THE CATHOLIC UNIVERSITY OF AMERICA
CANON LAW STUDIES
No. 232

The Administrative Transfer Of Pastors

AN HISTORICAL SYNOPSIS AND COMMENTARY

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A DISSERTATION

Submitted to the Faculty of the School of Canon Law of the Catholic University of America in Partial Fulfillment of the Requirements for the Degree of Doctor of Canon Law

THE CATHOLIC UNIVERSITY OF AMERICA PRESS
WASHINGTON, D. C.
1946

NIHIL OBSTAT:

H. Ludovicus Motry, S.T.D., J.C.D., *Censor Deputatus*

Washingtonii, D. C., die 14 iunii, 1946

IMPRIMATUR:

✠ Jacobus E. Cassidy, D.D., LL.D.,

Episcopus Riverormensis

Riverormii, die 18 iunii, 1946

Dedicated

to

My Father and Mother

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FOREWORD

The importance of the pastoral office as well as the need for a certain degree of stability for the adequate fulfillment of the functions required of a pastor of souls leads one readily to recognize the significance of a treatise on the precedure of administrative transfer. Since there have been committed to the pastor so many of the pastoral rights and duties entrusted by Christ to the Apostles, it is manifest that his responsibilities are many and grave. These the Church has always been most careful to determine, in order that each pastor may know those things for which he will be held accountable before God when his ministry upon this earth has been completed. He is expected, then, to endeavor to carry out his obligations to the best of his ability, not only to insure his own personal salvation, but also to secure the salvation of those who are committed to his care.

In view of the sacredness of the implicit agreement made between the pastor and God, it is expected that the Church will offer every possible help to the pastor that the fulfillment of this compact may be more easily effected. Being the provident Mother that she is, the Church has done this by demanding in her legislation that her pastors be appointed with a degree of stability which assures them of a generous sense of security in their office. Her sagacity in this regard is evident.

Certainly, the nature of the office of pastor, although it does not demand perpetuity, counsels that whenever possible pastors be constituted irremovable, since they are not hirelings, but the responsible shepherds of souls. They are not to seek those things which pertain to them personally, but those things which refer to the good guidance and government of the faithful committed to their care. But were it admitted that pastors could easily be removed from their office, it is not likely that they would use the diligence and vigilance required of them in fulfilling the obligations of a true shepherd of souls, since it is natural for man to lack interest in or have little love for those things which he

fears may soon be taken from him. On the other hand, if they know that they are to possess their office as long as they are diligent in the fulfillment of the obligations incumbent upon them, it is much more probable that pastors will not only make every effort to know their parishioners, their needs and their wants, but endeavor also to see that a proper care will be bestowed in every respect. Like the good shepherd spoken of by our Lord, they will seek out those sheep who were lost, in order to bring them back to their Father's house to foster in them the love and the worship demanded of them by God. This they will accomplish both in teaching and in example.

It is these considerations which underlie the present treatise on the administrative transfer of pastors. While at the same time safeguarding the dignity and stability of the pastoral office, the Church has found it necessary at times to insure the fulfillment of parochial obligations by threats and sanctions. Whenever a pastor may have been the cause, culpable or incupable, of detriment to the souls committed to his ministry, necessary measures must be invoked for the averting of further evil which otherwise should follow upon an inefficacious ministry. The provisions invoked by the Church are deprivation, removal and, as an indirect consequence of removal, transfer. Such sanctions have been prompted by the application of the principle: *Salus animarum suprema lex.*

However, in applying this principle, the Church has not confined herself exclusively to causes whereby the ministry of a pastor may redound to the harm of souls. On the contrary, she has applied this principle also to the case of a praiseworthy ministry of a pastor, in the light of which it is hoped that his care of souls may enhance the utility of the Church when it is employed in a parish other than the one possessed by him. Hence she has incorporated in her laws a process by means of which, with all due regard to justice and canonical equity, a pastor who has enjoyed a successful ministry in one parish may be transferred to another for the good of souls in that parish, and ultimately for the evident utility of the Church as a whole.

Since the scope of the present treatise is confined to the question of administrative procedure, and more specifically to the

administrative transfer of pastors for the good of the parish in favor of which the transfer is countenanced, the topic of penal deprivation and penal transfer has purposely been passed over. By way of background it will of course be necessary to give some attention to a transfer consequent upon removal, as well as to a transfer which envisions the good of the parish relinquished, but this consideration will have place primarily in the historical synopsis. The principal topic, and that about which this thesis is specifically concerned, namely, the transfer of a pastor for the good of the parish obtained, will be considered at length from both a negative and a positive aspect. In the negative consideration the writer will make an effort to show the non-applicability of the administrative transfer in pre-Code legislation; in the positive consideration he will attempt to study the process of the transfer of pastors from a theoretical standpoint, thereupon to make a practical application of its norms in the daily life of the Church.

The present treatise will include a brief study of the terms considered under the aspect of the old legislation; a summary of the development of parochial organization in the light of its existence as well as with a view to the quality of the stability accorded to pastors in the course of the centuries; a short review of the legislation concerning the transfer of bishops, which as analagous legislation may be utilized as a basis for the procedure regarding the transfer of pastors, and a study of the legislation established by the Church in respect of the transfer of a pastor for the good of the parish from which he was being removed. In the last chapter of the historical synopsis the writer will seek to ascertain whether or not there was any definite legislation previous to the promulgation of the Code of Canon Law regarding the purely administrative transfer of a pastor for the good of the parish which through the transfer he was to obtain.

In the canonical commentary on the precedure to be employed in the transfer of a pastor for the good of the parish to which he becomes assigned through the act of transfer, the writer will study the juridical nature of the administrative process in general, and the status of parishes and pastors according to the present law. He will then study the administrative process of transfer,

considering it in its general aspects and in its specific relation to pastors. In this treatment he will give close attention to a proper differentiation between the active and passive subjects in the procedure. After considering the minor personnel participating in this procedure, the writer next proposes a comprehensive study of the process, wherein the various steps of the procedure are featured from the point of the initial paternal invitation through which for accompanying reasons a transfer is contemplated up to the point at which the ordinary has issued the precept in his endeavor to elicit the acceptance of the change on the part of the removable pastor who until then has shown himself unwilling in this regard. The writer proposes a like study of the case of the irremovable pastor, whose unwillingness to accept the proposed transfer cannot be overridden by the local ordinary apart from special faculties obtained from the Holy See. He lastly considers the juridical effects consequent upon the ordered transfer, and examines the nature and the effects of the only remedy allowed in law to a pastor should he still feel aggrieved, namely, recourse to the Holy See.

A sincere expression of gratitude is extended to His Excellency, the Most Reverend James E. Cassidy, D.D., LL.D., Bishop of the Diocese of Fall River, for the opportunity of graduate study in Canon Law, and for his many acts of kindness to the writer. To the members of the Faculty of the School of Canon Law at the Catholic University of America for their helpful suggestions and criticism, to the staff of the Catholic University Library for their generous assistance, and to all others who have in any way made this work possible, the writer wishes to express his gratitude and appreciation.

PART ONE

Historical Synopsis

CHAPTER I

Definition of Terms

ARTICLE I. THE NOTION AND TYPES OF ADMINISTRATIVE TRANSFER

In order that a clear and accurate notion may be had of the procedure of an administrative transfer it is essential at the outset to know the meaning of the terms. It is the purpose of this chapter to define the terms: *transfer* (in its several implications); *parochus; irremovability; removability.* A clear conception of these terms renders an invaluable aid to the proper understanding of all that follows in this thesis.

Basing their notion of transfer on the chapter *Mutationes* in the Decree of Gratian,[1] authors have defined transfer as: "the canonical change of a cleric from one office or benefice to another, made for a just cause by legitimate ecclesiastical authority."[2] From this definition it can be seen that transfer could not be accomplished at will by those who held an office through a mutual exchange of their offices or benefices, but could be effected only on the authority of those who had the power to confer upon the incumbents these same offices or benefices. When there was question of the lower offices or benefices the ordinary was that competent authority.[3] All agreed that an exchange effected by

[1] C. 34, C. VII, q. 1.

[2] Hostiensis, *Summa Aurea* (Venetiis, 1570), lib. I, tit. 7, n. 1; Reiffenstuel, *Ius Canonicum Universum* (4 vols. in 7, Venetiis, 1735), lib. I, tit. 7, n. 2; Wernz, *Ius Decretalium* (6 vols., Romae, 1898–1904), II, (1899), n. 517, II; Bargilliat, *Praelectiones Juris Canonici* (24 ed., 2 vols., Parisiis, 1907), n. 226.

[3] Although the Decretalists did not treat of the transfer of the incumbents of the lower benefices *ex professo*, yet their treatment of the exchanging of

way of a transfer was valid only when it was made by a competent authority, but there was not the same general agreement regarding the one who was to be acknowledged as having this particular authority.

By the term *ordinary*, so some authors contended, one was to understand only the one who possessed both episcopal jurisdiction and episcopal dignity. They based their conclusion on the text of Pope Urban III (1185–1187), as found in the Decretals of Pope Gregory IX (1227–1241).[4] Others, on the other hand, felt that any grantor of a benefice could be included under this term, even though he had neither episcopal jurisdiction nor episcopal dignity.[5] But it was the common opinion that anyone who had episcopal jurisdiction, or at least quasi-episcopal jurisdiction, although not the episcopal dignity, could accept a proposed exchange of benefices, or effect the transfer of beneficiaries. The reason given by those who subscribed to this opinion was that the faculty belonged to the superior, not by reason of his dignity, but in consequence of his jurisdiction.[6] In listing these authorities specifically, Wernz (1842–1914) named the "bishop, the apostolic administrator, the abbot *nullius* with quasi-episcopal jurisdiction in a separate territory, and the vicar-capitular" as

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benefices provided a parallel with reference to the question of transfer. Cf. Nicholaus de Tudeschis (Abbas Panormitanus), *Commentarium in Quinque Libros Decretalium* (8 vols., Venetiis, 1588), lib. III, tit. 19, nn. 3–4 (henceforth this author will be cited under the name Panormitanus); Fagnanus, *Commentarium in Quinque Libros Decretalium* (4 vols., Venetiis, 1697), lib. III, tit. 19, n. 5; Barbosa, *Iuris Ecclesiastici Universi Libri Tres* (Lugduni, 1660), lib. III, tit. 19, n. 172; Leurenius, *Forum Beneficiale* (2 vols., Venetiis, 1752), pars I, qq. 72–74.

[4] C. 5, X, *de rerum permutatione*, III, 19, s.v. *"si autem"*; Barbosa, *Iuris Ecclesiastici Universi Libri Tres*, lib. III, tit. 19, n. 175.

[5] Sylvester de Pierio (1460–1523), *Summam Summarum* (Romae, [ ]), s.v. *"permutatione,"* 2, n. 2, cited by Barbosa, *op. cit.*, lib. III, tit. 19, n. 175.

[6] Barbosa, *op. cit.*, lib. III, tit. 19, n. 175; Garcias, *De Beneficiis Ecclesiasticis* (Venetiis, 1618), tom. II, pars XI, c. 4, nn. 60–71; Pirhing, *Ius Canonicum in Quinque Libros Decretalium* (Dilingae, 1674–1678), lib. III, tit. 19, n. 26 (hereafter cited *Ius Canonicum*); Gonzalez-Tellez, *Commentarium in Quinque Libros Decretalium* (5 vols., Lugduni, 1749), lib. III, tit. 19, n. 8; Wernz, *Ius Decretalium* (3. ed., Prati 1908–1915) V (1914), lib. II, n. 907.

possessing the necessary power.[7] It is worthy of notice that the vicar general was not numbered in the list of the legitimate authorities to whom was acknowledged the necessary competence for the effecting of a transfer. He could not act in this capacity without a special mandate.[8]

The passive subject of transfer, in general, was any beneficiary or any cleric who held an ecclesiastical office. However, since the present treatise is concerned with the transfer of pastors as its primary object, the treatment of the passive subject of transfer will be confined to these. The next article will be devoted to a consideration of this type of beneficiary.

Having ascertained the subjects of transfer, one may next consider the cause which was required for the making of a transfer. The change or transfer could be made only for a just cause, which cause, basing their opinion on the texts of the Decretals,[9] canonists were wont to speak of as utility or necessity of the Church.[10] Since the words *causa utilitatis vel necessitatis Ecclesiae* were very general in their nature, authors discussed and disputed about them at great length.

There were some authors, cited by Garcias († ca. 1613), who held that this utility or necessity had to exist strictly within the realm of the spiritual good of the Church. In fact, they even maintained that the utilization of any other kind of cause than this implied the presence of a simonical act.[11] The more common opinion, however, was that this change could rightfully be accomplished even for the personal good of the beneficiaries involved, as long as the good redounded to the Church, whether universally

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[7] *Ius Decretalium*, V, lib. II, n. 907.

[8] C. 2, *de officio vicarii*, I, 13, in VI°; Leurenius, *op. cit.*, pars III, q. 140.

[9] C. 2, X, *de translatione episcopi*, I, 7; C. 10, *de renuntiatione*, I, 9; C. 5, X, *de rerum permutatione*, III, 19.

[10] Panormitanus, *op. cit.*, lib. III, tit. 19, n. 7; Pasteur, *Tractatus de Beneficii et Censuris Ecclesiasticis* (3. ed., Tolosae, 1675), lib. III, tit. 11, n. 5; Fagnanus, *op. cit.*, lib. I, c. 3, n. 88; Garcias, *op. cit.*, tom. II, pars XI, c. 4, n. 44; Reiffenstuel, *op. cit.*, lib. I, tit. 7, n. 10; lib. III, tit. 10, n. 38; Schmalzgrueber, *Ius Ecclesiasticum Universum* (5 vols. in 12, Romae, 1843–1845), lib. III, tit. 19, n. 77.

[11] Garcias, *op. cit.*, tom. II, pars XI, c. 4, n. 45.

or also only locally.[12] It is evident from this that as long as the service of God was enhanced, whether in a negative or in a positive manner, by the change of one beneficiary from one benefice to another, such a change was allowed, and often, all things being equal, countenanced.

From the viewpoint of the measure of freedom that accompanied the act, the transfer was either voluntary on the part of the cleric, or compulsory for him.[13] A compulsory or enforced transfer was that which was imposed upon the transferee whether by way of punishment, or for any legitimate cause, culpable or inculpable, as occasioned on the part of the one transferred.[14] Since the present study deals exclusively with administrative transfer, the type of compulsory transfer which was occasioned by a culpable cause will not be dealt with here.

Regarding one species of transfer, namely, the transfer which was effected for the good of the parish relinquished, or as Hilling renders it, the transfer which was motivated by a "negative service interest,"[15] a few things must be noted. In a transfer of this type one had to look to the parish from which one was changed for the reason that motivated the transfer. It could be that the pastor or beneficiary, either because of ill health, or lack of fitness in respect to the particular temperament of his people, in view of hatred or aversion on the part of the people, or for any other reason which could make his ministry to be no longer useful in that particular parish, was unable to perform his duties in the proper fashion or with benefit to the souls committed to his pas-

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[12] *Gloss.* 2, s.v. *"utilitate"* in c. 8, X, *de rerum permutatione*, III, 19; Panormitanus, *op. cit.*, lib. III, tit. 19, n. 7; Garcias, *op. cit.*, tom. II, pars XI, c. 4, n. 46; Joannes Chokier, *De Commutatione Beneficiorum* (Romae, 1700), c. 21; Leurenius, *op. cit.*, pars III, q. 856; Bargilliat, *Praelectiones Juris Canonici*, n. 856.

[13] Noval, *Commentarium Codicis Iuris Canonici*, Lib. IV, *De Processibus* (3 vols. in 2, Romae: Marietti, 1920–1932), II, n. 605 (hereafter cited *De Processibus*, II).

[14] Wernz, *Ius Decretalium*, II, n. 517, II.

[15] "Amtsenthebung im Verwaltungswege und Versetzung der Pfarrer," *Archiv für katholisches Kirchenrecht*, XCIV (1914), 269 (henceforth cited with the initials *AkKR*).

toral care.[16] Such a state of affairs warranted a change for the good of souls, which consideration constituted the sovereign and supreme law.[17]

The compulsory transfer for the good of the parish obtained, or the "positive service interest" of the Church, was quite another matter. The solution for the question raised before the promulgation of the present law, whether or not the principle of the *salus animarum* was applicable in the case of irremovable pastors whose ministry was beyond reproach, will not be attempted at this point. It will be affirmed merely that the pope, in virtue of his supreme power in the full and free disposition of ecclesiastical benefices,[18] could demand the transfer of such pastors, and that bishops, by observing the specified demands of the law, could effect the transfer of removable pastors for the good of the parish thereby obtained by them.

The voluntary transfer, on the other hand, offered little difficulty, for it was either sought by the pastors themselves, or acquiesced in when it was suggested to them by their ordinary. Such a transfer generally implied the positive service interest of the Church. In other words, such a transfer was verified when a pastor who had furnished a successful ministry in a given parish was promoted by his ordinary to a better parish, or one which was equally good, or at least to one which was not of a notably inferior character.[19] In such a case it was either the ordinary's desire to reward the pastor for his past services, or else the intended recognition of his administrative skill, that furnished the occasion for the transfer of the pastor.

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[19] Wernz, *Ius Decretalium*, II, n. 526, II; Bargilliat, *Praelectiones Juris Canonici*, n. 226.

[16] Panormitanus, *op. cit.*, lib. III, tit. 19, nn. 7, 8; Leurenius, *op. cit.*, pars III, q. 867; De Negris, *Tractatus de Vacatione Beneficiorum* (Romae, 1741), lib. II, c. 2, n. 16.
C. 35, C. VII, q. 1.

[17] ". . . plurimorum utilitas unius utilitati aut voluntati praeferenda est."—C. 35, C. VII, q. 1.

[18] C. 1, *ut lite pendente*, II, 5, in Clem.

ARTICLE II. THE NOTION OF *Parochus*

Since parish organization was the result of a gradual process of development necessitated only by the spread of Christianity, it is to be expected that the crystallization of the word *parochus* likewise was the result of this same kind of evolution. For many centuries the names which were used in designation of the one whom we call pastor were both numerous and varied in character. In the very early ages of the Church the bishop alone was acknowledged as the pastor, since he took personal care of the flock committed to his care.[20] It was only when the task of caring personally for either a very large or a widely scattered flock began to exceed his ability, that he began to share his responsibility with others, by setting up subordinate centers of worship, which he committed to their care.[21]

Church legislation, general and particular, reveals the nomenclature attached to these priests who at first acted in the name of their bishop and later in their own name. From this nomenclature one may glean the following terms: *pastor, presbyter, sacerdos, plebanus* (folk-priest), *ecclesiasticus* (sacristan), *rector* (church-lord), *curatus* (one intrusted with the care [of souls]), *investitus* (one endowed with the [pastoral] office), *persona* (one made responsible for others), and *parochus* (parish-priest).[22] Although the term *parochus* was used in a few councils prior to the Council of Trent (1545–1563), it can be stated that this term was not given official sanction until the latter council gave it such

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[20] Bouix, *Tractatus de Parocho* (3. ed., Parisiis, 1880), pp. 16–21.

[21] Connolly, *The Canonical Erection of Parishes,* The Catholic University of America Canon Law Studies, n. 114 (Washington, D. C.: The Catholic University of America, 1938), p. 14.

[22] Schaefer, *Pfarrkirche und Stift im deutschen Mittelalter,* Kirchenrechtliche Abhandlungen hrsg., von U. Stutz, 3. Heft (Stuttgart: Ferdinand Enke, 1903), pp. 43–78. Cf. also Engel, *Collegium Universi Iuris Canonici* (Venetiis, 1718), *Tractatus de Parocho,* p. 5; Barbosa, *De Officio et Potestate Parochi,* Animadversiones et Addimenta Ubaldi Giraldi (Romae, 1831), pp. 3–6; Bouix, *Tractatus de Parocho,* pp. 5–16; Ferraris, *Prompta Bibliotheca Canonica, Iuridica, Moralis, Theologica, necnon Ascetica, Polemica, Rubristica, Historica* (9 vols., Romae: 1885–1899), VI, *"parochia,"* n. 7 (hereafter cited Ferraris).

by the use of that term.[23] Hence, if one were to look to the early councils for legislation on the *parochus,* in relation to the question of his transfer as for other matters, one must be wary not to become confused by the diverse terminology employed in their legislation. However, from the Council of Trent onward this difficulty is cleared up by the Council's definite assignment of pastoral duties to those whom it designates as *parochi.*

Furthermore, the term was to be taken in the wide sense, so as to embrace not only the pastor who possessed a parish *in titulum,* but also all who had the equivalent of a parish or a territory, such as rectors of the secular clergy who ruled in their own name, whether they were called pastors, perpetual vicars, or *desservants.*[24]

ARTICLE III. THE NOTION OF IRREMOVABILITY AND REMOVABILITY

Upon the previous specification of the passive subject of transfer, a few words about the element of irremovability or removability are not without import here. By irremovability is meant the privilege which demands that once one has been named to an office he cannot be removed from it (i.e., removed or transferred) except for a cause expressed in law, and unless the judicial solemnities required by the canons have been observed in this removal.[25]

As is implied in this definition, an irremovable pastor possessed perpetuity or stability in his parish, which rendered his removal or transfer from the same very difficult. However, this did not mean that he could not be removed unless he had been guilty of a crime which necessitated that removal. Rather, as seen above, when the public good demanded it, the removal or

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[23] Sess. XXIV, *de ref.,* c. 1, 2, 7; cf. Hinschius, *System des katholischen Kirchenrechts* (4 vols., Berlin, 1869–1888), II (1878), 291, 292.

[24] Wernz, *Ius Decretalium,* V. lib. II, n. 908; Bouix, *Tractatus* de Parocho, p. 175; Pallottini, *Collectio omnium conclusionum et resolutionum quae in causis propositis apud Sacram Congregationem Cardinalium S. Concilii Tridentini interpretum prodierunt ab eius institutione anno MDLXIV ad annum MDCCCLX, distinctis titulis alphabetico ordine per materias digesta* (18 vols., Romae, 1868–1895), s.v. "*parochus,*" I, n. 5 (XIV, 493) (hereafter cited as Pallottini). Noval *De Processibus,* II, nn. 521, 530.

[25] Claeys-Bouuaert, *De Canonica Cleri Saecularis Obedientia* (Lovanii, 1904), p. 286; cf. also Bouix, *Tractatus de Parocho,* p. 192.

transfer could be made, since the parish was not for the pastor, but the pastor for the parish and the good of souls.[26] Still, when there was a question of irremovable pastors, there was required a cause of great necessity or utility, whereas in the case of removable pastors a legitimate and proportionate cause sufficed for their removal.[27]

Removability, in contrast to irremovability, was had when, at the discretion of the superior or anyone else who had the right, one could without the form of a trial be recalled from the office committed to him. The recall did not postulate the presence of a canonical cause; any reasonable cause, even though not expressed in the law, sufficed.[28] In a discussion on removability the editors of the *Acta Sanctae Sedis* made a distinction between absolute and relative removability.[29] Such a distinction was unusual before the promulgation of the present law, since research among the authors reveals that they did not make any distinction in terminology, although there was a divergence of view as regards the reasonableness or unreasonableness of a cause for which removable a beneficiary could be displaced.[30]

The authors had always spoken of beneficiaries who were removable *ad nutum*. Some of these authors maintained that, since such beneficiaries had no strict right in law to their benefices or parishes, they could be removed without any needed presence of a justifying cause.[31] But they did not regard the absence of a

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[26] Bargilliat, *Praelectiones Juris Canonici*, n. 1010.

[27] Wernz, *Ius Decretalium*, V, lib. II, n. 908, note 17; Gennari, *Sulla Privazione del Beneficio Ecclesiastico* (2. ed., Romae, 1905), p. 215.

[28] Bouix, *Tractatus de Parocho*, p. 193; Pyrrhus, *Praxis Beneficiaria* (Venetiis, 1735), lib. I, cap. VI, nn. 270, 271.

[29] "Amovibilitas clericorum a determinatis in ecclesia officiis duplici sensu accipi potest: *absolute* videlicet vel *relative*. Absolute intelligitur, quando subiectum quod amovibile dicitur amoveri possit pro libitu et arbitrario ita, ut stet pro ratione voluntas; relative, quando subiectum ideo dicitur amovibile, quia non est certis statisque legibus alligatum, ob quas amoveri non possit nisi sub aliqua conditione et forma a legibus praescripta."—*ASS*, III (1867), 507.

[30] Claeys-Bouuaert, *De Canonica Cleri Saecularis Obedientia*, pp. 332–335.

[31] Pyrrhus, *op. cit.*, Lib. I, cap. VI, n. 72; Garcias, *De Beneficiis Ecclesiasticis*, pars I, cap. 2, n. 87; Craisson (*Manuale Totius Iuris Canonici* [5. ed., Pictavii, 1877], I, n. 563) gives a good résumé of the different authors' views on this point. See also Wernz, *Ius Decretalium*, II, n. 836, IV.

justifying cause as a matter which was convertible with the presence of a non-justifying cause. Accordingly, in their doctrine, it was not admissible that a removal or transfer could be prompted by open malice, secret hatred, or also devious deceitfulness on the part of the acting superior. Likewise, they admitted an exception to this otherwise general rule in the case of those who would have sustained undue harm or infamy in consequence of the removal or transfer.[32] The presumption, nevertheless, was always in favor of the superior who demanded the change; the burden of proof rested on the one who claimed the suffering of injury or harm.[33]

In commenting on this matter Bouix (1808–1870) stated: ". . . even though the one acting does so without cause or from an evil motive, it does not follow that he does not use his right, or that he does injury to the one recalled."[34] Such a removal, then, was made validly though of course not licitly.[35] Inasmuch as those who were designated simply as removable (*amovibiles simpliciter*) seemed to possess an added degree of stability in office as compared with those who were designated as removable at the superior's own good pleasure (*ad nutum*), it appears conclusive to hold that for the removal or transfer of the former a righteous and reasonable cause had to be present for the superior when he took action.[36]

By way of summary it may be stated that in the absence of a canonical cause irremovable pastors who were unwilling to accept a removal or a transfer, in view namely of their established right

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[32] Garcias, *op. cit.*, n. 88; Reiffenstuel, *Ius Canonicum Universum*, lib. III, tit. 5, n. 45; Bargilliat, *Praelectiones Juris Canonici*, n. 1018.

[33] *Analecta Iuris Pontificii* (Romae, 1855–1869; Parisiis, 1872–1891), I (1855), col. 1660, n. 66; cf. controversy, *ibid.*, XI (1872), cols. 39, 40; Claeys-Bouuaert, *op. cit.*, p. 334.

[34] *Tractatus de Parocho*, p. 413; Claeys-Bouuaert, *op. cit.*, p. 331.

[35] Schmalzgrueber, *Ius Ecclesiasticum Universum*, lib. III, tit. 5, nn. 37, 38; Bargilliat, *op. cit.*, n. 1017.

[36] The editors of the *Acta Sanctae Sedis* seemed to confirm this when they stated: "Contendimus autem, inspecta generatim canonica Ecclesiae disciplina, amovibilitatem intelligendam esse non absolute, sed relative; ex qua determinatione generalis solutio quaestionis pendet."—*ASS*, III (1867), 507.

in law to retain their incumbency in their benefices, were beyond the jurisdiction of the bishop in the matter or their removal or transfer. Those pastors who were removable, whether they were willing or unwilling to accept the change, were subject to the bishop in that they had to abide by his decision of removal or transfer, as long as he acted without any violation of justice, of equity, and of reasonableness.

CHAPTER II

The Stability of the Pastoral Office

SECTION I

Legislation Prior to the Decretals

ARTICLE I. STATUS BEFORE THE INSTITUTION OF BENEFICES

The giving of a detailed account of the legislation on the stability of the pastoral office from the constitution of the Church to the promulgation of the present law would indeed involve a gigantic task in itself. Since it is not the purpose of the present study to consider this subject *ex professo,* a cursory treatment of the same should suffice for the needed understanding of the background for the legislation on transfer. The intimate relationship between stability and transfer demands a study of both the existence of the pastoral office and the stability or the permanence of that office in the development of parochial organization.

It can safely be asserted that stability of the pastoral office was unknown in the early ages of the Church, since parishes distinct from the cathedral church of the bishop such as they exist today were then non-existent. Documents, by their silence, offer a negative proof for this conclusion.[1]

The New Testament offers nothing in the way of norms for the establishment of parishes, since those texts which deal at all with the sending forth of the pastors of souls must be regarded as having reference to bishops alone.[2] These texts speak of powers reserved exclusively to those who were of episcopal rank.

A study of the early Fathers likewise offers but a negative conclusion. Authors on the subject are accustomed to offer as examples the letters of St. Ignatius († ca. 107) and St. Justin

[1] Connolly, *The Canonical Erection of Parishes,* p. 13.

[2] Titus, I: 5; Acts, XIV: 22; XX: 28–30; Col., IV: 17; I. Tim., VI: 22.

(† ca. 165) as a negative proof of the non-existence of parishes other than those churches which were directly under the control of the bishop. Such letters, concerned with the administration of the sacraments and other spiritual ministrations, were addressed only to bishops. Furthermore, they made no reference to the duties of the minor clergy in this regard.[3] It is assumed that these Fathers would have issued like instructions to priests had there been committed to them the care of souls.[4]

It is indeed true that the bishops were assisted by priests and deacons in the administration of the care of souls and all duties proper thereto, yet such assistance was solely of an auxiliary nature. Such helpers possessed no real standing of their own, being merely at the beck and call of their bishops when necessity demanded it.[5] In other words, they were but delegates of the bishop, acting in his name and at his discretion. In no sense of the word can it be said that they possessed stability of office.

It would be misleading to fix a historical point of departure from which one may apodictically refer to the beginning of parochial organization. Since its evolution was so irregular, any definite time cannot be established as the beginning of parochial life in any one part of the Christian world. However, for the sake of convenience, it is generally asserted by historians that the development of parochial organization, embryonically at least, began about the beginning of the third century in the East, and of the fourth century in the West. As has been remarked, this fixing of dates must not be adhered to too strictly, since the ground is too uncertain.

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[3] St. Ignatius, *Ad Ephes.*, c. 4—Migne, *Patrologiae Cursus Completus, Series Graeca* (161 vols., Parisiis, 1856–1866), V. 648 (hereafter cited with the initials *MPG*); *Ad Magnes.*, c. 7, 1, 2—*MPG*, V, 668; St. Justin, Apol., I, n. 67—*MPG*, VI, 429.

[4] Coady, *The Appointment of Pastors*, The Catholic University of America Canon Law Studies, n. 25 (Washington, D. C.: The Catholic University of America, 1929), p. 5; Bastnagel, *The Appointment of Parochial Adjutants and Assistants*, The Catholic University of America Canon Law Studies, n. 58 (Washington, D. C.: The Catholic University of America, 1930), p. 5.

[5] Ferraris, s.v. *"parochia,"* n. 7.

The Councils of the East, primarily those of a particular territory, implicitly affirmed some sort of parochial organization in the third century. Such parishes were the result of the rapid growth of Christianity in the rural areas. These churches, enjoying a certain independence from the urban bishops, were placed under the government of "rural bishops." The distance of these churches from any city demanded the appointment of someone who was authorized to give a personal direction to the care of souls in those scattered areas. Hence the rural bishops, of which the synodal letter of the Bishops of the Council of Antioch (269) makes mention,[6] took their place through appointment by the urban bishops, who in the past had personally directed all the churches in their dioceses.

At a later date the rural bishops came to be known as *"Chorepiscopi,"* cited under that title for the first time in the Council of Ancyra (314).[7] The I Council of Nicaea (325) confirmed this institution, and in fact established its stability at the time.[8] Although these *Chorepiscopi* seemed to exercise many functions which might well be termed parochial, still one cannot affirm without qualification that they were pastors, as taken in the modern sense of the term.[9]

Again, due to the rapid spread of Christianity another institution succeeded that of the *Chorepiscopi.* Since it seemed a lowering of episcopal dignity to have as many consecrated bishops as would have been individually necessary for the numerous churches built after the great influx of the Christians into the country districts, conciliar legislation called for a diminished number of *Chorepiscopi,* appointing in their place visiting priests,

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[6] Eusebius, *Historica Ecclesiastica,* Lib. VII, cap. 30—*MPG,* XX, 709–720.

[7] C. 13—Hardouin, *Acta Conciliorum et Epistolae Decretales ac Constitutiones Summorum Pontificum* (12 vols., Parisiis, 1714–1715), II, 275 (hereafter cited as Hardouin).

[8] C. 8—Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio* (53 vols. in 60, Parisiis, 1901–1927), II, 671, 672 (hereafter cited Mansi); cf. also Council of Antioch (314), c. 10—Hardouin, I, 597; Council of Neocaesarea (314–325), c. 3—Hardouin, I, 286.

[9] Connolly, *The Canonical Erection of Parishes,* p. 17.

otherwise known as *"Periodeutae."*[10] These priests, ruling over their churches under the guidance of urban bishops, took over many of the duties formerly entrusted to the *Chorepiscopi.*

Examples of an apparent parochial system in Alexandria in the middle of the fourth century,[11] the testimony of the III General Council at Ephesus (431),[12] and the legislation of the IV General Council at Chalcedon (451), in which the ordination of priests was forbidden without a *titulus ordinationis*,[13] seem to imply that parochial organization had become a permanent institution at that time. But whether or not it really was permanent, the pastors of those churches possessed nothing of the stability of office or of the irremovability from their incumbency which is connected with the pastoral office in the present day.[14]

The development in the West proceeded somewhat in the same manner as in the East, although more slowly, in view of the many persecutions to which the Christians were subjected, which inhibited the growth of Christianity and likewise the growth of parishes. From the fourth century onward conciliar legislation reveals first the existence of baptismal churches, and later on a true resemblance of parochial organization. This legislation dealt with the functions whose exercise was denied to the priests in charge of these churches, as well as with the duties which were required of them. Instances of this for the country of Africa may be found in the II, III and IV Councils of Carthage, held in 390, 397 and 398 respectively.[15]

Spain was not without its legislation on parish administration. The Council of Elvira in about 305 spoke of deacons ruling over churches under the superintendence of priests,[16] and it enacted

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[10] Council of Sardica (343), c. 6—Mansi, III, 10; Hardouin, I, 639; Council of Leodicaea (343–381), c. 57—Hardouin, I, 792.

[11] Cf. St. Athanasius, *Apologia contra Arianos*, I, 74—*MPG*, XXV, 385.

[12] Act. VI—Mansi, IV, 1357, 1358.

[13] C. 6—Hardouin, II, 603.

[14] Nardi, *Dei Parrochi* (2 vols., Pesaro, 1829), II, 481.

[15] II Council of Carthage, c. 4—Mansi, III, 693; III Council of Carthage, c. 36—Mansi; III, 885; IV Council of Carthage, c. 10—Mansi, III, 952.

[16] C. 77—Hardouin, I, 258; Mansi, II, 18.

laws in canon 18 for enforcing the permanent residence of the clergy, and in canon 32 for the administration of the last rites to the dying.[17] The I Council of Toledo (400) passed legislation regarding the procuring of the holy oils each year,[18] and the Council of Tarragona (516) insisted upon the residence of the priests and deacons at the country parishes where they were appointed.[19]

In like manner conciliar legislation in France reveals the existence of churches separate from that of the episcopal city. The I Council of Vaison (442), like that of Toledo in Spain, instructed the priests to procure the necessary sacred oils and holy chrism each Easter season,[20] and the II Council of Vaison (529) gave to all parish priests the faculty of preaching and of public instruction for the benefit of their parishioners.[21]

Italy, in turn, likewise recognized the need of legislation in view of the rapid development of Christianity. In 402 the Roman Synod which was held under the direction of Pope Innocent I (401–417) extended the functions of parish priests to the administration of the sacraments of baptism and of extreme unction.[22]

Councils in both the East and the West enacted laws regarding the permanence of residence at the church for which one was ordained.[23]

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[17] Mansi, II, 9, 11.

[18] C. 20—Mansi, III, 1002.

[19] C. 7—Mansi, VII, 542.

[20] C. 3—Mansi, VI, 453.

[21] C. 2—Mansi, VIII, 726.

[22] C. 7—Mansi, III, 1137.

[23] I Council of Nicaea, cc. 15, 16—Mansi, II, 674: Council of Antioch (314), cc. 3, 21—Hardouin, I, 597; Council of Chalcedon (451), c. 6—Mansi, VII, 394; Council of Arles (314), cc. 2, 21—Mansi, II, 471, 473; Council of Sardica (343), c. 1—Mansi, III, 10; *Canones Apostolorum* (c. 400), c. 15 (14)—Hefele-Clark, *A History of the Councils of the Church* (4 vols., Edinburg, 1895), I, 205 (hereafter referred to as Hefele); II Council of Seville (649), c. 6—Mansi, X, 559; Council of Merida (666), c. 18—Mansi, XI, 85; Synod of Rome (402), c. 26—Mansi, III, 1138; Council of Epaon (517), c. 5—Mansi, VIII, 559; Capitulary of Aix-la-Chapelle (789), c. 25—Hardouin, IV, 833; Excerpt from Egbert of York (c. 750), cap. 13—Wilkins, *Concilia Magnae Brittaniae et Hiberniae* (4 vols., Londini, 1737), I, 102 (hereafter cited Wilkins).

This legislation establishes the fact that there existed in the rural areas churches which were ruled over by simple priests, who had been ordained for these churches as furnishing the title for their ordination. These priests were allowed to perform many functions formerly reserved to the bishops, or formerly executed by the priests only upon the bishops' consent. It is inferred from this that these churches were parish churches, which were established for the convenience of those christians who lived in the vicinity of these churches. Despite the amount of legislation regarding the title of ordination, as seen from the councils cited above, it is still questionable whether those priests possessed real stability in virtue of a strict ecclesiastical office. Studies made on this subject have not decided this question with any degree of certainty. It seems that the legislation merely manifests the Church's desire to secure a successful ministry as well as the proper support of her ministers. Thus it may be affirmed with Claeys-Bouuaert that "this stability pointed to the union of the cleric with the church for which he was ordained, and not to the right of holding an ecclesiastical office obtained by him at the church where he resided."[24]

In conclusion, then, it may be affirmed that at the end of the eighth century the churches in both the East and the West seemed to have reached the same stage of development. This is inferred from the enactments of the VII Ecumenical Council, which appears to sum up all the previous legislation in its insistence on the permanency of one's attachment to, and the exclusiveness of one's ministry at the church for which one was ordained.[25]

ARTICLE II. THE PARISH AS A BENEFICE

With the introduction of benefices in the Church the pastoral office seemed to acquire a new stability. Although it has been claimed by authors that the system of benefices took root in the sixth century,[26] when priests were allotted a certain portion

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[24] *De Canonica Cleri Saecularis Obedientia*, p. 287; cf. also Houwen, *De Parochorum Statu* (Lovanii, 1848), pp. 100, 101.

[25] II Council of Nicaea (787), cc. 10, 15—Hardouin, IV, 769, 770.

[26] Wernz, *Ius Decretalium*, II, n. 245; Claeys-Bouuaert, *op. cit.*, p. 286.

from the common fund of the diocese for their support,[27] it seems rather that this institution came into being only at a later period.[28]

Since Stutz (1868–1938) recognized the system of benefices as flowing from the system of proprietary churches, which had secured a strong foothold in the Frankish Kingdom after the end of the seventh century,[29] a brief description of these churches may be helpful towards an understanding of the inception of the system of benefices in the Church.

These churches, established by the more prosperous manorial lords of Germany upon their property for the convenience of those under their domain, belonged solely to these same lords. Consequently all revenue accruing to these churches became the property of the manorial lord, from which he was obliged to maintain the upkeep of the church, to conduct or to employ someone to conduct the divine services, and finally to provide for the works of charity with which the churches could help and protect the poor. Further, because of his status which implied rights equivalent to the old patriarchic rights possessed by the Romans, it was within his power to appoint and dismiss all priests at will, having no regard for the bishop's rights in this matter.[30]

As was to be expected, the Church could not approve this state of affairs. As early as the year 650 there was legislation in the Council of Chalon-sur-Saone against the territorial magnates who were withholding from the bishops the property of their manorial churches as well as withdrawing the clergy from the authority of the archdeacon.[31] About a century later a German Council (742) at which St. Boniface (680–754) presided, ordered every priest within the diocese to be subject to his bishop.[32] Finally, through

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[27] III Council of Orleans (538), c. 17—*Monumenta Germaniae Historica, Leges,* Sect. III *(Concilia)* I (ed. F. Maassen, Hanoverae, 1893), 78 (hereafter cited *MGH*).

[28] Stutz, "The Proprietary Church as an Element of Medieval Germanic Ecclesiastical Law," *Studies in Medieval History, Medieval Germany (911–1250), translated* by Geoffrey Barraclough (2 vols., Oxford: Blackwell, 1938), II, 55 (hereafter referred to as "The Proprietary Church").

[29] *Ibid.,* pp. 45 and 55.

[30] *Ibid.,* pp. 42–44.

[31] C. 14—*MGH, Leges,* Sect. III *(Concilia),* I, 211.

[32] C. 3—*MGH, Leges,* Sect. III *(Concilia),* II (ed. *Werminghoff,* 1904), 3.

the Carolovingian Reform it was effected that these churches were to be given a regular endowment; that the bishops were to be given power to see that they were maintained in good condition; and that every priest was to render an account of his administration to his bishop.[33] It was further decreed that the territorial lord was obliged to give his ministers in his private churches at least one freehold parcel of land.[34]

Speaking of the consequences flowing from this *Eigenkirchenwesen,* otherwise known as the proprietary church system, Stutz wrote as follows:

> More important and less unsatisfactory than the consequences so far described, was the final achievement of the proprietary church conception and of German Church Law as a whole: I refer to the ecclesiastical benefice. The theory from the day of Thomassin that the system of ecclesiastical benefices was derived from the *precariae* which were from time to time bestowed on clerks by bishops of the Roman and Merovingian period is untenable. . . The point of departure of the movement towards ecclesiastical investiture was, on the contrary, the proprietary church. The system of proprietary churches prepared the way for the movement in so far as it created within the diocese small independent church properties, the focal point of each of which was a church and a clerical office.[35]
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> Most frequent—and from the point of view of the Church, most desirable—was a permanent appointment in the form of an investiture. . . . Since the *beneficium* was the most popular and the most widely disseminated form of tenure at the period at which the free investiture of churches made its appearance—that is to say, in the eighth century—and since it was furthermore the form favored by the law of the Frankish Kingdom, it was natural that it should have been employed for preference in the conferment of churches. . .[36] In the course of

[33] Ecclesiastical Capitulary (818–819), c. 9—*MGH, Leges,* Sect. II *(Capitularia Regum Francorum)*, I (ed. A. Boretius, 1883), 277.

[34] Ibid., c. 10—*MGH, Leges,* Sect. III *(Capitularia)*, I, 277; Gratian, in quoting this text under c. 25, C. XXIII, q. 8, attributes the enactment to the Council of Worms (c. 850).

[35] "The Proprietary Church," *Medieval Germany 911–1250,* II, 55.

[36] "Art. cit.," 56.

> time the ecclesiastical benefice underwent radical transformations . . . the ownership of the beneficial lands passed to the church itself as a legal personality, and in consequence the right of conferment was transferred from the territorial lord to the bishop or one of his officials, and finally the *officium* itself, as opposed to the *beneficium,* received more adequate recognition.[37]

It seems more tenable, in view of this, to assert that the foundation of the beneficial institution is to be found in the eighth century. However, it was not until the eleventh century that this system became an accomplished fact, when community life among the clergy began to disappear.[38] Various councils legislated in this matter, demanding that clerics be ordained with the benefice providing the needed title for their ordination *(cum titulo beneficii),* in order that the clerics might be assured of support from the revenues of the property annexed to each parish or church.[39] Among these councils four are enumerated as enacting very specific legislation.[40]

The evidence inherent in this legislation, supplemented as it is by the additional facts presented by Stutz, gives an indication that the quality of stability was becoming more and more important in the eyes of the Church. In demanding ordination under the title of a benefice, the councils implicitly assured the pastors of souls a permanence in their office. This conclusion may be drawn from the very definition of the word *benefice,* which implied on the side of the Church a permanently bestowed right to receive revenues from ecclesiastical goods in consideration of the performance of some spiritual service.[41] The word ***permanently,*** a very important one in the definition, is to be noted well, since it lends support to the argument in favor of pastoral stability.

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[37] "Art. cit.," 57–58.

[38] Wernz, *Ius Decretalium,* II, n. 245.

[39] Phillips, *Kirchenrecht* (7 vols., Regensburg, 1845–1872), VII, 247.

[40] Council of Piacenza (1095), c. 15—Mansi, XX, 816; C. 2, D. LXX; Council of Clermont (1095), c. 15—Mansi, XX, 817; Council of London (1125), c. 8—Mansi, XXI, 331; Synod of Rheims (1148), c. 10—Mansi, XXI, 761.

[41] Leurenius; *Forum Beneficiale,* pars I, q. 1; Ferraris, s.v., *"beneficium,"* § 1, n. 6; Stutz, *art. cit.,* p. 58.

Other legislation of the time was in some respects even more explicit. The Council of Nîmes in 1098 decreed that pastors could not be dispossessed of their churches without serious cause and without a canonical trial.[42] In like manner the Synod of Rheims (1135) insisted upon seeing that each church had its own proper pastor,[43] as did the II General Council of the Lateran in 1139.[44]

The argument drawn from this latter legislation is based upon the word *proper*. Taking cognizance of the comparison frequently made at the time between the union of a cleric with his benefice and the union between a man and his wife in marriage, it seems that the word *proper* as used by the fathers of the council could well have been intended as equivalent to *perpetual*. As matrimony was perpetual, so by analogy was the union between the pastor and his church.[45] Although this analogy, like all comparisons, was of a limited application, at least it illustrated the thought behind the legislation of the time, namely, the desire for stability in ecclesiastical offices.

