

LEGITIMACY AND LAW IN
THE ROMAN WORLD

Tabulae in Roman Belief and Practice

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Contents

| | |
|---|----------------|
| <i>List of illustrations</i> | <i>page</i> vi |
| <i>Acknowledgments</i> | ix |
| <i>List of abbreviations</i> | xi |
| Introduction | I |
| PART ONE: THE WORLD OF BELIEF | |
| 1 The use and value of Greek legal documents | 12 |
| 2 Roman perceptions of Roman tablets: aspects and associations | 21 |
| 3 The Roman tablet: style and language | 44 |
| 4 Recitation from tablets | 73 |
| 5 Tablets and efficacy | 91 |
| PART TWO: THE EVOLUTION OF PRACTICE | |
| 6 Roman tablets in Italy (AD 15–79) | 125 |
| 7 Roman tablets and related forms in the Roman provinces (30 BC–AD 260) | 169 |
| 8 Tablets and other documents in court to AD 400 | 216 |
| 9 Documents, jurists, the emperor, and the law (AD 200–AD 535) | 250 |
| Conclusion | 294 |
| <i>References</i> | 299 |
| <i>Index</i> | 341 |

Illustrations

| | | |
|---|---|-----------------|
| 1 | Phase 1 Campanian wooden document: simple diptych. | <i>page</i> 128 |
| 2 | Phase 2 Campanian wooden document: doubled diptych. | 129 |
| 3 | Phase 3 Campanian wooden document: doubled diptych with <i>sulcus</i> . | 130 |
| 4 | Phase 4 Campanian wooden document: triptych. | 131 |
| 5 | Phase 5 Campanian wooden document: <i>pertusa</i> triptych. | 132 |
| 6 | Physical forms of formal procedural acts and official copies from first-century AD Campania. | 147 |
| 7 | Physical forms of formal financial documents from first-century AD Campania. | 148 |
| 8 | Physical forms of chirograph documents from first-century AD Campania. | 153 |
| 9 | Papyrus double-document. | 189 |

CHAPTER I

The use and value of Greek legal documents

Greek legal documents provide an important contrast – in language, treatment, and consequence – to Roman legal documents, for in the Greek world, what can be known about the wording and style of legal documents, as well as what can be known about attitudes towards them, underlines their ambiguous status and lack of independent legal authority. The evidence is mixed and uneven: for classical Athens, legal documents themselves do not survive, and are instead only referred to by fourth-century orators, while for the later Hellenistic world, especially Ptolemaic Egypt, the legal documents themselves exist, but in no descriptive context that allows a direct understanding of their value and relationship to their legal act. This has left considerable room for scholarly disagreement over how Hellenistic documents in particular were conceived and valued. Only relatively recently has a consensus over the legal strengths and, especially, weaknesses of these documents been forged, led by J.-P. Lévy and H.-J. Wolff.¹ What is written here adds to what has already been done by giving particular emphasis to what is known about the generation of these documents, what can be deduced from the wording of the documents themselves, and what can be hypothesized from social attitudes about documents when these are known, components specifically chosen because of the contrast they will provide to a discussion of the same components in Roman documents on tablets that follows.

CLASSICAL ATHENS

The implications of the mixture of oral and literate forms of communication that characterized classical Athens have been much studied in the last thirty years, as have the technical complexities and social implications of the

¹ Lévy (1959a); Wolff (1978) 141–69; and see below nn.34–5.

Athenian legal “system.”² Even so, little is known about the context in which a legal document was generated, what it looked like, or what wording it used, although it is agreed that legal documents came to be used only in the fourth century BC.³ Indeed, no attention appears to have been paid to the appearance or wording of these documents; they seem to have attracted no attention by virtue of having a physically distinctive form; and remarks of orators make clear that by themselves these documents carried little conviction in court. This all suggests only a most perfunctory fourth-century Athenian interest in developing and valuing legal documents.

