

Book II.
Title XII.

Concerning procurators.

Headnote.

The term “procurator” was more or less a technical term, generally used, particularly in early law, to designate a manager, a general agent, a factotum, frequently employed by rich and noble Romans to manage all, or a large share, of their extensive business. He was a trusted man, and ordinarily a freedman of the principal. Schlossmann, Besitzerwerb, 89-125. Such agent was, at least in classical and later law, governed by the rules of mandate (C. 4.35). In other words, he was a general agent who had been given general authority to act, although, in later law, we find the term applied also to one who was authorized to do only a specific thing, for instance, to conduct a lawsuit. L. 10 h.t. D. 3.3.1 pr. In a few instances the term was also applied to one without authority (Cons. 3.6.; Gaius 4.84) although he was then ordinarily, in later law, called a false procurator. L. 24 h.t. In other words, the term procurator ordinarily meant an agent with authority. If an agent had general authority, that implied and carried with it the power, without further specific authority, the ordinary things connected therewith. L. 16 h.t. For acts outside of the ordinary scope of such agency, specific authority was required, in order to make them binding. A procurator, then, was a mandatary to the extent stated, but a mandatary—one acting under a mandate—might not be a procurator, i.e. general agent.

The instant title deals mainly, though not entirely, with procurators in a lawsuit in civil cases. Agency in other matters is considered in C. 4.25-27; 35.

Lawyers, while also agents in a certain sense, were not considered procurators. They would act for the latter in the same way as for anyone else. In the course of time, however, and at least in the later empire, it became usual for a principal to appoint a lawyer as his procurator, who would then act in two capacities. L. 27 h.t. See generally, Schlossmann; Pernice, Labeo 48 ff; 32 Z.S.S. 280-281; 46 Z.S.S. 138, 474, 476.

2.12.1. The divine Pius to Severus.

A bond that the principal will ratify the transaction is demanded of a procurator when it is uncertain whether the suit has been entrusted to him. Promulgated Oct. 12 (150).

Note.

Representation in lawsuits was not, except in exceptional cases, permitted in the early period of the Roman law. A party thereto was required to appear personally and conduct his own suit, though he might be assisted by counsel. G. 4.82. Representation was permitted during and after the formulary period (C. 2.57), but only in an imperfect sense. For just as an agent, making a contract for another, was required to make it in his own name (C. 4.27.1 note), just so the striking peculiarity existed, and was continued, in suits, that when an agent sued upon the claim or right of a principal, though the instructions in the formulary procedure, and the pleadings of the later period, made reference to the original ownership of the obligation, the judgment rendered was in favor of the agent, and when an agent defended, judgment was rendered directly against him, and not against his principal. Gaius 4.86.87; Theoph. 4.10.2. A judgment rendered against the principal in the latter case was void. C. 7.45.1. In other words, the agent

carried on the suit in his own name. This peculiarity led to requirements not necessary in direct representation. Thus an agent who defended might be a pauper. Hence he, or his principal, were always required, even in Justinian's time, to give bond that the judgment would be satisfied. Gaius 4.101; L. 12 h.t. C. 2.56.1. Exceptions came to be made for legal representatives. When, on the other hand, a plaintiff sued by agent, the defendant took no risk if the agency was unquestioned, so the situation was different here. Hence if an agent was appointed by plaintiff in a formal, ceremonial manner, in the presence of the adverse party—such agent being known as cognitor—he was not required to give bond, since his authority was certain. Gaius 4. 97. But an agent's authority might not be certain, and, of course, the principal was not bound when no such authority existed (C. 7.56.1). Hence he was in such case required to give bond, that his principal would ratify his acts—such agent being known as procurator. Gaius 4.98. But gradual changes took place; the requirements in connection with the appointment of an agent for a suit became less formal, or different; the term cognitor went out of use, and when the authority of a procurator was certain, no bond that the principal would ratify was required. Inst. 4.11.3. C. 2.56.1. A similar rule applied to statutory representatives. C. 5.37.13; D. 26.7.23; D. 3.4.6.3. Gaius 4.99.

