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## PLENA POTESTAS AND CONSENT IN MEDIEVAL ASSEMBLIES

### A STUDY IN ROMANO-CANONICAL PROCEDURE AND THE RISE OF REPRESENTATION, 1150-1325<sup>1</sup>

By GAINES POST

By the end of the thirteenth century the royal writ of summons to Parliament usually specified that communities send representatives with "full power" to consent to whatever should be ordained by the king in his court and council. This "full power" was the famous *plena potestas* which was stated in the mandates carried by knights and burgesses to Parliament and by delegates of cities and towns to Cortes and States General, and which is still current in proxies for stockholders' meetings. It has, of course, like almost every word of the terminology in documents relating to representation, challenged interpretation: on the one side is the argument of J. G. Edwards,<sup>2</sup> who confines himself to England, that

<sup>1</sup> The following abbreviations are used for frequently cited works: *A. H. R.* = *American Historical Review*; Bracton = Bracton, *De Legibus et Consuetudinibus Angliae*, ed. George E. Woodbine (4 vols.; New Haven: Yale University Press, 1915-42); *E. H. R.* = *English Historical Review*; Lavissee = E. Lavissee, ed., *Histoire de France depuis les origines jusqu'à la révolution* (9 vols. in 18; Paris, 1911); McIlwain, *C. M. H.*, VII = C. H. McIlwain, "Medieval Estates," *Cambridge Medieval History*, VII, 665-715; Mansi, *Concilia* = J. D. Mansi, ed., *Sacrorum conciliorum nova et amplissima collectio* (31 vols.; Florence and Venice, 1759-98); *M. G. H.* = *Monumenta Germaniae Historica*; Morris, *English Government* = J. F. Willard and W. A. Morris, ed., *The English Government at Work, 1327-1536* (vol. I; Cambridge: The Mediaeval Academy of America, 1940); Stubbs, *S. C.* = William Stubbs, *Select Charters* (9th ed. by H. W. C. Davis; Oxford: at the Clarendon Press, 1929); Wahrmund, *Quellen* = L. Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Processes im Mittelalter* (Innsbruck, 1905 ff.).

*C.* = *Codex Justinianus* (ed. P. Krueger in *Corpus Juris Civilis*, vol. II; Berlin, 1915); *D.* = *Digesta* (ed. T. Mommsen in *Corpus Juris Civilis*, vol. I; Berlin, 1930); *Accur.* = Franciscus Accursius, *Glossa Ordinaria to C. and D.* (Paris, 1659); *Decr.* = *Decretales Gregorii IX* (ed. E. Friedberg, *Corpus Juris Canonici*, vol. II; Leipzig, 1881); *VI* = *Liber Sextus Decretalium* (ed. Friedberg); *Glos. ord.* = *Glossa ordinaria to Decr. Greg. IX* (Lyons, 1572).

<sup>2</sup> "The *Plena Potestas* of English Parliamentary Representatives," *Oxford Essays in Medieval History Presented to H. E. Saller* (Oxford, 1934), pp. 141-54; this was the first attempt to interpret *plena potestas* as used in England; Edwards concludes that its origin lay in part in the king's wanting representatives with full power in order to obtain sure consent to taxation, and in part in the feudal law on consent to extraordinary aids: "Historically the legal sovereignty of Parliament sprang . . . from a double root. One root was the character of Parliament as a high court. The second root was the *plena potestas* of the representatives of the Commons" (p. 154).\* F. Pollock and F. W. Maitland, *History of English Law* (2nd. ed., 2 vols.; Cambridge, 1898), II, 228, do not interpret; they merely state how "full powers" arose in the law of agency and in procuracy and representation in Parliament. C. H. McIlwain, "Medieval Estates," *C. M. H.*, VII, 679, seems to conclude that the consent expressed by *plena potestas* was more than a formality in that the representatives had some discretionary power (*ad tractandum*), which would naturally act as a brake on the king's demands. Similarly, but emphasizing more strongly the right of judgment and consent, Maude V. Clarke, *Medieval Representation and Consent* (London, 1936), p. 291; cf. pp. 200 f. For Spain, R. B. Merriman holds that the *poderes* were "one

*plena potestas* implied an almost political or sovereign consent which limited the royal authority; on the other, the assumption that it was an expression of involuntary consent to the acts and decisions of the royal government.<sup>3</sup> In general, of course, whatever modern scholars have decided as to the right of consent has resulted either from modern conceptions of representation or from a strict interpretation of the terminology in the sources for the history of assemblies. No one has examined *plena potestas* in the light of the legal theory and procedure of the thirteenth century.<sup>4</sup> It is possible that by studying how legists and canonists viewed the meaning of *plena potestas*—for it, like most of the terminology in the mandate, came from Roman Law—we can find at least a relatively new approach to the problem of medieval consent.

### 1. PLENA POTESTAS IN ROMAN AND CANON LAW

Like nearly all the formulas in thirteenth century mandates<sup>1</sup> for proctors or representatives, *plena potestas* was taken directly from the Roman Law. The Emperor Alexander Severus (*an.* 227) declared that if a proctor appointed for one suit or business (*ad unam speciem = ad causam, vel negotium* in a thirteenth century gloss)<sup>2</sup> exceeds or departs from his instructions (*officium mandati*), his action cannot prejudice his principal or *dominus*; but if while so acting he has *plenam potestatem agendi*, the sentence or judgment of the court need not be rescinded; for if the proctor acts fraudulently, his *dominus* can have him cited to court to obtain a remedy.<sup>3</sup> In other words, *plena potestas* meant simply that the proctor "fully represented his principal, so that the latter's right was brought into issue".<sup>4</sup> This law, preserved in Justinian's *Codex*, 2, 12, 10, was known and

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of the most important safeguards of Castilian parliamentary liberty" despite the king's right to interpret the powers of the delegates; *Rise of the Spanish Empire*, I (New York, 1918), 222 f.; and that consent limited the royal power effectively in Aragon; I, 461 f. \* See also Edwards, "Taxation and Consent in the Court of Common Pleas, 1338," *E.H.R.*, LVII (1942), 478.

<sup>3</sup> For France, M. Jusselin, "Lettres de Philippe le Bel relatives à la convocation de l'assemblée de 1302," *Bibliothèque de l'École des chartes*, LXVII (1906), 471; C. V. Langlois, in Lavissee, III, ii, 160 f., 261-4; McIlwain, *C. M. H.*, VII, 686, 690. For England, T. F. T. Plucknett, "Parliament," in Morris, *English Government*, I, 101 f.

<sup>4</sup> I consider the century broadly as a period from about 1150 to 1325.

<sup>1</sup> The *mandatum* was a contract by which an agent could act for his *dominus* in a business transaction or in lawsuits; the principal or *dominus* was so bound, if the agent honestly carried out the terms of the mandate, by the agent's conclusion of the contract or waging of the lawsuit, that he must accept the contract or the sentence of the court.

<sup>2</sup> Accursius, *Glos. ord.*, to C. 2, 12, 10, ad v. *unam speciem*: "Id est, ad causam, vel negotium."

<sup>3</sup> C. 2, 12, 10: "... quod si plenam potestatem agendi habuit, rem iudicatam rescindi non oportet, cum, si quid fraude vel dolo egit, convenire eum more iudiciorum non prohiberis." My interpretation is rather free but it is justified by the statement in an *Epitome* of the *Codex* of the ninth century (below, n. 5), and by the legists of the thirteenth and fourteenth centuries, below.

<sup>4</sup> W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (2nd. ed., Cambridge, 1932), p. 710.

commented upon perhaps as early as the ninth century in Italy, when a glossator said that *plena potestas* permitted the proctor to carry a matter to a conclusion.<sup>5</sup>

No reference to *plena potestas* in the works of the legists of the twelfth century has come to my attention. But it must have been known, for it occurs in a canonist's treatise on procedure in the 1180's.<sup>6</sup> Indeed, Rogerius makes *generalis et libera administratio* the equivalent of full powers, and Azo follows him.<sup>7</sup> In the thirteenth century Accursius likewise decides that, since the giving of a general mandate is sufficient only for litigation proper, the addition of *plena potestas* makes the general mandate adequate also for the *transactio* (i.e., a compromise of a dispute at law,<sup>8</sup> for which a special mandate in addition to the general one was usually required).<sup>9</sup> Odofredo observes no distinction between *plena potestas* and *libera et generalis administratio*; indeed, the former is implied by the latter.<sup>10</sup> This opinion was taken over by Bartolus in the following century, who in addition makes it clear that any one who has a mandate that specifies either *plena* or *libera administratio*, or contains the commonly used formula, *possit facere omnia que ipse dominus possit*, is thereby given *plena potestas* by the principal;<sup>11</sup> and Baldus even more clearly expresses the same opin-

<sup>5</sup> P. Vinogradoff, *Roman Law in Medieval Europe* (2nd ed. by F. de Zulueta; Oxford, 1929), p. 40: a ninth century *Epitome* of the *Codex*, to 2, 12, 10, states that "if the representative (*procurator*) of a person had full powers to act in the latter's behalf, a decision against him in a trial ought to stand; for in the case of a fraud, the *procurator* might be sued by his principal" ("nota qui habet plenam potestatem agendi posse rem sine dolo firmiter finire," p. 41). In the thirteenth century Odofredo also states that the remedy for the *dominus*, if his proctor acts collusively, is an action against the proctor; to C., 2 12, 10, below, n. 10.

<sup>6</sup> In the *Ordo iudicarius Bambergensis* (ca. 1182-85), ed. J. F. von Schulte, *Sitzungsberichte d. Kais. Akademie der Wissenschaften zu Wien, Philos.-Hist. Cl.*, LXX (1872), 300: "Procurator super his, quae ad ipsam procuracionem spectare noscuntur, plenariam recipit potestatem."

<sup>7</sup> Azo, *Lectura* (Lyons, 1596), to C. 2, 12, 10 (p. 159), ad vv. *convenire eum more iudic.*: "Quia conveniet eum actione mandati . . . Si ergo [procurator] habet liberam [literam in this edition] et generalem administrationem, servatur quod fecit, sed tamen tenetur de dolo et fraude, et de lata culpa et levi . . ." Rogerius, *Summa Codicis*, II, viii, *De procuratoribus*: the proctor for *administratio*, "sive habeat speciale mandatum, sive generale et liberam amministrationem, potest vendere, alienare et cetera facere: si autem generale nec liberam amministrationem, nec vendere, nec alienare, nec transigere potest"; ed. J. B. Palmieri, in *Bibliotheca Iuridica Medii Aevi* (ed. A. Gaudenzi), I (Bologna, 1887), 27 f.

<sup>8</sup> Buckland, *Roman Law*,<sup>2</sup> p. 525.

<sup>9</sup> Accursius says, to C. 2, 12, 10, ad v. *plenam potestatem*: "specialiter concessam, secundum quosdam. . . Tu dic, quod sufficit generalis cum libera [administratione] ad agendum et transigendum; sed generalis sola non sufficit ad transigendum, ut ff. eo. l. procurator cui generaliter, et l. mandato generali." (The latter reference is to D. 3, 3, 60: "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.")

<sup>10</sup> To C. 2, 12, 10: ". . . si procurator habet liberam et generalem administrationem, sententia lata contra eum nocet domino; sed si dicitur procurator colluisse cum adversario, dominus mandati poterit contra eum agere."

<sup>11</sup> *Commentaria* (Venice, 1602), VII; to C. 2, 12, 10: ". . . quero quando quis dicatur habere plenam potestatem? Quidam dicunt, quando habet speciale mandatum. Alii

ion.<sup>12</sup> Francesco Tigrini (†1360) goes so far as to say that *plena potestas* is implied by the formula, *et promitto me habere firmum et ratum quicquid procurator meus fecit*.<sup>13</sup> Thus the legists attach no peculiar importance to *plena potestas* alone; other formulas may have the same legal effect. All accept the general meaning of the imperial law, that if the *dominus* gives his proctor full power, he must accept the decision of the court in a suit brought by the proctor. But, as Baldus says, such power does not give the proctor any right arbitrarily to give away the principal's property, to injure his interests, or to commit a crime.<sup>14</sup> Both *dominus* and *procurator* must loyally abide by the terms of the contract embodied in the mandate. *Plena potestas* simply gave the judge or judges in a court the assurance that what the proctor had done in a matter which came to trial, or what he did in the course of the trial in the interests of his *dominus*, was done under such contract with his principal that the latter was legally bound to accept any resulting sentence of the court. Naturally an unfavorable sentence of the court could later, if reasonable grounds existed, be appealed to a higher court.

The glossators developed the law in the *Code* by bringing to bear texts from the *Digest* relating not only to the ordinary proctor, but also to the *Procurator Caesaris*. Thus Azo and Accursius made *plena potestas* almost the equivalent of *libera administratio* given in a general mandate, and refer to *Dig. 3, 3, 58* on this.<sup>15</sup> But, says Accursius, such a general mandate is not valid for the *transactio* (and offers as authority *Dig. 3, 3, 60*)<sup>16</sup> unless it contains the additional

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dicunt, et istud tenet gl. [i.e., the gloss of Accursius], quando habet liberam, et tene menti, et vide gl. (§2) Et sic no., quod idem est dicere, 'concedo tibi plenam administrationem', et 'concedo tibi liberam administrationem.' Idem forte important illa verba, que communiter apponuntur, ut 'possit facere omnia que ipse dominus posset', ut per hoc videatur concedi libera, ut l. (1) de offi. procu. Caesa."

<sup>12</sup> Baldus *super toto Codice* (Lyons, 1519), to C. 2, 12, 10: "... Quero quando quis dicitur habere plenam potestatem; et dicunt quidam quando specialiter hoc dicitur. Item quando dicitur habeas liberam, ut ff. de pecu. l. quam tuberionis. §. alia. Item si apponuntur ista verba, 'quod posset quicquid posset dominus si presens est'. Bar. allegat l. i. de offi. proc. cesar. Ego allego tex. ff. manda. l. creditor. §. lucius.—§. Conclude ergo quod tria vocabula sunt, que idem important plenam potestatem; et idem 'quod posset dominus', idem si diceretur 'concedo tibi [sibi in the 1519 edition] totalem potestatem', per d. §. lucius. Nunquam tamen in his verbis includitur donatio vel dilapidatio... Item nunquam includitur delictum...."

<sup>13</sup> Bartolus, *Commentaria*, to C. 2, 12, 10, §5, *Antiqua lectura*: "No. tex. cum glo. super verbo 'plenam,' quod idem est sive dicatur plena sive generalis et libera; quod si dicatur in aliquo procuratore generali, 'et promitto me habere firmum et ratum quicquid procurator meus fecerit', nunquid ex his verbis videatur induci libera potestas et administratio?" Some say no; but "hoc satis aequipollere videtur... Fran. Tigr."

<sup>14</sup> Above, n. 12; Azo adds, in his *Lectura*, C. 2, 12, 10, ad vv. *nullum domino praeiudicium*: "Non enim debet transgredi mandatum...;" ad vv. *convenire eum more iudic.*: "Quia conveniet eum actione mandati... Si ergo habet liberam [literam in printed text] et generalem administrationem, servatur quod fecit, sed tamen tenetur [procurator] de dolo et fraude, et de lata culpa et levi..."

<sup>15</sup> Above, nn. 7, 9; D. 3, 3, 58: "Procurator, cui generaliter libera administratio rerum commissa est, potest exigere, novare, aliud pro alio permutare."

<sup>16</sup> D. 3, 3, 60: "Mandato generali non contineri etiam transactionem decidendi causa interpositam."

formula *libera administratio* or *plena potestas*.<sup>17</sup> Bartolus and Baldus also made *libera administratio* equivalent in effect to *plena potestas*; that is, the general mandate containing the formula *libera administratio* was valid even for the *transactio*, for which no additional special mandate was needed. *Plena potestas* was inserted in the general mandate, no doubt, to give double assurance of its general validity for all kinds of legal business in a court, whether the litigant parties desired to pursue their controversy to the bitter end of judicial sentence, or to "transact" and come to an agreement before the judge but without the judge's deciding the outcome by a sentence. These formulas, *libera administratio* or *plena potestas*, made the general mandate effective likewise for other special kinds of proctorial action (e.g., selling goods for the *dominus*), for which otherwise the general proctor must have also a special mandate, as for *transactio*.<sup>18</sup> In brief, where normally a special mandate was needed, if instead the proctor was given a general mandate with *libera administratio*, he could do everything that the *dominus* himself could do.<sup>19</sup>

The passages in *Dig. 1, 19, Procurator Caesaris*, were all used as authority for the *libera administratio*; but, as Azo says, the *procurator* of Caesar can only administer—he cannot alienate to the Caesar's injury.<sup>20</sup> This idea was transferred by Bartolus and Baldus to the ordinary proctor.<sup>21</sup> Thus, once more, if the proctor had *libera administratio* or *plena potestas*, he should not act in such a way as to damage his *dominus*;<sup>22</sup> if he did, however, the *dominus* would find a remedy only in another action in court. Actually the *libera admin.* or *plena pot.*, or both, made the proctor not merely an attorney but also an administrator with a general mandate for all the business connected with a case or suit involving the principal.

Trained as they were in the Roman Law, canon lawyers naturally borrowed much from the Roman theory and procedure. And from the latter half of the twelfth century on, experts on procedure, decretalists, and popes took cognizance of the importance of *plena potestas*. As early as 1182-5 a canonist stated in his *Ordo iudiciarius* that the proctor should receive *plenaria potestas*,<sup>23</sup> and in 1200

<sup>17</sup> See the gloss of Accur. given above, n. 9.

<sup>18</sup> *D. 3, 3, 63*; Accursius, ad v. *speciali*; cf. Bartolus, to *e. l.*

<sup>19</sup> The thirteenth century legist Vivianus, in his *Casus*, to *D. 3, 3, 58, Procurator cui*, says: "Si aliquem constitui procura. [torem] et concessi liberam et generalem administrationem, procur. [ator] omnia poterit facere ut dominus; novare enim poterit, et permutare, et solvere debita creditoribus."

<sup>20</sup> Azo, as given by Accur., *Gl. ord.*, to *D. 1, 19, 1, ad v. diligenter [gerere commissum est]*: "Sed nonne bene potest gerere alienando? . . . quia hic habet liberam administrationem . . . unde videtur alienare; sed speciale est, ne in Caesaris praeiudicium alienet, alias contra . . . Az."

<sup>21</sup> Above, nn. 11, 12.

<sup>22</sup> *D. 3, 3, 49, Paulus*: "Ignorantis domini conditio deterior per procuratorem fieri non debet;" to which Accursius, *Gl. ord.*, ad v. *non debet*: "nisi in tribus casibus: quando scilicet est in rem suam; et quando speciale habet mandatum; et quando generale, sed habet liberam administrationem . . . Sed certe nec tunc quando generale habet administrationem et liberam, potest donare . . . Sed licet deteriolem facere non potest, tamen meliorem sic . . ."

<sup>23</sup> Above, n. 6.

Innocent III was summoning proctors of cities to come to the Curia with full powers.<sup>24</sup> A decretal of Gregory IX (1227-34) specified that a suitable proctor, sent to the papal Curia for a matrimonial case, should have *plena potestas ad agendum et respondendum* (*Decr.* 1, 38, c. 10 *Accedens*). This meant, says the *Glossa ordinaria*, that the proctor had such full powers that he could act as defendant as well as plaintiff in the suit if the adversary brought counter-charges, and was fully responsible if the sentence went against him.<sup>25</sup> *Plena potestas*, moreover, according to the decretalists (who agree with the legists), was the practical equivalent of *libera administratio*: the general mandate by itself did not preclude the necessity of the special mandate for the proctor to petition for a papal rescript,<sup>26</sup> to transact, to alienate, or to transfer, renew, or change a debt by the *novatio*;<sup>27</sup> but by the time of Boniface VIII the general proctor could do all these things without special mandate if the general mandate contained special clauses or gave him *libera administratio*.<sup>28</sup> Still earlier Guillaume Durant (*ca.* 1271-86) had masterfully summed up the rules of procedure for judicial representation in church courts and had made *libera* and *plena potestas*

<sup>24</sup> Below, §3.

<sup>25</sup> To *Decr.* 1, 38, 10, ad v. *respondendum*: "Sic ergo debet constitui procurator ad agendum datus, ut possit etiam defendere et respondere adversario si eum reconveniat: alias si non defenderet, denegabitur ei actio . . . , et in expensis alteri parti tamquam contumax condemnetur . . . In qua constitutione debet satisfationem exponere . . . ; et quod tempore sententiae erit in iudicio, alias omnia dabit quae in condemnatione veniunt, ut ibidem dicitur: *et ita plenam habet potestatem.*"

<sup>26</sup> In the Fourth Lateran Council (1215), Innocent III decreed that without a special mandate from the *dominus* no one could ask for a papal writ for a suit (*Decr.* 1, 3, c. 28 *Nonnulli*); this was repeated by Gregory IX (c. 33 *Ex parte*). To the latter decretal the gloss in the *Glos. ord.*, ad v. *sine speciali*, states that according to Roman Law the general proctor who also had *libera administratio* could petition for a rescript; but the author adds, "Curia tamen non servat hoc, quod hic et in concilio dicitur, nec daret litteras propter hoc appellanti."

<sup>27</sup> *Glos. ord.*, to c. 28 *Nonnulli*, § *Cum autem*, ad vv. *sine speciali mandato*: "Sic ergo generalis procurator non sufficit ad impetrandum litteras," for which, as for *transactio*, for *in integrum restitutio*, for *dilatatio iuramenti*, and for *acceptilatio*, a special mandate is necessary: to *Decr.* 1, 38, c. 9 *Petitio*, ad v. *generales*: "Licet fuerint generales procuratores, non tamen poterant transigere . . . , nec possunt alienare nisi fructus aut alia quae de facili corrumpi possunt . . . ;" to c. 11 *Dilectus*, e. t., ad v. *generalis* [*ad omnia eius tractanda negotia*]: "Potest ergo quis constituere generalem procuratorem ad omnia, tam ad iudicia quam ad negotia, ut hic dicit . . . ; tamen talis procurator transigere non potest, nec alienare . . ."

<sup>28</sup> Boniface VIII, VI 1, 19, 4: "Qui ad agendum et defendendum, ac generaliter ad omnia, etiamsi mandatum exigant speciale, constituitur procurator, ex vi generalitatis huiusmodi ad aliquem articulum, in quo speciale mandatum exigitur, admitti non debet. Sed si aliquis vel aliqui de articulis speciale mandatum exigentibus specificati fuissent adiecta clausula generali: tunc ad non expressos etiam admittetur. *Procurator quoque absque speciali mandato iuramentum deferre, transigere vel pacisci non potest, nisi ei bonorum vel causae administratio libera\* sit concessa.*" (\*Friedberg, the editor, wrongly has *libere*; but *libera*, which is given in several MSS, is better.) Zenzelinus († *ca.* 1350) sums up the decretal thus: "Procurator generalis non agit exigentia speciale mandatum, nisi cum aliqua illorum specificatione vel libera potestate."

identical with *libera administratio* in the general mandate.<sup>29</sup> It is probable, indeed, that ecclesiastical courts themselves often accepted a proctor as fully empowered by a mandate in which the terminology was vague or in part lacking—after all, the court could interpret because of the judge's jurisdiction.<sup>30</sup> It was therefore not always essential that *plena potestas* be stated specifically, provided that other terms were reasonable equivalents and that the judges were willing to accept the mandate as one conveying full powers—*non obstante subtilitate legali*.<sup>31</sup> Such a mandate was *sufficiens* and its bearer *sufficienter instructus*,<sup>32</sup> if it gave *plena potestas*.