The Council of Béziers (1233) was perhaps the most explicit as regards both the appointment of a proper pastor and his perpetual tenure of office.[46] Its declaration certainly strengthens the argument drawn from analogy in favor of perpetuity in office. It is evident, then, from this and other conciliar enactments, some of which were later embodied in *Gratian's Decree*, that the history of benefices played a very important part in the development of the pastoral office, and especially in establishing its stability. When appointed to a parochial benefice, a pastor was assured of a specific source of income and given a greater sense of security. Furthermore, there was less likelihood of his being moved simply at the will of his bishop. It cannot be affirmed, however, that at that time permanency in office was the universal practice of the

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[42] C. 9—Mansi, XX, 936.
[43] C. 9—Mansi, XXI, 460.
[44] C. 10—Mansi, XXI, 569.
[45] Cf. c. 4, C. XXI, q. 2.
[46] C. 12: "Volumus igitur et stricte praecipimus, ut quaelibet paroecialis ecclesia proprium habeat et perpetuum sacerdotem, qui personaliter deserviat in eadem."—Hardouin, VII, 12.

Church, since general legislation had not been enacted by the bishops of the whole world gathered together in council under the direction of the Holy Father. Further, no specific text directly or expressly stated that a pastor by virtue of his office was irremovable. The best that can be affirmed is that the enactments regarding stability betokened future legislation, after having really strengthened the foundations established by the earlier councils in this respect.

SECTION II

Legislation from the Decretals to the Code

At this point of the historical development of the stability of the pastoral office it is to be noted that legislation became clearer and more regular, culminating with the more explicit law of the Council of Trent (1545–1563) and the declaratory decisions of the Roman Curia, especially those of the Sacred Congregation of the Council.

Although, as has already been noted, some of the conciliar laws were embodied by Gratian in his *Decree,* they were still without universal binding force, since that collection was never made official. However, the very fact that they were included by that great canonist affords good reason to believe that they were at least followed as a directive norm before being given universal application by their substantial inclusion in the *Decretals of Gregory IX* in 1234.

Decretal legislation manifested the same idea regarding stability as portrayed in the previous enactments of councils. However, when considering this legislation, one must keep in mind a two-fold distinction regarding the possible character and status of parishes. There was the parish in which the vested *(habitualis)* care of the same belonged to the moral person to which it was united, the actual rule resting with a physical person called a vicar. There was also the parish in connection with which both the vested and the actual care of souls belonged to some specified physical person. Although the enactments of the Decretals seem to concern themselves more with the former type of parish, there seems to be no incongruity in regarding these enactments as

relating also to those pastors who ruled with a vested and an actual care over the churches committed to their charge.[47]

The Decretals reiterated the teaching of Pope Innocent III (1198–1216) in the IV General Council of the Lateran (1215), wherein he decreed that those who held prebends to which the care of souls was attached should have a suitable and perpetual vicar canonically instituted in the prochial church.[48] Before the issuance of Pope Gregory's Decretals this same demand had also been made by the particular council held at Mainz in 1225, celebrated under the supervision of the Legate of the Holy See. Inveighing against certain abuses which had crept in, such as the appointments of temporary vicars to parochial churches, it decreed that the practice be stopped and that the canonical statutes be adhered to in the future.[49] The fact that this council declaimed against an abuse demonstrates that perpetuity in the pastoral office was canonically desired.

In another place in the Decretal legislation this desire for stability is stressed even more forcefully in the words of Boniface VIII (1294–1303).[50] That this text was applicable to the demand of the Church that her pastors be perpetual is confirmed by the gloss on the word *perpetui.*[51] Commenting on the same text, Pyrrhus (†1686) remarked: *In proposito autem huius requisiti, nempe, quod beneficium debeat esse perpetuum, tenuit*

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[47] Hinschius, *System der katholischen Kirchenrechts,* II, 293.

[48] ". . . qui talem habet praebendam vel dignitatem, cum oporteat eum in maiori ecclesia deservire, in ipsa parochiali ecclesia idoneum et perpetuum habeat vicarium, canonice institutum . . ."—C. 30, X, *de praebendis et dignitatibus,* III, 5; cf. also *ibid.,* c. 15.

[49] C. 12—Mansi, XXIII, 6.

[50] "Presbyteri qui ad curam populi per monachos in eorum ecclesiis praesentantur Episcopis, et instituuntur ab ipsis, cum debeant esse perpetui, consuetudine vel statuto quovis contrario non obstante, ab eisdem nequeunt ecclesiis nisi per Episcopos et ex causa rationabili amoveri."—C. un. *de capellis monachorum,* III, 18, in VI°.

[51] "*Perpetui,* non enim beneficia dantur ad tempus, . . . 70 distin. sanctorum, . . . sicut enim matrimonium carnale ad tempus non contrahitur, sic nec spirituale, . . . nec moribus nostris expedit temporales habere filios, *Digest,* de adoptione, c. si tibi."—*Glossa* ad v. *perpetui,* c. un. *de capellis monachorum,* III, 18, in VI°.

etiam Caesar, Grass., dec. 13, n. 7, cum aliis allegatis per Buratt., dec. 224, n. 4. Et dicitur perpetuum, ad differentiam beneficii manualis. . .[52]

In denying that this text necessarily requires that all pastors be irremovable, Craisson (†1881) implicitly verified the interpretation of the text in favor of stability in the pastoral office.[53] Finally, Wernz remarked that this chapter in the Decretals of Boniface VIII treated only of those vicars who exercised the care of souls in parishes which were united in their temporalities only *(ad temporalia tantum)* with monasteries, for otherwise such vicars would be removable *ad nutum* by their own regular superiors.[54] It seems evident, then, that this text of Boniface VIII was to be understood of pastors who were presented by those monasteries with which the temporalities of the parish were incorporated but who for their institution in office depended upon the bishop. Hence it can be offered as an argument in behalf of the perpetuity of pastors taken in the strict sense. Such pastors were not to be moved by the bishop at will, but only for a cause of necessity or great utility.

Not all authors admitted the force of this argument. Among those dissenting was Bouix (1808–1870) who maintained that this text merely warned against the removal of such vicars *ad nutum* by the monasteries to which the parishes were attached. He argued that they were still removable *ad nutum* by the bishop who had given them their institution in office as pastors.[55] Bouix's argumentation, although somewhat intriguing, is not conclusive. Since there was question of parishes which were united *ad temporalia tantum* with monasteries, it follows that in no way was the removal of the vicars possible on the part of those who had presented them. Since the canonical approval of these vicars was in the hands of their bishops, so was their removal. Again, Boniface VIII stressed the fact that these priests were to have

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[52] *Praxis Beneficiaria,* lib. I, cap. 6, n. 269. This reference is apparently to Caesar Lambertinus (†ca. 1548) and Carlo de Grassis (early 17th century).

[53] *Manuale Totius Iuris Canonici,* I, n. 552.

[54] *Ius Decretalium,* II, n. 1056.

[55] *Tractatus de Parocho,* p. 204.

permanency in their appointment and that they were removable only for a reasonable cause. Certainly the text would have legislated in vain if such vicars would still have remained removable at the will of the bishop. In the making of this assertion it is not pretended that a solution is offered regarding the question whether perpetuity is essential to the pastoral office. It is the purpose here merely to demonstrate that stability was desired whenever possible, with due regard for any exceptions demanded by time or circumstance.

If one take cognizance of conciliar legislation even as early as the ninth century, this conclusion receives further corroboration in its certainty. The Council of Chalon-sur-Saone (813) in canon 42 legislated against arbitrary removals, whether by those who held incorporated churches or parishes, or by the bishops themselves.[56] This canon, primarily directed against those who possessed parishes by incorporation, may certainly be regarded as pointing to the state of general irremovability, since it postulated the commission of a grave misdeed and the subsequent intervention of a canonical trial before one could be removed from his parish.[57]

The Council of Pavia (855) implied the same in canon 5 of its decrees.[58] It may be assumed that the legislation of these councils in union with the decrees of those cited in a previous place[59] were influential in bringing about the enactments of the Decretals in this regard, then it seems that the Church had definitely decided that irremovable pastors were quite necessary for the fruitful ministry in the parishes to which they were assigned.

Whatever doubts may remain in relation to the foregoing legislation seem cleared up quite aptly in the enactments of the Council

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[56] ". . . . Unde oportet, ut, . . . hanc ecclesiam nonnisi gravi culpa et coram episcopo canonica severitate amittat."—Mansi, XIV, 102; c. 38, C. XVI, q. 7.

[57] Claeys-Bouuaert, *De Canonica Cleri Saecularis Obedientia*, p. 294.

[58] "Ipsi vero qui ad gubernandas plebes legitime sunt provecti, nullatenus a suis episcopis repellantur, nisi aut in alicuius criminis reatum inciderint aut easdem plebes male tractaverint."—*MGH, Leges*, Sect. II *(Capitularia)*, II (ed., A. Boretius and V. Krause, 1897), 82.

[59] Cf. *supra*, pp. 19–21.

of Trent. The decrees of this Council, concerning themselves with the status of both vicars and pastors in the ordinary sense of the term, stated the common law. After commanding each bishop to make a proper division of the territory of his diocese into parochial areas, it decreed that each parish be assigned its own permanent rector.[60] This mandate certainly sustains the preceding legislation cited in favor of the irremovability of the pastors of souls.

However, it has been argued by some that the immediately subsequent text: . . . *aut alio utiliori modo, prout loci qualitas exegerit, provideant,* militates against this conclusion.[61] In reply to this objection some have maintained that this alternative could just as well have been contraposed to the establishment of parishes as to the perpetuity of the pastors.[62] The proponents of this opinion feel that the council provided for those cases in which parishes could be established according to families rather than according to territorial limits. The establishment of parishes in this manner at a later time was upheld by the Sacred Congregation of the Council as not adverse to the enactments of the Council of Trent.[63]

Such an interpretation, although perhaps a true one, does not seem necessary to prove the mind of the Church regarding a pastor's perpetuity in office. The fact that the Council enacted a law which demanded that each parish have a *particular* and *perpetual* pastor certainly implied that the general law enjoined just that in ordinary circumstances. But since it is not to be denied that there could be exceptions to the general law, it could easily have happened that under certain circumstances such a manner of acting would have proved unfeasible. The fathers of

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[60] ". . . mandat sancta synodus episcopis pro tutiori animarum eis commissarum salute, ut distincto populo in certas propriasque parochias unicuique suum perpetuum peculiaremque parochum assignent."—Conc. Trident., sess. XXIV, *de ref.*, c. 13.

[61] *Loc. cit.*

[62] Houwen, *De Parochorum Statu*, p. 112; Claeys-Bouuaert, *op. cit.*, p. 300; Barbosa-Giraldi, *De Officio et Potestate Parochi* (Romae, 1831), pars 1, c. 1, n. 23.

[63] Barbosa-Giraldi, *op. cit.*, pars I, c. 1, n. 23.

the council, recognizing this possibility, allowed for the exception in providing the alternative which has been the cause of contention. Hence it does not appear that this alternative in any way detracts from the force of the text as an argument in favor of the irremovability of pastors.

The legislation concerning vicars who were responsible for the care of souls in incorporated parishes manifested the same desire for perpetuity.[64] This enactment seems to settle the problem of Bouix and others who insisted that the vicars spoken of by Boniface VIII were perpetual merely on the side of those who presented them, but not with relation to their bishops whose right it was to approve them canonically. It maintained that ordinarily such vicars were to be appointed with permanence. Again, the Council foresaw the possibility of the exceptional case, allowing for the institution of vicars removable *ad nutum* when necessity demanded it. However, before taking advantage of this exception each bishop, as manifested by the words *pro bono ecclesiarum regimine,* had to be morally certain that a real necessity warranted his action.

Before consideration be given to the decisions of the Roman Curia, it may be helpful to review in passing the legislation of some of the particular councils subsequent to the Council of Trent. Among these are cited three councils of Germany, in which it was demanded that each church have its own particular pastor as well as that each pastor remain in the church to which he was sent.[65] If one accept the validity of the analogy between espousals in the spirit and in the flesh, then the previously mentioned legislation serves, indirectly at least, as an example of the

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[64] "Beneficia ecclesiastica curata, quae cathedralibus collegiatis, seu aliis ecclesiis vel monasteriis . . . perpetuo unita et annexa reperiuntur, ab ordinariis locorum annis singulis visitentur, qui solicite providere procurent, ut per idoneos vicarios, etiam perpetuos, nisi ipsis ordinariis pro bono ecclesiarum regimine aliter expedire videbitur, . . . ibidem deputandas animarum cura laudabiliter exerceatur."—Conc. Trident., sess., VII, *de ref.*, c. 7.

[65] Council of Tournai (1574), c. 26—Schannat-Hartzheim-Scholl-Neissen-Hesselmann, *Concilia Germaniae* (11 vols., Coloniae Augustae Agrippinensium, 1759–1790) VII, 790 (hereafter referred to as Hartzheim); Council of Breslau (1592), c. 12—Hartzheim, VIII, 384; Council of Brixen (1603), cc. 7, 8—Hartzheim. VIII. 1552.

Church's wish for stability in the pastoral office. Other particular councils which repeated the ruling of the Council of Trent likewise indicated the mind of the Church in this matter.[66] Such legislation, giving evidence that the enactments of the Council of Trent were considered most important, manifested that the various provinces in which the councils were held were making every effort to see that these enactments were strictly observed throughout their dioceses.

Other sources upon which one could draw are certain papal constitutions: that of Pope Pius V (1566–1572), which demanded that perpetual vicars be instituted in those churches in Rome which were attached to a moral person to whom was accredited the vested care of souls;[67] that of Pope Benedict XIV (1740–1758), which repeated the teaching of the Council of Trent respecting both pastors strictly so-called and perpetual vicars;[68] and that of Pope Leo XII (1823–1829), which demanded that temporal vicars in Rome be suppressed.[69]

Just as the enactments of the Council of Trent had led the way for further conciliar legislation concerning perpetuity in office, so it established a firm foundation for the future decisions of the Roman Curia. All appeals or recourses sent to the Curia received consideration from this point of view. In other words, the Sacred

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[66] Provincial Council of Tours (1849)—*Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis* (7 vols., Friburgi Brisgoviae, 1870–1890), IV, 265a (hereafter cited as *Coll. Lac.*). Provincial Council of Sens (1850)—*Coll. Lac.*, IV, 883a; Provincial Council of Toulouse (1850)—*Coll. Lac.*, IV, 1042a; Provincial Council of Vienna (1858)—*Coll. Lac.*, V, 154a; Provincial Council of Cologne (1860)—*Coll. Lac.*, V, 341b.

[67] Const. *"Etsi omnibus,"* 5 nov. 1571, n. 1—*Bullarum Diplomatum et Privilegiorum Sanctorum Romanorum Pontificum Taurinensis Editio* (25 vols., Augustae Taurinorum, 1852–1872), VII, 948 (hereafter cited as *Bull. Rom.*).

[68] Const. *"Ad militantis,"* 30 mart. 1742, §§ 9, 16—*Codicis Iuris Canonici Fontes cura Emi Petri Card. Gasparri Editi* (9 vols., Romae (postea Civitate Vaticana): Typis Polyglottis Vaticanis, 1923–1939). Vols. VII, VIII, et IX ed. cura et studio Emi Iustiniani Card. Serédi), n. 326 (hereafter referred to as *Fontes*).

[69] Const. *"Super universam,"* 1 nov. 1824, n. 35—*Bull. Rom.*, XIII, 239.

Congregations recognized the element of irremovability as belonging to the pastoral office, while at the same time they admitted that pastors were removable in certain circumstances. They were quite cognizant of the teaching of the Council of Trent regarding the possibility of removable pastors and vicars.[70] Hence they did not consider the existence of removable pastors and vicars as a condition that was repugnant to the general legislation, whether of the Decretals or of the Council itself. In fact, when legislating with respect to the duties of removable pastors, the Sacred Congregation of the Council regarded them as enjoying the same pastoral prerogatives as irremovable pastors.[71] Hence it is evident that the Curia acknowledged these to be true pastors.

On the other hand, the same Congregation was insistent in its demand that in ordinary circumstances all pastors be irremovable. Some of the decisions of the Congregation were very explicit in this regard.[72] These decisions, supplementing the prevailing legislation certainly clarify one's mind respecting the Church's attitude in the matter of perpetuity or irremovability, as indeed does the decree *"Maxima cura,"* which repeated the same teaching by saying: . . . *praescriptum generatim fuit ut stabiles in suo officio permanerent.*[73]

In spite of these proofs it has been argued by some that the

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[70] Sess. XXIII, *de ref.*, c. 7; sess. XXV, *de ref.*, c. 11.

[71] S.R.C., *in Pisauren.*, 8 mart. 1631—*Decreta Authentica Congregationis Sacrorum Rituum* (6 vols., Romae: Ex Typographia Polyglotta, 1898–1927), n. 561 (hereafter referred to as *Decreta Authentica*); S.R.C., *in Sutrina*, 22 mart. 1631—*Decreta Authentica*, n. 563; S.R.C., *in Callien.*, 9 apr. 1633; S.C.C., *in Comen.*, 27 mart. 1706, these latter two are cited by Barbosa-Giraldi, *De Officio et Potestate Parochi*, Appendix II, n. 14.

[72] S.C.C., *in Leodien.*, 12 maii 1770—Pallottini, III, 405–406; S.C.C., in Ravennaten., 12 dec. 1829—*Thesaurus Resolutionum Sacrae Congregationis Concilii* (167 vols., Romae, 1718–1908), LXXXIX, 264 (hereafter cited *Thesaurus*); S.C.C., *in Gallipolitana*, 7 aug. 1841—*Thesaurus*, CI, 275; S.C.C. *in Portuen. et Ruf.*, 14 febr. 1846—*AkKR*, XXI (1869), 425–426; S.C.C. *in Narnien.*, 9 sept. 1848—*Thesaurus*, CVIII. 398; S.C.C. *in Soran.*, 3 iul. 1852— *Thesaurus*, CXI, 275; S.C.C. in *Messanen.*, 18 mart. 1854—*Thesaurus*, CXIII, 117; S.C.C., 26 iun. 1875—*ASS*, IX (1876), 203; S.C.C. 5 aug. 1876—*ASS*, *IX* (1876), 604; S.C.C. 26 apr. 1879—*ASS*, XII (1879), 489.

[73] S.C. Consist., decr. *Maxima cura*, 20 aug. 1910—*AAS*, II (1910), 636.

practice of the Church in instituting removable pastors in France, in Belgium, in Holland, in some parts of Germany, in England, in Scotland and in the United States, certainly militated against the Church's desire of stability in the pastoral office. On the face of it this objection seems to carry much weight, since not only did the Church permit such a practice, but in certain cases demanded the continuation of the same.[74]

A proper reflection on the matter will convince one, however, that the objection is not as forceful as it appears. Did not the general law of the Church consider such a possibility? The situation simply verifies the exception recognized by the Decretal legislation, by the Council of Trent, by the particular councils cited above, and by the decisions of the Roman Curia. The Church allowed this practice because it facilitated the administration of dioceses, and allowed bishops in troublesome times more readily to provide for the needs of the clergy, of the people, and of the general good of religion.[75] Certainly the situation which prevailed in these countries during the last century warranted such a practice in order to safeguard the interests of the Church. In evidence of this it seems advantageous to review briefly the status of affairs in France and in the United States. Such a résumé should acquaint one with the necessity of invoking the exception, namely, the institution of removable pastors.

Previous to the French Revolution the practice of appointing irremovable pastors was very much in evidence.[76] However, from the time of the French Revolution until the ratification of the Concordat between the Holy See and the French government, parochial organization in France was in a precarious condition, since the new government was not at all partial to the Church. There was little desire on its part to support the pastors, as had been the custom in the past. But with the Concordat of 1801 the

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[74] Gregory XVI to the Bishop of Liége (1 maii 1845)—cited by Bouix, *Tractatus de Parocho*, p. 237; Pope Pius IX to the Bishop of Evreux (5 oct. 1864)—*ASS*, XIV (1880), 188.

[75] Ayrinhac, *The Constitution of the Church in the New Code of Canon Law* (New York: Longmans, 1929), p. 313.

[76] De Brabandere, *Iuris Canonici et Iuris Civilis Compendium* (2 vols., Brugis, 1866–1869), I, p. 363.

situation was remedied to some extent. By agreement a certain few pastors were to be appointed perpetually, one for each territory of the Justice of the Peace. They were assured support from the government. Since these few were hardly enough to administer to the needs of the people in France, another agreement was reached whereby other pastors, called *desservants* or *succursalistes,* were to be instituted. These were appointed *ad nutum,* and were to be supported from the free will offerings of the people. Later on they were accorded a small pension from the government.[77]

Despite their removability these pastors possessed all the rights of perpetual pastors, as is manifested by a pastoral letter published in France on May 26, 1845.[78] Such *desservants* were indeed true pastors, who had been placed in charge of a new species of parishes.[79]

A few remarks respecting the status of rectors in the United States is now in order. Due to the fact that the United States constituted missionary territory until withdrawn from the jurisdiction of the Sacred Congregation for the Propagation of the Faith by means of the Constitution *"Sapienti Consilio,"*[80] and comprised a very extensive territory with a sparsely settled population, there were in the very beginning neither parochial boundaries nor parishes in the true sense. It was not until the I Provincial Council of Baltimore in 1829 that the first attempt was made to undo the confusion that existed in the church organization of this country, while it was only in the II Plenary Council in 1866 that definite territories were assigned to particular rec-

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[77] De Brabandere, *op. cit.,* I, pp. 363-364; Bargilliat, *Praelectiones Juris Canonici,* n. 1011.

[78] "Mais les Evêques, en organisant les dioceses, voulurent améliorer la position des prêtres prépôses au service des succursales; ils les mirent hors de toute sujéction vis-à-vis des curés de canton, ils leur donnèrent ce qu'on appelle droit d'étole; ils les rendirent indépendants dans leur églises respectives, et leur conférèrent des pouvoirs spirituels aussi étendus que les pouvoirs des cures inamovibiles d'autrefois. Ils ont même voulu que le nom de curé leur fût conservé."—cited by De Brabandere, *op. cit.,* I, p. 365.

[79] Wernz, *Ius Decretalium,* II n. 821, III.

[80] June 29, 1908—*Fontes,* n. 682.

tors.[81] These rectors, however, possessed no stability until the enactment of the III Plenary Council of Baltimore in 1884.[82] Although it was decreed that only one rector in every ten be made irremovable, this legislation indicated the Church's wish, when it became expedient, to have her rectors be irremovable. In other words, under normal conditions, as was later manifested by the present legislation, irremovability is the usual status of the pastorate, even for the pastors of the United States. The qualification, "even for the pastors of the United States," is made because previous to the promulgation of the *Code of Canon Law* in 1918, all other than the irremovable rectors were *amovibiles ad nutum*.[83] This reply, given in answer to the doubt proposed regarding the application of the *"Maxima cura"* to the removable rectors of the United States, declared that it did not give greater permanency to these, since they still remained vicars of the ordinary.

On the other hand, the decree *"Maxima cura"* did affect the status of other removable pastors, even the *desservants* of France and neighboring territories. Although still removable, they were no longer classed with those who were removable *ad nutum*.[84]

The conclusions presenting themselves in view of this and all preceding legislation, at least from the time of the Decretals, can be summed up in a few words. Pastors, if endowed with the vested and the actual care of souls, were in ordinary circumstances to be irremovable. Those who ruled as vicars of churches united

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[81] *Concilii Plenarii Baltimorensis II, in Ecclesia Metropolitana Baltimorensi, a die VII ad diem XXI Octobris, A.D. MDCCCLXVI,* Habiti, *et a Sede Apostolica Recogniti, Acta et Decreta* (2. ed., Baltimorae: John Murphy, 1894), nn. 123–125.

[82] "In singulis dioecesibus, auctoritate Episcopi, de consultorum suorum consilio seligantur certae missiones quae magis aptae videntur ut paroeciarum instar haberi possint, atque a rectoribus missionariis permanenter institutis seu inamovibilibus sicut in Anglia regantur."—*Acta et Decreta Concilii Plenarii Baltimorensis III, A.D. MDCCCLXXXIV* (Baltimorae: John Murphy, 1886), n. 33.

[83] S.C. Consist., 28 iun. 1915—*AAS,* VII (1915), 380.

[84] Decr. *Maxima cura,* 20 aug. 1910, can. 30: "Superius constitutis regulis, adamussim applicandis iis omnibus qui paroeciam, quovis titulo, ut proprii eius rectores obtinent, sive nuncupantur Vicarii perpetui sive *desservants,* sive alio quolibet nomine. . . . ."—*AAS,* II (1910), 647.

to moral persons were likewise to enjoy the same stability of office. Although the common law in exceptional cases recognized the lawfulness of removability, it was perpetuity in the pastoral office, or irremovability from the pastoral incumbency, that was acknowledged, if not as an essential condition, at least as the normal status of the pastoral office.

CHAPTER III

Transfer

The consideration of the procedure of transfer, as noted in the first chapter, demands that the distinction between transfer for the good of the relinquished parish and a transfer for the good of the newly acquired parish be kept in mind. This is essential if one endeavors to understand the background for the present legislation. In this chapter attention will be given to the former type of transfer. This kind of transfer will be reviewed by way of its analogy to the transfer of bishops, and from the standpoint of the exchange of benefices considered in the strict sense as well as an alternative allowed to bishops when invoking the administrative procedure for the removal of a pastor from his parish.

Although not universally prescribed, the doctrine respecting stability of the pastoral office was generally acknowledged at the time of the Decretal legislation. Hence the major part of the treatment on the procedure of transfer will be concerned with legislation after that time. However, what little conciliar legislation in the early ages of the Church was applicable will be cited inasmuch as it may have laid the foundation for the enactments of the later centuries.

SECTION I

The Transfer of Bishops

The fact that a section in this dissertation is devoted to a treatment of the transfer of bishops may at first sight occasion surprise for the general reader. To him it may seem extraneous to the topic under discussion. In order, then, to settle any doubts in this regard, the writer wishes to remark that this brief treatise on the transfer of bishops is written primarily that it may serve as a basis of analogy in relation to the transfer of pastors, since no treatment of the latter is *ex professo* evidenced in the conciliar legislation of the early centuries, nor in the Decretals, nor in the

writings of the Decretalists or commentators. In fact, the process of the administrative transfer of pastors, as an act of transfer, is comparatively new legislation.[1]

At the outset it is admitted that this analogy does not form a real juridical basis of comparison in view of the divergency that exists in the two relationships considered—that between the Holy Father and a bishop on the one hand, and that between the bishop and a pastor on the other. That divergency draws its origin not only from the distinctive difference in the nature of the power as possessed by the Holy Father and by a bishop in their character of active subjects in an act of transfer, but also from the patent dissimilarity in the nature of the bond by which a bishop and a pastor are linked with their offices in their character as passive subjects in an act of transfer.

Although a bishop has the full right of the exercise of jurisdiction in his own diocese, nevertheless, it is always within the power of the Roman Pontiff to reserve to himself some of this power in virtue of his primacy of jurisdiction over the whole Church.[2] Hence, the power of a bishop cannot be said to be as extensive as that of the Roman Pontiff, even as regards the transfer of beneficiaries in his own diocese. Likewise there is an inequality between the bond that unites a bishop to his diocese and the link that joins a pastor to his church. The bond of unification existing between a bishop and his see is far more rigid than the link existing between a pastor and his parish, as is evident from what was previously stated in the chapter on the stability of the pastoral office. Notwithstanding these variances, it seems that a knowledge regarding the analogy and situation may prove helpful inasmuch as it will furnish a basis for a comparative study.

So intimate is the bond between a bishop and his see that the arbitrary drifting and ranging of a bishop from one see to another has traditionally been regarded as a kind of spiritual adultery.[3]

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[1] Noval, *De Processibus*, II, n. 607.

[2] Ottaviani, *Compendium Iuris Publici Ecclesiastici* (Romae: Typis Polyglottis Vaticanis, 1936), p. 259.

[3] Synod of Rome (402), c. 13—Hardouin, I, 1037.

This view was derived from the comparison that was made between the espousal in the spirit—a bishop with his see—and the marriage in the flesh—a man with his wife. This comparison was very aptly illustrated centuries later by Pope Innocent III (1198–1216) when he spoke of the election of a bishop as ushering in, of the confirmation of his appointment as ratifying, and of the act of his consecration as consummating the status of his spiritual wedlock.[4] In the light of this it is not surprising that the early councils were very strict in their prohibition against bishops if these in their governing and ruling capacity sought to pass from one city to another without the consent of the proper authority.[5]

Such legislation was indicative of the mind of the Church that bishops were to remain in those sees in which they had been constituted, unless, with the permission of the competent authority and for a good reason, it was evident that the interest of the Church would be favored by their transfer to another diocese. This legislation was affirmed by Pope Innocent III (1198–1216) in his demand that bishops abstain from the abuse of exchanging dioceses at will,[6] as well as in his recognition that it was possible for a bishop to be transferred to an equal or a better diocese when the evident utility or necessity of the Church demanded it.[7]

In an effort to be more explicit concerning the causes for which the transfer of bishops could be permitted or countenanced, canonists based their conclusions on an intimate study of the verse which by the glossators was prefixed to the constitution of Pope Innocent on renunciation.[8] Under the heading of *causa neces-*

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[4] C. 4, X, *de translatione Episcopi*, I, 7. The terms used in this decretal were: *coniugium initiatum, coniugium ratum* and *coniugium consummatum.*

[5] I Council of Nicaea (325), cc. 15, 21—Mansi, II, 674; c. 19, C. VII, q. 1; Council of Antioch (341), c. 20—Hardouin, I, 598; Council of Sardica (343), c. 1—Hardouin, I, 638; c. 1, X, *de clericis non residentibus*, III, 4; Council of Arles (314), cc. 2, 21—Mansi, II, 470, 471; Council of Chalcedon (451), c. 5—Hardouin, II, 603; c. 26, C. VII, q. 1.

[6] Cc. 1, 3, X, *de translatione Episcopi*, I, 7.

[7] Cc. 2, 3, X, *de translatione Episcopi*, I, 7; Cc. 9, 10, X, *de renuntiatione*, I, 9.

[8] "Debilis, ignarus, male conscius, irregularis,
Quam male plebs odit, dans scandala cedere possit."

sitatis was classed not only the transfer which became imperative in view of the hatred which had been engendered against a bishop, but also the transfer which was necessitated in consequence of a hostile persecution, of an insalubrious climate, or for other similar reasons which rendered a bishop's stay in his diocese both fruitless and unhappy.[9] Included under the *causa utilitatis* was the transfer accomplished for the good of peace and harmony in the Church, and the transfer which implied a promotion in which the merits of a particular bishop were duly rewarded, or his special ability was employed in another place for the good of the Church.[10]

Although it has been disputed among authors whether or not the Holy Father at his own pleasure can dissolve the spiritual bond existing between a consecrated bishop and his church, it is certain that he cannot force an unwilling bishop to contract a new bond of relationship with a second church, since such an act postulates the bishop's consent. However, since the bishop could be subjected to punishment if the contemplated change were for the evident utility or necessity of the Church,[11] the problem is usually obviated by the bishop's acceptance of the proposed transfer. Although antecedently unwilling, the bishop would in all probability, when faced with potential punishment, accept the will of the Roman Pontiff and give his consent to contract the new relationship.[12]

This presentation of facts concerning the transfer of bishops brings home to one the force of the principle enunciated by Pope Pelagius II (579–590): " . . . *plurimorum utilitas unius utilitati aut voluntati praeferenda est.*"[13] Irrespective of the rigidity of the bond that unites or links any cleric with his benefice, the dissolution of the bond can become even imperative in the light of an exacting demand from the common good. If that be true in

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[9] C. 42, C. VII, q. 1; cf. Reiffenstuel, *Ius Canonicum Universum*, lib. I. tit. 7, n. 11.

[10] C. 34, C. VII, q. 1; cf. Reiffenstuel, *ibid.*, n. 10.

[11] Cf. Fagnanus, *Commentaria in Libros Decretalium*, lib. I, tit. 13, n. 119; Rieffenstuel, *ibid.*, n. 30.

[12] Wernz, *Ius Decretalium*, II, n. 526, note 49.

[13] C. 35, C. VII, q. 1.

the case of bishops, than whom no other ecclesiastic apart from the Pope possesses his see or benefice with greater stability, there certainly can be no question from this point of view regarding the authorization of the transfer of pastors. However, due allowance must be made for the difference existing between the passive subjects of the transfer, that is whether of a bishop or of a pastor, as well as for the difference existing between a transfer that is made for the good of the relinquished parish, and one that is effected for the good of the newly obtained parish. This will be seen more clearly in the subsequent treatment of pastors.

SECTION II

Transfer of Pastors for the Good of the Parish Relinquished

ARTICLE I. ANTE-DECRETAL LEGISLATION

Because of the similarity existing between the exchange of benefices and the transfer of pastors, both procedures may be treated in this section, with both contributing to a better understanding of administrative transfer. The fact that both the Decretals and the Decretalists treated these in the same title, *de rerum permutatione,* certainly warrants the comparison[14]

The conciliar legislation regarding irremovability prior to the time of the Decretal legislation, as reflected in the preceding chapter, was none too clear. Furthermore, whatever conciliar enactments did exist did not strictly pertain to the subject of irremovability nor indeed to that of transfer. Yet, it seems worthwhile to note in a brief way the laws of the councils as made during these formative years of the development of parochial organization. Knowledge of these laws will allow one the better to understand the more explicit legislation of later years.

Reference has already been made to the canons which legislated against the arbitrary passing of bishops from one diocese to another in their capacity of ruling prelates. Among these canons,

[14] Cf. C. 5, X, *de rerum permutatione,* III, 19.

some enactments included the lower clergy within their scope.[15] The enactments relating to the stability of the pastoral office may likewise be said to refer, indirectly at least, to the transfer of pastors. For instance, an excerpt of Egbert, Archbishop of York (735–766), reveals particular legislation which prohibited all ranging from place to place on the part of the clergy.[16] The Council of Tours (813) was very definite regarding the same prohibition,[17] as was also the Council of Rheims which was held in the same year.[18] The Council of Nimes (1096), even more severe in this matter, invoked a penal sanction against the roaming of priests without authority from one church to another,[19] while the Council of Tours (1163), held under the guidance of Pope Alexander III (1159–1181), and with almost the same binding force as that of an ecumenical council, was very positive in its insistence against the exchanging of benefices.[20]

The legislation of these councils is quite indicative of the mind of the Church regarding arbitrary transfer. Although she was strongly set against such arbitrary action, she did admit the transfer of her priests when it was done with the consent of the proper authority and for the good of the Church. However, it must be remembered that in general the stability which the Church wished to maintain at that time pertained more to the title of ordination than to any office to which her priests had been appointed,[21] even though in particular instances the appointment to a prebend con-

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[15] Council of Arles (314), cc. 2, 21—Mansi, II, 470, 471; I Council of Nicaea (325), c. 21—Mansi, II, 674; Council of Chalcedon (451), c. 5—Hardouin, II, 603.

[16] "Ut nullus presbyter a sede sanctae ecclesiae sub cuius titulo ordinatus fuit ambitionis causa ad alienam pergat ecclesiam, sed ibidem devotus, usque ad vitae exitum permaneat."—Wilkins, I, 102.

[17] C. 15—Mansi, XIV, 85.

[18] "Ut presbyter a minore titulo ad maiorem non liceat transmigrare."—Mansi, XIV, 79.

[19] C. 9: ". . . Quod si ambitionis vel cupiditatis causa ad aliam migraverunt ecclesiam, utramque amittant."—Mansi, XX, 936.

[20] C. 1: ". . . Idcirco, ut, sicut in magnis, ita quoque in minimis membris suis firmatam ecclesia habeat unitatem, divisionem praebendarum aut dignitatum permutationem fieri prohibemus."—Mansi, XXI, 1176; c. 8, X, *de praebendis et dignitatibus*, III, 5.

[21] Cf. *supra*, p. 16.

ferred the quality of perpetuity upon its incumbent. Moreover, the councils did not enlarge upon the cause of utility or necessity, seeming to leave that consideration wholly to the discretion of the authority which permitted the transfer. Again, the canons of the councils placed all priests on the same level with reference to the stability in their churches, demanding a formal trial for the removal of the priests from their churches.[22] The Council of Chalon-sur-Saone (813) legislated in like manner three centuries earlier.[23]

In conclusion, then the conciliar legislation prior to the Decretals, beyond forbidding the arbitrary ranging of priests from place to place, and also the exchanging of benefices by them without cause, seems not to indicate any definite norm of procedure for the transfer of pastors such as it now exists in the law of the Church.

ARTICLE II. DECRETAL LEGISLATION

Since the Decretal legislation offered some definite enactments on the matter of stability, one could rightfully expect that in like manner it contained some explicit laws regarding the procedure of transfer. The fact remains, however, that there is really only one basic text strictly applying to transfer in the sense in which it is treated under Title XXIX in Book IV of the *Code of Canon Law*. As an inspection of this text of Pope Urban III (1185–1187) will reveal there is found both a similarity and a dissimilarity in relation to the present procedure. Pope Urban, when asked about the validity of an exchange of benefices in view of the strict prohibition of the Council of Tours,[24] maintained that a bishop, if necessary, could transfer a pastor to another church in order that he might exercise a more useful ministry there.[25]

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[22] Council of Rheims (1148), c. 10: ". . . ne ab ejus regimine, alicuius, nisi episcopi, in cuius parochia fuerit, . . . canonico iudicio depellatur."—Mansi, XXI, 716.

[23] C. 42: ". . . ecclesiam hanc nonnisi gravi culpa et coram Episcopo canonica severitate amittat."—Mansi, XIV, 102.

[24] Cf. *supra*, p. 38.

[25] "Generaliter itaque teneas, quod commutationes praebendarum de iure fieri non possunt, praesertim pactione praemissa. . . . Si autem Episcopus

This text of Pope Urban seemed to apply strictly to what is now known as administrative removal, the indirect result of which could involve a transfer to another parish, in which the transferee might exercise a more fruitful minstry than he had done in the place he relinquished. But, as implied in the text, though necessity could occasion the transfer, it was the good of the parish from which the transfer was made that furnished the specifically differentiating element. From the words, *"ut quae [personae] uno loco minus sunt utiles, alibi se valeant utilius exercere,"* it can be inferred that the pastor to whom the text applied was one whose ministry, for some reason or other, had not borne fruit in the first parish. Thus the change was effected for the good of the souls in the parish which the pastor relinquished. It would seem an unwarranted extension of the meaning of the words, *"utilius exercere,"* if one concluded that the good of the parish to which the pastor in question was transferred had to be the motivating cause of the change. Title XXIX in Book IV of the *Code of Canon Law,* on the other hand, very specifically applies to a transfer which is made for the good of the newly acquired parish. Only those pastors who have fulfilled a fruitful ministry in the parishes from which they are changed are included under its legislation.[26]

Inasmuch as Pope Urban III did not manifest any later attempt to clarify this legislation, the commentators and especially the Decretalists, arguing from other texts in Gratian and the Decretals, endeavored to interpret this ligislation more explicity, in order to make it more easily applicable to actual situations. From their observations and reasonings it becomes evident what conditions they regarded as necessary if an exchange of benefices, and, by analogy, a transfer were to become permissible.

In consideration of the many prohibitions enacted against the abuse of the arbitrary ranging of clerics from one church to another, as well as of the canons militating against the exchange of

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causam inspexerit necessariam, licite poterit de uno loco ad alium transferre personas, ut quae uno loco minus sunt utiles alibi se valeant utilius exercere." —C. 5, X, *de rerum permutatione,* III, 19.

[26] Canon 2162.

benefices at will, it is evident that the first and principal condition was that the exchange be effected only with the permission of a legitimate authority. Otherwise such an exchange was null and void in any and all juridical effects.[27] Further, as has already been stated in the first chapter,[28] this legitimate authority seemed to include only those who enjoyed episcopal or at least quasi-episcopal jurisdiction,[29] since episcopal authority was demanded for such an act of jurisdiction, as was evident from the gloss on the word *conferatur*.[30]

Another demanded condition was that of a reasonable cause, that is, the utility or necessity of the Church, whether universally or locally.[31] As is evident, these enactments were taken from those canons which dealt with any manner of removal from a benefice, since as has already been noted, the Church was quite adverse to any act of arbitrary removal on the part of the bishop.

Concerning the nature of these causes for which an exception is made in the matter of a pastor's irremovability, nothing more need be said than has already been pointed out in the section which deals with the transfer of bishops. The possible situations militating against the common good of the faithful as cited there may well be applied to the case of pastors. Hence, by way of exception, bishops could in like circumstances derogate from the

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[27] As proof of this assertion authors pointed to the following enactments: Council of Antioch (341), c. 21—C. 25, C. VII, q. 1; Council of Piacenza (1095), c. 15—C. 2, D. 70; c. 8, X, *de praebendis et dignitatibus*, III, 5; c. un., *de rerum permutatione*, III, 5, in Clem.; c. un. *de rerum permutatione*, III, 10, in VI°.

[28] Cf. *supra*, pp. 2–3, where the different opinions of the authors concerning this matter are likewise mentioned.

[29] Cf. c. 5, X, *de rerum permutatione*, III, 19.

[30] ". . . Hoc tu scias quod episcopo est potestatem mutare vel permutationibus auctoritatem praestare, et non inferiorem. . ."—*Glossa* ad c. un. *de rerum permutatione*, III, 5, in Clem.; cf. *Glossa* ad c. 1, *de rebus ecclesiae alienandis vel non*, III, 13; c. 2 *de translatione Episcopi*, I, 7; c. 18, X, *de foro competenti*, II, 2.

[31] C. 1, *de rebus ecclesiae alienandis vel non*, III, 9, in VI°; c. 1, *ne clerici vel monachi saecularibus negotiis se immisceant*, III, 24, in VI°; c. 4, X, *de clerico aegrotante vel debilitato*, III, 6; c. 2, *de officio vicarii*, I, 13, in VI°.

ordinary way of removal which was accomplished by means of a canonical trial, and accordingly could accomplish the transfer of pastors by way of an administrative procedure, even though no culpability was apparent on the part of the transferees. This was the interpretation which eventually was given to the enactment of Pope Urban III.[32]

That the legislation on the matter of administrative transfer was far from complete at that time is evident from the enactments reviewed. Perhaps the most that can be said in its favor is that the Decretal legislation, in more readily acknowledging the supreme law of the *salus animarum,* attempted to facilitate its application by leaving more to the discretion of the bishops in matters of this kind. In this it offered an inchoate norm for that kind of administrative transfer which evisions the good of souls who were withdrawn from the care of the pastor transferred.

ARTICLE III. CONCILIAR LEGISLATION

Looking to the Council of Trent one finds little in the way of clarified legislation on this matter of transfer. In fact no specific text can be pointed out as referring to this procedure. However, it has been customary to refer to a text, which deals with ignorant and in competent pastors whose lives are otherwise beyond reproach, as indicating a norm for administrative removal, and indirectly one for administrative transfer. In speaking of such pastors the council provided that in their place temporary coadjutors be appointed, in order that the care of souls be properly taken care of in their parishes. This was one method which the bishop could invoke. But there was an alternative, since the council stated also that other provisions could be made in such cases. It is from this rather obscure text that one may infer that an administrative procedure could be employed.[33] Authors

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[32] Wernz, *Ius Decretalium,* V, n. 905; Gennari, *Sulla Privazione de Beneficio Ecclesiastico,* p. 217; Claeys-Bouuaert, *De Canonica Cleri Saecularis Obedientia,* p. 316.

[33] "Quia illiterati et imperiti parochialium ecclesiarum rectores sacris minus apti sunt officiis, . . . episcopi . . . coadjutores aut vicarios pro tempore deputare . . . *vel aliter providere possint* . . ."—Conc. Trident., sess. XXI, de ref., c. 6. Italics added.

argued that the alternative which was allowed to the bishop seemed to imply that such pastors could otherwise be transferred to another parish.[34]

If a bishop undertook to proceed in this manner he first had to consider the relative importance existing between the parish from which and the parish to which such a pastor might be transferred, as well as the degree of ignorance and unfitness of the pastor in question. If the pastor was densely ignorant or wholly unfit, it would have seemed useless to make such a transfer, since the same situation would have obtained in the new parish given to the transferee. However, if merely he did not possess the necessary qualifications for the parish of which he was in possession, in view namely of the particular character of the people committed to his care, then the transfer might well have been in order. If the pastor lacked these qualifications, then it could certainly be affirmed that this text had reference to a transfer, since that would certainly have redounded to the evident utility or necessity of the Church.

Another text of the Council of Trent forbidding the granting of permission for perpetual non-residence,[35] may be interpreted in like manner. If this text be taken in conjunction with another text which demands residence,[36] an argument in favor of transfer may be drawn. Accordingly, then, when a pastor whether with or without fault had made it necessary that he leave his parish, the ordinary could dispense him from the obligation of residence as long as this condition obtained. But, since according to the

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[34] Lega, *Praelectiones in Textum Iuris Canonici, De Delictis et Poenis* (ed. altera, Romae, 1910), n. 204 (hereafter cited *De Delictis et Poenis*); Suarez, *De Remotione Parochorum Aliisque Processibus Tertiae Partis Lib. IV, C.I.C.* (Romae: Pontificium Internationale Institutum Angelicum de Urbe, 1931), n. 28 (hereafter cited *De Remotione Parochorum*).

[35] ". . . nullique privilegia seu indulta perpetua de non residendo aut de fructibus in absentia percipiendis suffragentur; indulgentiis vero et dispensationibus temporalibus, ex veris et rationabilibus causis tantum concessis, et coram ordinario legitime probandis, in suo robore permansuris; . . ."—Conc. Trident., sess. VI, *de ref.*, c. 2.

[36] ". . . Discedendi autem licentiam in scriptis gratisque concedendam ultra bimestre tempus nisi ex gravi causa non obtineant."—Conc. Trident., sess. XXIII, *de ref.*, c. 1.

cited text this dispensation could not be perpetual, and in ordinary circumstances only for two months, then, if it was evident that the condition which demanded the pastor's absence would perhaps never cease, the existence of a cause for an administrative procedure seemed present in the case.

It can hardly be affirmed that the Council of Trent added much to the clarification of the legislation concerning the transfer of pastors. Other than confirming the possibility of the making of a transfer, the cited texts offer nothing in the way of an explanation regarding the class of pastors, whether removable or irremovable, to whom this procedure might be applied; nor do they furnish anything explicit regarding the procedure to be followed in this type of transfer. Evidently, then, the fathers of the Council, being more concerned with establishing the stability of the pastoral office, were not inclined to consider exhaustively any measure which perchance could have militated against their efforts in this matter.

