilateral appearances before assemblies of varying types. His rejection of *lis ficta* does not stop him from dealing with bilateral appearances as if between plaintiff and defendant. His treatment of the Italian *ostensio cartae* is rather narrow. What the literature calls *ostensio cartae* seems to have been used widely in Italy in various contexts, including that of dispute, conveyance and contract. Compare Bougard 1995, 319–329, who notes in passing ‘les vrais “Scheinprozesse“ de l’époque mérovingienne’, and Wickham 1997, esp. 185–191. Wickham’s conclusion about the context of the Italian *ostensio cartae* (p. 191) seems, at this point, about right: “The *placitum* [meaning the hearing that produced the final document] was an important legal occasion; it had many legal functions. It heard disputes; it ratified contracts; it made private agreements public. But we cannot always tell which is which.” Guillot 1995, 711f. The argument appears in n. 195 *bis*. Manaresi is not cited. The two most relevant surveys to my theme are French: Dekkers 1935 and Dumont-Kisliakoff 1970. Neither is interested in, or apparently aware of, the Merovingian *placita*. For a sense of how far and how pointlessly the concept can be stretched, see the classic of Henry Sumner Maine 1861, ch. II.
will conclude with some comments about the isolated disputes that have sometimes been classed as fictitious.

I.

In 1873 fictitious procedure as a category for understanding the early Frankish conveyance confirmations was established by Heinrich Brunner, who was also the first to argue that a placitum apparently about a dispute could also conceal a matter previously settled among the litigants.\(^{17}\) He saw the purpose of the conveyance placita as the acquisition of an unchallengeable royal charter, which, he claimed, was obtained by a fictitious lawsuit staged between the parties before the royal tribunal. His principal argument was that the form of procedure in the conveyances was a lawsuit about property, and he proceeded to compare one of the conveyance confirmations with a regular dispute to demonstrate his contention. It is hard to see initially why he did so with such satisfaction. In the summary of the two procedures I am about to give, you should note that the Merovingian texts provide no terms for plaintiff and defendant, or, to use the terms suitable for the conveyance procedure, petitioner and respondent. The role of the parties has to be inferred from the content of their claims and the response of the court, and from the term the confirmations clearly do use for respondent.\(^{18}\) This singular term, used in five of the six conveyance confirmations, is auctor, warrantor, a term derived from the Roman law of sale and conveyance.\(^{19}\)

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17 Brunner 1873 (Repr. 1931). Brunner was anticipated by Bethmann-Hollweg 1868, 493, for the Franks and see at n. 25; and, on Italian matters, by Ficker 1868, vol. 1, 37–45 (note the pointed comment as to Ficker’s priority by Manaresi 1950, 179). For the common source, see von Jhering 1852–1865; 2nd ed. 1869, vol. 3, 503–542 at n. 28. The trail is clear in the cases of Brunner and Bethmann-Hollweg, but no less sure for Ficker, despite no acknowledgment.

18 The comment by Bergmann 1976, 93: “Die […] Parteien treten fiktiv als Kläger und Beklagte auf und werden in der Urkunde als solche formulargemäß bezeichnet”, is assuredly mistaken. The first part of the statement is an interpretation unsupported by the language of the charter form. Cf. n. 7 above.

19 The auctor is the previous owner, obligated to warrant the title of the property and, in classical law, subject to penalties if the purchaser was later evicted by a rightful owner. See Berger 1953, s.v., for the basic definition. Auctor is a rare occurrence in the standard Roman law handbooks, but the term is all over later legislation. In Frankish law the physical presence of the auctor seems to have been essential to the suit: FAnd 47, 53; FMarc I 36 – the generally sure-footed translations of Alice Rio 2008 stumble a bit here. FMarc I 36 is the most illuminating because it refers to the need for royal permission to take over the defence of auctores who had died without heirs. Thirty-year prescription did away with the need for an auctor in a defence (e.g. see DM 126). I leave aside the role of auctores in the third-hand procedure of Lex Salica.
The disputes comprise a complicated group of five separate procedures: 1) Direct judgments in which the dispute is recorded from the appearance of the parties before the court to the command of the king in favour of one of them. 2) Interlocutory judgments in which the court, having heard the pleadings as in a direct judgment, calls for one of the parties to produce proof of its contention at a future hearing. 3) Judgments after proof has been provided as demanded by an interlocutory judgment. 4) Judgments after one party defaults, that is fails to appear at a hearing appointed by an interlocutory judgment. And 5) Confirmations of a previous judicial finding. Despite the various streams into which the dispute procedure could be channelled, there is a fairly uniform pattern to the way the pleadings were carried out. The plaintiff and defendant appeared before the royal tribunal and the plaintiff laid a charge against the defendant, usually for wrongfully retaining property that by right belonged to the plaintiff. The verb commonly used for laying a charge is *interpello*, but occasionally *suggero* is used, a more dispassionate term that means ‘to bring forward information’ or to petition. The information as it is reported, however, is clearly a charge of wrongful detention of the plaintiff’s property. The *placitum* then immediately reports the rejection of the claim by the defendant. Sometimes we are told of a plaintiff’s rejoinder to the rebuttal of the defense. Documents are commonly produced by the parties and examined by the court. The court then proceeds to an interlocutory judgment, awaiting further proof, or a direct judgment expressed through a royal command. The command is given on the basis of the testimony of the count of the palace that the *placitum*’s account of the proceedings is accurate and that these were carried out properly.

The procedure for the confirmation of conveyances is far less diverse than for disputes. The petitioner appears before the tribunal opposite the respondent and lays the information about the previous transaction between the parties before the court. The verb used for filing the petition is always *suggero*. The petitioner produces the documents relevant to the transaction, the bill-of-sale or donation charter, to be read before the court. The respondent then steps forward and is asked by the court to confirm the veracity of the petitioner’s claim, to verify the authenticity of the documents presented to the court, and to stand as warrantor of

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20 1) DM 88, 93, 94, 95, 149, 156, 167; 2) DM 135; 3) DM 126; 4) DM 79, 137, 141; 5) DM 157.
21 ‘Opposite’: the occasional word *adversus* is probably the only term shared between disputes and confirmations that could conceivably indicate dispute. It is found in six or seven *placita* (the text of DM 88 is uncertain), in about equal proportions between confirmations and disputes. It is not an essential element in the formulae. In the confirmations it is attached to the participle *veniens*, describing the petitioner’s appearance before the court in company with the warrantor (DM 136, 153, 187). In the disputes it is attached to the main verb indicating a petition or a charge being brought before the court (DM 95, 141, 156). The preposition is not of course limited to hostile contexts. It seems to refer to the two parties, standing opposite one another before the court, one laying his petition before the tribunal with respect to the other.
the transaction now and in the future. The *placitum* then ends with the royal command asserting the petitioner’s full title to property as established by the original documents of conveyance and enjoining the transferor to stand as warrantor in the future.²² This last detail, by the way, shows that the property was not deemed to have been removed irrevocably as a source of a future claim by another party just because the document was issued in the name of the king. The *placitum* confirmed the right of the petitioner merely on the basis of the reported transaction; just as importantly it established a clear warrantor, should it become the subject of a third party suit at a later date.²³

The common assertion that the procedure of conveyance confirmations and the trial of disputes are the same is demonstrably false.²⁴ The dispute and conveyance *placita* obviously share some terminology – I am about to return to this subject – and forms, but the procedures are distinct and it is difficult to detect elements of the confirmations that could be construed as fictional, never mind the process as a whole. The petitioner never lays a charge or claims that the respondent was unlawfully withholding property. The respondent never challenges the petitioner’s claim but willing supports it. The conveyance is presented in the past tense as lawfully concluded. The respondent in fact appears not as defendant but generally as warrantor of the property and its previous alienation. The royal command does not create the petitioner’s title but confirms the original conveyance. In other words, the conveyance *placita* contain independent procedures that need to be dealt with in their own terms, not as adjuncts of lawsuits.

