The Legal Procuartor

A STUDY OF THE HISTORICAL BACKGROUND, STATUS AND FUNCTIONS OF THE PROFESSION

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THE designation "legal procurator" as known to us appears to have crept gradually into use towards the closing years of the eighteenth or in the first quarter of the nineteenth century.. It may, in fact, be stated with some certainty that no reference to procurators as "legal" is to be found in the *Code de Rohan* or *Diritto Municipale di Malta* which was promulgated in 1784 ,and, as closely as it seems possible to ascertain, the earliest evidence of legislative recognition of this professional title is to be found in Proclamation No. XII of October 15, 1827.

Prior to this Proclamation a member of this branch of the legal profession in these Islands was known simply as a "*procuratore*" or "*curiale*", the latter name conveying, it appears, not so much the idea of representation of a client, as is suggested by the former term, but rather one who moves litigation in Court. Gradually the former term became more and more widely used to the extent that the word "*curiale*" disappeared from current legal parlance. In this connection it may be interesting to note that though the term "legal procurator" is now strongly embedded in the language not only of the Courts but also of the people, and though it has not been claimed for them that our legal procurators enjoy the status of solicitors in England, it is perhaps due only to one of those strange twists of history for which there is no accounting that the members of the Maltese profession are not called by the same name as their colleagues in England Indeed we find in the *Leggi e Costituzioni Prammaticali* of Grandmaster Manoel de Vilhena (promulgated in 1723, and the first code to the printed in Malta), in Title VII para. 3, a provision to the effect that there had to be exposed in every tribunal a list of all "*Dottori e Sollecitatori approvati*". The word "*sollecitatori*" in this context may be taken as synonymous with "*procuratori*", for the next section (para. 4) debars "*Avvocati, Procuratori e Sollecitatori*" from entering into any agreement with their clients regarding causes entrusted to them;

while any remaining doubt on this score is easily banished b para. XXVI of Title XII, which, after laying down that a executive warrants had to be signed by an advocate (*giurisperit* went on to concede to "*procuratori e sollecitatori approvati*" th right to obtain such warrants in cases of contumacy or case involving sums not exceeding five "*onze*", which in present da currency would be equivalent to one pound sterling. In the *Cod de Rohan* we do not come across the term "*sollecitatore*" bu both "*procuratore*" and "*curiale*" are maintained therein.

I—INTRODUCTION: AN ANCIENT INSTITUTION

As to the time to which the existence of this profession goe back Sir Antonio Micallef, in the admirable comments to th *Code de Rohan* which he published in 1843, (Vol. I, p. 158 state that we have here a very ancient institution, and he point out that it must have existed even prior to the promulgation of th *Prammatiche* of Grandmasters Carafa (1681) and Lascaris (1640) This is desumed from Title I of the *Prammatiche* (or Constitu tions) of Lascaris (MS. No. 148, Public Library) which deal with the Mode of Proceeding in Civil Causes and contains a pro vision roughly similar to para. XXVI of Title XII of the *Costi tuzioni di Manoel* (supra) regarding the signature of executiv warrants, here also the term "*sollecitatore*" and "*procuratore*" being used synonymously. Further references to the professior are to be found in the *Prammatiche of Carafa* (MS. No. 150 Public Library), and in the *Consolato di Mare di Malta* of Grand master Perellos, promulgated in 1697 (MS. N. 392, Public Lib rary). Thus the profession may safely claim to have served the community for well over three centuries and this is no doubt a circumstance which neither the members of the profession itself in upholding its dignity, nor the authorities, in applying such reforms as may be judged consonant with the times, can afford to overlook.

1. *The element of representation* .....

And as to the functions and status of legal procurators in our system of law, while only a brief outline may be attempted here, it is not hazardous to start from the fundamental point that a procurator is generally one who acts for another. In Roman Law it was recognised that even in the solemn juridical

transaction of the "*iudicium*" it was possible, as in any private transaction, for one person to be represented by someone else, and the term "*procurator ad litem*" was applied to a person who maintained and defended an action on behalf of another. Thus there arose side by side with the representation of the tutor and of the curator, that of the "*procurator*" whether "*omnium bonorum*" or nominated for the occasion, such as the "*procurator ad litem*" who eventually came to be placed almost on a level with the older institution of the "*cognitor*". Hence the word procurator has, in different degrees in different countries, continued to be used in codes which, like ours, bear the stamp of the Roman civil law, to denote court officials having more or less a representative character. The term is not unknown even in other countries. In Scotland the term "procurator" still means a "law agent" practising in the inferior courts, the Faculty of Procurators in Glasgow having a considerable membership. In England a practitioner in the ecclesiastical and admiraly courts is still called a 'proc'tor" ,which is after all only a syncopated variant of the term so familiar to us.

This characteristic of representation goes some way, though not all, in determining the main functions of the legal procurators in our Courts. The legal relationship between legal procurator and client is similar to that between advocate and client, that is, juridically speaking it is a relationship quite "*sui generis*", though it partakes both of the contract of mandate (involving representation) and o fthe contract "*locatio operum*" (not involving representation).

The theory of the *quantum* of representation to be found in this juridical relationship was clearly expounded by the Court of Appeal in re *Dr. Alf. Mercieca et vs F. Bonaci pro et noe* (per R.F. Ganado, E. Ganado and L.A. Camilleri JJ., Law Reports Vol. XXX, I, 625) in which it was held that the employment by a trader of an advocate and legal procurator to defend him in a cause before the Commercial Court did not render the two legal practitioners persons auxiliary to the trader, in spite of the mandate conferred upon them. However much this institute has lost of its representative character there seem to be some good grounds for holding that procurators came into existence originally as representatives or agents of their client for the purpose of instituting and proceeding with a law-suit. Title XII of the *Costituzioni di Manoel*, which dealt with procedure and was

modelled on the "*rito siculo*", laid down at para. 12 that no p son was to be admitted to file any written pleading or other ju cial act, whether on behalf of plaintiff or defendant, unless had exhibited his appointment as agent or procurator for th purpose. And in the preamble to Proclamation No. XII of C tober 15, 1827, the first attempt made under British rule to gislate for the profession, we find that one of the main obje of the law was that of providing "for the appointment of skil and honest Procurators to manage suits at law for those pers who have not leisure or ability to conduct their own legal cc cerns".