Some added consideration which looks to the enactments of particular councils may be beneficial at this point. Again, although these councils were not very explicit on the procedure of transfer, they do offer an insight into the diocesan and provincial regulations which came into existence during the centuries after the Council of Trent.

First among these was the enactment of the Council of Constance (1567) regarding the examination to which there were to be submitted those who were to be transferred to another parish.[37] The V Provincial Council of Milan (1579) legislated in like manner.[38] In 1592 the Diocesan Synod of Breslau repeated the

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[37] Cap. 3: ". . . non tamen prius assumatur, instituatur, aut investiatur, quam denuo se justo examini submittat, si non ob aliam causam, vel ideo maxime, ut ex eo intelligatur, quonam pacto priorem parochiam rexerit, et eam, cui jam praeficiendus est, imposterum regere, et administrare possit: facile enim fieri potest, ut is qui minori Ecclesiae gubernandae sufficiens fuerit, ad majorem minime idoneus sit futurus."—Hartzheim, VII, 556.

[38] C. 30: ". . . Si tamen . . . qui permutant, quo tempore parochiales illas ecclesias adepti sunt, examen praescriptum non subierunt; fit tunc de illis experimentum examinis, sed absque concursu."—Hardouin, X, 1057.

legislation which forbade the desertion of one church for another,[39] and in 1603 the Diocesan Synod of Brixen.[40]

In an effort to guard against an abuse of the power afforded to bishops in the matter of removal, the Provincial Council of Avignon 1849 demanded an inquiry into the cause for any removal or transfer from a parish.[41] The Provincial Council of Venice in 1859 demanded a like caution in this matter.[42]

Besides attesting the fact that ecclesiastical authority endeavored to invoke safeguards against an easy exchange of benefices or a ready transfer from one benefice to another, these enactments at least added something to the legislation concerning transfer, if nothing more than the demand that the passive subjects of transfer be found suitable for their new parish by way of an examination, and that some consultation was called for before the bishop proceeded to remove a priest from one parish to another.

ARTICLE IV. DOCTRINE OF COMMENTATORS

In view of the influence which canonists have exerted in the development of legislation, although their doctrine in no way established a new law,[43] a study of these commentators may offer

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[39] Cap. 12: ". . . Nulli autem parocho, vel rectori ecclesiae admisso, et approbato, suam parochiam, beneficium, ecclesiam sine licentia nostra expressa deserere et alio migrare liceat."—Hartzheim, VIII, 384.

[40] Cap. 11: "Nullus ecclesiam suam sine facultate nostra relinquat; nullus beneficium, aut officium ecclesiasticum resignet, nisi in manu ejus, ad quem instituere eum jure pertinet."—Hartzheim, VIII, 552.

[41] Tit. VI, cap. VI, n. 5: ". . . ordinarie nullus eorum, in singulis dioecesibus Provinciae, a sua parochia invitus amovebitur aut tolletur, nisi prius inquisito officialitatis aut auditorii nostri privati consilio."—*Coll. Lac.* IV, 349d.

[42] Pars II, cap. XV: Verum et illud prae oculis habeant, qui nulla interveniente legitima causa, translationem ad pinguiora beneficia non raro petunt, eos non gregem ut bonos pastores, sed mercenariorum more lac potius et lanam deligere, facile convinci; atque ut ab hujusmodi sane improbandis petitionibus abstineant, eos haec Synodus in Domino hortatur."—*Coll. Lac.* VI, 310d.

[43] Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, (5 tomes), tom. II, *De Legibus Ecclesiasticis* (Mechliniae: Dessain, 1930), n. 329 (hereafter cited *De Legibus Ecclesiasticis*).

some clearer notion regarding the matter of transfer, thus enabling one to gather a more perfect picture of the early legislation. Among the questions treated by the early canonists was that which regarded the transfer of unwilling pastors; the matter of a just cause as countenancing or permitting an exchange of benefices or a transfer from one benefice to another; the matter of the proper supervising authority and the nature of the benefice to which one could be transferred.

That the transfer spoken of by Pope Urban III (1185–1187) was applicable also in the case of unwilling beneficiaries was not definitely settled by the wording of that text in the Decretals. Hence, whether or not such a transfer could be effected was disputed among the early canonists. In answer to the question whether such beneficiaries were to be comprehended under this enactment, Ioannes Andreas (1272–1348) simply replied in the negative.[44]

Abbas Panormitanus (1386–1453), in continuing his commentary of the chapter *Quaesitum*,[45] challenged this doctrine. He maintained that such beneficiaries, though they were guiltless in a ministry that had remained without fruit, could be transferred to another benefice, at least to an equally good if not also a better one than the one from which they were being removed.[46] In making this affirmation this noted canonist argued from the silence of Pope Urban III regarding the need of consent on the part of the transferee, as well as from the text of Pope Innocent III in reference to the removal of bishops from their churches.[47] For one maintaining, as Panormitanus did, that an unwilling bishop could be

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[44] Cited by Panormitanus, *Commentarium in Quinque Libros Decretalium*, lib, III, cit. 19, n. 7.

[45] C. 5, X, *de rerum permutatione*, III, 19.

[46] Panormitanus, *op. cit.*, lib. III, tit. 19, nn. 7, 8.

[47] ". . . Sed contra eum facit textum in quantum dat episcopo facultatem transferendi personas de loco ad locum, et nullum mentionem facit de consensu partium."—*op. cit.*, lib. III, tit. 19, n. 7.

". . . Ad idem notabile dictum Inno. in c. *nisi, de renun.* [c. 10, X, *de renunciatione*, I, 9], ubi dicit, quod si scandalum imminet ecclesiae propter persecutionem praelati, potest talis praelatus licite privari per superiorem, licet ipse non sit in culpa huius persecutionis scandali, sed propter bonum publicum toleranda est talis privatio, dato tamen illi bono cambio."—*Ibid.*, n. 8.

forced to resign his church,[48] this argument was a valid one in view of the difference that exists between the bond which unites a bishop to his see and the link which joins a pastor with his church.[49] But in view of other canons in the Decretals,[50] Panormitanus somewhat qualified his assertion by maintaining that whenever the situation could be adequately taken care of by means of the appointment of a coadjutor, such a manner of procedure was to be preferred to that of effecting a transfer.[51]

In like manner Augustine Barbosa (1589–1649) affirmed the lawfulness of effecting a transfer in similar circumstances, at least when a just cause was present,[52] and so also did Pirhing (1606–1679).[53] Of the same mind were Engel (1634–1674),[54] Fagnanus (1598–1678),[55] Reiffenstuel (1642–1703)[56] and Schmalzgrueber (1663–1775),[57] who, in dealing with the words *cogere potest* with reference to the ordinary's power in this regard, implicitly inferred that unwilling pastors came under this power as long as the good of the Church could not be safeguarded in any other manner.

It is to be noted that no distinction was drawn between perpetual pastors and those who were appointed only for a time. However, this causes no difficulty if one but recalls that all, other than irremovable pastors, were considered removable *ad nutum*. Hence, it is to be implied that these commentators regarded this legislation as applying only to the former type of pastors, namely, those who possessed stability in their office. All others could be transferred at the ordinary's good pleasure, since in reality they had no right founded in law to the office possessed by them.

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[48] *Op. cit.*, lib. I, tit. 7, n. 4.

[49] Cf. Gonzalez-Tellez, *Commentarium in Quinque Libros Decretalium*, lib. I, tit. 7, n. 16.

[50] C. 5, X, *de clerico aegrotante vel debilitato*, III, 6; c. 6, X, *de postulatione Praelatorum*, I, 5.

[51] *Op. cit.*, lib. III, tit. 19, n. 8.

[52] *Iuris Ecclesiastici Universi Libri Tres*, lib. I, cap. 19, n. 34.

[53] *Ius Canonicum*, lib. III, tit. 19, n. 22.

[54] *Collegium Universi Iuris Canonici*, lib. III, tit. 19, n. 6.

[55] *Commentaria in Quinque Libros Decretalium*, lib. I, tit. 7, nn. 50, 88.

[56] *Ius Canonicum Universum*, lib. III, tit. 19, n. 38.

[57] *Ius Ecclesiasticum Universum*, lib. III, tit. 19, n. 77.

The notion of the requisite cause for a transfer, as well as that of the legitimate authority competent for the effecting of the transfer, having already been treated, it suffices to remark here that any exchange of benefices or also any transfer which was made without a just cause was looked upon as void,[58] as also when either of these was undertaken without the intervention of one enjoying episcopal authority.[59]

From the fact that in confirmation of his argument for the possible transfer of unwilling beneficiaries Panormitanus cited a text of Pope Innocent III, in which text was defined the quality of the benefice to which the transfer could be made, it seems that Panormitanus likewise demanded, as in the case of bishops, that the change be made to a benefice or parish of greater or at least of equal importance.[60] Leurenius (1646–1723), arguing from the Decretal legislation on the exchange of benefices in general,[61] inferred the same, at least when there was question of exchange still to be made.[62]

From the doctrine of the authors referred to above it can be concluded that they recognized that the bishop, or also the one who was endowed with at least quasi-episcopal jurisdiction, had the power to transfer a pastor from one place to another, even against his will, when the good of the parish from which the transfer was made motivated the act of transfer. However, the procedure to be followed remained undetermined in the law and without further clarification until the time when the Sacred Consistorial Congregation issued the decree *"Maxima cura"* on August 20, 1910.[63]

Canonists, especially those of the last century who had the advantage of many of the decisions of the Roman Curia, which furnished a new juridical basis for administrative removal and transfer, accepted and further developed the earlier teaching.

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[58] Garcias, *De Beneficiis Ecclesiasticis,* tom. II, pars XI, c. 4, n. 49.

[59] Cf. *supra,* p. 41.

[60] Panormitanus, *op. cit.,* lib. III, tit. 19, n. 8.

[61] Cc. 1, 6, X, *de rerum permutatione,* III, 19.

[62] *Forum beneficiale,* pars III, q. 874.

[63] Cappello, *De Administrativa Amotione Parochorum, seu Commentarium in Decretum "Maxima cura"* (Romae, 1911), p. 5.

With the help of this jurisprudence the more recent canonists[64] did succeed in illustrating somewhat more clearly the nature of this administrative procedure. However, the whole matter was still far from definitely defined, since the Holy See itself did not always act in the same manner even in somewhat similar cases. Thus it was difficult for the canonists to establish hard and fast rules until the time when a definite document in the nature of the *"Maxima cura"* appeared.[65]

By way of summary it suffices to say that these authors held substantially the same doctrine. They admitted the possibility of an enforced transfer for the good of the parish relinquished, when that good could not be attained in any other manner. The transfer could be effected by means of a simple decree of removal on the part of the bishop; there was no need of the employment of a judicial process. In the event of a pastor's refusal to resign his parish, a summary trial was all that was necessary for compelling the removal of a recalcitrant pastor. By way of compensation, inasmuch as an administrative removal did not imply the use of a penalty as did the punishment of privation, the pastor could be transferred to another parish, if indeed he was found suitable to rule another parish. Otherwise he was to be granted a simple benefice or pension, the income of which was to be equivalent or nearly equivalent to the revenue of the parish from which he was removed.

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[64] Cf. D'Annibale, *Summula Theologiae Moralis* (3 ed., 3 vols., Romae, 1892) III, § 61, note 51; Pierantonelli, *Praxis Fori Ecclesiastici, ad praesentem Ecclesiae conditionem accomodata* (Romae, 1883), § 88–89; Hinschius, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland,* V, 581; Craisson, *Manuale Totius Cleri Saecularis Obedientia,* pp. 316–329; Smith, *Elements of Ecclesiastical Law* (6 ed., 2 vols., New York; Benziger, 1888), nn. 391–420; *idem, New Procedure in Criminal and Disciplinary Causes of Ecclesiastics in the United States* (2 ed., New York: Pustet & Co., 1888), nn. 593–597; Gennari, *Sulla Privazione de Beneficio Ecclesiastico,* pp. 215–242; Sebastianelli, *Praelectiones Iuris Canonici* (2 ed., 3 vols., Romae, 1905), nn. 316–318; Wernz, *Ius Decretalium,* II, nn. 524–527, nn. 835–836; Lega, *De Delictis et Poenis,* pp. 274–277.

[65] S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910—*AAS,* II (1910), 636–648.

ARTICLE V. PRACTICE OF THE ROMAN CURIA

The decisions of the Holy See regarding questions of the administrative procedure, although at first few in number, after the middle of the last century became quite numerous. How is this earlier dearth of decisions to be explained? Was the number of removals and transfers accomplished through this procedure a relatively small one, or was it that the transferees were unaware of their right of recourse? The more probably correct answer to this question seems to be that, because of the uncertainty which prevailed in this matter, ordinaries may well have been averse to using this power, either out of fear of doing harm to their own pastors and flock, or of bringing upon themselves criticism from the authorities in Rome. This conjecture is based on the fact that it was only after the doctrine, popularized by commentators and worthy canonists, had received more specific development, that ordinaries began with greater frequency to invoke the administrative procedure for the sake of averting trying situations in their dioceses. Naturally enough, with the more frequent use of this faculty by the bishops, there evolved a greater number of recourses to the Roman Curia on the side of pastors who felt themselves wronged, since they had not been given the customary threefold warning, or their cases had not been considered before an ecclesiastical tribunal. In solving these cases, the Holy See, basing its decisions upon the previous enactments of the Decretals, upon the Council of Trent, and upon the interpretations of reliable canonists, clarified the nature and purpose of this procedure to some extent.

In the consideration of these cases presented to the Roman Curia for solution and decision, attention will be given to those in which transfer to a parochial benefice was the leading question, whether suggested by the bishop himself in removing the pastor in question, or whether countenanced by the Holy See as a provision to be made for the one removed.

A very early case with reference to transfer as a consequence of removal was submitted to Rome from the Diocese of Novara. In a letter sent by the Sacred Congregation of Bishops and Regulars to the bishop of that diocese it was suggested that if the irremovable pastor in question, from whom the bishop had requested a resignation because of the hatred which had been en-

gendered against him by his people, was judged unfit for that parish, this pastor could be transferred to another part of the diocese.[66]

Another important decision was that of the Eichstätt case. Here the bishop demanded that an exchange of benefices be accepted by an irremovable pastor who, by his indecent manner of living, by his neglect in the administration of the sacraments and in the visitation of the sick, and by his extreme cruelty towards children, had excited in the hearts of his people a hatred against himself to such an extent that they refused any longer to receive the sacraments from him or to attend services in his church. In upholding the decree of the bishop, the Congregation of the Council added: *"ita tamen ut permutatio per Episcopum fiat cum beneficio redditus aequivalentis."*[67]

In another early decision the same Congregation answered in like manner in the case of an irremovable pastor of the diocese of Aosta, who had sought redress against his bishop's decree which transferred him in view of the scandal and ridicule which had been provoked against him,[68] and again five years later in the case of a recourse invoked by a pastor of the archdiocese of Genoa.[69]

In 1755, however, the recourse of a pastor of the diocese of Constance was upheld on the ground that there was no sufficient cause for the transfer. In this particular case, an enforced exchange of parishes had been decreed by the diocesan curia because the pastor in question had been accused of speaking ill of the Jesuit fathers, who had presented him to the ordinary for appointment to a parish which was incorporated with their institute. Other criticism brought against him touched on his administration of the parish revenues, and alleged a neglect on his part in the care of souls. Inasmuch as the alleged causes were not sufficiently proved, the curia was commanded to return the parish to him along with the full restitution of all beneficial fruits and revenues which had been denied him in the meantime.[70]

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[66] S.C. Ep. et Reg., *Novarien.*, 12 ian. 1604—Fontes, n. 1629.

[67] S.C.C., *Eistetten.*, 21 iul. 11 aug., 2 sept. 1742—*Fontes*, nn. 3538, 3542; *Thesaurus*, XI, 125, 139, 156; *ASS*, I (1865), 518.

[68] S.C.C., *Augustan.*, 12 febr. 1730—*Thesaurus*, CXII, 205.

[69] S.C.C., *Ianuen.*, 10 sept. 1735—*Thesaurus*, VII, 113–115.

[70] S.C.C., *Constantien.*, 20 nov. 1756—*Thesaurus*, XIX, 140–143.

In another case, in which the diocese of Eichstätt was involved in 1770, the faculty of the ordinary to enforce the transfer from one benefice to another for the peace and spiritual good of the parish relinquished by the pastor was upheld by the Congregation of the Council.[71] Again, with reference to an irremovable pastor of the diocese of Bari in 1853, the Sacred Congregation of the Council proclaimed that, in agreement with the more common opinion of the Doctors, a pastor who had been removed from a parish when his ministry became no longer useful in consequence of scandal and ridicule was to be provided with another benefice in place of the one from which he had been dismissed.[72]

In the Messina case of 1854, the defense of the irremovable pastor is interesting in view of the arguments brought forth against the decree of privation promulgated by the bishop of that diocese. Among other things the pastor's advocate endeavored to show that in the past, once a just hatred had been proved against a pastor, the procedure was to transfer him to another parish rather than to decree his privation. In justification of this assertion, besides citing authors to this effect, he referred to an early decision of the Sacred Roman Rota: *decisio 17, de jure patronato, n. 10, coram Falconer., 17 iun. 1770.* In concluding the case the Sacred Congregation of the Council decided in favor of the pastor, even to the restoration of his parish.[73] A year later in the recourse of an irremovable pastor of the diocese of Acerenza the advocate argued in like manner.[74]

The decision rendered in the often quoted Limburg case upheld the decree of the diocesan curia in demanding the transfer of an irremovable pastor whose unpleasant disposition and imprudent conduct had made him an object of the people's hatred and aversion, thus rendering his ministry in that particular parish fruitless.[75] In a decision a year later concerning a pastor in the diocese of Trier it was counselled by the Sacred Congregation of the Council that this irremovable pastor be removed from his parish in view

[71] S.C.C., *Eistetten.*, 10 febr. 1770—Pallottini, XIV, 702, n. 24.
[72] S.C.C., *Baren.*, 28 maili 1853—*Thesaurus*, CXII, 202–208.
[73] S.C.C., *Messanan.*, 18 mart. 1854—*Thesaurus*, CXIII, 115–121.
[74] S.C.C., *Acheruntina*, 31 mart. 1885—*Thesaurus*, CXIV, 98–105.
[75] S.C.C., *Limburgen.*, 27 iun. 1857—*Thesaurus*, CXVI, 320–329; *Fontes*, n. 4156; 19 dec. 1857—*Thesaurus*, CXVI, 527–581; *Fontes*, n. 4185.

of the scandal which he had aroused by his refusal to pay a debt which he owed to the seminary in which he had been educated forty years before. In decreeing the removal the Congregation advised that another benefice with nearly equivalent revenue be given him in return.[76]

In view of the earlier decisions already cited, the decision of the Sacred Congregation of the Council which upheld the recourse of a pastor from the diocese of Montalcino is both interesting and surprising. This irremovable pastor, accused of too severe an exaction of tithes from his people as well as a lack of experience and knowledge, all of which excited the indignation of his people, was supported on the grounds that these alleged causes were not sufficient to warrant his removal. It was further maintained that the proper procedure of three warnings and of a judicial trial had not been observed. A parallel was drawn in the case between a deprivation of office and the transfer of an unwilling pastor to another office. However, such a parallel seems without value in view of the legislation seen above, conciliar and otherwise, since the act of transfer, even of an unwilling pastor, was put on a different plane from that of deprivation of office.[77]

Two years later, however, the same Congregation upheld the decision of the Würzburg diocesan court which had demanded the transfer of one of the irremovable pastors of that diocese. This pastor had been accused of too severe chastisement of the children; of an unbridled passion for pastimes, which led to his frequent absence from his parish and parish duties; of frequent excursions into neighboring towns, from which he returned late at night or in the early hours of the morning. All these practices had provoked the people against him to such an extent that they refrained from attending services conducted by him. The decision rendered by the Congregation in this instance was: *Attentis peculiaribus circumstantiis esse locum permutationi cum altero beneficio redditus fere aequivalentis infra sex menses.*[78]

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[76] S.C.C. *Treviren.*, 27 nov. 1858—Pallottini, XIV, 678, n. 48.

[77] S.C.C., *Ilcinen.*, 27 nov. 1858—Pallottini, XIV, 665, n. 5; 708, n. 135; 709, n. 138.

[78] S.C.C., *Herbipolen.*, 22 dec. 1860—*Thesaurus*, CXIX, 609–616; *Fontes*, n. 4190.

In 1863 the diocese of Bergamo furnished the occasion for a case of recourse when an irremovable pastor who had been removed from his parish because of the enmity of his people—though personally he was wholly innocent—was finally suspended when he refused to accede to the decree of removal issued by his ordinary, inasmuch as he claimed that no judicial form was duly observed. Upon recourse to the Holy See, the Sacred Congregation of the Council sustained the decree of removal, but it simultaneously provided that the pastor be given the next available vacant parish in exchange for the one over which he could no longer rule usefully.[79]

The following cases, reference to which is made by Cardinal Gasparri in the footnotes to the canons on administrative transfer for the good of the newly acquired parish, deal primarily with recourse interposed by removable pastors appointed in France and Belgium at the beginning of the last century. It is worthy of note that these cases are really not apropos to the canons in Title XXIX of IV Book of the *Code of Canon Law,* since the cases themselves, like those already cited in the present article, bear relation only to the transfer which is made for the good of the parish from which the priest is removed. Hence they will be considered only from this latter approach.

The first case of interest is one which from the diocese of Rheims came to the attention of the Sacred Congregation of Bishops and Regulars in 1868. The reasons attested to by the bishop in enforcing the transfer of the pastor in question were that the latter had persisted in establishing a community of women in his parish much against the wishes of the ordinary; that he had insisted on conducting novena devotions with such pomp and publicity as to furnish cause for scandal in the diocese; that he had financial interest in the transit company which conveyed the people to his services; that these excursions brought great confusion to the community in which they were held in that they were given over not only to devotions but to profane purposes as well, with much trafficking and dancing; and finally that he had insisted on spending a great deal of money for these lavish pomps and pilgrimages rather than using it for the erection of a much needed rectory, for repairs on the sacristy which was in a state of utter

disrepair, and for a wall around the cemetery which had suffered profanation because it was not properly enclosed with any protective barrier. When the pastor refused to heed the warning of the bishop in these matters, he was sent notice of his transfer. Upon his refusal to accept the transfer the bishop suspended him, whereupon the pastor countered with a pamphlet libeling the bishops of France. In rendering its decision, the Sacred Congregation of the Council sustained the transfer, and also the suspension for such a length of time as the pastor remained recalcitrant to the demands of his bishop. However, at the same time the Congregation took occasion to remind the bishop that the caution given by Pope Gregory XVI to the Bishop of Liége, as well as that given by Pope Pius IX to the Bishop of Evreux,[80] counselling the bishops to act prudently and paternally in the matter of transferring or removing these removable pastors, should be kept in mind.[81]

In the same year a priest who had been transferred in the diocese of Metz had recourse to the Sacred Congregation of the Council, claiming that the bishop had receded from the canonical norms, having transferred him without the three warnings. The first reasons assigned for the transfer, as reported by the pastor himself, were that the pastor had displeased the prefect of the region; that he had offended the archpriest in a controversy over the refusal of absolution to those who frequently changed confessors; and that he did not excel in moderation and regularity of life. Later, upon request of the Congregation for further information regarding the pastor's life, morals, and prudence in his ministry, the bishop spoke of the pastor's bitterness, of his forgetfulness to heed to his promise of obedience, of his stirring up of quarrels and the like, which because of their perturbing character redounded to the harm of souls and gave rise to scandal. After much correspondence had been exchanged between the pastor and the Roman Curia, and especially between the bishop and the same Curia, the Sacred Congregation demanded that the pastor acquiesce to the mandate of the bishop, and at the same time wrote to the bishop,

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[79] S.C.C., *Bergamen.*, 5 dec. 1863, 30 iul. 1864—*ASS*, II (1866), 276–284.

[80] Cf. *supra*, p. 29.

[81] S.C. Ep. et Reg., *Rhemen.*, 3 iul. 1868—*Fontes*, n. 1998; *ASS*, IV (1868), 13–27.

entrusting it to his sense of equity to make suitable provision for the removed pastor once the latter had complied with the Congregation's decree.[82]

In 1873 a priest of the diocese of Annecy had recourse against the bishop's decree of transfer. Since the pastor was a *desservant,* that is, a removable pastor, the bishop did not think it necessary to furnish any reasons for his decision. Upon request of the Sacred Congregation, however, he asserted that the transferee was a turbulent soul; that he lacked good sense, and also the prudence and intelligence necessary for a fruitful administration of the parish from which he was transferred; and that he had harmed others in such a manner by his harsh words that there could never be peace between him and his parishioners. On the contrary, evidence which was furnished in connection with the recourse proved him to be a man of zeal and integrity. In deciding the case of Roman Curia wrote to the bishop: *mens est Oratorem non futiles exceptiones opposuisse; matrem habere octuogenario maiorem et infirmam; ideoque ei permittendum esse, ut Missam celebret in loco ubi degit, et de congrua ecclesia parochiali quantocius providendum.*[83]

Of like interest is the decision rendered in favor of the Bishop of Verdun in 1878. Warned to give up his interest in a stone quarry, which business had been a cause of contention in the community, and also to give reasons for the dismissal of a Sister who had taught Christian Doctrine in his parish, the pastor refused, the result being that he was transferred to a parish of less importance. Finally receding from his contumacy he resigned his first parish and accepted the new one offered him by his ordinary. Disgruntled after a short time he sought to be reinstated in his former appointment, claiming that he had resigned under the threat of force and fear. In view of the fact that the bishop proved him to be a source of scandal to his parishioners and others, the Sacred Congregation not only affirmed the transfer, but demanded that the pastor retract all calumnies and injuries levelled against the bishop.[84]

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[82] S.C.C., *Meten.,* 21 mart. 1868—*Fontes,* n. 4210.

[83] S.C.C., *Annecien.,* 22 mart. 1873—*Fontes,* n. 4224.

[84] S.C.C., *Virodunen.,* 23 mart. 1878—*Thesaurus,* CXXXVII, 131–152.

The Roman Curia once again set its approval on a transfer effected by an administrative procedure when it confirmed the decree of the Bishop of Vannes who had transferred a pastor to an inferior parish. The pastor maintained that he had been transferred without a canonical cause and without a trial, and that the parish was much too inferior. In reply to the Holy See regarding the reasons for the transfer, the bishop stated that the same pastor had been transferred many times before, and always with good reason. He further maintained that against the legislation of the diocesan statutes the pastor had for a number of years provided residence for two young women in his house, thus arousing suspicion and scandal. The Sacred Congregation refused to grant the pastor restoration of prior status, maintaining that the transfer as decreed was to be sustained as done in accordance with the law.[85]

In like manner did the Sacred Congregation of the Council take action in 1880 in the case of a priest transferred in the Diocese of Saint-Denis. This pastor was accused of taking too great a part in political elections; of engaging in dissensions with his parishioners, and of editing a slanderous pamphlet against his bishop. Moreover, he was suspected of immoral conduct. The Congregation upheld the transfer as for the good of souls.[86]

Six years later the same Congregation ruled against the recourse of a pastor in the diocese of Digne, who sought to be reinstated in his old parish. Among the causes cited by his bishop it was maintained that this priest had rebuffed his parishioners without due discretion, and that he had been disobedient to his ordinary. In reply the Congregation commended that the transfer be sustained.[87]

Another case worthy of notice concerns an irremovable pastor of the diocese of Przemysl, in 1887. After having been warned about his irascible disposition and his unbridled passion for money, which had provoked hatred in the hearts of his people, this pastor

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[85] S.C.C., *Veneten.*, 24 apr., 29 maii 1880—*Fontes*, n. 4248; *ASS*, XIV (1881), 172–177.

[86] S.C.C., *S. Dionysii seu Reunionis*, 11 dec. 1880—*Thesaurus*, CXXXIX, 653–670; *ASS*, XIV (1881), 178–181.

[87] S.C.C., *Dinien.*, 27 mart. 1886—*Thesaurus*, CXLV, 308–318; *Fontes*, n. 4269.

was transferred to another parish. Because of his refusal to submit to the transfer, the bishop declared him suspended and irregular. After much contention between the bishop and the pastor, and upon recourse to Rome, the Sacred Congregation of the Council decided in favor of the transfer, although it advised at the same time that the suspension be lifted upon the pastor's submission to the mandate of the bishop.

Reference should be made here to the conclusions of the editors of the *Acta Sanctae Sedis,* as drawn from the solution of this case. Their conclusions are:

> "Ex quibus colliges: 1) Quum plurimorum utilitas unius utilitati aut voluntati praeferenda sit; ideoque Episcopus ex iure valet transferre parochum, etiam innocentem, cuius verba amplius non fructificant apud populum, qui eumdem parochum odit: ne divina contemnantur, aut scandalum enascatur. 2) Vulgatissimum esse, clericum cogi posse ad proprium permutandum beneficium cum alio, quoties gravis id postulet causa, vel clericus sit minus idoneus ad praestanda munera beneficii huius, vel aliquo loco; ut qui uno loco minus utilis est, alibi valeat utilius sese exercere. 3) Ex iure parochum inducendum esse ad resignandum vel permutandum, qui inimicitiis capitalibus implicatur, si aliquod post tempus hae inimicitiae sedatae non fuerint, etiam sine eius culpa. 4) Quum translatio, etiam sine culpa, fieri possit in bonum animarum, apprime haec fieri potuit in themate, dum parochus accusatus et convictus fuerat de crudelitate in suum populum, de exactionibus excessivis et de furore quo identidem aliquem percutiebat excitando in seipsum odium plebis."[88]

With reference again to removable pastors, consideration was given to the case of recourse made by a pastor of the Diocese of Nancy in 1894. The causes alleged were based upon disobedience to the bishop, and the fact that the pastor had been the cause of many quarrels and factions which had arisen in his parish. In decreeing the transfer, the bishop maintained that it was not only for the good of the parish, but also for the good of the priest himself, in that he was being given a chance to rehabilitate himself in another environment. The Sacred Congregation of the Council

[88] S.C.C., *Premislien.,* 18 iun. 1887—*ASS,* XX (1887), 126–142.

contended that the ordinary acted both validly and licitly in demanding the transfer.[89]

The final case receiving attention in this article concerned a priest of the diocese of Grenoble in 1895. The transfer to a slightly inferior parish was effected on the grounds that a glaring scandal had arisen over an accusation of the mishandling of parish funds, the result being that this pastor's ministry was no longer useful in the parish and town in which he had been assigned. Not acquiescing to the bishop's decree, and insisting that the civil court be called into the case to pass judgment on the decree, the pastor was placed under personal interdict by the diocesan court. In response to the recourse, the Sacred Congregation sustained the decree of transfer, but insisted that the interdict be lifted as a punishment not justified in the case.[90]

In summary it may be affirmed that the Holy See generally approved of the administrative procedure invoked by bishops in their removal and subsequent transfer of their priests. Basing its solutions on preceding legislation and the canonical interpretations of the authors, the Roman Curia recognized two main justifying causes as inhibiting the progress of the Church both universal and particular. The first was aversion on the part of the people, whether this arose culpably from the pastor's laxity, levity, negligence worldliness, harshness or unpleasant and revolting disposition, or whether it was wholly inculpable on the part of the pastor. The second was incompetence in a particular parish. This could result from ignorance, or it could be occasioned in view of the particular type of people with whom the pastor had to deal. The recognition of these factors as causes is evident not only from these decisions, but also from the arguments employed either by the plaintiff or by the defendant, and furthermore, from the conclusions drawn by the editors of the *Acta Sanctae Sedis*.

Although there is clarity about the justifying causes of an administrative transfer, the same cannot be said for the procedure that was to be followed in effecting a transfer or a removal. In

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[89] S.C.C., *Nanceyen.*, 1 sept. 1894—*Thesaurus*, CLIII, 1046–1067; *ASS*, XXVII (1884), 594–606; *Fontes*, n. 4292.

[90] S.C.C., *Gratianopolitana*, 26 ian. 1895—*Fontes*, n. 4294.

most of the cases, apart of course from demanding the reasons for such a transfer, the Roman Curia was content to give its decision without further comment. However, by sanctioning the bishop's mode of acting in these cases when he had not issued three successive warnings to the pastors before he invoked the remedy of transfer, the Congregation implicitly affirmed that the issuing of such warnings was not necessary. One warning seemed sufficient. Further, from the fact that often the Holy See demanded that a suspension placed upon a recalcitrant pastor be sustained until, in the mind of the bishop the pastor had acceded to his demands, it may be implied that such a sanction was considered just in enforcing a transfer upon an unwilling pastor. Perhaps these two things may be considered as indicative of something of the procedure that a bishop was to follow in invoking an administrative removal and its consequent, an administrative transfer.

With reference to the type of pastors who were subjected to this kind of removal, it is true that most of the decisions here considered dealt primarily with removable pastors. Perhaps this circumstance entails some evidence of the hesitancy on the part of bishops, who were still unwilling by proceeding in any other way to risk the chance of an annulment of their decrees. Yet from the fact that the Holy See did, in reality, confirm the transfer of some irremovable pastors, it bespoke the mind of Rome in this matter, namely, that it did recognize whatever procedure was followed as both valid and licit for the transfer of irremovable pastors whose ministry was fruitless in the parish committed to them.

ARTICLE VI. THE DECREE "MAXIMA CURA."

Fully aware of the apparent need of a more adequate legislation in the matter of administrative procedure for the removal and transfer of pastors whose ministry had been without fruit in their respective parishes, Pope Pius X (1908–1914) manifested a desire

[91] *ASS,* XXXVI (1904), 594; Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici* (5 tom., Mechliniae: Dessain, 1928–1939), tom. I, *Prolegomena* (1928), p. 336; Cicognani, *Canon Law* (2. ed., authorized English version by J. M. O'Hara and Francis Brennan, Philadelphia: Dolphin Press, 1935), p. 420.

that the preceding legislation as well as the doctrines of the canonists and the jurisprudence of the Holy See be explained and codified.[91] After long and careful study the commission of Cardinals appointed by the Holy Father for this purpose finally succeeded in drawing up a code of laws definitely specifying the causes as well as the manner of procedure to be used in the future. This codification, promulgated by Pope Pius X, was published by the Sacred Consistorial Congregation on August 20, 1910, under the title of the first words of the decree, that is *"Maxima cura,"* and it became the law for the whole Latin Church.[92]

A few introductory remarks regarding the character, purpose, juridic value, extension, and passive subjects of this legislation are in order before direct consideration be given to the content of this decree which deals with the provision of transfer. This decree, besides establishing new norms, clarified the legislation which preceded it by manifesting more precisely the nature of the causes for which a transfer could be allowed, by delineating a more detailed manner for the procedure to be followed, and by indicating for which class of pastors the enactments of this legislation became applicable.[93]

The purpose of this decree as manifested in the prologue was expressed in quite precise terminology. There it was stated that, although it had been the mind of the Church that pastors be instituted permanently in their office, this stability was not such that it might militate against the good of souls, which good was indeed the primary reason for the granting of a permanent incumbency to pastors. Hence in those cases in which the good of souls demanded that a pastor be taken from his parish even though the reasons alleged were not sufficient to warrant a judicial deprivation, another method was found necessary for averting the spiritual harm which might otherwise have come to those who were committed to his care as well as to the universal Church.[94] Thus this decree attempted to alleviate any such danger by offering the

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[92] S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910—*AAS*, II (1910), 636–648; *Fontes*, n. 2074.

[93] Wernz, *Ius Decretalium*, V, lib. II, n. 905.

[94] Decr. *"Maxima cura,"* Proemium—*AAS*, II (1910), 636–637.

remedy of administrative removal and transfer in its explicit provisions for the cases of this kind.

The importance of this degree was enhanced by the fact that it was made a general law which was obligatory throughout the whole Latin Church in view of its special approbation by Pope Pius X,[95] as is evident from the concluding words of the prologue.[96] Further, it possessed exclusive application, as is seen from the final words of the decree itself: *Praesentibus valituris, contrariis quibusvis non obstantibus,* thus abrogating all previous custom and particular laws contrary to its enactments.[97] Because of its juridic value as a universal law which bound the universal Church, this decree extended even to those regions which were subject to the Sacred Congregation for the Propagation of the Faith, at least in those places which were not purely missionary in character.[98] Likewise included were those countries which had been withdrawn from the jurisdiction of this Sacred Congregation in 1908, among which were the United States and England.[99] As already seen,[100] all pastors in virtue of any pastoral title whatsoever were included under this decree as long as they ruled in their own name. All others who acted in the name of another, such indeed as were the removable rectors in the United States, were exempt from any application of this law.[101]

In considering the content of this new law of 1910, the writer will give attention primarily to those canons which dealt with transfer, since the scope of this study is limited to this point. However, he will necessarily also give due consideration to those canons which, although not strictly pertinent to transfer, were basic for the proper understanding of the procedure involved.

In the first place, in view of the admonition of canon twenty-

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[95] Cicognani, *Canon Law,* pp. 78–80.

[96] "Decretum per hanc Congregationem edi iussit [ss.D.N. Pius PP.X] quo novae normae de amotione administrativa ab officio vel beneficio curato statutae promulgarentur, eaedemque canonicam legem pro universa Ecclesia constituerent, omnibus ad quos spectat rite religioseque servandam."—*AAS,* II (1910), 637.

[97] Cappello, *De Administrativa Amotione Parochorum,* p. 30.

[98] Cappello, *op. cit.,* p. 26.

[99] Cf. *supra,* p. 30.

[100] Cf. *supra,* p. 31.

[101] S.C. Constit., 28 iun. 1915—*Fontes,* n. 2090.

seven which forbade the granting of a parish to a priest who was found neither worthy nor suitable to rule over souls, it must be affirmed that not all the causes mentioned in the first title could be said to be relevant in the cases wherein a change of parochial benefices was to be effected. Certainly insanity, absolute incompetence and ignorance, and mental or bodily infirmity which rendered a pastor unequal to parish duties, excluded transfer as an alternative available to a bishop when he removed a pastor from his parish.

Perhaps relative incompetence and ignorance, that is, in relation to the type of parish from which such a pastor was removed, could well, all things considered, leave the option of transfer available for use. Likewise there seemed to be no reason which militated against the transfer of such pastors who had aroused the animosity of their parishioners; who had lost the esteem of serious-minded people solely among their parishioners; who had been guilty of an occult crime which, in the prudent judgment of the ordinary, was not likely to become known in a distant parish in the diocese; and perhaps those who indeed had been disobedient to the ordinary's precepts in serious matters which could easily be corrected.

However, cautious consideration had to be given to the cases of those who had been guilty of neglect in their parochial duties, or also to the cases of those whose tenure of office had reflected a mal-administration in the temporalities of the churches to which they were attached, especially when on their part there had been culpable fault in this matter. Certainly the pastors in question could be asked to manifest their mind regarding their future intentions, whether in respect of the spiritual or the temporal pastoral administration, and if in the prudent judgment of the ordinary it was thought that they would rehabilitate themselves in another parish, their transfer to such a parish could still become a palliative for the removal postulated by the remedy of transfer.

The second title, consisting of only one canon, stated in a rather general manner the order of procedure, mentioning the invitation to resign; the decree of removal in the event of a refusal; the review of the acts and the confirmation of the decree if a recourse was invoked; and finally the necessity of the observance of the particular provisions of the decree under pain of nullity of the procedure.

The third title, consisting of the third to the seventh canons inclusive, listed the persons who of necessity had to have a part in the procedure, namely, the ordinary, the synodal or pro-synodal examiners, and the parish-priest consultors. Further, there was decreed the manner of their election or selection, their term of office, the number necessary for consultation, and their obligations and duties.

The fourth title, extending from canons eight to thirteen inclusive, established the first steps to be observed in the procedure. Dealing with the invitation made to the pastor to resign, it provided that the ordinary proceed to the decree of removal in the case of the pastor's explicit refusal within the indicated time-limit, in the case wherein the pastor made no petition for an extension of time, and in the case wherein the pastor did nothing to offer a defense in his favor.

Title five, embracing canons fourteen to twenty-one inclusive, concerned itself with the decree of removal. This title defined the action which was open to the pastor after the invitation to resign, that is, by way of example, the preparation for his defense and the presentation of witnesses for examination. It further set forth that the matter of removal be taken up with the examiners, and that it be settled by means of a secret vote; also that any decree of removal attest the fact of the invitation to resign as well as the fact that there had been a majority vote in favor of the removal.

Title six comprised canons twenty-two to twenty-five inclusive, If the pastor had recourse against the decree of removal, then the ordinary and two parish-priest consultors were to review the acts of the case in order to ascertain the validity of the procedure and the sufficiency of the reasons adduced for the removal. The recourse had to be made within ten days from the issuance of the decree of removal, and the admission or the rejection of the recourse had to be determined by means of a secret majority vote.

Title seven, under canons twenty-six to twenty-nine inclusive, dealt with the question of the pastor's future assignment upon his resignation or removal. The only canon of concern in this study is the one that dealt with the question of transfer to another parish. The ordinary was instructed to take counsel with the examiners, or in the case of recourse with the parish-priest consultors, for

reaching a decision whether or not a transfer was feasible. As already mentioned above, canon twenty-seven provided that the ordinary make certain of the fitness of the priest before proposing to him a transfer to another parish. Then, if the pastor's worthiness and competency was ascertained, he could be assigned to a parish which was equal to, inferior to, or superior to the one from which he had been removed, according as equity and prudence demanded.[102] Title seven furthermore demanded that the question of the future assignment cause no delay in the removal of the pastor from his parish when the good of souls required an immediate removal, and also that, once the decision had been reached, the pastor was to leave as soon as possible, giving over to his successor all that belonged to the parish.

The eighth and last title, comprising canons thirty to thirty-two, defined the passive and active subjects of removal. As has been observed previously,[103] only those who ruled over parishes in their own names came under the term of passive subjects. On the other hand, only the ordinary or one delegated by him, not the vicar general without a special mandate, was designated as the active subject. Canon thirty-one further advised what procedure was to be followed when the pastors were being tried for some crime whether in the civil or in the ecclesiastical courts.

With this decree which remained in force until the promulgation of the *Code of Canon Law* came the first explicit written legislation on the matter of administrative removal and transfer for the good of the parish which the pastor was to relinquish. Although not perfect by any means, it served very admirably, as a comparison with the present legislation will show, as a true norm for the procedure outlined in Titles XXVII and XXVIII of Book IV of the present Code. In a word, it was definitely a great step forward in the development of the non-judicial procedure which was meant to facilitate the attainment of the *salus animarum*, the one and sole reason for the existence of the pastoral office within the organization of Christ's saving Church.

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[102] Decr. "*Maxima cura*," canon 27, § 1—*AAS*, II (1910), 646.
[103] Cf. *supra*, p. 31.

CHAPTER IV

Transfer for the Good of the Parish Obtained

The earlier legislation concerning the stability of the pastoral office, the transfer of bishops from their dioceses, and the transfer of pastors for the good of the parish which they relinquished in the act of transfer furnishes the groundwork for the treatise in the present chapter regarding the transfer of pastors for the good of the parish to which they were sent. In the preceding chapters was established the fact that the Church desired under ordinary circumstances to see its pastors appointed permanently in office; that in exceptional cases she tolerated, and at times even required, in view of circumstances of time and place, that her pastors be appointed temporarily to their churches, so that they might be more easily removed from their pastoral office; and finally that the pastors of both types could be removed from their office by way of a non-judicial procedure when the law on permanence in the pastoral office had to yield to the supreme law, namely, the securing of the *salus animarum,* when the latter warranted a removal or a transfer from a parish in which the attainment of the supreme law was in any way inhibited or completely frustrated.

Since the Church desired primarily that her pastors be irremovable, it stands to reason that she did not favor any arbitrary transfer of these same pastors from place to place. She desired that a good reason be evident, whether with reference to the manifest utility or patent necessity of the Church. And yet, as has already been observed, whenever such a cause was exemplified, outside of those given for the transfer of bishops, it was always limited in its reference and applicability to the ministry of the pastor in the church over which he already ruled. What few conciliar enactments there existed on the subject, whatever Decretal legislation there was in force, and whatever doctrine the authors had crystallized, considered just this situation, as indeed did the jurisprudence of the Holy See and the decree *"Maxima cura."*

In view of the dearth of specific legislation touching on the issue

that confronted him, the Bishop of Pamiers in 1912 was face to face with a problem when he attempted to transfer one of his priests who had exercised a very fruitful ministry in the parish of which he was in charge. When this pastor appeared unwilling to accept the transfer, the bishop appealed to the Sacred Congregation of the Consistory for enlightenment as to the procedure to be invoked in a transfer of this type. Among other things he asked if the procedure outlined in the decree *"Maxima cura"* could be applied in this particular case. In response the Sacred Congregation answered in the negative, adding that further reference was to be made to the title on *Transfer,* as outlined by the canonists.[1]

This reply seems somewhat strange in view of the scarcity of legislational matter concerning this type of transfer, since from

[1] Since this is the only primary source in which reference is made to a transfer of this kind, it seems advantageous to quote this response of the Consistorial Congregation. It follows: "Litteris diei 21^mae^ novembris 1912, A. T. Revma referebat quandoque Tibi necesse est aliquem parochum a paroecia quam regit ad aliam transferre, non quidem ob unam ex causis in Decreto *Maxima cura* praevisis, quae imo nulla in casu daretur; sed dumtaxat ad subveniendum necessitati alterius paroeciae, cui sine translatione sacerdotis de quo quaestio succurri nequiret. Ideoque expetebas ut derogatio fieret dispositioni decreti *Maxima cura,* Tibique tribueretur facultas, parochos in his adjunctis transferendi absque processu in memorato decreto praescripto.

Iamvero, re mature perpensa in plenario huius Sacrae Congregationis Congressu die 22 maii huius anni, Emi Patres in hanc devenerunt sententiam, quam cum plena SSmi D.N. Papae approbatione, hisce litteris cum Ampl. Tua communico.

Decretum *Maxima cura,* prout ex ejus titulo et totius dispositionis tenore clare patet, providet casui in quo aliquis parochus a sua paroecia amoveri debet, eo quod ob unam ex causis ibi praevisis utile ministerium in ea haud amplius exercet.