If there are no obvious fictional elements in the conveyance confirmation, it is worth asking how the concept of *Scheinprozeß* came to enter the study of early Frankish law. Brunner was a great scholar. Why did he so confidently claim to have detected fictional disputes in the conveyances? The answer I believe is to be found in the state of Romanist scholarship at the time he first proposed his theory of *Scheinprozesse*. Brunner acknowledged that he was not the first to classify the conveyance confirmations as fictitious suits. Bethmann-Hollweg a few years earlier, noting the resemblance of the conveyance processes to the celebrated Roman conveyance of *in iure cessio*, had already declared the Frankish procedure to be a fictitious *vindicatio*, or action for the recovery of property, designed to equip the new owner with an unchallengeable royal charter.²⁵ Bethmann-Hollweg borrowed the term *vindicatio* from Roman procedure and from *in iure cessio*.

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²² The exception is DM 153, on which see Appendix 2.
²⁴ “Das Verfahren eines solchen Scheinprozesses entspricht formal dem eines echten Prozess” (Bergmann 1976, 93). Only slightly less categorical (“in allen wesentlichen Zügen”): Brunner/von Schwerin 1928, vol. 2, 683; which also declares that the “plaintiff’s claim is disputed zum Schein”.
²⁵ Bethmann-Hollweg 1868, 493.
itself, though there is an echo of it in the Merovingian texts. It is hard to escape
the impression that the Roman in iure cessio was seen as some kind of pattern for
the interpretation of the Frankish institution. Brunner too called the procedure of
the conveyance placita a Scheinvindikation, and though he initially confined in
iure cessio to his footnotes, he clearly viewed it as a critical analogy to proce-
dures in German law. Later he referred to the confirmations of the placita as be-
ing carried out through a fictitious lawsuit ‘in the mode of the Roman in iure
cessio’. Unlike recent commentators, Brunner’s contemporaries too noted the
resemblance between the Roman and Frankish institutions. There is a reason for
the deserved prominence of in iure cessio in these accounts other than simply a
Romanist background among the legal fraternity. According to the dominant Ro-
manist doctrine of the day, as developed by Rudolf von Jhering, in iure cessio
was a prime exhibit, in some ways the parade piece, of those archaic Roman pro-
cedures he dubbed Scheingeschäfte, or fictional transactions. These included
the common Roman conveyance of mancipatio, whose language imprinted itself on
the new world of written instruments during the imperial period and continues to
surface in Merovingian and early medieval texts. At the time Bethmann-Hollweg
and Brunner wrote, in iure cessio was regarded with assurance as a fictitious pro-
cess based on a truncated action, or vindication, for the restoration of property.

The resemblances between in iure cessio and Frankish confirmations of con-
veyance before the royal tribunal are striking. Gaius provides a brief description
of the archaic Roman law procedure. The parties to the conveyance appear before
the magistrate, namely the praetor in Rome or the governor in the provinces –
once again there are no plaintiff and defendant. Appearance before a magistrate is
the meaning of in iure, corresponding in traditional Roman litigation to the first
stage preceding the magistrate’s assignment of a judge to try the case. In iure
cessio means a cession of property made before a magistrate, not as the result of a
lawsuit. To return to Gaius – the transferee, the person receiving the conveyance,
claims the property before the court using an ancient phrase common to both
litigation and private law transactions. Then the magistrate asks the transferor
whether he wishes to make a counter claim. The transferor replies in the negative

26 “[…] nach Art der römischen in iure cessio”: Brunner 1889, 275. Brunner included the
Anglo-Norman institution of fine and the later English common recovery as ‘Germanic
analogies’ to in iure cessio because of their fictional elements (ibid. 286).

27 For example Richard Schröder 1889, 271 who follows his colleague, even apparently
independently using the phrase as quoted in previous note.

28 Rudolf von Jhering 1852–1865; I have used the 2nd ed. 1869, vol. 3, 503–42. There is a
French translation of the third edition of vol. 3 by O. de Meuenaere 1887. It employs the
term actes apparents for Scheingeschäfte. The Italian equivalent is processi apparenti used
in the discussion of ostensio cartae.

29 The legis actio sacramento is generally claimed as a model.

30 Hunc ego hominem ex iure Quiritum meum esse aio: Gai. Inst. II 24 for in iure cessio;
I 119 for mancipatio; IV 16 for sacramentum in rem (litigation). The slave (homo) is just
an example of property.
or remains silent. The magistrate then ‘assigns’ the property to the transferee’s.\(^{31}\)

The word used to express the transferee assertion of ownership over the property is *vindicare*, a verb that just means to claim, but in the specialized substantive form *vindications* was applied by Gaius to a class of lawsuits for the return of property.\(^{32}\)

I do not want to belabour the resemblances between the Frankish and Roman institutions, in part because the juridical implications of both procedures would take us down a twisted track of conjecture that for the purposes of the present subject would be a distraction. But some of the formal correspondences are worth noting. The parties in both cases appear before the court in a fashion with parallels in lawsuits. The claim of the petitioner is quickly resolved without any actual disputation at all (in the archaic Roman case the claim never enters the dispute stage before the judge). The claim is initiated by the transferee in the conveyance; Buckland has noted that the benefitting party making the declaration is a characteristic feature of Roman formal transactions.\(^{33}\) Acquiescence to the claim by the respondent settles the matter in the eyes of the court.

There appear to be verbal echoes between the procedures as well. *Evindicare*, a Merovingian variant of the Roman *vindicare*, is used in the royal command of the *placita* to express the transferee’s acquisition of title to the property.\(^{34}\) In the

\(^{31}\) Gai. *Inst.* II 24. The verb is *addico*; the range of meanings in the literature (adjudge, award, confirm) tends to follow dogmatic interpretations of the procedure’s meaning.

\(^{32}\) Gai. *Inst.* IV 5: *Appellantur autem in rem quidem actiones uindicationes, in personam uero actiones […] condictiones*.


\(^{34}\) The usual phrase in disputes over property and in confirmations of conveyances is along the lines of DM 141: *ipso locello [=accus.] […] habiat evindicatum*, meaning ‘let him have the place in full title’ or ‘let him have acquired full title to the place’. That there is still a technical sense to (e)vindicare is shown by omission of the phrase in the one dispute regarding debt (DM 137). The ‘e’ presumably strengthens the simple *vindicare* to produce ‘to vindicate thoroughly’. *Vindicare* in *Lex Salica* need have no connection with a lawsuit: LS 67 = ‘claim’, in the sense of ‘have a right to’, with *tenere* as a near synonym; similarly LS 100 § 1. It appears also ca. 600 in Ravenna donations with the same meaning (with near synonyms, *habere, tenere, possidere, defendere*: *portionem […] iure dominioque, more quo voluerit, im perpetuo vindicent* (Tjäder, nos. 20, 31–33; 31, I, 10; 37, 55f.; cf. Tjäder, vol. 1, 461). It means to acquire ownership in the highest sense: *conparatorem […] ingredi, habere, tenere, possidere, vindere, donare, [commutare a]c suo iuri in perpetuo vendicare permisit* (no. 36, a sale). Levy 1951, 210–219 outlines the range of meanings in late sources. The idea of lawsuit, however, was never essential for the concept, no matter its usual classical law connotations. By 694 a newly coined synonym *vel elidiatum* was added to the Merovingian *evindicatum* clause in dispute formulae; the same appeared in the confirmations soon after, appearing by 702 (missing, and likely omitted in the copy DM 158 a. 710). It is generally, though not universally, believed that this is the verb *eliti- tigare* (on the doubts, see Vielliard 1927, 50 n. 3). It can be used outside of dispute contexts simply to express the full legal right to something. For example in formula no. 48 of the *Cartae Senonicae*, it is applied to the full right to fruits in a vineyard used as a security
procedure of *in iure cessio*, after the petitioner makes his claim, the magistrate asks the transferor if he wishes to respond.\(^{35}\) This is the *interrogatio* of *in iure* procedure, originally, at least, carried out in litigation by the plaintiff, and exceptionally as in *in iure cessio* by the magistrate; it was designed to elicit answers binding on the other party.\(^{36}\) *Interrogatio* appears in all six of the Merovingian *placita* following the declaration of the petitioner and it seems plain that the answers elicited are supposed to bind the respondent to the truth of the petitioner’s claim of ownership.\(^{37}\)

Two questions immediately arise from the comparison I have just presented.