This legal meaning of *plena potestas* and its equivalents was quickly embodied in the practical treatises on judicial procedure in the courts. A canonist's *Ordo iudiciarius* as early as the 1180's emphasized the necessity of giving full powers in the mandate,<sup>33</sup> and by the middle of the thirteenth century treatises and formularies of civilians and canonists specified in detail what things *plena potestas* in the general mandate enabled the proctor or syndic to do. William of Drogheda's *Summa aurea* (ca. 1240) maturely reflects Roman Law and the legists on the problem: a general mandate containing clauses for *libera et generalis administratio*, enables the proctor to act as if the constituent himself were present, to act in all eventualities without having to obtain special mandates from the constituent—the proctor thus has full powers, and needs no further instructions.<sup>34</sup> Some treatises of the middle thirteenth century on procedure in ecclesiastical courts are more conservative, usually stating that the general

<sup>29</sup> *Speculum iudiciale* (Lyons, 1547), I, iii, t. *De procuratore*, c. *Ut autem*, no. 11; below, n. 40.

<sup>30</sup> Honorius III (1216–27) had declared that exception to a mandate should not be allowed if the intention of the *dominus* was to give *libera potestas* to his general proctors, even though in this instance the *dominus* failed to state whether his agents were *syndici* or *actores* (*Decr.* 1, 38, c. 9 *Petitio*).

<sup>31</sup> *Glos. ord.*, to *Decr.* 1, 38, c. 9 *Petitio*, ad v. *intentio*: "Sic patet quod quando verba generalia sive dubia, ponuntur in mandato, recurrendum est ad intentionem constituentis . . . Unde si diceretur: 'ego do Titio potestatem agendi et defendendi in causa vel in causis, quam vel quas habeo cum tali,' sufficiens est mandatum, non obstante subtilitate legali . . ."

<sup>32</sup> See below, §5, on "sufficient instructions".

<sup>33</sup> Above, n. 6.

<sup>34</sup> *Summa aurea*, c. CII: the office of the proctor is to do those things "quae verus dominus faceret, si esset praesens . . . (*D.* 3, 3, 35, 3), nisi prohibeatur a iure, ut transigere et committere, nisi ad hoc habeat speciale mandatum . . . (*D.* 3, 3, 60 and 63);" c. CVI: the general proctor cannot do certain things without special mandate; but, c. CVII, if the general proctor is given *libera et generalis administratio*, he can "litigare, componere, et novare"; Wahrmond, *Quellen*, II, ii, 97, 101, 102 f. William also gives a form for a general mandate so drawn up that it confers full powers on the proctor, c. CVIII: "Si autem velit [dominus] ei [procuratori] dare potestatem ad transigendum et ad componendum, adiciat clausulam istam: 'Constituo etiam ipsum procuratorem ad transigendum et ad componendum' vel 'concedo ei liberam et generalem administrationem, ita quod omnia expediat, quae praesentialiter esse acturus. Ratum habiturus, quicquid iustitia mediante circa praedicta duxerit agendum; et pro eo iudicatum solvi, si necesse fuerit, promitto' . . .;" Wahrmond, II, ii, 103 f.

mandate, while good for a whole suit or several suits, is not sufficient for the special acts which demand special mandates.<sup>35</sup> But the *Summa minorum* (1250-54) gives a form for a general mandate which confers on the proctor for all suits, whether the proctor acts as plaintiff or defendant, both *totalis potestas* and *mandatum speciale* for certain matters.<sup>36</sup> And the *Curialis* (1251-70) offers a *procuratio ad omnia facienda* for the general proctor, which contains a clause giving him *speciale mandatum litigandi, defendendi, transigendi, componendi, etc.*, and thus provides him with *plenaria potestas* before the judges, and assures him that his *dominus* will ratify whatever he does *et in curiis et extra*.<sup>37</sup> The Saxon *Summa prosarum dictaminum* (before 1241) gives a mandate by which the proctor has *libera potestas* of making special pleas, of appealing, and of *totaliter* litigating in a suit; his constituents will hold *ratum* and *gratum* whatever he does in the particular case.<sup>38</sup> According to Rolandinus Passagerii (*ca.* 1260), a famous professor of the notarial art at Bologna, the general mandate *ad causas et negocia* enables the proctor to act as plaintiff or defendant generally in all *lites* and *controversiae* of his *dominus*, in any *negotia*, and before secular or ecclesiastical judges. Such a proctor has *plena et libera potestas* and *generale mandatum* to offer or receive *libelli* (i.e., to act as plaintiff or as defendant), formulate the issue (*litis contestatio*), propose *exceptiones*, ask for *termini* and postponements, accept or receive witnesses, produce instruments or written evidence, choose or refuse judges, and hear the court's sentence; he can also ask, demand or receive anything owed to the *dominus*, contract and transact, borrow, sell, buy and lease, and appoint proctors in his place.<sup>39</sup> Finally, Guillaume Durant sums up the meaning of *plena potestas* in Canon Law: in a general mandate *ad causas et*

<sup>35</sup> *Ordo Scientiam* (1235-40), ed. Wahrmund, II, i, 49: the proctor can do only those things required to answer to the charges as given in the papal rescript which assigns the case to judges.

<sup>36</sup> Wahrmund, I, ii, 53 f. Wahrmund has this: "Dans eidem procuratori *talem potestatem* et *mandatum speciale*, etc." But in formularies *talis* is used in place of names of actual persons, not for legal terms; and here there is no "such power . . . that," but simply "power . . . of" doing something. Wahrmund has probably mistaken an abbreviation in the MSS. for *totalem*; cf. Saxon *Summa*, cited below, n. 38, and Baldus, above, n. 12.

<sup>37</sup> This form of a general mandate is worth giving in detail: "Universis praesentes litteras inspecturis officialis Belvacensis salutem . . . Notum facimus universis, quod talis [i.e., the principal] in nostra praesentia constitutus Odonem clericum, latorem praesentium, ad omnes causas motas et movendas contra quoscumque tam clericos quam laicos, coram quibuscumque iudicibus, tam delegatis quam ordinariis, suum *procuratorem* et\* *constituit generalem*. Dans ei *speciale mandatum* litigandi, defendendi, transigendi, componendi et conveniendi debitores suos et iniuriatores, et recipiendi debita, quae sibi debentur, et iurandi in animam suam tam super principali, quam super expensis, et expensas eadem recipiendi, quotienscumque sibi fuerint adiudicatae, et constituendi alium procuratorem loco sui . . . , et faciendi omnia, quacumque faceret vel facere possit, si praesens esset in causa. Eidem, tamquam procuratori legitimo plenariam concessit coram nobis potestatem, ratum et firmiter habiturus, quidquid per O. vel eius procuratores . . . fuerit actum et etiam procuratum, et in curiis et extra . . . ; Wahrmund, I, iii, 25. \*Wahrmund wrongly inserts *et*, which should be deleted.

<sup>38</sup> L. Rockinger, *Briefsteller und Formelbücher des eilften bis vierzehnten Jahrhunderts* (*Quellen zur bayerischen und deutschen Geschichte*, IX; Munich, 1863), pp. 278 f.

<sup>39</sup> *Summa totius artis notariae* (Venice, 1574), I, 214<sup>v</sup>-215<sup>v</sup>.

*negotia* the proctor is given *plena et libera potestas . . . faciendi* all things expressed in the mandate—*libera* adds strength to *plena potestas*.<sup>40</sup> In his form-mandates he offers the example of a bishop and his church appointing a proctor with *specialis, plena, libera et absoluta potestas* to borrow up to 100 marks in the name of the church.<sup>41</sup> Other forms of general mandates give the proctor *plena et libera potestas* of acting before any judge, auditor, judge delegate, or sub-delegate; of petitioning, compromising, transacting, and so on; of acting for a corporation in the papal Curia; of petitioning, suing, responding to suits, making special pleas (exceptions) and answering pleas made by the adversary; of taking oaths, hearing the sentence, and appealing.<sup>42</sup>

Towards the end of the thirteenth century the *Summa notarie* of John of Bologna reflects the same practice in the English church.<sup>43</sup> But *plena potestas* had long since been current in ecclesiastical court procedure in England<sup>44</sup>—and in the common law procedure of the king's courts.<sup>45</sup>

To sum up. In both laws the special mandate, for the special proctor, was limited to a particular day<sup>46</sup> or to a particular matter which required the specific consent of the proctor's constituent.<sup>47</sup> The general mandate for the general proctor empowered him to act in a whole suit or in all suits, contracts and business of his *dominus*, but limited that power by making it necessary for the proctor to obtain special mandates for alienating, transacting, petitioning, appealing or doing anything which would damage the *dominus* without his special consent. But if *plena potestas* or *libera administratio*, or both, or their equivalents, were inserted in the general mandate, the proctor could do all special acts as well as represent his principal in general litigation and business

<sup>40</sup> *Spec. iud.* I, iii, t. *De procuratore*, c. *Ut autem*, no. 11: "§ Quod autem dixi 'liberam potestatem,' multum prodest: quia aliter non habet ita plenam, ff. de procu., procurator cui, et l. seq. et l. mandato, j. ver. notabiliter." Here Durant connects the *libera administratio* in the *Digest* with the *plena potestas* in the *Code*.

<sup>41</sup> *Spec. iud.*, I, iii, t. *De procuratore*, c. *Ut autem*, no. 21 (fol. 86<sup>r</sup> c. 1).

<sup>42</sup> *Spec. iud.*, I, fol. 86 c. 1, nos. 11 and 16.

<sup>43</sup> Rockinger, *Briefsteller u. Formelbücher*, p. 607: a mandate by which the prior and chapter of Christ Church, Canterbury, appoint a proctor and *nuncius* with *plena et libera potestas* of petitioning in the Roman Curia for *Litterae simplices* and *legendae*.

<sup>44</sup> For example, a mandate of 1252 issued by St. Albans for proctors, with *plena et libera potestas*, for business in the Roman Curia; Matthew Paris, *Chronica Majora* (ed. H. R. Luard; R. S.; London, 1876-82), VI, *Addimenta*, pp. 219 ff.

<sup>45</sup> Bracton, III, 142 (ed. Twyss, R. S., III, 408-10).

<sup>46</sup> But in the Church, as decided by a papal legate in England, 1237, a proctor must not be appointed for one day only; William of Drogheda, in Wahrmond, *Quellen*, II, ii, 168; Matthew Paris, *Chron. Maj.*, III, 436.

<sup>47</sup> *Summa minorum*, c. L., *De procuratorio*: "... aliquando datur procurator ad unum diem vel ad unam rem et talis procurator dicitur [esse] specialis. Aliquando datur procurator in omnibus causis vel in una causa generaliter et tunc dicitur procurator generalis;" Wahrmond, I, ii, 52. The canonists follow the legists on this, e.g., *Glos. ord.* of Accursius to *D.* 3, 3, 49, ad v. *non debet* ("Ignorantis domini conditio deterior per procuratorem fieri non debet"): "nisi in tribus casibus: quando scilicet est in rem suam; et quando speciale habet mandatum; et quando generale, sed habet liberam administrationem"—and in no event can a proctor *donare* if by so doing he damages his principal.

without having to get new instructions. If the proctor with full powers still must be loyal to his *dominus*, i.e., act in his real interest without fraud or collusion, nevertheless he had full powers to act as if the *dominus* were himself present. This was real representation without referendum<sup>48</sup>: it gave the representative such power that, under the general and special terms of his mandate or instructions, he could use his own judgment as to how best to act and meet the acts of any opponents; it also assured him that, although technically he received in his own person the sentence of the court, his *dominus* would be responsible for him, unless he had been fraudulent, and would pay any damages or fines if the suit were lost. More important, by giving full powers to his proctor the principal thereby submitted to the jurisdiction of the court, which could not proceed with a case if a litigant did not consent to the acts of his representative. Speedier and more effective court action was made possible—in spite of many preliminary delays still granted to the litigants—by the elimination of “reference back” when *plena potestas* took the place of special mandates for many a contingency: for agreements before the court but not in the court (e.g., *transactio*), for the settlement of a case out of court, or for any business that was not judicial yet might be transacted with judges as councillors or administrators. Thus *plena potestas* gave the proctor “sufficient instructions”<sup>49</sup> to act as if the principal himself appeared in court, fought the legal battle, and received the sentence of the judges. It expressed the consent of the interested parties both to the representation and to the authority of the court to decide the issue, after judicial process, and pass sentence. Refusal of consent could come only thereafter by way of appeal to a higher court.

## 2. PLENA POTESTAS, ADMINISTRATIVE AGENTS, AND AMBASSADORS

Not only did the Roman formulas in the mandate serve for representation in courts and in ordinary business transactions, but they were also adopted to express the powers both of ambassadors appointed by princes and cities to negotiate truces, treaties and other contractual agreements, and of royal procurators and papal legates as administrators. This practice started early—probably first in Italy and perhaps under the influence of close relations in the preceding period with Byzantium—in the sending by cities of ambassadors (or consuls and judges) to each other or to kings and emperors, and in the appointing by kings and popes of administrative procurators and legates. The precedent and inspiration derived ultimately both from the Roman proctorial mandate and from those passages on *procuratores Caesaris* in the *Digest* and *Code* in which the legists and decretalists of the thirteenth century found formulas to justify the equivalence of *plena potestas* and *libera et generalis administratio* in general mandates.<sup>1</sup> It is therefore not surprising to find this terminology, along with

<sup>48</sup> Unless a new case or suit was brought against the principal after he had appointed and empowered his proctors for other matters; below, §5.

<sup>49</sup> On instructions and reference back, see below, §5.

<sup>1</sup> See above, §1. The *Digest* furnished these opinions: 1, 19 *De officio procuratoris Caesaris*, 1; 3, 3 *De procuratoribus* 58 (Paulus: “Procurator, cui generaliter libera administratio rerum commissa est, potest exigere, novare, aliud pro alio permutare”); 15, 1, 7 §1;

*plena jurisdictio*, which also had its Roman background,<sup>2</sup> in the mandate of authority that the King of Jerusalem and his *curia* in 1176 wished to confer on Philip, Count of Flanders, as the royal *procurator*. William of Tyre, the royal chancellor, and something of an expert himself in Roman and Canon Law,<sup>3</sup> relates that the king and *curia* offered the Count *potestatem, et liberam et generalem administrationem super regnum universum*, with *plena jurisdictio* over all, in war and in peace.<sup>4</sup>

Papal legates and *nuntii* too, by the end of the twelfth century, were somewhat like royal *procuratores* and Roman proconsuls or legates, with *plena potestas, jurisdictio*, and *imperium* conferred upon them by the pope.<sup>5</sup> Certainly the Cardinal-legate Romano had full administrative and judicial authority when Gregory IX in 1228 gave him *libera ac plena potestas quaecumque de rebus Albigensibus agendi*.<sup>6</sup> In the middle of the century the papal *nuntii* to England were likewise given *plena potestas*.<sup>7</sup>

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17, 1, 60 §4; *Code*, 2, 12, 10. Azo, as cited in the *Glossa ordinaria* by Accursius, says that the *procurator* of Caesar has *libera administratio*, to *D. 1, 19 1 §1, ad v. diligenter [gerere commissum est]*: "Sed nonne bene potest gerere alienando? . . . quia hic habet liberam administrationem . . . unde videtur alienare; sed speciale est, ne in Caesaris praeiudicium alienet, alia[s] contra . . . Az." Azo, again, *Lectura to C. 2, 12, 10, ad vv. convenire eum more iudic.*

<sup>2</sup> *D. 1, 16, De officio proconsulis et legati*, ll. 1, 7 §2, and 13; 1, 21, *De officio eius, cui mandata est iurisdictio*; 2, 1, *De iurisdictione*. The twelfth-century idea of the royal *procurator* seems to have been taken both from the Roman *procurator Caesaris* and the *iurisdictio* and *imperium* given to a proconsul or a legate, or to any magistrate on whom a *iurisdictio* and *mixtum imperium* were conferred by king or emperor or pope, who had *merum imperium*. The papal legate, who is becoming important at this time, partakes of the nature both of a *procurator* of Caesar and of an ambassador; below, n. 5.

<sup>3</sup> A. C. Krey, "William of Tyre," *Speculum*, XVI (1941), 151, n. 3.

<sup>4</sup> *Recueil des Historiens des Croisades*, p. 1027, *sub an. 1176*. Philip refused the office, which was then conferred on Raymond of Antioch. *Sub an. 1104* (p. 450) William relates how Bohemond, prince of Antioch, entrusted Tancred with *cura et administratio generalis, cum plena iurisdictione*; it is possible, though doubtful, that William has a document before him for this statement; more likely he was putting back to 1104 a terminology that became fashionable somewhat later. Another example offered by William of Tyre is the appointment, in 1183 (p. 1116), of Guy of Lusignan as *procurator regni* with *generalis et libera administratio*.

But on the other hand, even England offers an early use of the term *procurator regni*: in 1123-26 Roger of Salisbury, justiciar under Henry I, during the absence of the king styled himself *procurator regni Angliae*; J. E. A. Jolliffe, *Constitutional History of England* (Adams and Charles Black, London, 1937), pp. 196 f.

<sup>5</sup> In 1195 Pope Coelestine III granted to two legates *plena potestas*, "ut evellant et destruant . . . plantent et edificent . . .;" Jaffé-Loewenfeld, *Regesta pontificum Romanorum* (Leipzig, 1885-88), no. 17274; cf. Ina Friedlaender, *Die päpstlichen Legaten in Deutschland und Italien am Ende des XII. Jahrhunderts* (*Historische Studien*, Heft 177; Berlin, 1928), pp. 110 f. In the same year Emperor Henry VI asked the pope to send three cardinals to his presence, *plenariam eis dantes potestatem*, who might thereby act as judges in ecclesiastical suits in place of the pope (*vicem vestram*); *M. G. H., Legum Sectio IV*, I, 514, no. 364.

<sup>6</sup> *Registres de Grégoire IX* (ed. L. Auvray; Paris, 1896 ff.), no. 229; cited by K. Ruess, *Die rechtliche Stellung der päpstlichen Legaten bis Bonifaz VIII* (Paderborn, 1912), p. 70.

<sup>7</sup> *Annales de Burton*, p. 410, in *Annales Monastici*, ed. H. R. Luard (R. S.; London, 1864), I.

An early and important usage of *plena potestas* was in the mandates given to *nuntii* or *procuratores* as ambassadors of princes and cities. In Roman Law, and also among the glossators of the thirteenth century, any kind of *pactum* or *conventio* was a contract between two or more consenting parties,<sup>8</sup> who could be represented by agents.<sup>9</sup> One kind of *conventio* was a public one, namely, treaties of peace, alliances, and truces,<sup>10</sup> which like private contracts could be handled by proctors.<sup>11</sup> In Italy, as early as the middle twelfth century, and frequently thereafter, cities were sending their *nuntii*, *legati*, or *ambasciatores* to emperor, pope or prince, or to each other; and throughout Europe rulers had long been familiar with ambassadorial procedure in their relations. When such *nuntii* first became, under the influence of the Roman formulas, literally plenipotentiaries, cannot be determined. But it must have been earlier than 1200,<sup>12</sup> when, as Villehardouin tells us, the crusading barons held a *parlement* at Compiègne and decided to send six ambassadors or *messages* (i.e., *nuntii*) to Venice to negotiate for transportation. These *messages*, including Villehardouin himself, were given *plain povir de faire toutes choses autretant con li seignor*.<sup>13</sup> They carried with them a proctorial mandate containing *plena potestas*; and Villehardouin's story shows that in Venice they acted as *nuntii* and proctors in negotiating a treaty with the Doge. But if they were proctors, they were at the same time plenipotentiaries.<sup>14</sup> Incidentally, they represented not the barons as a whole, but the Counts of Champagne, Flanders and Blois—it was not corporate representation.

The use of *plena potestas* and proctorial mandates for ambassadors spread, no doubt, from Italy, the seat of the revival of Roman Law. It was taken up by the imperial chancery: in a letter to Innocent III, 1208, Philip of Suabia announced the sending of four *nuntii* as ambassadors to the pope, *quibus dedimus plenitudinem potestatis et auctoritatem omnimodam* for establishing peace between the Empire and the Church.<sup>15</sup> More fully Roman was the mandate given by

<sup>8</sup> D. 2, 14, 1 §§1-4; Accursius, *Glos. ord.*, ad v. *conventionis* (in §3): "... nomen *conventio* generale est ad omne pactum, nam omne pactum est *conventio*, et *conventio* est genus: et ad omnia pacta pertinet verbum *conventionis*; nam et in unum conveniunt, qui contrahunt, sicut scholares in scholis." *Conventiones* are "in suo nomine contractus", including special contracts, e.g., *emptio* and *venditio*.

<sup>9</sup> D. 2, 14, 2, "vel per nuntium;" or by *procurator*, D. 2, 14, 11; 10 §2; 12; 13.

<sup>10</sup> D. 2, 14, 5: Ulpian, "... publica *conventio* est, quae fit per pacem, quotiens inter se duces belli quaedam pasciscuntur;" *Casus* in *Glos. ord.*, ad l. 5 *Conventionum*: "... [Some *pacta*] sunt publica, ut *induciae* et *foedera*, *amicitiae*, et *treugae* inter aliquos duos."

<sup>11</sup> Rolandinus Passagerii, *Summa totius artis notariae*, c. VI, *De compromissis*, p. 157: "Item nota quod paces seu concordiae et remissiones aliquando fieri solent per *procuratores*," who are appointed "specialiter ad hoc," and should be named in the *instrumentum pacis* (ca. 1260).

<sup>12</sup> Perhaps as early as 1162 in France, when Louis VII gave *pleins pouvoirs* to Thibaut of Champagne to negotiate with Frederick I; A. Luchaire, in Lavissee, III, i, 41.

<sup>13</sup> *Conquête de Constantinople*, ed. Edmond Faral, I (Paris, 1938), 14 ff.; ed. M. Bouquet, *Recueil des historiens des Gaules et de la France*, XVIII, 434 f.

<sup>14</sup> The treaty itself refers to the six *messages* as *nuntii*, who took oath for themselves and their *domini* (the barons and counts) that the treaty would be observed; Bouquet, XVIII, 436.

<sup>15</sup> M. G. H., *Legum Sectio IV*, II, 17 f., no. 14.