II—FUNCTIONS AND STATUS OF THE PROFESSION

Of this representative character there are still sufficie traces in our law and procedure to warrant its being described perhaps the main feature of the juridical relationship betwe legal procurator and client. Except, however, in so far as co cerns the courts of inferior jurisdiction and the court of volu tary jurisdiction, to which his right of audience is limited, t legal procurator must work under the direction and instructio of the advocate engaged by the client, and we do not have ther fore the same relations as exist in England between solicitor a client or solicitor and barrister, the latter in that country bei not only engaged but also briefed (i.e. has a summary of th facts and law-points of a case drawn up for him) by the forme

2. *Evidence before the Royal Commission*

The Royal Commission of 1911, which enquired *inter ali* into the judicial administration of these Islands, was evident interested in the status of the profession and perhaps it would l difficult to provide a clearer and more concise illustration what that status is than by reproducing some questions put the Hon. Dr. Vincent Frendo Azopardi, (later Sir Vincent Fre do Azopardi), then Crown Advocate, and the latter's repli thereto :—

"*10,031. Now will you tell us about the procurators?*"

The local solicitors are styled "legal procurators". The status is different from that of the English solicitors Legal pr curators are admitted to the practice of their profession by a Go nor's warrant, as in the case of advocates. The conditions f

obtaining the warrant are, *mutatis mutandis*, the same as in the case of advocates. The legal procurators are not required to go through a regular course of legal studies or to obtain a university degree in law. They have to pursue a special course of study of the rudiments of civil and criminal law and of the practice of the Courts. The principal duties of the legal procurators are to assist the advocate, with whom they are retained, in the proceedings of the case; to file written pleadings in the Registry on behalf of the clients, and to perform generally other services in connection with the preparation of cases by the advocates. Legal procurators are admitted to plead in the Inferior Courts. They are entitled to the same privileges, and are subject to he same disqualifications, as the advocates. Their fees in civil matters are regulated by the tariffi annexed to the Laws of Organization and Civil Procedure, and in criminal matters, as in the case of advocates.

"*10,033 You say that one of the duties of the procurators is to assist the counsel in the proceedings. Does that include what we call in England getting up his brief for him?*"

No, that is done by the advocate, generally speaking. In some cases it may be done by the procurators when they are able to help in that line.

"*10,034. But that is a question between the procurator and the advocate?*"

Yes, exactly. It is not part of their duties".

(Minutes of Evidence of the Royal Commission of 1911, H.M. Stationery Office, 1912, page 276)

The Court of Appeal in re *Tabone vs Farrugia et* (per A. Dingli C.J., Naudi and Xuereb JJ., Law Reports, Vol. XI, p. 506) put the situation this way : "In law, the functions of the legal procurator are to do for his constituent, in the business committe to him, all that which according to law appertains to his profession under the direction of the advocate (where one has been engaged) and this mandate has no limits other than those flowing from the legal procurator's professional duties (Sec. 1635, Ord. VII of 1868, now Sec. 1970 of the Civil Code)". This section states that where a person has been employed to do something in the ordinary course of his profession or calling, without any express limitation of power, he shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, accord-

ing to the nature of the profession or calling aforesaid, may l done by him. Thus, in the case above-mentioned, the Court Appeal ruled that according to Sec. 208 of the Laws of Orgar zation and Civil Procedure) (now sec. 181 (1) of the Code C ganization and Civil Procedure) the legal procurator for respo dent must accept service of an appeal petition in continuation the carrying out of the mandate (unless already revoked) in virt of which he filed the act instituting the law-suit.

3. *Duties in Superior Courts*

In the Superior Courts the main functions of the legal pr curator is to assist the advocate, to file the written pleading and generally to make himself useful by attending sittings, o taining adjournments where necessary, and to await on the Cou in the absence of counsel. A curious case in connection with th last-mentioned point is reported in Vol. XX, Part I, p. 59 of tl Law Reports. In giving judgment the court of first instance ha decided that no fee should be taxed in favour of the legal pr curator for the plaintiff, as, on the cause being called, the plai tiff's counsel being also absent, the legal procurator did not a pear "to request an adjournment and to do anything else tha might be required of him". An appeal was entered and a doul arose as to whether the judgment was appealable, it being co tended that the judgment was given in terms of the provisior of the then Title XVI of Book III of the Laws of Organizatio and Civil Procedure (*Respect due to the Court*). The judgmer was held to be appealable and actually reversed on the groun that (a) even if the legal procurator's omission was a contem of court it was punishable by ammenda, multa or detention (b) the said Title did not provide for the forfeiture of fees, n did it contemplate such an omission by a legal procurator. Tl judgment, in spite of its reversal, is useful because it states i no uncertain manner a duty which no legal procurator workin in the Superior Courts should transgress.

In the Superior Courts the right of the legal procurators t file the written pleadings in a cause (Sec. 180 (b), Code of Or ganization and Civil Procedure) has now come to be considere as one of his main duties, for an advocate may not file such plead ings in the Registry, and in the absence of a legal procurator the client would,as a general rule, have to go to the Court him self for that purpose. Hence the engagement of a legal procu

rator has become, at least in practice, an almost unavoidable necessity. The right of an advocate to employ a legal procurator without the latter being directly engaged by the client was challenged in *Dr. Ant. Caruana vs Scerri* (Law Reports, Vol. XXVI, Part. I, p. 533, June 18, 1926) but the Court of Appeal (Mercieca C.J., Agius and L. Camilleri JJ.) held that according to our system of law the party who entrusts an advocate with his defence in a law-suit implicitly entrusts him also with the duty of employing a legal procurator, unless he has shown the advocate a wish to the contrary. The assistance of the legal procurator, the Court went on to say, is indispensable to the advocate in the filing of judicial acts, and the client who allows such acts to be filed by the legal procurator tacitly recognises the services rendered to him by the latter even though there have been no direct relations between them.