Since a judgment was rendered for or against the agent, we should logically expect that it should be enforceable by or against him. And that was probably true, originally as to all procurators, but so far as we know, it was never true as to cognitors. Vat. 317.331. And finally, judgments in favor of procurators or statutory agents were always enforced by the principal, and judgments against procurators—and statutory agents were always enforced by the principal, and judgments against procurators—and statutory agents, were always enforced against the principal—if binding on him—except where the procurator acted for his own benefit (C. 4.35 headnote) or when he defended, knowing that the required bond was not given. D. 3.3.61. Thus the rule of direct representation was approximated, but in an illogical manner. Furthermore, substitution of principal for agent, and vice versa, during a lawsuit, was permitted in case of necessity. Laws 20, 22 h.t. And if a procurator who sued for the principal died, the latter succeeded him in the case. L. 28 h.t.

See generally, Eisele, Cognitur und Procuratur; Wlasack, Negotiolum Gestio, c. 5; Wenger, Zivilprozess 84 ff. 313; 2 Bethmann-Hollweg, Civilprozess 416 ff.; 3 Bethmann-Hollweg 167-168; Rümlein, Stellvertretung.

2.12.2. The divine brothers to Sextilia.

Since you say that the matter involved the payment of money in a civil suit, you can, by observing the usual formalities, answer the appeal of your adversary through your husband, since appeals involving the payment of money in civil suits can also be prosecuted by procurators on the part of both of the litigants.
Received July 25 (161).

2.12.3. Emperor Severus and Antoninus to Pomponius.

Sue the person who manages the property of the heirs, who, as you claim, owe you a trust estate, before the honorable praetor, and he will either be compelled to answer you or he will be forbidden the management of the business, according to the perpetual edict (formam jurisdictionis). 1. The praetor, moreover, if the agent does not defend the heirs, will consider whether he should put you in possession, for he will observe the provisions of the edict usually employed against those who are not defended.

Promulgated August 23 (204).

Note.

An agent who sued was required to defend a counter-claim against the principal. 1. 5 h.t. The instant rescript seems to go much farther. Generally an agent was not required to act in matters which he had not undertaken to do. L. 17 h.t. There were exceptions. Near relatives who acted as agents were required to defend. D. 3.3.33 pr. An exception seems also to be added in this rescript.

If a defendant could not be summoned and was undefended, plaintiff could be put in possession of his property. C. 7.72.9. Moreover, there was a general provision that a legatee or beneficiary of a trust. Left by decedent, could be put in possession of the property of the heirs, if there was delay in payment. C. 6.54.6.

2.12.4. The same emperors to Saturninus.

Since you say that the judgment was rendered in your absence, it is just that the defense of the cause should be restored to you; nor is it a valid objection against you that your wife was present at the trial or even acquiesced in the decision, since women cannot manage the affairs of others unless rights of action are set over to them for their own benefit, and their own gain.

Promulgated January 4 (207).

Note.

The woman's appearance in the case did not bind the husband, since she was disqualified to act for him. L. 18 h.t. For this reason, and because he had been absent, the case was reopened. C. 2.53.1 note. Others, too, as a defendant in a criminal case (L. 6 h.t.) and a soldier (L. 7 h.t.) could not act as agent for another in a lawsuit. A woman could appear for her parents in case of necessity, on good cause shown. D. 3.3.41. See Steinwenter, Versäumnißv. 69 note 3.

2.12.5. Emperor Antoninus to Pancratia.

It is already stated in the perpetual edict that an action should be denied one who wants to sue in the name of another, if he does not also defend him in a counter-action. Promulgated February 27 (212).

Note.

If the defendant whom the agent sued had a counter-claim or independent claim against the principal and sued thereon in the same jurisdiction in which the agent brought the suit (D. 3.3.35.2), the agent was bound to defend such claim. C. 2.56.1. That would, of course, be ordinarily just. An exception was made when the agent was the owner of the claim on which he sued, and which he had bought in good faith. D. 3.3.35. There is much dispute as to this exception.

2.12.6. The same emperor to Marcianus.

It is not unknown that a person who stands accused of a crime cannot undertake the defense of a case (of another) until his own innocence is established. Given February 24 (223).

2.12.7. The same emperor to Macrinus, a soldier.

A soldier must not act (in a suit) as procurator either for his father, mother or wife, even if he has an imperial rescript, since, for the public good, he is permitted neither to defend another nor purchase another's lawsuit, nor appear as a supporter of another.