Frederick II in 1244 to Raymond of Toulouse, Petrus de Vinea and Thaddeus of Suessa for representing him before Innocent IV and the Council of Lyons, but here the plenipotentiaries were more like proctors in litigation before the papal court than ambassadors.<sup>16</sup>

If the papal and imperial chanceries and the barons of Flanders and Champagne were acquainted with the new usage, inevitably the English kings were exposed to it. Besides, as early as 1172, the precedent of courts ecclesiastical had resulted in Henry II's citing to his *curia* the prior and other monks of a convent who were commanded to bring "letters of the convent to the effect that the others who remained at home would regard as valid whatever he and those who came with him might do."<sup>17</sup> Richard I and John sent *fideles nuntii* or *procuratores* as ambassadors to monarchs and popes, but in general gave them mandates that were hardly Roman in character—the king usually asks the recipients of the letters of credentials to believe or to have faith in the bearers.<sup>18</sup> Towards the end of John's reign, however, the mandates began to reflect a specifically Roman influence in the clauses of the *ratihabitio*, by which the king promised to ratify, to hold *ratum* and *gratum* whatever his ambassadors did<sup>19</sup> in establishing a truce, peace, or any kind of compromise.<sup>20</sup> To Innocent III, in 1215, John sent as *procuratores* his Chancellor, two archbishops, and two magnates, who were given a general mandate with *libera administratio* for all royal suits and business in the Roman Curia.<sup>21</sup> Thus under the influence of the two laws the English royal chancery was already using Roman formulas. But there seems to have been a temporary reaction in the early reign of Henry III, for in the 1220's the king was again sending ambassadors provided simply with *fides*. In 1229, however, if not earlier, there appeared royal writs conferring *potestas ad tractandum de pace*;<sup>22</sup> and in 1230 the king gave *plena potestas* to ambassadors

<sup>16</sup> Matthew Paris, *Chron. Maj.*, IV, 331: "... specialem et plenam concedimus potestatem jurandi in anima pro parte nostra, stare mandatis domini Papae et ecclesiae super omnibus articulis, injuriis, dampnis et offensis . . . , ratum habentes et firmum, quicquid super hoc praedicti fideles nostri duxerint faciendum." Also in J. L. A. Huillard-Bréholles, *Historia Diplomatica Friderici II* (Paris, 1852-61), VI, 172.

<sup>17</sup> A. B. White and W. Notestein, *Source Problems in English History* (New York and London, 1915), p. 89.

<sup>18</sup> T. Rymer, *Foedera*, I, i, 76: King John to the King and Queen of Castille, "mandamus quatinus ea, quae praedicti tres vel duo [of the *nuntii* or *fideles*] illorum dicent ex parte nostra, indubitanter credatis" (*an.* 1199); to Philip Augustus (p. 87, *an.* 1202), "fidem habeatis;" similarly (p. 101, *an.* 1208) to the Irish chiefs; and p. 114, *an.* 1213.

<sup>19</sup> *Ibid.*, I, i, 114; *an.* 1213, ambassadors to a Poitevin noble; p. 124: *an.* 1214, eight ambassadors to the King of France: "Sciatis quod id, quod . . . facient de firmis treugis capiendis inter Regem Franciae & nos, *ratum et gratum habebimus*."—On *ratihabitio* see *D.* 46, 8; cf. Buckland, *Roman Law*<sup>2</sup>, p. 712.

<sup>20</sup> Rymer, *Foedera*, I, i, 128: *an.* 1215, the royal *procuratores* are appointed "ad petenda . . . dampna . . . Et ad restitutionem faciendam . . . ; et ad pacificandum, componendum, transigendum . . . Ratum etiam et gratum habebimus quicquid, etc."

<sup>21</sup> *Ibid.*, I, i, 139; the *ratum habituri et gratum* clause, where the royal proctors were the plaintiffs, and the *judicatum solvi* clause where they were the defendants, were added. Here the proctors are not only ambassadors, but also representatives for litigation.

<sup>22</sup> *Ibid.*, I, i, 195.

sent to make a truce with Louis IX.<sup>23</sup> Thereafter *plena potestas* and the *rati-habitio* clause were frequently, though not always, employed for mandates of plenipotentiaries.<sup>24</sup>

For almost every kind of agency or representation, therefore, the Roman formulas were in daily use by the middle of the thirteenth century. *Plena potestas* gave the agent *carte blanche*, within the limits set by the principal's welfare and knowledge of the issue,<sup>25</sup> to conclude the business; and his conclusion of it had the consent of his constituent. This consent, however, was given in the terms of the mandate before the negotiation started.<sup>26</sup> If the affair was between equals (e.g., kings) or between autonomous communes and princes, the agents were ambassadors. But if it was between ruler and subjects or subject communities, the agents of the latter were clearly not ambassadors in the modern sense, but proctors representing their constituents before a superior authority. Consent to the negotiation (whether it were judicial, legislative, administrative, or merely consultative) was in the latter case quite different in quality from the consent of equals to a contract or treaty, although the procedure was strikingly similar. This distinction (overlooked by G. de Lagarde, who says that representatives in assemblies were "only ambassadors" of the different estates of the kingdom)<sup>27</sup> must be held in mind when we deal with the powers of proctorial representatives in Cortes, States General and Parliament in relation to the *imperium* and prerogative of the prince who summoned them.

### 3. THE BEGINNINGS OF PLENA POTESTAS IN REPRESENTATIVE ASSEMBLIES

Long before Henry III summoned delegates with full powers to Parliament in 1268, the precedent for his writ was created not only in Romano-canonical court and ambassadorial procedure, but also in the convocation of imperial and papal assemblies in Italy. Delegates (consuls and judges) of Lombard communes had attended the Diet of Roncaglia in 1158;<sup>1</sup> but what their powers were is not clear, except that they were subservient to Frederick Barbarossa. Our formula

<sup>23</sup> *Ibid.*, I, i, 198: "Rex omnibus, etc., salutem. Sciatis quod in omnibus, quae ad treugam pertinent, plenam potestatem dedimus" to five magnates, "ad loquendum et tractandum de treugis cum Ludovico Rege Franciae . . . ; ita quod treugas, quas ipsi cum dicto Rege ceperint, gratas et ratas sumus habituri."

<sup>24</sup> *Ibid.*, I, 1, 244 f., 247, 253, 256, 264, 295, 299, etc. See also Matthew Paris, *Chron. Maj.*, VI, *Addimenta*, p. 284, no. 140 (an. 1254). On English ambassadors and their credentials in the fourteenth century, see H. S. Lucas, "The Machinery of Diplomatic Intercourse," in Morris, *English Government*, I, 309.

<sup>25</sup> See below on instructions, §5.

<sup>26</sup> Unless, by another mandate dispatched in time and revealed to the opposing party and judges and accepted by them, the *dominus* recalled his agent before the final decision was given.

<sup>27</sup> G. de Lagarde, "L'idée de représentation dans les oeuvres de Guillaume d'Ockham," in *Histoire des assemblées d'états (Bulletin of the International Committee of Historical Sciences*, IX, iv, no. 37; Paris, 1937), p. 435; but it is still possible to agree on the whole with Lagarde that in these assemblies, on the continent, not the collective person of the nation but the little cellular powers defended their interests against the royal authority. But in England the common petition (also in Aragon) indicates a unity of purpose.

<sup>1</sup> G. Post, "Early Representation in Spain and Italy," *Speculum*, XVIII (1943), 226-28.

emerges clearly in 1200: Pope Innocent III summoned to his Curia *responsales* or *procuratores* from six cities; they must have *plenaria potestas* to meet with the pope, to consult (*tractare*), to bring *consilium* on the establishment of law and order in the Papal states, to render the services of *expeditionem, parlamentum, pacem et guerram*, and to accept the papal will in these matters and in the paying of an annual *census*.<sup>2</sup> These proctors, in a feudal *curia* or assembly, obviously came provided with full powers to submit to the pope's orders, not to refuse obedience and limit the papal authority. It is probable that, from 1215 on, proctors sent by cathedral chapters to general and provincial councils and by secular communities to the assemblies of Frederick II or to the *Cortes* of Aragon and Castille, often had "full powers" or the equivalent.<sup>3</sup> But since the mandates themselves have rarely survived from the first half of the thirteenth century, very few instances of the actual use of *plena potestas*, until the latter half of the century, can be given. Yet *plena potestas* must have enjoyed some popularity because of its legal importance. When the *generalissimum* Chapter of the Dominican Order met at Paris in 1228, it was attended by twelve provincial priors, each of whom was accompanied by two *diffinitores* as "deputies" of the provincial chapter, which had conferred *potestas plenaria* on them.<sup>4</sup> These provincial priors and *diffinitores*, however, were more than ordinary representatives; although they were elected, by the election they became administrators and judges, and as such in the meeting of the General Chapter they constituted a high council and court rather than a representative assembly.<sup>5</sup>

But other representatives in ecclesiastical assemblies, such as proctors of cathedral chapters and of dioceses, and *socii* elected by the convents to attend provincial chapters of the Dominicans, had the powers of ordinary proctors for litigating, negotiating, petitioning, carrying the record and information, and accepting the decisions of bishops or of priors and *diffinitores*.<sup>6</sup> These powers were not at first usually stated as *plena potestas*; but they were practically the same as the general and special mandates given by communities with the usual clause of *ratihabitio* along with the instructions.

After the middle of the thirteenth century the use of *plena potestas* was frequent and, by 1300, normal in sending representatives to assemblies, whether provincial councils, chapters of the religious (monks and friars), general councils, or high courts and councils of princes (to the English Parliament by 1265,<sup>7</sup> or

<sup>2</sup> A. Theiner, *Codex Diplomaticus Domini Temporalis Sanctae Sedis* (3 vols.; Rome, 1861-2), I, nos. XLII and XLIII.

<sup>3</sup> Post, *Speculum*, XVIII, 229-31. Innocent III summoned proctors of chapters to the Fourth Lateran Council, 1215.

<sup>4</sup> H. Denifle, "Die Constitutionen des Predigerordens vom Jahre 1228," *Archiv für Literatur- und Kirchengeschichte des Mittelalters*, I (1885), 193; G. R. Galbraith, *The Constitution of the Dominican Order, 1216-1560* (Manchester, 1925) pp. 37, 39.

<sup>5</sup> Elsewhere I shall discuss the judicial character of these chapters and of councils; cf. A. G. Little, "The Mendicant Orders," in *C. M. H.*, VI, 740; Galbraith, *l.c.*

<sup>6</sup> This statement is based on a study to be published in the future.

<sup>7</sup> See the examples from 1268 on, given by Edwards, *Oxford Essays*, pp. 142 ff.; G. O. Sayles, "Representation of Cities and Boroughs in 1268," *E. H. R.*, XL (1925), 580 f.; Clarke, *Medieval Representation and Consent*, pp. 200, 312-14, 374; Stubbs, *S. C.*, pp. 403, 406 f., 458, 476 f., 480 ff.; *Parliamentary Writs*, I, 21, 23, 25 f.

possibly earlier;<sup>8</sup> to the *Cortes* of Aragon by 1307, and probably much earlier;<sup>9</sup> and to the French States General in 1302 and thereafter<sup>10</sup>).

#### 4. *Plena potestas* AND THE PREROGATIVE

*Plena potestas* in ordinary judicial procedure signified the litigants' full acceptance of; or consent to, the court's decision of the case. However slow this procedure was because of the numerous excuses and delays granted to the litigants, the theory of judicial consent recognized the superior jurisdiction of the court. But of course the power, or *imperium*, of the court depended not only on legal definitions but also on the actual power of the government which claimed the right to enforce the law of the land. Thus in a well centralized state, under a strong monarch, the royal courts had sufficient jurisdiction to enforce legal procedure, to summon accused parties, to enforce consent by inflicting penalties for contumacy or default, to interpret the powers given the agents of parties, to pass sentence, and to grant or refuse the right of appeal. These rights of jurisdiction were limited by the slowness of the procedure which was developed to guarantee "due process" as a protection of all private rights brought into litigation. Nevertheless, if private rights were protected by the principles of law and justice, and by the theory that every legal right was accompanied by the right of consent to any change affecting it, the courts enjoyed the superior right of interpreting the legality of private rights and the quality of private consent. Judicial consent, that is, consent to the decision of the court, therefore, was obviously not voluntary—it was no limitation of the *imperium* of the king and his judges. The king's judicial power in this respect was limited not by the *plena potestas* of representatives in his courts, but by the law of the land according to which he must judge.<sup>1</sup>

Did *plena potestas*, however, mean the same kind of consent in a royal assembly? The procedure by which representatives were summoned, brought powers from corporate communities, defended the "liberties" of their constituencies, and

<sup>8</sup> Clarke, *op. cit.*, p. 308, says that *nuncii* of the dioceses had full powers for an assembly in England, 1254; cf. Stubbs, *S. C.*, pp. 406 f., for an example in 1265.

<sup>9</sup> *Cortes de los antiguos Reinos de Aragon y de Valencia, etc.* (Madrid, 1896 ff.), I, i, 194 ff.; *plena potestas* is not specified, but its equivalent is given—the delegates of Barcelona shall do all those things which their constituents could do if they were present. This is the earliest surviving mandate that I have found for representation in Spain. But *poderes* were no doubt given to representatives in Castile and in Aragon in the thirteenth century. In 1301 the king of Aragon asked the cities to send delegates with *plena et libera potestas* (*Cortes*, I, 1, 183); or with *pleno posse* (*an.* 1311; *ibid.*, p. 207).

<sup>10</sup> See, for examples, G. Picot, *Documents relatifs aux états généraux et assemblées réunies sous Philippe le Bel* (Paris, 1901), pp. 2, 27, 164, 170, 497; above all, see the important article by C. H. Taylor, "An Assembly of French Towns in March, 1318," *Speculum*, XIII (1938), 296, 299 f.; and McIlwain, *C. M. H.*, VII, 686 ff.

<sup>1</sup> The substance of this paragraph and of the following pages is a summary of a separate study on the Roman principle of judicial consent in relation to private rights, that is, on the maxim, "ut quod omnes similiter tangit, ab omnibus comprobetur" (*C.* 5, 59, 5 §2); this study will be published separately.

accepted the will of king and council, was quite analogous to that of litigation in courts ordinary. But the assembly was no ordinary court: the king was the highest judge and administrator in the land; he presided over the assembly in the fullness of his prerogative; and the essential core of the assembly was the king's high court and council before which magnates and delegates appeared in assembly. More important, representatives were not summoned to the assembly as litigant parties in the ordinary sense; they were summoned primarily to consent to an extraordinary demand of the king for a subsidy.<sup>2</sup> Thus even if the royal assembly be looked upon as a high court, analogy alone will not explain the *plena potestas* of representatives, for the whole institution of national representation was extraordinary, even though it developed logically out of ordinary Romano-canonical court procedure as adapted to the feudal *curia* as high court, council and assembly. Judicial procedure, therefore, is by itself insufficient to explain the formula. Any conclusive interpretation must depend on a careful estimate of the royal prerogative in the face of individual and community rights recognized by law and custom.

When the king of England, for example, needed an extraordinary subsidy, feudal law demanded that he obtain the consent of all whose rights and liberties were affected, and this consent was voluntary—witness *Magna Carta*, c. 12 and 14. But in the thirteenth century, under the influence particularly of Roman Law, the legal experts of popes and kings were beginning to assert the doctrine that an emergency, the "case of necessity", which was usually the just war of defense against an invader, touched both king and kingdom, the *status regis et regni*, the rights and welfare of the people—and not only the rights of tenants-in-chief, but also the relatively new rights of lesser free men in the communities of shires and towns,<sup>3</sup> which were not, strictly speaking, a part of the feudal system, but which by the very attainment of a jurisdictional status and of certain liberties granted by the king were now directly touched by the national emergency. Therefore, partly under the influence of the principle that what touches all must be approved of all, it was becoming necessary for both feudal magnates, who no longer fully represented others' specific rights except in certain feudal customs, and knights and townsmen to consent to measures which must inevitably cause some sacrifice of all liberties guaranteed by custom and law. To meet the emergency or danger the king, who represented the kingdom, must for the common utility and public safety raise an adequate army. For this he needed more money than feudal custom gave him, and consequently for the common good he had a superior right to ask his subjects for an aid. Indeed, his prerogative "meant that reserve of undefined power necessary to any

<sup>2</sup> But they could also bring petitions at the same time, or pursue appeals from lower courts.

<sup>3</sup> Serfs were not recognized as having such rights as had to be represented—except in so far as their masters represented them; as Helen M. Cam has said, the shire represented by knights was the community of all men under peers and above serfs, "L'assiette et la perception des indemnités des représentants des comtés dans l'Angleterre médiévale," *Revue historique de droit français et étranger*, 4<sup>e</sup> sér., XVIII (1939), 219ff.

government to enable it to deal with emergencies"<sup>4</sup> which affected the *status* of the king and the whole community of the realm. It was the king's right to deal with the emergency: for the common good he claimed a superior jurisdiction in order to suppress disturbers of the peace within the kingdom,<sup>5</sup> made a new law for a new situation with the counsel and consent of his council, and of all whom the matter touched,<sup>6</sup> and, likewise with the common counsel and consent of all, levied an extraordinary subsidy for the defense of all who had rights (that is, the king and the whole community of individuals and communities) in the "case of necessity"—which was usually a war.<sup>7</sup> Much of this theory, which already in the thirteenth century reflected a dawning conception of public right and state sovereignty as a means of defeating private or feudal rights, was derived from the Roman Law.<sup>8</sup>

When a state of emergency existed (and it was the king and his council who had the right to declare the "case of necessity", although they still must per-

<sup>4</sup> S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge: at the University Press, 1936), pp. 43, and 14-16, 33-43. What Chrimes says applies to the thirteenth as much as to the fifteenth century; see the following notes. In general, on the prerogative, see G. de Lagarde, *La naissance de l'esprit laïque au déclin du Moyen Age* (2 vols., Saint-Paul-Trois-Châteaux [Drome]: Editions Béatrice, 1934), I, 140-161 ff.; W. A. Morris, in Morris, *English Government*, I, 4-12.

<sup>5</sup> I do not mean that he was absolute in jurisdiction; as C. H. McIlwain says, in this sphere the king was limited by the law; *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1940), pp. 79 ff. But Edward I's judges gave the king's right superiority over the private rights of the Lords Marchers, for their quarrels and lawlessness endangered the public safety and utility: "Dominus Rex, pro communi utilitate, per prerogativam suam in multis casibus est supra leges et consuetudines in regno suo usitatas;" *Rotuli Parliamentorum*, I (London, 1767), 71; J. E. A. Jolliffe, *Constitutional History of Medieval England* (London, 1937), p. 305. On Bracton's theory of royal jurisdiction and administration, see McIlwain, pp. 72 ff.

<sup>6</sup> See G. Barraclough, "Law and Legislation in Medieval England," *Law Quarterly Review*, LVI (1940), 79—with emphasis on Hengham's famous words, "Ne glosez point le statut: nous [the royal justices] le savons mieuz de vous, qar nous le feimes." Also, in general, Morris, *English Government*, I, 4-12.

<sup>7</sup> Professor Carl Stephenson attaches no importance to the "case of necessity"—in relation to the right of the king to meet a national danger for the common good; "Les 'aides' des villes françaises," *Le Moyen Age*, 2<sup>e</sup> sér., XXIV (1922), 308 ff., 315 f., 322-328. Against Stephenson I am compelled to support French scholars like A. Coville, *Les états de Normandie* (Paris, 1894), pp. 6, 32 ff., 33 f., 49-54, and Ch. V. Langlois, in Lavissee, III, ii, 250 f. Unfortunately they too miss the connections between consent (*Quod omnes tangit*), necessity, utility, and the royal prerogative. McIlwain, *C. M. H.*, VII, 685 f., 691, is in fundamental agreement with Coville and Langlois, but stresses the obligation of responding to the royal summons. But the right to be summoned was also important—at least in the sense indicated in the following paragraph.

<sup>8</sup> Ulpian, *D.* 1, 4, 2; cf. also *D.* 1, 3, 8; 1, 3, 40; 10, 16, 10; and *Inst.* 1, 1, 4. But the same theory of public utility, or the common good, is to be found in Aristotle and Cicero, and in medieval writers from St. Augustine to Thomas Aquinas, Dante, Marsiglio, and Ockham. The Roman juriconsults added the case of "evident utility" or necessity and emergency to justify new imperial laws that might be contrary to custom and the prevailing law; cf. *D.* 1, 3, 32 and 37.

suade the assembly that there was no pretext in the declaration<sup>9</sup>), the king by his general prerogative, as well as by his more specific powers of administration and jurisdiction, had the right to demand aid in order to meet the danger which touched the welfare of all—*status regis* and *status regni*. He therefore had the right to summon all to grant him the resources for defending *l'estat du roialme*.<sup>10</sup>

\* This persuasion was usually in the form of the speech delivered by the king or his delegate before the assembly. In a sense the royal government had to prove its case in the assembly. Although as early as the first half of the thirteenth century the English magnates and prelates were able to refuse a subsidy to Henry III because they successfully argued that there was insufficient evidence for Henry's claim that Louis IX was about to break a truce and thus create a "case of necessity", generally the king had little difficulty in proving that the enemy was the aggressor, ready to attack the kingdom. The advantage was normally on the side of the royal authority, which already could control the news and shape it for ears ready to believe that the foreigner was wicked. Thus both Edward I and Philip IV in 1294-95 justified the "case of necessity" by shouting aggression at each other—and both got their subsidies. The Church had long since accepted it as legal for a king to demand subsidies of the clergy, provided that the pope was first consulted, for the defense of the kingdom in a just war (*Decr.* 3, 49, 7). Boniface VIII discovered that the pope had no real power of consent when two national monarchies, both Christian, were determined to tax the clergy for their wars, just or unjust.

<sup>10</sup> It is possible that the Statute of York, 1322, embodies both the idea of the "case of necessity" which touches the estate of the king and of the realm, and the corresponding principle of *Quod omnes tangit* in the consent of the community of the realm to measures taken by the king to meet the emergency and defend the rights of the crown as well as of the community. The famous clause:

"Mes les choses qui seront a establir, pour lestat de notre Seigneur le Roi, et de ses Heirs, et pour lestat du Roialme et du Poepple, soient tretes, accordees, establies, en parlementz, par notre Seigneur le Roi et par lassent des Prelatz, Countes, et Barouns, et la communalte du roialme; auxint come ad este acustume cea en arere" (*Statutes of the Realm* [London, 1810], I, 189) is no innovation; it confirms custom, as stated; and it means that when either a danger such as war, internal or external, or a new situation arises which is common to all, and touches all, then all must consent to the measures taken, whether such measures be a new subsidy or a new law (statute). Therefore the king must summon the whole community to give counsel and consent; and a part of the community was the representatives of boroughs and shires, or the commons. This did not mean that the commons enjoyed a sovereign right of consent: they simply had, as before, the right to hear the case of the government, and to negotiate on the amount of the subsidy—but they could not legally refuse the subsidy if the king proved that it was a "case of necessity" and that the public safety and good were endangered. The advantage was usually on the side of the prerogative. As for a new law, the commons had, it seems, the right to bring such information about local conditions as would help the king and his council to formulate the statute; but the commons had no power to consent to legislation in the modern sense—they could only present petitions asking for a law or complaining against a law that might injure local custom and liberties. However, it may well be that it was not yet considered that law-making touched the commons; consequently only the king, council and magnates may have been involved. But certainly a "national emergency" which called for a national tax did touch the whole community and thus the commons within the community; and in taxation, therefore, their consent was legally necessary. But, to repeat, their consent to a subsidy was still not sovereign; the king's right was superior to individual rights in an evident "case of necessity."

But these remarks are tentative; I hope to develop them in the near future, and to apply the principles outlined above to the interpretations of the Statute by G. Lapsley, G. L. Haskins, J. R. Strayer, and W. A. Morris.

If by the law the community had the right to be summoned (the king could do nothing of a really extraordinary nature without consulting the interested parties), nonetheless the right and power of summoning in these circumstances were greater than the privilege of being summoned.<sup>11</sup> The king's ordinary jurisdiction and administrative authority lay in the background; but his prerogative enhanced his power to summon and to punish for contumacy. He must summon, but those summoned must respond or suffer by default.