The signature of the legal procurator, once his services have been taken up, is required on all written pleadings together with that of the advocate, barring in commercial matters where they may be signed by the Parties (Section 178, Code of Organization and Civil Procedure). It may be interesting to compare the present state of the law on this subject with somewhat corresponding provisions of our past laws. The *Code de Rohan* (Book I, Chap. 7 ,para. 5) provided that the *Maestro Notaro* (the former title of the present day Registrar) of the *Tribunale della Gran Corte della Castellania* could not allow the filing of any act which was not signed by an advocate or by a "*curiale abilitato*", and a similar duty was imposed on the *Maestro d'Atti* of the *Supremo Magistrato di Giustizia* by para. 10 of Chap. XIII of Book I of the same Code. And as to commercial matters it is well-known that though under the *Consolato di Mare di Malta* of Perellos, which created a special tribunal for the determination of mercantile disputes, parties could be assisted by advocates or by "*procuratori matricolati*" (Title II, Chap. XVII), the chapters appended subsequently to 1697 established severe penalties against advocates and legal procurators who held up the speedy determination of a cause. (Vide *Riniero Zeno, Il Consolato di Mare di Malta,* Casa Editrice Jovene, Naples, 1936, pp. 18, 44, 57). This was perhaps logical for a Court which had to proceed "*sine strepitu et figura iudicii*". Title XXVIII ,para. 3 of the *Costituzioni di Manoel,* which also dealt with the *Consolato* and is modelled on the law of Perellos,

went even further and prohibited advocates and legal procurators from taking part in proceedings before the *Consolato* without the special permission of the Grandmaster, and the same provision was repeated in the *Code de Rohan* (Book XI, Chap. I, para. 27).

An important part of the duties of a legal procurator in the Superior Courts is that he may, (and most legal procurators serve for some period in this capacity) be appointed by the Governor, in terms of Section 87 of the Code of Organization and Civil Procedure, to perform in those Courts the duties of an official curator and of a legal procurator for the poor. In the former capacity he has, jointly with an advocate, to appear in and defend proceedings in the interest of a variety of persons, such as absent or interdicted persons, minors not legally represented, imbeciles, uncertain persons entitled to succeed to a vacant inheritance, and others (Sec. 928, Code of Organization and Civil procedure). His responsibilities in this capacity may render him personally liable to the party represented by him and his duties are clearly set forth at Section 936 of the above-mentioned Code, which provides that he has (a) to obtain for the advocate such information as to facts as the advocate shall require, (b) to file the written pleadings, (c) to be present at the hearings, and (d) to afford all other necessary assistance to the advocate. Every aspiring legal procurator, however, should make these aims his target not only in the official capacity above-mentioned but also when he is privately engaged.

It has been stated above that the legal procurator works under the direction and advice of the advocate. There is, *semble*, one case in which a legal procurator may dissent from the opinion of his advocate ,and this exception occurs in the case of his appointment by the court of voluntary jurisdiction under Section 502 of the Code of Organization and Civil Procedure in proceedings for the disencumberment of immovable property by the procedure of editcs (Law Reports, Vol. VII, p. 82, in re *Neg. Vzo. Bugeja vs Not. A.A. Fabri*, H.M. Civil Court, First Hall, per F. Pullicino J., April 18, 1874).

The only court of superior jurisdiction before which legal procurators have audience is the Second Hall of H.M. Civil Court, which is the court of voluntary jurisdiction, and as to the signature of applications filed in this court the law states (Sec. 470 (2), Code of Organization and Civil Procedure) that they

may be signed by the applicant himself, or by an advocate, notary or legal procurator.

4. *Duties in Inferior Courts*

Apart from such duties as he may take up in the Superior Courts a legal procurator is an independent practitioner in his own right in the Inferior Courts, that is, the Courts of Magistrates of Judicial Police. Indeed though advocates are by no means precluded from appearing before these Courts, and they do in fact frequently appear therein, the general practice is for litigants wheher in civil or criminal matters brought before those courts to engage a legal procurator.

III—QUALIFICATIONS

Having traced some, if not all, of the historical background of this profession, its status, and its duties in our system of law, it would not appear irrelevant to enquire into the qualifications for its exercise, and to compare these qualifications with those required of advocates. In the *Costituzione di Manoel* and in the *Code de Rohan*, its members were often referred to as "*procuratori o curiali approvati*". There seems to be no doubt, therefore, that even in those days the profession could not, at least in theory, be practised except by those who were in possession of certain qualifications, which entitled them to a licence or warrant to that end. This licence or warrant was called the "*matricola*", a word which denoted a diploma given to those who were registered as entitled to exercise an act or a profession, and hence they were also known as "*procuratori matricolati*" (Sir Antonio Micallef, loc. cit.).

What the qualifications for the exercise of the profession were is not very clear, though some light may be shed thereon. The *Constituzioni di Manoel* contained a Title (VIII) called "Of Advocates and Procurators", and the first two sections thereof dealt with the qualifications of Doctors of Laws. From these provisions it appears that advocates had to obtain a warrant from the Grandmaster, and for this purpose it was required that after having qualified as a Doctor of Laws it was also necessary for the advocate (a) to register his "*privilegio*" in the Gran Corte della Castellania; (b) to have practised continuously for two years with a senior advocate; and (c) to take the oath prescribed

for advocates at Title I, para. XIV, before the Castellano. Unfc tunately the third section quite aabruptly mentions "*sollecit tori approvati*" wihout saying what "*approvati*" really mean and there does not appear to be any elucidation of this point any other part of Manoel's Constitutions.

