

Book II.
Title LVI (LVII).

Concerning the giving of a surety.

2.56.1. Emperors Diocletian and Maximian and the Caesars.

It is not uncertain law that a man who is appointed as procurator (agent) of plaintiff by enrollment on the records (apud acta),¹ need not give surety that the principal will ratify the proceeding, for in such case he is to be considered as appearing as the procurator of a person present in court.

1. Thus although the plaintiff thereafter, changing his mind, does not want him to act as procurator, the judge must, nevertheless, uphold the proceeding in which he acted as such.

2. But if in the very beginning of the case, an (affirmative) claim (the subject of a counter-action) is interposed by the adversary, he, too (the procurator) is compelled, as though in this matter procurator of an absent principal, to give a surety to accept (undertake) the suit (in connection with the affirmative claim), and unless that is done, the suit entrusted to him will not be permitted by the judge to proceed.

3. The procurator or defender of a defendant, however, even though his appointment is shown by proof of record, is compelled, at the very threshold of the suit, to give surety that the judgment will be satisfied.²

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¹ [Blume] i.e., by statement in open court, of which a record was made. That, perhaps, might be in a court other than that in which the suit was pending, or by any one with the right of making public records. Bethmann-Hollweg, Versuche, 200; Eisle, Cogn. und Proc. 164, 165. But see Vat. 317.

² [Blume] With us, an attorney is presumed to have authority, though his principal is absent. Not so with the Romans, either in the case of a simple procurator or an attorney. One acting for an absent principal had to give a bond, except that a plaintiff's agent did not need to do so if it was certain that he was agent. C. 2.12.1 note.

If an agent brought the case, and the defendant set up a counter-claim, and the principal was absent, the agent had to give bond that the judgment on such counter-claim would be satisfied—for he was in that respect a defendant—under the rule that a man could not sue, if he was not willing to defend. C. 2.12.5. The claim of defendant would, doubtless, be litigated in the same proceeding and before the same judge. Eisele, *op. cit.* 167, note 117.