(1) The first question is awkward but unavoidable. Do the resemblances just outlined constitute grounds for supposing that Frankish conveyance confirmations are based on the *in iure cessio* procedure? In posing this question one should suppose that the details of *in iure cessio* as provided by Gaius would have in time been adapted to a legal world shorn of much of the archaism of classical, and earlier, law and would have become dominated by written instruments. The juridical meaning of the two institutions can be distinguished on various points based on fixed dogmatic constructs, but just as easily can be brought into almost complete harmony, especially if one recognizes distinct stages in a singular institutional development.\(^{38}\) Connections in language and form between the two are recognizable.

The lesson of *in iure cessio* for Frankish law, however, may not lie in arguing that the Frankish procedure is a continuation of its Roman counterpart. The main difficulty in seeing the Roman and Frankish institutions as linked is the chronological gap in the historical record between the two. *In iure cessio* remained a living institution well into the classical period, which is why Gaius and others could write about it. But so far as we can tell, it did not in practice survive the legal changes of the fourth century, at least insofar as the view encompassed by

\(\text{(cautio). It is not uncommon in the formulae in the phrase elidiato ordine, meaning to have ‘with full rights’ or ‘with protection of the law’, regarding donation, usufruct, and possession (FSalBig 10, FSalMerk 21, 33, 34). The earliest appearance I can find of the phrase is in DM 157 a. 709.}^{35}\)

\(\text{Praetor interrogat eum qui cedit an contra uindicet (Gai. Inst. II 24).}^{35}\)

\(\text{Berger 1952, s.v. Cognitio rolled up the various ancient distinctions into a much more flexible process, driven by the judge.}^{36}\)

\(\text{The formula in five instances is interrogatum ei fuit where } ei \text{ is the warrantor. An infinitive constructon is used once, in the confirmation DM 153, which also shows the question is posed by the tribunal. Interrogatio appears twice in the disputes in contexts that are similar: once to examine and disqualify a second *ex parte* defendant (DM 141), and once to question the mayor’s son Drogo and disqualify his claim that his wife had a right to the property in dispute (DM 149).}^{37}\)

\(\text{Levy-Bruhl 1934, 135, calls DM 153 (on which, see Appendix I) ‘le meilleur example d’in jure cessio concrète’ that we have, but this is intended, I believe, as a comparative not an historical analysis. He viewed both as simply confirmations.}^{38}\)
late imperial sources is concerned. The last reference to it as a functioning institution is in a constitution of Diocletian from 293. Nevertheless, it continues to be referenced in legal literature until the sixth century, though not in a form that readily suggests a legal source for contemporary institutions. It is hardly coincidental that its role in publicly attesting transactions suffered demise in the sources just as the practice of registration before the municipal councils and other officials provided a ready forum for recording transactions of various description. The role of municipal councils in providing a model for the procedure of the Frankish royal tribunal is accepted in the literature, though the details have not been fully explored. The undoubted resemblances between the court confirmations of the Frankish kings and curial registration, however, creates its own conundrum, because those elements where the *placita* and *gesta* procedure overlap tend to correspond to elements of *in iure cessio*, namely: the forum of a public body, the petition by the beneficiary, and the presence of the alienator as warrantor of the transaction. Moreover in the *gesta* procedure, a court *interrogatio* could also occur but at the request of the petitioner; this is analogous if not quite identical to that of *in iure cessio* and the *placita*. *In iure cessio* still remains the closest parallel to the *placita* confirmation conveyances. The various resemblances and chronological difficulties suggest two ways of resolving the relation of the *placita* and Roman procedure. The first possibility is that there is a direct relationship between *in iure cessio* because it survived into the Frankish period as a prerogative of courts presided over by supreme magistrates in the regions of Gaul. It seems clear that it was never abolished and since it was a prerogative of office it may never have been relinquished. The second possibility is that a procedure basically reproducing the elements of *in iure cessio* was reconstituted by the Me-

39 CJ 8, 53, 11, which omits the passage mentioning *in iure cessio*. It is supplied by the *Consolatio veteris iurisconsulti* VI 10. *In iure cessio* also appears in the *Fragmenta Vaticana* in writings attributed to Paul 47–51, 75, 5. Boethius treated it while commenting on Gaius (Boeth., *in top. Cic.*, p. 322, 15–25).

40 Classen 1956, 70. Bergmann 1976, 101, provides a useful schematic, optimistic comparison (apparently based on B. Hirschfeld’s dissertation of 1904) but avoids the variations of *gesta* form.

41 In Tjäder, no. 29 (a. 504), a fragment showing the registration of a sale in Ravenna, the purchaser requests the curia to question the vendor, who is present. In no. 31 (a. 540), agents of the curia leave the tribunal to seek out and question the vendor who is not present at the hearing. A similar procedure is followed in the famous donation to Pierius (nos. 10–11, a. 489). No. 32 (a. 540) is a letter by the vendors vouching to the curia for a sale to the purchaser; its intention may be in part to serve in lieu of the vendors’ appearance. The Frankish sources that deal with conveyances provide no evidence of the dual appearance of petitioner and warrantor. Instead the party applying (prosecutor) to the *curia* to open the records appears with a mandate: FAnd 1 (mandate from the beneficiary; applicant is donor and *mandatarius*); FMarc II 37, 38 (mandate from a donor or testator); FTur 2, 3 (mandate from a donor). In the Marculf and Tours documents there is no sign of the beneficiary.
rovingian kings out of traditional Roman elements that had already been folded into registration as this occurred before the local curia.

(2) The second question is, do the few points of contact between in iure cessio and a lawsuit, a vindicatio rei, justify the former being classed as a fictional procedure? Its secure position among Jhering’s Scheingeschäfte warranted Bethmann-Hollweg’s and Brunner’s characterization of the corresponding Frankish institution. But within a little more than a generation criticism began that slowly turned Romanist opinion against Jhering’s interpretation. This criticism is now reflected in various ways in the handbooks where in iure cessio is no longer regarded as a fictitious trial but as just ‘a conveyance which had to be performed in court’, or as a derived or hybrid, though still independent, mode long since separated from its putative links to vindicationes in the sense of litigation. Where its alleged fictitious or collusive character is still invoked, this is part of an explanation for its origin, not its character in historically attested times. Arguments in favour of the fictitious roots of in iure cessio in fact belong to the heady realm of conjectural history.

There are lessons for us in the now out-dated Romanist infatuation with fictitious trial as a key to understanding the bringing of conveyances before a public body. Fictitious procedure as a concept entered the study of Merovingian law from Roman-law studies but we have failed to notice its eventual rejection and the implication of this for our understanding of procedure before the royal tribunal. Bereft of the supposition that we have to be witnessing a fictitious trial, the resemblances between the conveyance confirmations and a lawsuit or trial in Frankish law seem to be rather minor: they share the opening formula describing the sitting of the king’s court, the petitioner’s appearance and request, and the employment of the royal command to implement the court’s decision. In between, the real procedural meat of the hearing, they steer different courses. The confirmations of conveyances are not trials in any sense. The most that can be said is that they are potential trials. Whether the process before the tribunal will remain on the confirmation track of the petitioner’s request depends on the respondent’s answer to the interrogatio of the court. All our examples of course show the respondents affirming the petitioners’ claims, but at least on a formal level, the procedure seems open to a negative response diverting the hearing along one of the tracks revealed in the dispute placita.

The sharing of parallel forms and expressions does not make one procedure real and the other fictitious or collusive. Nor need it mean that one is derived from

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42 M. Wlassak 1904 and 1907 and Ernst Rabel 1906 and 1907 were the tipping point. Dumont-Kisliakoff 1970, 11–15, provides a survey of later works. See also Levy-Bruhl in n. 10.