Promulgated March 8 (223).

2.12.8. The same emperor to Mansuetus.

If anyone has commissioned you to collect a debt for him, you cannot, before joinder of issue, commission another to do so.

Promulgated August 25 (223).

Note.

Joinder of issues in a case operated as a novation of an obligation sued on. An agent suing became, theoretically, principal in the case, and hence could thereafter himself appoint an agent. L. 23 h.t. But as to guardians, see L. 11 h.t. At times, however, the original principal could have himself substituted as party in the case. L. 22 h.t.

2.12.9. The same emperor to Aufidius.

Soldiers in active service may, so far as it can be done without harm to discipline, attend to their own affairs. Nor can it be said that a person attends to the affairs of others when he prosecutes actions which are set over to him by mandate (as his own), for proper and honest reasons, since though the suite is undertaken in another's name, in good faith, there is no doubt that he is managing his own affair. To forbid my soldiers this, would not only be absurd but also unjust.¹

Without consul and day.

Note.

It was stated in law 7 of this title that a soldier could not act in lawsuits on behalf of others. If he became assignee of causes of action, however, as owner, that is to say, if a mandate was given him to sue for his own benefit, he could sue as though the causes of action belonged to him originally.

2.12.10. The same emperor to Castricia.

If a procurator appointed for one transaction exceeded the mandate (authority) given him, his acts could not prejudice his principal. But if he had plenary power of action, an adjudication should not be revoked, since if he committed any fraud or deceit, you are not forbidden to sue him in the customary manner (more judiciorum).

Promulgated February 27 (277).

Note.

According to note Thalelaus to Bas. 2.84, the person referred to as having plenary power was not a general procurator (omnium rerum), but one who had specific authority to sue a particular debtor or all the debtors of the principal. In other words, general agency did not necessarily include the power to sue, but if such power existed, the judgment was binding on the principal.

2.12.11. The same emperor to Sebastianus.

Neither guardians nor curators can, by reason of their rights as such,² appoint a procurator in affairs of the person under their charge, but they must constitute another as their agent,³ by consent of the court.⁴ A male or female minor, however, under or over

¹ [Blume] See L. 7 h.t. and note.

² [Blume] ex sua persona.

³ [Blume] actor.

the age of puberty, can appoint a procurator with the consent of the guardian or curator, both to bring as well as defend an action, and the guardians and curators themselves may, after issue has been joined by them, appoint procurators in pattern of procurators who have joined issues.⁵

Promulgated May 15 (229).

2.12.12. The same emperors to Frontinus, a soldier.

There was no necessity of requiring of your son, who offered himself for your defense, proof of authority (mandate), for a double reason, either because anyone, a freedman (of the defendant), or a stranger, may be giving surety on account of the defense and, of course, by observing the other formalities, undertake a defense without mandate, or, because a son, although he voluntarily brings an action in his father's name, cannot be compelled to show a mandate. 1. Of course, because your son had not yet reached the legal age, the judge could deny him the right to act as procurator (agent), and that not contrary to law. But it would have been more just to listen even to such a defender than to visit an undefended and absent person with condemnation as though he were contumacious.

Given September 27 (230).

Note.

Anyone of proper age might defend by giving proper security. For an agent to sue generally required a mandate. L. 24 h.t. An exception was made in the case of near relatives and freedmen. D. 3.3.35 pr.; L. 21. h.t.

2.12.13. Emperor Gordian to Vicianus, a soldier.

You can bring an action for the prosecution of a lawsuit set over to you by mandate, by your mother, only if, on that account, the objection of your military service was not specially raised against you when you first joined issues. It cannot be made against you when an appeal is prosecuted. But when nothing has been done in the matter, the perpetual edict does not permit you to bring on an action set over to you in the name of another.⁶

Given December 30 (239).

2.12.14. The same emperor to Sabinianus.

The decision rendered against you is not any the less valid in law because your female adversary, under the age of twenty-five, commissioned her husband to carry on her case without the consent of her curator. For age is wont to come to the assistance of minors, when damaged, not to be an objection to them in affairs well managed.

Promulgated October 5 (241).

2.12.15. Emperors Diocletian and Maximian and the Caesars to Cornificius.

⁴ [Blume] The clause "by consent of the court" is not in the text. But the term "actor"—a word signifying agent in various ways (see [Heumann-Seckel](#) under "actor")—implies that he was appointed by the consent of the court. That was necessary in such case.