A partial solution is offered by Title VII, para. 7 of tl *Prammatiche* of Caraffa which laid down that the only perso who were entitled to carry out the "procura ad lites" were tho who were "matricolati con gli altri procuratori o sollecitatori abilitati da Noi" (i.e. by the Grandmaster). Even so this pr vision did not indicate the qualifications required for the Gran master's approval.

The *Code de Rohan* was at least more explicit in this r gard, Chapter XL of Book I (also entitled "Of Advocates ar Procurators") providing at para. XIX that any person seekir to be allowed to act as a procurator in the tribunals had to be *known honesty (nota probità)* and *sufficiently experienced indicial procedure and in the commilation of records*. The qual fications required of advocates by this Code may be briefly sun med up in the words of Debono (*Sommario della Legislazione Malta*, n. 241) as (a) knowledge of the civil, canon and statuto laws, (b) court practice, (c) honesty ,and (d) warrant of tl Grandmaster.

By 1827, evidently, the situation in regard to the observan of the law as to the qualifications of legal procurators had d teriorated, so much so that on October 15 of that year a Procl mation was published for the purpose of regulating the condi iions under which the profession could be exercised. Both i preamble and its substantive part make interesting reading. Tl first part of the premble has already been quoted, but the pr amble ended by saying that the Liutenant-Governor was "r solved to put a stop *to the iniurious practices of a class of me who, without any professional skill or character, make a trac of promoting litigation, and live by harassing others with friv lous and veratious actions or uniust defences*". The Proclam tion then provided that :

1. No person would be allowed to sue out any warrant other writ as Procurator in any of the Superior Courts or befo the Supreme Council of Justice, unless he were in possession a licence from the Head of the Governmnt to practise generall in the Courts or Council as a legal procurator, or unless he ha

received from the Government an official licence to act as such in a particular cause.

2. Permission to practice generally as a legal procurator was to be granted only to those who were of known honesty, furnished with sufficient experience in judicial proceedings and competently skilled in the English language.

3. The general licence under No. 1 was valid also for the Inferior Courts but these Courts could grant special licences for particular causes coming before them to persons of known probity and sufficiently experienced in judicial proceedings.

4. Any Court had power (a) to suspend the licence of any legal procurator, in so far as it related to the same Court, on proof of fraud or malpractice in the profession, or gross negligence or incapacity; (b) to order the legal procurator to pay costs to his client in case of neglect and to the opposite party for vexations conduct; and (c) to report the occurrence to the Government.

5. The offence of acting as a legal procurator without a licence was punishable by a penalty of 100 Scudi.

6. The final clause dealt with fees.

The Proclamation has to be read together with a Notification of June 18, 1814, whereby applications for the warrant or licence to practice the legal profession in any of its branches had to be made to the Governor and to be accompanied by a certificate signed by two judges regarding the applicant's character and ability, a provision which we still find in our law.

Knowledge of the English language had already been provided for by a minute published in the Government Gazette of May 17, 1820 and by a Proclamation of October 1, 1827,, but by a subsequent Proclamation dated October 25, 1830, it was declared that, without prejudice to the Proclamation of October 15, 1827, the Head of the Government could grant the necessary licence independently of the knowledge of this language.

In substance this Proclamation brought little or no change to the qualifications as set out in the *Code de Rohan*, but emphasis was placed on the control and discipline of the profession.

It is also worth mentioning that by means of a letter from the Government dated November 23, 1827, the Registrars of the Courts were informed that the provisions of the Proclamation were not to be interpreted in such a way as to exclude from appearing on behalf of their constituents and principals the man-

datories of absent parties, the legitimate representatives of nors, the administrators of *"luoghi pii"* and others entitled law to represent their constituents in judicial proceedings. T letter is relevant to the present subject ,not, of course, for legislative value, which is nil, but as it lends srength to w has been stated above in the sense that, in its beginnings, profession found its main element, if not its *raison d'etre* in idea of representation

Writing at a time when this Proclamation was the only governing the qualifications of legal procurators, (in fact it not repealed until Ordinance No. IV of 1854) Sir Antonio callef (op. cit p. 160), states than on obtaining the Governo licence for the practice of their profession legal procurators we like advoccates, to take the Oaths of Allegiance and of Of before the President of the Court of Appeal. The reference Micallef to the Oath of Allegiance clearly indicates an inno tion brought about under British rule, for under the *Costituzi di Manoel* and the *Code de Rohan* there was only the oath "F mula Juramenti Praestandi Per DD. Advocatus", the word of which referred only to professional duties, and this was administered to procurators. Debono (loc. cit.) makes no ref ence to the need of taking any oath by procurators under th laws. It is perhaps strange that in the *General Constitution all the Superior Courts of Justice*, brought into effect under then Governor, Sir Thomas Maitland, that great contribu towards the advancement of the administration of justice in th Islands, by Proclamation No. XV of May 25, 1814, there is mention of these oaths. But in the *Constitution of the Comm cial Court*, which came into force, together with that of t other Courts, by virtue of the same Proclamation, we find th para. 7 provided as follows :—

"All Advocates, Attornies, (procuratori in the Italian te and other officers of the Court, shall, on their appointment their said offices, take the Oath of Allegiance and the followi oath for the due execution of their respective duties....."

The Oath of Office was worded in substantially the sa manner as the oath nowadays prescribed by Section 84 of t Code of Organization and Civil Procedure.