43 The quotation comes from Fritz Schultz 1951, 338; see also Wlassak, Rabel, and Levy-Bruhl as in previous note. Mitteis 1908, 278 (‘hybrid’), Kaser 1966, 36 (‘nachgeformt’) following Rabel.

44 Nicholas 1962, 64.
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the other. If we look at Frankish procedure more broadly, there is certainly no reason to follow the Romanist penchant for speculating on some original pre or proto-historical legal collusion that might, according a particular modern theoretical framework, have first given rise to the court’s involvement in conveyances.

By the time we see the Merovingian royal tribunal taking under its mandate the confirmations of private law transactions, there was a long tradition of using the forum of public institutions as means of publicizing, validating and strengthening legal transactions. To this point I have commented on the connections between the Roman-law approach to public attestation and the language and forms of the placita. I have mentioned in iure cessio, the closest parallel to the placita, and the procedure before the municipal curia, still attested in Frankish sources. However, there is another side to the Merovingian legal experience which, though much shallower in the depth of its historical record, also has a general bearing on the Gallic habituation to the court, including the royal court, as a forum for private transactions.

Frankish law and contemporary practice was no stranger to non-dispute court processes, including conveyances. Lex Salica and Lex Ribvaria alone provide half a dozen examples of transactions before local courts and that of the king, including a form of testamentary conveyance, and sales in mallo that thereby claim the right to a notarized bill-of-sale. The formularies provide not only evidence of appearances before the curia involving registration in the public records but also transactions before regional courts, and, slightly more ambiguously, ‘before the king’: the last included a form of testamentary conveyance. In all we are talking about a dozen forms of transaction that in the course of the sixth and seventh centuries could take place before public fora.

It seems reasonable to suppose, then, that by the time the placita record appears, the concept of court validation of private law transactions was a legal notion of considerable antiquity, enhanced by the ability of courts at various levels to issue written confirmation of the acts that took place before them. The Gallic habituation to the use of courts as a forum for private transactions was long standing by the time the conveyance placita are attested in the late seventh century, and there is no reason why the royal tribunal would resort to the collusion of a

45 Lupoi’s general point (as in n. 14) about the role of assemblies is surely correct.
46 LS 44 (disbursement of reipi); LS 100 (disbursement of achasius); LS 60 (unilaterale repudiation of kinship ties); LRib 57 (manumission); LS 46, LRib 50 (testamentary conveyances); LRib 62 (sales in mallo) and cf. LS 47, which mentions in passing that transactions like sales, exchanges, and payments, had to take place publice – in LS 46 §4, C redaction, publice = in mallo; in LS 25 §3 it means ‘openly’.
47 FAnd 1 a, b, c (ratification of a mandate and registration of donation). FAnd 32 (confirmation of property holding when title deeds destroyed); its opening formula describing the sitting of the joint episcopal and comital court echoes the placita. FMarc I 12 (mutual donation), FMarc I 13 (testamentary conveyance). FMarc I 21 (creation of a mandate)
fictional trial and the drama of mock litigation to carry out the rather mundane confirmation of simple sales and donations.

To say ‘by the time the placita record appears’ avoids rather pointedly the question of when bi-lateral conveyance confirmations, involving petitioner and conveyancer/warrantor, became a commission of the officials making up the royal tribunal. The placitum form as whole in fact appears pretty much at the same time as does the charter record and is thus conditioned by the rather lopsided pattern of document preservation that characterizes Merovingian evidence.48 There is no reason to suppose that it, any more than conventional diplomas, was a new form in the seventh century.49 The conveyance placita appear in the 690s. In concluding on the difficult problem of placita origins, I will limit myself to reservations about the current view that so-called fictitious trials were intrinsically late arrivals to the royal court. First, this view needs testing against our dependence on the central role of the Saint-Denis archive in creating the chronological profile of the Merovingian diploma, on the circumstances of the archive’s survival during the medieval period, and its employment in forgery. (The earliest original diplomas survive largely because their text sides were glued down on backing and their reverse sides, giving the appearance of great age, were used for spurious charters). Second, the perspective that the appearance of conveyance placita in the late seventh century is a sign of the declining power of the monarchy seems rather overdrawn at the expense of recognizing the placitum’s merits as facilitating a relatively speedy, bureaucratic response to the desire for legal stability and a more extensive intervention of the monarch’s authority into the private law transactions of its subjects. The principal argument for a late appearance of the bi-lateral conveyances (that is the so-called fictious trials) as a mark of declining royal power is based on the survival pattern of unilateral confirmation diplomas: the latter are among the earliest surviving diplomas but leave no traces among later specimens.50 This pattern is to be accounted for, so it is argued, by the monarchy losing

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48  Legislation for the sixth and early seventh century, diplomas (including placita) for the seventh. There is no intrinsic reason for this pattern. Legislation was continued in the seventh century and diplomas were issued in the sixth. Another pattern among the diplomas is that original and genuine ones are vitally all Neustrian. See Murray 2005, 251–261 on the significance, or lack therof, of this pattern.

49  “Das neue, nicht-römische Instrument der Placita ist ein Resultat des […] Funktionswandels der Urkunde nach dem Verfall der letzten Reste spätantiker-römischer Aktenführung” (Kölzer 2004, 46) begs a number of questions. Cf. Murray (as in note 48) on the alleged importance of the political alterations of the late sixth century. There are further reservations by Goffart (Ganz/Goffart 1990, 919f.).

50  Early, original unilateral confirmations: DM 22 before a. 628 (testamentary donation); and see Debus 1967, 19. DM 28 a. 625 (donation); and see Debus 1967, 11. DM 32 a. 629 (inheritance and purchases), one of the only two uncovered papyrus originals from Saint-Denis, this one bearing Dagobert’s signature. DM 75 a. 639/50 (various deeded properties); Kölzer 2001, 191, argues it is not clear when the document reached the Saint-Denis
control of the confirmation process and the replacement by the 690s of unilateral confirmations with bi-lateral conveyance placita that reflected better the aristocratic interests controlling the court. However, unilateral confirmations mainly survive because an early sequence of them was converted by Saint-Denis forgers. The idea that unilateral confirmations ceased in the late seventh century just because specimens do not survive in the corpus of late diplomas also seems flawed. The formulary of Marculf shows that wholesale confirmations of property including sales, donations, and exchanges continued to be issued by the monarchy to laypersons and ecclesiastical corporations in response to unilateral petitions. Unilateral and bilateral confirmations, by diploma and placitum respectively, existed side by side. The placita are more a testament to the routinization of government than a special indicator of the dwindling political power of the monarchy.

To summarize my remarks thus far. The concept of fictitious procedure in the study of Frankish law is a distraction. Scheinprozeß was introduced to the study of Frankish law as an offshoot of Romanist concerns about the peculiarities of early, by which I mean archaic, Roman procedure. The unexpressed implication in the early literature of the placita is that such archaic modes might be applicable to early Frankish procedure. No one has noticed that in the meantime Romanists have rightly moved on, and thus abandoned the conceptual constraints of the idea of Scheingeschäfte. The concept of fictitious trial has nothing to contribute to our

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51 Bergmann 1976, 96ff., 100.
52 As a result of being pasted down on backing, they are in miserable shape, trimmed, lacunose and barely readable. Their attraction was that they were papyrus, a mark of age. As for the apparently unconverted DM 32, Kölzer 2001, 87, argues that it was a late addition, after the eleventh century, to the Saint-Denis archive, a circumstance that would account for its relatively intact survival. Brühl 1998, 44 attributes its survival before the forger’s hand to a clear autograph of Dagobert. In any case, on the borders, there are still remnants of glue (Kölzer 2001, 88).
53 As already argued by Kano 2007, 348–350. He uses a slightly different body of texts than I do. See next note. I reserve judgment on the deperdita that he cites. The general point is surely correct.
54 FMarc I 31 (for a layman): de omni corpore facultatae suae, tam quod regio munere […] quam quod per vindicionis, cessionis, donationis, commutationesque titulum ad praesens iustae et rationabiliter est conquestum et ad presens possidere videtur. FMarc I 35 (for a monastery): omnes facultates […] quicquid aut regia conlationem aut privatorum munere vel antecessores abbatis […] est legaliter atquestum aut comparatum. Kano 2001, 348 cites FMarc I 12, a mutual donation between spouses of usufruct, which I take not to be unilateral and limited in effect; FMarc I 13, a form of testamentary donation in which the king is a party to the act – there is a cession of property by festuca; and two rather difficult diploma deperdita (nos. 250 and 388, Kölzer 2001, vol. 2).
analysis of the procedure of the Merovingian royal tribunal. It operated in a world conceptually connected to the recent Roman past and obviously contemporary Frankish procedure. None of this background, which readily accepted the use of public fora to register conveyances and other types of judicial business, suggests any predisposition to employ fictions to accomplish fairly straightforward legal ends. Nor does this background suggest that the procedure of the conveyance placita was necessarily a new creation nor a sign of waning Merovingian power. Other sources can tell us about that. We divert our attention from the real significance of the placita and related documents by clinging to outmoded concepts of legal history.

