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THIRTEENTH-CENTURY DIPLOMATIC ENVOYS: *NUNCII* AND *PROCURATORES*

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So much confusion has prevailed concerning the nature of mediaeval diplomatic envoys that a closer study of their character appears worth undertaking. Such a study ought to employ legal writings to elucidate the diplomatic documents and to use diplomatic documents to exercise a factual control upon the discussions by legal writers. An investigation of these sources reveals that previous studies of the types of mediaeval envoys err in two ways: they discuss kinds of emissaries, such as the ambassador and the legate, actually not widely employed,[1] and they confuse those types which were commonly used.

Practically all secular diplomatic agents of the thirteenth century were either *nuncii* or *procuratores*. *Nuncii* had been in use for centuries,[2] but *procuratores* appeared only in the thirteenth century (or a little earlier).[3] The latter supplemented, but did not supplant, the earlier type of envoy. Recent writers on mediaeval diplomacy, such as G. P. Cuttino, Henry S. Lucas, Gaines Post,[4] François Ganshof, Pierre Chaplais, and Garrett Mattingly, discuss the *nuncius* and the *procurator* very briefly, and — except for Mattingly — somewhat incorrectly or

[1] It is probable that the modern office of ambassador was developing in Italy as early as the thirteenth century (François L. Ganshof, *Le Moyen Âge*, I; *Histoire des relations internationales*, Pierre Renouvin, éd. (Paris, 1953), p. 268; Garrett Mattingly, *Renaissance Diplomacy* (Boston, 1955), p. 29). The word had been in use for centuries, but not in a specifically diplomatic sense. No study exists, as far as I know, of the status of the early ambassador. The fifteenth- and sixteenth-century ambassador was defined as "any person sent by any other." However, it was conceded that a private person could not send an ambassador and that an ambassador required adequate credentials. The prescribed credentials suggest that he combined the characteristics of the earlier *nuncius* and *procurator*, for he was furnished with letters of credence, which were formerly used to introduce the *nuncius*, and a procuratorial mandate, granting the agent authority to bind his principal within the terms of the mandate (B. Behrens, "Treatises on the Ambassador Written in the Fifteenth and Early Sixteenth Centuries," *English Historical Review*, LI [1936], 619–620). I do not believe that *ambaxator* and *procurator* can be deemed synonomous. It is probable that "ambassador" had not achieved a technical meaning as early as the thirteenth century, whereas procuration had a very specific technical significance. When "ambassador" did receive a more specific definition it was held to differ from "procurator," in that the former represented the person of his principal (as did a *nuncius*, pp. 204 and 212), while the latter merely acted in his principal's name.

A great deal has been said by historians of diplomacy about *legati*, probably because several mediaeval treatises were written about them, including Guillaume Durant's (thirteenth century) published by Vladimir E. Hrabar, *De legatis et legationibus* (Dorpat, 1906). The thirteenth-century *legatus*, however, was ordinarily a papal legate and not a secular diplomat. The term is rarely used in practice to designate the latter (George P. Cuttino, *English Diplomatic Administration, 1259–1339* [London: 1940], pp. 84–85).

[2] Ganshof, *Relations internationales*, p. 41.

[3] Gaines Post, "Plena Potestas and Consent in Medieval Assemblies," *Traditio*, I (1943), 366–368.

[4] Strictly speaking, Professor Post should not be included among writers on mediaeval diplomacy, but the article on "Plena Potestas and Consent in Medieval Assemblies" includes a section on the diplomatic use of *plena potestas*.

unclearly.[5] Criticism of the conclusions of justly renowned scholars ought not to be undertaken lightly or in a captious manner; let us, therefore, summarize the views of each, before proceeding to an examination of the evidence.

Cuttino, whose description of the rise of the *custos processuum* as an English specialist in French affairs is of great importance and interest, exhibits some confusion in discussing the types of envoys. A legate or an ambassador, he maintains, was the most exalted diplomatic envoy, but rarely used in secular diplomacy. He correctly finds the *nuncius* to be a mere messenger. Less correctly (ignoring the *procurator negotiorum*), he declares the *procurator* to be originally and basically a legal representative. The *nuncius*, he believes, spoke in his master's name, but the *procurator* spoke in his own name on behalf of his master. In the use of an envoy named both *procurator* and *nuncius* he sees an effort to combine the "agent and representative."[6] In all this Cuttino is closely paraphrasing Behrens' "Treatises on the Ambassador Written in the *Fifteenth and Early Sixteenth Centuries*" (italics mine).[7]

Lucas, in *The English Government at Work, 1327–1336*, fails to distinguish between *procurator* and *nuncius*, which is incorrect, although many diplomatic documents seem to justify it. He also applies the term "letters of credence," which are the letters naming a *nuncius*, to documents granting full powers (*plena potestas*) or a special mandate and containing a *ratihabitio* clause. All of these are, in fact, characteristic of the mandate of a *procurator*.[8]

Gaines Post, also, despite his great knowledge of the *procurator* and of *plena potestas*, is not clear on the distinction between *nuncii* and *procuratores*. He, too, has been misled by the careless use of these terms in the documents, such as the description of Villehardouin as a *message* (French for *nuncius*), although he bore a procuration containing full powers. Post also calls "*nuntii* or *procuratores*" some simple *nuncii* appointed by King John of England, although he is well aware that their letters "were hardly Roman (i.e., procuratorial) in character." Furthermore, he represents the continued use of *fides* or letters of credence as a reaction, whereas the use of *procuratores* and the older *nuncii* continued side by side for different types of missions.[9]

Ganshof does not find a clear distinction of the kinds of envoys until the papal court regulated diplomatic status in the fifteenth century. At that period, he says, *nuncius* had a tendency to be employed for envoys having a message to deliver, rather than for those with power to negotiate.[10] Such, indeed, was always

[5] For an earlier treatment, see V. Menzel, *Deutsches Gesandtschaftswesen im Mittelalter* (Hanover, 1892). Menzel distinguished *Bote, Botschafter*, and *Machtbote* (p. 8). The last had full powers and was called a "proctor" (*procurator*) (p. 8). His classification of envoys is not legally meaningful. Also, "proctor" is a broader term than "plenipotentiary," as I shall show.

[6] G. P. Cuttino, *English Diplomatic Administration*, pp. 84–87. I believe and hope to prove that the double title, *procurator et nuncius*, has no significance (*infra*, pp. 211–212).

[7] *English Historical Review*, LI (1936), 621–622.

[8] Henry S. Lucas, "The Machinery of Diplomatic Intercourse," *The English Government at Work, 1327–1336*, edd. J. F. Willard and W. A. Morris (Cambridge, Massachusetts, 1940), I, 309–310.

[9] Post, *Traditio*, I, 366–367.

[10] Ganshof, *Relations internationales*, p. 268.

the character of the *nuncius*.[11] In the *procurator* Ganshof, like Cuttino, finds a representative at law, used in diplomacy only because some missions combine a judicial and a political character.[12] On the other hand, he does very clearly distinguish between letters of credence and full powers.[13]

Pierre Chaplais, in an undocumented paragraph, declares that in the making of a thirteenth century treaty the same envoys received procurations and letters of credence.[14] For special purposes this may have occurred, but I have not found it typical in the thirteenth century.[15]

The reader has every right to be confused by these statements. Garrett Mattingly, however, in his *Renaissance Diplomacy*, states that *nuncius* and *procurator* had specific and distinct meanings. A *nuncius* was a mere messenger or ceremonial representative of his principal, having no authority to negotiate anything. A *procurator* lacked the symbolic, representative function, but he did possess powers to negotiate within the limits of the business committed to him. Mattingly's description, while brief, is clear and correct. He does, however, relegate *nuncii* and *procuratores* to "the minor business of the great princes and for all the business of other persons or corporations."[16] This is appropriate for the period with which Mattingly deals, but their functions in the thirteenth century were much more exalted.

It is my purpose to provide an analysis of these two types of envoys in the thirteenth century, resting my case upon mediaeval law books and upon Flemish diplomatic documents.[17]

[11] W. W. Buckland, *The Main Institutions of the Roman Private Law* (Cambridge, England, 1931), p. 169.