D. 26.7.42; D. 26.9.6.

⁵ [Blume] The rescript duplicated in C. 5.61.1.

⁶ [Blume] See laws 7 and 9 h.t.

You plainly confess in your petition that you purchased a lawsuit contrary to good morals, since it is not unlawful to act as procurator—which office should be gratuitous—but duties of the kind (as you undertook) are not undertaken without blame. Promulgated April 3 (293).

Note.

The rescript refers to buying an interest into a lawsuit and undertaking its prosecution. That was champerty and unlawful. C. 2.6.5; C. 4.35.20 and note.

2.12.16. The same emperors and the Caesars to Paconia.

It is certain and plain that a procurator or business agent (actor) of a landed estate has no right, unless he has received a special mandate to sell, to dispose of the ownership of any of the property. Hence if you purchased the farm from them, who were the vendors, without the consent of the owner, you clearly understood that your demand to be declared that the ownership be conceded to you pursuant to such purchase, is not honest.⁷ Given at Byzantium, April 5 (293).

2.12.17. The same emperors and Caesars to Mardonius.

No one can be compelled to become a procurator against his wish, nor to extend his procuratorship beyond (what is undertaken by him), unless it be on account of an appeal. Nor is anyone (having in charge some particular business) compelled to undertake the defense of one absent (in another matter), since it suffices that he faithfully perform what he undertook to do.

Promulgated at Philippopolis, June 5 (293).

Note.

See L. 3 h.t. and note, qualifying the rescript. If a procurator (agent) sued, he might, in the exercise of due care, be required to take an appeal, in case he was defeated. C. 4.35.10. But if a lawyer acted as procurator (as was generally true in the later law), he could not appear in the appellate court. L. 27 h.t.

2.12.18. The same emperors and Caesars to Dionysia.

It is clear that the defense of others is a function of the male sex and is outside the sphere of women. If your son, therefore, is a minor under the age of puberty, ask for a guardian for him.

Given at Sirmium, January 21 (294).

Note.

While females could not ordinarily act as guardians—or defenders in a suit—mothers and grandmothers were, in later law, authorized to act as guardians. C. 5.35.2 and 3.

2.12.19. The same emperors and Caesars to Firmus.

⁷ [Blume] The question as to what powers were implied in a general agency is uncertain, and it is sometimes thought that in the course of development of the law, these implied powers were curtailed rather than enlarged. Such agent could collect and pay debts, exchange property, sell property easily spoiled, including crops, and probably do all things commonly arising in the management. See D. 3.3.58;59;63. Other powers were not implied, but required special authorization. Thus property could not be pledged, (C. 8.15.1), or the ordinary property sold, without special power. C. 4.35.12.

If you paid the price to the managing agents (actoribus) of another who sold you an estate or a slave without mandate (authority), and it is not shown that the consent of the owner either preceded or followed the contract, but the president of the province finds, upon investigation of the cause that the price accrued to the owner's benefit, he will order it to be restored to you.⁸

Given March 14 (294).

2.12.20. The same emperors and the Caesars to Verinus, president of Syria.

We do not think it makes any difference whether a case was turned over to a procurator before or after the action had been started.

Given at Demossus September 22 (294).

Note.

Substitution during a lawsuit of agent for a principal and vice versa (L. 22 h.t.) was permitted in case of necessity. The proceeding for this, during the formulary period (C. 2.57) took place before the magistrate and not the referee who tried the case, and a new instruction was issued to the latter. See Koschaker, Translatio iudicii, 40 et. seq.

2.12.21. Emperor Constantine to the council of the province of Africa.

Let a husband have full power, without mandate, to attend to the (judicial) transactions of his wife, by giving the customary surety and observing the other formalities, so that women may not, under the pretense of prosecuting a lawsuit, and in contravention of matronly modesty, boldly⁹ rush into assemblies of men, or be compelled to be present at trials. But if any person has received a mandate from her, though it be her husband, he must only execute what the given power prescribes.¹⁰

Promulgated at Hadrumetum March 12 (315).