II.

The implications of this diversion are prominent not only in the tendency to read the conveyances as markers of declining royal power but also in efforts to cast select dispute placita in turn as Scheinprozesse.\(^{55}\) The judicial claims in these cases all involve, and always indirectly, the mayor of the palace, Grimoald. A leading assumption here is that kings were mere ciphers; the interest of mayors could not have been seen to be jeopardized in court cases before the tribunal, and therefore such trials, touching on what are perceived to be mayoral interests, must simply be confirmations and fictitious in some way. A counter assumption for those detecting continuing power of Merovingian kings is to see the same cases as indicators of the still contained power of the mayors. The power of the late mayors, however, is hardly a good starting point in reading late disputes. Jettisoning the concept of fictitious procedure, can help check the introduction of invented, tendentious circumstances into the record.\(^{56}\)

There are two principal candidates for fictitious trial among the disputes, one first suggested by Brunner and one by Bergmann.\(^ {57}\) The two placita have consi-
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considerable intrinsic interest and, with more time, would be worth exploring. On the question of their fictitious character, however, whatever traction this idea has had stems largely from the perception that fictitious trials formed an element in the placita to begin with (on which I have said more than enough) and its counterpart that real trials virtually disappeared before the late Merovingians.\(^5\) One can readily show, however, that both placita do not have fictitious elements and fit comfortably into the pattern of conventional dispute process.

Brunner regarded DM 157 to be a Scheinklage, despite all appearances to the contrary that it simply concluded a suit. The subject of the placitum is Saint-Denis’s claim as plaintiff to a mill held by the fisc, whose own claim was defended by its representatives, agents of Grimoald, Mayor of the Palace. The fisc and its representatives were the defendants, not Grimoald personally. The monastery’s claim was settled by an inquest ordered by the mayor, and on the basis of the mayoral judgment proceeding from the inquest, the placitum confirms St-Denis’ right.\(^5\) Like so many placita DM 157 is a confirmation, but of a judicial decision ending a suit not of a conveyance.

Interpretation of this placitum is complicated by the sequence of events outlined in its narratio which presents the reader with voice problems that are not easily resolved. Basically there are two ways to read the sequence preceding the confirmation of the royal court.\(^6\) (1) The judicial process began before the mayoral court and subsequently was brought before the royal tribunal for confir-

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\(^5\) Cf. the characterization of the placita of the ‘last Merovingians’, apparently those after 700, by Heidrich 1967, 108f. All placita of the period are confirmations, she claims, with the single exception of DM 167. The implications here are quite misleading and depend on classing DM 157 as a confirmation, which is technically true, but it confirms a judgment and comes at the end of a dispute, and dismissing DM 156 as a dispute only in appearance. A better view of the late placita would find that four are conveyances and three are disputes. The big picture of the placita is not quite as skewed by the later record as Heidrich implies. Of the six placita originals and good copies before the 690s when the conveyances appear, all are judgments; but of the five originals, four are converted Saint-Denis papyrus specimens of which three reflect a dossier of some kind, since they are connected with a certain Ermelinus. Of the six placita of the 690s (all originals), two are conveyances. Of the thirteen placita from the 690s to 726 (originals and good copies), six are confirmations and seven are disputes. The tilt towards conveyance confirmations is real but it is subtle. Among Saint-Denis originals, the period after 700 produces two conveyances and three disputes.

\(^6\) Murray 2005, 269f. and see Appendix 2.
mation. This is the view of Brunner and Bergmann. (2) The process began with a petition before the king. It was then taken up by the mayor for further investigation. The royal court then confirmed the mayoral judgment. Whether St-Denis’ claim began in the palace or not, however, is incidental to the question whether the final procedure before the tribunal contains fictional elements or not.

Brunner’s argument is that the procedure before the tribunal approximates that of the conveyance confirmations, which he had already defined as Scheinprozesse. It takes the form of a lawsuit though it is intended to acquire a confirmation. He laid stress particularly on the lack of the phrase malo ordine in the charge laid by St-Denis, implying that while the form of procedure resembled a lawsuit, the subject of the appearance was no longer really a claim about the illegal withholding of property, and therefore was at the same time both disputatious and fictitious. In rejoinder it can be pointed out that the confirmation conveyances are what they are: they are not lawsuits, they are not fictitious and have no bearing on DM 157. The procedure before the tribunal about the mill is likewise what it appears to be: the confirmation of a judgement ending a suit. There is no attempt to disguise the substance of the proceedings. The first part of the plactum provides the history behind the monastery’s claim; there is no new charge of withholding property. Whether malo ordine had ever been part of the original charge is a moot point. There would have been no significance in its omission if it were not. Not all property disputes have it, nor should we suppose that it was essential to a charge. Moreover its inclusion in a claim against the royal fisc, which is what the mayor’s representatives served, might have seemed impertinent. The dispute outlined in DM 157 was not about personal property and illegal acts but an administrative disagreement among the great servants of the king, the fisc and the monastery of Saint-Denis, on how public resources ultimately derived from the crown had been allocated. DM 157 is merely a record of the tribunal’s confirmation of the happy outcome for Saint-Denis. There are no fictional elements in it.

Administrative friction also forms the context of the other dispute plactum, DM 156, cited as a Scheinprozess. Again it is a quarrel between the fisc, that is the agents of the mayor, and Saint-Denis and was concluded in Saint-Denis’ favour the day before DM 157. (In a short period of time, therefore, Saint-Denis won two victories, but of course given the nature of the record we never hear about its losses.) The candidacy of DM 156 as a Scheinprozess is recent and the argument owes much to its association with DM 157 and the argument made

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61 This seems to be the reason for Bergmann’s assertion (p. 176) that the mayor’s auditor (the equivalent of the king’s count of the palace) was physically present at the confirmation before the royal court: he would act in the role of the respondent as in the conveyance confirmations. But the auditor Rigofredus’ attestation is only in the mayoral judgment; he is not said to be physically present to respond to the court. There is no interrogatio.

62 A translation is provided in Appendix III.
about the latter. In DM 156 representatives of Saint-Denis appeared before the royal tribunal and claimed that its right to tolls collected from merchants at the fair of Saint-Denis was being infringed by agents of the count of Paris and Grimoald, mayor of the palace. Saint-Denis supported its claim with a sheaf of documents from previous kings. Grimoald’s representatives objected that the share they themselves collected was customary. Saint-Denis responded that an earlier count had introduced this custom by force. An examination of various persons and the diplomas of earlier kings was conducted. As it upheld Saint-Denis’ claim to the tolls in their entirety, its finding was accepted by the mayor and the rest of the court. Bergmann, whose argument is the most circumstantial, claims there was a previous mayoral judgment favorable to St-Denis issued before the St-Denis’ appearance in court as in DM 157 about the mill; DM 156 is thus like DM 157 a Scheinprozess. In fact only mayoral agreement to the consensus of the court is mentioned – no mayoral hearing, no mayoral judgment. The dispute took place before the royal tribunal and the language of dispute, claim, and counterclaim is unmistakable. The lengthy account of the issues and the different claims of the sides read easily enough as genuine litigation. Again, there are no signs of fictional elements in what is a direct judgment of the tribunal.