When a document like a contract or a will was written down, the only convention followed by Athenians was the summoning of witnesses, who could be either carefully called ahead of time or rounded up at the last minute. These witnesses were given little to observe, for they were never assumed, after the fact, to know anything about the content of the document, and often testified only that a document had been made.⁴ Thus the creation of such a document, as well as the legal act such a document might have embodied or expressed, was visually and audibly uninformative. This inexpressiveness suggests by its very lack of emphasis an unimportant, undistinctive process.⁵

These documents could be written on tablets (a γραμματεῖον or γραμματεῖδιον) or on papyrus, and were usually sealed.⁶ Their wording, as far as

² Harris (1989) 65–115 put the study of functional Greek literacy on an entirely new basis, but since then Steiner (1994), and, especially, R. Thomas (1989) and (1992) – to be read with Sickinger (1994) and Boffo (1995) – have turned our attention to some of the implications of an interconnected oral-literate world. All give references to earlier scholarship; interested readers should start there, since further references in this chapter will be extremely selective. Legal: Todd (1993), a salutary contrast to Harrison (1968) and (1971) in its organization and sensitivity to extra-legal issues, with an extensive introduction (3–29) to questions of legal methodology and scholarship.

³ R. Thomas (1989) 41 and n.83 (Isoc. 17.20 is the first reference to written contract, 400–390 BC); Rhodes (1980) 315; Garner (1987) 137.

⁴ On context, see Thphr. fr. 21 on sale (Szegedy-Maszak [1981] 63–73), which lays out legal steps preliminary to the sale itself. Witnesses: Is. 3.18–19 and R. Bonner (1905) 39–40; their ignorance, Is. 4.12–14, Calhoun (1914) 136 n.4, and R. Bonner (1905) 40 (wills); Todd (1990) on witnesses as supporters of the defendant rather than as truth-tellers; *contra* Pringsheim (1950) 17–19 this need for witnesses is not “formalism,” and their number varied.

⁵ Little weight: Garner (1987) 137–8 on two rhetorical commonplaces, and see below n.12.

⁶ Kufßmaul (1969) 63–71 (list of συνθήκαι: two written on γραμματεῖα, one on papyrus [Dem. 56.1], three on unknown medium); there is no indication of medium in the rhetors’ citation of wills (cf. Harrison [1968] 153–5) except for Is. 6.29 (γραμματεῖου). For various uses of tablets in an Athenian court, Boegehold (1995) 240–1. Wooden or waxed tablets were not considered a particularly distinctive medium at Athens, cf. Wilhelm (1909) 240–9 for a selective list (“destinés à une publicité temporaire,” 240), Harris (1989) 95 (“quite commonplace”), Sickinger (1999) 147–8 and 208 n.25, Rhodes (2001a) 34–6, and Fischer (2002); *contra*, Sharpe (1992) 128, who presumes the importance of what the Athenians wrote on wooden boards and tablets, and attributes excessive importance to Dziatzko, who noted (1900) 14–26 that writing on tablets was a part of how Athenians saw their own past, and that (138) the gods do not seem to use papyrus βιβλοι.

it can be deduced, is entirely consistent with everyday and informal usage both within and outside Athens,⁷ even though inscribed examples are incomplete: pre-classical debt-markers are very brief (“To X, Y owes . . .”), while Athenian *horos*-stones marking obligation are similarly terse, and even seem incomplete by legal standards, as do Athenian lease-inscriptions.⁸ The one συγγραφή (contract, in this case a maritime loan) quoted in a speech of Demosthenes lays out its terms in perfectly unexceptional Greek.⁹ Even documents of the same legal “type” (like contracts or wills) are thought to have had no characteristic phrasing or style until the end of the fourth century, if then. There is nothing in the language and style of a classical Athenian legal document to suggest that it was not very informally conceived – as nothing more than an accessory to an action whose weight or essence was elsewhere.¹⁰

Fortunately, the fact that so much of the Athenian evidence about legal documents is embedded within the speeches of fourth-century orators does permit an assessment of contemporary reactions to them. Although it is clear, from the number of references to legal documents after mid-century, that they were increasingly used, and useful because they could fix some details that witnesses might forget or misremember (as was true also of written witnesses’ statements),¹¹ from the ways in which they were presented it is also clear that they were never trusted.¹² How could they be, when they had come into existence – so Aeschines claimed – out of mutual suspicion? “We would all agree that we make agreements with one another through distrust, so that the man who sticks to the terms may get satisfaction from the man who disregards them,” he said, making an explicitly wide

⁷ Style of Athenian documents: Kußmaul (1969) 80–2 (on συγγραφαί) and Todd (1996) 121 (in general, “the language of law was the language of the street”). Little attention to appearance and language: Gneist (1845) 439–40, 468–82; Kußmaul (1969) 69–71; Harrison (1971) 153–4.