2.12.22. The same emperor to Bassus, City Prefect.

When procurators are appointed, and they, after joinder of issue, have become principals in the suit, the persons who gave them authority by mandate have no power to prosecute the action unless deadly hatred, sickness, or other compelling reason has arisen; for in such case, the suit may be transferred even against their (the procurators') wish.

Note.

That an agent became principal in a suit after joinder of issues was, of course, largely theoretical in view of the fact that he could be forced out of a case; that, if he died, the principal and not the heirs succeeded him (L. 28 h.t.), and that judgment was enforced in favor of or against the original principal. Headnote, h.t.

2.12.23. Emperor Julian to Secundus, Praetorian Prefect.

There is no doubt that after a case has been put in motion¹¹ in court, a procurator, since he has become principal of the suit, may carry the cause thus begun and the dispute to a conclusion even after the death of the person who gave him authority, by mandate, for the purpose of bringing or defending it, since the ancient founders of the law were of the opinion that such procurator could even appoint another in his stead.

⁸ [Blume] See C. 4.26 headnote. The agents (actors) were generally slaves. See L. 16 h.t.

⁹ [Blume] del. "nec."

¹⁰ [Blume] See L. 12 h.t., note.

¹¹ [Blume] i.e., after joinder of issue. See L. 8 h.t.; D. 44.4.11 pr.

Read on the records February 4 (363).

2.12.24. Emperors Gratian, Valentinian and Theodosius to Pancratius, City Prefect.

Although in the beginning of a dispute an inquiry should be made as to whether a procurator has a mandate from the principal of the suit to prosecute the case, still, if he is later found to be a false procurator, the controversy is customarily not stated by counsel for the parties, nor can the trial proceed.

Given at Constantinople April 4 (382).

Note.

Bas. 8.2.98 states this law as follows: "Though before joinder of issue no inquiry is made as to the person of the procurator, if he is found to be a false procurator (one without authority), the trial will be null and void." That is doubtless what the rescript intended to state, but in an unhappy manner.

Originally a proceeding was not void, though a man bringing a suit for another was not shown to have authority, provided he gave a bond that the principal would ratify. We find a remnant of that in the rule mentioned in this title that near relatives were not required to have a mandate. Eisele, Cogn. und Proc. 190. But commencing with the middle of the second century A.D., a person, to bring a suit for another, was required to have authority. A mere intermeddler could not do so. C. 2.18.20.2. The point was still disputed in Gaius' time. 4.84. A law of 382 A.D. went still further, enacting that inquiry whether a man bringing a suit for another had a mandate should be made at the very beginning of the suit, and unless he had one, the controversy should not be stated by counsel for the parties (*nec dici controversiae solent*), and that no trial could be had (*nec potest esse iudicium*). C. Th. 2.12.3. That law was clear. L. 24 h.t. was taken from it, but was changed to mean that if at any time it should be found that the procurator had no authority, the proceedings had should not be considered valid. But that makes the clause as to the statement of the controversy by counsel for the parties meaningless, and changes the meaning of the clause that no trial should be had to the unnatural meaning that the trial should be invalid. See on this point Eisele, *op. cit.* 218-237.

The rescript deals only with procurators for the plaintiff, since any one might defend for the defendant. L. 12 h.t.

2.12.25. Emperors Valentinian, Theodosius and Arcadius to Tatianus, Praetorian Prefect.

Persons who have reached the heights of the sublime praetorian or city prefecture or have become master of the military forces (*magisterium militare*) or have received the insignia of the rank of consistorian countship, or, as proconsuls, have declared the law, or have had the power of the administrative post of vicar, shall, if they institute a lawsuit or defend one, appoint a procurator to represent their rights in the case. If anyone transgresses the precepts of this sanction, and enters the courts to litigate, he shall lose the suit, the outcome of which he did not await through a procurator. And none the less, the judge who acts contrary hereto may know that twenty pounds of gold shall be demanded from him, and an equal amount from his staff.

Given September 14 (392).

Note.

Certain dignitaries of the empire had a right to sit with the judge. C. 3.24.3. And it was deemed best, in order that men in high positions should not be able to influence decisions in which they were interested, to prevent them from appearing in their own behalf. The present law was modified by Novel 71, which provided that only persons of

illustrious rank should be required to appoint procurators in civil and some criminal cases, but that other dignitaries might defend their own suits. See also C. 9.35.11.