[12] Ganshof, *Relations internationales*, p. 270 and pp. 275–276.

[13] *Ibid.*, p. 123. The author is incorrect in asserting (pp. 275–276) that full powers only take the form of a private law procuration in cases more juridical than political.

[14] Pierre Chaplais, "The Making of the Treaty of Paris and the Royal Style," *E.H.R.*, LXVII (1952), 237. Ambassadors of the fifteenth century did receive both letters of credence and procuration. See, for example, Joycelyne Dickinson, *The Congress of Arras, 1435* (Oxford, 1955), pp. xvi–xx, who adds: "Such letters (of credence) might be the only documents required, if an ambassador was simply delivering a message or undertaking some straightforward mission for which a detailed procuration would not be needed. . . . "

[15] I questioned Mr Chaplais on this point, and he replied (letter of 14 April 1958) that for an embassy sent to negotiate a peace treaty "all the documents I mention could be issued, but not necessarily." I agree. Mr Chaplais promises a full treatment of diplomatic envoys in his forthcoming volume on *English Medieval Diplomacy*.

[16] Mattingly, *Renaissance Diplomacy*, p. 30. In this article I ignore the question with which Mattingly is primarily concerned: the origin of resident ambassadors. The permanent procurators of the thirteenth century are among those whom various authors have named as predecessors of the resident ambassadors identified by Mattingly no earlier than 1341. Mattingly considers these claimants judiciously and rejects them: " . . . the diplomatic procurators were not residents, and the resident ones were not diplomats" (p. 67). He admits, however, that the resident legal representatives were incidentally useful to their masters in diplomatic affairs. The issue, like so many questions of the origins of institutions, may well be more semantic than historical.

[17] Flemish documents have been used for the examples because I had the opportunity, thanks to a Fulbright grant, of working in the libraries and archives of Belgium and France on the subject of Flemish diplomacy and its administration. I have consulted enough diplomatic credentials issued by other western European powers, however, to know that the same types were current among them.

I

The *nuncius* was — and is in modern civil law[1] — merely a messenger. As Azo phrased it: "A *nuncius* is he who takes the place of a letter: he is just like a magpie and the voice of the principal sending him . . . and he recites the words of the principal.[2] The Digest uses *nuncius* and *epistola* as near equivalents.[3] Just as in the case of a written letter, one could make a legally effective declaration of will by means of a *nuncius*.[4] If such a juristic act was performed, however, the principal was conceived to have performed it, the *nuncius* being only an instrument.[5]

Nuncii could be the simplest sort of message-bearers, like those dispatched by Count Guy of Flanders to Edward I to request the return of John of Brabant to his duchy. These envoys were called "porturs des lectres," signifying their very circumscribed function.[6] *Nuncii* could also provide the means of obtaining information. Countess Margaret of Flanders sent *nuncii* (called *legati* by Jacques de Guyse) to seek information concerning her sons captured by the King of the Romans, William II of Holland, at the battle of Westcappel. Since the envoys had no authority to treat concerning the release of the prisoners, the simple message-bearing character of the *nuncius* was all that the mission required.[7]

[1] Rudolph Sohm, *The Institutes: A Textbook of the History and System of Roman Private Law*, 3rd English ed. (Oxford, 1907), par. 45, p. 219.

[2] *Summa* (Venice, 1594), col. 430, no. 1 (to *C.* 4, 50: *Si (quis) alteri vel sibi sub alterius nomine, vel aliena pecunia emerit*). Also, Gulielmus Durandus, *Speculum juris*, 2 v. (Turin, 1578), 1, 3, 4 (*ut autem*), 5. Professor Ganshof cites letters of Edward II to Clement IV in 1309, which request the pope to hear the very voice of the king through the speech of his *nuncii* (*Relations internationales*, p. 275).

[3] *Corpus juris civilis*, edd. Paul Krueger and Theodor Mommsen, 2 v. (Berlin, 1888–89), *D.* 18, 1, 1, 2 and *D.* 29, 2, 25, 4. (All references to the *Digest*, *Code* or *Institutes* will be to the modern edition, which does not include the glosses.) Michele Carboni called the *nuncius* " . . . un semplice portatore di volontà, uno strumento di dichiarazione equiparabile ad una lettera parlata . . . " ("Sul Concetto di 'Nuntius'," *Scritti giuridici dedicata a Giampietro Chironi* [Milan, Turin, Rome, 1915], pp. 47–48).

[4] *D.* 2, 14, 2. See also: Adolf Berger, *Encyclopedic Dictionary of Roman Law*, in *Transactions of the American Philosophical Society*, N.S., 43, 2 (1953), p. 602; Carboni, *Scritti*, pp. 47–48.

[5] Sohm, *Institutes*, par. 45, p. 219.

[6] John, son-in-law of the English king, was residing in England when his father, John I of Brabant, died in 1294. The new duke's presence was required in Brabant to break up the intrigues of the pro-French party. The document is in Ernest van Bruyssel, ed., "Liste analytique des documents concernant l'histoire de la Belgique qui sont conservés au *Record Office*," *Bulletin de la Commission Royale d'Histoire*, 3e série, 1 (1859), 111. Permanent messengers, called *nuncii regis*, were maintained in the household of the English king in the early thirteenth century, and were supplemented in the middle of the century by a group of foot-messengers of lesser rank, called *cokini* or *cursores* (Mary C. Hill, "King's Messengers and Administrative Developments in the Thirteenth and Fourteenth Centuries," *E.H.R.*, LXI (1946), 315–316). The same messengers seem to have been used for domestic and foreign affairs.

[7] Jacques de Guyse, *Annales de Hainaut*, ed. and trans. Fortia d'Urban, 22 vol. (Paris, 1826–38), XV, 148. As foundation for my identification of *legati* as *nuncii*, see Guillielmus Durandus in Hrabar, *De legatis et legationibus*, p. 32: "Legatus est . . . quicumque ab alio missus est, . . . sive a principe, vel a papa ad alios . . . nuncii, quos apud nos hostes mittunt, legati dicuntur. . . . " *Legatus* is equated with the *nuncius* of a private person in Du Cange, IV, 62. Ganshof (*Relations internationales*, p. 268) equates them.

Payment of a debt could also be claimed by means of *nuncii:* a letter of credence given by Countess Margaret in 1245 requests the king of England to believe without doubt what her *nuncii* will convey orally to him and to pay the arrears of her money-fief to them.[8] In a similar case, when Count Guy in 1296 received from his son-in-law, the count of Guelders, a money-fief owed by the French crown, he sent a "porteur de ces lettres" to report this transaction to Philip IV and to receive payment.[9] According to Roman law it was equally possible for a *nuncius* to fulfill an obligation or pay a debt for his principal.[10]

In keeping with his character as a channel through which the principal could act, the *nuncius* could both take and receive oaths in place of another. In taking an oath, he would swear "on the soul" of his principal.[11] Furthermore, just as a principal could create an obligation via an oath taken by a *nuncius*, he could renounce his obligations by the same means, as when Guy of Flanders sent his defiance to Philip IV in January 1297 by the hands — and words — of *nuncii*.[12]