In his comparison of the status of advocates with that legal procurators in his time Sir Antonio Micallef (loc. cit.) sta that they both occupied offices of a public rather than of a p

vate nature. To-day we still find this principle enunciated in Section 31 of the Code of Organization and Civil Procedure which provides that both advocates and legal procurators when they appear before the Superior or Inferior Courts shall be deemed to be officers of the Court. He also points out these differences : (a) that legal procurators, unlike advocates, could agree with their clients regarding the fees payable to them, while advocates could not demand more than was taxable to them. Section 80 of the Code of Organization and Civil Procedure provides also that an advocate may not by agreement fix his fees at an amount higher or lower than that fixed in the Code, saving when for some particular purpose of the contending party the action is restricted to an interest smaller than that on which the decision will have a bearing. This section, however, does not mention legal procurators; (b) that advocates wore a silk gown and legal procurators woollen ones. Nowadays legal procurators do not wear a gown.

IV—OTHER RIGHTS AND DUTIES

When eventually the new Laws of Organization and Civil Procedure were promulgated (Ordinance No. IV of 1854) the qualifications set out at Sections 101 to 103 were the following : (a) Warrant from the Governor; (b) Oaths of Allegiance and Office; (c) good conduct and good morals; (d) a native born British subject; (e) possession of a Lyceum and University certificate of a good knowledge of arithmetic and handwriting, and of having, after being admitted to the University, attended therein the lectures prescribed for legal procuraors; (f) practice for a period of not less than a year with a practising advocate; (g) examination by two judges and certification by them as being in possession of the above qualifications and competent to act as a legal procurator. The present Code contains no substantial divergencies from the above, saving that the qualification at (c) has been adequately tightened in the sense that mere attendance at University lectures is not enough, but the applicant must be approved by the examining board of the Faculty of Law. This amendment was made by Ordinance No. IX of 1886. The qualification at (d) has been amended by the condition that the period of practice must be subsequent to the passing of the examination mentioned at (c). Approval in this examination entitles the successful candidate to a University diploma.

Now as to their various rights and duties under the law advocates and legal procurators are subject to much the same principles and rules.

1. *Liability*

And first, taking the question of liability towards their clients the basic principle repeated in a string of judgments is that liability must be subject to the proof of malice (*dolus*) or fault (*culpa*), and that a legal practitioner is not liable in damages merely because he is found to have acted in error, unless the error be so manifest as to force to the conclusion that it was born of *culpable ignorance* or *evident incompetence* (Court of Appeal, *Cremona vs Cremona*, February 13, 1905; also *Barbara vs Notary Vella*, January 1, 1929, per Mercieca C.J., R.F. Ganado and P. Pullicino JJ., Vol. XXVII ,Part I, p. 262; and more recently, *Buttigieg vs Hirst noe*, February 16, 1945, per Borg C.J., Camilleri and Harding JJ.). This is by no means a far cry from para. 6 of Title VII of the *Costituzioni di Manpel*, which, while rendering advocates and legal procurators liable in damages ,costs and interest in favour of their client in the event of a cause being lost through their fault or ignorance, restricted such liability to cases of "*supina, manifesta ed inescusabile colpa ed ignoranza principalmente ex defectu solemnium et formalitatis processus*".

2. *Privileged communications*

Communications made to a legal procurator are privileged as in the case of an advocate, provided in both cases they have been made in professional confidence (Sec. 638 Criminal Code and Sec. 587 Code or Organization and Civil Procedure). The latter provision adds an important condition in the sense that the communication must be made "in reference to a cause". The inviolability of professional secrecy has also been exteneded to documents obtained in professional confidence (Law Reports, Vol. XXV, Part I, p. 799 ,and Vol. XXVI, Part. I, p. 20). An interesting judgment is reported at Vol. III, p. 497 of the Law Reports, where the Civil Court allowed the plaintiff, in spite of objection raised by the defendant, to call as a witness a legal procurator in order to testify on facts learned from defendant's mother in the course of giving her professional assistance in certain judicial proceedings against defendant himself. The

Court, admitting the evidence, held that the above quoted Section 587 of the Code of Procedure (then Section 599) referred only to circumstances learned from the parties to the suit or to facts which might affect the legel procurator's or advocate's client, but not to third parties. The legal procurator was in fact ordered by the Court to reply to all questions put to him as long as they did not affect the property or interest of defendant's mother. The point does not seem to have been tested again in any reported case and it is perhaps a matter for conjecture whether a similar ruling would be given to-day. The English practice does not seem to be in agreement with the view held by the Court, and Taylor (On Evidence, 12th Edit., Vol. I, p. 580, para. 919), says that "the protection afforded to professional confidence applies with equal force though the client be in no shape before the court". In the case of a solicitor called upon by subpoena or otherwise to produce a document with which he has been confidently entrusted by some stranger to the suit, if he claimed the privilege of the client, he would be protected not only from producing the document but from answering any questions with regard to its nature. He concludes by stating that though there have been precedents in which the Court has inspected the document and pronounced on its admissibility, it seems to be now settled that in strict law the judge ought not to look at the writing to see whether it is a document which may properly be withheld. Of course, in our case, the wording of the text seems to argue that the communication, to be privileged, must be made not only in professional confidence but also *in reference to the cause* and this last phrase is bound to play an important part in the determination of such an issue.

3. *Pactum quotae litis*

Legal procurators, like advocates, are debarred by Section 81 of the Code of Organization and Civil Procedure from entering into any agreement or stipulation *quotae litis*, which by Section 1029 of the Civil Code is declared to be void. This refers to agreements whereby an advocate or legal procurator stipulates that in the event of a successful outcome of the cause he shall rceive a determined portion of the award, that is to say, he actually purchases the cause entrusted to him. In our law this was also prohibited by the *Code de Rohan* (Book V, Chap. IX, para. 1), and after the repeal of that Code, was re-introduced by

Section 37 of Ordinance V of 1859, later incorporated as Section 692 of Ordinance No. VII of 1868 (now Section 1029 of the Civil Code) as far as concerns the civil law, and by Section 100 of Ordinance No. IV of 1854 as regrds the law of procedure. The origin of this provision goes back to Roman Law (L. 1, para. 12, D. de extraordinaria cognitione (L. 13); L. 53, D. de pactis (II. 14). Micallef (op. cit. p. 155) describes it as an odious contract which is an impediment to the amicable settlement of lawsuits and it is, of course, absolutely below the dignity of the legal profession.