Perhaps, then, the analogy is not so far-fetched as one might suppose: even in public matters that were not of the nature of private affairs tried in court, the assembly of the whole community met before (*coram* is the usual word) the king and his council; rather, it met before the king in his court in his council;<sup>12</sup> and over the assembly the king presided, not as a mere president or chairman, but as the highest administrator, judge and legislator representing the public good: He and his council, before summoning representatives, decided that an emergency existed and that the whole community should help meet the danger common to all. The representatives were needed by the government to report on how much their constituents could give by way of a subsidy; their constituents were interested in appointing representatives in order that their rights might be protected and that they might protest against a too burdensome tax. When it was almost a foregone conclusion that they would have to grant a subsidy, the communities might want to delay or to refuse sending delegates. But the royal government in an emergency needed the money at once, and could tolerate neither delay nor refusal. Having a superior right to demand a subsidy, the king, following ordinary judicial procedure, demanded that the communities give their representatives *plena potestas*, that is, such full powers that quick action and legal consent would result. *Plena potestas*, therefore, was to an assembly what it was to a court: it was in theory an expression of consent, given before the action, to the decision of the court and council of the king. The "case of necessity" was, as it were, tried in the assembly, and the representatives were, in a sense, attorneys protecting the rights and interests of the communities against the royal claim of public utility, and binding the communities by their consent to the decision.

But the king, too, in another sense, in so far as he had to prove the case of

<sup>11</sup> It was not merely the expense that discouraged willingness to attend the assembly; it was also the desire to delay consent to what the king would surely demand. Of course, communities might insist on the right of sending representatives in order to press their own private interests, in the form of petitions and appeals. Just as the king needed to summon representatives not only to obtain the consent formally required, but also to get a report ("the record") on conditions in the country.

<sup>12</sup> It has long been held that Parliament was largely judicial and conciliar in character and in procedure—by Maitland and McIlwain, and most recently by Morris, "Introduction," *English Government*, I, 4 ff., 11 f., 13 ff.; T. F. T. Plucknett, "Parliament," *ibid.*, pp. 82-9, 112 ff. Morris and Plucknett emphasize the conciliar nature of Parliament, but also maintain the importance of the king's *imperium* in his presidency over the assembly. H. G. Richardson and G. O. Sayles, "The Origins of Parliament," *Transactions of the Royal Historical Society*, XI, (1929), 137-83, perhaps over-stress the judicial nature of Parliament; it was also conciliar, and even, in the broad sense, administrative.

necessity and his honest intent to act for the common welfare, was a defendant. Yet he was no more a defendant than a modern state which, while granting a hearing to all whose property rights are touched, compels men to sell land for a public highway or an artificial lake—the right of eminent domain for the public good is superior to private rights.<sup>13</sup> And, as said above, it was relatively easy for the king and his government to make good their case. Nevertheless, the representatives could defend local and private interests by presenting petitions containing grievances, by negotiating on the amount of the subsidy demanded, by arguing against the need of a subsidy, and by trying to obtain promises of no-precedent. In turn, the king and council had the power to hear and to grant or deny the petitions, although generally promises were made to remedy the grievances presented. After such hearings and minor decisions, the king's court and council announced the decision as to the amount of the subsidy, and the assembly formally consented to the will of the government—unless, as it rarely happened, the king had been forced to withdraw his demand because of being unable to prove that a “national emergency” such as the danger of invasion really existed. Consent even to taxation was therefore consultative and judicial, not political. Only when Parliament ceased being a council and court, in effect, and when the king was deprived of the practical right to refuse a common petition, could *plena potestas* signify in England popular sovereignty.<sup>14</sup>

<sup>13</sup> But just as in the United States eminent domain involves the taking of private property, while taxation (also for the public good) does not, so in the thirteenth century the power of taxing did not mean taking real property.

<sup>14</sup> The formulas used in the mandates along with *plena potestas* reinforce this conclusion; generally, the powers are given to the representatives to consent to what is ordained by the king and his council. In 1294 the knights are to have the power, *obligandi comitatum et faciendi quod per consilium domini regis ordinaretur*; Edwards, “*Plena Potestas*,” *Oxford Essays . . . to H. E. Salter*, p. 145, quoting Bartholomew Cotton. In 1282 Edward I's writ of summons had specified that the representatives of counties and towns should have power *ad audiendum et faciendum ea quae sibi ex parte nostra faciemus ostendi* (Stubbs, *S. C.*, p. 458); in 1290, knights from the shire shall have full powers *ad consulendum et consentiendum . . . hiis quae comites, barones et proceres praedicti tunc duxerint concordanda*, and the same in 1294 (*S. C.*, pp. 472 f., 476 f.; the knights are to hear and do *quod eis tunc ibidem plenius injungemus*, p. 477). For the famous Parliament of 1295 Edward emphasized full powers as essential in order to prevent delays—i.e., no *limited* mandates are to be given representatives by communities; when the king orders that the representatives have *plena et sufficiens potestas* to do *quod tunc de communi consilio ordinabitur*, there can be little doubt that “common counsel” involves no real participation of the commons in the government, or in the king's Council (cf. Plucknett, *op. cit.*, p. 101, for the like conclusion for the years 1327–36). As Plucknett says (*op. cit.*, pp. 101 f.), “Probably all that was required of them [i.e., the representatives] was authority to do and to consent to whatever might be ordained; . . . the magnates were summoned to treat and give counsel; the commons, however, were not called to give advice, nor to treat and reach decisions.” But in the sense of giving information and defending local interests, and of negotiating, the commons did give advice and they did “treat”—*tractare* often means defense, by assertion of legal rights in court. See also Jolliffe, *Eng. Const. Hist.*, p. 351.

Finally, the use of the Romano-Canonical equivalent of *plena potestas* should be noted: powers to do *quae vos ipsi* (i.e., the constituents) *facere possetis si praesentes ibidem essetis* (*an.* 1265; Stubbs, *S. C.*, p. 406 f.).

The principal kingdoms of Spain in the late thirteenth and fourteenth centuries present a complicated picture of representation in relation to the royal authority. In Castile the nobility were usually too powerful for the king to assert his authority, and the cities sometimes acted as if they were independent. The powers of consent enjoyed by the representatives of the third estate must therefore be interpreted against the background of weak kings and anarchic conditions. Nevertheless the *theory* of the royal prerogative was much the same as in England or France. The *Siete Partidas*, II, i, 8, held that the king could demand and take more than was customary when, in case of necessity, it was for the public utility.<sup>15</sup> The king therefore had the duty and the right to summon the towns to send representatives with *poderes*; but, at least when he was strong enough to assert his prerogative, he also had the right to interpret the *poderes* and therewith command consent.<sup>16</sup> In Aragon and Catalonia the same legal theory of the prerogative, the necessity of the state, and consent to taxation prevailed.<sup>17</sup> As in Castile, but more effectively, the Cortes of the fourteenth century through its *Diputacion* "watched over the observance of the laws", limited the king's right to interpret necessity and public utility, and audited the royal accounts in order to be sure that a subsidy granted was actually spent for the public good.<sup>18</sup> In such circumstances the *plena potestas* was still no limitation of the royal power when it was honestly carried out according to law and custom; for in a real case of necessity, and in the interest of the public safety, the king still had the right to demand that the nobles and cities consent to a subsidy, though he did not always have the power to enforce consent.

What has been said about the system in Aragon and Catalonia may be illustrated by a few examples of the use of *plena potestas*. In 1301, James II

<sup>15</sup> One fourteenth century commentator declares that the king can impose an aid "pro communi terrae utilitate etiam non vocatis subditis"; but no doubt the king in practice could obtain no subsidy without summoning representatives of the town and the nobles; as Lucas de Penna says, "quod honestum et necessarium esset eos, quos hoc negotium tangit, ad rei examinationem evocari, ut ex consensu omnium fiat, et sic videmus etiam in Regibus de consuetudine fieri;" *Siete Partidas*, II, i, 8, ad v. *Venga*. See Merriman, *Spanish Empire*, I, 225, on a *servicio* above the customary amount.

<sup>16</sup> Merriman, *op. cit.*, I, 221-3. If the king had the right to interpret the *poderes*, they were not, as Merriman maintains, "one of the most important safeguards of Castilian parliamentary liberty" (p. 223). A thorough study of the question is needed for Spain.

<sup>17</sup> See the interesting form-letters published by M. Usón y Sesé, "Un formulario latino de la cancillería real aragonesa (siglo XIV)", *Anuario de Historia del Derecho Español*, VI (1929), 402f.; c. CIV, *Super subsidio postulando ratione guerre*; c.CV—because of an invasion, which concerns the honor and glory of the royal crown and of all faithful subjects, the king asks a city to support "causam nostram, que vos principaliter velut caput nostre celsitudinis tangere noscitur . . . nobis in tante necessitatis articulo quod nos et vos deceat faciatis subsidium . . .".

<sup>18</sup> For Castile, Merriman, *op. cit.*, I, 225. For Aragon, Merriman, I, 460f., 483; McIlwain, *C. M. H.*, VII, 699, 703. It is possible that McIlwain (p. 699) misinterprets the situation of 1322, when only the proctors of the third estates granted a subsidy to the king. He concludes that they alone participated in this grant; I would conclude that the representatives were unable to refuse. The nobles probably were more important than the representatives of cities in limiting the royal power.

ordered cathedral chapters and cities to send proctors having *plenam . . . et liberam potestatem tractandi consensuendi faciendi et firmandi ea omnia et singula que in dicta curia fuerint ordinata*.<sup>19</sup> In 1305–1307 the *consejo* of Barcelona elected proctors or syndics to represent the city before (*coram*) the king, and in the mandates the *consejo* gave the representatives full powers (i.e., promised to ratify whatever they did, “just as if the counsellors and *jurati* were themselves present”). But in this case the powers are specified in illuminating fashion. As related in the mandate of 1305, the king had summoned the usual prelates, magnates and syndics to a *Curia Generalis* at Barcelona; there the assembly presented to the king *plura capitula* which he refused to accept. Another *colloquium* or assembly was held on these *capitula* in the same year at Montalban, and a Cortes was convoked to discuss the same *capitula* at Barcelona in 1307. The mandate given to its representatives for this Cortes by the city of Barcelona empowered them to renounce adherence to the said chapters presented to the king by the earlier Cortes; but they should defend in so far as possible, all corporate and individual “privileges, immunities, liberties, usages, customs, statutes, and special favors” (*gratiae*, dispensations); and they should do everything that the city councillors and *jurati* could do if they themselves were present (i.e., they should have *plena potestas*); all these acts, the *consejo* promises, would be ratified and “never revoked”.<sup>20</sup> Following the mandate is a record of what the representatives did—they followed the instructions given in the mandate—and of the consent of the king made at Huesca in the form of a contract signed by the king, the representatives and witnesses.

All the above shows that the procedure was judicial and conciliar, with the king recognized as having the right to grant or refuse a petition. But essentially it is an expression of the medieval theory of the king’s ruling according to law and the rights of privileged individuals and corporations, which, according to the Roman principle of consent (*Quod omnes tangit*), sent representatives to defend their legal rights by petition in the king’s court and council. A series of mandates for the Cortes of Gerona and Barcelona in 1358 shows that the powers given the city representatives reflect the same consensual participation of the third estate before the king’s court and council, and that *plena potestas* implied initiative and capacity of judgment on the part of the representatives only for debating a common defense of liberties before the king.<sup>21</sup>

<sup>19</sup> *Cortes . . . de Aragon*, I, i, 183.

<sup>20</sup> *Cortes . . . de Aragon*, I, i, 195 f.

<sup>21</sup> *Cortes . . . de Aragon*, I, i, 576ff. Barcelona issued a mandate conferring full powers on its representatives for acting with others on the contents of the royal summons; the city ratified whatever should be done by all the representatives (syndics) or by the *maior pars* of them. Lerida (pp, 578ff.): two proctors (for the *negocia* of the king) to be present in the Curia, “ad tractandum et ordinandum” with the prelates, chapters, magnates, knights and other city representatives, “et ad concedendum firmandum laudandum approbandum consensuendum et ratificandum” all that the members of the assembly shall approve and ratify; “ad contradicendum requirendum et protestandum in animas dictorum constituencium nomine universitatis predictae quelibet juramenta necessaria vel opportuna fieri ad predicta”; and to do whatever seems expedient to the said syndics and proctors,

Thus in Aragon the judicial character of the assembly was retained even though the cities may have obtained a more effective right of consent than in Castile, or in France and England. The royal prerogative remained important, and *plena potestas* continued to mean something less than sovereignty vested in the

even if a special mandate is required. Gerona (p. 581): its proctors have power to consent to the "tractatibus et ordinacionibus" in the Cortes, and even "ad dissenciendum . . . si eisdem . . . videbitur faciendum, et ad protestandum dicte curie seu in dicta curia" if expedient; and to present *capitula* and *supplicationes* (petitions). The *villa* of Cervaria (p. 586), after giving its syndics the normal powers for Cortes, also gave them "meram liberam ac generalem administrationem cum plenissima facultate" and to each syndic these powers *in solidum*. The *universitas* of Villafranca (p. 588): powers to give *consilium* and *iuramentum* to the king, to treat and consent, also "ad excusandum et defendendum, reverencia Regia semper salva, dictam universitatem ab eisdem que in dicta littera [the king's summons] continentur," and "ad petendum requirendum et supplicandum" (*plena et libera potestas*, and *libera et generalis administratio*). Puigcerda (p. 590): powers for doing all things "eciam si talia sint que de sui natura mandatum exigant speciale ac maiora graviora et duriora que in presenti sindicatus instrumento contineantur vel sint nominatim expressata."

For the Cortes of Barcelona (1358) mandates detailed powers more abundantly still, and some show more clearly a strong influence of the judicial procedure, as if the proctors appear to join their colleagues in defending their rights in the king's court. The town of *Regalis* (pp. 611 ff.), by the authority of the lieutenant of the royal *baiulus*, gave its proctors (12 of them) powers to appear "coram . . . Rege seu eius procuratore" or any royal deputies for any matters and discussions "tam in subveniundo et concedendo similia que per alias universitates tocius Cathalonie . . . Regi fuerint concessa, quam eciam in tractando utilitatem publicam ad reformationem boni status" of the kingdom; for rendering fealty to the king; for renouncing the privilege of its own *forum* and of its immunity, for submitting the *universitas* and its members and their *bona* to courts whether of judges ordinary or delegate, and for appearing in such courts; for declaring and promising to pay anything contracted; for receiving warnings, requisitions, and sentences of execution and condemnation from any judge against the town, for renouncing all dispensations and privileges, and full powers for all lawsuits (excepting, replying, etc.).

Another town (*locus*, pp. 616 ff.) gives powers to wage any kind of suit with any other corporations or persons in the royal *Curia*, before the king or his *procurator*, or in any lower courts; to present complaints against royal officers; to present appeals, petitions, etc.; to renounce the right to ask for royal dispensation from the payment of the "violariorum seu censualium mortuorum" requested by the king; to grant to the king all that is granted by other towns and cities, as requested by the king, and "[ad] assecurandum illas peccunie quantitates que ad nos et ad dictam universitatem tangeant pertineant et expectent seu ad nostram partem perveniant, si casus erit quod per ipsum dominum Regem aut aliquem loco sui petantur demandentur seu exigantur illi vel illis, cui *vel quibus per ipsum dominum Regem vel eius venerabiles Consiliarios ordinabuntur vel mandabuntur* . . . Et ad obligandum nos et bona nostra et dicte universitatis et singularium" for any sums of money that "proferentur, dentur seu promittentur" to the king for any cause or reason; "*Et ad interessendum eciam in curiis generalibus domini Regis et parlamentis et consiliis generalibus vel specialibus quibuscunque et ubicunque teneantur seu per . . . Regem mandentur*, et ibi per vos et per dictam universitatem *concedendum atorgandum promitendum consencendum et assencendum omnia et singula et similia que per alios syndicos nuncios et procuratores civitatum villarum et locorum regalium Cathalonie concedantur promitantur et consenciantur de quibuscunque negociis ibi tractetur seu ordinetur, et firmandum et laudandum ea omnia et singula . . . que in comodum veniant ad . . . Regem et ad totum Regnum suum, et prout per ipsum dominum Regem mandetur ordinetur seu alias voluntati sue videbitur expedire.*" Further, powers are

Cortes. In reality the practical value of *plena potestas* depended on the actual power of the third estate in alliance with the nobles.<sup>22</sup>

In France, in the time of Philip the Fair, the royal prerogative was even more clearly expressed in the king's power to summon to the States General and to specify the kind of powers (*plena potestas* or "sufficient instructions"<sup>23</sup>) which he wanted the communities to give to their representatives. In 1302 Philip ordered representatives of towns and chapters to bring *plena et expressa potestas*, or *plenum et sufficiente mandatum*, of hearing, accepting, doing and consent to what he would ordain.<sup>24</sup> Other examples of mandates from 1303 and later give such formulas as *plena, generalis, et libera potestas*,<sup>25</sup> *plena et libera potestas et speciale mandatum*,<sup>26</sup> or *generalis potestas et speciale mandatum*.<sup>27</sup> As Jusselin says, these representatives played a rôle "bien effacé", for they were summoned only to approve acts and decisions of the royal government—which

given to do and ordain everything pertaining to the aforesaid "ubique in iudicio et extra iudicium" that true proctors can do. If any unmentioned points come up, the proctors have the power for these things understood.

These points should be emphasized. The royal *civitas* seems to have greater weight in the Cortes than the *villa* or *locus*, which appoints its proctors under the authority of royal officials for Cortes and for all royal courts, while coöperating in the common consent of all the representatives to the king's decisions. The right of consent is asserted, but it is still judicial, not political, consent to what the king and his Council decide after giving all interested parties a hearing and a chance to defend their interests. Finally, it will be noted that the mandates all express full powers in varying fashion, but in such fashion generally that there is no reference back or referendum. If the proctors of Gerona can dissent, it is by petition in the court that they do so.

<sup>22</sup> On the actual powers of the representatives when the king's authority was weak, see Merriman, *Spanish Empire*, I, 432-50, 460-62. The king's prerogative was not so much involved in struggles between king and Cortes as the question of forcing the king to rule according to law and in observance of individual rights. Thus I do not believe that representation even in fourteenth century Aragon was a democratic institution reflecting the will of the people; it reflected the law of the land.

<sup>23</sup> Beaumanoir, *Coutumes de Beauvaisis* (ed. A. Salmon; Paris, 1899-1900), c. IV, §§4 and 13, had already accepted the Roman *plena potestas* for court procedure in a region of customary law; he gives an example of a mandate with *pleniore poeste* for action before any judges or officers, and emphasizes that (§13) one should answer only to a proctor who has a "sufficient mandate" (i.e., full powers), for then if one wins one is sure that the *dominus* of the proctor must be responsible.

For further discussion on "sufficient instructions," see below, §5.

<sup>24</sup> Picot, *Documents*, nos. I and XI (pp. 1, 27); C. H. Taylor, "Some New Texts on the Assembly of 1302", *Speculum*, XI (1936), 38-42; McIlwain, *C. M. H.*, VII, 686.

<sup>25</sup> Picot, p. 164.

<sup>26</sup> Picot, p. 170: Saint Marcel appoints seven proctors to appear before two royal deputies, or before any royal *curiales*, "ad omnes causas seu demandas" of the royal *Curia* "contra dictam universitatem seu contra aliquem de dicta universitate"; the proctors are given full powers and special mandate "agendi, defendendi, excipiendi, proponendi, libellum seu libellos petendi seu porrigendi, litem seu lites contestandi, etc." This mandate is not for a States General, but for responding to the demands of royal agents in a local assembly.

<sup>27</sup> Picot, p. 497; other examples given by McIlwain, *C. M. H.* VII, 688f., and by Langlois, in Lavissee, III, ii, 262.

they did.<sup>28</sup> Yet, in the matter of granting taxes, they could defend specific legal rights and custom; and the king could not raise extraordinary subsidies without obtaining the consent of the communities through their representatives; thus the delegates with full powers did have the power of consenting. But this consent was consultative and judicial, before the king and his council, or before commissioners, not a sovereign limitation of the royal prerogative.<sup>29</sup>

As for Germany and north Italy, while special studies are needed on the problem, it may be said that because the cities became practically independent of the imperial authority (except for a brief time when Frederick I held his famous Diet at Roncaglia, 1158),<sup>30</sup> the *plena potestas* of representatives was ambassadorial in character. There was no real state, no public law, to subordinate local liberties to the common utility; consequently the power of consent was such that there was not even a possibility of a central government capable of interpreting in its favor the representatives' power of consent. In other words, representation was that of independent states sending plenipotentiaries to negotiate, as it were, with a foreign power.<sup>31</sup>

More clearly and logically than in the secular state, the Roman judicial-conciliar character of assemblies was developed in the Church. Popes, papal legates and archbishops, and *presidentes* and *diffinitores*, according to their place in the hierarchy, presided as high executives, legislators and judges over general and provincial councils, and over general and provincial chapters of the monastic

<sup>28</sup> M. Jusselin, "Lettres de Philippe le Bel relatives à la convocation de l'assemblée de 1302," *Bibliothèque de l'École des chartes*, LXVII (1906), 471; cf. Langlois, in Lavissee, III, ii, 262-4, also 160f., 261.

<sup>29</sup> See the important work by J. R. Strayer, *Consent to Taxation under Philip the Fair* (in Strayer and Taylor, *Studies in Early French Taxation*; Cambridge, Harvard University Press, 1939). Strayer admirably demonstrates the machinery by which the royal government obtained taxes, and shows how the French people failed to "secure control of taxation and some voice in legislation" (p. 91) because of localism and the paradoxical weakness (p. 94) of the king; but he does not look at the other side of the question: the power of the royal government and the use of the machinery of representation not only to get information (p. 21) but also to obtain the consent necessary if local rights and custom were to be respected according to the principle *Quod omnes tangit*. The early use of representation was not merely for information and publicity; it was in addition an attempt to conform to the thirteenth century idea of getting consent in a general assembly in order to prevent later, legally justifiable, resistance to the tax. If resistance did develop in spite of the general consent given in States General, this was, when not contrary to the law, in conformity with the legal practice of dilatory procedure, of continuing litigation by appealing and making excuses to the last ditch. Courts could decide, but strongly traditional localism could delay and obstruction override the decision without denying the theoretical jurisdiction of the courts. Not even the royal absolutism of Louis XIV produced universal obedience to the will of the government. See below, §5, nn. 64ff., and text. On delays caused by contumacy, or defaulting, see Picot, *Documents*, no. 137.

<sup>30</sup> Post, *Speculum*, XVIII, 228.

<sup>31</sup> McIlwain, *C. M. H.*, VII, 705f. The Kingdom of Sicily needs further study. But under Frederick II representation meant centralization under the real authority of the king; similarly in the time of Charles of Anjou. Space is lacking for any adequate treatment at this time. But see McIlwain, *C. M. H.*, VII, 704.

orders. They consulted with prelates and representatives of ecclesiastical corporations, but they initiated and decided, after giving hearings and receiving information, without being controlled by the consent of the clergy. Each assembly was a court as well as council.<sup>32</sup> Representatives of cathedral chapters in provincial and general councils appeared before the archbishop and the pope and their councillors (the prelates), and had only a consultative "voice" (vote). Their powers, which were drawn up as mandates, that is, "sufficient instructions" with *plena potestas*, consequently expressed corporate consent to whatever the council might decide.