Sed translatio, de qua A. Tua loquitur, res est toto caelo diversa; siquidem sacerdos in casu utile ministerium in sua paroecia utique exerceret, nullamque per se praeberet causam amotionis ab ea, sed necessitas alterius paroeciae et defectus cleri in dioecesi causae essent quae exigerent, ut ille, dimissa prima paroecia, ad aliam transiret. Non est igitur casus amotionis in dicto decreto praevisus, sed potius translationis.

Et quamvis in decreto *Maxima cura* ad artic. 7^um^ can. 26 sermo fit de translatione, hoc incidenter et qua subsequens provisio dicitur, sicut etiam verba fiunt de pensione amoto praestanda, ne emendicare cogatur. Non raro enim contigit ut qui utile ministerium in uno loco exercere non potest,

the time of the earliest Decretalists onward there is no direct reference to this kind of transfer other than that which deals with the transfer of bishops. Whatever reference is made to other clerics is to be found under the same title of the Decretals, namely, *de rerum permutatione*. Although this has been previously explained,[2] it seems necessary to recall it to mind once again in order better to understand the difficulties arising from this reply of the Sacred Congregation of the Consistory.

Some of the questions which can be raised, as insinuated by J. Besson,[3] by Hilling,[4] and by A. Boudinhon (1858–1941),[5] are the following. To which title in the Decretals does this response of the Congregation direct the Bishop of Pamiers: to that which treats of the transfer of bishops, or to that which deals with the exchanging of benefices? If, as it seems from the wording of the response, reference is made to the question of the transfer of bishops, can an exact parallel be drawn between bishops and pastors as regards the active and passive subjects of transfer? Did

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alibi idem praestare valeat; ideoque amotus juxta juris regulas ab una paroecia potest ab ordinario transferri ad aliam. Sed translatio haec, quae subsequens et contingens provisio est post amotionem, non est confudenda cum translatione sacerdotis, qui dignam utilemque operam in sua paroecia praestitit, nullamque dedit causam amotionis ab. ea. Illa enim translatio in bonum est paroeciae a qua quis transfertur, et haec amotio proprie dicenda est; altera est in bonum paroeciae ad quam quis transfertur; et haec promotio vel gubernationis provisio potius dicenda est, minime vero amotio in sensu decreti *Maxima cura.*

Quando itaque res sit de translatione in bonum loci ad quem quis mittitur, minime procedi debet juxta regulas memorati decreti, sed alio omnino *juxta normas quae Canonistae tradunt in titulo de translatione.*

Juxta has normas erga A. Tua procedere poterit in casibus de quibus in tuis litteris loquitur." S.C. Consist., 3 dec. 1913—quoted in *Nouvelle Revue Théologique,* XLVI (1914), 7–8; cf. also, *Le Canoniste Contemporain,* XXXVII (1914), 129–131; *AkKR,* XCIV (1914), 268–269.

[2] Cf. *supra,* pp. 39–42.

[3] "Une importante decision de la S. Congrégation Consistoriale," *Nouvelle Revue Théologique,* XLVI (1914), 5–10; 325–332; 389–404 (hereafter cited *NKT*).

[4] "Amtsenthebung im Verwaltungswege und Versetzung der Pfarrer," *AkKR,* XCIV (1914), 265–271.

[5] "La Translation Administrative des Curés," *Le Canoniste Contemporain,* XXXVII (1914), 129–140; 441–452.

the Decretal law of Pope Urban III (1185–1187)[6] bear upon the transfer of bishops as well as of pastors? In other words, was the clause, *"ut quae [personae] uni loco minus sunt utiles alibi se valeant utilius exercere,"* as employed by Pope Urban, merely illustrative in its effect, or did it establish a comprehensive legal norm? Further, since the decree *"Maxima cura"* furnished no legal norm for the case considered by the Sacred Consistorial Congregation, did it necessarily follow that *desservants,* to which class of pastors the priest of this particular case belonged, did not possess the same stability that the decree *"Maxima cura"* acknowledged for *desservants* when there was question of a removal for the good of the parish that was to be relinquished?[7] Finally, what was the status of irremovable pastors, and what was the procedure that was to be followed in the transfer of these as well as of the removable pastors who ruled over parishes in their own names?

These questions demand some consideration, for they certainly bring to light the very problems which confronted not only the Bishop of Pamiers, but in all likelihood all the other bishops who were faced with the same difficulty, namely, the transfer of unwilling pastors for the good of the parish of their new appointment. In attempting to solve these problems, as was noted in the previous chapter, it seems that one must look to the analogical situations connected with the transfer of bishops, and also to the cases which admitted or even demanded the executing of a transfer for the negative service interest of the Church. Accordingly, one may institute a comparison between the negative and positive service interest of the Church in order to ascertain whether the supreme law—the *salus animarum,* which when specified more concretely denotes the evident utility or necessity of the Church—can be applied on equal footing to both types of transfer. Having made this comparison one will find it possible to estimate whether or not a transfer for the good of the parish to which the transferee was to be changed could be effected through an administrative procedure even previous to the definite legislation of Title XXIX of Book IV of the *Code of Canon Law.*

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[6] C. 5, X, *dererum permutatione,* III, 19.

[7] Cf. S.C. Consist., *"Maxima cura,"* 20 aug. 1910, canon 30—*AAS,* II (1910), 647.

Since the transition from the transfer of bishops to the transfer of pastors does not seem inadmissable, and in view of the wording of the reply of the Sacred Congregation of the Consistory, which very explicitly referred the Bishop of Pamiers to the Decretal title *de translatione Episcopi,* it appears that this was primarily the title to which reference was contemplated in the response.[8] Hence the writer will give particular attention to that title in an endeavor to discover what official enactments, or also what doctrinal inferences of the canonists in this matter, were applicable in the case of the transfer of pastors.

As has already been mentioned in the section on the transfer of bishops, it was admitted both in conciliar and Decretal legislation that bishops who were willing to accept a transfer could be changed from one diocese to another for the utility or the necessity of the Church.[9] By analogy, then, the same could be said of inferior beneficiaries, such as pastors, since the bond which joined them to their church was certainly inferior to that which existed between a bishop and his see. This was commonly admitted by canonists.[10] The possible making of such a transfer offered no difficulty, since there was no need of weighing the relative difference between the power of the Pope in relation to bishops, and that of the bishops in relation to inferior beneficiaries, inasmuch as in the contemplated case the transferee was willing to accept the transfer. The whole question hinged upon the matter of stability in office rather than upon the character of the active subject of transfer. But, since the matter of stability in office had been definitely settled, any and every difficulty was completely obviated.

When, however, the problem of transfer had to be considered with reference to an unwilling beneficiary, the inquiry acquired a new aspect. In this latter case the difference in the power as possessed by the active subject of transfer became a distinctive element. Abstracting from the dispute whether or not the Pope, as the supreme dispenser of all beneficiaries, had it within his

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[8] Cf. Ferreres, *Institutiones Canonicae* (ed. altera, 2 vols., Barcinone, 1920), II, 389.

[9] Cf. *supra,* pp. 35–37.

[10] Besson, "art. cit."—*NRT,* XLVI (1914), 393; Boudinhon, "art, cit."—*Le Canoniste Contemporain,* XXXVII (1914), 445.

power to transfer a bishop from one diocese to another against his will, one may safely state that for all practical purposes he could effect such a transfer, granted of course the existence of a just and reasonable cause.[11]

In the consideration of this point Besson, in his controversy with Boudinhon, contended for the existence of a juridical basis in justification of the act of administrative transfer. He insisted that the natural consequence of the analogy postulated that the bishop had the right of imposing such a transfer upon a beneficiary, whether irremovable or removable, but that as a general rule it was not presumed that he wished to utilize that right.[12]

Boudinhon, on the other hand, basing his conclusions on a commentary of Santi (1830–1885)–Leitner (1862–1929),[13] maintained that if the Pope has never undertaken to use his supreme power in the matter of a transfer of a bishop from one church to another apart from or against his will, even when the good of the Church in the diocese to which the bishop was to be appointed definitely countenanced such action on the part of the Pope, then it seemed that the bishop, who in no way exercised an equal power over pastors,[14] could not impose a purely administrative transfer upon a pastor if there existed no motivating reason in connection with his ministry in the parish in which he was stationed up to the time of the transfer.[15] The most that Boudinhon admitted was that the bishop could propose a change, and even order the same when the utility or necessity of the Church demanded it, but that he could never compel a pastor to leave his church even for a better one.[16]

Another element which by way of analogy was applicable to the case of the transfer of pastors related to the quality of the benefice or parish to which the pastor was to be changed. Since the general law of the Church looked upon a transfer to an inferior dignity

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[11] Cf. *supra*, p. 36.

[12] "Art. cit."—*NRT.*, XLVI (1914), 394–395.

[13] *Praelectiones Iuris Canonici* (3. ed., 5 vols., Ratisbonae, 1898–1899), lib. I, tit. 7, n. 8.

[14] Cf. *supra*, p. 34.

[15] "Art. cit."—*Le Canoniste Contemporain*, XXXVII (1914), 135.

[16] *Ibid.*, pp. 135–136.

or to a smaller diocese as reflecting discredit or dishonor upon the person transferred,[17] it followed, by analogy, that the transfer had to be made to a parish which was better than, or at least equal to, the former parish, both as regarded honor and income.[18]

Concerning the question whether or not, in seeking a juridical basis for administrative transfer one may point to the decretal title *de rerum permutatione,* which contains the classic text of Pope Urban III that permitted the transfer of ecclesiastical persons for the evident utility of necessity of the Church, Besson affirmed that the case treated by Pope Urban III, together with the additional examples cited by the canonists was to be considered as merely indicative and illustrative of other similar cases to be regulated by the same law. In confirmation of this he cited a passage from Schmalzgrueber's (1663–1735) commentary on the exchange of benefices.[19] Besson stressed the fact that Schmalzgrueber treated of the case in which an exchange of benefices was imposed on two beneficiaries.[20] From this he argued that, if it was allowable to consult the spiritual necessity of souls by means of a reciprocal transfer, then it was likewise permissable to do so by means of a unilateral transfer.

However, this line of argument does not seem justified. An exchange of benefices must be understood in the strict canonical sense. In any such exchange it is always postulated that the beneficiaries themselves request the exchange, and hence any transfer that is made for the good of the parish obtained implies a willingness on the part of the transferee to accept it. Thus it does not appear that the passage cited from Schmalzgrueber could rightfully add any weight to Besson's argument in favor of the existence of legislation for the non-judicial transfer of unwilling pastors.

Hilling, in his article, seemed to agree with Besson on this point. However, he admitted at the same time that the application of this doctrine was very difficult in practice in view of the many possible abuses that could ensue upon the arbitrary determination of the

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[17] Cc. 1, 4, *de translatione Episcopi,* I, 7.

[18] Wernz, *Ius Decretalium,* II, 520; Hilling, "Art. cit."—*AkKR,* XCIV, (1914), 271.

[19] *Ius Ecclesiasticum Universum,* lib. III, tit. 19, n. 77.

[20] "Art. cit."—*NRT,* XLVI (1914), 398, note 2.

causa necessaria. Arguing from the decision of the Sacred Congregation of the Council, given on August 6, 1910, concerning the care of souls,[21] he maintained that only in the case of absolute necessity could a bishop impose the acceptance of an office upon an unwilling priest. In like manner, he concluded, only when the situation could not be remedied otherwise, was the bishop authorized to impose a transfer upon a pastor for the positive service interest of the Church.[22] But, the analogy employed by Hilling seems highly controvertible. There is a very substantial distinction between the enforced acceptance of an ecclesiastical office and the enforced transfer of a cleric from a well administered office.

In commenting on this same question Boudinhon, against the opinion of Besson, implied that no strict appeal to the text of Pope Urban III was admissable. He contended that the *Corpus Iuris Canonici* contained no law respecting the purely administrative transfer of pastors and other beneficiaries, since the Decretal law of Pope Urban, by its very wording, applied only to the transfer of pastors whose ministry had not been all that was desired in the churches over which they ruled.[23] Thus he maintained that the case treated by Pope Urban III covered in full the applicatory extent of his law, and therefore was not to be considered as illustrative of other cases to which the same law could apply.

When considering the status of removable pastors, one must make a distinction between the time preceding the promulgation of the decree *"Maxima cura"* and the time subsequent thereto. Previous to the promulgation of this decree, all such pastors were considered removable at the good pleasure of the proper superior *(ad nutum competentis superioris).*[24] Since the promulgation of this decree, however, as already seen, the status of removable pastors seemed to be changed considerably. This decree practically suppressed the legal possibility of removing at will *desservants* and other removable pastors who ruled in their own names. After the decree became operative the norms of a set procedure had to be

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[21] S.C.C., *S. Iohannis de Mauriana,—AAS,* II (1910), 911-916.
[22] "Art. cit."—*AkKR,* XCIV 1914), 270.
[23] "Art. cit."—*Le Canoniste Contemporain,* XXXVII (1914), 136.
[24] Cf. *supra,* p. 31.

observed, and the cause for which any removal was effected had to be a cause which was mentioned in the exhaustive list of causes enumerated in this decree.[25]

In spite of this new quality of stability which had been granted *desservants* by the decree *"Maxima cura"* Besson still maintained, as he had done in the first article which occasioned this controversy,[26] that the purely administrative transfer of removable pastors was to be governed by the earlier law regarding the question of their transfer.[27] Hence he argued that such pastors could be transferred validly apart from any consideration of the good of the parish from which they were to be transferred.[28]

Boudinhon, on the other hand, specifically distinguished between the stability accorded *desservants* before the promulgation of the decree *"Maxima cura"* and that which they enjoyed subsequent to its having become the law with reference to the administrative removal of pastors. Speaking of this, he stated:

> Although irremovable pastors could not be removed without a canonical trial nor by means of an administrative removal, formerly *desservants* could be deprived of their parishes *sine causa,* that is, without procedure, the bishop being under no obligation to vindicate or to justify the motive of his decision. The removal of such *desservants* was always considered valid, although such pastors had the right of recourse in consideration of the parish to which they were assigned, especially when they had done nothing which merited their being transferred to a far inferior parish.[29]

In view of the new stability accorded to these pastors, however, Boudinhon contended that, since the promulgation of the decree *"Maxima cura,"* these also could not be transferred in a purely administrative manner, in spite of the fact that the Sacred Consistorial Congregation, in its reply to the Bishop of Pamiers, denied the application of this decree to the transfer of this type of pas-

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[25] Cf. *supra,* pp. 62–65.
[26] "Art. cit."—*NRT,* XLVI (1914), 9.
[27] "Art. cit."—*NRT,* XLVI (1914), 400–401.
[28] *Ibid.,* p. 9.
[29] "Art. cit."—*Le Canoniste Contemporain,* XXXVII (1914), 138.

tors. He argued strongly against the illogicalness of the contrary view. In his view, if the Holy See took such notable precautions against the arbitrary removal of removable pastors even when in fact they had furnished some reason for their removal, it did so precisely in order that those who had furnished no cause for a removal from their parishes should *a fortiori* be granted the same consideration.[30]

Hilling, of a like mind in this matter, maintained that it would be a very strange law which through its introduction of the principle of irremovability would make more difficult the removal of a pastor for the negative interest of the Church, while at the same time it would make provision for a possible transfer in consideration of the positive service interest of the Church.[31]

For one who has taken cognizance of the arguments presented on either side, the sentiments of the two principal controversialists are apparent. Basing his opinion on the supremacy of the principle that the private good must cede to the public good, namely to the *salus animarum,* Besson held for the existence of a juridical basis in the decretal law in the question of the purely administrative transfer of pastors, irremovable or removable. He maintained that the interest of souls demanded that, in the removal of pastors, the bishop had to consider not only the good of the parishes already provided for, but also the good of those parishes for which provision had yet to be made. Accordingly then, he concluded, it was imperative for the bishop to invoke the use of administrative transfer when among the priests who could freely have been appointed none were found suited for the appointment to a particular parish.[32]

In Besson's mind such a situation created a cause parallel to the necessity or great utility of the Church, which was demanded by canonists for the removal of irremovable pastors in consideration of the good of the parish they were asked to relinquish. According to his view, then, when the spiritual necessities of the faithful *imperiously* demanded a transfer, which needs could not be provided for in any other manner, and when the beneficiary to whom

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[30] "Art. cit."—*Le Canoniste Contemporain,* XXXVII (1914), 138–139.
[31] "Art. cit."—*AkKR,* XCIV (1914), 271.
[32] *Ibid.,* p. 5.

the transfer was suggested could not present any reasonable motives in opposition to the change of benefices, the bishop could impose the transfer even though the transferee was still unwilling to acquiesce in it.[33] His opinion regarding the transfer of removable pastors has already been considered.[34]

In replying to this argumentation Boudinhon questioned in what manner a pastor was responsible for the good to be accomplished in another parish; how the solicitude for this good could provide a motive for resigning from a parish in which he has ruled usefully; how the pastor's strict right to his own benefice became void and inoperative for the reason that another parish needed a pastor; and finally, how the needs of the faithful of another parish could imperiously demand that a pastor already acting in the capacity of a beneficiary be transferred to supply these needs.[35]

In answering these questions Boudinhon contended that, although the good of souls is the supreme law, the good of particular souls in another parish does not militate against the strict right which an irremovable pastor has to remain in his parish. He insisted that the personal right of a pastor to his parish did not depend on circumstances totally outside of himself, and of so variable a character, that the absence of any other available priest rendered an enforced promotion legitimate. He further maintained that one should think twice before making applications of the supreme principle of the *salus animarum* if they entail any detriment for the acquired rights of titulary who is not held by any obligation to look to the good of souls in particular.[36]

Boudinhon eventually asked the following rhetorical question: what stability in office or benefice could ever prevail against the application of the principle of the *salus animarum* if every pastor, even against his will, could be taken from his parish to minister to the good of souls in another? Implicitly affirming that the quality of perpetuity would be nullified if such were the case, he asserted that one must turn to the unanimous teaching of the canonists, namely, that an enforced transfer is justified in the light of only

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[33] *Ibid.*, p. 399.

[34] Cf. *supra*, pp. 74–75.

[35] "Art. cit."—*Le Canoniste Contemporain*, XXXVII (1914), 449.

[36] *Loc. cit.*

those motives which concern the beneficiary himself or his benefice.[37] In confirmation of this he quoted an old adage cited by Engel (1634–1674): ". . . *ius suum nemini sine culpa aut causa publica auferendum est.*"[38] Thus Boudinhon summed up his teaching on the purely administrative transfer of unwilling irremovable pastors for which Besson contended so ardently.

Besides attempting to show the illogicalness of Besson's view regarding the status of removable pastors, Boudinhon took further exception to other arguments offered by his adversary. He disputed the validity of Besson's reasoning, namely that the consideration of the *salus animarum* could demand the administrative transfer of a given particular removable pastor when that good was to be provided for solely in the parish which was to be obtained. He maintained that, in view of the elastic manner in which the administrative necessity could be met if the bishop was fully authorized to provide for the needs of such a parish, Besson's position did not seem justified. He felt also that surely there could be found some suitable priests who would be willing to accept a change, and that therefore any enforced transfer of a removable pastor would hardly be reconcilable with the assumption that the pastoral need could not be consulted in any other way.[39]

Besides what has already been cited, Boudinhon took exception to other arguments offered by his adversary. He maintained that Besson, after admitting that he was impressed by the fact that neither the canonists nor the decisions of the Roman Curia specifically treated of transfer for the good of the parish that was to be obtained,[40] begged the question when he contended that the reply of the Sacred Consistorial Congregation to the Bishop of Pamiers was superfluous if the enforced transfer of a pastor who has exercised a useful ministry is never legitimate.[41] He dismissed in like

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[37] *Loc. cit.*

[38] *Collegium Universi Iuris Canonici*, lib. I, tit. 7, n. 3.

[39] *Ibid.*, p. 139; cf. also *ibid.*, 449–450.

[40] Besson, "art. cit."—*NRT*, XLVI (1914), 389.

[41] Boudinhon, "art. cit."—*Le Canoniste Contemporain*, XXXVII (1914), 444–445. He further continues: ". . . Par conséquent, rien n'autorise à dire que la S.C. 'ne juge pas la doctrine opposée, *entoute hypothèse*, aux promotions,' si ce n'est dans la mesure ou la doctrine, c'est-à-dire l'enseignement auquel on nous renvois, n'y pas lui-même opposé."—*loc. cit.*

manner[42] his adversary's affirmation that the doctrine of the canonists was not as exclusive as it appeared at first sight,[43] and also turned another admission against Besson, namely that the Sacred Congregation did not take occasion to enact new legislation in its reply to the Bishop of Pamiers.[44] In view of this, so Boudinhon maintained, the special circumstances found in the diocese of France, and alleged by Besson as a justifying cause for effecting a transfer of this type,[45] would in no way have exercised an influence on the reply.[46]

In concluding his final article in this controversy, Besson summed up in the following manner what appeared to him the cases and limitations which the Sacred Congregation seemed to have in mind with reference to transfers considered in its reply to the Bishop of Pamiers. He stated:

> 1. There must be a true and real necessity to provide for the spiritual service of a parish to which another priest cannot otherwise be assigned. 2. There must be a true promotion, and not a veiled withdrawal under the appearance of a promotion; in other words, the motive of the transfer must be exclusively the necessity of the parish which is to be obtained or the necessity of a third parish. 3. The ordinary must seriously consider the well-founded and legitimate reasons presented by the interested party, and, if he sees fit, must take them into account.[47]

He looked upon such a change, then, not as an arbitrary measure, but rather as an act of wise and equitable administration, in which the interest of the pastor were always conciliated with the imperative demands of the superior good of souls.

Taking cognizance of the limitations acknowledged by Besson, Boudinhon in his own conclusion of this controversy, qualified his own position regarding an enforced transfer of removable pastors to a better parish as follows:

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[42] *Ibid.*, 445.

[43] Cf. Besson, "Art. cit."—*NRT*, XLVI (1914), 390.

[44] *Ibid.*, 326.

[45] "Art. cit."—*NRT*, XLVI (1914), 390–391.

[46] Boudinhon, "art. cit."—*Le Canoniste Contemporain*, XXXVII (1914), 443–444.

[47] "Art. cit."—*NRT*, XLVI (1914), 404.

> Thus reduced to the exceptional cases; preceded in each case by all the opportune administrative negotiations; utilized only when the refusal of a pastor to accept a determined parish is evidently unreasonable; admitting also the remedy of suspensive recourse, the enforced promotion can be admitted as a legitimate procedure of administration. Within these limits I do not reject it, and I adhere as nearly as possible to the conclusions of M. Besson. But I demand of him in return (which demand was not acceded to) that he recognize, if he has not already done so, that the reply of the Sacred Congregation of the Consistory to the Bishop of Pamiers has not modified anything of the previous law, and has not extended the scope of either the normal or the exceptional powers of the ordinary.[48]

From this it is evident that Boudinhon, although he still maintained that the administrative transfer of unwilling irremovable pastors was outside the jurisdiction of the ordinary, did not deny that removable pastors, lacking the stability of the former type, could be subjected to this procedure in exceptional circumstances.

Upon a close study of these two opinions with a view to enhancing the results of research portrayed in the previous chapters, it seems that Boudinhon's position was far more tenable than that of Besson. It has always been the mind of the Church that her pastors remain in their parishes. In the earlier centuries she demanded this in view of the title of ordination. With the advent of the system of benefices in the Church her pastors were given even a greater stability, and after the legislation of the Council of Trent the Church's desire in this regard was definitely established. Furthermore, she always manifested herself as opposing the arbitrary removal of pastors, by demanding a judicial process for the deprivation of those who were guilty of such grave delicts as called for such a penalty, and by requiring an administrative procedure for the removal of those whose ministry had been rendered sterile. In all cases, as has been noted, the grounds for this removal centered about the ministry already exercised by the pastor in question. Since she was very explicit in this, and in view of her position regarding the irremovability of pastors, it seems safe to say with

[48] "Art. cit."—*Le Canoniste Contemporain*, XXXVII (1914), 452.

Boudinhon that the Church never recognized a purely administrative transfer in relation to irremovable pastors when these were unwilling to acquiesce in the act of transfer.

In regard to the removable pastors who had not been accorded any stability in their pastoral office until the promulgation of the decree *"Maxima" cura,* it appears that the position held by Boudinhon in his conclusion is likewise the more feasible one. Since there was no legislation between 1910 and the promulgation of the *Code of Canon Law,* his suggestions seemed both acceptable and commendable for application throughout that particular period.

SUMMARY AND CONCLUSIONS

Previous to the legislation of the Code the Church did recognize an indirect type of transfer which was nothing more than a consequent of removal. The pastors affected by this type of transfer included only those whose ministry had been rendered sterile, whether culpably or inculpably, in their former parishes. The enactments of the Church from the time of the Decretals pertained solely to this type of transfer. They could in no way be extended to include the transfer of unwilling pastors whose ministry left nothing to be desired in their parishes.

Before the promulgation of the Code, then, there was no statute law concerning the purely administrative transfer of those pastors who had exercised a useful ministry. Title XXIX in Book IV of the Code, which deals with the transfer of this type, appears to be the result of the recognition of the difficulties faced by bishops who sought to transfer their pastors to other parishes by way of promotion, or as a means of furthering the positive interests of the Church in their diocese.

Because of the quality of perpetuity in the pastoral office, which was firmly established by the Council of Trent, pastors whose ministry had been fruitful and who were unwilling to accept a change could not be transferred without the intervention of the Holy See, whose supreme power over benefices could be invoked when good reasons countenanced a transfer.

Removable pastors, lacking true stability in their office, could be changed only in exceptional cases, after safeguards had been taken not to abuse their status, especially after the promulgation of the decree *"Maxima cura."*

Pastors, irremovable or removable, who were willing to accede to the suggestion of a change, could be transferred without any juridical trespass upon the stability desired by the Church.

PART TWO

CANONICAL COMMENTARY

CHAPTER V

INTRODUCTORY NOTIONS

Although some of the material of this chapter has been considered in previous dissertations, it seems necessary to include a few introductory notions that the reader may more readily understand the nature of the process of transfer, as well as the reason for the procedure in view of the stability which the *Code of Canon Law* has given to the pastoral office. The topics to be treated, therefore, will concern primarily the nature of the administrative process in general, the pastor in relation to his parish, and finally his stability in office.

ARTICLE I. THE NATURE OF THE ADMINISTRATIVE PROCESS

A consideration of the nature of the administrative process seems to demand that attention be given to the relation of this procedure to the generic term *"De Processibus,"* which is the title of the entire fourth book of the *Code of Canon Law.* This title includes within its scope three distinct and quite diverse modes of procedure, namely: *De Iudiciis,* which considers the true judicial regulations found in the first part of this book;[1] *De causis beatificationis Servorum Dei et canonizationis Beatorum,* which treats of the solemn process to be followed in the beatification and canonization of saints;[2] and finally *De modo procedendi in nonnullis expediendis negotiis vel sanctionibus poenalibus applicandis,* which deals with particular procedures to be followed in specific cases requiring an efficient and summary solution.[3] It is under this

[1] Canons 1552–1998.
[2] Canons 1999–2141.
[3] Canons 2142–2194.

third part of the fourth book that the title *De modo procedendi in translatione parochorum*[4] is included. The procedure employed here is one which facilitates the transfer of pastors without adhering to the complicated solemnities of a judicial process.

In contradistinction to the judicial process which is burdened with its many rigid formalities, the procedures mentioned in the third part of the fourth book of the Code have received various names among the authors. Among these, which also include the terms "disciplinary," "economic," and "summary," that of "administrative" seems to be the one which can be applied to all of these processes with greater exactness, and is the one which is used most commonly in the commentaries on the Code.[5] Hence the term "administrative," which appears preferable especially in relation to the process of transfer, will be employed to designate the procedure to be treated in this thesis.

That the material of this part of the fourth book of the Code is certainly to be included under the generic rubric "De Processibus," which term can be described as designating "a series of acts and solemnities which are prescribed by law for the settlement and expediting of questions by public authority,"[6] is evident from the fact that it demands the strict observance of definite, although not too rigid, norms and formalities by the competent superior employing the procedure for the determination of matters included

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[4] *Codex Iuris Canonici*, Lib. IV, tit. XXIX.

[5] Suarez, *De Remotione Parochorum*, n. 1; Fanfani, *De Iure Parochorum* (editio altera, Taurini-Romae: Marietti, 1936), n. 139; Cappello, *Praxis Processualis* (Taurini: Marietti, 1940), n. 2; Wernz-Vidal, *Ius Canonicum* (7 vols. in 8, Romae: Apud Aedes Universitatis Gregorianae, 1927–1938), VI (2. ed., 1928), n. 742; Coronata, *Institutiones Iuris Canonici* (5 vols., Taurini: Marietti, 1933–1939), III (1933), n. 1573; Vermeersch-Creusen, *Epitome Iuris Canonici* (3 vols., Mechliniae-Romae: H. Dessain, 1934–1937), I (6. ed., 1937), n. 308; Lega-Bartocetti, *Commentarius in Iudicia Ecclesiastica iuxta Codicem Iuris Canonici* (3 vols., Romae: Anonima Libraria Cattolica Italiana, 1938–1941), I (1938), Art. VI, nn. 1–9; Noval, *De Processibus*, II, nn. 457–463—wherein is given a rather solid commentary regarding the different terms applied by the authors; the preference for the term "administrative;" and the difference between administrative and judicial processes.

[6] Cf. Noval, *De Processibus*, Pars I, *De Iudiciis* (1920), n. 4; Suarez, *op. cit., loc. cit.*

under this title.[7] Supplementing the acts and solemnities which are dictated by the natural law and reason for the hearing and settlement of a particular matter are those which have been specifically demanded by the legislator for these administrative processes. Of these special acts the precept, or the invitation, exhortation or recommendation, all of which are equivalent to a precept, stand out above all others, since being fundamental and distinctive they give the specific form to these administrative processes. Further, since they are the essential part of processes directed exclusively toward clerics, they are distinctly different from the common kind of precept which is intended for all the faithful.[8]

The acts comprising these processes are divided into three parts: the first being the introductory part, the essence of which is the precept, invitation, exhortation or recommendation; the second, the simply deliberative part, embracing simple decrees which however are not definitive, which takes place before the local ordinary; and the third, the definitive deliberative part, which is held before the same superior and is completed in the form of a definitive decree issued by him. The only remedy in law against this final decree is recourse to the Holy See, which indeed is allowed,[9] because this decree is never irrevocably inviolate. Regarding the solemnities what are required it suffices to say that everything should be put in writing and subscribed to by all,[10] and the observance of secrecy is strictly demanded.[11] Later, in the more specific treatment of the administrative transfer of pastors, a more detailed explanation will be given concerning these particular acts and solemnities.

The *negotia* for which these special processes have been assigned are those matters which pertain to the administration of a diocese in which the removal and transfer of both irremovable and removable pastors are to be effected for the good of souls, and without harm to the rights of pastors through any arbitrary use of

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[7] Cf. Suarez, *op. cit., loc. cit.*

[8] Cf. canons 1933, § 4; 2225.

[9] Canons 2146, § 1; 1601.

[10] Canon 2142.

[11] Canon 2144. Cf. Noval, *De Processibus*, II, nn. 450; 480.

power on the part of a competent superior.[12] The penal sanctions included under this administrative procedure are those that are to be invoked only when a pastor or another cleric has proved himself guilty of serious and culpable delicts which are listed exclusively in the titles pertaining to administrative processes, and has showed himself to be contumacious. Again, however, it must be remembered that these sanctions are established primarily for the salvation of souls rather than for the direct punishment of the guilty cleric. This may be inferred from the prologue of the decree *"Maxima cura,"* which is considered as the primary basis of most of the matters included in this particular legislation of the Code.[13] Nevertheless, it seems that it still can be maintained that the element of punishment is not wholly excluded, just as the rights of pastors and of other clerics are at least secondarily sustained, since the strict adherence to definite norms and solemnities is always demanded.[14]

Regarding this particular point it is agreed by all that essentially the administrative process was adopted in law as a means of promoting the salvation or the welfare of souls. This is evident from the wording of the legislation prior to the promulgation of the Code itself, concerning the removal, transfer and application of penal sanctions to pastors and other clerics. However, it remains to be seen whether or not it was really in the mind of the legislator to have due regard also for the inalienable rights of the passive subjects of these processes, and whether the precautions imposed by the legislator are sufficiently effective to protect their prerogatives. Authors, while agreeing that the administrative process is intended basically for the supreme good of the ecclesiastical society and the eternal salvation of souls, inasmuch as it is demanded by

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[12] Wernz-Vidal, *Ius Canonicum,* VI, n. 740. Cf. also Suarez, *De Remotione Parochorum,* n. 1; Beste, *Introductio in Codicem* (2. ed., Collegeville, Minnesota: St. John's Abbey Press, 1944), p. 863; Coronata, *Institutiones Iuris Canonici,* III, n. 1573.

[13] S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910, Proemium: ". . . Salus enim populi suprema lex est: et parochi ministerium fuit in Ecclesia institutum, non in commodum eius committitur, sed in eorum salutem pro quibus confertur."—*AAS,* II (1910), 636; *Fontes,* n. 2074.

[14] Cf. Wernz-Vidal, *Ius Canonicum,* VI, n. 740; Coronata, *Institutiones Iuris Canonici,* III, n. 1573; Suarez, *De Remotione Parochorum,* n. 31.

the public good, generally admit that the protection of rights is inherent in this legislation, and consequently it seems that this is another reason for its incorporation in the Code.[15]

Noval (1861–1938), on the other hand, while admitting the fact of a limited protection of these rights through the imposition of specific precautions (*cautelae*) by the legislator, such as the employment of a notary, the taking of the oath to insure truthfulness, and the demand for consultation with the synodal examiners or parish priest consultors, nevertheless still maintains that all these taken together are not sufficiently efficacious to preclude the possibility of injury to a pastor or another cleric. He asserts that the competent superior, not being bound by the strict formalities and solemnities of a judicial process, even in good faith can very easily fall into error, and consequently occasion some harm. Again, he says that there is ample room for an arbitrary use of power on the part of the superior because, even though he is required to seek counsel, the decision is left entirely to his own judgment, the opinion of the examiners and parish priest consultors notwithstanding. Hence, he adds, even in good or bad faith, the superior can be responsible for jeopardizing the prerogatives of the clerics subject to these particular processes. In making these assertions he seems to feel that it is in perfect accord with the mind of the legislator that there be place for the arbitrary use of power by the competent superior in view of the fact that the basic reason of the administrative process is the supreme good of souls. He seems then to look upon these rights as merely an individual good to be sacrificed for the attainment of the common good.[16]

In giving his opinon, Noval seems to lose sight of the fact that the supreme good of souls included another aspect, namely, the good of pastors and other clerics, since there is a definite connection between the protection of their rights and the welfare of souls. If an arbitrary and even imprudent judgment be allowed

[15] Cf. Beste, *Introductio in Codicem*, p. 863; Coronata, *Institutiones Iuris Canonici*, III, n. 1573; Suarez, *De Remotione Parochorum*, n. 31; Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Augustine, *A Commentary on the New Code of Canon Law* (8 vols., St. Louis: Herder & Co., 1925–1938), VII (3. ed., 1930), 411 (hereafter cited *A Commentary on Canon Law*).

[16] Cf. Noval, *De Processibus*, II, nn. 477–478.

to a superior in matters of this kind, it is evident that much harm can be done to the ecclesiastical order, and consequently to the salvation of souls. One has but to consider the consequences that would follow such a mode of action. Certainly it would become a source of scandal if it were brought to the attention of the people, as it well might be by an imprudent cleric, or even through their own observation, that the local ordinary was using his power arbitrarily in making changes and meting out penal sanctions without regard for the rights of his clerical subjects.

Again, one has but to consider the effect it would have on those in office, parochial or otherwise, if they felt that this process abstracted from their stability in office, and consequently that they were subject practically to the whim of their superior. Theirs would not be an efficient and shepherd-like administration, since they would feel that regardless of how well they executed the duties proper to their office, they still would enjoy no stability in it. Certainly this situation, as does scandal, militates against the welfare of souls.

Moreover, the legislation concerning pastors, which is to be considered in the latter part of this chapter, would be of no avail, since the Church's desire to give pastors a real stability in office would yield to an arbitrary removal or transfer by a superior, and thus the laws for perpetuity and irremovability would be useless.[17] Certainly it is not the mind of the legislator to make laws of this nature, and hence it cannot be asserted that he intended to enhance the power of the competent superior to an almost supreme degree at the expense of the rights of others which have a true foundation in law. On the other hand, the incorporation of the administrative process in the Code appears as a definite attempt on the part of the Church to protect the rights of her clerics, since previous to the promulgation of the decree *"Maxima cura,"* which preceded the Code by only eight years, the legislation was rather obscure, with the consequence that there was much more chance for error and injustice than ever could be had in the employment of this process.

Certainly, then, it can be maintained that it is consistent with

[17] Cf. *infra*, pp. 93–97.

the mind of the Church that matters of this kind concerning the good of the Church and the salvation of souls be expedited without the confusion which often accompanies a judicial process,[18] and without promoting contentions between superiors and subjects, which, often the consequence of judicial trials, redound to the contempt and debasement of public authority.[19]

However, it does not necessarily follow that, by allowing this latitude, the Church intends to open up a way to undermine something she has striven to develop, such as the stability of office which she has expressly given to pastors of souls.[20] It must be remembered that the ordinary is not allowed to determine what is to be observed in this procedure, but that he himself is to observe strictly those norms which have been determined by the Code.[21] Consequently it can be asserted with good reason that the legislator definitely had regard for the inalienable rights of pastors and other clerics, and established sufficiently efficacious precautions (*cautelae*) to effect their protection.[22]

ARTICLE II. THE PARISH AND PASTOR IN THE CODE

A commentary regarding parish and pastor seems worthy of consideration in order that a clearer notion may be had of the different species of pastors, and those considered equivalent to pastors by the enactments of the Code.

A parish, then, may be defined or described as that distinct portion of a diocese, having its own particular church administered by a proper rector, whose duty it is to exercise ordinary jurisdiction in the internal forum necessary for the care of souls, over those of the faithful who are committed to his care.[23]

Parishes are classified by authors under different species, and a few remarks about these divisions seem to have place here. First of all there are the parishes *proprie dictae,* which are found

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[18] Suarez, *De Remotione Parochorum,* n. 1.

[19] Wernz-Vidal, *Ius Canonicum,* VI, n. 740.

[20] Cf. canons, 454; 471; 1438.

[21] Cf. Suarez, *op. cit.,* n. 16.

[22] Cf. Suarez, *op. cit.,* n. 31.

[23] Cf. canon 216, §§ 1, 3. Cf. also Fanfani, *De Iure Parochorum,* n. 1; Beste, *Introductio in Codicem,* p. 225.

in those regions in which an ecclesiastical hierarchy has been fully and legitimately established. These are certainly *partes dioecesis*, since, when these conditions have been fulfilled, such regions constitute true dioceses.[24] Further, these parishes truly and properly constitute ecclesiastical benefices if they have a stable and congruous endowment, from which perpetual revenue can be obtained to provide for the decent support of the pastor and for other expenses required for the maintenance of the parish.[25] It is over these parishes that pastors, properly so-called, are established with a certain degree of stability.[26]

The Code defines a pastor as a priest or a moral person to whom a parish has been committed in title, with the obligation of caring for the souls therein under the authority of the local ordinary.[27] Hence in the first part of canon 451 are included those upon whom has been conferred a definite territory, which is given them *in perpetuum*, or at least without a definite determination of time, to be ruled in their own name, and, all things being equal, as a benefice which is legitimately possessed.[28] Furthermore, they have the right and the duty of caring for the souls committed to them through the exercise of ordinary jurisdiction in the internal forum, and even domestic or economic power in the external forum,[29] subject, of course, to the authority of the local ordinary.

When canon 451 speaks of a moral person it has reference to any juridical entity in which vests the title of pastor and of the parish as a benefice, such as a monastery, or any institution with which a parish may be *pleno iure* united or incorporated. Such, however, must commit the actual care of souls to a parochial vicar, since neither *de facto* nor *de iure* does it have the right to the

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[24] Cf. canon 216, § 3. Cf. also Fanfani, *op. cit.*, n. 3.

[25] Cf. canons 1409; 1415, § 1. Cf. also Fanfani, *op. cit.*, n. 1.

[26] Canon 454, § 2. Cf. also, S.C. de Prop. Fid., 9 dec. 1920—*A.A.S.* XIII (1921), 17.

[27] Canon 451, § 1.

[28] Cf. canon 454, §§ 1, 3. Cf. also Fanfani, *op. cit.*, n. 87; Coronata, *Institutiones Iuris Canonici*, I (2. ed., 1939), n. 467.

[29] Cf. canons 196–197. Cf. also Beste, *Introductio in Codicem*, pp. 284–285; Coronata, *op. cit.*, I, n. 467; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 546.

actual vigilance of the faithful belonging to such a parish. The moral person merely possesses vested rights regarding the administration of the parish or parochial benefice, and has an interest in the filling of the parish incumbency either by presentation or by nomination.[30] Actual pastors, on the other hand, are those priests who rule in their own name, exercising the care of souls *de facto* and *de iure*.[31]

Another type of parish, taken in the wide sense of the term, is the quasi-parish. These, found in mission territories, denote those territorial portions of a vicariate or prefecture apostolic, to which a particular rector has been assigned with the duty of caring for the faithful committed to him,[32] under the direct dependence on the ordinary of the place.[33] Only after mature deliberation has been given to their need can parishes of this nature be established[34] in those many regions throughout the world, in which the Catholic religion has not been sufficiently established, and consequently where dioceses, proper so-called, cannot be erected. It is the Holy Father who, in virtue of his supreme power over the whole world,[35] rules and governs these places through his vicars, who in turn, in order to facilitate the administration of them, divide and give portions of these territories to rectors, called quasi-pastors, who by law are considered equivalent to pastors, and enjoy all the rights and duties which are proper to them.[36]

Another distinction is that made between territorial, personal and mixed parishes. A territorial parish is had when the faithful are subject to the pastor by reason of the circumscribed district

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[30] Cf. canons 452; 1425. Cf. also Fanfani, *De Iure Parochorum*, n. 88; Vermeersch-Creusen, *op. cit.*, I, n. 537; Beste, *op. cit.*, pp. 99–100; Coronata, *op. cit.*, I, n. 469.

[31] Beste, *op. cit.*, p. 286; Fanfani, *op. cit., loc. cit.*

[32] Cf. canon 216, § 3.

[33] Coronata, *Institutiones Iuris Canonici*, I, n. 307.

[34] Cf. S.C. de Prop. Fid., instr., 25 iul 1920—*AAS*, XII (1920), 331; canons 302–303. Cf. also Beste, *Introductio in Codicem*, p. 226; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, nn. 330–331; 421.

[35] Canon 218.

[36] Cf. canons 451, § 2, 1°. Cf. also Fanfani, *De Iure Parochorum*, n. 3; Coronata, *op. cit.*, I, n. 307; Beste, *op. cit.*, p. 227; Vermeersch-Creusen, *op. cit.*, I, n. 535.

within which they live.[37] A parish is personal on the other hand, if the distinctive character in consequence of which the people belong to the parish and the competency of the pastor becomes fixed, is some quality purely personal, without having regard to any territorial limits.[38] Again, a mixed or national parish possesses qualities common to both of the afore-mentioned species of parishes, in that it has regard both to the quality of the people and also to a particular territory. Hence, the competency of the pastor is restricted to those faithful who possess a distinctive quality, e.g., rite or nationality, in a determined diocese.[39] At the present time, however, it is the mind of the Church that territorial parishes be established, since personal and mixed parishes can no longer be erected without the express permission of the Holy See.[40]

Parishes are also divided into incorporated and independent ones. Incorporated parishes are those which are united *pleno iure*, that is, with regard to both spiritual and temporal affairs, or *semi-pleno iure*, that is, as regards temporal matters only, with a monastery, a convent, a chapter or any other ecclesiastical moral person, whether collegiate or non-collegiate.[41] The former type of incorporation places the vested title of the care of souls with the religious house, chapter or institution with which the parish is united, whereas the actual care of souls is vested in the priest who is named as the parochial vicar. If the incorporation is made *pleno iure* with a religious house, the vicar is chosen from among the members of that particular family of religious, since by virtue of this incorporation the parochial benefice becomes a religious one.[42] However, in all other species of incorporation, inasmuch as the parochial benefices remain secular in character, the vicar is chosen from the secular clergy. However, regardless of whether or not the vicar is of a religious house or of the secular clergy,

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[37] Canon 216, § 1.

[38] Cf. canon 216, § 4. Cf. also Beste, *op. cit.*, p. 227.

[39] Cf. Beste, *op. cit.*, p. 227.

[40] Canon 214, § 4. Cf. Pontificia Commissio Interpretationis Codicis, resp., 20 maii 1923—*AAS*, XVI (1924), 113 (hereafter reference is made to this Commission with the letters P.C.I.).

[41] Cf. canons 452, § 2; 1425.

[42] Cf. canons 1425, § 2; 1442, 471, § 1.

although his presentation may depend upon the superior of a religious house, or upon the chapter or institution possessing the right of incorporation, he can be instituted only by the ordinary.[43] This vicar, in exercising the care of souls, enjoys all the parochial rights and duties defined by the common law and diocesan statutes, or established as a result of legitimate custom,[44] and consequently is included under the term *parochus*.[45]

Those parishes which are *semi-pleno iure* united give the right to the religious house, chapter or institution, merely to share the revenue of the parish with the corresponding obligation of supplying a pastor to administer to the faithful of the parish. However, in these cases only priests from the secular clergy may be presented to the ordinary for institution, and the parish remains secular.[46] On the other hand, those parishes which are in no way burdened with any such limitation, whether through union with a religious house or any other moral person, are called independent.[47]

In view of a consideration of the rights of the legitimate superiors in the bestowal of parochial offices a similar distinction may be made between parishes of *free conferral* and those of non-free or *necessary conferral*. The former type is had when the ecclesiastical superior, in whom rests the right of appointing and instituting a pastor to a vacant parish, is in no way restricted by the right of a third party in the designation of a worthy priest for that office. In other words, he possesses the full and free canonical right to confer that office, and in effect such a concession accords full title to the office in question.[48]

The latter species obtains when, in making the concession of a parochial office, a legitimate superior is restricted to a choice among those candidates who are presented or nominated by a moral person

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[43] Canon 459, § 1; 471, § 2.