There has been a tendency to view the late placita involving Pippinids as political indicators of their strength. The concept of fictitious trial allows them to be savvy political manipulators; its rejection shows them still not to be in the saddle but blocked by their enemies. The possibility that the cases have nothing much to do with either of these scenarios is largely unacknowledged. The routinization of procedure is ignored. The systematic, and bureaucratic, character of court procedure is disregarded. The structures of Frankish government are thoroughly personalized and reduced to a political show.

I do not want to suggest that the placita are of no value in arguments about the political conditions of the last phase of Merovingian history. I do argue however that the concept of fictional trial does not add to that discourse and is an unnecessary distraction. Moreover, I want to suggest that the placita, even those

63 Bergmann 1976, 173–175, imports Brunner’s argument re malo ordine and the supposition of a previous mayoral hearing. Kölzer 2001, 389; 2004, 55 accepts a previous hearing. The confirmation of Pippin DK 6 = ChLA 15: 602, which refers to a previous judgment, (illo iudicio evindicato domno Hiltberto rege et avunculo nostro Grimoaldo maiorum domo) proves only the obvious: the existence of DM 156, not a separate, previous judgment by Grimoald. Grimoald’s agreement with the court finding is found in DM 156. Further argument here seems pointless: there is no previous mayoral hearing in the text or in DK 6. Inventing a Pippinid deperditum here seems slightly perverse: Heidrich 1966, 270, no. 25. Though Heidrich eschews the term Scheinprozess, her earlier interpretation of the suit in DM 156 suggested it was a dispute in name only.

64 There is an amazing circularity to the accrual of Scheinprozesse: the conveyance confirmations are claimed to be fictitious; DM 157, like the conveyances, is a confirmation and so must be fictitious like them; DM 156 (though quite superficially) resembles 157 and therefore it must be a fictitious trial too.
involving mayor’s servants, and mayor’s sons, are testimony to administrative and legal processes, first and foremost. We all know that these exist within particular political environments, but we also know that outside of modern, true authoritarian contexts they can operate according to rules that do not simply reflect the will of rulers or even elites. It would be worthwhile if there were some appreciation of the common regularities of law and administration before headlong, unchecked fixations on power heedlessly distort evidence that has important things to tell us about the functioning of early Medieval society.  

Appendix I

Explaining DM 153

The *placita*, as scholarship has so designated them, readily break down according to content into two groups: disputes, namely a heterogeneous group of judgments and phases in the judgment process; and conveyance confirmations, which have been discussed in the previous pages as a fairly uniform legal category. The *placitum* form, however, was likely very flexible and may have encompassed a variety of circumstances that have not come down to us. There is no reason to assume *placita* only encompassed judgments about disputes and simple conveyance confirmations. Some slightly anomalous features of one of the latter needs discussion, for it is possible that the *placitum* in question comes at the end of an extra-judicial disputatious process, even though it is presented, quite unfictitiously, as a conveyance. By any reading, it contains an immediate cession of rights of a kind that is not found in the other conveyance *placita*.

DM 153, dated 702, records the conveyance to Saint-Germain-des-Prés of a monastery by Adalgudis and her deceased husband Gammo, as confirmed by a representative of Adalgudis called Aigatheus, who, the language of the *placitum* suggests, may be a party to the transaction before the tribunal. Only Aigatheus is present before the court. Aigatheus confirms the documents made by Adalgudis and her husband in favour of Saint-Germain. Then Aigetheus “both on behalf of himself and Adalgudis by festuca also said to the assembly on behalf of himself and Adalgudis that in all respects he was quit” of the small monastery that was

65  Cf. remarks by Weitzel 2006, 311.
66  Murray 2005, 271. This owes much to Classen’s observation 1955–1956, 69–70 about the resemblance of the form to minutes, well-known in Roman and ecclesiastical sources.
67  Bergmann’s not very exact summary 1976, 171f. ignores Aigatheus and treats Adalgudis as if she acts before the court in person and was the sole donor. Woman had standing before the tribunal. The use of a representative must mean that she was not there at all, that she was present but preferred not to stand before the court, or that the representative acted not only on her behalf but also on his own.
the subject of the donation.\textsuperscript{68} The conclusion of the court’s decision confirming the documents also adds, uncharacteristically, the wish that “dispute regarding this matter be set to rest in the future”.\textsuperscript{69} Aigatheus, on behalf of Adalbudis or himself, never offers, or is asked, to stand as warrantor of the donation. DM 153 thus stands out from the other conveyances for three reasons: immediate cession of an interest in the property by festuca; no mention of the opposite party standing as warrantor; the wish that in the future dispute may be set at rest. These features are the basis of a recent argument that DM 153 concludes a real dispute.\textsuperscript{70}

It is true that DM 153 is the closest we can come among the conveyance confirmations to language that indicates a dispute, but there is no mention of a previous judgment in it and the form still hews pretty closely to standard conveyance confirmations. If it did come at the end of some disagreement between the parties, that dispute seems likely to have been extrajudicial, the subject of negotiations, mediation, or arbitration (to use terms of increasing formality that still fall short of litigation).

It is possible to speculate on some of the circumstances behind the placitum because DM 153 is unique in another way. There is a cartulary copy, dated 697, of what purports to be the terms of a donation agreement – the original one, we must presume, behind DM 153 – between Saint-Germain and the couple Gammo and Adaltrudis, made five years before the placitum.\textsuperscript{71} To go by the copy, Gammo and Adaltrudis made a donation of the monastery to Saint-Germain but, typical of the period, reserved usufruct over the place for the rest of their own lives and that

\textsuperscript{68} Qui et ipsi \textsuperscript{[=ipse]} Aigatheus in praesenti per sua festuca tam pro se quam et pro ipsa Adalgude se in omnibus de ipso monasthyrio Leunauso una cum adieciencias […] dixit esse exitum. In praesenti = openly, before those present, before the court; it can sometimes mean, ‘on the spot’, ‘immediately’. The subject of dixit could of course be Adelgudis, but while this shifts the focus of the procedure a little, I do not think it clarifies anything.

\textsuperscript{69} Et sit inter ipsis ex hac re in postmodo subita causacio. A future wish of no dissension hardly constitutes grounds for assuming that a dispute has just taken place, but the phrase is used in dispute placita (see Appendix II for an example) and only in this one conveyance confirmation. The phrase may be suggestive but is hardly conclusive of anything.

\textsuperscript{70} Kano 2007, 340–342; DM 153 is thus not a Scheinprozess, but a real trial, according to categories of traditional scholarship. Kano, recognizing the obscurities of the context, never presses his interpretation home. He acknowledges that the dispute could have been extrajudicial. I hope some of my comments help resolve the distinctive features of the placitum.

\textsuperscript{71} The modern edition is Poupardin, no. 10 = Pardessus, no. 442. Brühl 1998, 115 and n. 51, supports its essential genuineness because of the existence of DM 153, but detects “deutliche Zeichen später Überarbeitung”. The incompatibilities listed are minor (they go back to Mabillon) and of the readily detectable kind. There is more wrong with this charter, some of which I think could be established with close reading. The usufruct and the two daughters still emerge from the text, sometimes awkwardly, despite intrusions. I take the familial usufruct as genuine because it fits the cession of rights by festuca of DM 153.
of two daughters, one an abbess of the monastery and another called Maria.\textsuperscript{72} The donation, so it seems, was widely publicised when it was originally made.\textsuperscript{73} None of these details are alluded to in DM 153. Nevertheless, the existence of usufructuary rights seems to me obviously connected with the cession of residual interest in the property by means of a \textit{festuca} recorded by the \textit{placitum}. By the time of Aigatheus’ appearance before the tribunal, Gammo had obviously died, and we are left to guess the fate of the daughters. DM 153 may simply be a confirmation of the original donation, occasioned possibly by the deaths of one or more of the principals and Adalgudis’ decision to finally be quit of her interest in the monastery (which would not occasion the subject of warranty because the donation had been widely publicized). Thus, the confirmation is secondary; the main purpose behind the appearance before the tribunal is the cession of usufructuary rights.\textsuperscript{74}

If there is more to it than that, then, I would suggest the following scenario. Aigatheus, whom the \textit{placitum} treats as an agent of Adalgudis and as an interested party on his own, is a relation, possibly a husband or even son of the said Maria, with an interest in the fate of the property. He has been persuaded to drop his interest (through negotiations, to follow the simplest course, that for all we know involved due consideration for his good will). He appears before the court as representative of Adalgudis, the only way in fact by which he could have standing, to confirm the donation in her name and to cede her and his own remaining interest in the property.\textsuperscript{75} The question of being a warrantor is never addressed to him because Aigetheus was never an owner of the property and, after his cession of interest, will never be one. His warranty is immaterial. By this reading of the \textit{placitum} the focus of the procedure is really Saint-Germain and Aigatheus, whose standing before the court depends on his role as agent of Adalgudis, but whose cession of interest in the property Saint-Germain is eager to have acknowledged.