Despite his "magpie" nature, a *nuncius* could also find employment in negotiation of truces and treaties. Although a *nuncius* could not bind his principal by an act of his own will, as a procurator could, the principal could commit himself legally through a *nuncius*, as through a letter. If a binding covenant was to be consummated on the spot, the *nuncius* could not hold the discretionary powers which might be granted to a procurator. He could only be used as an instrument of communication, a speaking letter, by which the principals could express their wills. Jacques de Guyse provides a detailed account of another mission undertaken by *nuncii* (called *legati*) sent by Countess Margaret to the King of the Romans to discover his terms for releasing her sons. William answered them disdainfully, demanding that the countess purge herself of infidelity and contumacy before he would discuss conditions. After a lapse of some time, however, the same emissaries returned as *legati* of the French king and all the towns of Flanders, and this second attempt elicited the terms upon which William would agree to free the captives.[13] In similar manner, Flanders dispatched *messages*, or *nuncii*, to seek a truce from Edward I in 1274.[14] A *nuncius*, moreover, could even be endowed with freedom to negotiate terms to be referred to his principal for consideration and possible acceptance. Negotiations concerning the mutual raiding of English and Flemish merchant ships occasioned the appointment of a series of Flemish *nuncii* to the English court. In 1236 two *nuncii* of the Countess Jeanne explained to Henry III the grievances of the Flemish and obtained from the king his promise of restitution to the offended merchants.[15] In 1271 Henry accorded a safe-conduct to *nuncii* dispatched to him by Countess Margaret *to treat* concerning an end to the seizure of merchants' goods.[16] In neither of these cases, unfortunately, is the letter of appointment extant, so the possibility exists that the English reply of 1236 and the safe-conduct of 1271 incorrectly employ the word *nuncius*. If further evidence is needed, however, that *nuncii* could participate in the give-and-take of negotiations — subject, of course, to subsequent approval by the principal, it is provided by Guy's appointment of three envoys to Edward III in 1293. They were to deal with a dispute over a bloody battle between English and Flemish merchants, which threatened a general disruption of commerce. Their document of appointment is clearly a letter of credence, characteristic of the *nuncius*.[17] Note, however, that none of the above emissaries appear to have authority to obligate their masters. Although the "ad tractandum nobiscum" of Henry's safe-conduct of 1271 imports considerably more than the conveying of information or a request, it does not indicate authority to *conclude* negotiations. A *nuncius* could only commit his principal upon terms known to the latter and accepted by him. He could not both treat and conclude without reference to the principal, although he could do one or the other.

The dissolution of obligations by agreement of the parties could also be achieved through *nuncii*, as evidenced by Count Guy's attempt to annul an arbitral agreement with the count of Hainaut through *nuncii* provided with power and special mandate for that purpose.[18]

[8] "Supplicantes quatenus super arreragiis feodorum nostrorum . . . , quibus nobis tenemini, secundum quod ipsi . . . vestrae celsitudini exponent . . . ore tenus indubitanter credere, et eadem arreragiis nobis per ipsos . . . transmittere dignemini . . . " (Thomas Rymer, ed., *Foedera, conventiones, litterae et cujuscunque generis acta publica*, 4 vols. [London, 1816–69], 1^3, 259).

[9] " . . . nous nos foiaule clerc Iehan Calward, porteur de ces lettres, mettons en nos liu . . . " (Archives départementales du Nord, Lille, B4055, #8796).

[10] *D.* 50, 17, 180. Rudolf Düll, "Über Ansätze direkter Stellvertretung im fruhrepublikanischen romischen Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 67 (1950), 168.

[11] "Si vero dn̄us est absens, nuncius iurabit in aĩa sua quod dn̄us iuravit se ita facturum et precepit, ut ita iuraret . . . " (Franz Gillman, ed., "Die Dekretglossen des Cod. Stuttgart. hist. f. 419," *Archiv für katholisches Kirchenrecht*, CVII [1927], 208, n. 1). On 25 January 1257, Richard, earl of Gloucester, and John of Avesnes, as "legitimi, solempnes, et autentici nuncii" of Richard of Cornwall, took an oath on the soul of the newly elected King of the Romans. See Henry S. Lucas, "John of Avesnes and Richard of Cornwall," SPECULUM, XXIII (1948), 98. (This valuable article contains several errors of detail: Philip of Namur was not the uncle of Baldwin of Constantinople but the eldest surviving brother; Ferrand was not a nephew of Philip Augustus, but the nephew of Mathilda, widow of Philip of Alsace; it was not Philip Augustus who seized St Omer and Aire but Prince Louis; it was not Louis IX who opposed Henry III (and the false Baldwin) in 1225 but Louis VIII.) An oath could also be received by a *nuncius* on behalf of his principal. A treaty of 1250 between Margaret of Flanders and William, count of Holland and king of the Romans, provided that the king might reaffirm his oath to support the treaty in the presence of her *nuncii* (A. Kluit, *Historia critica comitatus Hollandiae et Zeelandiae*, 3 vols. in 4 (Middelburg, 1777–82), II, 584–85, #CLXX; F. van Mieris, *Charterboek der graven van Holland, Zeeland en Heeren van Vriesland*, 4 vols. (Leiden, 1753–56), I, 200.

[12] Thierry de Limburg-Stirum, *Codex diplomaticus Flandriae inde ab anno 1296 ad usque 1325*, 2 vols. (Bruges, 1879–89), I, 132–133, #40.

[13] Jacques de Guyse, *Annales de Hainaut*, XV, 148–162.

[14] Rymer, *Foedera*, 1^2, 514.

[15] *Ibid.*, 1^2, 227.

[16] *Ibid.* 1^2, 489.

[17] "Hinc est quod magistrum Jacobum de Aqua, legum professorem, clericum de nostro consilio, Petrum de Weda de Brugis, et Willielmum de Speia de Dam, opidanos nostros dilectos, ad vestrae magnitudinis excellentiam destinamus, precibus intimis rogantes quatinus eisdem . . . in hiis quae ex parte nostra super praemissis . . . exposuerint, fidem indubitatem clementia regalis dignetur adhibere" (*ibid.*, 1^2, 788).

[18] Étienne Delcambre, "Recueil des documents inédits relatifs aux relations du Hainaut et de la France de 1280 à 1297," *Bulletin de la Commission Royale d'Histoire*, XCII (1928), 44–48. Despite their "special mandate," their status as *nuncii* is indicated by the repeated use of that term, a

The letters used to constitute a *nuncius* were called letters of credence,[19] the heart of which was a clause of supplication requesting the addressee to believe what the *nuncius* would say on behalf of the sender. *Nuncii* could be appointed, however, without the clause requesting credence. In 1295 Guy of Flanders simply named "nos especiaus messages et vrais procureurs pour senefiier a no neveut Jehan de'Avennes, conte de Haynau, le fourme et le maniere de le lettre et che ke contenu est en celi lettre dont li teneurs sensuit par ces mos."[20] Indeed, according to Aegidius de Fuscarariis, a *nuncius* could be appointed without any letters at all.[21]

In summary, the *nuncius*, normally appointed by letters of credence, was basically a messenger, an instrument for sending or obtaining information. Since the principal, however, could make as legally effective a declaration of will via a *nuncius* as via a letter, a *nuncius* could be used for paying debts or receiving payments, for taking or receiving oaths, or for concluding a truce or a treaty the terms of which had already been approved by his principal. In short, anything which could be accomplished by a letter, could also be done through a *nuncius*. Even preliminary negotiation of a treaty could be conducted by a *nuncius*, but he could not bind his principal to anything to which the principal had not personally consented.

II[1]

In spite of the many documents which seem to use *nuncius* and *procurator* as synonyms, the proctor[2] actually was quite different. The basic definition is Ulpian's, *D.* 3, 3, 1: "A procurator is one who administers another's affairs by the mandate of the principal."[3] His function was to do those things that the principal

reference to the credentials as letters of credence, and the close restrictions placed upon them. *Mandatum*, of course, has a broad and nontechnical meaning, as well as its specific legal sense. Nonetheless, it is possible that they bore a procuratorial mandate, as well as their letters of credence.

[19] Ganshof, *Relations internationales*, pp. 275–276. The fifteenth-century ambassador also received letters of credence (Mattingly, *Renaissance Diplomacy*, p. 38).

[20] Nord, B1263, #3708. Notice the use here of "messages et vrais procureurs" for envoys who obviously do nothing more than bear a letter (*infra*, pp. 211–212). In another letter of appointment, Jeanne of Flanders merely places Wago, *bailli* of Douai, in her place for receiving the castle of Douai, and this seems to constitute Wago a *nuncius*, though that word is not used (*Layettes du Trésor des Chartes*, edd. Alexandre Teulet and Joseph de Laborde, 3 vols. (Paris, 1866–1909), II, 334, #2481).

[21] Contrasting *procurator* and *nuncius:* "Praeterea, nuntius dicitur, qui mittitur sine mandato et sine literis . . . " (Aegidius de Fuscarariis, *Ordo iudicarius*, in Ludwig Wahrmund, ed., *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter*, 5 vols. (Innsbruck, 1905–31), III, i, 23–24.