[44] Canon 471, § 4.

[45] Canon 451, § 2, 2°

[46] Cf. canon 1425, § 1. Cf. also Beste, *Introductio in Codicem*, p. 703; Coronata, *Institutiones Iuris Canonici*, II (2. ed., 1939), n. 981.

[47] Fanfani, *De Iure Parochorum*, n. 3.

[48] Cf. Beste, *Introductio in Codicem*, p. 200; Augustine, *A Commentary on Canon Law*, II (6. ed., 1936), 106; Fanfani, *op. cit.*, n. 91; Coronata, *op. cit.*, I, n. 209.

or patron, or elected by those enjoying that right. However, the right of confirmation or institution, as has already been seen,[49] belongs exclusively to the local ordinary.

As is evident, the Holy Father, in virtue of his office, enjoys the right of free conferment of all ecclesiastical offices,[50] and in fact does confer those which are reserved to him.[51] Consequently he can exercise this right validly at all times, without being impeded by any human authority, and even lawfully, except in those cases where he may have obligated himself, by agreement or in any other manner, to observe a determined mode of acting.[52] The local ordinary, on the other hand, is presumed by law to enjoy the right of free conferral for all the offices in his territory,[53] except those exempted by law,[54] and excluding those for which his right of bestowal is contested and the claim proved, as obtains in the case when one enjoys the right of patronage over a parish or benefice.[55]

ARTICLE III. THE STABILITY OF THE PASTORAL OFFICE IN THE CODE

Since the promulgation of the *Code of Canon Law* there is no longer any doubt of the Church's intention of having a certain degree of stability attached to the pastoral office.[56] As is evident in the historical synopsis of the present study, the Church manifested this desire in the gradual development of the parochial system, especially with the establishment of ecclesiastical benefices and the conferring of parishes upon clerics *in titulum*, and in the enactments of the councils, particularly the Council of Trent, which, besides demanding the division of a diocese into parishes, required also an element of stability, preferably that of irremovability, for the pastoral office.[57] In like manner did the practice of the Roman

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[49] Cf. *supra*, p. 92.

[50] Canons 218; 1431.

[51] Cf. canons 455, § 1; 1435, §§ 1–4.

[52] Coronata, *Institutiones Iuris Canonici*, I, n. 220.

[53] Canons 152; 1432, § 1.

[54] Cf. canons 392–393; 1435, §§ 1–2.

[55] Cf. canons 1448; 1455, § 1. Cf. Chelodi, *Ius de Personis* (ed. altera, recognita et aucta a Sac. Ernesto Bertagnolli, Tridenti: Tridentum, 1927), n. 136.

[56] Cf. canons 454, §§ 1–3; 1409, § 3; 1438.

[57] Cf. *supra*, pp. 16 ff. and 21 ff.

Curia give evidence that it was averse to any arbitrary removal of either irremovable or removable pastors. Besides giving a thorough consideration to any acts of recourse made by those pastors who felt themselves wronged by what they considered a violation of their right in office, the Holy See, at times, even reestablished pastors in the parishes of which they had been deprived.[58]

With the promulgation of the decree *"Maxima cura,"* however, this stability in the pastoral office was all the more emphasized, since this decree enunciated not only very definite norms to be observed in the removal of a pastor, but likewise established the principle that even removable pastors, if ruling in their own name, were no longer to be considered removable *ad nutum*.[59]

Although this decree did not affect the status of removable pastors in the United States,[60] since they still remained vicars of their ordinaries, their status of permanency was definitely established by the *Code of Canon Law*, as is evident from the reply of the Prefect of the Commission for the Authentic Interpretation of the Code to the Apostolic Delegate in the United States.[61] This reply affirmed the fact that all parishes of the United States, erected with definite boundaries and having assigned to them a rector for the people and the church within that territory by the ordinary, became canonical parishes *ipso facto* upon the promulgation of the Code.[62] In transmitting this reply to the Bishops of the United States the Apostolic Delegate went on to say that, in view of his official answer, all the parishes of the United States having the three necessary qualifications, namely: a resident pastor, endowment (resources of revenue according to the provisions of the canons treating of benefices),[63] and boundaries, were not only parishes in the strict canonical sense, but were also to be regarded

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[58] Cf. *supra*, pp. 50 ff.

[59] S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910—*AAS*, II (1910), 636; *Fontes*, n. 2074.

[60] S.C. Consist., 28 iun. 1915—*AAS*, VII (1915) 378; *Fontes*, n. 2090.

[61] (Private): Letter of the Apostolic Delegate, U. S., 10 Nov. 1922—Bouscaren, *The Canon Law Digest* (2 vols., Milwaukee: Bruce, 1934–1941), I, 149.

[62] Bouscaren, *The Canon Law Digest*, I, 151.

[63] Canons 1410; 1415, § 3.

as ecclesiastical benefices.[64] Since the rectors assigned to these canonical parishes were consequently pastors in the canonical sense of the term, it necessarily followed that they received the same stability that is acknowledged as belonging to all pastors properly so called.

The Code affirms that anyone who has been placed in charge of a parish as its own proper rector possesses stability in that office, without however precluding the possibility of his removal in particular circumstances and with the observance of the formalities determined by law.[65] This enactment, while reiterating the demand for irremovability in the pastoral office, still admits degrees in that stability, since it adds at once that not all pastors obtain the same quality of perpetuity. Although three grades are mentioned,[66] it cannot be said that for those who pertain to the last of these grades there is really conferred a true stability, since they still remain removable at the good pleasure of the competent superior (*ad nutum competentis superioris*).

The first type is represented by the irremovable pastor who, although enjoying the highest degree of perpetuity, is not absolutely irremovable. In the absence of a delict, however, such pastors cannot be removed or transferred without the employment of the special processes outlined in law.[67] Among those enjoying this quality of irremovability are all physical secular pastors who have been given title to an irremovable parish, whether territorial or mixed.[68]

The Church's desire that all pastors should ordinarily be given this degree of stability is evident from the fact that all parishes erected after the promulgation of the Code are presumed to have irremovable pastoral incumbents.[69] Others possessing irremova-

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[64] Bouscaren, *op. cit.*, I, 151.

[65] Canon 454, § 1.

[66] Canon 454, §§ 2, 5.

[67] Cf. *Codex Iuris Canonici*, Lib. IV, pars III.

[68] Canon 454, §§ 1, 2.

[69] Canon 454, 3: ". . . novae [paroeciae] quae erigantur, sint inamovibiles, nisi Episcopus, prudenti suo arbitrio, attentis peculiaribus locorum ac personarum adiunctis, audito Capitulo, amovibilitatem magis expedire decreverit."

bility in office include those secular parochial vicars of incorporated parishes who are endowed with full parochial powers, and also parochial assistants of the secular clergy, if their appointments simultaneously imply their incumbency in a true ecclesiastical benefice which has been conferred upon them with permanency.[70] The presumption of law stands for the bestowal of all secular benefices in this manner, since the Code demands that all benefices be conferred for life, unless other indication be given in the law of foundation, or through immemorial custom, or by means of a special indult.[71] Hence, in ordinary circumstances it naturally follows that such benefices, since they enjoy objective stability, be conferred with subjective perpetuity.

Simple removability is the second degree of stability spoken of by the Code.[72] Pastors, who have been granted in title any parish whose incumbent has not the fullest degree of stability, enjoy the quality of simple removability and cannot, therefore, be removed or transferred without a canonical reason and without the observance of the specific norms of law. Likewise, parochial vicars and assistants, about whom mention was made above, who in virtue of their office are also incumbents of an ecclesiastical benefice which may have been conferred with the provision that they be simply removable, possess this second degree of perpetuity. Also, since the incumbents of all quasi parishes are removable,[73] all quasi-pastors of the secular clergy possess this same quality. However, they are simply removable since they are included under the term *parochus*, as already seen, and are considered under canon 454, which, in demanding stability for the pastoral office, makes exception only for those pastors who belong to a religious order or congregation.[74]

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[70] Cf. canons 1411; 1438; 471, § 3; 477, § 2. Cf. also Noval, *De Processibus*, II, n. 521; Suarez, *De Remotione Parochorum*, n. 30; Coronata, *Institutiones Iuris Canonici*, III, n. 1579, nota 5.

[71] Canon 1438.

[72] Cf. canon 454, § 2.

[73] Canon 454, § 4.

[74] Cf. canon 454, §§ 1, 5. Cf. Suarez, *De Remotione Parochorum*, n. 91; Coronata, *Institutiones Iuris Canonici*, I, n. 470. Cf. also Coady, *The Appointment of Pastors*, p. 98. This last mentioned writer wrongly concludes that quasi-pastors are removable *ad nutum* on the basis of the fact

Those who have the least degree of stability are the pastoral incumbents who belong to some religious institute,[75] as well as all religious parochial vicars of parochial benefices incorporated *pleno iure* with a religious institute.[76] Likewise, all other parochial vicars, other than those already mentioned, who are listed in the Code,[77] are removable *ad nutum*.[78] It can be affirmed also that even secular pastors or parochial vicars are removable *ad nutum* in the event that they have been granted a parochial benefice which in virtue of a special indult can be conferred in this manner.[79] Quasi-pastors pertaining to a religious order or congregation are also included among those who possess this lowest degree of stability.

Regarding this third type of stability it is to be noted that, although all included in it are removable *ad nutum,* their removal or transfer is not to be an imprudent or arbitrary one. As stated in the law, a reasonable and just cause is required for their removal or transfer, and in the event of a non-suspensive recourse, which is the only remedy in law for such subjects, these reasons must be manifested to the Holy See.[80]

It is in line with these degrees of stability accorded by the enactments of the Code to pastors and those equivalent to pastor that the matter of administrative transfer will be considered. Accordingly, it will be ascertained who are subject to this process, who is the competent superior, and in what manner the latter is to proceed in view of the greater or lesser degree of perpetuity possessed in the pastoral office.

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that the word "removable" is used without modification. On the other hand, as already stated, the fact that the term is not modified confirms the conclusion that such pastors are *simply* removable, or removable *ad norman iuris*.

[75] Canon 454, § 5.

[76] Canon 471, § 3.

[77] Canons 472–476.

[78] Canon 477, § 1: "Vicarii paroeciales de quibus in can. 472–476, si religiosi sint, amoveri possunt ad normam 454, § 5; secus ad nutum Episcopi vel Vicarii Capitularis, non autem Vicarii Generalis sine mandato speciali."

[79] Cf. canon 1438. Cf. also Coronata, *Institutiones Iuris Canonici,* II, n. 992.

[80] Cf. canons 454, § 5; 471, § 3.

CHAPTER VI

The Nature of Administrative Transfer

SECTION I

The General Notion of Transfer

A pastor can lose his office by renunciation, deprivation, removal, transfer and lapse of time.[1] Among these modes is the one considered in this study, namely, transfer. As already defined in the historical synopsis, *transfer* in general is the "canonical change of a cleric from one office or benefice to another, made for a just cause by legitimate ecclesiastical authority."[2] This is reiterated in the Code, where it is stated that transfer from one office to another can be effected only by one who has the right both of accepting a renunciation and of removing a cleric from the first office and promoting him to another.[3] The intervention of a legitimate authority is demanded in view of the fact that transfer implies a twofold juridical act, namely: the willingly entertained or unwillingly sustained removal from the office from which one is transferred, and the bestowal of the new office to which one is appointed.[4]

Concerning the different kinds of transfers, post-Code authors, following the classifications made by those writing previous to the promulgation of the Code, have considered transfer in the light of the occasional cause, as *direct* or *indirect*,[5] and from the viewpoint of the measure of freedom that accompanies it, as *voluntary*

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[1] Canon 183.

[2] Cf. *supra*, p. I. Cf. also Coronata, *Institutiones Iuris Canonici*, I, n. 270; Noval, *De Processibus*, II, n. 605.

[3] Cf. canon 193, § 1. Cf. also Beste, *Introductio in Codicem*, p. 212; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 309.

[4] Cf. Beste, *Introductio in Codicem*, p. 212; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 309; Wernz-Vidal, *Ius Canonicum*, VI, n. 768.

[5] Cf. *supra*, p. 4; Noval, *De Processibus*, II, n. 605; Suarez, *De Remotione Parochorum*, nn. 77, 115; Coronata, *Institutiones Iuris Canonici*, III, n. 1593; Beste, *op. cit.*, p. 861.

and *compulsory*.[6] It is interesting to note that both Noval and Suarez, in commenting upon the transfer of pastors, maintain that such a procedure is not truly a voluntary one in that the transfer is suggested by a legitimate authority, and hence that it should be placed in the category of a compulsory one. However, they mitigate their opinion somewhat when they acknowledge that a transfer can become voluntary, or as Noval says, "voluntary *secundum quid*," since the pastor can fully and freely consent to the change.[8] The very fact that a pastor is willing to accept a transfer seems to place it immediately in the category of a voluntary one, since very often the suggested transfer is desired by the one who is changed. Hence the distinction made by these authors seems entirely unnecessary, for it seems evident that such a transfer can be considered compulsory only if the pastor in question is unwilling to submit to the will of his competent superior.

Another classification of transfers is that which is made in consideration of the office to which one is changed. Hence it may be *one of honor*, if the cleric is given a better office or parish by way of promotion,[9] *ordinary*, if an equal office or parish is conferred upon him,[10] and *penal*, if the transfer is made to a greatly inferior office or parish.[11]

Again, with reference to the passive subject, transfer concerns *major* incumbents of offices, such as bishops, and *minor*, such as pastors and those equivalent to them, or any lesser incumbents of ecclesiastical offices. With reference to the active subject, transfer may be looked upon as *reserved*, as obtains when the Roman Pontiff alone is the competent superior, and *non-reserved*, which can regularly be accomplished by the local ordinary.[12]

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[6] Cf. Beste, *op. cit.*, p. 212; Coronata, *op. cit.*, I, n. 271; Fanfani, *De Iure Parochorum*, n. 155.

[7] Noval, *De Processibus*, II, n. 606; Suarez, *De Remotione Parochorum*, n. 106.

[8] Suarez, *op. cit., loc. cit.*; Noval, *op. cit., loc. cit.*

[9] Cf. canon 193, § 1. Cf. also Beste, *Introductio in Codicem*, p. 212; Fanfani, *De Iure Parochorum*, n. 155; Coronata, *Institutiones Iuris Canonici*, I, n. 271.

[10] Coronata, *op. cit.*, I, n. 271.

[11] Cf. Fanfani, *op. cit., loc. cit.*; Coronata, *op. cit., loc. cit.*; Beste, *op. cit., loc. cit.*

[12] Noval, *De Processibus*, II, n. 605.

From the standpoint of its motivation, transfer may be classified as *necessary,* when it is absolutely demanded for the good of souls, and *useful,* when merely the utility of the Church countenances it for the positive service interest that can derive from it[13]

SECTION II

The Process of Administrative Transfer

ARTICLE I. ORIGIN AND NATURE

The process of the administrative transfer of pastors,[14] by reason of its specific difference from administrative removal, is directly, that is, *per se* intended for the very consideration that is inherent in it, and consequently has regard to the parish to which the change is made. This is evident from the fact that it has a distinctive species, inasmuch as it is effected not from the necessity which implies the obligation of averting a harmful or at least a less useful ministry, but rather for the consideration of utility, which consists in the producing of more abundant fruit among the faithful.[15]

Hence no comparison is drawn between a less useful ministry in the earlier possessed parish and a more useful ministry in the later obtained parish; nor does any necessity inherently demand that the change be accomplished. The only reference that this transfer implies for the first parish is that the transfer presupposes that the pastor has already ruled usefully and well there, and because of his particular ability is now requested by his legitimate superior to accept the second parish, for the reason that in the latter's opinion the parish could usefully employ a pastor endowed with his special qualities. Such a transfer is merely a practical application of the principle: *"Salus animarum est suprema lex,"* effected either in a voluntary or compulsory manner for the positive interest of the Church.[16]

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[13] Noval, *op. cit., loc. cit.*

[14] Canons 2162–2167.

[15] Canon 2162. Cf. Noval, *De Processibus,* II, n. 607.

[16] Beste, *Introductio in Codicem,* p. 863; Coronata, *Institutiones Iuris Canonici,* III, n. 1600; Suarez, *De Remotione Parochorum,* n. 106; Vermeersch-Creusen, *Epitome Iuris Canonici,* III (5. ed., 1935), n. 768; Noval, *De Processibus,* II, n. 607.

That this process is new legislation both with reference to the cause that warrants it and also with reference to the formalities to be employed is generally accepted among the authors. The historical synopsis served to bear this out, as is evident from the conclusions which have been deduced from a study of the conciliar and Decretal legislation as well as from a consideration of the practice of the Roman Curia. This was further emphasized in the consideration of the controversy, occasioned by a reply of the Sacred Congregation of the Consistory to the Bishop of Pamiers,[17] which took place between two eminent canonists, namely Besson and Boudinhon, immediately following the response. Hence these conclusions, supported by the opinions of post-Code authors, seem to testify to the fact that this entire legislation is truly an innovation in law.[18]

However, it must be stated that not all subscribe to the fact that this legislation is entirely new, since Noval, while affirming that it had its origin in the Code, states that the legislation, in introducing this species of procedure and in assigning to it as a cause the consideration of utility or of the greater good of souls, does not establish an entirely new law. He maintains that the legislator merely explains in a literal sense an old law which was promulgated by Pope Urban III (1185–1187).[19] In confirmation of this assertion he contends that, when the jurisprudence of the Sacred Congregation as based on the interpretation of the Doctors[20] construed the words *"causam necessariam"* in the strict sense, and *"minus utiles"* as meaning *harmful* or at least as *not useful,* such an interpretation was counselled only by their own prudence in having regard for the enactments of the earlier laws, and the ordinary

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[17] S.C. Consist., 3 dec. 1913—*NRT,* XLVI (1914), 7, 8; *AkKR,* XCIV (1914), 268, 269.

[18] Wernz-Vidal, *op. cit.,* VI, n. 769; Suarez, *op. cit.,* n. 107; Coronata, *op. cit.,* III, n. 1600, nota 3.

[19] "Generaliter itaque teneas quod commutationes praebendarum de iure fieri non possunt, praesertim pactione praemissa. . . Si autem Episcopus causam inspexerit necessariam, licite poterit de uno loco ad alium transferre personas, ut quae uno loco minus sunt utiles alibi se valeant utilus exercere."—C. 5, X, *de rerum permutatione,* III, 19.

[20] Cf. *supra,* pp. 45–49.

practice, and the common opinion concerning the stability of clerics in offices and benefices.[21]

This seems to be a gratuitous assertion. It can hardly be maintained that the Decretal title on the exchanging of benefices extended to other than those cases to which it had been applied, since, had it been applicable to the case in which the utility of the new parish was also the motivating element of a transfer, it appears that the Roman Curia and the Doctors, in the face of the difficulties which were experienced in effecting a transfer of this type, would have been eager to utilize it. Furthermore, prudence alone cannot be alleged as the reason for the restricted interpretation which was given to this legislation, for the incorporation of the administrative process of transfer in the present law has in no way militated against the stability of the pastoral office. Consequently there seems to be no reason for Noval's attempting to interpret the mind of the Roman Curia or of the Doctors when they very specifically considered this text of Pope Urban III as referring only to a removal which was warranted by a true necessity in the parish which was relinquished.

Hence, it can be affirmed that merely an analogical argument may be drawn from this legislation of Pope Urban III, and nothing more. If this is what Noval means, then his opinion is acceptable, but it is only by a wide extension of terms that the legislation in this text on the exchange of benefices can be established as a basis for the enactments of the title which is now being considered, wherein the good of the parish yet to be obtained is the essential and differentiating element.

This type of transfer differs not only from that which is accomplished on the occasion of an administrative removal, but also from an exchange of benefices,[22] and in some respects from transfer in general.[23]

In the act of exchanging benefices, the exchange, which involves two and only two beneficiaries, is suggested by the incumbents, and the express authority of a competent superior is needed only

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[21] Noval, *De Processibus,* II, n. 607.
[22] Cf. canon 1487.
[23] Canons 193–195.

for its completion, whereas the process for the transfer of pastors, which is unilateral, is begun and completed at the instance of the same superior.

Further there is greater latitude allowed as regards the reason for which an exchange may be made, since other causes than the necessity or utility of the Church are accepted as valid reasons, as is evident from the words *"aliave iusta de causa"* which are employed by the legislator.[24] Again, if the parish is one in which the right of patronage is enjoyed, which case however has no application in this country,[25] or one of necessary conferment in view of the fact of incorporation, the consent of the patron is absolutely required, and it seems that in the latter instance the consent of those enjoying the privilege of presentation and nomination in virtue of the incorporation is also demanded by law. It appears that the words *"sine aliorum detrimento"* warrant this latter conclusion.[26] On the other hand, in the administrative transfer the ordinary has no obligation of seeking the consent of the patron or of the moral person in order to transfer the incumbent of such a parish, but merely has to advise the moral person that he is effecting it. However, when there is question of transferring one to a parish in which the right is enjoyed, then the local ordinary must respect the right of the patron and the moral person and obtain their consent.[27]

Another difference existing between the exchange of benefices and the administrative transfer as considered in canons 2162–2167 rests with the examination which is demanded for the filling of the office of pastor in a parish. According to law an examination of the clerics in the presence of the ordinary and synodal examiners is required in the determination of their fitness for the administration of a parish before it is conferred upon them.[28] Again, in canon 459, § 4, it is indicated that clerics are required to submit to a

[24] Canon 1487, § 1.

[25] Beste, *Introductio in Codicem*, p. 712.

[26] Canon 1487. Cf. also Coronata, *Institutiones Iuris Canonici*, II, n. 1022; Beste, *op. cit.*, p. 717.

[27] Cf. Noval, *De Processibus*, II, n. 521; Wernz-Vidal, *Ius Canonicum*, VI, n. 745, nota 17.

[28] Canon 459, § 3, 3°.

special type of concursus in those regions in which it was demanded at the time of the promulgation of the Code, since the latter approves this particular law as retaining its obligatory force until the Holy See has decreed otherwise. Among these regions was included the United States in virtue of the law of the III Plenary Council of Baltimore (1884), which demanded such a concursus for the appointment of irremovable pastors.[29]

Soon after the promulgation of the Code, however, a doubt was proposed to the Commission for the Authentic Interpretation of the Code, asking whether or not the usual doctrinal examination for candidates to the pastoral office was required when one was transferred *ex officio* in accordance with the law on the administrative transfer of pastors. The reply was in the negative, based on the fact that the transfer was made at the instance of the local ordinary.[30]

Previous to this response it has been declared by the Sacred Congregation of the Council that in transfers effected in the same manner, the special concursus or competitive examination demanded in particular regions was not required.[31] In this country it is no longer necessary to have regard to this latter decree, since the Sacred Congregation of the Council, in a reply to the Apostolic Delegate in the United States, affirmed that the provision of the III Council of Baltimore (1884),[32] was abrogated, and that all appointments to parishes whether of irremovable or of removable pastors, were to be made according to the prescriptions of law regarding the usual examination before the ordinary and synodal examiners.[33] It is evident, then that, even in those regions which still adhered to the demand for a special species of examination inasmuch as the same had not been abrogated by the Holy See, pastors who are transferred according to the norms of canons

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[29] *Conc. Plen. Balt. III, Acta et Decreta,* n. 36.

[30] P.C.I., 24 nov. 1920, ad 3—*AAS,* XII (1920), 574.

[31] Cf. canon 459, § 4; S.C. Conc., *Romana et Aliarum,* 21 iun. 1919—*AAS,* XI (1919), 318.

[32] *Conc. Plen. Balt. III, Acta et Decreta,* n. 36.

[33] Cf. canon 459, § 3, 3°. Cf. also (Private): S.C. Conc., decr. 24 iun. 1931, transmitted to the Bishops of the United States through His Excellency, the Apostolic Delegate—Bouscaren, *The Canon Law Digest,* I, 249.

2162–2167 are exempt from either kind of concursus or examination.

In the matter of an exchange of pastorates, however, wherein the change of parochial benefices if made at the instance of the pastors themselves, it seems that the latter are bound to submit to the examination each time, unless the ordinary with the counsel of the synodal examiners judges that the fitness of the candidate still continues and is sufficient for the new parish. Although in the act of an exchange of parishes neither parish becomes vacant until the reciprocal conferral of the other parish has been effected through the manifestation of consent by the local ordinary,[34] this conclusion can be inferred from the spirit of the law which requires the examination in the filling of a vacant parish, since the purpose of this law is primarily to determine the fitness of a pastor for a particular parish. Further, the reply of the Commission for the Authentic Interpretation of the Code, which exempted pastors from submitting to an examination each time, considered only those pastors who were transferred at the instance of the ordinary, and left it to the judgment of the ordinary to determine about those who sought the change themselves.[35]

Hence, in spite of the similarity which obtains in some respects between an exchange of parochial benefices and the process of transfer of pastors, it is evident from the many differences that have been considered as existing between the two that an exchange of pastorates is wholly distinct from the transfer which the Code treats in canons 2162–2167.

In view of the differences existing between the administrative process of the transfer of pastors on the one hand, and transfer in general on the other, as treated in the second book of the Code, it can be affirmed that in the latter, as in the exchange of offices or benefices, the change can be made at the instance of the cleric, whereas in the former species of transfer it is always the competent superior who requests that the transfer be accomplished.[36]

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[34] Cf. canon 1487, § 2. Cf. also Coronata, *Institutiones Iuris Canonici*, II, n. 1022.

[35] P.C.I., 24 nov. 1920, ad 1—*AAS*, XII (1920), 574.

[36] Cf. Suarez, *De Remotione Parochorum*, n. 106.

Another difference obtains with regard to the reason for the transfer. In the canons which treat of transfer in general it is seen that any just cause suffices for the voluntary change of those who possess an ecclesiastical office other than a pastorate.[37] However, since the law does not favor transfer, it seems that nearly the same cause is required as for a renunciation of office, although a lesser cause may suffice if the one promoted is more suitable and useful to the new office.[38]

For a compulsory transfer, on the other hand, nearly the same cause is demanded as for deprivation, and the same procedure is required.[39] Clerics, with the exclusion of pastors, who are removable in office can demand only the observance of the norms which have been established for their administrative transfer. Hence, any such cleric may be transferred for a just cause according to the prudent judgment of the ordinary, who in turn is obliged to see that the norms of natural equity are observed, such as having consideration for the behavior of the cleric, and of allowing recognition for the past services rendered by him to the diocese, and the like,[40] and who must also intimate in writing the fact of transfer to the cleric who is to be changed.[41] From a decree of transfer rendered in this manner it is allowed to the cleric to have recourse to the Holy See, but with a non-suspensive effect only,[42] which means that the effect of the decree of transfer stands during the interim of recourse.

Irremovable pastors, on the other hand, cannot be transferred without the observance of the norms of four of the titles included in the third part of the fourth book of the Code,[43] or in the event

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[37] Cf. canon 193, § 2.

[38] Chelodi, *Ius de Personis,* n. 150; also n. 147; Coronata, *Institutiones Iuris Canonici,* I, n. 273.

[39] Canon 193, § 2.

[40] Cf. canon 192, § 3. Cf. Augustine, *A Commentary on Canon Law,* II, 165.

[41] Cf. canon 159. Cf. also Coronata, *Institutiones Iuris Canonici,* I, n. 273; Chelodi, *Ius de Personis,* n. 150; Vermeersch-Creusen, *Epitome Iuris Canonici,* I, n. 310; Beste, *Introductio in Codicem,* pp. 210–211; Augustine, *op. cit.,* II, 164–166.

[42] Canon 192, § 3.

[43] Canons 2147–2156; 2168–2175; 2176–2181; 2182–2185.

that a transfer is imposed by way of a vindicative penalty,[44] without the adherence to a true judicial process according to the norms of canons 1933–1959. In the former instance recourse from the degree of the ordinary to the Holy See is allowed,[45] while in the latter a true appeal with suspensive effect is admitted against the sentence of the judge, and hence the effects of the sentence are suspended until the same has been confirmed by the court of second instance.[46] It is evident that even irremovable pastors are subject to a transfer of this nature, since the nature of the transfer postulates that the reason for the change has to do with the office or parish to be relinquished, whether the reason points to a culpable or a non-culpable act on the part of the transferee.

These observations readily manifest the distinct difference obtaining between the norms for the general transfer of clerics and those included under the law which regulates the administrative transfer of pastors. Not only has it been seen that in the former species of transfer the change can be purely voluntary in the sense that it is made at the instance of the cleric himself, but it has also been perceived that the two processes are dissimilar when measured by the cause which is required or suffices, when compared in the nature of the process, and when considered in relation to the passive subject, namely, when a pastor who enjoys the quality of irremovability in his office is unwilling to accede to the change. In the latter case even an unwilling irremovable pastor is subject to the jurisdiction of the local ordinary, which, however, is not admitted in the norms concerning the administrative transfer of pastors, unless the ordinary obtains a special indult from the Holy See.[47]

ARTICLE II. THE PASSIVE SUBJECTS

The passive subjects in the administrative process of the transfer of pastors embrace all physical pastors, properly so called, of the secular clergy, all secular quasi-pastors, all secular parochial vicars

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[44] Canon 2298, 3°.
[45] Canon 2146.
[46] Cf. canons 1879; 1889, § 2.
[47] Canon 2163, § 1.

with full parochial rights and duties as vicars of those moral persons in whom has been placed the vested title in the care of souls, and all secular parochial assistants upon whom has been confirmed an ecclesiastical benefice in virtue of their office.[48]

A distinction must be made between irremovable and removable pastors in relation to their transfer. Irremovable pastors are passive subjects of this process only in a voluntary transfer, since it is only when they are willing to accept the transfer that in this matter they are subject to the jurisdiction of the local ordinary. In a compulsory transfer they are subject to the latter only when he becomes competent through the acquisition of a special indult to this effect from the Holy See. This suggests itself from the fact, as has already been seen, of the desire of the Church to insure the stability of those pastors who have given no reason in the parish which they possess for the changing of them to another parish. It also gives assurance of the presence of just reasons when the change is suggested, since these must be manifested to the Holy See when the local ordinary seeks the special faculties for the transfer of an unwilling irremovable pastor.[49] Those who are simply removable are subject to the jurisdiction of the local ordinary, whether in a voluntary or in a compulsory transfer, and the transfer must be accomplished according to the norms, both general and particular, established for the administrative processes in the fourth book of the Code.[50]

It is evident from the status of a moral person,[51] that such is excluded from the legislation of this title, since it possesses merely the passive capacity for exercising the care of souls. Further, all religious pastors and vicars, being removable *ad nutum*, are not included, since no particular process is required for their transfer.[52]

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[48] Cf. *supra*, pp. 93–96.

[49] Cf. Suarez, *De Remotione Parochorum*, n. 115; Coronata, *Institutiones Iuris Canonici*, III, n. 1601; Fanfani, *De Iure Parochorum*, n. 155; Beste, *Introductio in Codicem*, p. 863.

[50] Cf. canons 2142–2146; 2162–2168.

[51] Cf. *supra*, pp. 89–90.

[52] Cf. *supra*, p. 97. Cf. Suarez, *De Remotione Parochorum*, n. 30.

ARTICLE III. THE ACTIVE SUBJECTS

In giving attention to the active subjects of the administrative transfer of pastors one must take cognizance of what has already been asserted above in the matter of the free and non-free or necessary conferral of office. There it was affirmed that the Roman Pontiff, in virtue of his supreme power over the whole Church, has the right of free conferment for all ecclesiastical offices and benefices.[53] Consequently, because of that right and the fact that he is not bound by the common law, he can effect the transfer of the incumbents of all ecclesiastical offices regardless of the stability of those who possess them, whether by acting personally or by granting an apostolic indult to the local ordinary to bring about this effect.[54] Likewise, it was asserted that the local ordinary enjoys the right of free conferral for all offices and benefices of his territory, except in those cases wherein certain offices or benefices have been exempted by law, or when his right has been restricted and the claim of restriction stands proved against his presumptive right.[55] However, many questions which will now be considered in relation to transfer can be raised concerning this particular competent superior.

At the outset attention will be given to the jurisdiction over the parochial benefice from which and to which the transfer is to be made. Since the present dissertation concerns merely the transfer of pastors who are looked upon as minor magistrates of the Church, consideration will be given solely to non-consistorial benefices, because these alone pertain to such beneficiaries. According to an exhaustive enumeration by the Code, the non-consistorial beneficies,[56] including even parochial ones, which are exempt by law or reserved to the Holy See are those which become vacant through the death, promotion, resignation or transfer of cardinals, papal legates, the higher officials of the Roman Congregations, Tribunals and Offices of the Roman Curia, and also members of the Papal Household, even though the latter have a purely honorary status.[57]

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[53] Cf. *supra*, p. 93.

[54] Cf. canon 2163, § 1. Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1601.

[55] Cf. *supra*, p. 93.

[56] Canon 1413, § 1.

[57] Canon 1435, § 1, 1°.

Included in the Pope's household are papal chamberlains, domestic prelates, prothonotaries and papal chaplains. However, that the reservation obtain with regard to the conferral of their benefice it is necessary that at the time of the vacating of it they still retained the title even though it was merely honorary.[58] Further, other benefices reserved to the Holy See are those which exist outside of Rome but which have become vacant through the death of the beneficiary in Rome, whether the Apostolic See be vacant or occupied;[59] benefices invalidly conferred because of simony;[60] and all those with which the Roman Pontiff has dealt personally or through a delegate in one of the following ways: by declaring the election to the benefice null and void, by forbidding the electors to proceed to the election, by accepting the renunciation of the incumbent, by promoting him or depriving him of the benefice, or by giving the benefice with the simple right of commendam (*in commendam*).[61]

These rules, however, apply only to perpetually conferred benefices whose incumbents are irremovable, since manual benefices of which the titular is not irremovable are not included under these provisions except by an explicit declaration to the contrary. Benefices which are subject to lay or mixed patronage are likewise excluded.[62] Furthermore, some of the reservations enumerated above may not hold in virtue of a contrary ruling through concordats, special indults or acquired rights, since the Code has not changed previously existing conditions which derived their existence through these juridical factors and legal agencies.[63] As far as

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[58] Cf. Coronata, *Institutiones Iuris Canonici*, II, n. 989; Vermeersch-Creusen, *Epitome Iuris Canonici*, II (5. ed., 1934), n. 767, 2: wherein these authors point out the difference in the pre-Code law in this regard; Ayrinhac, *Administrative Legislation in the New Code of Canon Law* (New York: Longmans, Green & Co., 1930), p. 339.

[59] Canon 1435, § 1, 2°. Cf. Coronata, *op. cit.*, II, 989, nota 2; Ayrinhac, *op. cit.*, p. 340; Beste, *Introductio in Codicem*, p. 708: wherein it is stated that the reservation holds whether or not the beneficiary was in Rome on ecclesiastical business or merely out of devotion to the sacred relics of the Apostles.

[60] Canons 1435, § 1, 3°, and 729.

[61] Canon 1435, § 1, 4°.

[62] Canon 1435, § 2.

[63] Canon 3–6.

this country is concerned, it seems that no custom could be in existence against the reservation of benefices as long as in fact there were no benefices. Hence, since parishes were not declared canonical parishes and benefices until the promulgation of the Code,[64] neither an immemorial custom nor any other legitimate established custom can be claimed against this prescript of law regarding reservation.[65]

Another instance wherein a benefice is reserved to the Roman Pontiff obtains when the bishop, after having received certain notification of the vacancy of the same, through grave negligence has failed to fill the vacancy within six months,[66] which allotted time is to be computed as in the calendar and without counting the day on which the notification of vacancy was received.[67] However, in the matter of appointment to vacant parishes, in accordance with the prudent judgment of the ordinary, this time may be extended if particular circumstances of place and person warrant the delay.[68] Such circumstances may obtain during a time of war, or persecution, of interference by a political power, or even when there are lacking suitable priests in consequence of their insufficient knowledge or experience to assume the office of pastor.[69] Augustine also included among these circumstances such situations as may have been occasioned through unpaid debts in a parish, by unstable conditions in consequence of a fluctuating

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[64] Cf. *supra*, pp. 94–95.

[65] Cf. canons 5 and 28. Cf. Augustine, *A Commentary on Canon Law*, II, 523. This author maintained that papal reservations do not seem to interfere with the bishop's free right of appointing parish priests in this country. This conclusion does not seem justified in the light of canonical legislation or through the aid of any juridical reasoning.

[66] Canon 1432, § 3. Cf. P.C.I., 24 nov. 1920—AAS; XII (1920), 577.

[67] Cf. canon 34, § 3, 3°.

[68] Canon 458.

[69] Cf. S.C. Conc., 14 nov. 1916—*AAS*, VIII (1916), 445. Through this ruling, during the first World War, an extension of the time was allowed for the conferral of benefices in the dioceses of those nations which were at war. Cf. Beste, *Introductio in Codicem*, p. 287; Coronata, *Institutiones Iuris Canonici*, I, n. 473, nota 6; Ayrinhac, *The Constitution of the Church in the New Code of Canon Law*, p. 321; Fanfani, *De Iure Parochorum*, n. 94.

population, by the erection of a parish school, or in view of the advisability of punishing the people for their unjust treatment of the former pastor, and the like.[70]

Hence, since the Code is insistent that ecclesiastical offices, parishes, and benefices ordinarily be given an incumbent within six months from the notice of vacancy in view of the harm that otherwise may ensure from a delay, the ordinary who delays the appointment must have a cause which is both reasonable and sufficiently proportionate to offset that danger. Again, the fact that the extension of time allowed by the Sacred Congregation of the Council during the first World War was revoked almost immediately upon the termination of the conflict manifests the desire of the Church in this matter, namely that there be no unnecessary delays in the filling of these vacancies.[71] This desire is further attested by a comparatively recent reply of the Pontifical Commission for the Authentic Interpretation of the Code wherein it is denied that the economic necessities of a diocese warrant the extension of the time-limit granted ordinaries for the filling of parochial incumbencies in their dioceses.[72]

Moreover, the stability of office which is demanded by the Code for the incumbents of parishes seems to be an imperative consideration for the ordinary's serious reflection when he forms his judgment regarding the advisability of postponing the conferral of a particular parochial benefice. If, then, his judgment is palpably not based upon these considerations, it seems that his right of conferral devolves upon the Roman Pontiff,[73] and therefore any appointments made by him to such parochial benefices would be invalid.[74]

The question now arises regarding the jurisdiction of the local

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[70] *A Commentary on Canon Law*, II, 527. No reasons are offered by this author in his enumeration of these particular examples, and certainly it seems that the instances cited would more often than not demand the appointment of a competent pastor as soon as possible in order to offset the conditions that obtain.

[71] S.C. Conc., decr. 26 febr. 1919—*AAS*, XI (1919), 77.

[72] Cf. P.C.I., resp. 30 maii 1945—*AAS*, XXXVII (1945), 144.

[73] Canons 1432, § 3, and 458 with 152.

[74] Canon 1434.

ordinary over these parochial benefices in the matter of transfer. In the first place it can be affirmed that the local ordinary cannot transfer a pastor to one of these parochial benefices, whether reserved by law or by devolution, without having consulted the Holy See according to the norms which have been established by the Apostolic Datary for the observance by ordinaries in asking the Holy See to confer benefices.[75] Hence his right is restricted with regard to the parish to which the transfer is made, and should he make the transfer it would be invalid.[76]

Again, when the Roman Pontiff has conferred a reserved parochial benefice upon a pastor, a parochial vicar or an assistant who possesses his benefice simultaneously with his office, the local ordinary cannot validly transfer such an incumbent without seeking the consent of the Holy See, since originally he did not have the right of conferring the parochial benefice upon him. This conclusion follows from the very notion of transfer which, involving as it does the twofold juridical act of the removal from and the bestowal of an office, demands that it be accomplished by a superior competent in both respects.[77] In this instance the local ordinary is not competent, and therefore the transfer is invalid. This restriction obtains both for the voluntary and compulsory transfer of irremovable parochial beneficiaries, and for removable ones if their reservation is expressly stated,[78] or the bestowal of these benefices has devolved upon the Holy See.[79]

Concerning parishes in which the act of conferral becomes necessitated through intermediate factors, as has already been seen,[80] the ordinary is not restricted to the procurement of anyone's consent with regard to the parish *from* which the transfer is made, but has merely to seek the consent of the one enjoying the right of presentation, election or nomination when there is question of

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[75] Dataria Ap., 1 ian. 1942—*AAS*, XXXIV (1942), 113.

[76] Cf. canons 193, § 1, and 1434. Cf. also canon 455, § 1.

[77] Cf. canons 193, § 1.

[78] Cf. canon 1435, § 2.

[79] Cf. Haydt, *Reserved Benefices*, The Catholic University of America Canon Law Studies, n. 161 (Washington, D.C.: The Catholic University of America Press, 1942), p. 103.

[80] Cf. *supra*, p. 103.

transferring one *to* a parish which is subject to this limitation in the making of an appointment.

It must now be determined who are to be included under the term *"Ordinarius loci."* According to the general prescription of the Code those included under this term are, besides the Roman Pontiff, all who rule and govern a diocese or ecclesiastical territory equivalent to a diocese: residential bishops, abbots and prelates who rule and govern independent or autonomous ecclesiastical districts, and their vicars general; also apostolic administrators, vicars apostolic and prefects apostolic; and the vicars capitular or administrators during the vacancy of a see, if they are such under the common law or according to approved constitutions.[81] It is to be noted that major superiors of exempt clerical religious institutes, although embraced under the term *"Ordinarius,"* are not regarded as local ordinaries.[82]

With regard to the question of transfer it has now to be established who among these local ordinaries has the right of effecting the change of the passive subject in this process. It is evident that residential bishops, all points of law being duly observed,[83] have the right of invoking this procedure for all parishes of their territory which, for the appointment of their incumbents, are not reserved by law or by devolution. Likewise, vicars and prefects apostolic have jurisdiction in this matter for their respective mission territories, as do abbots and prelates *nullius* for their autonomous districts, since otherwise it would be impossible for them to foster those things which pertain to the good of souls of the faithful committed to their care. However, when one considers the operative authority of the vicar general, of the vicar capitular, or of the administrator with regard to this process, the matter is not so clear. It is this problem which will now be given consideration.

Regardless of the dispute obtaining among authors concerning the right of the vicar general to institute administrative processes without a special mandate to that effect,[84] it is clear that he cannot

[81] Canon 198, §§ 1–2.

[82] Canon 198, § 2.

[83] Cf. *supra*, pp. 93, 109. Cf. also canon 2163, § 1, and *infra*, pp. 181 ff.

act without a special mandate in the process of transfer unless the see is impeded,[85] since transfer implies not only the loss of a parochial benefice, but also the bestowal of another in place of the one given up by the beneficiary. The law of the Code, however, denies to the vicar general the right to bestow benefices,[86] to grant ecclesiastical offices,[87] or to confer a parish upon one except in an extraordinary circumstance,[88] if he does not have the special authorization of his bishop to perform this act. The only extraordinary case evisioned by the Code obtains when the see is impeded through the absence of the bishop by captivity, banishment or exile, or by his incapacity or inability to fulfill the duties of his office, so that, in all cases, it is impossible for him to communicate with his diocese.[89] In such circumstances the vicar general is given the right to confer benefices and parishes whenever the need should arise. Consequently, only in this instance, if the good of souls demanded it, would he be the competent superior without the need of a special mandate to effect a transfer of the passive subjects in this process.[90] This conclusion naturally follows from the prescriptions of law about transfer which allow only those who are competent in the matter of conferring ecclesiastical offices

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[84] Cf. Noval, *De Processibus,* II, nn. 483–489; Coronata, *Institutiones Iuris Canonici,* III, n. 1585; Vermeersch-Creusen, *Epitome Iuris Canonici,* III, n. 342; Cocchi, *Commentarium in Codicem Iuris Canonici* (8 vols., Augustae Taurinorum: Marietti, 1931–1940), VII (3. ed., 1940), n. 377; Muniz, *Procedimientos Eclesiásticos* (2. ed., 3 vols., Barcelona, 1921), I, n. 638; Wernz-Vidal, *Ius Canonicum,* VI, n. 745. All of these authors maintain that the vicar general cannot act without a special mandate. Cf., however, Augustine, *A Commentary on Canon Law,* VII, 420; Suarez, *De Remotione Parochorum,* nn. 25 and 29. These two assert that it cannot be proved that this special mandate is necessary unless it is demanded by a special restriction proper to a particular process.

[85] Cf. canon 429, § 1.

[86] Canon 1432, § 2.

[87] Canon 152.

[88] Cf. canon 455, § 3, with 429, § 1.

[89] Canon 429, § 1.

[90] Cf. Suarez, *De Remotione Parochorum,* n. 110; Coronata, *Institutiones Iuris Canonici,* I, n. 273; III, n. 1600; Vermeersch-Creusen, *Epitomē Iuris Canonici,* I, n. 342; Beste, *Introductio in Codicem,* p. 863; Fanfani, *De Iure Parochorum,* n. 92; Noval, *De Processibus,* II, n. 485.

to effect the transfer of clerics from one office to another.[91] Hence, in ordinary circumstances, the vicar general, without a special mandate, is not regarded as a competent ecclesiastical superior in the administrative process of the transfer of pastors.

Concerning the pro-vicars and pro-prefects, who are required by the Code to be appointed by the vicar or prefect apostolic upon his succession to office,[92] there is no problem in ordinary circumstances, since they possess no power except that which is specifically committed to them by those whom they represent. However, when the see is impeded, they may be said to enjoy the same right over quasi-pastors as vicars general have over pastors of those dioceses with which the bishops are unable to communicate because of the reasons expressed in law,[93] as they also do when the vicar or prefect ceases to officiate.[94]

In addition to the aforementioned who, when the see is impeded, enjoy full competence in the matter of transfer, there are others who may possess the same jurisdiction under like circumstances. It may happen that those who are prevented from ruling their sees have delegated some other ecclesiastical person to act in their name, and hence according to the mandate of delegation, may enjoy both the right of conferring offices and also the right of removing the incumbents of ecclesiastical offices or benefices.[95] Again, the Holy See itself may have intervened by choosing the one who is to rule the see while these extraordinary conditions exist,[96] and he too, all things being equal, would be fully competent in this regard.