⁸ Pre-classical: on lead tablets, c. 500 BC (Corcyra), with witnesses listed, Calligas (1971) 85–6 (he suggests bottomry loans); see also Wilson (1997–8) 43–53, who surveys the non-Athenian evidence and proposes “formalised or accepted language” in the various uses of the verb *διδῶμι* in a contract from fifth-century BC Gaul. *Horos*-stones, see Finley (1952) 118–93 and Millett (1982); also R. Thomas (1992) 90 on their incompleteness (lacking dates and one party’s name). Lease inscriptions, Kußmaul (1969) 60 (“*formlos*”).

⁹ Dem. 35.10–13.

¹⁰ Attic lease-documents, for example, came in several different forms: Behrend (1970) 114. Shared format: R. Thomas (1989) 42.

¹¹ Used after mid-century: Garner (1987) 137 (cf. Isoc. 17.20); Harris (1989) 68–71. Fixing details (but not trusted): Dem. 33.36 (depositing a contract to prevent alteration by either party). Witnesses’ statements: Dem. 45.44 (no changes possible this way); cf. Harris (1989) 71–2 and n.31; on dating, Ruschenbusch (1989) 34–5.

¹² Not trusted: Is. 1.41–2 (weak and unimpressive form of evidence), 7.2 (sealed will weaker than adoption); see Soubie (1973) and (1974); Lentz (1989) 71–89; Harris (1989) 72–3 and 88–92; and Cohen (2003).

(and therefore believable) claim while also reminding his audience of the extensive Greek tradition that equated writing with deceit or the intent to deceive.¹³

Such suspicion was clear in court. In at least twenty-two of thirty-one cases where a legal document is cited as evidence, it was either attacked as forged and unreliable, or preemptively vouched for by witnesses or depositary, the man with whom it had been deposited for safekeeping.¹⁴ Moreover, when documents were attacked, the method preferred was an impugning of the witnesses' or (especially) the depositary's reliability.¹⁵ This is a good sign that the strength of a document was contributed by the staunchness, standing, and oral testimony of the people around it, and not by any value inherent in the document itself. As Aristotle said, "for of whatever sort those may be who wrote their names or guarded [the contract], such is the trustworthiness of the contract."¹⁶ By the end of the fourth century, a legal document was still considered, by its very nature, weak evidence, the witnesses to it or its depositaries the best guarantors of its value.¹⁷

This preference for reliable people over unreliable writing eventually promoted the habit of deposit with a *polis*-official, a practice attested outside Athens before the end of the fourth century, in Athens by (possibly) the end of that century.¹⁸ That more documents, chiefly contracts and wills, came to be used over the course of the fourth century is thus not so much an index of the growing acceptance of writing as definitive proof as it is of the growing complexities of commercial life and the healthy suspicion in which parties continued to hold each other – or, in the exceptional case of maritime loans, as a result of a law (c. 350 BC) stipulating that only when

¹³ Aeschines: 1.161 (τὰς συνθήκας . . . ποιούμεθα). Greek tradition: starting with Homer *Il.* 6.168–9 (tablets with writing condemn Bellerophon), continued in Plato's *Phaedrus*, etc.; cf. Detienne (1989), S. Lewis (1996) 142–6 (letters).

¹⁴ Documents in court and forgeries: numbers arrived at by a comparison of R. Bonner (1905) 61–6 and Calhoun (1914) 135–9, cf. Lentz (1983) 248, 256–7 and Harris (1989) 72–3; Lentz (1989) 74 notes "over one hundred instances" of documents of some sort (including laws) cited in court.

¹⁵ Calhoun (1914) gathers references; Kußmaul (1969) 76–80; Todd (1990), esp. 27–9 and n.15.

¹⁶ Arist. *Rhet.* 1.1376b.

¹⁷ The one example of unchallenged use of an unwitnessed contract in a court of the 320s (Hyp. 5.8), on which Pringsheim (1950) 46 n.1, (1955) 290 based his argument for a gradual shift in valuation away from witnesses to the document alone, is incomplete and exceptional: Finley (1952) 298 n.22, Kußmaul (1969) 80–2, and Maffi (1988) 203–10. Protection afforded documents used in court reflects not the high value placed on these documents (as argued by Préaux [1964] 181–3), but the determination of antagonists not to let the other gain an unwarranted advantage.