By either reading, or some combination thereof, nothing is fictitious. There is no mock trial, no real trial, no distortion of confirmation procedure. The tribunal is exploited, but openly and legally to acknowledge the cession of proprietary interest in the monastery by Adalgudis, and Aigatheus. DM 153 is still a conveyance confirmation (Adalgudis’ and Gammo’s original donation), and also a little more than that: the cession of residual rights in the property.

\textsuperscript{72} The term usufruct is not used, though that is how we would understand the arrangement. The couple and their daughters retain the right \textit{res tenere vel dominare} for as long as they live.

\textsuperscript{73} The donation supposedly received considerable public, even royal acknowledgement: \textit{Epistola huius donationis […] Bituricas in civitate in conventu nobilium, in praesentia regis domini nostri Childeberti relectas, et Parisius civitate in monasterio Sancti Vicentii […] super altare Sanctae Crucis posita}.

\textsuperscript{74} See Kano 2007, 341, whose comments are made within the self-imposed burden of defining ‘fictitious trial’.

\textsuperscript{75} For intervenors without standing, see DM 141, where the son of the defendant is questioned and fined after his intervention. The penalties are pledged in court by \textit{festuca}.
Appendix II

The Sequence of Hearings in DM 157

In the text I noted that ambiguities in the use of voice in DM 157 make it difficult to be clear about the sequence of appearances before the king and the mayoral court. The usual view is to read the appearance of Saint-Denis before the king as the one and only presentation of the case before the royal court. The background to the dispute, which concerned a mill, is consequently all part of a narration provided by Saint-Denis, including notice of the monastery’s disputation with the mayor’s officials and then the settlement of the dispute by the mayor’s judgment (parts 1–2, in translation below). The mayoral judgment is then confirmed by the royal tribunal. The hearing referred to in the opening formula is in this scenario the same as the one that issues the final decision concluding the placitum. In the text I noted another way of reading the placitum in which the opening formula refers to a first appearance before the king. The case is thereafter taken up by the mayor who issues a decision in favour of Saint-Denis, which then comes back before the royal court to receive confirmation. There are thus in this scenario two appearances before the king. I would like to explore this reading a little more fully and consider the features of the placitum that seem to point in that direction.

I have appended a translation, marked by arabic numerals noting what I take to be the main components of the placitum and the main phases of the dispute process.

1. Petition to the king. It may seem to some natural to read the opening formula as a description of the beginning of the same hearing that gives a decision. But that practice is true only of placita that contain direct judgments and conveyance confirmations, in both of which a judicial determination follows directly on the appearance of the parties; there is no break in the proceedings, and so judgment follows on the appearance of the parties before the tribunal. This pattern is demonstrably not true for the range of procedures dependent on interlocutory judgments that involved at least two hearings. In these cases, the opening formula of the placitum refers to the first hearing when plaintiff and defendant appear together. The placitum itself is dated to the final hearing when, at least in the case of defaults, only one party was present. The opening formula of DM 157, therefore, need not refer to the day the confirmation is given. The placitum, with its

76 DM 79, 141 (defaults after interlocutory judgments); DM 126 (proof after interlocutory judgment). DM 126 has an ante dies superscript in the opening formula noting the dislocation between charge and judgment. The charge was laid in Compiègne and the judgment issued at Luzarches. In DM 157 appearance and royal confirmation both took place at Montmacq, an inconclusive detail, because the place in dispute is only a short distance away and the total length of time for completion of the trial process need not have taken very long. In DM 141, despite possibly multiple hearings, the place of the initial hearing and judgment were the same, Valenciennes.
background to the suit and its course up until judgment, was written at the time of the confirmation but ranged back to the initiation of the complaint.

There are also positive reasons to doubt that the hearing in the opening formula of DM 157 is in fact a meeting of the tribunal at all. The king alone is mentioned in the formula, a pattern paralleled in one other placitum, DM 137, which raises similar problems to that of DM 157. Only the agents of Saint-Denis are said to appear (the fisc’s initial response appears in the narrative of the monastery). There is no mention of a counter party, equivalent of a defendant in direct judgments and a respondent in conveyance confirmations. The plea looks to be completely unilateral. The procedure portrayed reads easily as a petition brought before the king not a lawsuit before the dedicated tribunal. The common view that DM 157 resembles a conveyance confirmation also seems quite unwarranted. There is no respondent, no following interrogatio, no affirmation of the petitioner’s claim, indeed no sign of another party at all.

The outcome of the petition is that Grimoald, in conjunction, typically enough, with other officials, agrees to investigate the monastery’s complaint, which would fall under the jurisdiction of the fisc anyway. The monks, it seems, were able to make a prima facie case as to their version of the mill’s relationship to Saint-Denis, a factor that is reflected in the mayoral prescription of proof in a form that privileges Saint-Denis’ claim (below 2). One can imagine that Saint-Denis, frustrated in its attempts to gain satisfaction before local fiscal officials, has decided to approach the king and the palace directly. Having gained the attention of the mayor and palace officials, the case was speedily subject to mayoral inquiry.

2. Transfer to the court of the mayor. Grimoald decided to subject the issue to a form of inquest, requiring an oath from locals from both the mayoral and monastic collection centres who were to swear as to their knowledge of previous practices involving Saint-Denis.

3. Report on the mayoral hearing. The findings of the inquest and the decision of the mayoral court are found in the report of the proceedings made by Rigofridus, the mayor’s auditor (a mayoral parallel to the royal count of the palace); the report is obviously the basis for the confirmation of the royal tribunal.

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77 The form is Bergmann’s B class of introductions 1976, 61, 64 common only to DM 137 and 157. The case for the suit beginning before the king is a little more difficult to make for DM 137. It seems to start with a unilateral petition to the king, but since the placitum records a default process, the unilateral character of the introductory formula can be accounted for by the non-appearance of the defendant. The problem in DM 137 is whether the case started in an episcopal court and was only completed before the tribunal or whether a royal order, in response to a petition by the plaintiff, required the episcopal court to resolve the dispute by trial if possible. FMarc I 27 provides a possible model. The stages from petition, to failed resolution in the episcopal court, back to the royal court for final proof and default seemed to be marked by the relative adverb unde, but a conclusive argument is not yet possible.
The decision of the mayoral judgment, as reported in the *placitum*, confirmed the priority of the Saint-Denis claim. It should be noted that, though judgment is given by the mayor, it is based on what amounts to a verdict issued by a local panel. The judgment of the mayor, for all his power, follows the finding of the inquest. The officials of the fisc, that is to say the defendants, we are told, accepted the verdict and the mayoral judgment, conceding to Saint-Denis its right to the mill.