On the other hand, in the event that the appointment of all these is impracticable, the law permits the election of a vicar capitular by the cathedral chapter in those places in which such a chapter exists, or the selection of an administrator by the diocesan consultors, as is the rule in this country, who may rule the see for the interim. Whether or not they possess the same full competence will be settled in a consideration of the jurisdiction which they possess under these circumstances, or which belongs to them when

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[91] Canon 193, § 1.
[92] Canon 309, § 1.
[93] Cf. canons 309, § 2, and 429, § 1.
[94] Canon 309, § 2.
[95] Cf. canon 429, § 1.
[96] Cf. canon 429, § 1.

they have been elected within eight days of the notice of the vacancy of a diocese, as is required by law,[97] to govern the vacant diocese until the appointment of a successor to its former incumbent.

Although this vicar capitular or administrator, as already seen, is regarded as a local ordinary, and enjoys ordinary power of jurisdiction, particular exceptions which deny him certain rights have been incorporated in the law of the Code.[98]

In a general manner he is forbidden to do anything prejudicial to a diocese or to the episcopal rights,[99] and in particular with regard to parochial benefices his power is likewise restricted. For instance, he cannot confer parochial benefices of free conferral unless the see has been vacant for at least one complete year,[100] which duration is to be computed as in the calendar and without counting the first day of the vacancy.[101]

It is to be noted in this latter instance that it is not necessary that the vicar capitular or the administrator have ruled the see for a year, nor does it matter how long the parish has been vacant, since the canon demands only that the see itself have been vacant or impeded for at least one year.[102] Hence, in view of this restriction regarding the bestowal of parishes of free conferral it can be affirmed that the vicar capitular or administrator is restrained from transferring pastors, or those equivalent to them, from one parochial benefice of free conferral to another, until the year of the vacancy of the see has been completed, since he cannot be regarded as a competent superior in the process of transfer before that time has run its full course.[103]

In dealing with the question of parishes of necessary conferment[104] which can be conferred through institution by the afore-

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[97] Cf. canons 432 and 427; S.C. Consist., 22 Febr. 1919—*AAS*, XI (1919), 75.

[98] Cf. canons 435, § 1, and 368, § 2.

[99] Canons 435, § 3, and 436.

[100] Canons 1432, § 2, and 455, § 2, 3°.

[101] Canon 34, § 3, 3°. Cf. Fanfani, *De Iure Parochorum*, n. 92.

[102] Cf. canon 455, § 2, 3°. Cf. also Coronata, *Institutiones Iuris Canonici*, II, n. 990.

[103] Cf. canon 193, § 1.

[104] Cf. *supra*, pp. 92–93.

mentioned vicar capitular or administrator without being retarded by the consideration of any indicated temporal restriction,[105] one must make a distinction in the matter of transfer. When the transfer involves pastors or vicars of parochial benefices in respect both of the benefice relinquished and the one obtained, these superiors can be considered competent to effect the transfer without regard to the length of time that the see has been vacant.[106] On the other hand, they cannot transfer a pastor from a parish of necessary conferral to one of free conferral, as is evident from what has already been asserted,[107] but they can effect the change of a pastor from a parochial benefice of free conferral to one of necessary conferral, although in the latter instance they could appoint only an administrator for the parish from which the transfer was made, until the required time limit with reference to the vacancy of the see had elapsed. This seems to follow from the fact that the restriction placed upon these superiors regards merely the conferral of the parish or benefice of free appointment.

In estimating the juridical effect of transfer accomplished by the vicar general without a special mandate, or by the vicar capitular or administrator without waiting for the full lapse of a year of vacancy, one must give attention not only to the words used in these prohibitions, but also to the root of the power of jurisdiction possessed by the aforementioned local ordinaries.

A consideration of the wording of the law[108] reveals that the Code does not explicitly state that the unwarranted placing of such acts would involve them in nullity, nor does it seem to affirm this equivalently, since it uses merely the word *"nequit,"* which, in this legislation, to all accounts seems to connote only a prohibition.[109] Hence, at first sight it does not indeed appear that these acts would be invalid.[110]

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[105] Canon 455, § 2, 2°.

[106] Canon 455, § 2, 2°.

[107] Cf. *supra*, p. 117.

[108] Cf. canons 455, § 2, 3° and § 3; 1432, § 2.

[109] Cf. Van Hove, *De Legibus Ecclesiasticis*, n. 161; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 103.

[110] Cf. canon 11: "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur."

However, an argument evincing the nullity of these acts can be drawn from a consideration of the root of the power which belongs to either of these superiors. Although both the vicar general and the vicar capitular or administrator possess the ordinary jurisdiction which belongs to a residential bishop, and therefore also the right of administration with regard to both the spiritual and the temporal affairs of a diocese, nevertheless this power has been made operative only within a definitely restricted sphere. In some matters the vicar general is powerless to act, and for others he needs a special mandate, as has been seen with reference to his right in the conferring of parishes and benefices.[111] In like manner certain matters have been excepted from the jurisdiction enjoyed by the vicar capitular or administrator.[112] In view of these restrictions it must be asserted that these local ordinaries do not possess any rights with regard to the bestowal of parochial benefices, since, until the specifically postulated conditions of authorization or lapsed time-interval have been fulfilled, these rights are excluded from the jurisdiction accorded them by the law of the Code. In view then, of the lawgiver's concession that in the absence of an express prescript of law the needed directive norm should be derived from laws enacted for similar concerns, or also from the general principles of law in harmony with canonical equity,[113] it seems that by way of analogy one may appeal to canon 203, § 1, which deals with delegated jurisdiction. This particular prescription of law establishes the principle that a delegate who

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[111] Cf. canons 368, §§ 1–2; 1432, § 2; also canon 455, § 3, by the law of which the vicar general, without a special mandate, cannot confer parishes even of necessary conferment, that is, apart from the extraordinary circumstance envisioned in canon 429, § 1. Cf., however, Coronate, *Institutiones Iuris Canonici*, II, n. 990, who, quoting Reiffenstuel, concedes this right to the vicar general on the principle that such a conferral is not simply an optional act, but a necessary one. In view of the aforementioned restriction of canon 455, § 3, this conclusion is without any foundation in law.

[112] Cf. canon 435, § 1, together with canons 1432, § 2, and 455, § 2, 3°.

[113] Cf. canon 20: "Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, a legibus latis in similibus; a generalibus iuris principiis cum aequitate canonica servatis; . . ."

exceeds the limits of his mandate, concerning either objects or persons, acts invalidly, and hence nothing unwarranted seems inherent in the statement that anyone who exceeds the limits of his ordinary jurisdiction which has been given by law likewise acts invalidly in regard to those particular matters.[114]

In view of these considerations it can be rightfully affirmed that any conferrals of parochial benefices made in contravention of the restrictive import of the canons are invalid, and therefore any transfers accomplished by the vicar general and the vicar capitular or administrator, but in which the prescriptions of law have not been observed, are also null. This conclusion naturally follows from the fact that the restrictions in the process of transfer are based upon the limitations prescribed by law for the bestowal of parishes.

In considering the jurisdiction of the apostolic administrator, one must make a distinction between the one who is permanently constituted and the one who is constituted in office only for a limited time. Since the former of these enjoys the same rights as a residential bishop,[115] he can execute the transfer of the passive subjects of this process in the same manner as a residential bishop.

On the other hand, he who has been given this office only temporarily, possesses merely the jurisdiction of the vicar capitular.[116] Hence, in the matter of transfer, this latter apostolic administrator is restricted in the same manner as the vicar capitular, and consequently can effect the transfer of pastors only under the same conditions and with the same limitations which have already been described above.[117] Should he act contrary to these limitations of law, and transfer of pastors effected by him would be invalid, since he lacks the necessary power to effect the transfer.

In this chapter, those who are included under the term *"Ordinarius loci,"* and who, in various circumstances, are considered competent to extend the invitation for transfer and thereupon to institute the process of transfer, have been properly determined.

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[114] Cf. Noval, *De Processibus,* II, n. 484.
[115] Canon 351, § 1.
[116] Canon 315, § 2.
[117] Cf. *supra,* pp. 117–118.

The question now to be proposed is whether or not these superiors may delegate to another the right to institute this process.

That the local ordinary, in view of the ordinary power of jurisdiction and the paternal care which he exercises in virtue of his office over those who are committed to his care,[118] can delegate another to act in his place is evident from the fact that all ordinary power of jurisdiction can be delegated as long as the law has not specified a restriction to the contrary.[119] But, in the law which deals with the process of transfer there is no restriction which demands that the ordinary personally give the exhortation or complete the procedure, or that he personally confer the parishes upon their incumbents.[120] Hence it follows that the local ordinary is not bound to institute the process personally, but may act through a capable delegate.

What is to be said of those who, when the see is impeded, act through delegation received from the Holy See? It seems that they too, even in the process of transfer, may subdelegate their power, since their power of jurisdiction, having come from the Holy See, can be delegated habitually or for a definite number of cases, unless this has been explicitly or implicitly prohibited, or unless the rescript or some other circumstance shows that the delegate was chosen because of his personal qualifications.[121] Again, nothing seems to militate against subdelegation in particular cases by the one who may have been delegated by the bishop under the same circumstances, since it seems that the nature of the situation, namely the fact that the ordinary is unable to communicate with his diocese, demands that he delegate his power *ad universitatem negotiorum*, and consequently such delegated power can be subdelegated.[122]

However, to secure the desired effect in this rather delicate matter of transfer, the procedure appears to demand that, when-

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[118] Canons 329, § 1; 334; 294; 298; 315, § 1; 368, § 1; 435, § 1.

[119] Canon 199, § 1. Cf. Coronata, *Institutiones Iuris Canonici*, I, n. 288. Beste, *Introductio in Codicem*, p. 217.

[120] Cf. canons 2162–2168; 2142–2146; 455; 1432. Cf. also Coronata, *op.*

[121] Canons 429, § 1; 199, § 2. Cf. Beste, *Introductio in Codicem*, p. 217 *cit.*, III, 1585.

[122] Canons 429, § 1; 199, § 3. Cf. Beste, *op. cit.*, p. 217.

ever possible, the local ordinary personally give the invitation and preside at the entire process, inasmuch as this process calls for a paternal as well as an authoritative mode of action. Nevertheless, it seems that an exception can always be made for a cardinal archbishop who, because of his dignity, should delegate his authority in this matter.

CHAPTER VII

The Minor Officials in the Process of Transfer

In the process of transfer the major official is the local ordinary, who has already been considered in the foregoing chapter under the articles treating of the active subject of transfer. Attention will now be given to the minor officials, namely the notary and the parish priest consultors who have a part in this procedure. Likewise, consideration will be given to the witnesses who, although not officials in any sense of the word, may have an important part in this process.

ARTICLE I. THE NOTARY

Canon 2142. *In processibus de quibus infra, adhibeatur semper notarius, qui scripto consignet acta quae ab omnibus subscribi debent et in archivo servari.*

The notary, whose signature authenticates all ecclesiastical documents,[1] is the first minor official required in the process of transfer. In addition to the chancellor who, by virtue of his office, is a notary,[2] the bishop may appoint others to fulfill the office of notary for all ecclesiastical matters, or merely for judicial affairs, or for particular cases, or for certain kinds of cases. The general duties of a notary are to put in writing all episcopal acts or documents regarding enactments and obligations which may have been assumed by the ordinary; every judicial citation and intimation, all decrees and sentences, and whatever else requires his intervention; also to make a record of all the important events of the episcopal administration, indicating for each one the place, day, month and year, and duly signing and dating the same; and finally to show these acts to those who have the right to see them, and to authenticate original acts and documents kept in the diocesan archives.[3]

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[1] Canon 373, § 1.
[2] Canon 372.
[3] Canon 374, § 1.

Although only in criminal trials is it required that the notary be a priest,[4] prudence seems to demand that, whenever possible, a priest or at least a cleric should be employed in the administrative processes for the sake of averting all unnecessary scandal that may otherwise arise from the employment of a layman.[5]

The process of transfer demands that at least one notary[6] be employed to consign to writing all that is to go into the acts which are to be preserved in the archives after having been signed by him.[7] With regard to the signing of the acts it is to be noted that the notary has the obligation of signing all without exception, while all others taking part in the process are required merely to sign those, at the end of each session, in which they had part.[8]

From the preceding it is certain that, for the lawfulness of the procedure, the presence of the notary is required. However, whether or not he must be employed under pain of nullity is quite another matter. There are many authors[9] who affirm that the

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[4] Canon 373, § 3.

[5] Cf. Coronata, *Institutiones Iuris Canonici,* III, n. 1574; Muñiz, *Procedimientos Eclesiásticos,* I, 640, and Amanieu, *Dictionnaire de droit canonique,* v. "Amotion," col. 477, as cited by Coronata *(loc. cit.)*; Suarez, *De Remotione Parochorum,* n. 5; Noval, *De Processibus,* II, n. 493; Beste, *Introductio in Codicem,* p. 863.

[6] Cf. Connor, *The Administrative Removal of Pastors,* The Catholic University of America Canon Law Studies, n. 104 (Washington, D. C.: The Catholic University of America, 1937), p. 84: wherein, with Coronata, *(Institutiones Iuris Canonici,* III, n. 1574), he states that it is not necessary that one and the same notary be employed from the beginning to the end of the process, and for a just cause a notary may be removed and two or several may be employed in the same process.

[7] Canon 2142.

[8] Noval, *De Processibus,* II, n. 493; Meier, *Penal Administrative Procedure Against Negligent Pastors,* The Catholic University of America Canon Law Studies, n. 140 (Washington, D. C.: The Catholic University of America Press, 1941), p. 102.

[9] Blat, *Commentarium Textus Codici Iuris Canonici* (5 vols. in 7, Romae: Collegio "Angelico," 1921–1927), VI (1927), n. 737; Fanfani, *De Iure Parochorum,* n. 144: who states merely that this is the common opinion based on canon 1585, § 1; Beste, *Introductio in Codicem,* p. 853; Wernz-Vidal, *Ius Canonicum,* VI, nn. 740, 748; Noval, *De Processibus,* II, nn. 490–493; Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 370; De Meester, *Juris Canonici et Juris Canonico-Civilis Compendium* (nova

notary must always be employed for the validity of the administrative process. Among these, some simply state that canon 2142 demands this, while others argue from the wording of canon 1585, § 1,[10] from the purpose and scope of the prescript of the law, and from the nature of the obligation itself.[11]

On the other hand, there are reliable commentators who affirm with forceful arguments that the notary's presence is demanded only for the lawfulness of the precedure.[12] It seems that the opinion of these authors is more tenable in view of the arguments that can be given against the contention of those authors who demand the presence of the notary for the validity of the administrative procedure. According to law, an act is null when a prescript of law explicitly or equivalently declares it to be such, or when an essential element is wanting, or when there are lacking essential formalities or conditions which are required by the sacred canons under the pain of nullity.[13]

It is now asked whether or not any law specifically demands or declares that the presence of the notary is necessary for the validity of the administrative procedure. Canon 2142 merely states

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ed., 3 vols. in 4, Brugis: Desclée, De Brouwer, 1921–1928), III, n. 1670; Reilly, *Residence of Pastors,* The Catholic University of America Canon Law Studies, n. 97 (Washington, D. C.: The Catholic University of America, 1935), p. 49; Woywod, "Procedural Law of the Code: Application of Penal Sanctions," *Homiletic and Pastoral Review,* XXXV (1935), 158 (hereafter cited *HPR*).

[10] "Cuilibet processui interesse oportet notarium, qui actuarii officio fungatur; adeo ut nulla habeantur acta, si actuarii manu non fuerint exarata, vel saltem ab eo subscripta."

[11] Cf. Meier, *Penal Administrative Procedure Against Negligent Pastors,* p. 98.

[12] Vermeersch-Creusen, *Epitome Iuris Canonici,* III, n. 343; cf., however, same edition, III, n. 41, wherein they maintain that canon 1585, § 1, extends even to administrative processes; Doheny, "The Removal of Irremovable Pastors," *AER,* XCIII (1935), 492; Connor, *The Administrative Removal of Pastors,* pp. 84–88; Suarez, *De Remotione Parochorum,* n. 5; Coronata, *Institutiones Iuris Canonici,* III, n. 1574; Amanieu, *Dictionaire de droit canonique,* v. "Amotion," col. 478, quoted by Suarez (*ibid.,* nota 4) and Coronata (*ibid,* nota 4); Augustine, *A Commentary on Canon Law,* VII, 405; Meier, *op. cit.,* p. 99.

[13] Canon 1680, § 1.

"adhibeatur semper notarius," and therefore neither expressly nor equivalently declares the procedure to be null and void if the notary is not in attendance. On the other hand, canon 1585, § 1, upon which those who hold the more rigorous opinion base their argument, does not pertain to these processes, since it serves as an integral part of that portion of the fourth book of the Code which treats exclusively of judicial matters.[14] Had the legislator meant that the enactment of this canon should apply to administrative procedure, and in particular to the specific administrative procedure here under consideration, he could have placed it in an introductory part proper to all matters contained in Book IV of the Code. Again, the words *"cuilibet processui"* of canon 1585, § 1, can very properly be regarded as pointing to the various procedures demanded in a judicial trial, namely, the contentious, criminal, matrimonial and ordination processes, and hence do not necessarily, as is asserted by these authors, point to all processes treated in Book IV of the Code. In fact, in view of what has already been affirmed, it appears that they have no application to matters of procedure outside of a judicial trial.

Other arguments likewise can be offered against the stricter opinion. One is based upon the wording of paragraph two of canon 1585,[15] wherein the word *iudex* is specifically mentioned. The definite mention of the word *judge* seems to preclude the application of the enactment of canon 1585, § 1 to the processes which are considered in the second and third part of the fourth book of the Code. Another argument is based upon the fact that the notary is specifically demanded in canon 2013, § 1, for the process dealing with the beatification and canonization of saints, and again in canon 2142 for the procedure under discussion. It appears that, had the legislator intended to apply the prescript of canon 1585, § 1, to all these distinct processes, he would not have made special mention of the necessity of the notary in these particular canons. Finally, a consideration of the *fontes* appended to each of these

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[14] Cf. canons 1552–1989.

[15] "Quare iudex, antequam causam cognoscere incipiat in actuarium assumere debet unum e notariis legitime constitutis, nisi ipse Ordinarius aliquen pro ea causa iam designaverit."

canons in the Gasparri edition of the *Code of Canon Law* reveals the fact that distinctly different legislation of the past is indicated as the source of the laws enacted in these various canons here contemplated.[16]

Again, the presence of the notary is not demanded in the light of the nature of the process itself, since the purpose of the office of notary is to impart legal value to the documents, which he does by affixing his signature, but this latter manner of proceeding is not the only way whereby a document may gain legal value.[17] Also, a notary is demanded in a judicial process as a safeguard for an innocent party against the possible suffering of harm at the hands of an unscrupulous judge.[18] In the administrative process this danger is not so imminent, for the ordinary acts paternally rather than judicially,[19] and consequently it cannot be maintained that without the presence of a notary these processes would necessarily be null for the reason that a notary's presence is required as a proper safeguard for the integrity of the acts.

In view of these assertions it appears quite evident that the presence of the notary is required solely in order that these processes, and specifically the processes of transfer, be carried out in a lawful manner. This opinion is confirmed by the decree *"Maxima cura,"* which required that a notary be employed in that instance only in which the invitation to resign was given to a pastor orally, and this requirement was referred simply to that one act.[20]

In practice, however, the notary should be employed throughout the entire process. Nevertheless, should he not have been in attendance through an oversight or for any other reason, the acts are still valid, because there is at least a *dubium iuris* whether his presence is required for the validity of the process. Consequently

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[16] Cf. Suarez, *De Remotione Parochorum*, n. 5.

[17] Cf. Suarez, *op. cit., loc. cit.*

[18] Cf. c. 11, X, *de probationibus*, II, 19.

[19] Suarez, *De Remotione Parochorum*, n. 5.

[20] Canon 10, 1: "Invitatio scripto facienda generatim est. Potest tamen aliquando, si tutius et expeditius videatur, verbis fieri ab ipso Ordinario, vel ab eius delegato, adsistente aliquo sacerdote, qui actuarii munere fungatur, ac de ipsa invitatione documentum redigat in actis curiae servandum."—*AAS*, II (1910), 641; *Fontes*, n. 2074.

a decision must be awaited from the Holy See before it can be definitely affirmed that the validity of the process would be affected in consequence of the notary's absence from the process.[21]

ARTICLE II. THE PARISH PRIEST CONSULTORS

Other officials who are called upon to take part in the procedure of transfer are two parish priest consultors,[22] to be selected from those who, as demanded by law, have been appointed for each diocese.[23] The Code affirms that not less than four nor more than twelve priests, who are actually pastors,[24] be appointed and approved in the diocesan synod as parish priest consultors, after having been proposed by the bishop.[25] In the event that one of these has died, or if for some reason he has retired from office during the period of time intervening between synods, then pro-synodal consultors may be appointed by the bishop with the advice of the cathedral chapter or, as is the rule in this country, with the advice of the diocesan consultors, as is done for all such appointments when made out of synod.[26]

Both synodal and pro-synodal parish priest consultors terminate their duties after ten years, or even before that if a synod is held. However, in such an event they may complete any cases in which they have begun to take part, and with the prescriptions of law being duly observed can be re-elected to office. Those who have been substituted for the parish priest consultors who did not complete their term will remain in office only until the expiration of the term of office held by the remaining consultors.[27] Grave rea-

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[21] Cf. Canon 15; Suarez, *De Remotione Parochorum*, n. 5; Connor, *The Administrative Removal of Pastors*, p. 88; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 100.

[22] Canons 2165–2166.

[23] Canon 385, § 1.

[24] Beste, *Introductio in Codicem*, p. 278; Coronata, *Institutiones Iuris Canonici*, I, n. 432; Cocchi, *Commentarium in Codicem Iuris Canonici*, III 3. ed., 1931), n. 279; Sipos, *Enchiridion Iuris Canonici* (3. ed., Pécs: "Haladás R.T.," 1936), p. 273.

[25] Canon 385, §§ 1–2.

[26] Cf. canon 386, §§ 1–2.

[27] Canon 387, §§ 1–2.

sons demanding their dismissal, the parish priest consultors can be removed by the bishop with the counsel of the cathedral chapter or body of diocesan consultors.[28]

The office of parish priest consultor originated with the decree *"Maxima cura,"* which demanded that those who were to take part in the administrative processes be selected according to seniority. This order of seniority was determined by the length of the term of office, the date of ordination to the priesthood, or by reason of age. In the event of any suspicion of prejudice, or if any exception was taken by the pastor at the very beginning of the process against one or both of these consultors, the ordinary could choose another or others according to the same norm.[29]

Although this decree did not consider the kind of transfer as it is understood in Title XXIX of the third part of the fourth book of the Code, nevertheless it is evident that the legislator has borrowed from this decree as a means of insuring that a pastor receive just treatment in this matter.[30] Hence, even though the Code allows the ordinary a free choice in the selection of the two parish priest consultors, and has not reiterated the fact that the pastor may take exception against one or both of these consultors, it seems that canonical equity demands a prudent choice on the part of the ordinary in this matter.[31] Consequently the ordinary must avoid selecting any consultors who may be prejudiced, whether for or against a particular pastor, since such a state of affairs would militate against the very reason for their part in this process.

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[28] Canon 388.

[29] Decr. *"Maxima cura,"* canon 5—*AAS*, II (1910), 639–640. Cf. Cappello, *De Administrativa Amotione Parochorum* pp. 80–83; Wernz-Vidal, *Ius Canonicum*, VI, n. 749; Connor, *The Administrative Removal of Pastors*, pp. 92–93; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 105; *Connolly, Synodal Examiners and Parish Priest Consultors*, The Catholic University of America Canon Law Studies, n. 177 (Washington, D. C.: The Catholic University of America Press, 1943), pp. 54–56.

[30] Cf. *supra*, pp. 85–88.

[31] Cf. Noval, *De Processibus*, II, n. 564; Suarez, *De Remotione Parochorum*, n. 46; Connor, *The Administrative Removal of Pastors*, p. 96; Wernz-Vidal, *Ius Canonicum*, VI, n. 749; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 105; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 160.

For the same reason it seems that the pastor has the right in natural law to take exception to the consultor when he can establish a good reason for doing so. Otherwise inequity, at least objectively, could result for the pastor even though the consultors have a merely consultative vote, for, should the fact of the prejudice be unknown to the ordinary, the pastor would be helpless in the face of that situation. On the other hand, the very fact that their advice is to be sought under the pain of nullity[32] evidences the mind of the legislator to provide every means for averting the pastor's possible suffering of any injustice, and consequently seems to countenance the right of exception on the part of the pastor.[33]

Although the authors do not consider the matter of consultation with reference to the mission territories of prefectures and vicariates apostolic it seems that those who are to be called in for counsel are two of the three or more missionaries whose appointment to Council mentioned in canon 302 has been motivated in view of their mature years and greater prudence,[34] for the matter of transfer must certainly be regarded as one of grave import. However, in view of the normally extant factor of distance, it seems that this advice may be sought by letter rather than in the presence of two simultaneously convoked counselors, as is required for the consultation of canonically appointed parish priest consultors. In any event it appears that consultation, either oral or written, is required at least for licit action on the part of the ordinary.[35]

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[32] Canon 2165.

[33] Cf. Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 160. Cf., however, Wernz-Vidal, *Ius Canonicum*, VI, n. 749, who maintain that, in view of the fact that the consultors no longer enjoy a deliberative vote, there is no necessity for upholding the right of exception on the part of the pastor.

[34] "Constituant [vicarii et praefecti apostolici] Consilium ex tribus saltem antiquioribus et prudentioribus missionariis, quorum sententiam, saltem per epistolam, audiant in gravioribus et difficilioribus negotiis." Cf. canon 457 for an instance in which this ruling of canon 302 finds application.

[35] Canons 302 and 105, § 2.

ARTICLE III. THE OATH OF SECRECY

Canon 2144, § 1. *Examinatores et consultores ac notarius debent, interposito ab initio processus iurciurando, servare secretum circa omnia quae ratione sui muneris noverint ac praesertim circa documenta occulta, disceptationes in consilio habitas, suffragiorum numerum ac motiva.*

§ 2. *Si huic praescripto minime paruerint, non solum a munere amoveri debent, sed alia etiam condigna poena ab Ordinario, servatis servandis, plecti poterunt; ac praeterea damna, si qua inde secuta sint, sarcire tenentur.*

At the beginning of the process, that is, at the particular stage at which these officials are called into the case,[36] the notary, the parish priest consultors, and the chancellor if he is distinct from the notary,[37] must take the oath of secrecy relative to those matters which they shall learn in connection with their function. This oath especially extends to the content of secret documents, the discussions regarding whatever meetings are had, and the votes and reasons which influence the decision of the ordinary. This oath, a special one, is distinct from that which they take when they assume their office, at which time they promise to fulfill the duties of their office faithfully, and to maintain secrecy within the limits established by the law and the ordinary.[38] In canon 2144 there is found an instance whereby the law specifically determines the obligation of secrecy relative to the administrative processes, and in this particular case in connection with the process of transfer.[39]

Attention must now be given to the extent of this obligation. The law speaks of those matters of which knowledge is had in connection with their function, and specifically enumerates those things which are a special object of secrecy. Hence it is evident

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[36] Suarez, *De Remotione Parochorum*, n. 13; Coronata, *Institutiones Iuris Canonici*, III, n. 1576; Augustine, *A Commentary on Canon Law*, VII, 406; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 372; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 739; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 150.

[37] Coronata, *Institutiones Iuris Canonici*, III, n. 1576.

[38] Cf. canon 364, § 2, 1° and 2°

[39] Cf. canon 2165.

that these officials cannot reveal anything or any information which comes to them exclusively in view of the part which they have in the procedure. Thus, in the procedure of transfer it is expected that they will respect the secret concerning the contents of the letter of refusal by the pastor to accept the proposed transfer, the discussion between the ordinary and the parish priest consultors, and the final decision arrived at between the ordinary and the consultors, since a manifestation of these particular matters could very easily cause prejudice to the pastor whose transfer is ultimately insisted upon.

It seems, moreover, that this obligation of secrecy extends also to the invitation given by the ordinary to the pastor to whom the transfer is proposed. Consequently the oath of secrecy should be taken both by the notary and the two witnesses as mentioned in canon 2143, in whose presence the paternal invitation[40] was issued by the ordinary, if it was made orally and thus called for the attestation of the notary, or of the chancellor, or of two witnesses.[41] This assumes that the paternal invitation to accept a transfer when the invitation is extended by the ordinary to a pastor is given juridic force by means of a formality which is considered necessary to the nature of that invitation. This will be discussed later when the form of the paternal invitation is specifically treated.

The difficulty arising from the question whether or not this obligation of secrecy extends to matters known through a twofold source, namely from the process itself and from a source extraneous to the procedure, is hardly relevant to the matter of transfer, since there is scarcely any possibility that information be obtained from anyone other than the pastor himself. He alone could speak of the fact of the proposed transfer, his refusal and the reasons for the same, before the consultors could be called into the case. In such an event, should he have divulged this information, it seems that he has forfeited his right to the maintenance of secrecy in

[40] Canon 2162. Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1576.

[41] Cf., however, Augustine, *A Commentary on Canon Law*, VII, 406. This author denies that any oath is required with reference to the mere paternal invitation. His opinion naturally follows from his view concerning the nature of the paternal exhortation, since he maintains that it is devoid of all juridical force, as will be seen later.

this regard. However, since the law does not distinguish,[42] and demands secrecy for whatever matter has come up in the course of the procedure, it seems that this information, regardless of its source, but known also through a participation in the process of transfer, is included within the obligation of secrecy. Although Coronata[43] holds the opposite opinion in this matter, he immediately adds that prudence demands silence on the part of those who have this information from a double source. In accordance, then, with the more common opinion, which indeed seems to be the more tenable one, the present writer concludes that the officials are liable to the penalties specified in canon 2144, § 2, if they violate their oath in regard to the knowledge which they have gained from this twofold source.[44]

Although there is even less likelihood that with reference to matters relating to the transfer these officials will gain knowledge solely from outside sources, still there is a remote possibility for this to happen. Obviously, any information gained in this manner is not an object of the obligation of secrecy. However, the obligation of maintaining secrecy arises from another source, namely the natural law, or at least it seems that this is so in view of the following reason. If the officials should speak of matters which are directly connected with this particular priest and in any way have some relation to his transfer, people may be inclined to think that this information was gained through their official capacity.[45] Consequently they may be scandalized when they naturally assume that these officials revealed matters of which they obtained knowledge in the fulfillment of their duties in office. Again, people may repeat what they have heard, exaggerate it, and ultimately attribute the source of their information to these same officials. In view of the obvious consequences of such revelations it appears very evident that those who take part in the process of transfer

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[42] Suarez, *De Remotione Parochorum*, n. 13; Noval, *De Processibus*, II, n. 504; Beste, *Introductio in Codicem*, p. 854; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 149.

[43] *Institutiones Iuris Canonici*, III, n. 1576.

[44] Cf. Noval, *De Processibus*, II, n. 504; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 149.

[45] Noval, *De Processibus*, II, n. 504.

should refrain from mentioning anything at all about the case or the priest in question, lest a wrong interpretation be placed upon their observations, and for fear that the above-mentioned consequences ensue. However, should they be imprudent in this matter, they would not become subject to the penal sanctions enacted in canon 2144, § 2.[46]

Although no particular formula has been decided upon by the legislator for the taking of this oath, it seems that the formula furnished by the Sacred Consistorial Congregation in 1912[47] can be used as a directive norm for the administration of the oath of secrecy.[48] However, it appears that the most that can be said for this formulary is that it is purely directive, in spite of the opinion of some post-Code commentators that it is at least implicitly retained in the legislation of the Code, and that consequently it should still be employed.[49]

Connolly,[50] in giving his opinion on the matter, maintains that the fact that there is no obligation on the part of the ordinary to use this formula seems beyond all doubt, since the formula includes not only the oath of secrecy, but also the oath to fulfill one's office faithfully and not to receive anything whatsoever, even under the

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[46] Cf. Noval, *op. cit.*, n. 504; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 150.

[47] "Ego N.N. examinator (*vel* parochus consultor) synodalis (*vel* prosynodalis) spondeo, voveo ac iuro munus et officium mihi demandatum me fideliter, quacumque humana affectione postposita, et sincere, quantum in me est, executurum: secretum officii circa omnia quae ratione mei muneris noverim, et maxime circa documenta secreta, disceptationes in consilio habitas, suffragiorum numerum et rationes religiose servaturum: nec quidquam prorsus, occasione huius officii, etiam sub specie doni, oblatum, nec ante nec post, recepturum. Sic me Deus adiuvet et haec sancta Dei Evangelia, quae meis manibus tango."—*AAS*, IV (1912), 142.

[48] Suarez, *De Remotione Parochorum*, n. 13; Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 739; Coronata, *Institutiones Iuris Canonici*, III, n. 1576; Connor, *The Administrative Removal of Pastors*, p. 91; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 110.

[49] Augustine, *A Commentary on Canon Law*, VII, 406; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 372; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, 344.

[50] *Synodal Examiners and Parish Priest Consultors*, p. 151.

form of a gift, on the occasion of one's duties, or even before or after. He adds that in the present law the examiners and consultors, as has already been seen,[51] are required at the very beginning of their term of office to take an oath to fulfill their office faithfully, and that it would therefore seem superfluous to demand the same oath on each occasion on which they enter one of the administrative procedures. He further adverts to the fact that nowhere in the present law is it required that they take an oath not to receive any gifts, even though it is an accepted fact that these officials should certainly refuse all gifts offered them by interested parties on the occasion of the discharge of the duties of office. He concludes then that, unless an ordinary of his own volition should require these added oaths, there is not only no obligation to use this formula containing them, but that it actually should not be used.

These arguments appear forceful enough to show that there is certainly no obligation resting on the ordinary to employ this formula. However, they do not seem to prove definitely that, unless the ordinary specifically demand its use, it may not be employed, for the very fact that it may be, in some portions, superfluous does not necessarily establish a prohibition with regard to its serving as a norm and in fact being used in its entirety.

This oath is to be taken before the ordinary or his delegate. Since the notary and the consultors in the process of transfer are priests, they must follow the prescription of canon 1622, § 1, and in taking the oath, instead of placing their right hand upon the Book of the Gospels, they must place their right hand over their heart.[52]

As already mentioned, this oath must be taken at the beginning of the process, that is, at the time in which the different officials first take part in the process. However, there is no statement, nor any equivalent intimation in law, to the effect that this oath is required under pain of nullity of the acts. The Code nowhere requires it in the process of transfer for the validity of any of the

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[51] Cf. *supra*, p. 131.

[52] Cf. Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 110; Connolly, *op. cit.*, p. 150.

subsequent acts.[53] Hence, it must be maintained that the decree of the Sacred Consistorial Congregation,[54] which required that the oath mentioned by the same Congregation in the decree *"Maxima cura"*[55] be taken under pain of invalidity of the subsequent acts, no longer has force.[56]

Coronata[57] gives evidence of uncertainty in this matter, and qualifies his observation by saying that the penalty of nullity, at least the kind of nullity which may not be sanated, is not enacted in the present law. Augustine (1872–1943)[58] appeared to follow the opinion that this oath is required for the validity of the acts, since he referred without comment to the formula of the oath which was given by the Sacred Consistorial Congregation in 1912, relative to the legislation of the decree *"Maxima cura."*[59] In view of the fact that the legislator was well aware of this decision of the Sacred Consistorial Congregation of 1912, and at the same time did not include its prescription in the present law, it is evident that there is no foundation in fact of in law for Coronata's hesitancy or Augustine's inference. The juridical principle enunciated in canon 11 of the present law appears to settle the matter beyond all doubt.[60]

That this oath implies a severe sanction is seen from a consideration of the second paragraph of canon 2144. Before this oath be administered, attention should be drawn both to the gravity of the sin for its violation,[61] as well as to the penalties attached under the same circumstances.[62] In the event that the oath is violated

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[53] Cf. canons 2144; 2162–2167.

[54] 15 febr. 1912—*AAS*, IV (1912), 141.

[55] 20 aug. 1910, can. 7, § 1—*AAS*, II (1910), 640; *Fontes*, n. 2074.

[56] Cf. canon 11. Cf. also Suarez, *De Remotione Parochorum*, n. 13; Connor, *The Administrative Removal of Pastors*, pp. 90–91; Meier, *op. cit.*, p. 109; Connolly, *Synodal Examiners and Parish Priest Consultors*, pp. 150–151.

[57] *Institutiones Iuris Canonici*, III, n. 1576.

[58] *A Commentary on Canon Law*, VII, 406, footnote n. 3.

[59] Decr. 15 febr. 1912—*AAS*, IV (1912), 141.

[60] Cf. Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 151.

[61] Fanfani, *De Iure Parochorum*, n. 144.

[62] Cf. Noval, *De Processibus*, II, n. 505; Coronata, *Institutiones Iuris Canonici*, III, n. 1576; Augustine, *op. cit.*, VII 407; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 108; Connolly, *op. cit.*, 152.

the guilty official may and ordinarily should be removed from office, and the ordinary may inflict other suitable penalties according to the nature of the offense. Finally, the guilty official is bound to make restitution for all damages caused by his violation of the oath.[63]

It has been stated that the guilty official *may* and *ordinarily should* be removed from office. Not all authors are in agreement that no alternative is allowed to the ordinary in this matter. Some make no attempt to decide the meaning of the word *"debent,"*[64] and perhaps mean to imply that the ordinary must necessarily invoke the removal of such officials according to law.[65] Others,[66] evidently basing their opinion on a pre-Code commentator,[67] assert that the ordinary has no alternative, and that accordingly he must proceed with the removal of the official who violated this oath of secrecy.

It seems, however, that the opinion of those authors who affirm that canon 2144, § 2, points to the infliction of a vindicative penalty, and therefore is to be interpreted in view of the legislation of the fifth book of the Code, presents the more tenable view. Consequently reference is made to canon 2223, § 3, which prescribes that the penalty is ordinarily to be inflicted if the law uses preceptive terms. At the same time this latter canon admits that, under certain circumstances, the ordinary may follow his conscience and prudent judgment, and accordingly may refrain from urging the specific penalty. In giving examples of these conditions the Code mentions that the ordinary may withhold the infliction of the penalty if the offender has perfectly made amendment and has repaired in full whatever scandal may have followed from his guilty action. Again, it allows for the imposition of a less severe

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[63] Canon 2144, § 2.

[64] Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1576; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 344; Fanfani, *De Iure Parochorum*, n. 144; Beste, *Introductio in Codicem*, p. 854.

[65] Cf. canons 372, § 5; 388; 192, § 1.

[66] Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Augustine, *A Commentary on Canon Law*, VII, 407; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 739; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 372.

[67] Cappello, *De Administrativa Amotione Parochorum*, pp. 86–87.

penalty should there be circumstances and the like which may lessen the imputability of the delict.[68]

In the matter of transfer there is much less likelihood of occasioning scandal by violating the sworn secrecy than is present in the other administrative processes. Hence, all things being equal, it seems only fair that the ordinary consider the conditions in each individual case before he remove the offender from office, and therefore it does not seem that the ordinary must of necessity remove the guilty official in every instance.[69]

No official procedure is demanded for the removal of the guilty official, and hence it is effected in an administrative manner. Consequently a recourse may be lodged with the Holy See against the decree of removal, but such a recourse will not suspend the operative effect of the decree.[70] The bishop, or his successor or superior may likewise remove the notary from office,[71] as may also the vicar capitular with the consent of the cathedral chapter, and the administrator with the consent of the diocesan consultors.[72] The consultors may be removed from office by the bishop with the advice of the cathedral chapter or the diocesan consultors.[73]

In addition to their removal from office, if the ordinary deems it expedient, he may impose other suitable penalties, in accordance however with the prescriptions of law.[74] The vicar general, unless the see is impeded[75] or unless he be authorized by a special man-

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[68] Canon 2223, § 3.

[69] Cf. Suarez, *De Remotione Parochorum*, n. 14, nota 16; Noval, *De Processibus*, II, n. 505; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 111; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 153.

[70] Canon 192, § 3: "Si de amovibili [officio agatur], privatio decerni ab Ordinario potest ex qualibet iusta causa, prudenti eius arbitrio, etiam citra delictum, naturali aequitate servata, sed certum modum procedendi sequi minime tenetur, salvo canonum praescripto circa paroecias amovibiles; privatio tamen effectum non habet, nisi postquam fuerit a Superiore intimata; et ab Ordinarii decreto datur recursus ad Sedem Apostolicam, sed in devolutivo tantum."

[71] Canon 372, § 1.

[72] Canon 373, § 5. Cf. also canons 427 and 429.

[73] Canon 388.

[74] Canon 2144, § 2.

[75] Cf. canon 429, § 1.

date, cannot inflict these penalties.[76] The normal manner of inflicting such penalties will be through the usual judicial procedure, except when the law provides otherwise.[77] However, there is no obligation in this matter, since it is left to the prudent judgment of the ordinary. He could well be guided by the norm stated in canon 2218, § 1, whenever there is question in his mind whether further penalties should be inflicted.[78] It seems that in the case of the witnesses mentioned in canon 2143, who may be called in to witness the extending of the paternal invitation for transfer, the infliction of some penalties is perhaps the only remedy afforded to the ordinary in the event of their having been guilty of the violation of the oath of secrecy. Again, however, he is still free to use his discretion in this matter, and in view of particular circumstances he may deem it unfeasible to invoke any stern or otherwise rigorous penal sanction in such a case of violated secrecy.

Finally, there is an obligation of making reparation for any harm that may have been done to the pastor involved in this process of transfer through a violation of the obligation of secrecy.[79] This obligation of making adequate restitution, which duty arises from the natural law itself,[80] exists whether or not court action has been instituted for the recovery of damages, unless the party has condoned the injury,[81] since the obligation is a moral one. However, while it is a moral obligation, it does not exclude the demands of justice nor does it preclude the use of judicial means for enforcement of reparation. Hence, if the guilty party does not make spontaneous amendment in this regard, then strictly judicial action may be taken for the recovery of whatever damage there may have been,[82] unless the ordinary extrajudicially persuades the guilty

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[76] Canon 2220, § 2.

[77] Canon 2220, § 1. Cf. also canon 222, § 1; Noval, *De Processibus*, II, n. 505; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 112.

[78] Cf. Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 739.

[79] Canon 2144, § 2.

[80] Cf. Noval, *De Processibus*, II, n. 505; Coronata, *Institutiones Iuris Canonici*, III, n. 1576; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 739.

[81] Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 153.

[82] Cf. canons 1933–1989. Cf. also Noval, *op. cit.*, II, n. 505; Connolly, *op. cit.*, p. 153; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 113.

person to make reparation and thus obviates the necessity of resorting to a criminal trial.[83] If this cannot be accomplished, then the injured part has the right to denounce the guilty official or witness,[84] or the promoter of justice may do so in the name of the injured pastor,[85] or he may also act officially[86] in defense of the commonweal.[87]

It is to be noted that those who are bound by this oath of secrecy in the matter of transfer are merely the minor officials and the witnesses mentioned in canon 2143, § 1. The ordinary, including the vicar general, the vicar capitular and the administrator, is not subject to the prescription of canon 2144.[88]

ARTICLE IV. THE WITNESSES

Canon 2145, § 1. *In iis processibus summarie procedendum est; at duo vel tres testes sive ex officio arcessiti sive a parte inducti audiri non prohibentur, nisi Ordinarius, auditis parochis consultoris. . . , existimaverit partes eos inducere ad mores nectendas.*

§ 2. *Testes et periti, nisi iurati, ne admittantur.*

Since it has been manifested that the process of transfer, although administrative in nature, has been introduced by the legislator as a means of insuring that the rights of a pastor to his office be properly safeguarded, it follows that this procedure admits of everything that is demanded by natural equity for the attainment of truth and justice.[89] Consequently, even though they are not usually admitted in an administrative process,[90] witnesses may have a part in this procedure of transfer if the claim in the case demands their appearance. However, since it has also been affirmed that this process demands an expeditious settlement of the case, a limitation is necessarily placed upon the number of witnesses who

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[83] Cf. canons 1925–1932.

[84] Canon 1935, § 1.

[85] Canons 1934 and 1937.

[86] Canon 1938, § 2.

[87] Canon 1934 and 1586. Cf. Meier, *op. cit.*, p. 113; Connolly, *Synodal Examiners and Parish Priest Consultors*, pp. 153–154.

[88] Coronata, *Institutiones Iuris Canonici*, III, n. 1576, and nota 9.

[89] Cf. *supra*. pp. 84–88.

[90] Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 345.

may be called.[91] Further, the number of witnesses is limited in order to preclude the danger of scandal which would necessarily be increased by the admittance of numerous witnesses, since there would thus arise a greater likelihood of the revelation of matters pertaining to this procedure. Such a revelation could frequently become the source of scandal.[92]

The Code expressly provides that two or three witnesses be heard either officially or at the instance of the pastor, unless the ordinary, upon consultation with the parish priest consultors, is of the opinion that these have been introduced merely to prolong the issue.[93] This number, set at two or three, does not appear to imply necessarily an exclusive enumeration, as is affirmed by Blat,[94] for it seems that all, but they alone, who are needed for arriving at a determination of the reasons suggested for or against the transfer of a particular pastor, should be allowed admittance.[95]

The ordinary may well follow the prescriptions of canons 1756–1758 as a guide for the admittance of these witnesses, and the regulations of canons 1760–1764 as a norm for their exclusion.[96] Further, since canon 2145, § 1, established nothing regarding the character and quality of the witnesses who are allowed to give testimony in this process, it seems to leave these matters to the prudent judgment of the ordinary. However, from the nature of the procedure of transfer there is little likelihood that, other than experts, any layman would be in a position to exercise a useful rôle, and therefore be entitled to have a part in the process. Experts may be called in, for instance, to testify regarding the state of ill health alleged by the pastor, and to determine whether or not

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[91] Beste, *Introductio in Codicem*, p. 854; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 740; Noval, *De Processibus*, II, n. 506; Suarez, *De Remotione Parochorum*, n. 17; Connor, *The Administrative Removal of Pastors*, p. 93.

[92] Vermeersch-Creusen, *op. cit.*, III, n. 345; Noval, *op. cit.*, II, n. 583; Connolly, *Synodal Examiners and Parish Priest Consultors*, pp. 156–157.