[1] I am indebted to Professor Gaines Post for many legal references to the *procurator*. My study of *nuncii* has been of necessity more purely empirical (i.e., based upon actual diplomatic documents, rather than upon analytical sources) than the study of proctors which follows; the legal sources contain much information on proctors, little on *nuncii*.

[2] The English word "proctor" will generally be used henceforth for *procurator*. Unfortunately there is no generally accepted English translation for *nuncius* or *nuncii*.

[3] Some students of the classical pre-Justinian law argue that "mandatu domini" is an interpolation whereby the compilers confused several institutions. The act regulating the relation between *dominus* and *procurator*, according to Serrao (following Albertario and Frese) was the *actio negotiorum gestorum*,

could have done if he had been present,[4] and the act of the proctor was as valid as if the principal himself had performed it.[5] Therefore, one who could not be present in his own cause — e.g., a litigant who desired representation in court, a monastery whose entire membership could not attend an assembly of the order, a borough or shire required to represent itself in parliament, or a ruler whose public duties required his presence at his own court — could act *in absentia* by employing a procurator.[6]

In post-classical Roman Law a *procurator* was a true and direct representative.[7] A representative, according to Sohm, is one who decides upon the will to

not the *actio mandati*, which was used for the classical *cognitor* (F. Serrao, *Il procurator* [Milan, 1947], p. viii and pp. 13–15). Here we are concerned, however, only with the views of mediaeval lawyers and bureaucrats, who accepted as authoritative what they found in the *Digest*. The earlier mediaeval legists followed Ulpian without significant change (*Petri exceptionum legum Romanorum appendices*, c. 67, *Quid procurator*, in Hermann H. Fitting, *Juristische Schriften des früheren Mittelalters* [Halle, 1876], p. 162; *Libellus de verbis legalibus*, c. 29, *De procuratore et defensore*, in Fitting, *Juristische Schriften*, p. 192). Azo and Tancred (early thirteenth-century canonist) specify that the service must be gratuitous and that a *procurator* must be appointed by the *dominus*, whereas a syndic or an actor was appointed by a curator, a college, or the prelate of a church (Azo, *Summa*, col. 85, nos. 1 and 2 [to *C.* 2, 13, *De procuratoribus*]; Tancred, *Ordo Judiciarius*, P. 1, t. 6, par. 1, ed. Bergmann, *Pillii, Tancredi Gratiae libri de judiciorum ordine* [Göttingen, 1842], p. 114, and P. 3, t. 2, par. 4, p. 205). This last distinction was ignored by the middle of the thirteenth century (Gratia Aretinus, *Summa de judiciario ordine*, 1, 8, in Bergmann, p. 348). Hostiensis discusses the modification of Azo's definition, and then gives his own opinion: "Procurator est qui negocium gerendum suscipit ab eo qui potest mandare . . . " (Hostiensis, *Summa super titulis Decretalium* [Lyon, 1548], Lib. I, t. *De procuratoribus*, #1). The French *Établissements* follows the *Digest*, omitting, however, any mention of the mandate (*Les Établissements de Saint Louis*, ed. Paul Viollet, 4 vols. [Paris, 1881–86], II, 345). A clear intention to eliminate the need for a mandate appears in the definition found in the *Summa Codicis Irnerii:* "Procurator vero est qui domino permittente aliena negotia amministrat" (*Summa Codicis des Irnerius*, ed. Hermann Fitting [Berlin, 1894], 2, 7, pp. 31–32). This is a curious reversion to the pre-Justinian, classical concept of the *procurator*, as described by Serrao.

[4] William of Drokeda, *Summa aurea*, in Wahrmund, II, ii, 97. Also *D.* 3, 3, 35, 3. Or, as a procuration by Guy of Flanders puts it: "Et pour faire tout chun ke nous faire poirrens, et deveriens, se en nostre propre persone, nous fussiens present. . . . " (Rymer, *Foedera*, I², 853).

[5] "Qui facit per alium, est perinde, ac si faciat per scipsum" (*Liber Sextus Decretalium*, 5, 12 (*De regulis juris*), 72). References to the *Liber Sextus*, the *Decretum*, and the *Decretales* are to the *Corpus juris canonici*, instruxit Aemilius Friedberg, 2d ed., 2 vols. (Leipzig, 1897) unless otherwise specified. "Effectus procuratoris est, ut ratum sit quod geritur cum procuratore ac si cum domino gestum esset" (Bernardus Papiensis, *Summa Decretalium*, Lib. I, t. 29. See also *D.* 2, 14, 10, 2).

[6] *Decretum Gratiani*, Secunda pars, C. 5, q. 3 *Quod autem;* Tancred, *Ordo Judiciarius*, P. 1, t. 6, par. 1, in Bergmann, p. 114. J. Mervyn Jones believes that the use of the private law of procuration as applied to diplomatic agents was based primarily upon canonist sources, and only indirectly upon Roman Law (*Full Powers and Ratification* [Cambridge, England, 1949], p. 68). This is probably also true of the other uses mentioned above.

[7] Serrao, *Il procurator*, p. 93 and p. 99. Cf. N. Isaacs, "The Influence of Judaism on Western Law," in *The Legacy of Israel*, E. R. Bevan and Charles Singer (Oxford, 1928), p. 396. Isaacs argues that the doctrine of representation was not derived by the canonists from Roman Law, which did not possess it, but may have been taken from the same sources which supplied the theological doctrines of vicarious sin and atonement. This seems implausible to me. Sohm points out, however, the tardiness and the weakness of representation in Roman law. The civil law never recognized the liability of the principal under contracts entered by his proctor, although the principal was subject to an equitable praetorian action (Sohm, *Institutes*, par, 45, pp. 220–222, and par. 88, pp. 431–432).

be expressed, expresses that will, and thereby concludes a juristic act for another, which has the same effect as if it had been concluded personally by the principal.[8] In distinguishing between the *nuncius* as a representative and the *procurator* as an agent, therefore, Cuttino, following Behrens, unduly restricts the concept of representation.[9] They err, moreover, in holding (Cuttino quoting Behrens): " . . . the proctor spoke in his own name on behalf of his master, but the nuncius spoke in his master's name, and was like a magpie or a musical instrument. . . ."[10] Mattingly and Ganshof, on the other hand, correctly note that a *procurator* speaks in his lord's name, but in his own person, while a *nuncius* speaks in the person of his principal.[11] The distinction that ought to be made, I think, is between the *procurator*, who uses his discretion and exercises his will to act for another, and the *nuncius*, who merely expresses the will of his master.

The representative character of the proctor was based upon his procuration or mandate, which derived its force from the consent of the contracting parties.[12] Acts performed by a supposed proctor lacking a mandate were not binding upon the principal.[13] The true proctor bearing a mandate was bound diligently to observe its limitations,[14] and any acts exceeding those limitations were invalid.[15] Countess Margaret of Flanders, for example, protested that even if her *bailli* of Ghent had reached an agreement with the count of Holland concerning tolls on the lower Scheldt, this would have been beyond his mandate, and she, therefore,

[8] The clarity of Sohm's distinction between a messenger (*nuncius*) and a representative (of which a procuratorial representative is one type) justifies quoting his words: "Suppose, however, that in employing another to do business for me, I have no intention of concluding the transaction myself. In that case I shall give the other person authority to act on my behalf, to act in my name . . . My intention is that the negotiations conducted with the person whom I have authorized to act in my stead, shall decide the result, and shall be regarded in the same way as though they had been carried on by myself on my own behalf. The business of the authorized representative is not merely to save me a journey, but to conclude the juristic act for me, to decide as to the will to be expressed, and then to express that will and thereby conclude the juristic act. Therein lies the essence of representation. A messenger is merely an instrument by which I express *my* will. The expression is mine; the messenger expresses no will whatever. But the will expressed by a representative — the will to conclude a juristic act in my stead — is *his* will, and his alone. I express no will whatever. A representative, then, is a person who concludes a juristic act by the expression of his own will, but with the intention that the act thus concluded shall have the same effect as though it had been concluded, not by him, but by another. Representation is the conclusion of a juristic act by one person with the intention that it shall operate directly for another person; in short, the conclusion of a juristic act by one person *in the name of another*" (*Institutes*, par. 45, pp. 219–20). See also W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian*, 2d ed. (Cambridge, England, 1932), p. 710.