While on this point it may be as well to recall that though there is no express provision of law on the subject, legal doctrine has extended the nullity of the pact *quotae litis* to any stipulation by which any legal practitioner agrees not to be paid any part of his fees except in the event of the cause being won (Giorgi, Obbligazzjoni, Vol. III, para. 377; and our Law Reports Vol. XXVII, Part I, p. 225).

As to the rules of professional conduct legal procurators are likewise subject to the same rules as advocates. The law on this point is to be found at Book III Title XVII of the Code of Organization and Civil Procedure, entitled *Of Respect Due to the Court and of the Discipline of the Legal Profession*, the main provision of which are the following :

Section 990 provides punishment of fine (multa or ammenda) or detention for contempt of Court by the use of indecent words or gestures during the sitting or insulting any person.

Section 992 provides that in serious cases the Court may condemn the advocate or legal procurator to interdiction from his profession for not more than one month.

Section 993 provides against the use of insulting or offensive words if not necessary for the cause in any written pleading.

Section 995 directs the Court to repress any excess on the part of an advocate or a legal procurator in the discharge of his duties, and at the same time to ensure the most ample liberty to any advocate or legal procurator in the discharge of his duties consistently with the law, and to repress any improper behaviour towards him.

These provisions, however, cover only cases of actual contempt of court, and, saving Section 82 of the same Code and Sections 120 and 121 of the Criminal Code, which cover cases of extremely rare application, there was no provision in the law,

at least up to 1913, for the exercise of discipline over the profession by the Courts. By Ordinance No. XV of 1913, due to the work of the Royal Commission of 1911, which had shown an evident interest in the matter (*Minutes of Evidence*, p. 218, questions 8071 to 8077 and *Report*, under the heading of The Legal Profession, para 261, pp. 37, 38) an amendment was brought to Section 995 empowering the Court of Appeal to inquire into any complaint made to it by the Attorney-General or by the President of the Chamber of Advocates regarding any *abuse or misconduct* attributed to any advocate or legal procurator in the exercise of his profession and in connection with his professional duties. The Court may repress such abuse or misconduct by reprimand, ammenda, multa, detention or temporary interdiction from the profession after allowing the practitioner full opportunity for his defence.

By a further amendment brought by Ordinance No. II of 1947 the employment of touts and any agreement between advocates, notaries and legal procurators for the sharing out between them of fees earned in respect of professional work were declared to be abuses within the meaning of the section. The right of bringing complaints before the Court of Appeal was by this Ordinance also extended to the Registrars of the Courts.

Thus between the promulgation of the law of procedure in 1854 and 1913 there was really no provision for the discipline of the profession in cases of misconduct not of a criminal nature. But it is interesting to note that by a Minute dated October 28, 1816, published in the Government Gazette, the Governor "deemed it expedient to state to His Majesty's Judges" that they had power to suspend an advocate from his functions only for notorious, flagrant and evident corruption and misconduct or for actual contempt of Court", but that in all other cases they had to notify the Government of any exception taken against an advocate. The *Code de Rohan* (Book I, Chap. XL, paragraphs XXI-XXII) laid down that "if any advocate or procurator shall put aside his integrity and honesty and shall have no other purpose but that of increasing the number of law-suits entrusted to him, or, to please litigants, shall give way too easily to their wishes, vexing others with delays and unjust claims, he shall be debarred from carrying out his functions. If he shall fall short of his other duties or fail to comply with the provisions of this chapter, he shall be liable to suspension ,and all agreements entered

into by him shall be void". The Code, however, failed to state by whom these penalties were to be applied.

Under the present law both advocates and legal procurators are also subject to two provision of the Criminal Code. Section 120 renders them liable to a fine and to temporary interdiction from their office, if, having commenced to act for one party, they shall in the same law-suit or in any other matter involving the same interest, in opposition to such party or any person claiming under him, change over without his consent, and act on behalf of the opposite party. This provision of the Criminal Code was by no means an innovation as it was included, though in a somewhat different wording, in the *Code de Rohan* (Book I, Chap. XL .para. 10) as well as in the *Costituzioni di Manoel* (Tit. VIII, para. VII).

V—RULES OF PROFESSIONAL CONDUCT

By Section 121 of the Criminal Code any advocate or legal procurator who shall betray the interests of his client in such a manner that in consequence of his *betrayal* or *deceitful* omission, the client shall lose the cause or any right shall be barred to his prejudice, is liable to hard labour from seven to eighteen months and to perpetual interdiction from his profession. There seems to have been no equivalent provision in the *Code de Rohan* and the provision of para. VI of Tit. VII of the *Costituzioni di Manoel* (supra) seems to have contemplated only cases of *negligence* and not of malicious *intention*. Of course these provisions of the Criminal Code are quite formidable but there seems to be no reported case in which they have been applied.

Section 82 of the Code or Organization and Civil Procedure, moreover, provides that a conviction of any crime liable to imprisonment for a term exceeding one year other than involuntary homicide or a crime excusable in terms of the Criminal Code, shall be a cause of perpetual disability to practise the profession of advocate. The Governor may at any time remove the disability. Legal procurators are also subject to this provision (Section 86).