[93] Canon 2145, § 1.

[94] *Commentarium Textus Codicis Iuris Canonici*, IV, n. 740.

[95] Suarez, *op. cit.*, n. 17; Noval, *op. cit.*, II, n. 506; Vermeersch-Creusen, *op. cit.*, III, n. 345; Coronata, *Institutiones Iuris Canonici*, III, n. 1577.

[96] Cf. Coronata, *op. cit.*, III, n. 1577; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 114.

he could endure without hardship a less salubrious climate and the like; or to determine the actual condition of the parish property regarding its need of repair or replacement and the like; or even, should the circumstances warrant it, to consider the financial situation of the parish by setting the books in proper order. In such an event their testimony would be of a purely scientific nature. However, even should such experts be called into the case and give their conclusions, the ordinary, if he is not convinced, is not bound to follow them,[97] although in normal circumstances it seems that their observations should determine his mode of action.

Another class of witnesses includes those priests who are in a position to testify, from observation, whether or not the reasons alleged on the part of the ordinary or the pastor are of such a nature that the transfer should be accepted or refused. Perhaps these priests, because of their familiarity with the parish to which the prospective assignment is to take pastor, or with the pastor himself, may be better equipped to give an opinion than even the parish priest consultors who have been called into the process. Should there be such witnesses, it appears that in the interests of justice and truth the ordinary would do well to summon them or allow them to be summoned to give testimony relative to the claims inherent in the case. Basically, however, no one is excluded by law other than those who are brought in solely to delay the settlement of the case,[98] and hence all who can give testimony about some pertinent fact, the knowledge of which they have acquired through their own observation or own particular skill, may be admitted to the process as long as their rôle is not merely that of a character witness.[99]

Canon 2145, § 1, does not specify at what time or with what frequency witnesses may be brought into the case. Perhaps before the ordinary tenders to the pastor the canonical invitation to accept the transfer he may see fit to call in particular witnesses to guide him in the decision which he is formulating in his mind. Nothing

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[97] Canon 1804, § 2.

[98] Canon 2145, § 1.

[99] Cf. Noval, *De Processibus*, II, n. 507; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 156.

seems to preclude his seeking of their testimony. Again, once the invitation has been refused, nothing seems to militate against the pastor's production of witnesses for attesting to the truth of the allegations which he has made in his letter of refusal.

In like manner the ordinary may seek evidence with regard to this matter. In fact, in the event that an irremovable pastor has refused to accept a proposed transfer, the testimony of witnesses may prove most helpful to him in his decision whether or not he should seek an apostolic indult whereby he may be granted the power of ordering the pastor's transfer. Finally, witnesses may be necessary to prove that the pastor has received the first or second invitation extended by the ordinary,[100] or that the pastor has not refused to accept the transfer because of ill will or for any other reason that could redound to insubordination. In other words, there seems to be no limitation regarding the occasion on which the witnesses may be called into the case, as long as the process is not unduly delayed, and provided that their admittance is demanded by equity and justice.

The question which now presents itself concerns the problem proposed by authors, namely, whether or not the ordinary is bound to seek the advice of the consultors in deciding that witnesses should be admitted. There are two opinions on the matter. There are some who say that the counsel of these officials must be sought whenever there is question not only of rejecting but even of admitting witnesses.[101] The more common opinion, held by Emmanuel Suarez and others,[102] demands that the advice of the parish priest consultors be sought only when there is question of refusing admittance to certain witnesses when the ordinary feels

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[100] Cf. canons 2162 and 2166.

[101] Fanelli, *La Procedura Canonica nei Processi Amministrativi e Penali* (Vicenza: Società Anonima Tipografica, 1936), p. 19; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 345.

[102] *De Remotione Parochorum*, n. 61; Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Coronata, *Institutiones Iuris Canonici*, III, n. 1577; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 370; Beste, *Introductio in Codicem*, p. 854; Connor, *The Administrative Removal of Pastors*, p. 93; Meier, *Penal Administrative Procedure Against Negligent Pastors*, pp. 116–117; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 156.

that their testimony is requested merely for the sake of prolonging the procedure. As Suarez points out,[103] both the wording of canon 2145, § 1,[104] and the reason of the law manifest in it quite clearly demonstrate that the consultation is necessary only in the event of a proposed rejection of these witnesses. He argues that the words in the *nisi* clause indicate the circumstances in which it is required to hear the consultors, and that the reason of the law is manifestly that of protecting the rights of the pastor. Since no harm could come to the pastor through the admittance of witnesses, according to this author, it follows necessarily that no consultation is demanded. The force of these arguments as well as the confirmatory authority of the authors seems to prove quite conclusively that the ordinary is wholly free in the matter of the admittance of any witnesses requested by the pastor. This, however, is a distinct change from the regulations found in the decree *"Maxima cura,"*[105] which required the consent of the examiners for both the admittance and the rejection of the witnesses.[106]

Regarding the consultation which the ordinary must seek with the parish priest consultors, the question arises whether or not this is necessary under pain of invalidity of the process. It is evident that they must be heard if the ordinary thinks that certain prospective witnesses should be excluded, and it is likewise manifest that, although the ordinary should ordinarily follow the advice which is given him, it is not required that he do so.[107] It is not settled, however, whether or not this advice is demanded for validity. The answer to this question ultimately involves the interpretation that is given to canon 105, § 1, and revolves about the words *"satis est."* This problem has been considered in relation to different aspects of the law wherein counsel is required, and in each case the authors have ended their discussion with the conclusion that, in view of the authority on both sides of the ques-

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[103] *Op. cit.*, n. 17.

[104] ". . . at duo vel tres testes . . . audiri non prohibentur, nisi Ordinarius, auditis parochis consultoribus seu examinatoribus,' existimaverit partes eos inducere ad moras nectendas."

[105] 20 aug. 1910, can. 15, § 3—*AAS*, II (1910), 643; *Fontes*, n. 2074.

[106] Cf. Meier, *op. cit.*, p. 117.

[107] Canon 105, § 1.

tion, there is a *dubium iuris* as to the invalidity of the acts placed in contravention of the law which requires the seeking of this counsel.[108] Although the question has been proposed to the Pontifical Commission for the Authentic Interpretation of the Code, no answer has been given to the problem. Consequently, in practice, should the ordinary fail to seek this consultation in the exclusion of witnesses, although such neglect implies a definite violation of the law, it cannot be concluded that his failure to seek the counsel would affect the validity of the process.

Paragraph two of canon 2145 demands that, before any of these witnesses are to be admitted, they must take an oath to tell the truth. Ordinary witnesses swear to tell the truth, the whole truth and nothing but the truth.[109] Expert witnesses swear to discharge their office faithfully, and thus their oath indirectly compels them to tell the truth about the result of their findings.[110] Neither witnesses nor experts are exempt from the prescription of canon 2145, § 2, and hence in all cases, regardless of the fact that perchance they may be suspect or unsuitable witnesses, it appears that they are subject to the requirements of this canon.[111]

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[108] Coronata, *Institutiones Iuris Canonici*, I, n. 153, nota 8; Vermeersch-Creusen, *Epitome Iuris Canonici*, I, n. 229; Connolly, *Synodal Examiners and Parish Priest Consultors*, p. 93.

[109] Canon 1767, § 1.

[110] Canon 1797, § 1.

[111] Cf. Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 118.

CHAPTER VIII

Procedure in the Administrative Transfer of Pastors

SECTION I

The Invitation and Reasons for Transfer

Canon 2162. *Si bonum animarum postulet ut parochus a sua, quam utiliter regit, ad aliam paroeciam transferatur, Ordinarius eidem translationem proponat ac suadeat ut eidem pro Dei atque animarum amore consentiat.*

The canonical procedure in the administrative transfer of pastors begins with the paternal invitation, extended by the ordinary or his delegate to a pastor, asking him to accept a transfer from the the parish which he possesses to another one in the same diocese. The enactment regarding this invitation is found in the canon which states that, if the welfare of souls requires that a pastor be transferred to another parish from a parish which he has governed with success, the ordinary shall propose the matter to the pastor and persuade him to accept the transfer for the love of God and of souls.

Since the words of canon 2162, *"quam utiliter regit,"* presuppose that the pastor is truly useful to the souls of his present parishioners, the welfare of souls, which is the canonical and only cause warranting the transfer of pastors as considered in canons 2162–2167, is nothing other than that which consists in the greater utility or supernatural good of souls to be obtained in the parish to which the transfer is to be made. Now, in view of the stability which a pastor possesses in virtue of his office, it may be asked how this greater good of souls is realized. Certainly, a tangible reason must be offered by the ordinary in his proposal to a pastor that he leave a parish which has been canonically conferred upon him, and in which his ministry leaves nothing to be desired. The Code does not clarify the generic term *"bonum animarum,"* and hence it seems

that it is left to the prudent judgment of the ordinary, based upon the teaching of the authors, to determine the comprehensiveness of this term.

It may be affirmed, at the outset, that anything pertaining directly or indirectly to the good of souls in the parish to be assigned may countenance the transfer of a particular pastor.[1] Specifically, then a change directly relating to the welfare of souls could be accomplished for the following reasons which, although not exhaustive in their scope, may well serve as a norm to be employed by the ordinary in the contemplation of the transfer of any of his pastors.

These causes include: an ardent zeal with regard to all the duties of the parochial ministry or even a few specific ones; a faculty for handling factions which perchance have arisen in the parish to which the transfer is to be made; a deep and inexhaustible charity which would naturally endear a pastor to the hearts of his parishioners who may need the services of such a pastor to arouse them from their spiritual lethargy or to promote good will among them; a bearing of authority which may be required in a pastor to offset particular conditions whereby the members of a certain parish may have appropriated certain rights which pertain properly to the office of the pastor; a holiness of life which may be necessary for restoring respect for the priesthood which may have been lost through the example given the parishioners by a former imprudent pastor; an intellectual ability which in a modest but genuine display proves desirable for a particular parish in view of the cultured class of people who comprise the greater portion of its members; or any other like reason which would enhance the good of souls and cultivate greater respect for the Church as a whole.[2]

A few examples may clarify the application of these causes. It may happen that a particular parish is subject to a number of factions which, being almost uncontrollable, are tending to disrupt the spiritual life of its members. The former pastor, perhaps because of his lack of prudence or tact, was unable to dispel these

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[1] Suarez, *De Remotione Parochorum*, n. 112.

[2] Cf. Suarez, *De Remotione Parochorum*, n. 112; Beste, *Introductio in Codicem*, p. 813; Noval, *De Processibus*, II, n. 613.

and establish the necessary unity among his flock. Observing these conditions, the ordinary may decide that this parish demands the services of a pastor endowed with extreme charity, prudence and authority. Consequently, in view of his comprehensive knowledge of the pastors of his diocese, he chooses one whom, he feels, is the one priest capable of offsetting the conditions which obtain, and of restoring the desired unity necessary for enhancing the spiritual life of the faithful of that parish. In such an event he has every reason to propose the transfer and, as long as all other demands are met, insist that the pastor accept the new parish.

Again, a parish may be suffering great leakage from the Faith because of the lack of proper instruction in the principles of religion. This condition may have been the result of the former pastor's failure, whether through infirmity or perhaps because of real negligence, to have proper regard for this very essential aspect of his parochial ministry. The conditions obtaining may have become so acute that immediate reformation is required. In this instance there may be a particular pastor known by reputation to be most ardent in his zeal for instruction both to children and to adults, who appears to be the only one capable of counteracting this neglect and promoting the Faith among the parishioners. In such circumstances the ordinary would have a true reason for suggesting the change to this particular pastor.

Further, a parish may be composed of people who, in holding prominent positions in their community, may have many opportunities publicly to manifest their Faith by word and example, and consequently to stimulate others to inquire into its principles. However, because they have received no guidance from a former incompetent or intellectually lazy pastor, they have wasted their opportunity to bear greater fruit for the Church and for souls. In such a case the ordinary may well propose to a pastor, noted for his work in stimulating Catholic action among his parishioners, that he accept this other parish and use his talents to guide the new parishioners in their promotion of Catholic action in their daily lives.

In addition, it may be brought to the attention of the ordinary that there is a particular parish in which there are many non-Catholics, some of whom are well disposed toward the Church,

but who have never been enlightened about it nor encouraged to inquire concerning its dogmas. It seems that a pastor, if noted for his zeal in making converts, and having proved this by the number of conversions he has effected in his own parish in a relatively short period of time, may well be requested to accept a transfer to such a parish.

Once more a parish, perhaps through neglect on the part of its former pastor, or even because of his inability to understand and cope with the temperament of its members, may have few parishioners frequenting the sacraments. In consequence these people gradually have become morally negligent to such an extent that spiritual indifference is manifested publicly in their daily life, perhaps through a prevalence of crime, or immorality, or in any other manner. It appears that, should the ordinary desire to transfer a pastor well known for his work in instigating the frequent reception of the sacraments, and who in fact seems to be the most capable priest available to remedy the prevailing conditions, he may insist that this pastor accept the change in order to stimulate the Faith that is in the souls of the parishioners and make their religion mean more than a mere name to them.[3]

Reasons pertaining only indirectly to the welfare of souls may be alleged by the ordinary in proposing the acceptance of a transfer. These causes may have relation to a pastor's financial ability; to his efficiency in raising revenue for parish expenses; to his facility in planning for the building and repairing of parochial property;[4] or even to the pastor's own promotion.[5] Again a few examples may clarify the matter relative to the ordinary's allegation of these reasons in a proposed transfer.

There may be a particular parish of which the financial condition is in a very precarious state because of a former pastor's lack of prudence in handling the revenue of the parish. In view of these circumstances the church and school may be in great need of repair, but because of the great debt with which the parish is burdened there is little likelihood that the necessary work can be

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[3] Cf. Noval, *De Processibus*, II, n. 613.

[4] Cf. Suarez, *De Remotione Parochorum*, n. 112; Augustine, *A Commentary on Canon Law*, VII, 445; Beste, *Introductio in Codicem*, p. 863.

[5] Wernz-Vidal, *Ius Canonicum*, VI, n. 768.

accomplished. As a consequence of this many of the parishioners may stay away from the church in view of its condition of disrepair, or may even refuse to let their children attend the school. Naturally, the spiritual welfare of souls in that parish is bound to suffer. In this instance the ordinary would have every right to propose a transfer to a pastor who has proved himself adept in financial matters, in order that the former status of this parish may be attained both temporally and spiritually.

Another instance may occur in which the former pastor of a parish has proved his inability to acquire a decent support for himself and for the ordinary and extraordinary parochial expenses, which consequently redounds to the detriment of the parish. On the other hand another pastor, in view of his own personal wealth which he has been accustomed to expend in the interest of the Church, or because of his particular personal qualities which have proved an asset to him in raising revenue, or because of his friendship with wealthy members of the parish in question, may prove to be the one priest of the diocese who can counteract the conditions which obtain in that parish. As a consequence it appears that the ordinary, realizing as he does the particular qualities of that pastor, may propose that he accept this parish and use his talents in behalf of the souls of its parishioners.

Still another example is had when a parish may need a larger church or school to accommodate the increasing number of parishioners. Because of inadequate facilities it may again happen that many people do not bother to go to church, whether for Mass or any other ecclesiastical functions, because of the inconvenience they may suffer while in attendance. If there be need of a larger school many of the children are deprived of the opportunity of receiving the advantages of a Catholic education because they cannot be accommodated in the present one. In such a case the ordinary may well choose another pastor who has shown his proficiency in planning and building to take over the duties of pastor in this other parish, in order that the spiritual welfare of souls might ultimately be duly served.[6]

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[6] Cf. Suarez, *De Remotione Parochorum*, n. 112. This author recounts the same and similar examples as having an indirect relationship to the good of souls.

It has been stated that the promotion of a pastor to a better parish may have an indirect influence upon the utility of the Church. This is evident from the fact that, inasmuch as a pastor is made to realize through such a promotion that his former labors have been duly appreciated, he will be stimulated to carry out an even more intensive work in the new parish which has been proposed for his acceptance. Consequently this promotion ultimately redounds to the welfare of souls, even though directly it be intended as a reward for a praiseworthy ministry.

It is to be noted that throughout these examples mention was made of the fact that the pastor to whom a transfer may be proposed because of his particular qualifications with reference to the parish which may be offered him must be considered to be the *only* one capable of taking care of the particular situation which obtains. This qualification was made in manifestation of the fact that, should another priest be available and should he likewise be considered as a suitable pastor for the parish in question, he is to be chosen rather than the pastor who already possesses a parish and enjoys a canonical right to the same. That is clear. Although, all things properly considered, a capable and worthy cleric must be chosen to till a vacant office,[7] and especially a vacant parish,[8] a cleric when once chosen cannot be forced to leave his parish which he has ruled in a praiseworthy manner unless he is to be preferred above all others for the administration of the new parish.[9]

It must also be remembered that the good of souls in the parish to be relinquished must be given consideration in a contemplated transfer. If the transfer were to be made with detriment to the faithful in that parish, it seems that the harm that may ensue would offset any good which could be attained in the parish to be obtained. Hence, since the utility of the Church would not be enhanced, there would be no canonical reason present to justify the transfer.[10] Moreover, the canonical right which a pastor has to his parish must

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[7] Canon 153.

[8] Canon 459.

[9] Cf. Noval, *De Processibus*, II, n. 610; Coronata, *Institutiones Iuris Canonici*, III, n. 1600.

[10] Cf. Noval, *De Processibus*, II, n. 610.

not be overlooked. Consequently the greater good of another parish is not to be procured at the expense of undue harm which comes to the pastor who is the object of the transfer, and hence this possibility must always be given attention in its relation to the reasons alleged for his transfer.[11]

SECTION II

The Nature of the Invitation for Transfer

In view of the paternal nature of this invitation authors are not in agreement whether or not this exhortation is equivalent to the canonical admonition which is mentioned in the general norms for the administrative processes.[12] Some completely ignore the question of its legal effect.[13] However, these authors do comment on what may be considered a parallel canons, and it seems, as will be seen later,[14] that an opinion may be drawn from their observations. Others distinguish, either restricting the canonical effect to a compulsory transfer,[15] or maintaining that it should be considered canonical when it is applied to removable pastors.[16] One author requires the employment of a notary to give it a juridical effect,[17] while another, distinguishing between form and effect, maintains that in form the invitation is paternal and in effect it is legal, and that consequently the norms of law for a canonical admonition must be applied.[18]

Before giving an exposition of these particular opinions to determine whether or not this paternal invitation is to be considered canonical at least in effect, and therefore equivalent to the true

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[11] Wernz-Vidal, *Ius Canonicum*, VI, n. 768.

[12] Canon 2143.

[13] Cf. Augustine, *A Commentary on Canon Law*, VII, 445–446; Sipos, *Enchiridion Iuris Canonici*, p. 220; Fanfani, *De Iure Parochorum*, n. 149; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 361; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 762; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, 387; Wernz-Vidal, *Ius Canonicum*, VI, n. 768.

[14] Cf. *infra*, pp. 162–163.

[15] E.g., Beste, *Introductio in Codicem*, p. 863.

[16] E.g., Coronata, *Institutiones Iuris Canonici*, III, n. 1602.

[17] Suarez, *De Remotione Parochorum*, n. 113.

[18] Noval, *De Processibus*, II, nn. 610 and 601.

canonical admonition,[19] one must necessarily give some attention to the nature of the formal admonition and to the formalities required by law for rendering it canonical.[20]

ARTICLE I. THE CANONICAL ADMONITION

Canon 2143, § 1. *Quoties monitiones praescribuntur, hae fieri debent vel oretenus coram cancellario aliove officiali Curiae aut duobus testibus, vel per epistolam ad normam can. 1719.*

§ 2. *Peractae monitiones eiusque tenoris documentum authenticum in actis servetur.*

§ 3. *Qui impedit quominus monitio ad se perveniat, habeatur pro monito.*

Monitio in the universally accepted sense is the recalling of something to the mind of some person with the exhortation that the latter do or omit something.[21] Nothing in this definition demands that it partake exclusively of a penal nature, whether as a merely penal remedy or as a strict punishment. Hence it seems that an invitation or exhortation, given by a legitimate superior to recall to the mind of a pastor that certain circumstances seem to require his transfer, and that consequently he is exhorted to accept the change, can be included within the scope of the term *admonition*. It is in the light of this interpretation that the canonical formalities will be considered.

According to canon 2143, § 1, the admonition or exhortation may be made orally to the pastor by the ordinary or his delegate[22] in the presence of the chancellor, notary or some other official of the diocesan curia, or before two witnesses who, because they may later be required to attest to the fact of the communication, must be chosen from those who are eligible in the eyes of the law.[23] The ordinary may give the exhortation personally or also through a delegate, especially when the pastor is stationed in a quite distant part of the diocese or mission territory.[24]

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[19] Cf. *infra*, pp. 158 ff.

[20] Cf. canons 2142; 2143.

[21] Noval, *De Processibus*, II, n. 494.

[22] Cf. canon 2162, and *supra*, pp. 121–122.

[23] Cf. canons 1756–1758.

[24] Cf. Suarez, *De Remotione Parochorum*, n. 9; Wernz-Vidal, *Ius Canonicum*, VI, n. 740.

In this latter case the delegate, acting in the name of the ordinary and in virtue of the mandate which he has received from him,[25] must give the exhortation in the presence of two acceptable witnesses or a notary. It seems, in this latter case, that there is no requirement that the notary be selected from the notaries of the diocesan curia, and hence he can be authorized by the ordinary for this one determined act.[26] As already stated,[27] both the notary and the witnesses must take the oath of secrecy, unless perchance they have taken it previously for this particular process.[28] It seems that the delegate should also take the oath in the presence of the notary or of the witnesses once it has been administered to them, since it does not appear that he is exempt in the same manner as the ordinary, who enjoys this privilege simply in his capacity of ordinary.

Whether this admonition be given personally or through a delegate, certain formalities must be followed of a necessity, for the tenor of the document and the fact of its communication must be recorded in the acts and preserved in the diocesan archives, after having been consigned to writing and signed by at least the ordinary or his delegate, and also the notary or the witnesses according as he or they were present.[29] Augustine[30] and Cocchi[31] hold that the pastor's signature is necessary, while Beste[32] maintains that his signature would strengthen the tenor of the document, whereas others[33] demand merely the signature of those who took an active part in the process.

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[25] Cf. Coronata, *Institutiones Iuris Canonici,* III, n. 1575.

[26] Cf. Coronata, *op. cit.,* n. 1575, nota 2; Wernz-Vidal, *Ius Canonicum,* VI, n. 740.

[27] Cf. *supra,* p. 131.

[28] Canon 2144, § 1.

[29] Cf. canons 2142 and 2143 § 1.

[30] *A Commentary on Canon Law,* VII, 405.

[31] *Commentarium in Codicem Iuris Canonici,* VII, n. 370.

[32] *Introductio in Codicem,* p. 854.

[33] Wernz-Vidal, *Ius Canonicum,* VI, n. 740; Coronata, *Institutiones Iuris Canonici,* III, n. 1574; Suarez, *De Remotione Parochorum,* n. 10; Blat, *Commentarium Textus Codicis Iuris Canonici,* IV, n. 737; Fanfani, *De Iure Parochorum,* n. 144.

The admonition may also be communicated by means of registered mail with the demand for a return receipt,[34] or, although it be not explicitly provided for in this canon, by means of a messenger from the diocesan curia.[35] This seems to be implicitly included in the prescription of the law which provides for the transmission of the exhortation by registered mail,[36] and in fact appears to be the preferred method of communicating the admonition to a pastor, since the use of registered mail is looked upon as an extraordinary mode of procedure.[37]

If, however, the exhortation or invitation be made in writing and sent by means of either of these channels it is necessary that certain formalities be observed. The exhortation must be made in the presence of a notary or chancellor, or at least attested by him, and a certified copy is to be attached to the acts of the process.[38] If the exhortation is sent by registered mail, then the return receipt is likewise to be included in the acts of the process.[39] On the other hand, if it was delivered by an approved messenger, then the signed statement of the acceptance or of the rejection of the invitation is to be preserved among the acts, and in the event that it was received by some other responsible person, then a notation is to be made to that effect. The statement of the messenger is to bear a notation of both the date and the hour of the reception of the exhortation, as well as of the name of the messenger, and of the name of the pastor or the responsible person who accepted it. Needless to say, the name of the pastor or of his agent is to be affixed in the signature of the respective bearer of the name. In the event of a refusal to accept the admonition, the day and the hour, and also the name of the courier, are to be

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[34] Cf. canons 2143, § 1, and 1719.

[35] Cf. canon 1717. Cf. also Suarez, *De Remotione Parochorum*, n. 9; Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Noval, *De Processibus*, II, nn. 497 and 499.

[36] Suarez, *op. cit.*, n. 9.

[37] Cf. canon 1719.

[38] Cf. canons 2143, § 2, 2142 and 1716. Cf. also Coronata, *Institutiones Iuris Canonici*, III, n. 1575.

[39] Cf. canons 2143, § 2 and 2142; 1722, § 2. Cf. also Wernz-Vidal, *Ius Canonicum*, VI, n. 740.

recorded in a document, and this is to be preserved with the acts of the process.[40]

With regard to another method permitted in judicial trials in the serving of citations,[41] whereby a summons may be given either by publication in the public newspapers or by the attaching of the edict to the doors of the church, it must be affirmed that such means are excluded in this particular process. Canon 2143 does not mention this means at all, and no argument can be drawn from canon 20, since there is no similarity in this regard between an administrative process and a judicial trial. In the latter instance, since for the sake of justice the decision must be rendered by the promulgation of a judicial sentence, it is necessary to show publicly that the defendant was contumacious.[42] Moreover, the very nature of the proceedings which demand the utmost secrecy, and especially that of transfer, which in a paternal invitation requires some species of personal contact, seems quite definitely to preclude the use of this very extraordinary method of issuing the exhortation.[43]

Wernz (1842–1914)–Vidal (1867–1938)[44] and Coronata,[45] however, no allow this means for the communication of an admonition in the case of necessity, as for instance in the event that the serving of the admonition is not accepted by the pastor. Nevertheless, Coronata immediately adds that perhaps this necessity will never arise. It appears quite evident that such a necessity never could arise, for paragraph three of canon 2143 provides for the case wherein a pastor has prevented the exhortation from reaching him.[46] Hence, should a pastor refuse to accept the exhortation, which refusal may be certified either by the postal authorities or

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[40] Cf. canons 2143, § 2, 1721 and 1722, § 1.

[41] Cf. Canon 1720.

[42] Noval, *De Processibus*, II, n. 496.

[43] Suarez, *De Remotione Parochorum*, n. 9; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 160.

[44] *Ius Canonicum*, VI, n. 740, nota 2.

[45] *Institutiones Iuris Canonici*, III, n. 1575.

[46] In response to the question asked of the Pontifical Commission for the Authentic Interpretation of the Code, namely, whether a public invitation to resign, if issued as an edict or published in a newspaper after the manner of a summons referred to in canon 1720, was a sufficient notice to justify the pastor's removal from office when he has failed to appear and

by the messenger to whom was assigned the delivery of the exhortation, he is looked upon by the law as having received the invitation.[47]

The same may be affirmed of the pastor who, upon receipt of the exhortation, has destroyed it without reading it,[48] or who has refused to see the messenger or to appear before the ordinary or his delegate, or who has absented himself from his residence precisely that he may not be available to accept the invitation or notice that he is to appear before his superior. In each of these instances there is the element of a malicious fraud (*dolus*), since the pastor has calculatingly placed a positive hindrance to the reception of the exhortation, or has designedly done nothing towards removing the difficulties which are experienced by his superior in contacting him either personally or otherwise.[49]

In speaking of the pastor's absence from his residence, Coronata[50] maintains that he is to be considered as having received the invitation if he was absent unlawfully. Suarez[51] affirms more severely that, should the pastor have been away from his residence even with good reason, but without having informed the bishop to that effect as required by law,[52] he is to be looked upon as having received the exhortation. Furthermore, according to Suarez, even though the pastor may have asked a neighboring priest to substitute for him, and this priest has either forgotten or neglected to do so, the pastor is to be regarded as having been admonished. Noval, on the other hand, basing his opinion with apparently more correctness on the interpretation of the previous law,[53] maintains

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has further succeeded in concealing his whereabouts precisely for the sake of putting himself beyond the reach of the aforesaid notice, the reply was: Provision for the case is made in canon 2143, § 3. Cf. P.C.I., 24 nov. 1920—*AAS*, XII (1920), 577.

[47] Canon 2143, § 3.

[48] Coronata, *Institutiones Iuris Canonici*, III, n. 1575; Augustine, *A Commentary on Canon Law*, VII, 405–406.

[49] Cf. Noval, *De Processibus*, II, nn. 502–503.

[50] *Institutiones Iuris Canonici*, III, n. 1575.

[51] *De Remotione Parochorum*, n. 11.

[52] Cf. canon 465, § 4.

[53] Canon 6, 2°. Cf. c. 2, *ut lite pendente nihil innovetur*, II, 5, in Clem.; c. 3, *de electione et electi potestate*, I, 3, in Clem.; c. 1, *de renuntiatione*, I, 5, in Clem.; c. 1, *de foro competenti*, II, 2, in Clem.

that an element of malicious fraud must truly be present. This seems to be more in harmony with the spirit of the administrative processes and the desire of the Church to treat the pastor with equity as well as strict justice.[54]

In all these cases, as will be seen, the ordinary must make every effort to make certain that the non-reception of the communication is completely attributable to the culpability of the pastor, if the ordinary is rightly to consider the latter as having duly received the admonition.[55]

ARTICLE II. THE CANONICAL FORMALITIES TO BE OBSERVED IN THE INVITATION FOR TRANSFER

Of itself, canon 2162 states nothing regarding the nature of the invitation or of the formalities to be employed by the ordinary in extending it. However, from a consideration of the wording of canon 2166, "*. . . Ordinarius . . . paternas exhortationes iteret,*" it is implied that the invitation or exhortation is to be strictly paternal in nature. It is now asked whether the paternal nature in the invitation is to be referred strictly to the terminology of the invitation or whether it is also to be referred to the manner in which the invitation is to be administered. In other words, does the paternal nature which attaches to the invitation specifically exclude the use of the usual canonical formalities?[56]

Since it very definitely is to be referred to the phrasing of the exhortation, a few observations may be made relative to this matter. In considering the transfer of a particular pastor, the ordinary should have regard for the canonical stability possessed by the pastor, for the condition of the parish over which the pastor presently rules, for his health, for his temperament, and for other similar characteristics, and should likewise endeavor to use the persuasive measures which are best adapted to these conditions. Consequently he should be most prudent in the wording of the invitation in order to promote a feeling of good will between himself and the pastor to whom the transfer is being proposed.

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[54] Noval, *De Processibus*, II, n. 502.
[55] Noval, *De Processibus*, II, n. 503.
[56] Cf. canons 2142; 2143.

Authors, in general, feel that in most cases it will not be difficult to persuade a pastor, whether removable or irremovable, to accept a transfer, if the ordinary acts in a paternally charitable rather than in a strictly authoritative manner. They suggest that preferably the invitation be communicated orally, and if possible personally, rather than in writing, in order that the desired good will may thus be duly encouraged. They also propose that the ordinary take the pastor aside privately in suggesting the acceptance of a transfer, expound concrete reasons for the change, and appeal to him in a paternal but not imperious manner to accept the new parish out of his love of God and his solicitude for souls, which form the very motivation of his status as a pastor.[57]

It is also suggested that an effort be made to convince the pastor that the transfer is meant as a promotion[58] the while it substantially serves the greater utility of the Church. Likewise it has been proposed that the heeding of the invitation could be made to imply even some title of honor or of jurisdiction, e.g., that of vicar forane or something similar, as a means of persuading the pastor to accede to the ordinary's wishes,[59] which implied honor or authority may prove indeed to be an effective motive in this regard.

On the whole, then, it is agreed that this invitation should partake of a paternal nature, and should therefore not evince a patently authoritative domination. However, must it be said that all formalities are therefore implicitly excluded in the extending and communicating of this exhortation? As already seen, not all authors are in agreement regarding this point. A consideration will now be given to their opinions.

Augustine,[60] while saying nothing about the legal effect of the first invitation, did comment on the second paternal exhortation extended to a removable pastor in a compulsory transfer[61] by stating that it is not of a canonical nature, but of a paternal character. Previous to this, however, in speaking of the paternal

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[57] Cf. Beste, *Introductio in Codicem*, p. 863; Suarez, *De Remotione Parochorum*, n. 113; Coronata, *Institutiones Iuris Canonici*, III, n. 1602.

[58] Wernz-Vidal, *Ius Canonicum*, VI, n. 768.

[59] Coronata, *op. cit., loc. cit.*

[60] *A Commentary on Canon Law*, VII, 448.

[61] Canon 2166.

exhortation given to a removable pastor to resign,[62] the same author stated that no special formality is required for this admonition, which is expressly styled paternal, i.e., not canonical, and yet at the same time added that, if it were given in writing, it should be sent by registered mail.[63] In this Augustine apparently contradicted himself, for he implicitly demanded a canonical formality for a written invitation, while at the same time he declared such a formality non-essential for an oral invitation. To this one may answer that, if a formality is required in the one instance, then certainly it seems obligatory also in the other, for the two instances simply reflect a difference of means employed to obtain the same effect.[64]

Sipos says nothing about either invitation in the process of transfer, but with reference to the procedure for the removal of pastors he holds that no canonical form is required inasmuch as the exhortation is paternal in character.[65]

Fanfani[66] ignores the question in the process of transfer, but does demand the observance of canon 2143, § 1, for the issuing of the paternal invitation given in the procedure for the removal of pastors.[67]

Vermeersch (1858–1936)–Creusen,[68] while offering no opinion with regard to transfer, yet in considering the exhortation for removal state simply that the authors require the true canonical form for this. However, they do not commit themselves with regard to its necessity.

Blat[69] makes no comment concerning the first invitation extended in the process of transfer, but requires that a record of the second be attached to the acts of the process, which seems implicitly to demand the presence of a notary.[70]

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[62] Canon 2158.
[63] *A Commentary on Canon Law*, VII, 442–443.
[64] Cf. canon 2143.
[65] *Enchiridion Iuris Canonici*, p. 219, n. 3.
[66] *De Iure Parochorum*, n. 149.
[67] Canon 2158.
[68] *Epitome Iuris Canonici*, III, n. 359.
[69] *Commentarium Textus Codicis Iuris Canonici*, IV, n. 766.
[70] Cf. canon 2142.

Cocchi[71] while speaking of the invitation for removal, simply requires that a document to that effect be preserved in the acts of the process.

Wernz-Vidal[72] say nothing on this point in connection with the exhortation for transfer, nor do they explicitly mention whether a canonical form is required in the paternal invitation mentioned in canon 2158. However, they do remark that, if these invitations have been given in writing, the ordinary has the obligation of lawfully and certainly establishing the fact that they have been received by the pastor in question. It seems that they imply as necessary the employment of some species of canonical form, since otherwise this canonical proof of the communication of the invitation could not be satisfactorily established.

Beste[73] asserts, as already seen, that the canonical form is to be invoked according to canon 2143, § 1, only in a compulsory transfer, i.e., when the pastor has refused to accept the proposal of the ordinary. Since he does not distinguish between an irremovable and a removable pastor, it seems that in relation to both species he insists on this requirement. However, in view of the fact that in the matter of an administrative transfer the ordinary has not competence without an apostolic indult over an irremovable pastor who is unwilling to accept the transfer, a second invitation could not be extended to such a pastor.[74]

Suarez[75] speaks of an oral and paternal invitation, and then asserts that for its desired juridical effect the norms of canon 2142 are to be followed. Hence he requires the presence of the notary, the consignment of the invitation to writing, and the signature of the active participants, and also the preservation of the document in the acts of the process. In commenting on the second invitation extended in the process of transfer,[76] he maintains that it should not be given privately, but in a legal manner, in view of the fact that he holds this invitation to be canonical rather than paternal, in

[71] *Commentarium in Codicem Iuris Canonici*, VII, n. 384.
[72] *Ius Canonicum*, VI, nn. 766 and 772.
[73] *Introductio in Codicem*, p. 863.
[74] Cf. canon 2163, § 1.
[75] *De Remotione Parochorum*, nn. 113; 122. Cf. also n. 97.
[76] Cf. canon 2166.

character. Regarding the paternal invitation mentioned in the process of removal in canon 2158 he affirms that, although the invitation is not of a canonical character, yet the presence of the notary is required.

Cappello,[77] in his formularies relating to the process of the transfer of pastors, implicitly requires some species of canonical form in the issuing of this paternal invitation.

Finally, Noval,[78] with what appears to be the more correct doctrine, demands that the norms of canon 2143 be observed in the initial invitation for transfer as well as for all other paternal exhortations of the administrative processes. His reasoning is based on the canonical effect which is desired, namely, that certain and definite proof be had of the fact of the communication of the invitation to accept a transfer for the good of souls, which indeed is the very reason for the formalities demanded by law for a true canonical admonition.[79] It is affirmed that Noval's doctrine seems to furnish the more tenable opinion for the following reasons. Of all the authors mentioned, only one[80] denies absolutely that a paternal exhortation requires the employment of a canonical form of one kind or another. All the others admit either the employment of a notary, the use of registered mail with the demand for a return receipt, or the strict observance of the formalities for a canonical admonition, in the communicating of the first or the second paternal invitation.[81] Furthermore, among the authors mentioned, those who deny the need of a canonical form do so simply in view of the fact that the initial invitation is to be given in a paternal manner. However, all later paternal invitations likewise imply that the superior use a friendly approach, and yet these commentators demand the use of a canonical form for the communicating of these exhortations. Their reasoning appears to be wholly inconsistent, for it can be asked: why should they make a distinction with regard to the paternal invitation in the different phases of the same process, or in slightly dissimilar processes? It is only logical that,

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[77] *Praxis Processualis*, n. 213.
[78] *De Processibus*, II, nn. 610 and 601.
[79] Cf. canon 2143, § 3.
[80] Sipos, *Enchiridion Iuris Canonici*, p. 219, n. 3.
[81] Cf. *supra*, pp. 159–162.

if the formalities are demanded in one instance, they are required in all, and by the very force of analogy they should therefore be employed in all like instances.[82] Moreover, in the lack of explicitly enacted special norms relative to the process of transfer the general norms established for the administrative processes as a whole seem applicable.[83]

In view of the consequences which may follow from the non-observance of a legal form in the tendering of an invitation to a transfer, one can also argue the question from the standpoint of expediency. When a pastor, irremovable or removable, receives a paternal invitation to accept a transfer to another parish, he may willingly acquiesce in the request or refuse to make the change.[84] If he accedes to the wishes of his ordinary, he must manifest his willingness, not because he wishes to incur the favor of his superior, nor because he feels that, regardless of the type of parish offered him, he is obliged to accept by his promise of obedience,[85] but because the good of souls and the utility of the Church warrant the transfer. Hence there must be some record of the reasons why this transfer was proposed at the instance of the ordinary, and of the qualities of the parish to which the transfer is being made.

These requirements are set in view of the fact that, although the pastor may immediately have accepted the transfer, he may later, if he becomes dissatisfied with it, make an effort to regain incumbency in the parish from which he was transferred. Thus, such a pastor could claim that he accepted the change through duress of grave fear prompted by unjust threats on the part of the ordinary, or he could allege that he was deceived with regard to the condition of the new parish and the reasons given for his acceptance of the same. In such an event his claim or allegation could not readily be disproved, for there would be only the ordinary's word as against his. But, since he has a right in law or

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[82] Cf. canons 18; 2166 and 2158.

[83] Cf. canon 20. Cf. also Coronata, *Institutiones Iuris Canonici*, III, n. 1602, nota 2.

[84] Cf. canons 2162; 2163.

[85] Cf. Wernz-Vidal, *Ius Canonicum*, VI, n. 770.

equity to the parish which he possessed,[86] he could demand that this right be respected.

Although the right to a rescissory action in a judicial trial is the ordinary remedy in law in such a case,[87] in this instance the aggrieved pastor could place the matter in the hands of the Holy See by having recourse against the decree of transfer which has been issued by the ordinary.[88] In such an event, had the initial invitation been given in the manner of a canonical admonition, it would be easy to prove immediately, without awaiting recourse from the Holy See, that the transfer was accomplished according to law and without threats or deceit on the part of the ordinary.

On the other hand, should an irremovable pastor be unwilling to accept a transfer, the feasibility of employing the formalities of a true canonical exhortation becomes quite evident. In this instance, it would be necessary for him to obtain special faculties from the Holy See to render him competent for that act. Consequently, in applying for the indult he must acquaint the Holy See with the facts of the case, namely that he has proposed the transfer for the canonical reasons embraced in the generic concept of the *"bonum animarum,"*[89] that in suggesting the transfer he phrased it in a paternal manner by appealing rather than by demanding that the particular pastor accept the transfer for the love of God and of souls; and that the pastor, after the suggestion of transfer had been intimated to him, nevertheless refused to comply with the suggestion in spite of these reasons.

Again, if a transfer to a very notably inferior class of parish was proposed by the ordinary and then refused even by a removable pastor,[90] it is necessary for the superior to procure special faculties from the Holy See to accomplish this transfer if the pastor in question has given no cause to allow the ordinary to resort to the administrative process of removal.[91] In such an event the ordinary must send the record of the proposed transfer to the Holy

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[86] Canon 451, § 1.
[87] Canon 103, § 2.
[88] Canon 2146.
[89] Cf. Suarez, *De Remotione Parochorum*, n. 115.
[90] Canon 2163, § 2.
[91] Coronata, *Institutiones Iuris Canonici*, III, n. 1601.

See in seeking the necessary faculty. Hence, in either case wherein a special faculty must be sought, it appears quite clear that the employment of a canonical form, which in effect would be a legal one, would obviate many difficulties which might otherwise ensue.

Another element which is worthy of consideration relative to the problem of the canonical form in which the invitation to accept a transfer is to be intimated concerns the computation of the period of time allotted to the pastor for considering the acceptance of the proposed change. It seems that in a matter of such importance an appropriate interval of time should be given to the pastor for considering whether he is willing to acquiesce in the wishes of the ordinary. In virtue of the principle sanctioned in canon 20, with a view to supplying for the lack of an explicit prescript in connection with the process of transfer, nothing seems to militate against the substitution of the prescript of canon 2148, according to which there may be granted to an irremovable pastor a reasonable time in which to resign his parish. Although the decree *"Maxima cura,"* with reference to the question of removal, allowed a maximum of ten days,[92] the present law leaves it to the prudent judgment of the ordinary to determine this matter in individual cases.

In the matter of transfer it seems that ten days or even more could be granted to a pastor, in adaptation to existing circumstances, to accept or to reject the proposal of the ordinary. However, this time of option must not be unwarrantably prolonged, since any unnecessary retarding of the change could redound to the detriment of the souls for whose benefit the transfer was suggested.

The question is now raised relative to the starting-point from which the period of available time is to be computed if there exists no formal document to the effect that the invitation has been communicated to the pastor in question. This particular problem would exist in the event that the invitation was sent by mail or by messenger. If the invitation had in fact been sent by registered mail or by messenger, the available time afforded to a pastor to

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[92] S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910, canon 10, § 4—*AAS*, II (1910), 641; *Fontes*, n. 2074.

make his response could in its starting-point be determined from the signed receipt of the postal authorities or of the messenger, which indicates the fact that the invitation was delivered and also the day on which it was received by the pastor or some responsible person. Hence, it would be from this record, preserved in the acts, that the ordinary would compute the available time according to the general law which regulates the manner of computation.[93]

Again, the problem could also arise if the pastor, knowing that there was not kept any certified document of his conversation with the delegate of the ordinary when the latter proposed the transfer to him, should refrain from replying within the allotted period of time. It would certainly be difficult to prove, if the fact were challenged, that the exhortation was communicated on a particular date together with the provision of a specified period of time for a reply. The same would hold true if there were no authentic record of the tenor of the invitation administered in writing.

It is not necessary, at this point, to consider the canonical effects of the failure of the pastor to reply within the period of time specified by the exhortation relative to the transfer. Attention will be given to these effects in the next section of this treatise. It suffices for the present to say that the lack of definite proof or the absence of documentary evidence regarding the fact of the communication of the invitation, or of the tenor of the exhortation, or of the particular period of time specified for a response, would make it possible for a contumacious pastor to take advantage of the benefits of law instead of being punished for his disrespect to ecclesiastical authority. This will become more evident in the detailed treatment if the canonical effect of the invitation which suggests the accepting of the transfer.

From the foregoing consideration it appears evident that a true canonical invitation must be employed if there are to be obviated the possibilities which may arise in contravention of the justice which should be accorded both to the ordinary and to the pastor. Hence it may be affirmed that the invitation is paternal as regards

[93] Canon 34, § 3, 3°: "Si terminus *a quo* non coincidat cum initio diei, . . . primus dies ne computetur et tempus finiatur expleto ultimo die eiusdem numeri."

its terminology and phraseology as well as with respect to the recommendations based on the love of God and of souls. However, in view of the possible danger of a transgression of justice, which danger can so readily derive from the possible consequences which may arise from the lack of an authentic record of the invitation, the intimating of this invitation must be legal in effect. Hence Noval's opinion,[94] in which it is maintained that the form of a true canonical admonition[95] is to be employed, appears to be both the correct and also the most practical one. In fact, this should be considered as the opinion not merely of Noval, since practically all the authors cited above,[96] if they were fully consistent, would be forced to subscribe to the same doctrine. However, there is no question of validity with regard to this matter, since it is to be remembered that the canonical form of admonition is required simply for the sake of facilitating proof regarding the existence of a fact. Only when the norms of the law[97] have been duly observed will it be possible to establish proper proof of this fact in the event that any of the aforementioned situations has arisen, or also in the case of recourse.

The manner of procedure for communicating the invitation to accept the transfer depends for its specification upon the prudent judgment of the ordinary. Practically all the authors, however, are of the opinion that, whenever possible, the invitation should be given orally, since they feel that the connoted personal interest would more likely help to accomplish the desired effect, namely the acceptance of the proposed transfer. They further suggest, as already noted, that the invitation be given privately by the ordinary.