Yet in the second quarter of the thirteenth century representatives of cathedral chapters tried to issue limited mandates and to refuse consent to the action of the archbishop and his provincial council.<sup>33</sup> Indeed, in the Council of Bourges, 1225, the proctors of chapters refused consent to Honorius III's request for prebends,<sup>34</sup> but they were unsuccessful in resisting the demand for an extraordinary tax to finance Louis VIII's crusade in 1226.<sup>35</sup> In any event such powers of consent were judicial as well as conciliar, for the council was also a court. If by the Roman principle, *Quod omnes tangit*, the lower clergy had the right of consent, it was consent, after judicial and conciliar process, to what the council of prelates decided. But if the law was clearly on the side of the represented communities the council could not legally obtain consent—though the pressure applied by an alliance of pope, king and prelates could do what the theory of necessity could not. In any case the ecclesiastical court and council needed to decide quickly; therefore, as in the secular assemblies, representatives were summoned to bring full powers or sufficient instructions.<sup>36</sup> If few mandates

<sup>32</sup> The subject of the church council as a high court will be treated elsewhere.

<sup>33</sup> In 1226 the Chapter of St. Osmund's, Salisbury, instructed its proctors to resist, in a national council held by the Archbishop of Canterbury, a royal demand for a subsidy; *Register of S. Osmund* (ed. W. H. Rich Jones; R.S.), II, 64f.; Dorothy Bruce Weske, *Convocation of the Clergy* (London, 1937), pp. 42ff., 201-3; W. E. Lunt, "The Consent of the Lower Clergy to Taxation during the Reign of Henry III," *Essays in Honor of George Lincoln Burr* (New York, 1931), pp. 121 f.; Lunt, *Financial Relations of the Papacy with England to 1327* (Mediaeval Academy of America, Cambridge, 1939), pp. 187 f. In 1233 the clergy of the province of Canterbury asked Archbishop Peckham to grant a delay for considering a new royal request because their *potestas, quae limitata fuerit*, did not extend to this; Peckham, *Register* (ed. C. T. Martin; R.S.; London, 1882-5), II, 536. On limited powers see below, §5.

<sup>34</sup> Mansi, *Concilia*, XXII, 1213-17; Matthew Paris, *Chron. Maj.*, III, 105ff.; F. M. Powicke, *Stephen Langton* (Oxford, 1928), pp. 158f.; Lunt, *Financial Relations*, pp. 178-86, for the refusal of the English clergy.

<sup>35</sup> Ch. Petit-Dutaillis, *Étude sur la vie et le règne de Louis VIII* (Paris, 1894), pp. 288-94; E. Berger, *Histoire de Blanche de Castille* (Paris, 1895), pp. 96-8; L. Auvray, ed., *Les registres de Grégoire IX* (Paris, 1896-1907), nos. 134 and 155. Why consent could be refused to a demand for prebends and not for taxes needs further study; but it may be that there was already some distinction between taking property and taking taxes; besides, taking prebends for the necessities of the Curia was not demonstrably for the common utility of Christendom.

<sup>36</sup> Below, §5.

survive from the thirteenth century (and these in the latter half), those few and the summons express the *plena potestas* of the proctors to consent to what is enacted in the assembly by the prelates.<sup>37</sup>

<sup>37</sup> No one could deny that representatives of the clergy had no power of limiting the *plenitudo potestatis* of the pope in a General Council. But it is interesting to show this by a mandate issued by the Benedictine prior and convent of Norwich for their proctors for the Council of Vienne, 1311; their proctors (4) are given "*generalis potestas et mandatum speciale* in dicto concilio interessendi, tractandi, ac *plenum et expressum consensum prebendi*, una cum ceteris in dicto concilio legitime comparentibus, super omnibus et singulis dicto concilio deductis et per Dei gratiam deducendis . . . , necnon ad omnia alia que in eodem concilio statuentur, fiunt, ordinabuntur, et *que secundum tenorem mandati apostolici fuerint opportuna, faciendi, consensuendi, expediendi, eciam si mandatum exigant speciale*, pro eisdem vero . . . rem ratam haberi et iudicatum solvi sub ypotheca rerum nostrarum promittimus et exponimus cauciones;" W. A. Pantin, ed., *Documents Illustrating the Activities of the General and Provincial Chapters of the English Black Monks, 1215-1540* (Camden Third Series; 3 vols; London, 1931-37), I, 171. This general mandate shows clearly the judicial character of the General Council.

If a papal legate held a council, he too had the real authority, and representatives of the clergy were sent with full powers to consent to his decisions. This is illustrated by a mandate given by the monastery of Bec to its proctors for a legatine council at Paris in 1284; the proctors are given power "ad audienda, referenda et recipienda mandata sedis apostolice atque vestra;" *plena potestas* is not given, but its equivalent is, i.e., the clause *ratum etiam habituri et gratum quicquid, etc.*; in *MS. Cotton Dom. A. XI* (British Museum), fol. 131. Another illustration comes from the legatine Council of London 1237: proctors shall bring mandates, "ut quicquid in concilio statueret legatus, ratum utrobique haberetur;" Matthew Paris, *Chron. Maj.*, III, 415.

Even the *diffinitores* presiding over a provincial chapter of the Dominican Order and the *abbates presidentes* of a General Chapter of the Benedictine Order act as judges in high court; consequently the powers of consent given to representatives of convents are judicial, not sovereign. Thus in 1287 the prior and convent of Bec send to the "presidents" of a General Chapter of Abbots of the province of Rouen two proctors "ad proponendum et ostendendum coram vobis" the *rationes* demanded by the "presidents"; the proctors are also appointed to "hear, report back, or prosecute the *negocium*, and to appeal"; they are given *potestas plenaria* and *mandatum speciale* (*MS. Cott. Dom. A. XI*, fol. 121). For other examples relating to General Chapters of the Black Monks in England, see Pantin, *Documents*, III, 264-75; still other examples, I, 128, 141 f., 144; III, 276.

As for provincial councils of archbishops and bishops, the proctors are given powers to appear *before* the archbishop and to consent to the acts of the Council: Council of Béziers, 1280—proctors of the chapter of Elne, "ad audiendum tractatus super negotiis universalem statum totius Narbonensis provinciae tangentibus, et ad faciendum super praedictis, prout memorato concilio expedire visum fuerit, et Dominus ministrabit; ratum et firmum perpetuo habituri, quicquid super praemissis per eundem procuratorem fuerit procuratum;" Mansi, *Concilia*, XXIV, 364 f.

Likewise, for the convocation of the English Clergy when the King held a Parliament. If the *communitas cleri* seems to have the power of consent in 1283 (the archbishop of Canterbury summoned proctors, "sufficienter instructi," of chapters and of dioceses to bring "plenam et expressam potestatem . . . tractandi et consentiendi quae ibidem . . . cleri communitas providebit;" Stubbs, *S.C.*, p. 459; Peckham, *Register*, II, 509; Clarke, *Medieval Representation*, pp. 312 f.), this consent is controlled by the prelates who are the essential Convocation or Council. In 1295 Edward I ordered the clergy of the province to send proctors with *plena potestas* "ad tractandum, ordinandum et faciendum nobiscum, et cum caeteris praelatis, proceribus et aliis incolis regni nostri, qualiter hujusmodi periculis et

All the above has been very generally stated,<sup>38</sup> but the implication is that the strong king, not the communities, was the interpreter of *plena potestas* and could thereby obtain consent to decisions which were supported by public law. In this connection a question arises, however, which must be treated in some detail before we can definitely say that the consent of a community was in effect given with the mandate before the meeting of the assembly. Could a city or county limit the mandate, refuse to give full powers to its mandataries, and thereby withhold consent and cripple the prerogative? And to ask this is to ask further: after hearing the proposals of the government, could representatives who came with *plena potestas* delay their answer by claiming the right of "reference back" in order to get fresh instructions from their constituents; and how much judgment was entrusted to representatives whose powers were not limited?

##### 5. 'SUFFICIENT INSTRUCTIONS,' 'REFERENCE BACK,' AND LIMITED MANDATES

If representation were to develop as the means of expressing the political sovereignty of the people, not only must the king have the power to summon to his assembly, but the representatives must have a mandate from below. The mandate could not be a final transfer of responsibility from electors to representatives, for political representatives should by the mandate owe to their constituency judgment rather than mere obedience, and this judgment must be exercised in coöperation with other representatives with like powers. But if their discretion and judgment were not trusted, they must at least be able to "refer back" and obtain specific instructions from the communities that sent them.<sup>1</sup> Did *plena potestas*, however, express these conditions of political representation and consent? In court procedure, we shall find, it did not deprive proctors of the right to defend with legal skill the interests of their *dominus*, and certain delays were normally permitted in order that the defense might be adequately prepared and that, if such a new situation arose that the principal had no knowledge of it, the proctors could report back, inform the principal, and

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*excogitatis malitiis obviandum;*" Wilkins, *Concilia*, II, 215; Stubbs, *S.C.*, p. 480. If the king stressed the Roman principle of consent, *Quod omnes tangit, etc.*, in his writ to his two Archbishops in 1295, this judicial and conciliar consent was clearly connected with *plena potestas* by the archbishop of Canterbury in 1296; the proctors of chapters and of the diocesan clergy shall attend the assembly, "ad tractandum, ordinandum nobiscum, et tractatibus et ordinationibusque in praemissis . . . faciendis, ac omnibus tractationes et ordinationes hujusmodi contingentibus, nomine dominorum consentiend[um] *plenam et sufficientem potestatem habentes* . . . Cum commune sit periculum, et per consequens *communibus, absque cujusque fori privilegio, remediis congruis devitandum, et quod omnes tangit, merito debet ab omnibus approbari;*" Wilkins, *Concilia*, II, 219 f. Note the emphasis of the *privilegium fori* in connection with consent!—due process of law in court seems to be the main point.

<sup>38</sup> Evidence will be brought to bear in my full study of the "case of necessity" and public utility.

<sup>1</sup> So the argument of Maude V. Clarke, *Medieval Representation and Consent*, p. 291; her contention is not based on any study of the legal meaning of the mandate, *plena potestas*, and agency.

obtain new instructions in the form of a special mandate. But all this was determined by the court, was simply a part of the procedure, and involved no limitation of the jurisdiction of the court or of the right of the judges to decide the case. Was the royal assembly, however, to return to the question discussed above, equivalent to an ordinary court except in being the highest court of the land?

Professor C. H. Taylor has studied the problem of the limited mandate and "reference back" more profoundly and challengingly than any other authority on representation.<sup>2</sup> After emphasizing the tautology in Philip IV's summons in 1302 (the king instructed French communities to send delegates with *plena potestas* and *absque excusatione relationis*, because he wanted both to prevent delays caused by proctors' "referring back" to get fresh instructions and to avoid the necessarily additional expense),<sup>3</sup> for *plena potestas* theoretically released the proctor from the obligation of getting new instructions.<sup>4</sup> Taylor

<sup>2</sup> However near the correct interpretation his may be, it is not intended as a study of the legal background. Consequently it seems necessary to review his conclusions in the light of legal theory. See Taylor's article, "An Assembly of French Towns in March, 1318," *Speculum*, XIII (1938), 295-303; also his *Assemblies of Towns and War Subsidy*, in J. R. Strayer and Taylor, *Studies in Early French Taxation*, pp. 128 ff.

<sup>3</sup> "An Assembly of French Towns," *Speculum*, XIII, 299, 302; M. Jusselin, "Lettres de Philippe le Bel," *Bibl. de l'École des chartes*, LXVII, 407 f., for the summons; also Langlois, in Lavissee, III, ii, 160 n. 2, 280.

<sup>4</sup> *Speculum*, XIII, 299, n. 2. Cf. P. Viollet, *Histoire des institutions politiques et administratives de la France* (Paris, 1903), III, 98 f: a limited mandate was back of the practice of the deputies' refusing to consent to new burdens demanded by the king, because, as they alleged, they must refer back to their constituents (p. 198, n. 3: "pro eo quod asserebant se a suis communitatibus seu universitatibus nullam super hoc potestatem habere, nisi tantummodo audiendi et dictis suis communitatibus seu universitatibus referendi;" p. 199: in 1303 the Chapter of Nîmes gave these powers, "comparendum, tractandum et referendum dicto capitulo," and this mandate was judged insufficient—Picot, *Documents*, p. 242, no. CLXVIII). Hence, says Viollet, the king almost always insisted that the representatives have full powers and not a limited mandate.

Sometimes, however, the *referendum* stated in the mandate does not mean "reference back" in the above sense; it may mean simply the power given the proctor to "bring back" the decision of the assembly without any implication of a refusal to accept; in 1300 the proctor sent by a monastery to a royal convocation was given power *ad audiendum et referendum* what was ordained by the king, but also *ad obtemperandum* the royal commands, *si necesse fuerit, quantum justum fuerit*; C. V. Langlois, "Formulaire," *Notices et extraits*, XXXIV, 21 f. The power to "obey" is an unusual expression, but the expressions *si necesse fuerit, quantum justum fuerit* show that obedience to the royal will was not questioned except in the medieval sense of obedience only if the king's will were based on justice and law (other examples are referred to by Mellwain, *C. M. H.*, VII, 688). Sometimes the proctors of ecclesiastical communities in provincial councils went with instructions in the mandate to consent and to bring, or refer or report, back the decisions and statutes made by the higher prelates; see above, §4, n. 37. So also in the case of proctors of a group of villages in France, 1308, who were appointed *ad audiendum et reportandum mandata seu statuta* (Picot, *Documents*, p. 673, no. 998); cf. no. 996: the proctors of Autun are appointed *ad audiendum ordinationem* of the King.

For a similar use of *obtemperare*, see the request of the Chapter of St. Osmund, Salisbury, in 1226, that proctors appear before the Archbishop of Canterbury, "ut de uniformi eorum provisione et consilio, tam certa et tam uniformis procedat responsio, ut domini P. P., si

concludes that "a proctor who had full power to do anything that his constituents could do if present"<sup>5</sup> did not necessarily have to do anything in particular which the king asked of him. If the King could hardly give detailed advance knowledge of matters to be treated in an assembly, the proctors could not "commit themselves and their towns to a line of action on which they were (necessarily) not prepared and instructed by their constituencies. . . . A mandate defined the limits beyond which an agent must not go: full powers in a mandate gave the proctors apparently unlimited and discretionary range of action—but would the proctor interpret such a mandate as a 'blank cheque'? Did towns that gave their delegates full powers expect them to act, and bind their towns, on matters whereon the town had given no advance instructions?" Answers to these questions, he acknowledges, must be based on a thorough study of the theory and practice of procuration. "But it is *a priori* possible that a proctor with full powers was not thereby, as institutional practice went, a free agent; possible that the government as it endeavored to get action from representative assemblies was aware of this difficulty, and tried to insure the appearance of representatives who would have, not merely formal (and formless!) *plena potestas*, but also positive *instructions*, which could be given only if the body which constituted a proctor had some knowledge of the business to be discussed."<sup>6</sup> Therefore the government, in 1318, 1321, and 1346–47, obviated the difficulty of instructions by using preliminary local assemblies held in the *bailliages*, where the royal commissioners could explain the king's will and as a result the towns could properly instruct their representatives, who would no longer need to go back again to their constituents.<sup>7</sup>

Thus Taylor supposes that *plena potestas* did not fully obviate reference back for further instructions from constituencies. And G. Lapsley has observed that by 1341 the English towns attached such importance to Parliament that they instructed their representatives during sessions and received reports from them on their return—hence Parliament and the Commons were by then politically important.<sup>8</sup> Ernest Barker, on the other hand, has held that *plena potestas*, as given to clerical representatives to Parliament, denied any *referendum*.<sup>9</sup> In the one opinion, by implication, consent was not fully expressed by "full powers"; in the other, consent was absolutely given by the constituents before the assembly met. Does the legal theory of canonists and legists on procuration help us understand these problems?

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*viderint expedire, obtemperetur mandato et ad honorem totius ecclesiae Anglicanae et ad cleri protectionem;*" this was a papal mandate to the clergy to pay an aid to the king; *Reg. S. Osmund*, II, 61 f. Again there is question only of defense of legal rights before submission to the papal authority.

<sup>5</sup> Here Taylor cites Picot, *Documents*, pp. 148–149 and *passim*, and says that this was a common phrasing to sum up full powers. Actually, *possit facere omnia que ipse dominus possit* was an equivalent of *plena potestas*; both did not have to be stated; so Bartolus and Baldus, to C. 2, 12, 10, on *plena potestas*—see above, §1, nn. 11, 12.

<sup>6</sup> *Speculum*, XIII, 299 f.

<sup>7</sup> *Speculum*, XIII, 300 ff.

<sup>8</sup> Maitland, *Selected Essays* (Cambridge: at the University Press, 1936), pp. 5 f.

<sup>9</sup> *Dominican Order and Convocation* (Oxford, 1913) p. 73.

In the first place, what does the royal request for "sufficiently instructed" proctors mean? In fourteenth century France, according to Taylor, it meant that the king wanted the delegates to have, in addition to the full powers in the mandate, full instructions from constituents fully informed on how to respond to the king's requests to be treated in the assembly. Such full and positive instructions were usually not specified in the mandate itself, but sent along separately with the proctors. In any case, *plena potestas* was perhaps not given to a proctor who did not also have instructions,<sup>10</sup> and *plena potestas* and "sufficient instructions" were two separate matters connected with the proctor's functions.<sup>11</sup>

In the judicial procedure of the two laws, however, the phrase *sufficienter instructus*, which early had a technical meaning for obviating delays and subterfuges,<sup>12</sup> did not always mean that a proctor representing a litigant must appear in court only if fully prepared, on the basis of his principal's full knowledge and instructions, to answer every question that might come up. The plaintiff, of course, was fully informed, and could give his proctor precise knowledge of the suit. But the defendant had to be informed by the judge issuing the citation and by the *libellus* or writ of accusation submitted by the plaintiff.<sup>13</sup> Thus the defendant in particular could feel injured by an adverse sentence if he had not been fully informed by the court and the plaintiff as to the nature of the charges against him; from such a sentence he could appeal. In addition, both he and the plaintiff could feel injured if new charges and counter-charges were raised in the trial without their knowledge. Technically, therefore, in both laws, information in one sense was the knowledge that the litigants, especially the defendants, received of the origin and course of the suit.<sup>14</sup>

If the defendant had not been fully informed by the *libellus* of the plaintiff and by the citation to court, his proctor could secure a delay for further de-

<sup>10</sup> *Speculum*, XIII, 299 f., 300n.

<sup>11</sup> H. S. Lucas also distinguishes between the mandate or credentials and the instructions given to English ambassadors in 1327-1336; "The Machinery of Diplomatic Intercourse," in Morris, *English Government*, p. 309. As Lucas says, the letter of credence rarely stated the details of the subject of negotiations; the agent was fully "instructed" by the king either *viva voce* or in a separate instrument.

<sup>12</sup> Innocent III issued decretals on the subject: *Decr.* 1, 5, 5 *Postulationem*, vv. "per procuratores idoneos ad omnia *sufficienter instructos*"; and *Decr.* 2, 14, 6 *Cum dilecti*: a certain defendant had been cited by the pope to appear in the Curia "per se vel per procuratorem sufficientem sufficienter instructum, ne postmodum per dilaciones vel occasiones quaslibet subterfugere videretur examen." It appears frequently in thirteenth century treatises on procedure. In 1226 the Archbishop of Canterbury, granting the request of the Chapter of Salisbury, permitted the bishops to ask cathedral chapters to send each an "ydoneum procuratorem . . . *sufficienter instructum super negotio*" of the aid asked by the king; *Reg. S. Osmund*, II, 62 f.

<sup>13</sup> All the treatises on judicial procedure discuss the *libellus* or *petitio* submitted to the judges by the plaintiff, the court summons to the accused, and the delays granted to the latter for preparing his defense. See the collection of treatises edited by Wahrmund, *Quellen*; and Beaumanoir, *Coutumes de Beauvaisis*, cc. ii-iv, vi, vii. M. A. v. Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts* (6 vols; Bonn, 1864-74), VI, 27-53, gives only a very general discussion that is not helpful here.

<sup>14</sup> On this kind of information, see the *Curialis* (1251-70) in Wahrmund, *Quellen*, I, iii, 10f.; and other treatises listed below, nn. 18, 19.

liberation with him on how to handle the charges in court. A decretal of Pope Coelestine III states that when a defendant is cited to court by authority of a papal rescript, and if by the rescript sent to him he is fully informed (*plene potuit instrui de quo in iudicio convenitur*),<sup>15</sup> then he shall be given no further delays for deliberation (*induciae deliberatoriae*).<sup>16</sup> But a decretalist objects that papal rescripts rarely specify all matters by which the defendant is fully instructed. If, however, in addition to the rescript or citation the *libellus* of the plaintiff is sent to the defendant, the latter may then fully deliberate; and if the defendant is then fully instructed he shall have no further deliberatory delays.<sup>17</sup> But the judge, continues the gloss, can still give certain *dilationes* to the defendant for hiring lawyers, seeking the counsel of friends, or procuring witnesses or instruments to help him fight the charges. Such delays, however, are in the power of the judge, not of the defendant.<sup>18</sup> Naturally, if the citation to court does not clearly state the nature of the charges, and if the cited party appoints a proctor, then the proctor should be given a delay to consult with and be "certified by" his principal.<sup>19</sup>

One kind of information, therefore, was that which the plaintiff and the court must give to the defendant, and in time for him to deliberate on how to fight the charge and appoint and instruct his representative. (The judicial summons set a *terminus* that allowed for a delay for preparing the defense.) A different kind of information were the instructions given to the proctor by the principal. Taylor thinks that such instructions were different and separate from the mandate given the proctor by his principal; that when the prince demanded that proctors *sufficienter instructi* come to the assembly, he wanted them to have full information from the constituents on how to treat all questions that came up in the

<sup>15</sup> *Decr.* 2, 8, 2.

<sup>16</sup> *Curialis*, c. VI (Wahrmund, I, iii, 17): "... Sicut videtur quaedam decretalis, reus inducias habere non debet, nisi in libello citatorio aliquid fuerit incertum, quia ex eo potest deliberare et instrui, super quo convenitur, ut Extra, de dilationibus, praeterea [*Decr.* 2, 8, 2]." But to this the defendant can reply, "quod etsi sciebat, super quo debeat conveniri, tamen nesciebat, qua actione, super qua causa, et ideo non potuit deliberare." The success of such caviling depended on the will of the judge.

<sup>17</sup> *Glos. ord.*, to e. c., ad v. *plene* [*potuit instrui*]: "... et si tunc per litteras vel libellum plene instrui potuit, non debet alias inducias deliberatorias habere..." The gloss explains that the actor or plaintiff is not given delays because he is naturally fully instructed or informed at the start.

<sup>18</sup> See Richardus Anglicus, *Summa de ordine iudiciario* (ed. Wahrmund, II, iii), c. XXV.

<sup>19</sup> Innocent IV, *Apparatus*, to *Decr.* 1, 38, 11 *Dilectus*, ad v. *consulet*: "Ar. quod si qui citatus est, non expresse super quo, et citatus constituit procuratorem, procurator debet habere inducias ut consulat dominum."