[9] "Representative" appears as a synonym for "agent" in *Black's Law Dictionary*, 3d ed. (St Paul, Minnesota, 1933), *agent*, par. Synonyms, p. 80. (The section on synonyms has been omitted from the 4th ed.)

[10] Behrens, *E. H. R.*, LI (1936), 622; Cuttino, *English Diplomatic Administration*, p. 87.

[11] Mattingly, *Renaissance Diplomacy*, p. 30; Ganshof, *Relations internationales*, p. 270; *infra*, p. 212.

[12] "Obligatio mandati consensu contrahentium consistit" (*D.* 17, 1, 1).

[13] "Sine mandato non valet, quod egerit" (William of Drokeda, in Wahrmund, II, ii, 97).

[14] "Diligenter igitur fines mandati custodiendi sunt" (*D.* 17, 5, 1). Also *Inst.* 3, 26, 8.

[15] *Decretales Gregorii Noni Pontificis, cum epitomis, divisionibus, et glossis ordinariis* (Lyons, 1558), 1, 43 (*De arbitris*), 9, *Auctoritate iudicis*, gloss to *Fines mandati excesserit*.

could not be bound.[16] The true role of the proctor was "to observe the mandate enjoined to him with exact faithfulness."[17]

In classical law the *procurator* was a general administrator of the affairs of the represented. The *procurator litis*, or legal proctor, developed later, and eventually representation at law became the primary use, while the administrative proctor became distinguished as the *procurator negotiorum*.[18] Since diplomatic activity is not normally judicial in character, it is the *procurator negotiorum* with which we are mostly concerned, although on occasion a *procurator litis* might fulfill a role which could be classified as diplomatic, as we shall see.[19] A proctor could be appointed *ad causas et negotia* to perform both functions, as witness the forms given in legal and notarial writings[20] and an exemplar given in the First Chartulary of Flanders,[21] as well as actual procurations.[22] The distinction between the *procurator litis* and the *procurator negotiorum* is similar to the distinction in Anglo-American law between an attorney-at-law and an attorney-in-fact.[23]

The post-classical Roman law also distinguished between special and general proctors.[24] A *procurator* who was appointed "to a given day or to a given task" was a special proctor, while one appointed "in all causes or in one cause generally" was a general proctor.[25] Again, in modern Anglo-American law a similar distinction is recognized between a special agent and a general agent.[26] Many things could not be accomplished by a simple general procuration. William of Drokeda, declaring that the office of a *procurator* is to do those things which the true *dominus* could do if he were present, adds this qualification: "nisi prohibeatur a

[16] Leopold A. Warnkoenig, *Histoire de la Flandre jusqu'à l'année 1305*, trans. A. E. Gheldolf, 5 vols. (Brussels, 1835–64), I, 361, #XXI.

[17] "Quid sit eius officium: 'Mandatum sibi iniunctum exacta diligentia servare . . . , et ut litem exequatur diligenter, usque in finem' " (Hostiensis, *Summa*, Lib. I, t. *De procuratoribus*, #11). Also, *Établissements*, II, 345–347.

[18] Serrao, p. 17 (following Frese). Buckland found it difficult to accept the view of Frese that the *procurator ad litem* did not exist in classical law (*A Textbook of Roman Law*, p. 709, n. 9).

[19] *Infra*, pp. 206–207.

[20] Post, "Plena Potestas," *Traditio*, I, 362, summarizing Rolandinus Passagerii, *Summa totius artis notariae* (Venice, 1574), I, 214v–215v.

[21] Procuration to the Roman curia "ad impetrandum pro me et ad promovendum mea negotia in vestre curia sanctitatis" (Nord, B1561, #505).

[22] "Noverunt universi quod nos in omnibus causis querelis et negotiis . . . in iudicio et extra Johannem de Boneffia, Johannem Favrial et Egidium de Glin clericos nostros constituimus procuratores . . . " (Ghent, Rijksarchief, Saint Genois, #664). De Sturler discusses *attornati* of Brabançon merchants in England serving as legal and general business representatives (Jan de Sturler, *Les relations politiques et les échanges commerciaux entre le duché de Brabant et l'Angleterre au moyen âge* [Paris, 1936], pp. 264–266).

[23] Mattingly, *Renaissance Diplomacy*, pp. 66–67, appreciates this distinction between "legal procurators" and "diplomatic procurators."

[24] Serrao, *Il procurator*, p. viii.

[25] Magister Arnulphus, *Summa Minorum*, L, in Wahrmund, I, ii, 52–53. In a very rigorously technical sense, *mandatum* refers only to a special mandate (Berger, *Encyclopedic Dictionary of Roman Law*, p. 654). It is customarily used much more broadly.

[26] *Black's Law Dictionary*, 4th ed. (St Paul, Minnesota, 1951), p. 86.

jure, ut transigere et compromittere, nisi ad hoc habeat speciale mandatum."[27] Some of the other powers denied to a general proctor include making a peace or a pact,[28] and the taking or receiving of an oath.[29] A general proctor, however, was not absolutely denied the powers which a special proctor could exercise, since he could also be given a special mandate to supplement the broader, though less conclusive powers, based upon his general procuration.[30] By a more sweeping grant of powers, the general proctor could possess the freedom and flexibility characteristic of his status along with the more conclusive authority of the special proctor. This was accomplished by the grant of *libera administratio* or *plena potestas*, which gave a proctor authority to do all things that his principal could do.[31] *C.* 2, 12, 10 holds that the *procurator* with *plena potestas* could even commit his principal beyond the limitations of his letters.[32] Most diplomatic activity required either a special mandate or a general procuration with *libera administratio* or *plena potestas*. Without one or the other an envoy had no freedom to negotiate, and as his talks developed he would have to refer constantly to his principal to obtain an expression of the latter's will, just like a *nuncius*.[33] As Sir Harold Nicholson points out in *The Evolution of Diplomatic Method*, this was a severe handicap under which diplomacy labored before the use of procurations.[34]

[27] William of Drokeda, CII, in Wahrmund, II, ii, 97. *D.* 3, 3, 60 declares: "Mandato generali non contineri etiam transactionem decidendi causa interpositam: et ideo si postea is qui mandavit, transactionem ratam non habuit: non posse eum repelli ab actionibus exercendis." Also see 'Accursius' *Glossa Ordinaria* to *C.* 2, 13, 10, ad v. *plenum; Liber Sextus*, 1, 19 (*De procuratoribus*), 4, *Procurator generalis; Decretales* 1, 43 (*De arbitris*), 9, *Auctoritate iudicius.* Gulielmus Durandus, *Speculum juris* 1, 3, 4 (*ut autem*), 11, gives one of many examples of formulas for granting a special mandate for a *compromissum.*

[28] *Liber Sextus* 1, 19 (*De procuratoribus*), 4, *Procurator generalis;* Gulielmus Durandus, *Speculum juris*, 1, 3, 1 (*Ratione igitur*), 4–5.

[29] *Ibid.* Also Magister Arnulphus, in Wahrmund, I, ii, 54.

[30] *Glossa Ordinaria* to *Liber Sextus*, 1, 19 (*De procuratoribus*), 4, *Procurator generalis*, ad v. *speciali mandato.* E.g., see *Curialis*, LXXVIII, in Wahrmund, I, iii, 25.

[31] "Si aliquem constitui procura., et concessi liberam et generalem administrationem procur. omnia poterit facere ut dominus" (*Casus* to *D.* 3, 3, 58; *C.* 2, 12, 10; *Liber Sextus*, 1, 19 (*De procuratoribus*), 4, *Procurator generalis*). Regarding the relationship of *plena potestas* and *libera administratio*, Bartolus makes it clear that a proctor who has one or the other, or whose mandate contains that phrase, "possit facere omnia que ipse dominus possit," has *plena potestas.* Some say that one who has a special mandate has *plena potestas.* Therefore, it seems to me that *plena potestas* is generic, *libera administratio* one of the specific ways of obtaining it, although this is by no means certain (Bartolus, *Commentaria* (Venice, 1602) to *C.* 2, 12, 10). Baldus also seems to support my interpretation (*Super todo Codice* (Lyons, 1519) to *C.* 2, 12, 10). Post, "Plena Potestas," *Traditio*, I, 357, no. 11 and 358, n. 12, quotes from these two passages. But *Liber Sextus*, I, 19 (*De procuratoribus*), 4, *Qui ad agendum*, suggests that "libera potestate" constitutes a special mandate!