2.12.26. Emperors Arcadius, Honorius and Theodosius to Anthemius, Praetorian Prefect.

Although no judicial precept or decision so states, we give everyone the right, provided he wishes to do so, to answer in civil actions by a procurator, unless, at times, perchance, the mighty authority of the highest judge (Praetorian Prefect), on specially just grounds, calls persons before him.

Given at Constantinople October 14 (406).

2.12.27. (Synopsis from Greek text).

Since it has happened in times past that the same persons would act as procurators both before the glorious presidents and the learned court-referees and thus, as usually happens, suits were protracted, inasmuch as procurators could not attend the glorious presidents and the referees at the same time, this constitution ordained in the first place that some procurators should be in the high courts of the honorable presidents, others to give their services in lawsuits to their learned court referees.

1. Next, lest the same procurator might often be appointed (to appear in a suit) before the glorious prefects and before the glorious president, thus again retarding suits, this sanction ordains that no one should ever perform the duty of procurator or assessor before two glorious magistrates.

2. Since it also happened that when a cause had been decided by a referee the person condemned would appeal, or the referee, doubtful how to decide, would refer the case to the glorious president to whom he is subject, and hence the suit, which was commenced to be tried before the referee, would be transferred, as it were, to his glorious prefect, the constitution ordains that no procurator who commenced to prosecute a cause before the referee should terminate it before the honorable president, but that a transfer should be made from him to a procurator who attends the president, no fee to be charged for this transfer as though for the appointment of a procurator, nor a new bond to be demanded on account of this transfer; and that the bond given for defendant that judgment would be satisfied, and the bond given by a procurator for plaintiff that the matter would be ratified, should be so framed in the beginning as to contain a provision for expenses of such transfer, the person furnishing either of such bonds promising: "I promise on behalf of him (the procurator) who prosecutes the suit before the referee to fulfill the guaranty that the judgment will be satisfied—or that his acts will be ratified—and if it should happen as a result of the referee referring the case, or by reason of an appeal taken from his decision, that the cause is taken into the higher court to which the referee is subject, I, in the same manner, give bond for him who by reason of the transfer will be procurator in the higher court."

3. For if these provisions are not all obeyed and this law is violated in any of the higher courts by the proper bureau, it shall pay a penalty of five pounds of gold; if, however, the law is violated before the referees, a penalty of one pound of gold shall be collected from the assessor of the learned referee who arranges the case, and a penalty of two pounds of gold from the two others assigned to the referee from the bureaus or schools, and the procurator himself, by whom anything has been neglected, shall be chastised with lashes by the president or referee and forbidden to appear as advocate in a court in the future.

Note.

This constitution (with date and author unknown) is important, and provides that a procurator who appeared in the inferior courts could not appear in any of the higher courts, and that he could appear in but one of the higher courts. As to these courts, see headnote C. 3.13; as to assessors, C. 1.51; as to referees and petty judges, C. 3.3. Inasmuch as the governors were far apart, it is readily seen that a procurator could conveniently appear in the court of but one governor.

It is apparent that the constitution speaks of attorneys and considers them the same as procurators. In the later times private individuals did not, ordinarily, act as procurators in a suit, but full power and authority was given attorneys to do and perform all duties that had formerly been performed by procurators, in addition to their ordinary duties as attorneys. In other words, the term procurator, when acting in a suit, was at this time the equivalent of the term attorney. (Bethmann-Hollweg, 3 Civilprocess 168; Cujacius, 13 Obs. c. 5).

It is further shown by this law that men were assigned to the referees or petty judges from the official staff of the superior magistrate or from the so-called schools—corps of men in the imperial service. See note C. 3.3.2, and Novel 82.

2.12.28. (From Greek text).

If the surety of a procurator has not fixed the time and, perchance, has stated: “I become surety for him although he should die or not appear,” and that happens, another should be appointed within twenty days. If he whom someone appointed as procurator of a lawsuit should die or not appear, and the twentieth day has passed after the decree of the president concerning substitution has been announced, the principal who lives abroad in a remote province has six months respite within which either to substitute another or appear personally; but if he is not far away, the (time for) respite is fixed in the discretion of the president.¹²

¹² [Blume] See Koschaker, Translatio iudicii, 116.