4. **Decision of the tribunal and royal command.** The submission of the mayoral judgment really marks the substance of the procedure that took place on 14 December 709. There is no indication if Rigofredus is on hand to confirm the mayoral judgment in person or not. The document, with signatures and a seal, should have been sufficient. The mayor may or may not have been present as a member of the tribunal. Attestation by Rigofrid of Grimoald’s judgment, the decision of the king’s court to confirm that judgment, and, critically at least from a procedural point of view, the royal count of the palace’s attestation that all of these steps were carried out properly in turn becomes the foundation for the point of the *placitum*, the royal command, validated by the referendary or his substitute.

When examined closely, DM 157 resembles neither a direct judgment nor a conveyance procedure. It has minor resemblances to interlocutory judgments. It really stands apart for what it is: the sole example of the confirmation of a previous judgment. It is obviously not fictitious in any of its elements. DM 157 attests to what is essentially an administrative dispute. Whatever politics there are behind it (and there surely were some) are wrapped in the regularities of petitions, hearings, inquests, and judgments. The royal confirmation may attest to the high value of documents issued by the king, as is usually supposed, but it may also be tied to the fact that the royal court is where the process began and where it was assumed to end. Nothing important for the mayor or the monarchy really hinged on a decision about a mill. Saint-Denis seems to have had a good case. The monks won. Neither king nor mayor, we may suppose, lost any sleep over the decision.

Translation. The Latin text may be consulted in the DM 157 or ChLA 587 versions.

[1. *Petition to the king*] Agents of the basilica of our special patron lord Dionysius, wherein the precious man himself rests in the body and the venerable abbot Dalfinus presides as its head, brought [a petition] to our attention at our palace at Montmacq that agents of the illustrious mayor of the palace were withholding the mill in the place called Cadolaicus in the district of Uernus, which mill for a long time their predecessors always possessed [as an adjunct] to the basilica’s villa of Latiniazus and [the agents of the mayor] were saying that it was dependent on his villa of Uernus. The agents of Saint Dionysius next said78 that for a period of many years that mill was never dependent on Uernus but on the villa of Latinia-

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78 *Dicebant postia*, and cf. *postia dicebant* in DM 156, concluding the complaint.
cus belonging to the basilica; Ebroinus, mayor of the palace, in his own day, when he was in possession of the villa, caused it to be so dependant and quite legitimately renders were made to them or the house of the holy Dionysius.

[2. Transfer to the court of the mayor] Now, after that, Grimoald, the mayor of our palace, along with our fideles ordered this claim to be brought before him so that he might investigate it with more care, and he has done so. Thus it was prescribed by Grimoald that six men of good faith from Uernus and six from Latiniacus should swear together in his oratory on the mantle of Saint Martin that for a long time the mill has always been dependant on Latiniacus, the curtis of the monastery of Saint Dionysius, and quite legitimately dues were paid there.

[3. Report on the mayoral hearing in 2] Now, in so far as the illustrious Rigofridus, auditor of Grimoald, has attested that those men fulfilled in all respects the decision of Grimoald just as he prescribed it and those agents [of the fisc] accepted the oath, as prescribed, and the judgment, confirmed by the hand of Rigofridus and sealed with the ring of Grimoald, [acknowledging] that Dalfinus and his monastery of Saint Dionysius should possess and control the mill with secure title:

[4. Decision of the tribunal and royal command, based on 3] Whereas we have so decided along with out leading men, insofar as the illustrious Bero, count of our palace, substituting for the likewise illustrious count of our palace Gimbercithus, has verified that the said Rigofredus has provided his attestation, that this case was so done and decided before Grimoald, mayor of the palace, we order, now that the judgment of Grimoald, mayor of our palace, has been examined, just as he proclaimed it, that the aforesaid agents [of Saint-Denis] have gained title and acquired for all time possession of that mill on behalf of Dalfinus and the monastery of Saint Dionysius, without any further claim by Grimoald and against his agents, heirs, successors and anyone else; and may dispute about this matter be laid to rest in the future.

Dagobertus, substituting for Angilbaldus, has validated.

Given on 14 December in the sixteenth year of our reign at Montmacq under good auspices.

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79 Sed at the beginning of a sentence does not mean ‘but’ in Merovingian legal Latin. It generally marks a long pause, that can be rendered in English by a paragraph break, with or without the adverbs ‘then’ in the sense of next, or ‘now’ as a means of emphasis marking a slight change of focus or subject. The sed passage comes at the point where the defendant should respond, rebutting the charges, in a conventional dispute.

80 See previous note.
Appendix III

DM 156, A Judgment in Favour of Saint-Denis Regarding Tolls
Translation of the text of DM 156.

I have marked out the stages of the pleadings and the judicial decision in italics. The alleged previous mayoral judgment is supposed to be found in [5]. The Latin text can be consulted in the DM 156 or ChLA 586 versions.

[1. S-D’s case] When in our presence and that of our leading men, in our palace at Montmacq, representatives of the venerable abbot Dalfinus of the basilica of our special patron, Saint Dionysius, wherein the precious lord rests in the body, came into our presence and made allegations about the representatives of the illustrious mayor of our palace Grimoald, saying that over a long period of time the late Chlodouius our grandfather and afterward our uncle Childericus and our lord and father Theudericus, and also our brother Chlodocharius, as stated by their directives, granted to the church of Saint Dionysius in its entirety that toll that [was collected] from all the merchants, Saxons and those of other nations, attending the market on the feast of lord Dionysius; there was also the condition that neither afterwards or then would the fisc exact or collect on its own behalf either there at the market or within the pagus of Paris or in the city tolls from the merchants, but the toll was bestowed and granted in its entirety on the said basilica of lord Dionysius. Whereupon they presented to the court such directives of the said princes to be read out. When they were read and examined it was found that the grant had been so made by those princes in its entirety to that house of God. Next they said that agents of Grimoald, mayor of our palace, and also the count of that pagus of Paris took half of that toll from them and removed it from the possession of the basilica.

[2. Case of the fisc] The agents of Grimoald, the mayor of our palace, alleged that for a long time the custom existed whereby the house of Saint Dionysius received half and the count received the other half on behalf of our fisc.

[3. S-D’s rebuttal] The agents of Saint Dionysius asserted in reply that the late Gairinus count of Paris imposed this custom there by force and at times took away half of the toll from them, but those agents informed the palace of this and always renewed their directives in their entirety.

[4. Examination] Again an examination was conducted of many persons and also of the directives which the aforesaid princes originally and subsequently granted and confirmed without diminution.

[5. Judgment] Thus, with the agreement of Grimoald, mayor of our palace, our other many fideles also resolved and decided that the agents of Grimoald on behalf of our fisc should invest that toll once again on the agents of Saint Dionysius by means of a gage – which they have done.

[6. Royal command] Now whereas this matter was so treated, concluded, examined and determined, as the illustrious count of our palace Rigofredus has attest-
ed it was, we command, now that the previous directives to the monastery have been examined, that the monastery of Saint Dionysius, wherein the precious lord rests in the body, and abbot Dalfinus and his successors have gained and acquired title for all time to that toll in its entirety from the feast of Saint Dionysius, both that which arises on the lands of the basilica and after that in Paris.

[Added guarantee] In earlier times the market was moved on account of a catastrophe from the site of Saint Dionysius and was established in the city of Paris between the basilicas of Saint Martin and Saint Laurence and for that reason they received directives from the aforesaid princes that the aforesaid basilica of Saint Dionysius should get the toll in its entirety there or wherever it set up to to conduct business and commerce on the occasion of the feast. In view of these circumstances, should it happen that on account of some catastrophe or interruption the fair should be moved somewhere else, let that aforesaid toll, because of our devotion to that holy place, in present and future times, remain granted and bestowed upon that house of God to offset the cost of lighting [the basilica] of Saint Dionysius in respect for that holy place.

And on the part of our fisc and that of the agents of Saint Dionysius, may all dispute and contention be laid to rest.

Actulius has by command validated.

Given on the December 13 in the sixteenth year of our reign, at Montmacq, under good auspices.

Bibliography

1. Primary sources


*Cartae Senonicae*: Formulae Merovingici et Karolini aevi, ed. Karl Zeumer (MGH Legum sectio 5), Hanover 1886, 185–211.


2. Secondary sources