[32] "Si procurator ad unam speciem (causam vel negotium) constitutus, officium mandati egressus est: id quod gessit, nullum domino praeiudicium facere potuit. Quod si plenam potestatem agendi habuit, rem iudicatam rescindi non oportet: cum si quid fraude vel dolo egerit, convenire eum more iudiciorum non prohibearis." (*C.* 2, 12, 10).

[33] Post points out that the bearer of *plena potestas* was regarded as "sufficienter instructus," and did not need to refer to his principal (*Traditio*, pp. 383–407).

[34] *The Evolution of Diplomatic Method* (London, 1954), p. 11 and p. 17.

Although the *procurator negotiorum* was more commonly employed in diplomatic affairs, there were tasks which bordered, at least, upon diplomacy, which called for the use of a *procurator litis.* For example, a *procurator litis* represented the count of Flanders before *enquêteurs* of Philip IV investigating infractions of a truce arranged by the king between Flanders and Hainaut.[35] On another occasion, Count Guy appointed a special *procurator litis* to present before arbitrators his arguments in a dispute with the bishop of Liége.[36] The same count named *procuratores litis et negotiorum* in 1292 "in all causes, complaints and affairs . . . in court and out" to oppose Guy of Hainaut's attempt to obtain the bishopric of Tournai in a contested election against his own candidate.[37] The use of the *procurator litis* in diplomacy, however, was confined to such quasi-judicial matters. The *procurator negotiorum* was much more commonly employed.

Oddly enough, a few envoys who are called special proctors appear to have been nothing more than messengers to deliver or receive documents.[38] Perhaps loose terminology has simply confused them with *nuncii.* It may be noted, however, that in the cases mentioned the documents to be transferred were not mere messages, but documents involving a proprietary interest, which may account somehow for the use of procurators.[39]

In financial relations between princes, as between private parties, special proctors or those with *libera administratio* or *plena potestas* could accept payment of debts owed to their principals.[40] Count Guy appointed a number of such proctors in his efforts to collect the Scottish dowry of his daughter, Margaret.[41] The three extant procurations concerning the Scottish dowry also empower the proctors to pay to the king the sum owed by the count in connection with the marriage.[42] This conforms to the civil law, which recognized that a proctor could pay debts for his principal,[43] as well as accept payment. A proctor could also negotiate

[35] Delcambre, *BCRH*, XCII (1928), 75.

[36] E. Poncelet, "La Guerre dit 'de la Vache de Ciney,' " *BCRH*, 5e sér., III (1893), 292–293.

[37] Ghent, Saint Genois, #644.

[38] Nord, B1263, #3680–84, #3686, #3702; Ghent, Saint Genois, #768.

[39] According to Menzel, the formal conclusion of a treaty was achieved by its actual reception. Thus the envoy receiving a copy of the treaty from the other party performed a formally conclusive act (Menzel, *Deutsches Gesandtschaftswesen im Mittelalter*, pp. 13–14).

[40] *D.* 2, 14, 11; *D.* 3, 3, 58; *Formularium*, in *Wahrmund*, I, viii, 40; Gulielmus Durandus, *Speculum juris*, 1, 3, 4 (*ut autem*), 11; *Curialis*, in Wahrmund, I, iii, 25.

[41] The dowry was made over to Guy in 1284 or 1286, because of debts owed to him by Margaret and her second husband. The four efforts to collect are attested in the following: Nord, B403, #3087-bis; De Reiffenberg, *et al.*, *Monuments pour servir à l'histoire des provinces de Namur de Hainaut et de Luxembourg*, 8 v. (Brussels, 1844–74), I, 260–261; *ibid.*, I, 272, and Rymer, *Foedera*, I², 791; Reiffenberg, *Monuments*, I, 276–277. In the last and successful attempt, the proctors represented Margaret, herself.

[42] Nord, B403, #3087bis; Reiffenberg, *Monuments*, I, 260–61; *ibid.*, I, 276–277.

[43] "Quodlibet debitum solutum a procuratore meo, non repeto: quoniam cum quis procuratorem omnium rerum suarum constituit, id quoque mandare videtur, ut creditoribus suis pecuniam solvat . . . " (*D.* 46, 3, 87). But only a special proctor (*D.* 3, 3, 63), or one with *libera administratio* or *plena potestas* (*D.* 3, 3, 59).

a loan. The First Chartulary of Flanders includes a procuratorial model for borrowing money.[44] A mandate giving an envoy power to borrow money in the principal's name was given to Count Guy's procurator to Rome in 1282.[45] Armed with a special procuration, *libera administratio* or *plena potestas*, a proctor could also be empowered to settle by agreement a disputed claim.[46] An account dated at Westminster in February 1286 is such an agreement between a proctor of the count of Flanders and proctors of English merchants who were despoiled by the Flemish.[47]

We usually think of the diplomatic agent as the negotiator of treaties or alliances. A proctor could enter such conventions in the same manner as the proctor of a private person could form contracts, using his own judgment and expressing his own will, but acting in his principal's name to bind the latter.[48] An example of procuratorial treaty-making is furnished by the alliance of Flanders with England in early 1297 completed by Count Guy's special proctors.[49] If an alliance was to be cemented by a marriage, that also required a special mandate or *libera administratio*.[50] The Treaty of Lier, which engaged Philippa, Guy's daughter, to Edward, the English heir-apparent, states that the Flemish envoys had "a special mandate . . . for the said matter."[51]

Mediaeval princes sought to provide in their conventions sanctions against breach of faith by providing for an exchange of oaths. Taking an oath for his principal was another power denied to a general proctor, which could be granted by special procuration or by *libera administratio*.[52] Authorization to swear "on the soul" of the principal was customarily quite explicit.[53] Guy's proctors who negotiated the Scottish marriage alliance and those who concluded the Treaty of Winendale-Ipswich swore such oaths.[54] Countess Margaret ordered one representative to swear to uphold a treaty with William, king of the Romans and count of Holland, although she herself was present.[55] The countess was assuming royal airs, for monarchs were not accustomed to swear in person.[56]

[44] Nord, B1561, #505.

[45] Ghent, Saint Genois, #310.

[46] *Supra*, pp. 205–206.

[47] Ghent, Saint Genois, #394.

[48] *Supra*, p. 204.

[49] Rymer, *Foedera*, I², 853.

[50] *Liber Sextus*, 1, 19 (*De procuratoribus*), 9, *Tria dicit.*

[51] Émile Varenbergh, *Histoire des relations diplomatiques entre le Comté de Flandre et d'Angleterre au Moyen Âge* (Brussels, 1874), pp. 229–30, #XIII. The treaty also mentions previous negotiations conducted by envoys under special mandate.

[52] *Supra*, p. 206.

[53] E.g.: "Et expressement nous leur donnons poir et mandement de jurer, et de faire sairement, et foi fianchier en l'ame de nous . . . " (Rymer, *Foedera*, I², 853).

[54] Émile Varenbergh, "Épisodes des relations extérieures de la Flandre au Moyen Âge; Trois filles de Gui de Dampierre," *Annales de l'Académie d'Archéologie de Belgique*, XXIV, 2e sér., t. 4 (1868), 625–627; Limburg-Stirum, *CDF*, I, 114, #30.

[55] Kluit, *Historia critica*, II, 584; Van Mieris, *Charterboek*, I, 259.

[56] Chaplais indicates that kings refused to take oaths in person before their inferiors, coronation oaths excepted (*EHR*, LXVII [1952], 237 and 241). William was Margaret's vassal for Zeeland. Certain other royal airs were adopted by the counts of Flanders.