¹⁸ Officialdom: [Arist.] *Oec.* 2.1347b (Chios, deposit in δημόσιον), cf. Steinacker (1927) 47–51; Arist. *Pol.* 1321b (official "supervising" public contracts, "sacred recorder" holding copies) – neither existed in Athens at the time of Aristotle's writing, Harris (1989) 70, but soon thereafter, a συσθήκη is deposited with θεσμοθέται (Finley [1952] 125 no. 17); cf. R. Thomas (1992) 133–4 (skeptical on Athens), Sickinger (1999) 134.

there was a written contract, a *syngraphe*, could a “maritime case,” a δίκη ἔμπορική (*dike emporike*), be brought.¹⁹ Thus even in a society where the oral and the literate mingled, the implications of the latter were at best ambiguous; as S. C. Todd has remarked, “the effects of literacy,” even in the fourth century, “did not run very deep.”²⁰

THE HELLENISTIC GREEK WORLD

This ambivalence surrounding legal documents and their courtroom use almost certainly continued through the Hellenistic period, whether or not significant substantive continuities between Athenian and later Greek law can be postulated.²¹ Here, the distribution of evidence is diametrically different from what it had been in classical Athens. Documents do survive, on papyri or stone, many but not all from Ptolemaic Egypt.²² Yet this pleasing fact of survival tells us nothing about their inherent value, despite wishful scholarly thinking,²³ and there are few oratorical (or other) assessments of the value of these documents to help – neither endorsements of, nor attacks on, their reliability.²⁴ But some parallels with Athens would suggest that these documents, while proving themselves ever more useful in everyday life, did not develop any fundamentally new character or function.

As in classical Athens, so too in Ptolemaic Egypt the implications of legal documents are, in their form and language, neutral. Although it becomes possible to distinguish, by their form, specific types of legal documents in Ptolemaic Egypt, all written on papyrus, any one specific type of document

¹⁹ Chiefly contracts and wills: see Arist. *Rhet.* 1375a, contracts were the only written form of inartificial proof in his list; bank-books also called on, Isoc. 17.2. συγγραφή required for δίκη ἔμπορική: Dem. 32.1, cf. Isager and Hansen (1975) 79 (precedent-setting for other contracts?), and note that one earlier in the century was written on a γραμματεῖον, Lys. 32.7; MacDowell (1978) 233–4; Todd (1993) 334–7.

²⁰ In general, Gernet (1955) 173–200, Préaux (1964) 180–1; quotation, Todd (1990) 33 n.23; cf. 29 n.15 (“in the field of literacy, at least, Athenian law seems to have been more static than is sometimes supposed”).

²¹ Finley (1952) vii–viii.

²² For a collection, see *RIJ passim*. This gives the documents themselves, not references to documents, as, e.g., Durrbach and Roussel (1935) 178 no. 1449 Aab 11.29–31, 192 no. 1450 A 104–5 (Delos, second century BC), an inventory listing a γραμματεῖον δίπτυχον λελευκωμένου (whitened diptych tablet) containing a loan (restored) and a συγγραφή; it is identified by Vial (1988) 58–60 as a copy of a document made between 314 and 305 BC.

²³ Steinacker (1927) 37–8, papyri themselves remarkably unforthcoming about what their own value is.

²⁴ The only one known to me is *UPZ* 2.162 (117 BC), a petition and account of a trial (about property) in which numerous documents and quotations of law were adduced; the winning side does seem to have the better (more relevant) documents, but in the end the case was decided by a royal amnesty (7.15–17).

cannot be associated with any one type of legal act. As H.-J. Wolff summarizes, “we come to the conclusion that the use of one or another . . . [of the many types of document] was to a high degree no more than a question of the local custom of the time.”²⁵ In other words, the choice of document-type, such as a six-witness *syngraphe* or a *cheirographon*, did not correlate significantly with a specific legal act.²⁶ Moreover, lacking this fundamental connection to its legal act, the legal document also, as at Athens, conveys no sense of any ceremonial attendant upon its making. Similarly, the language used was not significant or marked, being either local dialect or, for legal acts whose participants came from widely separated parts of the Greek world, the *koine*.²⁷ This perceptible standardization of form, and the apparent transparency of language, are attributed not to any changed perception of what a legal document was, but to the growing influence of notaries.²⁸ That the impetus for this change in documentary habits came only from this quasi-official quarter is also argued by W. Harris, who judged that the people using these documents (both in Egypt and elsewhere) were “mainly from governments and . . . [were] senior government officials pursuing their own interests.” That is, what was changing in the Hellenistic world was the level of fussy bureaucracy in government, not the internalized significance of a legal document.²⁹

Moreover, parallel also to Athenian practice, the hunt for witnesses and depositaries of the most reliable kind continued, and found its logical bureaucratic conclusion in the securing of documents through “registration” with public officials.³⁰ In this way, privately generated documents could

²⁵ Wolff (1978) 136–9 at 137.