On this whole question of delays see also Richardus Anglicus (ca. 1196) *Summa*, cc. XXII, XXIV, XXV; Tancred (ca. 1214-16), *Ordo Iudiciarius*, P. 2, t. 17 (ed. F. Bergmann, pp. 180-4); William of Drogheda, *Summa aurea* (ca. 1239), c. CCCLVIII (Wahrmund, *Quellen*, II, ii, 292-5); the *Curialis* (1251-70), c. XXV (Wahrmund, I, iii, 11-13). Cf. Bartolus to D. 3, 3, 2: "Sed procurator possit petere dilationem ut certificetur a domino quid respondeat," if proper instructions are not given to the *dominus* in order that he may instruct his proctor. If the *dominus* is instructed and summoned *specialiter*, he must send "procuratorem instructum quid respondeat, et ideo non debet sibi dari dilatio; imo si non vult respondere, punietur dominus, ut contumax... Innoc. in c. dilectus."

assembly, as well as full powers to handle the business and to consent to the final decision. Roman and Canon Law, however, made little distinction between instructions, information, and the mandate: the proctor who was legally appointed and had a properly drawn up mandate was necessarily *sufficienter instructus* and informed.<sup>20</sup> A legally constituted proctor, for example, was appointed by the mutual consent of prelate and chapter in a case that concerned both; his mandate, therefore, was valid for litigation.<sup>21</sup> This mandate must assure the court of its authenticity by containing at least the names of the constituents of the proctor, the nature of the *causa* or suit, and the clause of *rati-habitio* (*quod ratum habebit, etc.*)<sup>22</sup> In fact, the proctor for a lawsuit in the papal Curia should have in his mandate the *plena potestas ad agendum et respondendum*—so Gregory IX, *Decr.* 1, 38, 10 *Accedens*. In other words, as the glossator says ad v. *respondendum*, the proctor appointed as plaintiff should also have the power to act as defendant if the original defendant brought a cross-action or “reconvened” the proctor. It followed that the mandate must also contain the *satisfactio* and the *iudicatum solvi* clause by which the constituent stood as *fideiussor* for his proctor as defendant, and in addition the clause affirming that the proctor would be in court when sentence was pronounced. By having all these clauses in the mandate *ad agendum et respondendum*, the proctor had *plena potestas*.<sup>23</sup> Another gloss, to *Decr.* 1, 38, c. 13 *Mandato* (Gregory IX),

<sup>20</sup> See the decretals of Innocent III, cited above, n. 12. Pope Gregory IX issued a decretal (1227-34) in which he explained that a litigant should be represented “*per procuratorem idoneum et sufficienter instructum ad litem contestandam et ad alia omnia negotia peragenda quae necessaria decisioni negotii videbuntur . . .*” (*Decr.* 2, 14, 10 *Venerabilis*); *Glos. ord.*, ad v. *sufficienter instructum*: “*Sufficiens dicitur qui ad agendum et defendendum et respondendum constitutus est legitime;*” and in support of this the author of the gloss refers to three decretals on proctors and their mandates (*Decr.* 1, 38, cc. 1 *Alia quidem*, 10 *Accedens*, and 13 *Mandato*). From these decretals and their glosses we learn that the proctor *legitime constitutus* is one who is provided with a mandate given with the consent of the interested parties; see the following notes. Also Bartolus, *Com.*, to *D.* 3, 3, 1, no. 1: “*Ille qui mittit ad iudicem procuratorem cum mandato non sufficienti, non est amplius citandus, tanquam vere contumax. Videtur enim declarasse se nolle venire . . .*” But Bartolus also indicates that the *procurator instructus* is instructed by his constituent on how to reply (to *D.* 3, 3, *Non solum*, no. 2: the proctor may obtain a delay, “*ut certificetur a domino quid respondeat . . . Aut fuit citatus [dominus] specialiter, et tunc debuit mittere procuratorem instructum quid respondeat, et ideo non debet sibi dari dilatio . . .*”).

<sup>21</sup> *Glos. ord.* to *Decr.* 1, 38, 1 *Alia quidem*, ad v. *legaliter*. Of course, where a business concerned only the chapter, the consent of the prelate was not needed; and *vice versa*.

<sup>22</sup> Gloss to c. 1 *Alia quidem*, ad v. *mandato*. Authenticity was assured further by the attestation of notaries or by the seal attached to the mandate. This gloss was taken from Tancred, to *Comp.* I, 1, *De procur.*, c. 1 *Alia quidem*; ad v. *mandato legaliter*: “*In hoc mandato tria contineri debent, scilicet, nomen eius qui procuratorem constituit, causa ad quam constituitur, et quod ratum habebit, quod cum eo actum fuerit . . . t.*” Vincentius Hispanus adds: “*Sed pone quod de mandato dubitetur, quia sigillum incognitum est: de eo fides fieri debet . . . Vinc.*” (Bamberg, *MS. Can.* 20, fol. 17<sup>v</sup> c. 1). All this relates to the corporate proctor.

<sup>23</sup> *Glos. ord.*; to c. 10 *Accedens*, ad v. *respondendum*: “*Sic ergo debet constitui procurator ad agendum datus, ut possit etiam defendere et respondere adversario si eum reconveniat: alias si non defenderet, denegabitur ei actio . . . , et in expensis alteri parti tanquam contumax condemnnetur . . . In qua constitutione debet satisfactio exponere, per quam ipse*

states that the mandate for the proctor as plaintiff should contain the names of the constituent and his proctor, the subject of the *causa* or suit, the *ratihabitio* clause, and the names of the judges. The mandate for the defending proctor must have in addition the clause of *satisfactio* or *iudicatum solvi*: this clause, however, might be omitted in the case of a proctor of a corporation, for the proctor, not the corporation, takes the oath that the action is brought or defended in good faith (*iuramentum de calumnia*).<sup>24</sup>

That *sufficiens instructus* meant essentially a proctor with a sufficient mandate (that is, a mandate with all the above clauses which were necessary to give the proctor full powers), rather than instructions apart from the mandate, is implied again by the canonist Aegidius de Fuscarariis, *ca.* 1262-66. When the *dominus* as defendant promises, if he loses the suit, to pay the fine or costs (*iudicatum solvi*) for his proctor, should he say "*iudicatum solvi pro omnibus clausulis stipulationis*" in the mandate,<sup>25</sup> or should he merely say "*iudicatum solvi*"?<sup>26</sup> Aegidius decides that the mandate is *plenius* and *securius* if the whole clause with *pro omnibus clausulis stipulationis* is expressed; but if the *pro omnibus clausulis stipulationis* is not added, the mandate is nonetheless *sufficiens ad relevandum procuratorem*.<sup>27</sup> Indeed, the proctor is *sufficiens instructus* even if his *dominus* failed to relieve him of the burden of *satisfacendi iudicatum solvi*; if the adversary claims that such a proctor should not be admitted to court, and that his *dominus* should be pronounced *contumax* because the *dominus* did not send *procuratorem sufficiens*, the proctor shall nevertheless be admitted, and his *dominus* is not *contumax*.<sup>28</sup>

Certain formulas, however, were indispensable if the mandate and proctor were to be held "sufficient" against any contrary assertions by the adversary in court.<sup>29</sup> The mandate contained general clauses that stated a contract between

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[dominus] fideiussor sui procuratoris existat, iudicatum solvi sub hypotheca rerum suarum . . . ; et quod tempore sententiae erit in iudicio, alias omnia dabit quae in condemnatione veniunt, ut ibidem dicitur: et ita *plenam habet potestatem*."

<sup>24</sup> *Glos. ord.*, ad v. *mandato procuratoris*.

<sup>25</sup> See H. F. Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: at the University Press, 1932), p. 289. The defendant should, outside court, give security (*satisfactio*) and make himself the surety (*fideiussor*) of his proctor for all the clauses of the *satisfactio* which was the *iudicatum solvi*; *Inst.* 4, 11, *de satisf.*, 4: ". . . extra iudicium satisfactionem exponere, per quam ipse sui fideiussor existit pro omnibus iudicatum solvi satisfactionis clausulis." See on this question P. Collinet, *La procédure parlibelle (Études historiques sur le droit de Justinien, IV)*; Paris, 1932), p. 140. The proctor himself furnishes the *satisfactio* or *iudicatum solvi* to the court, and for all the clauses of the *satisfactio* (to remain at the court, to conduct the suit to the end, to pay the condemnation); Collinet, pp. 190 f., and in general pp. 188 ff. Actually, the clause *iudicatum solvi* frequently appears in defendants' proctorial mandates of the thirteenth century and later; but it is not necessary to study this question in detail for the present purpose.

<sup>26</sup> Aegid. de Fusc., *Ordo iudiciarius*, c. XV (Wahrmund, Quellen, III, i, 28 ff.).

<sup>27</sup> C. XV (Wahrmund, III, i, 28).

<sup>28</sup> C. XV (Wahrmund, III, i, 29).

<sup>29</sup> *Idem*, c. XX, p. 34: "Contra formam [procuratoris] multa possunt opponi; si constituatur [procurator] generaliter nec habeat mandatum ad agendum et defendendum, non valet . . . Nec est sufficiens procurator, scilicet rei, constitutus ad agendum, si non contineatur: ad defendendum . . ."

proctor and principal and thus informed the court of the responsibility especially of the principal. Such a mandate remained general in content even when many additional clauses were inserted to make more specific the powers of the proctor.<sup>30</sup> These clauses were part of the instructions given the proctor, but were general nonetheless; for if the proctor really had powers, he must be able, particularly if the court were at a long distance from his constituents, to act according to his best judgment without having recourse to the constituent on every issue brought up in court. Indeed, the very fact that the defendant appointed a proctor was evidence to the judge that the proctor was *sufficienter instructus*,<sup>31</sup> that the defendant had given his proctor what information he had received in the *libellus* and summons, and had told the proctor generally how to act to meet the charges. In fact, the courts generally demanded that the *dominus* send a *sufficienter instructus* proctor, with a "sufficient mandate", else the *dominus* would be declared *contumax*;<sup>32</sup> and one party could take exception to the form of the mandate given the other party's proctor, if the said proctor as defendant were not *sufficiens* because his mandate did not contain the formula *ad defendendum*.<sup>33</sup> It was the court, however, which had the power to decide whether, despite omissions or legal subtleties in the formulas of the mandate, the instructions given the proctor were sufficient to constitute *plena potestas*.<sup>34</sup>

But if the proctor *sufficienter instructus* was presumed to have a legally valid mandate giving him full powers, he was supposed to be fully informed or instructed in still another sense. He must be *idoneus*, that is to say, capable of intelligently handling the interests of his constituent because of his knowledge of the matter; and if *idoneus* he was necessarily informed by the constituent and provided with the authentic instruments or documents or other records that

<sup>30</sup> For example, the proctor could accept or refuse the judges delegated by papal rescript for the suit, make exceptions or pleas, offer replies (*replicationes*) to exceptions, etc.

<sup>31</sup> Innocent IV, *Appar.*, to *Decr.* 1, 38, 11 *Dilectus*, ad v. *a iudicibus*: "Nam si ad causam, que commissa est procuratori, ut eam defendat, citetur procurator, has non debet dare iudex inducias, quia presumitur quod dominus instruxerit eum." But Innocent IV would grant delays to the defendant's general proctor in the event that a new charge, unknown to the constituent, should arise; also to a proctor for one suit if the constituent was not instructed properly by the court on the nature of the accusation.

<sup>32</sup> Bartolus, to *D.* 3, 3, 1, no. 1: "Ille qui mittit ad iudicem procuratorem cum mandato non sufficienti, non est amplius citandus, tanquam vere contumax. Videtur enim declarasse se nolle venire . . ."

<sup>33</sup> Aegidius de Fuscarariis, *Ordo Iudiciarius*, ed. Wahrmund, *Quellen*, III, i, 34: "Contra formam [*procuracionis* or *mandati*] multa possunt opponi; si constituatur generaliter nec habeat mandatum ad agendum et defendendum, non valet . . . Nec est *sufficiens procurator*, scilicet rei, constitutus ad agendum, si non contineatur: 'ad defendendum' ut . . . (*Decr.* 1, 38, cc. 10 and 12, *Accedens* and *Constitutus*)."

<sup>34</sup> Honorius III (1216-27) declared that if the intention of the principal was to give his proctors *libera potestas*, even though the proper terminology was lacking, then the mandate should be held valid by the judges (*Decr.* 1, 38, 9 *Petitio*). On this see the *Glos. ord.* ad v. *intentio*: "Sic patet quod quando verba generalia sive dubia ponuntur in mandato, recurrendum est ad intentionem constituentis . . . Unde si diceretur: 'ego do Titio potestatem agendi et defendendi in causa vel in causis, quam vel quas habeo cum tali', sufficiens est mandatum, non obstante subtilitate legali . . ."

were needed to establish his case in court.<sup>35</sup> Thus the "suitable" proctor was one who literally bore the record (*gesta*), that is, the legal instruments which would support his case, and who had sufficient legal learning and skill to use the record intelligently enough to carry conviction with the judges. Further, he was "certified" or instructed by his constituent on how to reply in a suit.<sup>36</sup>

But such an unexpected point might arise that the proctor would want to "refer back" to his principal in order to inform him<sup>37</sup> and to get further specific instructions or additional evidence (in witnesses or instruments). Now, if the proctor was appointed for one specific suit, as plaintiff he was informed by the knowledge of his constituent in the *libellus*; as defendant by the *libellus* and citation to court. His mandate was furnished by a constituent so informed; and by his mandate the proctor was *sufficiens instructus*, had full powers to act. As we have seen, the proctor of the plaintiff had no need of a delay for further consultation with his *dominus*; and the defendant, if fully informed by the citation and the *libellus*, was to be granted no delay for further instructions after the trial began. The same was true when the proctor of the plaintiff answered exceptions as defendant, just as the proctor of the defendant could act as plaintiff in pleading an exception. All this applied when the proctor had a mandate with full powers for one case (*causa*) or suit. This was perhaps a limited mandate, but only in the sense of a mandate for one specific action, not in the sense that the powers of the proctor were limited in the particular action: for it the proctor had *plena potestas*.

Even so, however, the court sometimes permitted a delay to a defendant who had given full powers to his proctor for a particularly important suit (*ardua causa*). In the pontificate of Gregory IX (1227-41) the Archbishop of Bourges was claiming the *ius primatiae* over the ecclesiastical province of Bordeaux, and he carried his case to the papal Curia. The pope, following the normal judicial procedure, issued a peremptory writ citing the Archbishop of Bordeaux, who must appear at the beginning of Lent either in person or *per procuratorem idoneum sufficienter instructum ad litem contestandam et ad alia omnia negotia peragenda, quae necessaria decisioni negotii videbuntur*.<sup>38</sup> But after this summons was issued, the pope summoned the same prelate to Rome in person for a quite

<sup>35</sup> *Glos. ord.*, to *Decr.* 1, 5, 5 *Postulationem* (Innocent III), ad v. [*per procuratores*] *idoneos [ad omnia sufficienter instructos]*: "Quia sciant et possint reddere rationem, 17. *Dist. multis* (*Dist.* 17, c. 5), et infra, de procura. c. 1 (*Decr.* 1, 38, 1 *Alia quidem*)." (This gl. derives from Laurentius Hispanus, to *Comp.* III, 1, 4, 5, ad e. v.—Bamberg, *MS. Can.* 19, fol. 123 c. 2). To c. *Alia quidem*, in which Gregory I ordered a bishop to send an "instructam personam cum mandato legaliter facto . . . , *gestisque ex more indicto* . . . , ut quicquid cum ea actum fuerit iure subsistat," Innocent IV, *Appar.*, ad v. *gestisque*, says: besides *gesta* in the sense of deeds, are "*gesta quedam facta in scriptis redacta vel potius ipse scripture in quibus gesta referuntur, et iste scripture apud se. [dem] ap. [ostolicam] dicuntur registra; et ista gesta si sunt bene custodita et inveniantur in archivis auctenticarum personarum, puta earum qui habent potestatem auctenticas scripturas faciendi, fidem faciunt hic . . .*"

<sup>36</sup> Bartolus, above, n. 20.

<sup>37</sup> *D.* 3, 3, 49: "Ignorantis domini conditio deterior per procuratorem fieri non debet."

<sup>38</sup> *Decr.* 2, 14, 10 *Venerabilis*.

different business, which was *pro ecclesiae Romanae subsidio*, and therefore for "public utility", a *causa* more important (*maior*) than the other *causa* of the primacy—so the Archbishop of Bordeaux later maintained through the proctor appointed for meeting the suit brought by the Archbishop of Bourges.<sup>39</sup> The Archbishop of Bordeaux therefore came to the Curia for the business that interested the pope and the Church, and for the same reason the Archbishop of Bourges was there. The latter seized the opportunity of demanding that the pope proceed at once with the trial of the question of the primacy; but the former, refusing to answer in person, returned home, leaving a proctor at the Curia to defend his interests in the case. This proctor was given full powers (*omnia faceret, quae in propria erat persona facturus [archiepiscopus]*).<sup>40</sup> Against the Archbishop of Bourges' demand that he answer to the charge, the proctor countered with an *exceptio*: the Archbishop of Bordeaux was not held to make response while he was at the Curia, since he had been summoned there *pro alia maiori causa, pro publica scilicet utilitate*, and hence must be considered as absent and as having the privilege of appealing to a judge in his own city (*revocandi domum*); moreover he had not had sufficient time to deliberate with his suffragans and the clergy of his province, whose interests or rights were touched by the claim of primacy, and whose counsel such an *ardua causa* required<sup>41</sup> (*Quod omnes*

<sup>39</sup> Decr. 2, 8, 4 *Exposuit*.

<sup>40</sup> Decr. 2, 8, 4. The wording is at first glance contradictory, for the archbishop, according to the pope, reserved for himself all exceptions, otherwise giving the proctor the power to do all that the archbishop himself would do ("qui [procurator], salvis exceptionibus sibi competentibus in respondendo et defendendo ac aliis, omnia faceret, quae in propria erat persona facturus"). But the proctor did present *exceptiones* against the Archbishop of Bourges, and asked for a delay in order that his principal, the Archbishop of Bordeaux, might have more time to consult with the clergy of his province and to prepare for the suit.

<sup>41</sup> Decr., 2, 8, 4. The archbishop had thus instructed his proctor to advance the rapidly prevailing Roman principle of consent: when a case touched the legal interests of others besides the principal party, as in a corporate community, the head of the community (the archbishop in this instance is the head of the province which is by legal fiction a corporation) was the representative of all the interested members, but he should obtain their consent to his action in refusing or accepting the challenge to a suit, to his appointment of proctors, and to the instructions given the proctors (the interested parties must all be responsible and accept the decision of the court). As Innocent IV says, *Apparatus*, to c. 4 *Exposuit*, ad v. *tenui*, the Archbishop of Bordeaux was not held to reply in person at the Curia to the Archbishop of Bourges without getting a delay, because he was in the Curia on other business; because in such an *ardua causa* he ought not to be compelled to act by proctor (thus the proctor left at the Curia when the archbishop returned home was given full powers, but with the instruction to make good, if possible, the *exceptio* that would release him from standing trial for the archbishop and would give the archbishop time to prepare to answer in person); and because if the archbishop did not have the *ius revocandi domum*, "tamen debet procurator habere inducias ad consulendum dominum . . . Item quia causa totam provinciam tangebatur, non poterat plene deliberare an cederet vel concederet, nisi consilio habito cum eis, ff. eden. l. 1 [D. 2, 13, 1]; non tamen dico quod necesse sit, eos vocare, ff. de li. cau. si pariter [D. 40, 12, 9]." And *Glos. ord.*, ad v. *cum suffraganeis*: "Cum quibus, et etiam cum capitulis cathedralium ecclesiarum debet deliberare, cum eorum intersit . . ."; "*Additio*. Unde appellantur induciae ad tractandum super iure primatiae . . .; et quia quod omnes tangit, ab omnibus debet comprobari, vel reprobari . . .;" and further, delays are granted "propter causam supervenientem".

This plea for a delay to consult with all interested parties whose rights were at stake (the claim of primacy in this case was held to touch the bishops and cathedral chapters of

*tangit*—Bracton can likewise assert the principle for judicial process<sup>42</sup>). Thereupon the Archbishop of Bourges demurred, rightly asserting that the defendant had been cited by him before he had been summoned on papal business, and declaring that the original *terminus* had given the defendant ample time to deliberate sufficiently to be on hand for both affairs. But the pope decided in favor of the *exceptio* presented by the proctor of the defendant: the Archbishop of Bordeaux was given a further delay, and the *terminus* was extended to Christmas.

Thus a proctor for one suit was given full powers; but because he won the point of the *exceptio* before the actual trial, he obtained a delay for his principal. He was able to "refer back," but only in the sense of reporting the pope's decision to his constituent, who was then able to complete the business of obtaining the consent of all interested parties to the instructions for the waging of the suit. It was in no sense a "reference back" after the trial began; and it was in the pope's power to deny the *exceptio* which permitted a delay for new instructions.

But let us suppose that a proctor was a general one, that is, appointed for a long term to represent his principal in all the lawsuits and affairs that touched the principal's interests. Such a *procurator generalis*, so-called because he was given a general mandate *ad omnia tam ad iudicia quam ad negotia*,<sup>43</sup> could not assume full responsibility in every kind of question that might come up.<sup>44</sup> A decretal of Gregory IX (*Decr.* 1, 38, 11 *Dilectus*) and the glosses on it illustrate this. If a general proctor *ad omnia eius [domini] tractanda negotia*, acting as defendant were refused a delay for consulting his principal on whether he should yield or contend a particular suit or fact, he could appeal the sentence. For the proctor could not deliberate on whether to yield or to contest a charge—in this matter he had no judgment; he must consult his *dominus principalis*. In other words, such a proctor was given an *inducia deliberatoria* (usually of twenty to

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the province of Bordeaux) was probably on the same legal basis as that of bishops who on occasion refused to consent to a papal subsidy until they consulted with the clergy of their dioceses—for which purpose preparatory diocesan synods were held. (I shall treat this subject elsewhere, under *Quod omnes tangit*.) That the consent of the clergy of the province was in nature of judicial process is shown by the outcome of this suit. The pope asked for the consent of the clergy of Bordeaux to his sentence that decided the case, but he ordered any chapter refusing consent to show cause in the papal court—consent was compulsory, except in so far as aided by a legal right that the pope might recognize; see *Decr.* 1, 33, 17 *Humilis*.

<sup>42</sup> See Bracton, IV, 330 ff. (ed. Twyss, VI, 378 ff.), on the *exceptio dilatoria quia ius commune, etc.*

<sup>43</sup> *Glos. ord.*, to *Decr.* 1, 38, 11 *Dilectus*, ad v. *generalis*: "Potest ergo quis constituere generalem procuratorem ad omnia tam ad iudicia quam ad negotia . . . ; tamen talis procurator transigere non potest, nec alienare," i.e., without getting a special mandate to transact or alienate. But see above, §1, nn. 7-20, 28-34, 40, on *plena potestas* and *administratio*; the legists and canonists hold that a general and *libera administratio* or *plena potestas*, permits *transactio* and *alienatio* if the constituent is not injured thereby; but *libera* must be given specifically, and then no special mandates in addition to the general are required.