Even oaths of homage and fealty, which were peculiarly personal according to strict feudal law, could be performed by proxy on occasion, as Margaret's homage to Frederick II was.[57] Renunciation of these obligations could be accomplished similarly.[58]

A proctor with *plena potestas* could even be authorized to substitute another proctor for himself.[59] A procuration given by the count of Flanders in 1278 contained this authority.[60] Somewhat analogous was the power granted by Guy to envoys sent in quest of the oft-mentioned Scottish dowry to name a receiver of the payments in the future.[61]

All of these powers — to pay debts and to accept payment, to contract loans, to settle by agreement, to make treaties and marriage alliances, to guarantee these by the most solemn oaths, to substitute another procurator, and many others — could be given to a proctor by a specific grant in the form of a special mandate. Alternatively, a general proctor receiving *libera administratio* or *plena potestas* could be appointed. Such a proctor would use his own discretion within the limitations of the mandate to bind his principal.

A necessary element in a procuration was the *ratihabitio* clause, in which the principal ratified in advance the acts of his procurator.[62] Beaumanoir declares its importance: "Nule procurations ne vaut riens, se cil qui le fet ne s'oblige à tenir ferme et estable che qui sera fet ou dit par son procureur."[63] Serrao states that it is *solely* by virtue of the *ratihabitio* that the acts of the procurator pass into the juridical sphere of the principal.[64] The *Digest* contains a statement: "*Ratihabitio* is equivalent to a mandate."[65] This originally referred to a subsequent ratification of the acts of one lacking the authority of an agent. It seems also to be true, however, of the previous ratification given in a procuration, the *ratihabitio* being the clause in such letters authorizing conclusive action. Furthermore, as Post points out, Francesco Tigrini in the fourteenth century held that the *ratihabitio*

[57] Theo Luyks, "De Strijd van Margareta van Constantinopel Gravin van Vlaanderen en Henegouwen voor het Behoud van hare Rijksgebieden," *Gedenkschriften van de Oudheidkundigen Kring van het Land van Dendermonde*, 3e r., dl. II, 4e afl. (1950), pp. 7–8. On the other hand, the countess performed homage for her money fief before a procurator of the English king (*ibid.*). Guy's document naming procurators of Margaret to try to collect her dowry authorized them to perform fealty and homage (Reiffenberg, *Monuments*, 276–277). Those forming the English alliance of 1297 could take the oath of fealty (Rymer, *Foedera*, I², 853).

[58] Maude V. Clarke, *Medieval Representation and Consent* (London, 1936), p. 185.

[59] A formula from the *Summa Minorum* of Magister Arnulphus: "Dans etiam eidem mandatum speciale substituendi alium procuratorem loco eius . . . , ratum et gratum habiturus, quicquid procurator vel ab ipso substitutus in omnibus praedictis et singulis egerit et fecerit seu etiam procuraverit" (Magister Arnulphus, L, in Wahrmund, I, ii, 53).

[60] Poncelet, *BCRH*, 5e sér., III, 292–93. For an example of the actual use of this power, see G. P. Cuttino, "The Process of Agen," SPECULUM, XIX (1944), 166.

[61] "Item, ad constituendum certos ou certum receptorem aut receptores dictae dotis pro se et nomine suo in futurum . . . " (Reiffenberg, *Monuments*, 276–277).

[62] "In mandato enim procuratorio debet contineri praecipue . . . et quod ratum habebit quod cum eo actum erit . . . " (*Glossa Ordinaria* to *D.* 1, 38, 13 ad v. *Mandato procuratoris*). Also see *D.* 3, 3, 65.

[63] Philippe de Remi, sire de Beaumanoir, *Coutumes de Beauvaisis*, ed. Am. Salmon, 2 v. (Paris, 1899–1900), #10, I, 78.

[64] Serrao, *Il procurator*, p. 97.

[65] " . . . rati enim habitio mandato comparatur" (*D.* 46, 3, 12, 4).

clause granted *libera potestas et administratio*, although others held that it did not.[66] I find considerable evidence in support of Tigrini's view. The *Glossa Ordinaria* to the *Decretals of Gregory IX*, for example, states first that a proctor with a general mandate for suing cannot *transigere*; but, the gloss continues, "si tamen abbas preter mandatum procuratorium habeat literas de rato a capitulo suo continentes simpliciter, quod quicquid super tali negotio fecerit, ratum habebit, potest transigere: ut sic notentur differentiae inter literas procuratorias et literas de rato."[67] Another gloss to the *Decretals* states of the *ratihabitio* clause: " . . . although he has a general mandate, he cannot *transigere* or *componere* . . . . But if the *clausula de rato* has been added, then it seems he can *transigere*, otherwise not."[68] Since this would be the effect of *libera administratio*, the glosses seem to support Tigrini's assertion. Moreover, in a document which I take to be a procuration given by the Countess Margaret to her son Guy, the only possible source of his powers to represent her is the clause of ratification.[69] An exemplar from the First Chartulary also suggests that the *ratihabitio* was equivalent to *libera administratio*, since a general procuration is given, then the *ratihabitio*, followed by the statement: "I do not wish, however, that by virtue of these letters anyone should contract a loan."[70] A general proctor, as we know, could not borrow money unless he received *libera administratio*, so unless the *ratihabitio* clause had the effect of *libera administratio* the restriction would be meaningless. Among modern scholars, V. Menzel and J. G. Edwards also support Tigrini's opinion.[71]

Miss Dickinson asserts that in the sphere of treaty-making, as opposed to that of common or civil law, subsequent ratification was considered formally essential, although the right to refuse ratification to the authorized acts of an ambassador was not recognized.[72] For the thirteenth century, at any rate, I do not find any

[66] Post, *Traditio*, I, 358, and n. 13.

[67] Decretales, I, 38 (*De transactionibus*), 3, *Contingit, casus* ad v. *contingit*.

[68] *Ibid.*, I, 43 (*De arbitris*), 9, *Auctoritate iudicis*, ad v. *generale mandatum*.

[69] "Nous Margherite, contesse de Flandres et de Haynau, faisons scavoir a tous ke comme nobles homs Jehans, cuens de Ponthieu, et maistre Jehans de Troies, archedyakenes de Bayens, soient envoye de le court de France pour enquerre des contens ki ont estei et qui sont entre nous et nostre treschier fils Guion, conte de Flandres et marchit de Namur, dunepart, et noble homme Robert, conte Dartois, daultre part, vers les parties de Gravelinghes et ailleurs es marches de Flandres et Dartois, nous avons et aurons ferm et estable quant ke nostre fils, li cuens de Flandres devantdis, a dit et dira et a faict et fera par lui our par aultruy de ces contens et de toutes les choses ki ces contens touchent devant le conte et archedyakene devantdis et ailleurs en quelconque lieu ke ce soit de tant comme il appertient et peut appertenir a nous par le tesmoing de ces lettres, ki furent donnees lan del incarnation mil deux cens soixante et onze, le dimenches apres les witanes de le St. Denis" (Ghent, Stadsarchief, Van Duyse et De Busscher, #95).

[70] Nord, B1561, #505.

[71] Menzel, *Deutsches Gesandtschaftswesen im Mittelalter*, p. 16; J. G. Edwards, "The Plena Potestas of English Parliamentary Representatives," *Oxford Essays in Medieval History Presented to Herbert Edward Salter* (Oxford, 1934), p. 153, n. 3. Neither of these authors, however, bases his findings upon legal materials, but upon diplomatic and parliamentary use of procurations, respectively.

[72] *Congress of Arras*, p. 193. She cites J. Mervyn Jones, *Full Powers and Ratification* (Cambridge, England, 1949), pp. 66–68. Jones, however, is dealing with evidence of the seventeenth century to the twentieth, which indicates that ratification was obligatory before the American and French

juridical distinction between the ambassador and the agent in private law or between the treaty and the private law contract, and I do not believe that subsequent ratification was necessary. It was *customary*, as Lucas says, to ratify even the acts of ambassadors armed with *plena potestas* or a special mandate, if the mission were an important one.[73] Subsequent ratification lent publicity to an accord and the express acceptance of the agent's acts lent added moral sanction, but I am unable to support Miss Dickinson's assertion of the formal necessity of a later ratification of that which had already been ratified in advance. The *ratihabitio* clause is a ratification, and sufficed to bind the principal.[74]

The advantages for diplomatic affairs in the flexibility of a proctor armed with a special mandate or with full powers are obvious and great. Within the limits of his mandate, the proctor possessed great discretionary powers, whereas the *nuncius* could do little more than bear the messages of his master. Procuratorial powers were especially useful in an age of slow communications. There were, of course, attendant risks of being bound to an unacceptable accord, but the advantages in the use of trusted proctors seem to outweigh them.

