THE LEGAL PROCURATOR

(PART II)

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III QUALIFICATIONS (cont.)

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 procurators; (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 divergences 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.

IV OTHER RIGHTS AND DUTIES

Now as to their various other 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 VIII of the *Costituzioni di Manoel,* 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 of 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 extended 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 legal 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 interests 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 pro-

tection 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 confidentially 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 by 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 receive 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 regards 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. In the case *Dr. G.M. Camilleri vs. W. Parkey noe* (7/9/1973) the Court of Appeal held that an agreement for fees payable to a lawyer in respect of extra-judicial services was not invalid by reason of the prohibition of the *pactum quotae litis*, there being no *lis*, and that the provisions of the Code of Organisation and

Civil Procedure relating to the taxing of fees for such services ap plied only where there is no such previous agreement.

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

V RULES OF PROFESSIONAL CONDUCT

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

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

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

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

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

These provisions, however, cover only cases of actual contem of court, and, saving Section 82 of the same Code and Sections 1 and 121 of the Criminal Code, which cover cases of extremely ra application, there was no provision in the law, at least up to 191 for the exercise of discipline over the profession by the Courts. Ordinance No. XV of 1913, due to the work of the Royal Commissi of 1911, which had shown an evident interest in the matter (*Minut of Evidence,* p. 218, questions 8071 to 8077 and *Report,* under t heading of The Legal Profession, para. 261, pp. 37, 38) an amen ment was brought to Section 995 empowering the Court of Appeal

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 Registrar 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 provisions 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).

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. VIII 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 of 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 Title VIII 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 judgement. This provision was not reproduced in the *Code de Rohan* (Micallef, op. cit. p. 156) and finds no counterpart in the law of today, 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 through a cause without a good reason, though he may, of course, refuse to accept any case without assigning any reason.

VI FEES

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 Criminal Code does not enter except in so far as concerns criminal cases before the Courts of Magistrates. Unfortunately, the relative Schedule C has not been revised since its first introduction in 1921 and the statutory maximum is therefore definitely on the low side. 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 qualifications and duties of advocates and legal procurators at Book I, 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 lawful for them to agree with their clients in any other manner, saving their right to accept any higher 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* come to a similar pri-

vate 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.

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 reasonable 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, 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 practice to tax the procurator's fee at more than one third of that of the advocate.

Now, as to the law today, 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 to 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 the 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 1856 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, Chap. V., paras. 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 effectual 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. VIII, para. 398).