In paragraph V of the Title VII of the *Costituzioni di Manoel* we find a provision whereby an advocate or legal procurator, having embarked on a cause, was obliged, unless excused by a just cause, to continue his defence of it up to the last act of execution of the judgment. This provision was not reproduced in

the *Code de Rohan* (Micallef, op. cit. p. 156) and finds no counterpart in the law of to-day, and indeed it appears to be in conflict with the principle that legal practitioners exercise their profession freely, so much so that Item No. 28 of Tariff G appended to the Code of Organization and Civil Procedure fixes a fee for the advocate who *abandons* or is abandoned by his client. Of course, there is nowadays the same restraint, but coming from a different source, that is, the ethics of the profession, as no self-respecting legal practitioner will abandon his client midway trough a cause without a good reason, though he may, of course, refuse to accept any case without assigning any reason.

1. *How established*

As to the question of fees and other remuneration for the services of legal procurators the law thereon has also been evolved within the same framework as that concerning advocates.

Starting from the *Costituzioni di Manoel* we find therein a whole Title (XXIX) on the fees payable to judges, advocates and others, and Chapter IV of this title deals particularly with the fees of advocates and legal procurators. It contains a paragraph fixing their fees even in criminal matters, a field in which the present Law and Civil Procedure does not enter except in so far as concerns criminal cases before the magistrates. The provision of those *Constitutions* which is of greatest interest to the present subject is paragraph XVI which provided that the fee payable by the client was to be divided into three parts, two to go to the advocate and one to the procurator. As we shall see this proportion was later changed, the legal procurator becoming entitled to only a third of the fee due to the advocate. Paragraph XXIV of the same title laid down that any advocate or legal procurator who exacted a higher fee than that allowed by law was to be deemed guilty of *extortion*. The only corresponding provision in the law of to-day is Section 80 of the Code of Organization and Civil Procedure (*supra*).

In the *Code de Rohan* we do not find a separate provision dealing with fees, but the subject is taken together with the qualification and duties of advocates and legal procurators at Book 1, Chapter XL. The fees were not laid down specifically, but that there was some system of taxing them is obvious from paragraph XIII, which provided that advocates could not claim fees higher than those taxed in their favour, and that it was not law-

ful for them to agree with their clients in any other manner, saving their right to accept any hgher reward offered spontaneously by a client.

Where, however, (para. XX) any of the parties to a suit wished to engage a procurator, such party and the procurator could come to a private agreement as to the fee payable to the latter. Micallef (op. cit. p. 160) emphasises this difference between the two branches of the profession, since advocates could not in view of the above mentioned provision of the *Code de Rohan* came to a similar private agreement. In the absence of such an agreement the client had to pay the procurator one third of the whole fee payable to the advocate. This marked a substantial difference from the moiety of the whole fee for the case allotted to the procurator under the laws of *Manoel*, and the fee payable to the legal procurator in the Superior Courts has remained fixed at one third of the advocate's fee ever since. This provision of the *Code de Rohan* ended by stating that where the procurator was engaged by the advocate, the latter had to pay the former out of his own fee. This rule has not been reproduced. Indeed, as we have seen, the client has to meet the fee of the legal procurator engaged by his advocate.

VI—FEES

Both the *Costituzioni di Manoel* (Title XXIX, Chap. IV, para. XXV) and the *Code de Rohan* (Book VII, Chap. XVIII, para. XXVII) contained a provision to the effect that in mercantile matters, where an advocate or procurator had been permitted to appear in the office of the *Consolato del Mare* his fee was taxable at only one third of that taxed in favour of the Consuls and Assessors.

We next come to the Proclamation of October 15, 1827 the main provisions of which have already been examined. As to the fees of the procurator it was provided therein (Section 6) that if he had carried out his duties with diligence, ability and honesty he was entitled to any resonable fee which his client agreed to pay him, and, in the absence of such an agreement to a fee proportionate to the importance of the suit, to the time and labour devoted thereto, and to the financial condition of the client, such fee to be taxed by the Court of trial and to be recoverable even by an executive warrant.

It will be noted that this Proclamation did not specify any proportion between the fee of the advocate and that of the procurator. However, we have it on the authority of Micallef (op. cit. p. 160) that it was not the pracice to tax the procurator's fee at more than one third of that of the advocate.

Now, as to the law to-day, the main provision is at Sec. 1003 of the Code of Organization and Civil Procedure which states that costs are taxed and levied in accordance with the Tariff in Schedule A annexed to that Code. Tariff G of this Schedule is entitled "Fees Payable to Advocates, Legal Procurators and Official Curators", and No. 32 of the Tariff lays down that legal procurators shall receive one third of the fees allowed advocates, with a few exceptions, principally regarding work which either according to law or the custom of the profession is not done by procurators but by advocates. In the case of these exceptions, such as, for example, an opinion or for drafting a deed or perusing a draft deed to be published by a notary, the law apparently does not fix any fee for the legal procurator, but it is equally true that if he does this kind of work he is not thereby doing anything which is against the law and he is therefore entitled to some remuneration as a non-gratuitous agent or as a "*locator operum*". This was held in re *Parascandolo vs P.L. Lanzon* (Court of Appeal April 17, 1925 per Mercieca C.J., G. Agius and L. Camilleri JJ., Vol. XXVI Part I, p. 83 of the Law Reports).

The fees of legal procurators, together with those of advocates, when required to appear before the Inferior Courts, are fixed by No. 34 of the Tariff. Those in respect of sea-protests or proceedings concerning average in H.M. Commercial Court are fixed by Tariff N.

As to the fees payable to advocates, legal procurators and notaries in respect of extra-judicial services, their taxation falls within the competence of the Court of Voluntary Jurisdiction under whose authority the Registrar taxes such services on the demand of any interested party, saving the right of appeal by a **writ of summons, within one month**, to the Court of Contentious Jurisdiction. The demand for the taxation is made by means of a note showing the services in respect of which it is demanded, and the note, if the demand is made by the creditor has to be confirmed by him on oath. (Sec. 555 Code of Organization and Civil Procedure).