<sup>44</sup> Hostiensis, *Summa*, II, t. *De dilationibus*, no. 4: even the plaintiff can be given *induciae* "si inopinatum quid emergat de quo non potuit divinare, puta contra rescriptum suum exceptio opponitur, in quo replicatione opus est. . . ."

twenty-five days, but the term could be lengthened if the principal were far away from the court) to consult his constituent, to get new instructions.<sup>45</sup> Such a delay was only one of the many kinds granted to the defendant (another kind was for procuring lawyers, testimony, etc.),<sup>46</sup> and it must be obtained before the actual trial started.<sup>47</sup>

The general proctor who received a delay for "referring back" for new instructions thus had limited powers: he could not yield a charge without contesting it, could not "transact", and could not alienate, unless he obtained the express consent of his principal in a new and special mandate. But this meant infinite delays in justice, and even the defeat of justice; the court needed to speed matters by compelling the litigants to accept its jurisdiction; and the rules of judicial procedure increasingly emphasized that the litigants give full powers to their agents. There can be no due process unless courts can compel consent to their judicial power. So it is that the treatises on procedure were by 1250 reflecting the needs for quicker and better justice by elaborating the various formulas expressing *plena potestas* in the mandate. As we saw above, models of mandates expressed not only *plena potestas*, which should have been sufficient as "full instructions," but also most of the specific things that the proctor should have power to do in court in order to protect his constituent until he had to bow to the decision of the judges on each point. *Plena potestas*, or *libera adminis-*

<sup>45</sup> *Glos. ord.*, to c. 11 *Dilectus*, ad v. *cedere*; the quality of the *negotium* and of the parties helps the judge to decide whether to grant a delay. Hostiensis, *Summa*, I, t. *de procur.*, no. 11: "§Sed et generalis ad negocia generaliter agere et experiri potest . . . ; et si dominus ita remotus sit, quod intra. xx. dies, qui dantur ad deliberandum, consuli non possit, maior dilatio danda est, que si negatur, iuste appellabitur . . ." Guillaume Durant, *Speculum iudiciale*, II, i, *De dilationibus* (fols. 55<sup>r</sup>-59<sup>r</sup>), no. 18 (fol. 56<sup>r</sup>, c. 2): *dilationes deliberatorie* are given "ad deliberandum reis, utrum velint cedere vel contendere"; the *terminus* is 25 days, sometimes more, "secundum locorum distantiam, extra. de procura. dilectus;" sometimes these delays are denied. Johannes Andreae, *Novella*, to c. 11 *Dilectus*, ad v. *dominus principalis* in the gloss ad v. *cedere* (*Glos. ord.*): such a delay was granted because the principal had not incurred blame by not "instructing" his proctor, which the principal could not do before the suit was brought against him; as Innocent IV said, if the proctor is "instructed"—i.e., given a proper mandate—for this suit, no delays are given to him ("quod speciali procuratori ad causam istam constituto non darentur inducie, de quibus hic dicitur, presumitur enim instructus"). But here Joh. Andreae cites Hostiensis, who says that whenever anything arises "super quo procurator per se respondere non potest, nec potest aliquid domino imputari, habebit inducias ad dominum consulendum, ut se sic instruat et respondeat" (i.e., he must obtain a new mandate and instructions); e.g., if a prelate is cited to court and is asked what was done in a chapter-meeting which he did not attend, he should obtain a delay to consult the chapter. But Innocent IV had held both opinions, which are in no real contradiction of each other; *Appar.*, to c. 11 *Dilectus*, ad vv. *a iudicibus* and *consultet*; Hostiensis and Joh. Andreae follow Innocent IV on these points: "Ar. quod si citatus est, non expresso super quo, et citatus constituit procuratorem, procurator debet habere inducias ut consultat dominum."

<sup>46</sup> Guill. Durant, *Spec.*, II, i, *De dilat.*, no. 22: *dilationes preparatorie*; also Hostiensis, *Summa*, II, e. t.

<sup>47</sup> Guill. Durant, *Spec.*, II, *De exceptionibus et replicationibus*, §iii, no. 1 (p. 64): The *exceptio dilatoria* must be put forward and proved *ante litem contestationem*. The time allowed for such exceptions was set by the judge, *Decr.* 2, 25, 4.

*tratio*, gave the proctor the power to petition, transact, alienate, make special pleas or exceptions, reply to exceptions, produce witnesses and instruments, refuse the judges, and to do anything for which, without full powers, the proctor would otherwise need a special mandate. As Boniface VIII decided, the general proctor could do all these things without any special mandates if the general mandate contained special clauses or specified *libera administratio*.<sup>48</sup> Thus such "reference back" as limited the authority of the court was obviated by a mandate which conferred full powers.

In short, in all civil matters, by legal theory and procedure the plaintiff and court should adequately, if generally, inform the defendant as to the nature of the charges. The court should give the defendant enough time to prepare his case, to get expert advice, furnish documents, and consult with all parties whose rights might be directly or indirectly touched by the outcome, and whose consent was therefore necessary—it was in the interest of speedier justice that the court grant ample time for this, since those concerned had the legal right to refuse to accept the sentence and to appeal if they had not been informed and consulted. The defendant, particularly if a corporation or a group of individuals and corporations with common rights, could then deliberate, consider the means of litigating, prepare the record, and appoint a proctor or proctors, and draw up a mandate which, according to the general practice expected by the court, contained the *plena potestas* or instructions furnished to the proctor. But when the proctors of plaintiff and defendant appeared in court, they could still resort to any number of actions to delay proceedings and defend the rights of their constituents: they could, among other things, challenge the jurisdiction of the court itself, contest the wording of the *libellus* and writ of citation, deny the capacity of the opposing proctor,<sup>49</sup> maintain that they had not been adequately informed about a new action, and claim the right of referring back for new instructions. But if the judges decided that the proctors really had full powers, they could pass on all preliminaries such as exceptions, replications, duplications and triplications,<sup>50</sup> and proceed with the actual trial. The court might still grant an exception, however, which would postpone the business and give the parties time for new instructions. Yet the fact that the proctors had full powers meant that the decision of all preliminaries and of the case was accepted by the principal parties, who thereafter had no right of appeal against the decision—unless they could maintain that the judges disregarded the law and their legal rights in passing sentence.

<sup>48</sup> VI, 1, 19, 4. See above, §1, n. 28.

<sup>49</sup> It might be declared that the proctor of the opponent was not qualified, or that his powers were inadequate. This was particularly important, since if the plaintiff won his suit and the defendant later claimed that his proctor acted fraudulently or was not given full powers and therefore appealed the sentence, then the plaintiff must continue the battle in other courts. The reverse applied when the defendant could prove that the proctor of the plaintiff had insufficient powers to accept the outcome of decisions of *exceptiones* or of the whole case in favor of the defendant.

<sup>50</sup> Cf. Pollock and Maitland,<sup>2</sup> II, 611-19; Bracton, III, 142 (ed. Twyss, III, 408-10), on the attorney.

Full powers, therefore, did not absolutely preclude possible delays in "reference back." But such reference back did not limit the consent of litigants to the jurisdiction of the court, did not deny the power of the court; it was not a limitation of the *plena potestas* of the representatives to accept the will of the court, for *plena potestas* acknowledged the authority of the judges to grant or deny any pleas presented by the litigants. There were still delays (justice was slow in the thirteenth century, as now) even after the defendant was legally informed and after he in turn legally instructed his agent; but all these delays were made according to the law and special circumstances as interpreted by the court. Even if the losing party had the right of appeal to a higher court, his appeal did not mean that he had limited the powers of his representative, nor that he refused consent to the sentence of the court in any manner other than that permitted by judicial process, the interpretation of which belonged to the public authority and not to private individuals.

Whatever the subtleties involved in court decisions of all these matters in a case, it is clear that, from the point of view of the court and in the interests of justice, agents of parties must have full powers, and these powers were the instructions given by the interested parties in the mandates. But from the point of view of the litigants, a second kind of instructions were the documents and written or oral advice which were given to the proctors in order to help them act wisely in defending the constituents' interests. How much judgment was left to the proctor it is hard to say; but his judgment did not extend to injuring his principal. It was the second kind of instructions which in part led to the practice of drawing up petitions to be presented by the proctors in court; and there was nothing to prevent many different parties, all touched in common by a demand or a complaint, from instructing their representatives to cooperate, to present a common front, and thus to strengthen their arguments. The jurisdiction of the court was not limited by this procedure; it had to hear the common arguments, but it could still decide against the whole body of defendants if the facts and the law so warranted. And the representatives, each of whom had full powers, lost individually even though they had either unanimously or by majority agreed upon a plea which was unsuccessful.

The essential elements of all this procedure are to be found in French and English treatises on customary law—in Beaumanoir<sup>51</sup> and in Bracton.<sup>52</sup> Indeed, the Romano-canonical rules were, despite variations wrought by local custom and environment, readily adapted to the courts of common law and to

<sup>51</sup> *Coutumes de Beauvaisis* (ed. A. Salmon; 2 vols.; Paris, 1899-1900), ch. IV, §§4, 12, 13, 17-20, 24 (in lay courts a "sufficient mandate" without the clauses of *cautio* or surety required by ecclesiastical courts is adequate), 26 (I, pp. 75 ff.); on summons and excuses and delays, chs. II and III.

<sup>52</sup> *De legibus et consuetudinibus Angliae*, II, 317 ff. (ed. Twyss, II, 206 ff.), on the general and brief statement in the writ of the matter at issue and the claim of the plaintiff as information to the defendant; III, 77 ff. and IV, 245 ff. (Twyss, III, 206 ff. and VI, 150 ff.), on exceptions; IV, 52 ff., 64 ff. and 71 ff. (Twyss, V, 92 ff., 130 ff. and 146 ff.), on default, summonses, and excuses or *essoins*. The attorney, who by definition has full powers, can transact and make all the above special pleas; III, 142 (Twyss, III 408-10).

royal jurisdiction.<sup>53</sup> In this development the clergy, who had suits in secular courts, must have played an important rôle. But the direct influence of legists in England must not be undervalued.<sup>54</sup> Certainly the relation between the instructions carried to court and the plea for a delay because of ignorance of the law is recognized by English royal courts in 1281.<sup>55</sup> The parties should be so instructed on coming to court that they could not allege ignorance of the law. Moreover, the principle that all who were interested in the business must be given a hearing, that all must be summoned and informed of the business, and that they should send properly instructed attorneys to court to consent to the decision of the case—in short, the principle of *quod omnes tangit* in connection with due process and information and *plena potestas*, was a fundamental ideal of English and French law in the thirteenth century.<sup>56</sup>

That papal and royal requests for subsidies resulted in an application of court procedure to the summoning of representatives of all common and corporate rights can be amply illustrated. But leaving aside what is well known, namely, the history of the appearance of representatives in councils and royal assemblies, we must note how the communities were informed and how they in turn instructed their delegates and tried to limit their consent.

As stated above, the "case of necessity" and public utility, the dawning "right of state", enhanced the royal and papal prerogative in such a way that the right to summon was greater than the right to refuse obedience to the summons. Indeed, the writ of summons was in the form of a peremptory, public citation<sup>57</sup> which generally, but adequately, stated the nature of the case and of the need for a subsidy, and, by fixing the date of the assembly, permitted sufficient delay for electing representatives and instructing them. The summons, in other words, generally informed the recipients that there was an emergency which touched the *status regis* and the *status regni*, and that for the common good the king needed counsel and aid—needed, usually, a subsidy, which was required to enable the king to meet the danger common to all. Even though the precise details were lacking—the amount of money needed was not stated—the ruler intended that the summons, like a court writ, should pass for adequate information on the

<sup>53</sup> For England, see Pollock and Maitland<sup>2</sup>, II, 611-19.

<sup>54</sup> See George L. Haskins, "Franciscus Accursius; a New Document," *Speculum*, XIII (1938), 76; and H. G. Richardson, "The Oxford Law School under John," *Law Quarterly Review*, LVII (1941), 319-38.

<sup>55</sup> G. O. Sayles, ed., *Select Cases in the Court of King's Bench* (3 vols.; Selden Society, LVIII-LX; London, 1936-39), I, 89 f.—the court refused to grant a dilatory exception: "nec poterit excusari dicendo quod nescivit si hoc esset ius vel non, cum pars debet venire ad iudicium ita instructus quod non possit in posterum allegare ignorantiam iuris."

Ignorance of the summons was treated analogously: if the citation was made publicly, then the cited could not allege that he was ignorant and therefore must not suffer injury from an adverse sentence.

<sup>56</sup> Bracton is well acquainted with *quod omnes tangit*; IV, 330 ff. (ed. Twyss, VI, 378 ff.). But the Roman principle stated what had long been a principle in feudal law but was beneficial chiefly to the magnates; it was now being extended to cover the rights of the lesser laity and clergy, and to communities of these.

<sup>57</sup> Details on the assembly as a court in this respect will be given in a separate study.

basis of which the communities summoned could send "sufficiently instructed" representatives, that is, representatives with full powers both to defend the rights of their constituents and to accept the final decision of the high court and council. That there existed a "national emergency" or "case of necessity" was information enough.<sup>58</sup>

But the royal government in France sometimes felt so strongly the need of informing, in the legal sense, the whole community of the kingdom that it sent the summons to *baillis* and seneschals who were commanded to hold preparatory, provincial assemblies. This was not only to inform but also to expedite matters in order that no community could allege lack of information and preparatory deliberation as an excuse either for limiting the powers of representatives to be sent to the general assembly or for later resistance.<sup>59</sup> Precedents had been furnished by the Church in the thirteenth century, and possibly also by the example of English county courts.<sup>60</sup> Thus informed, could those summoned

<sup>58</sup> The theory of royal or of papal authority included the right of the monarch to interpret what constituted necessity and public utility. The pope's interpretation met little difficulty in the Church—if the pope decided that a war must be supported for the defense of the Church or the faith, naturally for the common good of Christendom, the clergy summoned to general or provincial councils could not refuse a subsidy, though they could negotiate on the amount. Yet the clergy sometimes tried to argue that no such necessity existed except as a papal subterfuge. Of several examples, this will illustrate clerical opposition: in 1264, after a papal legate demanded a tenth from the French clergy, some of the clergy of Rheims maintained that while all things belonged to the prince *quantum ad defentionem et tuitionem*, the papal war against Manfred (for which the subsidy was demanded) was not a just war for the defense of the faith, and besides Manfred was the rightful king of "Apulia." But this and other complaints made in the council and afterwards, were obviously not heeded by legate or pope; see the *Summa de omni facultate*, perhaps by Drogo, in P. Varin, *Archives législatives de la ville de Reims*, 1<sup>re</sup> partie (*Documents inédits*; Paris, 1840), pp. 448-55, 449, 452 f. Similarly, the English clergy had protested against contributing for earlier papal quarrels with Frederick II; Lunt, *Financial Relations*, pp. 197 ff., 206-19.

In the fourteenth century, in France and in England, the magnates and representatives repeatedly tried to limit the right of the government to determine the "case of necessity" and what constituted public utility—in England with more success (though not complete) than in France. I am treating the subject with detail in a separate study on *Quod omnes tangit* and the "case of necessity".

<sup>59</sup> For details see Taylor, *Speculum*, XIII, 298-302. But sometimes the local assemblies were held after the general one, for the purpose of receiving the report of the royal will expressed in the general assembly and to facilitate obedience.

<sup>60</sup> By the middle of the thirteenth century a papal request for a subsidy often was transmitted by legates who ordered archbishops to summon their suffragans to a provincial (or even national) council; while the bishops, claiming that they could not consent for the clergy of their dioceses, in turn held diocesan synods to inform the lower clergy and obtain their consent by way of diocesan representatives chosen to go to the legatine council. The English shires, or rather the courts, were obviously convenient for the same purpose when the king needed consent to a subsidy. Thus king, legate, or archbishop could be sure of observing the rules of *Quod omnes tangit*: through such preparatory assemblies all communities or corporations and individuals "touched" by the demand or any other "national" business were officially, publicly, legally informed (magnates and specially privileged towns were summoned individually) and given time for assenting to the representation; and therefore no community or individual could later successfully claim that there was no proper summons and therefore that the decision of the kind in the assembly was not binding.

ask for delays other than the time given before the date fixed for the assembly? Obviously the government desired a speedy consent to its needs, and it had a good argument against delays in the plea of imminent danger to the public safety. Just as obviously, all who had vested rights and interests often failed to appreciate the need of paying extraordinary taxes, and used every legal fact or fiction in defense of their rights against new demands. On occasion they claimed that they had been too generally informed,<sup>61</sup> or not informed at all about a new demand,<sup>62</sup> and hence they could not give full powers to their representatives. In 1283 the proctors of the lower clergy of the province of Canterbury, asserting that their powers were for one royal request and were limited to it, and consequently did not extend to a second request, asked the archbishop for a delay to deliberate on the second for which they had no instructions.<sup>63</sup> The archbishop granted the delay requested, for it was legally defensible—it was no limitation of the powers given for the first request; nor for the second, since for it no powers at all had been given.

In France, in the early years of the fourteenth century, when Philip the Fair was trying to obtain universal consent to an appeal to a general council against Boniface VIII, ecclesiastical communities tried to limit the mandates of proctors, and at the assemblies to qualify consent, by inserting "saving" clauses. This procedure resulted from the natural feeling, based on the law of the Church, that full submission to the king's authority was impossible when royal interests were inferior to, or, rather, separate from, the rights and liberties of the churches and

<sup>61</sup> In 1264 Drogo, *Summa*, complained that the legate's mandate (writ of summons) was too harsh and general, for it commanded the cathedral chapters to send proctors "qui haberent potestatem consentiendi in sua voluntate facienda precise, nulla mentione facta de sua voluntate facienda, nec aliqua certitudine super hoc expresso;" and this enslaved the churches; Varin, *Arch. législat. . . de Reims*, 1<sup>re</sup> p., p. 455. In this case the complaint came after the legate held the council, and no doubt the legate succeeded in overriding such pleas and compelling the delegates to consent to his will as the summons indicated they should have full powers to do.

<sup>62</sup> An illustration comes from England. In 1283 the proctors of the lower clergy of the Province of Canterbury asked the archbishop for a delay to consider a new royal petition for a subsidy, a petition that was separate from an earlier one for which the clergy had been summoned to convocation. They asserted that their *potestas* was *limitata* and did not extend to the second royal request; Peckham, *Registrum*, II 536: On the last day of a Council held in London (Lambeth), says the archbishop, "per procuratores cleri provinciae nostrae, post datam eorum responsonem in scriptis super petitione domini regis facta Northampton, de decima triennali, nobis et confratribus nostris extitit supplicatum, ut novas eis concederemus inducias ad tractandum et deliberandum super secunda petitione domini regis de concedendo sibi a clero pro utilitate publica aliquo subsidio liberali; praesertim, cum super ipsa petitione, quae nova fuit, prius non tractaverant, nec se ad hoc eorum potestas, quae limitata fuerat, extendebat." In this case the mandate was limited, but limited legally with respect to a second business on which neither constituents nor proctors had been informed by proper citation. But the mandate and powers of the proctors were not limited with respect to the first royal petition for a subsidy. Consequently Archbishop Peckham granted the requested delay "ad tractandum et deliberandum super secunda petitione."

<sup>63</sup> See the preceding note. It seems that this is an illustration of the use of a mandate giving full powers for one case; a new mandate was needed for a new case when the proctors had not been given a general mandate with *plena potestas* for all cases that might arise.

the spiritual rights of the pope over all Christendom.<sup>64</sup> But there are earlier examples of attempts, among the clergy of cathedral chapters, to limit the powers of their proctors in councils. In 1264 some chapters, when the cardinal-legate summoned them to send to a council at Paris "instructed" proctors with full powers to consent to a subsidy, gave their proctors only a *mandatum ad audiendum et referendum*.<sup>65</sup> Indeed, before it was clearly understood that the superior authority of pope or papal legate was decisive in summoning "fully instructed" representatives and in interpreting the instructions in the mandate, there must have been many instances of limited mandates.

There was, however, no legal justification for such failure to give full powers when the administrative and judicial authority demanded that communities give their delegates *plena potestas*. Even the "saving" clauses inserted by the French clergy in 1302-1303, while legally founded on the rights of the papacy and the Church, were contrary to the reviving theory of the superior right of state: the pope was, so the king alleged, endangering the common good and the rights of king and kingdom, and consequently the rights and welfare of both clergy and laity; the danger touched the *status regni* and the *status* of all, and therefore all must consent to the royal appeal to the general council against Boniface VIII. (Moreover, the legal theory of corporate appeals made it necessary for the government to appeal to a council in the name and by the consent of all members of the kingdom as the corporate community of the realm.) The king thus could demand full powers of consent, and in fact he compelled many of the recalcitrants to consent.<sup>66</sup> When the king wished to tax the clergy, and, as usually happened in the thirteenth century, the popes yielded to the royal declaration of the "case of necessity", of a just war against the aggressor,<sup>67</sup> the clergy could not legally cause delays, after being informed, by asking for "refer-

<sup>64</sup> Picot, *Documents*, no. 4 (the clergy of the province of Tours declared, 1302, that they would aid the king "ad defensionem iurium, statusque et honoris suorum et regni, salvis iuribus et libertatibus ecclesiarum nostrarum, statibus nostris animarumque salute"); no. 50 (a prior gives full powers to his proctors to consent to the king's will "quantum cum Deo et salva consciencia et honore Sedis Apostolice possumus et debemus et permittunt canonice sanctiones," and "salvis semper offensione divina et reverencia Romane Ecclesie universalisque Ecclesie unitate omnique conjuratione et conspiratione cessantibus"); no. 185 (the proctor of the chapter of Carcassonne adheres to the appeal to a general council, saving the honor, authority and reverence of the Apostolic See and the unity of the Church, "et in quantum secundum Deum possum et debeo, et volunt et paciuntur canonice sanctiones et sanctorum patrum statuta"—no doubt his mandate had contained, as instructions, these limiting clauses).

<sup>65</sup> Drogo, *Summa*, Varin, *Arch. législat. . . de Reims*, p. 448. But, as the complaint states, these proctors consented to a tenth, thereby exceeding the limits of their powers—this they could not do, says the author. The legate, it is obvious, was the interpreter of the mandates, and he compelled the proctors to consent. Complaints against his interpretation could be carried by appeal to Rome, but hardly with success.

<sup>66</sup> Ch.-V. Langlois, in Lavissee, III, ii, 160 f.—this in 1303, when the king obtained consent locally, not in a general assembly. But the legal theory was the same, whether applied locally or generally, or generally and locally in succession.

<sup>67</sup> It was chiefly in the Church, from 1179 on, that the right to tax the clergy beyond the customary aids was based on necessity and public utility. See *Decr.* 3, 49, cc. 4 and 7, and G. Le Bras, *L'immunité réelle* (Paris, 1920), pp. 21-30, 49-148.

ence back"; nor could they limit their consent except in so far as they could complain and reduce the amount of the subsidy or appeal to the pope because of abuses committed in the form of violence or of the violation of judicial procedure and due process. For example, it could be argued, usually after the event, that the corporate consent of a chapter bound only the chapter as corporation and its corporate property, but not the individual members in so far as they had property and rights separate from those belonging to the corporation; or that those who were not summoned to be consulted did not consent; or that the lower clergy should not have to pay when the consent was ostensibly given for them by representatives of cathedral chapters—this was back of the growing practice of summoning proctors of dioceses as well as of chapters, for everybody with any kind of right was asserting the principle of consent in *Quod omnes tangit*.<sup>68</sup> If these rules applied to the clergy, how much more to the laity!