²⁶ Description of document types: Wolff (1978) 57–135. A six-witness *συγγραφή* was a dated, narrative document written in the third person (“x, son of y”); the names of six witnesses were listed at the bottom (57–8, 107); a cheirograph was phrased in the first person (“I”), and often given the standard prescript of a letter; it was supposed to be in the handwriting of the author, although professional writers also helped (107–8).

²⁷ *Koine*: Kußmaul (1969) 86 (in *συγγραφαί*); cf. *IG* 12.7.67–9 (Arkesine, on Amorgos), three *συγγραφαί* in *koine*. Widely separated: the first contract preserved from Egypt, *P.Eleph.* 1 (310 BC), has protagonists from Temnos and Cos, the witnesses from Gela, Temnos, Cyrene, and Cos (emphasized by Harris [1989] 118 n.6). Note also the contrast in the Nikareta loan documents (*IG* 7.3172): the *συγγραφή* with Nikareta (3172A) is in *koine*, but the headings, decrees, and agreements about this contract, preserved with it, are in Boeotian dialect.

²⁸ Standardization, notaries: Wolff (1978) 5–6 (stressing existence throughout Greek world), 8–15, 18–27.

²⁹ Harris (1989) 119–20; the number of these documents before the 130s BC is “remarkably small.”

³⁰ Use of witnesses continues: Préaux (1964) 182; one of the witnesses of the six-witness *συγγραφή* was called the *συγγραφοφύλαξ*, a private depositary (Wolff [1978] 59 n.12); Boussac (1993) 682–4 and Auda and Boussac (1996) suggest that the thousands of seals found in a house in Delos (an Athenian dependency), burned in 67 BC, derived from legal documents kept by such a person. For a list of similar collections of seals in the Hellenistic and Roman eastern Mediterranean, Salzmann (1984) 164–6.

be witnessed and then deposited in an “official archive” of a city or even a village, becoming part of that entity’s records and protected from tampering by the official in charge of the archive. Such archives are widely attested: in Paros, Priene, Andros, Tenos, Nikopolis, Seleucia, and at several levels in Egypt.³¹ This process of registration, and the complex ways in which archives functioned and archive-officials worked to protect the documents deposited in them, demonstrate the perceived vulnerability of documents, and the need for unimpeachable, reliable witnesses to secure their value. A legal document standing by itself was still perceived as having only a limited value: it needed strengthening and protecting.

This is not a new conclusion: it was first suggested in 1845 by H. R. Gneist, who analyzed the form (or rather formlessness) of Greek legal documents.³² But scholars subsequently challenged his rather negative assessment of legal value, driven not least by their suspicion that Gneist’s conclusion was at best paradoxical, since he deemed of little significance documents whose everyday value, as evidenced by their survival, seemed to grow with every decade.³³ L. Mitteis in 1891 tipped the debate’s scale decisively in this other direction, by suggesting that since Greeks accepted the idea of fictive loans, they had created or at least accepted the idea of “dispositive” documents – strong documents that embodied rather than simply documented the legal act undertaken – and, moreover, that Roman sources were aware of this, and recognized it as different from most Roman practice.³⁴

³¹ Paros: Lambrinudakis and Wörrle (1983), second century BC (many further references); Priene, *I. Priene* 1.114–16; Andros, *IG* 12.5.721; Tenos, Patsch (1921) 132; Nikopolis, Klose (1984), sixty-one seals from a public archive stretching back into the Hellenistic period; Seleucia, Invernizzi (1996); cf. Préaux (1964) 190–1 (equivalents attested in Crete, Sardis, Mesopotamia, etc.), and Berges (1996), Carthage. Egypt: regional (e.g., Tebtunis, Soknopaiou Nesos, Krokodilopolis), Wolff (1978) 34–46, Préaux (1964) 192–4; in general, R. Thomas (1992) 133 n.17, 140–4. The popularity of, and dependence on, registration are deemed to be the cause of the decay of the six-witness συγγραφή, Wolff (1978) 67–71, 81–105, 169–73; Amelotti and Migliardi Zingale (1989) 305 suggest that the addition of subscriptions also contributed.