The main difference between taxed bills obtained under the above-mentioned provision and taxed bills in respect of judicial fees and disbursements is that the latter provide, while the former do not, the advocate or legal procurator in whose favour they are issued with an executive title, that is, the right of recovery of the sum approved thereon may be enforced by an executive warrant after the lapse of at least two days from the service of an intimation for payment made by a judicial act, generally an official letter, provided, of course, the taxed bill has not in the meantime been impugned by the debtor. The time limit for impugning a taxed bill is also in this case one month [Secs. 251 (c), 254 (2), 274, 62 of the Code of Organization and Civil Procedure].

2. *Privilege*

In certain cases legal procurators, like advocates, have a privilege, that is to say, a right of preference over other creditors, even hypothecary ones, for the recovery of their fees and expenses. In our law privileges, of course, may exist over movables as well as over immovables and they may be either general or special (Secs. 2103, 2104, 2105 Civil Code), and the privilege here under review is a special one. As far as it concerns movables it operates in favour of the advocate and legal procurator over the particular thing which is recovered by means of the action wherein they are engaged, and their fees and disbursements in respect of which are therefore so secured (Sec. 2113 (d) Civil Code). As to immovables, it applies in their favour for the fees and expenses due to them in the action for the recovery of an immovable, over the immovable itself, if recovered (Sec. 2114 (c) Civil Code). It was explained by G. Pullicino J., in *Dr. Caruana vs. Sacco* (Civil Court, First Hall, October 13, 1899, Law Reports Vol. XVII, Part II, p. 125) that the justification of this right of preference is that it guarantees adequately to lawyers the honorarium due to them in so much as their services are beneficial to their debtor, and that it prevents the possibility of these services being exploited by third parties. This privilege was recognised in the practice of our Courts even before it was placed on the statute book by Sir Adrian Dingli through Ordinance No. XI of 1865 and is founded on the rule of equity "*neminem licet locupletari cum aliena jactura*" (Vide Micallef op. cit. p. 162; and Law Reports, Volume of Judgments January-June 1841 p. 166). In the first quoted judgment it was held that

the privilege continues to exist even if the recovery is obtained as a result of a compromise, and in the second and older judgment the right of preference was placed higher than that of a wife claiming by a reason of dowry.

3. *Prescription*

And lastly the law regarding the prescription of the action of legal procurators for their fees and disbursements is the same as that touching advocates. Section 2254 (c) of the Civil Code, in fact, states that their action, like that of notaries, architects and other persons exercising a profession or liberal art is barred by the lapse of *two years*.

The present law in this respect is somewhat divergent from the old law on the subject. The *Costituzioni di Manoel* (Title XII, para. LXVI) after laying down that the institute of prescription "being founded on the canon and civil law", was to be recognised by the Courts, went on to say that "in the case of personal services such as Doctors, Surgeons, Advocates or Procurators or other privileged persons, in adherence to Chapter 62 of King Ferdinand, the right of action for their services is prescribed by the lapse of five years". The *Code de Rohan* (Book II, Chapter V, para. 3, 4) fixed this period at five years during the lifetime of the debtor or one year from his death, the latter period to run "*a die scientiae*".

As Micallef (op. cit. p. 315) points out this period of prescription is a "brief" one, that is, it renders the right of action and the credit to which it relates ineffective but it does not extinguish them, and it is founded on the presumption of payment in view of the effluxion of the time determined by law. Consequently the advocate or legal procurator against whom this plea may be set up in bar may subject the debtor to the oath as to whether he can declare that he is not debtor or that he does not remember whether the sum has been paid. In the event of the oath being deferred to the heirs of the alleged debtor, the plea shall not be effectualy if such heirs do not declare that they do not know that the sum is due. This rule is now laid down in Section 2365 (1) of our Civil Code.

With regard to "brief" prescriptions of this nature it is safe to state that it is now well settled that they may be set up by the official curators of an absent person or of a vacant inheritance without their being bound to take the oath under that section of the Code. There was for a long time much controversy on

this point and the earlier judgments were in a contrary sense (*Law Reports* Vol. VI, p. 396; Vol. VIII, p. 471; Vol. XI, p. 254; Vol. XIII, p. 61; Vol. XXIV, II, 684; Vol. XXV, I, 624). Gradually, however, the Courts came more and more into line with the view that the right to subject the alleged debtor to the oath is only a means of rebuttal of the plea of prescription, of which the creditor is deprived in this case, thus leaving the plea unrebutted (*Law Reports*, Vol. IX, p. 459; Vol. XIII, p. 112, a judgment of Sir Adrian Dingli; Vol. XVI, p. 298; Vol. XX, I, 213; Vol. XXVIII, III, 1251; Vol. XXX, I, 27; and also *Baudry—Lacantinerie & Tissier*, Prescrizioni, p. 746; *Ricci*, Vol. V, p. 285; *Giorgi*, Vol. VII, para. 398).

WHEN LAWS ARE MANY:

Corruptissima in republica plurimae leges.—**SENECA.**

La moltiplicità delle leggi e dei medici in un paese sono egualmente segni di malore di quello.—**ITALIAN PROVERB.**

Je Mehr Gezetze, je weniger Rect — **The more laws the less justice.** —**GERMAN PROVERB.**

BROUGHAM'S DEFINITION:

The lawyer is a gentleman who rescues your estate and keeps it to himself.

THE INTELLECTUAL PROFESSIONS:

Five great intellectual professions have hitherto existed in every civilized nation; the soldier to defend it, the physician to keep it in health, the lawyer to enforce justice in it and the merchant to provide for it and the duty of all these men is, on due occasion, to die for it.—**RUSKIN.**

"The doctor sees all the weakness of mankind, the lawyer all the wiskedness, the theologian all the stupidity.—**SCHOPENHAEUR.**