Obviously, then, when the state was in danger, the king could not, unless too weak to enforce his will, tolerate the limited mandate, or any kind of reference back or reservations of consent. Delays endangered the public safety. Feudal custom<sup>69</sup> was here strengthened by the growth of royal power and by the procedure of Roman and Canon Law: delays that had imperiled the safety of the suzerain now imperiled the safety of the king as head and representative of the kingdom, hence the safety of the state. Naturally, then, the ruler, as the highest administrator and judge, demanded that sufficiently instructed delegates, that is, delegates bearing full powers, be sent, lest the decision be delayed by the subterfuge of reference back.<sup>70</sup> He was thus assured of consent to his

<sup>68</sup> Drogo, *Summa* (Varin, *Arch. legislat. . . de Reims*, 1<sup>re</sup> partie, p. 448): when in 1264 the proctors of chapters consented to the tenth demanded by the papal legate, they had no right to bind the individual members of their chapters, the author claims; for if the tenth were paid the chapters must pay it "de suis bonis communibus;" the individual members should not pay, "quia nec requisite super hoc fuerunt, nec promiserunt. Unde dicit lex, quod illud quos omnes tangit, debet ab omnibus probari." Moreover, as in *D. 3, 4, 7*, what is owed to the *universitas* is not owed to the individual members; "etenim bona universitatis non sunt singulorum, sed ipsius universitatis vel collegii." One recognizes in this argument the corporate theory of the thirteenth century; see O. Gierke, *Das deutsche Genossenschaftsrecht* (4 vols., Berlin, 1868-1914), III, 263; and P. Gillet, *La personnalité juridique en droit ecclésiastique* (Malines, 1927, pp. 129, n. 2, 137 f. We cannot pause to examine the theory in detail; nor the theory of the majority which binds the minority. Suffice to say that in the court or council the judges could interpret the consent given by proctors as binding the corporation both collectively and individually. But the subtle distinctions made by the lawyers were a source of legal resistance.

As Drogo says, pp. 443 f., even if the defense of the state or of Christendom was involved, nevertheless a subsidy should be reasonable—and this was based on the law; whence many complaints of the English clergy in the same period.

<sup>69</sup> Beaumanoir, c. II, §65: "Cil qui sont semont pour aidier leur seigneurs contre leur anemis ou pour aidier leur seigneurs a leur mesons defendre, ne doivent pas contremander ne querre nul delai." This in connection with summonses. The principle applied to corporate communities, which aided in the defense of the kingdom by paying subsidies more than by fighting, even if we should not treat them as a part of the feudal system.

<sup>70</sup> See the decretal of Innocent III, *an. 1200*, in *Decr. 2, 14, 6 Cum dilecti*: the pope cited *peremptorie* a litigant to appear at the Curia "per se vel per procuratorem sufficientem sufficienter instructum, ne postmodum per dilaciones vel occasiones quaslibet subterfugere videretur examen."

decisions made with the advice of his court and council, before which, not in which, the representatives appeared. No mandate, therefore, without a clause stating full powers was considered valid in the royal court and assembly.<sup>71</sup> So it was that, because of numerous attempts of the clergy to limit powers and consent by the claim of *referendum*, Philip the Fair specified *plena potestas absque excusatione relationis faciende*.<sup>72</sup> Given the circumstances, and the continued efforts of many communities to misunderstand the royal command to send fully instructed representatives, this tautology in the royal writ of summons was necessary.

This was certainly true where the monarchy had become fairly well centralized and the king had real authority. Almost as a paradox, therefore, it was in the England of common law that the king (at least at the end of the thirteenth century) was able to apply most logically the Romano-canonical principles of necessity, public utility and *Quod omnes tangit*, and the Romano-canonical procedure of corporate representation by agents bearing full powers. For England was sufficiently unified under the monarchy to enable the king to prevent the extremes of localism which in France partly resulted in the towns and ecclesiastical corporations repeatedly trying to limit the *plena potestas* in the mandate.<sup>73</sup> I

<sup>71</sup> As Beaumanoir had said, c. IV, §143: "Nule procuracions ne vaut riens se cil qui fet le procureur ne s'oblige a tenir ferme et estable ce qui sera fet ou dit par son procureur." He follows the legists and canonists in this equivalent expression for *plena potestas*. In Picot, *Documents*, we find several examples of mandates of delegates refused by the royal judges or commissioners because of their insufficiency; nos. 148-152, 156, 158. These mandates were insufficient because full powers were not given; instead, power only to hear the commissioners and refer back, or to present excuses and ask for delays (no. 166). Sometimes, however, the excuses were heard and the delays granted; nos. 153 (permitted because of need to consult with other interested parties—*quod omnes tangit*) and 216 (same reason).

<sup>72</sup> Jusselin, *Bibl. de l'École des chartes*, LXVII (1906), 470. In Catalonia a royal statute of 1358 forbade the use of a *procuratorium* with *potestas limitata* in any court; *Cortes . . . de Aragon*, I, ii, 656.

<sup>73</sup> In France there were as many local variances in procedure and in forms of mandates, even in the *pays de droit écrit*, as there were in experiences in community spirit, enterprise and customs. In England the procedure, like the individual participation in village, hundred and county courts, and responsibilities in the community, was strikingly unified as a result of the historical development of the monarchy in relation to the communities. Prof. F. M. Powicke has rightly emphasized the importance of the social position and experience in local government of the knights of the shire. It was the peculiar class of knights (i.e., peculiar to England) which facilitated the royal application of the Roman principles and procedure of representing corporate legal interests, but which at the same time was an indispensable reinforcement of the power of the magnates to limit that other Roman principle of monarchy, absolutism. Thus England, Spain and France started from the thirteenth century with a fairly common background of Roman procedure and judicial consent shaping the control of extreme feudal particularism and individualism. But where in England the king could go only so far towards absolutism, in Spain and France the feudal nobility in the long run were unable to stop the growth of absolutism because they were not strengthened sufficiently by a great body of knights. The cities proved to be an inadequate substitute for a country gentry—perhaps because the cities were too closely allied, normally, with the king—or were controlled by the royal agents.

find little evidence of limited mandates being drawn up for Parliament.<sup>74</sup> But on the other hand the almost national feeling of community in England, along with the well established experience of knights of the shire in local government under royal supervision, was an insuperable obstacle, in the long run, to a royal absolutism based on public utility and the well-known Roman theory, "*Quod principi placuit, legis habet vigorem.*" Thus because the king was powerful at this period, and because there was a real "community of the realm" when knights and magnates had common interests, a unified system of representation arose which resulted in the constitutional or limited monarchy of a later age.

Full instructions, or powers, then, meant essentially, from the point of view of the government, the complete acceptance of the issue and, after legal hearing in the assembly, the consent of all interested parties to the royal decision on the means of defending the community of the realm against aggression or any other threats to the common good. But since by the very theory that the king must rule according to law and justice it was essential that the government permit representatives to defend the legal interests of their constituents against any extraordinary demands, which inevitably affected all rights or liberties confirmed by custom or privilege, it was expected, and desired, that the delegates should bring all the instructions that would enable them to act intelligently and with legal proof for every step taken in protecting local interests. These instructions, which would also help the government decide its policy or the amount of the tax in relation to what burden could be reasonably borne by the communities, were analogous to the advice and means of waging suit in ordinary court procedure. They were the *gesta*, the "record", such as the originals or authenticated copies or privileges granted by the king, and statements of law and custom guaranteeing liberties; they were in addition information on the conditions in the communities; finally, they were frequently the complaints which the communities wished to present against royal agents and abuses of privileges as a counter-claim to challenge the king's right to ask for sacrifices. In all this the constituents must have instructed their representatives generally on how to meet the government's demands, how to proceed in the presentation of the record, or of petitions supported by the record, and how to make common cause with other representatives.<sup>75</sup>

<sup>74</sup> Repeatedly, however, Edward I in his writ of summons commanded that the full powers given the knights and burgesses should not have any defect that would result in unfinished business: "Et ita quod pro defectu potestatis hujusmodi idem negocium infectum non remaneat;" *Parliamentary Writs*, I, 26, no. 3; similarly, 29 f., no. 4; 48, no. 38; 84, no. 5.

On the back of the writs returned to Parliament is usually noted the statement that the knights and burgesses were chosen "ad factum quod breve exigit," or were given full powers "secundum tenorem brevis" (*Parl. Writs*, I, 21 ff.). In one instance it is stated that the representatives were given *plena potestas* "ad faciendum coram domino Rege et ejus consilio quod hoc breve requirit;" *ibid.*, p. 39, no. 19. Unfortunately the actual mandates, brought with the returned writs, do not survive.

<sup>75</sup> In 1226 Pope Honorius III, approving the "necessities" of Henry III of England, ordered the prelates of England to grant a subsidy, to be raised in each diocese, to the king. When the Archbishop of Canterbury urged the bishops to make the clergy of their dioceses

Unfortunately copies of such instructions have only exceptionally survived, so far as I know, the thirteenth century.<sup>76</sup> But it is likely that by the end of the century most of the instructions were embodied at first in the petitions of individual communities and at last in common petitions presented by all the communities as the "community of the realm". In fourteenth-century England, at any rate, the towns did instruct their representatives even during sessions of Parliament.<sup>77</sup> But in the legal theory of the age neither instructions on how to contest the king's demands nor petitions asking for remedies of abuses constituted a limitation of the *plena potestas*. "Full powers" was consent to the decision of king and court and council, consent given before the assembly was held. But in the assembly the representatives had the right to use all legal means of shaping the final decision in favor of their constituents.

It was in this sense that representatives could use their judgment. They could not deliberately injure their constituents' rights by voluntarily yielding to the demands of the government. They must use their judgment in finding the best

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give at least a twelfth or a fourteenth, the Canons of the Chapter of Salisbury, appealing to the principle of *Quod omnes tangit*, met in order to discuss whether they should agree to aid the king, whether they should give the twelfth or the fourteenth, and how the churches of England could be protected from the establishment of a precedent. The chapter then asked that the bishops persuade the archbishop to summon proctors of the clergy in an assembly where a uniform response of all the clergy could be given and thus the papal mandate be obeyed without injury to the English Church and clergy. The archbishop granted the request, and through the Bishop of Salisbury summoned the chapter to send proctors who were to be *sufficienter instructi*. If the archbishop meant full powers by "sufficient instructions"; the chapter gave other instructions, in addition to the technical powers, to its elected proctors in the form of a list of opinions drawn up in writing. The chief of these instructions were that the proctors of the chapter, along with the proctors of other chapters, should agree to a subsidy if it were deemed fitting to do so; if possible they should argue for a twentieth (instead of a fourteenth or sixteenth) as a subsidy, and in no case should they consent to more than a sixth; they should try to obtain certain methods for the assessment and collection of the subsidy; they should ask (of the council of bishops) what was to be done if some canons individually refused consent to what the majority of the chapter decided (the problem of individual consent within a corporation); and they should ask for a "non-prejudice" guarantee from the king.

It is noteworthy that the chapter did not instruct its delegates to refuse consent if the subsidy was necessary—obviously the archbishop and bishops were the essential council in the assembly, and by the papal mandate they must inevitably decide the case of necessity in favor of the king. The proctors were merely told how to negotiate, to try to reduce the amount demanded, to obtain measures in the collection that would not injure the clergy in the future. Finally, that the proctors merely had a legal hearing before the prelates is shown by the fact that the assembly granted a sixteenth, not the smaller twentieth desired by the Chapter of Salisbury. They obeyed the papal mandate, but could negotiate and have a voice in the amount granted. After all, papal decrees had stated that *reasonable* subsidies should be granted in cases of necessity (*Decr.* 3, 39, 6; 3, 49, cc. 4 and 7).

On all this see W. H. Rich Jones, ed., *The Register of S. Osmund* (2 vols.; R. S.; London, 1883-84), II, 57-67; Lunt, *Financial Relations*, pp. 187f.; *idem*, in *Burr Essays*, pp. 121 f.; Weske, *Convocation of the Clergy*, pp. 42 ff., 201-3. Lunt sees the papal *plenitudo potestatis* as the compulsion which the clergy could not resist. But the pope was simply applying the Lateran decrees to royal governments as well as to cities: it was the duty of the clergy to help the state in a "case of necessity".

<sup>76</sup> See the preceding note.

<sup>77</sup> Lapsley, in *Mailland Selected Essays*, pp. 5 f.

way to present complaints and thus try to reduce the amount of the subsidy requested. They might, if the atmosphere in the assembly was encouraging, above all if the magnates acted as leaders, try to point out that the subsidy was not needed, that the government was pretending a case of necessity, or was planning an expedition overseas when a real threat existed nearer home.<sup>78</sup> But individual judgment was not likely to be of much effect. By the fourteenth century, therefore, the representatives of different communities began to meet together in order to arrive at a common understanding and to present before the king and his council a common judgment. The common petition might be used in a like manner. The judgment of the whole community of communities was of far greater weight in influencing the royal judges and councillors. But this judgment, whether expressed by the speaker for all the representatives or by a common petition, was simply a carrying out or defense of the interests of the constituencies before the king's court and council. If it were well supported by the record of grievances, of universal complaints about royal demands, of abuses committed by royal agents, and of legally attested rights, and by the weakness of the position taken by the government, then it might indeed constitute a successful defense and the defeat of the king. In the legal theory, however, the king and his court and council had the power of decision; and if they judged that their case of national defense was proved, they could decide against the pleas of the representatives. To this final decision the representatives must consent in accordance with their full powers. Since they had used their best judgment, had honestly represented the interests of their constituents, these must likewise accept the decision, for they had given full powers to their delegates before the meeting of the assembly took place.<sup>79</sup>

<sup>78</sup> Edward I found it difficult to obtain a subsidy in 1297-98 for his campaigns in Gascony and Flanders; the magnates argued that Scotland was the real danger, that they were not legally obliged to go to Gascony without the king, who planned to be in Flanders; Stubbs, *S. C.*, pp. 482-89. But in this case the commons seem to have granted the subsidies demanded, leaving it to the magnates to resist the king's will and obtain a confirmation of charters. Yet the right of consent is confirmed to the commons, just as feudal rights are confirmed to the magnates, *S. C.*, pp. 492-4. See J. G. Edwards, "Confirmatio Cartularum and Baronial Grievances in 1297, Part I," *E. H. R.*, LVIII (1943), 147-71.

<sup>79</sup> Chrimes, *English Constitutional Ideas*, p. 80, n. 2, argues, against Edwards' thesis (above, Introduction, n. 2), that *plena potestas* was local in its range, that consequently an area that failed to send representatives with *plena potestas* would not be bound by the consent of the representatives of other communities, and thus that *plena potestas* leaves unexplained the fact "that parliament came to be regarded as binding on all the king's subjects, whether they had legal representatives therein or not". But Chrimes neglects several important legal theories connected with *plena potestas*: (1) the will of the majority in a corporation determined the policy of defending corporate interests in court; (2) the proctor given *plena potestas* to carry out this policy and represent the corporation in court acted for the majority of the members; (3) the court's decision bound the whole corporation, even the minority of individuals who refused to consent to the representation; (4) similarly the *plena potestas* of knights of the shire and the decision in Parliament bound the whole community of the shire (i.e., except the magnates and towns in the shire, who consented for themselves); (5) when the representatives of the communities summoned to Parliament met in one body as the community of the communities, their full powers included the judgment involved in agreeing on a policy of negotiating with the government and defending the interests of the community as a whole in the king's court and council; (6) whether these

Instructions and judgment were related not only to the royal summons, but also to other matters which the communities thought it opportune to bring up in the king's court. Thus if the representative was appointed for the one assembly, he was sometimes given, instead of a mandate with full powers for the main business of a subsidy, a general mandate with additional clauses constituting full powers and taking care of special matters for which a general mandate as such was not valid.<sup>80</sup> In that sense he was a general proctor for the assembly, in which several kinds of business could come up: the proctor sent by a town or other community might be instructed not only to answer to the king's request, but also to submit petitions to the king for special favors, to sue or be sued in the king's court, or to pursue an appeal to the king. Nevertheless, so far as the king's business was concerned, the mandate was limited to that business. But it carried full powers for that business. If the king summoned representatives in order to obtain a subsidy, and if in the summons the king properly instructed the communities as to the general nature of the business of the subsidy, then the *plena potestas* of the representatives meant that there could be no delays for reference back after the assembly met and after the royal decision was made. The only delay possible, unless the king found it necessarily expedient to grant another delay, was that given for deliberation between the date of the summons and the date of the assembly—such a delay was normal. This delay gave the communities ample time to prepare the record, the documents and other instructions for the proctors to take to the assembly. In such circumstances *plena potestas* precluded "reference back", unless the king permitted it either by his good grace or by the necessity of bringing up an unannounced business that required a new consultation with the constituencies and new mandates. But with proper instructions in the summons or citation to the assembly, and with no other business arising, the communities were fully informed; and when they sent "sufficiently instructed" delegates, whether in France, in Aragon,<sup>81</sup> or in

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representatives, the commons, agreed unanimously or by majority (cf. Chrimes, pp. 135 f.; Chrimes hesitates to accept the majority-principle in the commons before the fifteenth century, but I think he misunderstands the documents), their judgment bound the dissenters and the absent, and the king's government must accept the judgment of the majority as representing the attitude of the community; (7) but the final decision of the king, while it might be influenced by the legal force of the arguments presented by the commons as a whole, was not dictated by the commons; (8) the royal decision, however, did bind the whole body of representatives, whatever the claims or defense they had agreed upon; (8) further, the decision bound all representatives individually (even those who as a minority had not agreed on yielding to the king's demands), and through the representatives and their full powers of attorney, bound all the communities in the community of the realm; (10) finally, the decision was binding on the communities which failed to send representatives, if the whole community of the realm had been summoned properly, for such communities were in default. In brief, what bound all the king's subjects was both *plena potestas* and the king's prerogative for the common utility of all; *plena potestas* was the legal means of connecting the central government with the community of the realm, of giving all rights representation and a legal hearing, and of binding all the community to any decision made for the common good. Cf. Edwards, "Taxation and Consent . . . 1338," *E. H. R.*, LVII, 473-82, where some of my conclusions are implied but not reached.

<sup>80</sup> See above, §2; McIlwain, *C. M. H.*, VIII, 689.

<sup>81</sup> Cf. McIlwain, *C. M. H.*, VII, 700.

England, they had no legal right to limit the full powers of their representatives by attaching a "reference back" clause.

We must therefore not attribute too much importance to a combination of terms expressing instructions, powers, and reference back. The important thing is, that if the monarch was powerful and asserted his superior rights of jurisdiction and his full prerogative, he could legally demand full powers for representatives in order to prevent the communities from enjoying *referendum* and the limitation or delay of their consent to the royal will. If he observed the rules of the law by citing to court in the correct manner, the parties cited must give such full powers to their agents that there could be no reference back, no delay of proceedings in the assembly, nor any delay afterwards in the form of denying the legality of the royal decision in assembly. The communities could not legally qualify their antecedent consent to the king's decision by asserting the right of *referendum*. *Plena potestas* continued, as in ordinary court procedure, to express full consent to the decisions of the king in his Council and High Court of Parliament, Cortes or States General.

#### 6. CONCLUSIONS

In this study the legal theory of *plena potestas* has been emphasized. The practical application of it in the assemblies, the manner in which the representatives carried out their powers, their organization and methods of agreeing among themselves on a common policy or response to the demands made of them, and the particular circumstances which an able opportunism could shape into a defeat for the government, these are a few of many problems that need further investigation if we are to understand how the practice sometimes departed from the theory—how, for example, full powers implied, at least on occasion, a more effective consent in Aragon than in England. Yet the legal theory—if properly kept in relationship with the general legal and political ideas of the time; if properly viewed against the background of feudal law and custom, individual and community rights or liberties hierarchized like medieval society itself, royal and papal authority, and the renewed conception of the superior right of state for the public utility; and if properly considered as capable of interpretation by the judges in royal and papal courts—the legal theory is an indispensable aspect of representative institutions, whether it was cause, accompaniment, or result of the rise of representation, or all three at the same time.

An essential part of the legal environment was the revival of Roman Law and the development of Romano-canonical procedure, which helped corporate and quasi-corporate communities become bearers of individual rights of lesser free men, and stimulated the application of the procedure of representation in such a manner that local interests could be defended and obligations to the government fulfilled. Of all the terminology taken from the Roman Law and accepted throughout western Europe by the middle of the thirteenth century, *plena potestas* was one of the most significant expressions of the new relationship between the communities and the central authority. It meant the acceptance of the right and power of the ruler to summon, ask for information, and demand consent to measures decided for the common good and safety. It meant the

right of the communities to be summoned, to elect representatives and instruct them on how to defend local rights, to negotiate for a reasonable subsidy or beneficial statute, and to consent to the decisions of the king and his council. Without precluding the right of representatives to oppose, by judicial means, the wishes of the government, it meant such full instructions and powers of consent that the king's prerogative could not be limited by *referendum*. If the ruler must consult with, and secure the consent of all who were touched by the business, by compelling communities to give full powers to their delegates he bound them to the central authority. *Plena potestas*, then, stood not for political, sovereign consent, but for judicial-conciliar consent to the decisions of the prince and his high court and council.

We must therefore neither exaggerate nor underestimate the value of *plena potestas*. It was not, as J. G. Edwards has maintained, one of the roots of the legal sovereignty of Parliament, for it was interpreted by the royal court and was subordinate to the prerogative; it could be such a root only if other forces deprived the king of his actual judicial and administrative powers. Nor was *Quod omnes tangit* the second root of popular sovereignty; it was more a principle of judicial process than of political consent. But on the other hand *plena potestas* was no symbol of abject surrender to the will of the monarch. It was used partly because all interested parties had the right to be summoned, for by law and custom the government could do nothing extraordinary without consultation and consent. Even Philip IV of France summoned the third estate and the lower clergy for a better and more compelling reason than the mere desirability of propaganda and publicity: by the legal fictions of the period he could not appeal to a General Council, in a case that touched king and kingdom, without obtaining the consent of the community of the realm to the act of appeal. Consent was usually forthcoming, especially when the government could present a clear "case of necessity" and public utility—and exert real pressure. Nonetheless absolutism was made impossible by the very theory of judicial consent and by the procedure of obtaining that consent through the full powers of representatives. Joined with the prevailing theory of rights and consent to any changes affecting them, *plena potestas* was in favorable circumstances a means of defending local liberties and individual rights, and an essential part of a system of judicial and conciliar representation based on that law of the land by which the prince must rule.

If it be argued that *plena potestas* and accompanying terms in the documents, such as *quod omnes tangit*, *status regni*, and *necessitas*, were nothing more than a *flatus vocis*, the answer is that legal terminology then as now was developed by legal experts to withstand challenge in the courts, and that royal and papal judges were guided by the legal language in reaching decisions and in interpreting the law. If it be argued that the terminology was merely a matter of procedure and not of the essence of the law, the answer is that up to a certain point procedure is itself of that essence, for without a well formulated procedure the benefit of the law is denied. *Plena potestas* was perhaps a legal fiction, but in court fiction is often more powerful than fact.

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