³² Gneist (1845) 413–18.

³³ Steinacker (1927) 26 (a generalization); he also pointed out that Gneist’s argument was suspect on other levels, e.g., in the identification of one “Greek law” (27).

³⁴ Mitteis (1891) 469–72 on Nikareta’s contract, *IG* 7.3172A = *Rij* 275–311 (no. XIV) (c. 230–150 BC): a difficult case whose circumstances are not fully understood, cf. Hennig (1977) 131–8, with Brandileone (1920), (1932), and Lévy (1959a) 455, who sees no fiction (*mensonge*) here. Two Roman sources touch on the Greek συγγραφή, but contradict each other: *G.* 3.134 calls it a *genus obligationis proprium peregrinorum*, but he is uncertain of its juridical force, *litterarum obligatio fieri videtur chirographis et sygraphis* (emphasis mine; for the Roman *litterarum obligatio* referred to, see chapter 5 pp. 108–10); Ps.-Asc. on Cic. 2 *Verr.* 1.91 (Orelli) contradicts by specifically excluding chirographs and claiming that only in *sygraphis etiam contra fidem veritatis pactio venit*. That συγγραφαί were fictive, binding contracts to be equated with the Roman *litterarum obligatio* seems, therefore, very tenuous. For clear summaries of the Mitteisian view, see Vinogradoff (1922) 240–5, Kunkel (1932), and Gröschler (1997) 303–6.

More recently, however, the unnecessary extremeness of this view, and the extent to which it relied only on Mitteis's assumptions and Roman misperceptions, have been recognized, and a strong compromise position that conserves all the evidence has won widespread acceptance. As H.-J. Wolff makes clear, these legal documents could not have been considered "dispositive" because their internal forms were interchangeable and their value seems to vary by place and circumstance; but they *were* increasingly valued because their validity *as proof* of a transaction's occurrence was increasingly accepted. There is no need to make surviving legal documents into absolute exemplars of dispositive acts (a modern analytical category), especially when a simpler interpretation of any given document as leaner or plumper proof of a legal act is sufficient to explain the value apparently attributed to it.³⁵

Hellenistic legal documents therefore took on no new "dispositive" role for themselves, nor were perceived to have done so by those who used them. Their growing value as proof merely continues the trend observed in Athens: to be anything at all, a legal document had to be protected and secured. Once it was – once there was greater dependence on, and faith in, city or village archives and their officials – then legal documents could assume a value commensurate with the public trust in those institutions.³⁶ Historical context and legal value, as in Athens, intermingled. The deliberately limited and unemphatic role allowed to Athenian legal documents in court points to a deeply felt ambivalence about the reliability of writing itself that was society-wide and not merely court-determined; an Athenian court was a microcosm of Athenian society, its standards of credibility what people in general felt, documents themselves a late and dubious entry into a well-established agonistic arena. In the Hellenistic world, by contrast, the greater security granted to documents by the improved methods of safekeeping practiced raised the value of such documents to a level of believable proof

³⁵ Wolff (1978) 141–69; at 141–4 nn.1–9, summary of the dispute over the value of Hellenistic legal documents, cf. Freundt (1910) 31–5 and Méléze-Modrzejewski (1984). Note the distinction Wolff draws (144 n.9): that "Hellenistic documents could come close to having *the practical effects* [his italics] of what we understand as dispositive documents," but (as his following discussion makes clear) this kind of near-efficacy was the result of any given document's perceived strength *as proof*.

³⁶ That the use of, and apparent reliance on, documents could increase without a commensurate shift in their legal valuation can also be paralleled elsewhere: cf. Yemeni society before 1962, where "[i]n traditional legal practice there is no generalized reliance on the efficacy of a written instrument, while at the same time few people would consider transacting without using documents. Whether a transaction placed in written form holds firm depends nearly entirely on the nature of the social relationship between the transacting parties and the stature of the associated witnesses . . . there is a strong aversion to documentless transactions at the same time that the documents themselves are not thought to have decisive strength" Messick (1983) 48.

that would not have gone unchallenged in an Athenian court. In both cases, however, a legal document was part of everyday life, and partner to all of that life's uncertainties. Unmarked in language and unceremoniously created, Greek legal documents were no more reliable than the men who made them, witnessed them, and guarded them. Roman documents, as we shall see, were very different.