III

Oddly enough, credentials of diplomatic representatives often included both terms, *procurator* and *nuncius*. Professor Cuttino expresses the tentative belief that this was true because the envoy was to be both agent and representative, i.e., was to be empowered to speak in his own name and in his master's name.[1] I fear

revolutions, discretionary thereafter. It is obvious that a far clearer distinction then existed between public and private law than in the thirteenth (or the fifteenth) century. Jones stresses (p. 12) that as late as the end of the eighteenth century a treaty was regarded as a personal compact, a diplomatic envoy as an agent, and full powers as powers of attorney.

[73] Lucas, *English Government at Work*, I, 329. Mattingly, dealing with a somewhat later period than Lucas, shares this view that ratification was not necessary when the ambassador was armed with special or full powers, "like a power of attorney, executed in due form" (*Renaissance Diplomacy*, pp. 42–43). Such powers *are* powers of attorney. Incidentally, when medieval treaties were ratified, as they usually were, this could also be accomplished by a procurator (Frantz Funck-Brentano, "Additions au Codex Diplomaticus Flandriae," *Bibliothèque de l'École des Chartes*, LVII [1896], 378; I. J. Saunders, "The Texts of the Peace of Paris [1259],I' *E.H.R.*, LXVI [1951], p. 84, no. 6).

[74] In a famous instance, the mission of Villehardouin and his five colleagues resulting in the Treaty of Venice, the envoys negotiated the treaty, swore in the name of their principals to uphold it, and promptly dispatched *nuncii* to Rome to obtain papal confirmation of it. Confirmation could hardly be sought for a treaty that did not yet exist, lacking ratification by the principals. Yet papal confirmation was immediately sought, so I conclude that the act of the procurators sufficed to bring the treaty into juridical existence. See *La conquête de Constantinople*, éditée et traduite par Edmond Faral (Paris, 1938) par. 81, I, 82. It is true that Thibaut was intended to swear to uphold the treaty. See Villehardouin's oath, *ibid.*, I, 218. But there is no evidence that he did so.

[1] Cuttino, *English Diplomatic Administration*, pp. 86–87. I have already commented upon this statement (*supra*, p. 204). I agree with Menzel that in the early use of procurational powers deliberate contamination of forms was practiced, though this ceased to be customary after a time (Menzel, *Deutsches Gesandtschaftswesen im Mittelalter*, pp. 16–17).

that this is one of those cases where the historian is imposing the rationality that he would like to find where only irrationality exists. Actually, the two terms, *nuncius* and *procurator* (or their equivalents) are found in juxtaposition, not only in diplomatic credentials, but also in letters appointing attorneys-at-law who were clearly procurators.[2] Moreover, this inexact usage was sanctioned by exemplars of credentials contained in the legal and notarial manuals.[3] Legal discussions of *procuratores* and *nuncii* add to the confusion. *Lo Codi*, a work of the mid-twelfth century, says of a *procurator*, "id est nuncium suum."[4] The civilian Azo compounds confusion, declaring that "although in the broad meaning any *nuncius* is a *procurator*, not every *procurator* is a *nuncius*."[5] This statement can be true only if *procurator* is used non-technically, as Azo himself indicates. The canonist William Durand follows Azo almost verbatim.[6] Yet the *Digest* itself expressly distinguishes the two offices, denying the title of *procurator* to a mere carrier of a thing, a letter or a message.[7] Aegidius de Fuscarariis, whose *Ordo Judiciarius* dates from the early 1260's, explains the confusion. He writes: "So in this document, which says: 'his *nuncius* and *procurator*,' there seems to be a contradiction, for there is a difference between a *nuncius* and a *procurator* because the *nuncius* ought to form his words in the person of his principal, but not in his own person. . . . But the *procurator* ought to speak in his own person . . . ." This inconsistency of putting into the mandate "*nuncius* and *procurator*," according to Aegidius, "is tolerated by custom."[8] Therefore, in his estimation, and in mine, the legal distinction of the two offices was clear, but the words were used carelessly as synonyms. It did not make any difference what the envoy was called, if only the intention of the principal was clear.[9] This view that the *procurator* and *nuncius* were quite distinct in office, though often confused in language, is supported by all the evidence that I have seen.

[2] E.g., "nuncii et procuratores" named by Guy and John of Dampierre to represent them in proceedings concerning their legitimacy in 1253 (Duvivier, *La querelle*, II, 347–48, #CXCIX). See Gaines Post, "Parisian Masters as a Corporation," SPECULUM, IX (1934), 436, n. 6, for a series of thirteenth century documents appointing legal representatives of the masters of Paris and using *nuntius* and *procurator* indiscriminately. The two names also might be applied to an envoy who was merely a *nuncius*, also (*supra*, p. 202).

[3] *Summa notariae annis MCCXL–MCCLXIII Aretii composita*, L; *Summa notariae Belluni composita*, XXXII–XXXVI; Gulielmus Durandus, *Speculum juris*, I, 3, 4, 11.

[4] *Lo Codi*, II, t. XXVII, par. 3. I have borrowed this reference from a manuscript note by Professor Post.

[5] *Summa*, Bk. 4, t. *Si alteri, vel sibi, sub alterius nomine, vel aliena pecunia emerit*, #1.

[6] Gulielmus Durandus, *Speculum juris*, I, 3, t. *De procuratore*, c. *ut autem*, n. 5.

[7] " . . . sicuti ne is quidem, qui rem perferendam ve epistulam vel nuntius perferendum suscepit, proprie procurator appellatur" (*D.* 3, 3, 1, 1).

[8] Wahrmund, III, i, 23–24.

[9] " . . . sive dicatur procurator, sive sindicus, . . . nullum nomen exprimatur, nichil obstat, dummodo de mente constituentis liqueat" (Henry of Susa, *Summa*, I, t. *De procur*, quoted in Post, SPECULUM, IX (1934), 432, n. 2). "Sic patet quod quando verba generalia sive dubia ponuntur in huiusmodi instrumentis procurationis, recurrendum est ad intentionem constituentis . . . Et illa est causa quia verba debent de servire intentioni, non intentio verbis . . . " (*Glossa ordinaria* to *Decretales*, 1, 38 (*De procuratoribus*), 9, *Procurator episcopi*, ad v. *intentio*).

In the *procurator*, therefore, the thirteenth century added a new type of envoy to the accustomed *nuncius*. The older emissary remained in use for delivering messages, for ceremonial missions, and even for quite important tasks when it was not desirable to commit discretionary powers to the envoy. He was, in truth, like a living letter or a magpie.

Whereas the *nuncius* was volitionally passive, the *procurator* was volitionally active. I like to think of the word "attorney" as a synonym for "proctor" (*procurator*) — not because it is true that proctors were used in diplomacy only when there was a semblance of judicial character to the mission — but because of the close resemblance between the attorney-in-fact and the *procurator negotiorum*, on the one hand, and the attorney-at-law and the *procurator litis*, on the other. Usually, though not invariably, as I have pointed out, diplomatic affairs called for the *procurator negotiorum*. Like the attorney-in-fact of a private person, the diplomatic *procurator negotiorum*, if given a suitable mandate, could employ his own discretion to act in the name of his principal — by the exercise of his own will he could bind his principal. He possessed at the same time freedom to negotiate and authority to irrevocably commit, limited only by the terms of his mandate. It would be unthinkable to delegate such great powers to envoys of a modern depersonalized state, and especially of a constitutional one wherein the chief of state lacks sole jurisdiction over foreign affairs. But thirteenth-century princes, who entered into treaties as if they were private contracts, and who could select from among their advisors or bureaucrats thoroughly trusted agents, employed *procuratores*, as well as *nuncii*, in their diplomacy to great advantage.

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