But if it be given privately, the question arises: how does the invitation establish a legal effect if it is not issued according to the formalities required for a canonical exhortation? After having summoned the pastor to appear before him or his delegate at a particular hour on a definite day the ordinary has two alterna-

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[94] *De Processibus,* II, nn. 610 and 601.
[95] Cf. canons 2142; 2143.
[96] Cf. *supra,* pp. 159–162.
[97] Cf. canon 2143.

tives from which to choose. After having talked the matter over with the pastor and upon endeavoring to win his good will, and even when the good will of the pastor has been obtained, the ordinary should call in the chancellor, or another notary, or two witnesses, or, in the event that it is the delegate who extends the exhortation, then he should summon the notary or two witnesses, to whom the oath of secrecy has been administered,[98] and repeat the tenor of this private conversation in order to have the proper record. This should then be reduced to writing, and signed by the ordinary and the notary, or the two witnesses. The document should contain mention of the reasons for the suggested transfer, of the period of time designated for a reply, of the name of the pastor and of both his present parish and the prospective parish with reference to which the transfer has been proposed, of the place and the date of the discussion, and finally the necessary signatures.[99]

Cappello,[100] in giving his model formulas, allows the option of two memoranda regarding the fact of the communication of the oral invitation to accept the transfer. One, signed only by the bishop, mentions the place and date, the name of the pastor, his present parish and the parish of transfer, and the generic reason of the good of souls. After giving this the author asserts that mention of this matter is to be made in the acts, which indeed seems to imply that some kind of canonical formality is required for this exhortation. The other memorandum is the one signed by the chancellor, attesting the fact of the proposed transfer. It includes mention of the same details that received attention in the earlier memorandum, but it furthermore records that upon the pastor's request a ten day period of time was allotted to him for his consideration of the proposal.

The other alternative within the option of the ordinary allows him to follow up the private discussion with a written exhortation for the transfer. If this method of procedure is adhered to, then the

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[98] Cf. canon 2145.

[99] Cf. Suarez, *De Remotione Parochorum*, formula 7, pp. 310–311. This author implicity demands the signature of the pastor, but that does not seem to be strictly demanded by canon 2142.

[100] *Praxis Processualis*, n. 213.

document should contain the same details as were mentioned for the oral invitation. This document should be signed by the ordinary and his notary or the chancellor, and a copy of it should be preserved in the acts of the process. Mention should also be made by the notary or the chancelor that the document has been sent out on a certain day, and it should likewise be recorded whether the document was transmitted by means of registered mail with the request for a return receipt, or through the services of a duly appointed messenger.[101]

SECTION III

The Legal Effects of the Invitation for Transfer

The communication and reception of the canonical invitation which proposes the acceptance of a transfer to another parish leaves open a twofold choice on the part of the pastor in question. He may either ask for an extension of time in which to consider the proposition of his lawful superior,[102] or he is required to inform the ordinary whether or not he freely and willingly accepts the new parish. However, his own reaction may be to elect to take no action at all. Although this possibility with regard to a pastor who has enjoyed a fruitful ministry is not treated in the Code, attention will be given to this rare eventuality along with a consideration of the legitimate reactions of the pastor.

ARTICLE I. THE ACCEPTANCE BY THE IRREMOVABLE OR REMOVABLE PASTOR OF THE PROPOSED TRANSFER

The pastor to whom a transfer has been proposed may either immediately, or after mature consideration within the period of time designated by the invitation or allotted to him by request, inform the ordinary that he accepts the new parish which has been offered to him. If he does so the question arises: what mode of procedure, if any, is required by the law?

The Code, whether in its norms for transfer in general,[103] or

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[101] Cf. Cappello, *Praxis Processualis*, n. 213

[102] Coronata, *Institutiones Iuris Canonici*, III, n. 1603.

[103] Canons 193–195.

whether in those which are established for the transfer of pastors,[104] does not expressly demand the observance of any legal formalities for the manifestation of acceptance on the part of the pastor to whom a transfer has been proposed. In view of this many authors, without excepting pastors from their general statement, maintain that no form is required in connection with a voluntary transfer of clerics from one ecclesiastical office to another.[105]

Augustine,[106] in treating specifically of pastors, denied the necessity of the adherence to any formalities other than the pastor's informing of the ordinary that he accepted the transfer, so that, as Augustine asserted, the ordinary may declare the parish vacant, not however, by resignation.

Coronata[107] maintains that with reference to the vacated office as effected through a voluntary transfer those things are to be observed which are demanded for a resignation. However, he immediately limits these requirements to the necessary presence of a just cause and the acceptance by a competent superior both of which, he feels are implicit in the act of the superior decreeing or allowing the transfer. In treating expressly of the transfer of pastors, the same author[108] affirms that the pastor should declare his acceptance in writing and in legal form so that, as he maintains, the ordinary may declare the parish vacant by reason of transfer, and not by reason of resignation. However, other than reiterating the words of Augustine,[109] he does not explain the reason of the requirement of a written acceptance, nor does he describe the nature of the legal form to be employed.

In view of the legal aspects of the voluntary acceptance of a proposed transfer it is asked: what it to be said of the opinion just cited? Do they reveal a clear notion of the intrinsic nature of the

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[104] Canons 2162–2167.

[105] Chelodi, *Ius de Personis*, n. 150; Beste, *Introductio in Codicem*, p. 212; Cocchi, *Commentarium in Codicem Iuris Canonici*, II, n. 111; Sipos, *Enchiridion Iuris Canonici*, p. 166; Ayrinhac, *The Constitution of the Church in the New Code of Canon Law*, p. 353.

[106] *A Commentary on Canon Law*, VII, 447.

[107] *Institutiones Iuris Canonici*, I, n. 273.

[108] *Op. cit.*, III, n. 1602.

[109] Cf. *supra*, p. 170.

process of transfer? It must be asserted at the outset that the process of transfer, since it is but one of the five distinct modes by which an ecclesiastical office may be lost,[110] is entirely differentiated from that of resignation. Hence, being a distinct process, there is required simply the observance of those norms which are proper to it and which are established for it by law unless some other formal element enters into the process. Is there a formal renunciation of a parish on the part of the pastor who voluntarily accepts the proposed transfer? It appears that there is not, for by his acceptance the pastor merely releases the ordinary from respecting the right in law which the pastor has in relation to his parish. When the pastor has done so the ordinary then becomes competent, without the aid of special faculties from the Holy See,[111] or without the necessity of adhering to other special norms of law,[112] by means of one and the same act to remove the pastor from the parish which he possesses and to appoint him to another. These are the essential elements of a transfer.[113] Consequently through his voluntary acceptance the pastor tacticly renounces, not his parish, but the right of stability which he has by virtue of his office.[114]

With regard to the opinion of Coronata[115] it may be affirmed that there is no reason for demanding the observance of any of the norms relative to a formal resignation. After all, it is presumed that a just cause is present, since the acknowledged existence of it is demanded for a lawful voluntary transfer.[116] Concerning the requirement of the acceptance of the resignation by a competent superior, which acceptance Coronata holds to be at least implicitly contained in the decree of transfer, it appears that he is a bit confused in regard to the nature of the transfer itself. This is further evident from his statement that the vacancy of the first parish must be decreed by the ordinary.[117]

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[110] Canon 183.
[111] Cf. canon 2163, § 1.
[112] Cf. canons 2164–2167.
[113] Cf. canon 193, § 1. Cf. also *supra*, p. 98.
[114] Cf. canons 454; 471, § 3; 1438.
[115] *Institutiones Iuris Canonici*, I, 273. Cf. *supra*, p. 170.
[116] Canon 193, § 2.
[117] *Institutiones Iuris Canonici*, III, n. 1602.

As a matter of fact, in the decree of transfer the ordinary merely implicitly acknowledges, in view of the surrender by the pastor of his right of stability in office, that he is competent to effect the transfer, and consequently manifests his competency by the removal of the pastor from one parochial benefice and by the bestowal of another parochial benefice upon him. By that act the ordinary gives the pastor the right to take canonical possession of the new parish, either by way of formal installation or by means of a dispensation from the observance of the due solemnities,[118] and consequently, unless a contrary indication be given by the ordinary, the first parish *ipso facto* becomes vacant through the taking of canonical possession.[119] In view of this it cannot be asserted that the Code requires the observance of the norms of law established for a valid and licit resignation.

What, then, is the nature of the legal form mentioned by Coronata,[120] and what basis in law has he for the assertion that a legal form is necessary and that it be in writing? It seems that he requires the adherence to the prescripts of law that deal with resignation, even though he appears to deny that this obligation exists in the cases wherein the ordinary decrees the vacancy of the parish in consequence of a transfer rather than as resulting from a completed act of resignation. If it be so that he nevertheless demands the observance of the norms of law which relate and pertain to the process of resignation, then it appears that he must base his opinion on an interpretation that draws on the principle of analogy, the employment of which principle was occasioned by his failure to distinguish between the formal elements of the two distinct processes of resignation and transfer. His misconception in this regard becomes clearly manifest when in his distinction between compulsory and voluntary transfer he maintains that the latter species of transfer is effected through resignation.[121] In view, then, of the difference that exists between these two processes, it must be affirmed that inasmuch as the act of resigning from office is not

[118] Cf. canon 1444.
[119] Cf. canon 194, § 1.
[120] *Institutiones Iuris Canonici*, III, n. 1602.
[121] Cf. *op. cit.*, I, n. 270.

implied in the pastor's voluntary acceptance of the transfer, there is likewise not required for the latter the particular kind of formality that is postulated for the act of resigning from office.

On the other hand, it seems quite evident that some kind of formality is required if consideration is once again given to canon 2142. This preliminary canon sets up a ruling that applies to the process of transfer precisely because its ruling applies to all administrative processes of the third part of the fourth book of the Code. It appears, then, that the pastor's voluntary acceptance of the transfer, if that acceptance be indicated orally, should be made in the presence of the notary or the chancellor, be then consigned to writing, be thereupon signed by both the pastor and the notary, and be ultimately incorporated in the acts of the process. Expediency also seems to postulate the drawing up of an authentic document which later can lend itself in confirmation of the fact that the pastor willingly accepted the parish proposed to him by the ordinary, since the same kind of consequences that can ensue in the case wherein no canonical form was employed for the invitation could well obtain in the absence of any definite documentary proof of the free and willing submission of the will of the pastor to that of his ordinary in the pastor's voluntary acceptance of the transfer proposed by the ordinary.[122]

In the event that the reply of the pastor is made in writing, a practical suggestion may be made with regard to the manner of sending this response. A carbon or photostatic copy of the reply could best be sent by registered mail with the demand for a return receipt. This precaution is advised in view of the fact that the reply may, for one reason or another, never reach the ordinary. If this happened, but if the pastor nevertheless had a receipt from the postal authorities attesting his letter's delivery to some responsible person, he would have definite proof in his favor to show that he had replied within the specified period of time allotted to him in the invitation for transfer.[123]

Hence, it seems that those authors who have commented on transfer in general, but in so doing failed in their observation to take

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[122] Cf. *supra*, pp. 163–164.

[123] Cf. Suarez, *De Remotione Parochorum*, n. 50, E.

note of the special regulations for the process of the transfer of pastors, have actually overlooked the preliminary norms for all administrative processes,[124] and consequently are incorrect in their opinion that no legal formalities are required by law for the acceptance of a new pastoral office in a voluntary transfer. Furthermore, the very reason for the observance of a canonical formality, namely the obviation of practical difficulties and uncertainties which may otherwise follow, seems definitely to preclude the holding of any opinion than that which demands the necessity of a legal form.

It is evident that, for lawfulness, the decree of transfer issued by the ordinary must be consigned to writing, since in virtue of this decree the pastor receives a new appointment.[125] Although the wording of canon 159—*"Cuiuslibet officii provisio scripto consignetur"*—does not with any nullifying sanction prevent the ordinary from decreeing the transfer verbally,[126] nevertheless it is evident that the decree must be consigned to writing eventually.[127] If this be done in the presence of the notary and the pastor, such a procedure seems to suffice for licitness, for thus an authentic document verifies the fact that the transfer was lawfully made, and that the pastor has a *ius ad rem* to the new parish, should his right to it ever be challenged. Usually, however, the oral decree is confirmed by means of a letter which is sent immediately to the pastor. It is evident that such a letter should take the form of a formal decree of transfer, and as is required of a letter of appointment, it should be clear and absolute in its statement.[128]

The ordinary, after acknowledging the pastor's acceptance of the new parish, should also include in the decree of transfer the following: a designation of the pastor to be transferred; a mention of the parish from which and the parish to which the transfer is to be effected; an indication of at least the generic reason of the good of souls, and preferably of the specific reasons for the transfer; the

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[124] Canons 2142–2146.

[125] Cf. *supra*, p. 98. Cf. also canon 159, and Coronata, *Institutiones Iuris Canonici*, I, n. 273.

[126] Cocchi, *Commentarium in Codicem Iuris Canonici*, II, n. 65, #4; Coronata, *op. cit.*, I, n. 214.

[127] Cf. canon 159 in connection with canon 2142.

[128] Cf. Coronata, *Institutiones Iuris Canonici*, I, n. 214.

statement of the pastor's exemption from the usual form of examination; the specification of the time within which the pastor is to take formal possession of his parish; and finally the determination of the manner in which possession of the parish is to be gained, whether in view of a corporal installation, or in view of a granted dispensation. Furthermore, if the ordinary has decided to indicate a specific time then the transfer becomes effective, and when consequently the first parish is to be considered *ipso facto* vacant, that fact should be specifically indicated. Otherwise the first parish will become vacant only when the pastor has taken possession of the new parish to which he was transferred.[129] This decree of transfer should be signed by the ordinary and the chancellor, dated, and sealed with the seal of the curia.[130]

Such a complete decree will leave no doubt in the pastor's mind as to its full juridical effects, and it will serve to quiet any scruples that he might otherwise have regarding his rights and duties in either parish.

After receiving this decree the pastor must personally[131] make his profession of faith, as is required by law, before the ordinary or his delegate.[132] This profession is made according to the form as printed immediately prior to the canons in the Code of Canon Law.[133] To this profession of faith is to be added the Oath against Modernism,[134] which the Holy Office[135] declared as remaining in force until it would be abrogated by the Holy See. The profession of faith is strictly required by law, since the Code explicitly condemns all customs contrary to this prescription of law.[136] The law of the Code further directs the ordinary to warn those who neglect to make their profession of faith, and to punish them even with deprivation of their office if they do not make

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[129] Canon 194, § 1.

[130] Cf. Cappello, *Praxis Processualis*, n. 214.

[131] Canon 1407.

[132] Canons 461 and 1443, § 1; 1406, § 1, 7°.

[133] The Gasparri edition of the Code is here contemplated.

[134] Pius X, motu propr. *"Sacrorum Antistitum,"* 1 sept. 1910—*AAS*, II (1910), 669; *Fontes*, n. 689.

[135] Decr. 22 mart. 1918—*AAS*, X (1918), 136.

[136] Canon 1408.

their profession of faith within the specified period of time granted to them.[137]

ARTICLE II: THE PASTOR'S REFUSAL TO REPLY TO THE INVITATION FOR A PROPOSED TRANSFER

Without requesting an extension of time to consider the proposed transfer the pastor may elect to abstain from replying to the exhortation of the ordinary. The question presents itself as to how the ordinary should proceed in this instance. Shall he consider the pastor to be contumacious and correspondingly proceed to decree the transfer according to the norms of law, or shall he repeat the paternal invitation? Evidently a distinction must be made between the irremovable and the removable pastor when one considers this question, in view namely of the difference in stability with regard to these two species of pastors. Attention will first be given to the removable pastor.

Coronata[138] asserts that the ordinary should repeat the paternal exhortation according to the norms required for the canonical invitation,[139] and by precept compel the pastor to reply. He adds immediately, however, that the pastor has the right to request an extension of time for considering the proposition.

Wernz-Vidal,[140] on the other hand, arguing from the analogous norms concerning contumacy in the process of removal,[141] hold that if the pastor gives no reply, or even persists in impeding the act of the ordinary through what may be called passive resistance, the latter may proceed to decree the transfer after having heard the parish priest consultors. They mitigate their opinion, however, by affirming that prudence requires the repetition of the paternal invitation as demanded by canon 2166, for as they assert, the pastor may have been legitimately impeded from replying to the initial exhortation. They further affirm that, before the pastor can be declared contumacious in accordance with the norms pre-

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[137] Canon 2403.
[138] *Institutiones Iuris Canonici*, III, n. 1605.
[139] Cf. canons 2142; 2143.
[140] *Ius Canonicum*, VI, n. 772.
[141] Canon 2149, § 1.

scribed in canon 2149, § 1, concerning the removal of irremovable pastors, the ordinary must ascertain whether the written document of invitation actually reached the pastor and, if so, whether the pastor had a reasonable excuse for not replying within the period of time allotted to him for a response. Further, they continue, it must be settled whether or not a time-limit had been prescribed in the paternal invitation.

They could well have added that in the event the invitation was given orally by the ordinary or by his delegate the authentic document exhibiting the content of the exhortation given in this manner must likewise be investigated for the sake of ascertaining whether or not a time-limit had been designated. Moreover, they could likewise have mentioned that the authority of the delegate who communicated the invitation must also be definitely established.

Before giving an opinion with regard to this matter the writer purposes to consider the manner of conducting the investigation if there is to be certainty that the pastor must be considered contumacious. Usually the ordinary can easily assure himself of the fact that the exhortation for the transfer was duly administered, and in most cases that it was received by the pastor. However, in the event that it was impossible to contact the pastor because of his absence from his residence, the ordinary cannot always be sure that the pastor maliciously absented himself for the sake of preventing the communication from reaching him. Also the ordinary may not be certain whether the pastor has sent a reply which for some reason or another was not received by the ordinary, or whether the pastor was legitimately impeded from making a reply in view of illness or any other lawful reason.[142]

In the event that the invitation was given orally, it is evident that an examination of the documents of the case should reveal whether the pastor was obliged to respond within a specified time. The acts should also reveal the specific date on which the communication to the pastor was made, and by whom it was administered. It is presumed, of course, that the law was observed as regards the proper recording, signing and preserving of the acts in the archives

[142] Cf. Suarez, *De Remotione Parochorum*, nn. 50, B; 50, F; 49.

by the notary.[143] Similarly, if the invitation was given in writing and sent either by means of registered mail or through a messenger, the copy of this document and the signed receipt of the postal authorities or of the messenger should indicate the tenor of the invitation, the fact of its communication, and the time of its reception by the pastor. In both cases it should also be ascertainable whether a request by the pastor for an extension of time had been granted by the ordinary or by his delegate.[144]

It has been affirmed that it is much more difficult to be certain whether the pastor has maliciously evaded the reception of the exhortation, or whether he has been legitimately impeded from making a reply, or whether perhaps his reply has miscarried. A few effective means of acquiring certain knowledge about these situations may be suggested. Evidently, it may be helpful to question the pastor himself, who may perhaps be able to prove that he had a reasonable excuse for not being at home to receive the invitation, or that he had actually sent a reply, or that circumstances beyond his control had prevented him from making a response. These excuses or allegations may in turn be investigated by means of discreet inquiries among his trustworthy and reliable subjects,[145] or perhaps through the employment of another priest, delegated by the ordinary for the sake of ascertaining the truth of the alleged reasons for the pastor's silence.[146] If after making these investigations the ordinary is not morally certain of the pastor's bad faith, he cannot deprive the pastor of the concessions accorded him by law in the process of transfer.[147] Consequently it seems that in this instance the ordinary is obliged to issue a new invitation, as suggested by Coronata,[148] or grant an extension of time for the pastor to make his reply.[149]

On the other hand, should the ordinary have moral certitude

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[143] Cf. canons 2142; 2143. Cf. *supra*, pp. 123 ff.

[144] Cf. Noval, *De Processibus*, II, nn. 571–572; Connor, *The Administrative Removal of Pastors*, pp. 102–103.

[145] Noval, *De Processibus*, II, n. 572.

[146] Coronata, *Institutiones Iuris Canonici*, III, n. 1586.

[147] Cf. canons 2164–2166.

[148] *Op. cit.*, III, n. 1605.

[149] Cf. canons 20 and 2149, § 1

that the pastor has proved himself to be contumacious, it appears that the ordinary has the right to proceed as though the pastor had shown himself unwilling to accept the transfer. Consequently he should hear the parish priest consultors as to the reasonableness of the causes for the proposed transfer, and also issue the second invitation mentioned in canon 2166.[150] It seems that this second invitation is demanded, not only by prudence, but also by law, since the Code has not reiterated the prescriptions of canon 2149, § 1, as it did in the process for the removal of removable pastors.[151] Had the legislator desired to punish the pastor for his non-compliance with the suggestion of his transfer by denying him these further advantages of law,[152] it appears that he would have incorporated a specific mention of canon 2149, § 1, in the process of transfer.

Furthermore, it does not follow necessarily that the pastor's initial non-compliance with the exhortation for transfer actually proves him to be pertinaciously disobedient to a precept of his ordinary, and that therefore he should be punished according to the norms of canon 2331, § 1. To be obstinately disobedient, according to the more common opinion,[153] a person must have received an admonition either as contained in the law or at least as implicitly included in the precept, to the effect that he would be punished for his disobedience.[154] This has been taken care of in the process of removal, since canon 2149, § 1, expressly legislates for the contumacious pastor. However, that this law in its penal sanction[155] cannot be applied to the presently considered case is evident from the fact that even in similar instances a penalty

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[150] Cf. canons 20 and 1844.

[151] Cf. canon 2159.

[152] Canons 2165; 2166.

[153] Coronata, *Institutiones Iuris Canonici*, IV (1935), n. 1928; Augustine, *A Commentary on Canon Law*, VIII (3. ed., 1931), 326; Chelodi, *Ius Poenale* (4. ed., recognita et aucta a Vigilio Dalphiaz, Tridenti: Ardesi, 1935), n. 69; Ayrinhac-Lydon, *Penal Legislation in the New Code of Canon Law* (revised edition, New York; Benziger, 1938), p. 244; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 531.

[154] Cf. S.C. Consist., decr. *"Maxima cura,"* 20 aug. 1910, canon 1, 9°—*AAS* (1910), 638; *Fontes*, n. 2074.

[155] Cf. canon 2149, § 1, with canon 2154.

cannot be extended from one case to another unless the law expressly makes provision to that effect.[156]

The only punishment, then, would seem to be a denial of the right of the pastor to present his reasons after the first exhortation, and for this no admonition is required. Hence, the pastor is not punished very severely if upon receding from his earlier circumvention of the ordinary's invitation for transfer he be later deprived of the opportunity of furnishing his reasons against the proposal of transfer before the ordinary will start his consultation with the parish priest consultors. Further, since the pastor's non-responsiveness may be regarded as a manifestation of his unwillingness to accept the transfer, for otherwise it is presumed that he would have replied, it appears that the ordinary may proceed with the case as though the pastor had expressly manifested his refusal to accept the change. Hence the opinion of Wernz-Vidal[157] seems more tenable, not for the reasons alleged, namely of prudence and of the necessity of ascertaining the fact of persistent non-compliance, since this has already been established, but because it appears to be fully in accord with the spirit of the law in its attitude towards contumacious persons and stubbornly non-conforming subjects.[158] Further, even in this instance the pastor is not without redress, for nothing in the law seems to militate against the possible manifestation of his reasons for refusal even after the second invitation.[159]

Again, it cannot be argued by those who favor the opinion of Coronata,[160] which demands the issuing of a new invitation, that inasmuch as the opinion of the present writer is based on parallel canons he should likewise be ready to concede by way of analogy with relation to canon 1843, § 2, that the second invitation is demanded. This is not a compelling argument, for with reference to the instance mentioned in canon 1843, § 2, the second citation is allowed solely for the sake of ascertaining whether the person in question is actually contumacious. However, in the case of the

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[156] Canon 2219, § 3.
[157] *Ius Canonicum*, VI, n. 772.
[158] Cf. canon 1844, § 1.
[159] Noval, *De Processibus*, II, n. 617.
[160] *Institutiones Iuris Canonici*, III, n. 1605.

pastor his attitude stands fully ascertained. Hence it can be maintained that it is the manifestation of good will on the part of the ordinary that alone underlies the issuing by the ordinary of another paternal invitation.

With regard to the irremovable pastor it suffices to say that, should he elect to remain silent after having received the paternal invitation, it appears that of himself the ordinary can do nothing further. It is presumed that such a pastor is unwilling to accept the transfer after it has been proved that of set purpose he has remained silent. In such a case, should the ordinary decide to seek special faculties from the Holy See to effect the transfer, he must acquaint the Holy See with the fact of the communication of the exhortation, with the reasons for the proposed transfer, and with the fact of the persistent non-compliance on the part of the pastor.[161]

ARTICLE III. THE REJECTION BY THE IRREMOVABLE PASTOR OF THE PROPOSED TRANSFER

Canon 2163, § 1. *Parochum inamoviblem Ordinarius invitum transferre nequit, nisi speciales facultates a Sede Apostolica obtinuerit.*

Canon 2162 affirms the right of the ordinary, in virtue of his office, to propose a transfer to an irremovable pastor. On the assumption that the pastor has willingly acceded to the change, the ordinary is implicitly conceded the right and power to transfer him to the parish which he is willing to accept. On the contrary, canon 2163, § 1, which deals with the case of the irremovable pastor who is unwilling to accept a change of parishes, establishes a presumption of law in this regard. It denies the right of the ordinary to demand the compulsory transfer of such an irremovable pastor unless the ordinary has obtained special faculties from the Holy See for this, whether for one or many cases, or for a limited or undetermined time.[162]

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[161] Cf. canon 2163, § 1. Cf. Suarez, *De Remotione Parochorum*, n. 115.

[162] Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 763; Suarez, *De Remotione Parochorum*, n. 115.

These faculties are granted through the Sacred Congregation of the Council exclusively. Vicars and prefects apostolic never have occasion to seek them from the Sacred Congregation for the Propagation of the Faith, for quasi-pastors are never irremovable.[163] Without these faculties the ordinary is never competent to effect the transfer of an irremovable pastor unless the latter has consented to the transfer as proposed by the ordinary.[164]

In the beginning, then, the entire matter of transfer is within the power of the ordinary, who may extend the invitation and by divers exhortations may endeavor to persuade the irremovable pastor to accept the change for the love of God and of souls.[165] Once, however, the irremovable pastor refuses such a proposed transfer, nothing more can be done without apostolic intervention,[166] since the power of the ordinary over an irremovable pastor in the matter of transfer for the good of the parish to which the assignment is to be made extends merely to the right of issuing the paternal invitation. Hence, neither is it within his power to demand that the pastor accept the transfer under the threat of deprivation, nor can he deprive the pastor of his parish, both of which within a legally set sphere are allowed with respect to the removable pastor.[167]

However, should the ordinary be convinced that the good of the parish proposed in the invitation for transfer calls for the appointment of a particular irremovable pastor, he may, if he has special faculties from the Holy See, proceed with the transfer according to the norms established in these faculties by the Sacred Congregation of the Council.[168] On the other hand, if he is not fortified with this indult his only alternative is to petition these faculties from the Holy See for this particular case, since it is only by obtaining these that he becomes competent to exercise his ordinary power of jurisdiction over an irremovable pastor in the matter of his transfer to another parish, for as long as the latter remains unwilling to accept the proposed transfer he likewise remains

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[163] Blat, *op. cit., loc. cit.;* Suarez, *op. cit., loc. cit.*

[164] Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 388.

[165] Cf. canon 2162.

[166] Cf. Coronata, *Institutiones Iuris Canonici,* III, n. 1601.

[167] Canon 2167.

[168] Suarez, *De Remotione Parochorum,* n. 115.

exempt from the ordinary's power to effect it in the pastor's own person.[169]

In applying for these faculties in a particular case the ordinary must transmit a documentary record of all the preliminary acts which have taken place, or in other words he must acquaint the Sacred Congregation of the Council with the tenor of the invitation and exhortations by which he endeavored to persuade the pastor to accept the transfer. It is evident that this record must include mention of the reasons why he proposed the transfer in the beginning, and why, in view of the pastor's refusal, he still feels that the transfer should be effected. The Holy See must also be assured of the fact that the invitation was received by the pastor and the proposal of his transfer was refused by him, or remained unanswered. This could be implicitly established by means of an authentic transcription of the letter or the original document in which the reasons for his refusal were manifested by the pastor, which manifestation is indeed always demanded by the Sacred Congregation.[170]

The reason for this latter requirement is evident, since the Holy See must be in a position to consider whether there is a true proportion between the reasons alleged by the ordinary in favor of the change and those alleged by the pastor against the proposed transfer. Consequently, in view of the importance of these data, they must be sent in their entirety to the Holy See in the very beginning, for otherwise the case will be unduly delayed in consequence of the Sacred Congregation's request for further data before it will consider the case.[171] Hence when the pastor manifests that he does not desire to accept the new parish, the ordinary must insist that he send his reasons in writing as demanded by law for a removable pastor,[172] in order that there may be no difficulty of any undue prolongation in definitely settling the matter.[173]

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[169] Cf. canon 2163, § 1. Cf. also Ryan, *Principles of Episcopal Jurisdiction*, the Catholic University of America Canon Law Studies, n. 120 (Washington, D. C.: The Catholic University of America Press, 1939), p. 92; Suarez, *De Remotione Parochorum*, n. 115.

[170] Cf. Suarez, *De Remotione Parochorum*, n. 115.

[171] Suarez, *op. cit., loc. cit.*

[172] Cf. canon 2144. Cf. also *infra*, p. 196.

[173] Cf. Suarez, *op. cit., loc. cit.*

After receiving the preliminary acts of the case the Sacred Congregation will consider the relative merits of the proposed transfer and render an equitable decision. It may refuse to grant the faculties to the ordinary, or it may render him competent to accomplish the transfer. In the latter event the faculties will provide for the manner in which the ordinary is to proceed with the process, and the latter is strictly obliged to adhere to the norms of procedure established in the indult.[174]

If, on the other hand, the reasons alleged by the irremovable pastor should convince the ordinary that he will no longer insist upon the transfer, it appears that he should inform the pastor to that effect, even though that be not specifically prescribed by law in the process of transfer as it is done in the process of removal.[175] Such information would relieve the pastor of any anxiety which might otherwise be occasioned by his uncertainty regarding a later possible transfer in virtue of faculties received from the Holy See. Were this anxiety to persist, it appears that it might ultimately affect the pastor's ministry, and indirectly redound to the detriment of the souls committed to his care.[176]

The reason for this restriction of the ordinary power of the ordinary is evident. As already seen the historical evolution of the parochial system[177] and the present law as well[178] manifest quite conclusively that the Church desires that the proper rectors of parishes enjoy a permanent incumbency in their parochial benefices. This subjective stability follows naturally from the nature of the parochial office or from the nature of a benefice, since by canonical possession the pastor or beneficiary obtains a strict right in law[179] which cannot be violated as long as he does nothing, culpably or inculpably, which renders his ministry ineffective or detrimental to the good of souls.[180]

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[174] Cf. Suarez, *op. cit., loc. cit.*

[175] Cf. canon 2152, § 2.

[176] Suarez, *op. cit.*, n. 122.

[177] Cf. *supra*, pp. 93–94.

[178] Cf. *supra*, pp. 95–97.

[179] Cf. canons 451; 1410; 1438.

[180] Noval, *De Processibus*, II, n. 611; Wernz-Vidal, *Ius Canonicum*, VI, n. 768; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 763.

Consequently, because of this strict right which the irremovable pastor acquires in his benefice, it cannot be said that when he objects to the proposed transfer he is not submissive to ecclesiastical authority, or in any way violates the canonical obedience which he has promised to his ordinary. Nor, indeed, should he be subjected to any rebuke because of his refusal.[181] However, since it appears that he is bound at any rate by the virtue of charity in view of the wording of canon 2162,[182] he should not refuse to accept the transfer unless he is fully convinced in his own mind that his reasons offered in the refusal are sufficiently important, in contradistinction to the reasons manifested by the ordinary with reference to the good of souls, to justify his action. However, whether or not the causes alleged are reasonable, he does not lose the strict right which he has in his parish, and the Holy See alone, through the plenitude of its power and because it is not bound by the common law, is constituted as the superior who enjoys the necessary power to disregard this right which has been granted by common law.[183]

The question now arises whether a transfer made by the local ordinary without the necessary faculties is invalid, or merely unlawful. Further, the legal redress which is granted to such a pastor as well as his reaction to this violation of his right must also be considered.

It is the opinion of this writer that an irremovable pastor who is unwilling to accept the transfer cannot validly be changed by the local ordinary in virtue of his ordinary power. This opinion is based on the restriction which the law has placed upon this ordinary power in very definitely exempting the unwilling irremovable pastor,[184] and on the reason for the law itself.

It is true that canon 2163, § 1, does not expressly state that the ordinary is forbidden under pain of invalidity to transfer such a pastor, since it simply uses the word *"nequit."* As already noted in a previous chapter, such a word is not in itself equivalent to a

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[181] Wernz-Vidal, *Ius Canonicum,* VI, n. 770.

[182] Noval, *De Processibus,* II, n. 610.

[183] Coronata, *Institutiones Iuris Canonici,* III, n. 1601; Suarez, *De Remotione Parochorum,* n. 115.

[184] Canon 2163, § 1.

disqualifying term.[185] However, the canon does state that without the apostolic faculties an ordinary cannot transfer an irremovable pastor who is unwilling. Consequently the presumption of the law is not in the local ordinary's favor, since it explicitly restricts his ordinary power which has been acquired in virtue of his office, whether it be proper or vicarious.[186]

Thus, the law has placed the matter of transfer in the case of an unwilling irremovable pastor among those matters which are known as *causae maiores per accidens,* that is, among those things which, while they are potentially subject to at least the bishop's power of jurisdiction, have been actually subjected by positive law to the higher authority of the Pope in virtue of the *immediate* character of his jurisdictional primacy.[187] Hence the local ordinary's power in this particular matter has been completely withdrawn in virtue of the specific ruling which appears in canon 2163, § 1.

In view of this it is asked: does this requirement of special faculties from the Holy See constitute an invalidating clause in the light of the principle enunciated in canon 11?[188] In other words, can the clause in canon 2163, § 1, be regarded as an *equivalently* invalidating clause? It seems that it can be considered as such.

According to ecclesiastical legislation[189] an act is null when there are lacking in it those things which essentially constitute the act itself, or the solemnities or conditions desired by the sacred canons and required under the pain of nullity. In the presently considered case the demand of canon 2163, § 1, for the obtaining of an apostolic faculty certainly appears to constitute an essential part of the act in the transfer of an irremovable pastor who has refused to accept the change of parishes. This is maintained in view of what has been affirmed above, since the faculties granted by the Holy See to the ordinary concede a power over such a pastor

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[185] Cf. *supra,* p. 118.

[186] Cf. canon 197.

[187] Cf. Ryan, *Principles of Episcopal Jurisdiction,* pp. 91–92.

[188] "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel *aequivalenter* statuitur." Italics added.

[189] Canon 1680, § 1.

which, because of his unwillingness to surrender the inalienable right to his parish as conceded to him by the common law, previously was withdrawn by the restriction in this canon.[190]

Further, the ordinary cannot dispense himself from respecting this right, nor can he dispense himself from the restriction that has been placed upon him by this canon.[191] Hence it belongs to the Holy See, which in virtue of its primacy of power can reserve,[192] and through its exemption of the unwilling irremovable pastor has reserved, to itself the right to exercise, either personally or through the local ordinary to whom this right may be communicated, this power over such a pastor.[193]

In conceding the right to exercise a power which had previously been withdrawn, the Holy See seems equivalently to grant a power which otherwise, although potentially at least the bishop's, functionally is not possessed by him, since his operative capacity has been limited by the common law in view of the irremovable pastor's refusal. Hence it appears that the acquisition of the special faculties from the Holy See is a substantial part of the act by which the ordinary effects the transfer of an irremovable pastor against his will, since by it the ordinary receives a specifically functional power which he does not otherwise have. Should he therefore perform the act of a compulsory transfer without having observed this substantial formality, it seems necessarily to follow that the particular act would be invalid, for the Holy See concedes a power which, though it be only functional, nevertheless is essential to the validity of the act to be placed.[194]

It appears, then, that the positive law of canon 2163, § 1, which demands this essential formality whereby the functional power to accomplish such a transfer is conceded to the ordinary, is indirectly an invalidating law. Furthermore, the clause stating the formality, which in this case is the acquisition of the apostolic faculties, likewise appears to be an indirectly invalidating clause. Since an indirectly invalidating law or clause corresponds to the concept

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[190] Cf. *supra*, p. 182.

[191] Cf. Noval, *De Processibus*, II, n. 611.

[192] Cf. Ottoviani, *Compendium Iuris Publici Ecclesiastici*, n. 136.

[193] Coronata, *Institutiones Iuris Canonici*, III, n. 1601.

[194] Cf. canon 1680, § 1.

implied in the term *"aequivalenter"* as mentioned in canon 11,[195] it follows that canon 2163, § 1, and its clause stand as an example which answers to the very definition of an invalidating law.[196] Hence the violation of the law of canon 2163, § 1, in view of the fact that it is an invalidating law, renders the transfer of an irremovable pastor invalid as long as the substantial requirements of this law have not been satisfied.

A confirmatory argument may be drawn from the reason for the incorporation of this prescription of law whereby the power of the ordinary is restricted relative to the compulsory transfer of an irremovable pastor. It is evident that this limitation of the ordinary's power is the direct and logical consequence of the desire of the Church to give the quality of stability, and especially that of irremovability, to the pastors of souls. This desire has been fulfilled, as has already been noted, and has received its confirmation in the various enactments of the Code wherein a strict right in law for the abiding possession of his parochial benefice is granted to each irremovable pastor.

It has also been shown that, in incorporating the administrative processes in the Code, the legislator had in mind, not only the expeditious settlement of the cases which come under this administrative procedure, but also a protection of the inalienable right of the pastor,[197] since this right is intimately connected with the good of souls. Consequently it would be an anomaly in law were the legislator to demand the acquisition of special apostolic faculties merely for the lawfulness of a transfer which otherwise still would be valid in spite of the total disregard for an inalienable right accorded to the pastor by the common law. Such a law would certainly render futile the laws which grant the quality of stability of office, and consequently would furnish no protection for the inalienable right which the legislator established as an abiding possession for irremovable pastors. Noval[198] confirms this when he states that a pastor who has ruled his parish usefully could

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[195] Cf. Roelker, "The Interpretation of Invalidating Laws."—*The Jurist*, III (1943), 390–391.

[196] Cf. canon 11.

[197] Cf. *supra*, pp. 84–88.

[198] *De Processibus*, II, n. 611.

hardly be designated as irremovable if he could nevertheless be validly transferred against his will by means of the ordinary power of the ordinary.

Finally, the fact that the special faculties received from the Holy See contain specific norms to be followed by the ordinary in his transferring of an irremovable pastor against his will[199] clearly manifests that the Holy See requires that a particular process be followed. Does it not seem that the observance of this process is required for the validity of the transfer? In view of the fact that the legislator demands the observance of special norms of law for the transfer of a removable pastor, and the observance of one of these, namely the consultation by the ordinary with the parish priest consultors,[200] is demanded under pain of invalidity, it seems that a greater protection would be afforded for the rights of the removable pastor than for those of the irremovable one, if the specific norms issued by the Holy See in the grant of its faculties were of a merely prohibitive and not also of an invalidating nature with reference to the restriction which is placed on the ordinary. If this were so, then the law of canon 2163, § 1, would appear unjust, for the acquired right of stability on the side of the removable pastor derives simply from canonical equity as its source, but the same right on the side of the irremovable pastor has for its fountainhead strict justice itself.

With reference to the redress which the pastor could seek in such a case, it is evident that he could immediately have recourse to the Holy See.[201] In the meantime, however, it may be better for the good of the Church and for the obviation of scandal that he peacefully betake himself to the new parish after having informed the ordinary that he is lodging recourse with the Holy See. It is evident that he should not openly resist the ordinary, nor endeavor to enlist the support of his parishioners in favor of his cause, nor, above all should he invoke the aid of the civil authorities to sustain his rights against the decree of the ordinary.

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[199] Cf. Suarez, *De Remotione Parochorum*, n. 115; Coronata, *Institutiones Iuris Canonici*, III, n. 1601.

[200] Canon 2165.

[201] Canon 2147.

This question will be treated more at length in the detailed consideration of recourse which will follow in a later chapter.[202]

However, to protect his own good name, if perchance his transfer furnish cause for acrimonious comment regarding his behavior, nothing seems to disallow the giving of information to his parishioners that he is accepting the transfer under protest, and that he is invoking a recourse against the action of the ordinary. He may go so far as to quote the law on the matter to substantiate his claim that he should not be transferred without, however, making it public that his appointment to the new parish is invalid. Thereupon, he should insist that, until the Holy See decides in his favor, he will go to the new parish, and endeavor as required by law to carry out to the best of his ability a useful ministry there for the good of souls and the utility of the Church.

In reference to the recourse which is thus allowed to the pastor, it must also be affirmed that he has the right to seek redress from the ordinary for any harm or expense which he may have suffered from the latter's unjust and invalid action.[203] Consequently the loss of any revenues, or any other sustained injury that can be definitely established in a tangible manner, can be alleged and brought to the attention of the Holy See, which alone is competent to pass judgment in a contentious case of this kind in which the ordinary is the defendant.[204]

The facts, clearly stated in this recourse, must show that this alleged harm or expense definitely followed from the transfer, and all confirmatory proof that is available should be sent to the Sacred Congregation of the Council. If it is proved to the satisfaction of this Congregation that the alleged facts are true, it is expected that the Holy See, in one way or another, will command the ordinary to indemnify the pastor whose rights were so unjustly disregarded.

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[202] Cf. *infra*, pp. 258–259.

[203] Cf. canon 1681.

[204] Cf. canon 1557, § 2, 1°.

ARTICLE IV. THE REJECTION BY THE REMOVABLE PASTOR OF THE PROPOSED TRANSFER

Canon 2163, § 2. *Parochus vero amovibilis, si paroecia* AD QUAM *non sit ordinis nimio inferioris, etiam invitus transferri potest, servatis tamen praescriptis canonum qui sequuntur.*

This canon concedes the right to the local ordinary in virtue of his ordinary power to demand that a removable pastor accept a transfer even though he has manifested his unwillingness to do so. This right is subject in its use to certain restrictive conditions. The parish to which the change is to be made must not be of a notably inferior class, and the ordinary must follow a definite procedure, part of which is demanded for the validity of his act.[205]

The reason that the local ordinary has this power follows from the fact that the good of souls surpasses in importance the right which the removable pastor acquires in equity[206] to the parish which he possesses. Although he has his parish *in titulum,* he does not possess it in perpetual title, but merely for an indefinite or undetermined period of time. Consequently he does not obtain the strict right of retaining it,[207] and therefore it cannot be said that the concession of law to the ordinary for effecting the transfer of a removable pastor in any way violates the virtue of justice, as it would with regard to the irremovable pastor.[208] Further, proper safeguards have been provided for the protection of the pastor's equitable right, lest the ordinary's judgment be rendered imprudently or be influenced by undue emotion when he demands the transfer of such a pastor, who in fact has furnished a fruitful ministry in the parish he is called on to relinquish.[209]

A consideration will now be given to the parish to which the pastor may be transferred. The Code does not require that the parish be of a superior order, or even equal to the earlier possessed parish, but expressly permits a transfer to a parish of a somewhat inferior order. However, since equity without a counterbalancing

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[205] Cf. canons 2164–2167, and especially canon 2165.
[206] Cf. Blat, *Commentarium Textus Codicis Iuris Canonici,* IV, n. 763.
[207] Wernz-Vidal, *Ius Canonicum,* VI, n. 768.
[208] Cf. *supra,* p. 185.
[209] Cf. Wernz-Vidal, *op. cit.,* VI, n. 771.

cause postulates that the pastor be not deprived of a benefice which he possesses even though only for an indefinite time, the legislator restricts the power of the ordinary by interdicting any transfer to a parish of a notably inferior class as compared with the parish which is to be relinquished in the act of transfer.[210]

When a pastor has ruled a parish in a praiseworthy manner, the ordinary does not in virtue of his ordinary power possess the competence to enforce a transfer to a parish comparatively far inferior to the first one.[211] If the ordinary should, when it is plainly evident that the parish to which the transfer is to be made is far inferior, insist upon the transfer of the removable pastor, it is necessary for him to seek faculties from the Holy See to effect the transfer under such circumstances.[212] However, it is difficult to conceive of any just cause which would countenance a transfer to a greatly inferior parish, and it seems that the Holy See would be reluctant in view of canonical equity to give the ordinary the required power to effect the transfer.

In the event that the ordinary is personally convinced that the parish proposed in the transfer is within the order allowed by law, the question arises as to how it can be definitely ascertained that the parish is not notably inferior. In other words, what norm of comparison is to be applied? The Code does not settle the question. Authors, for the greater part, believe that the matter must be decided in each individual case, and in a concrete manner.[213]

Coronata[214] and Fanfani[215] maintain that the matter can be settled

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[210] Coronata, *Institutiones Iuris Canonici,* III, n. 1601.

[211] Cf. Wernz-Vidal, *Ius Canonicum,* VI, n. 771.

[212] Suarez, *De Remotione Parochorum,* n. 116; Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 388; Coronata, *Institutiones Iuris Canonici,* III, n. 1601. One must be wary in reading Coronata on this particular point, since he seems to allow the ordinary the alternative of instituting the process of removal. It is evident that the pastor in question has given no cause for the institution of such a process, since his past ministry has been praiseworthy.

[213] Cf. Coronata, *op. cit., loc. cit.;* Suraze, *op. cit., loc. cit.;* Fanfani, *De Iure Parochorum,* n. 156, C; Augustine, *A Commentary on Canon Law,* VII, 447; Beste, *Introductio in Codicem,* p. 863.

[214] *Op. cit., loc. cit.*

[215] *Op. cit., loc. cit.*

in the discussion required between the ordinary and the parish priest consultors. It appears that the question could well be decided at that time. Suarez[216] affirms that in some dioceses it would be comparatively easy to decide this matter, if perchance the different parishes were classified according to different orders. He cites as an example the case in which there are three grades of parishes in a particular diocese. According to his reasoning, if a pastor to be transferred possessed a parish in the highest grade he could be transferred to one of the second order, since the latter would be *simply* inferior. On the other hand, should the change be proposed to the same pastor whereby he was offered one of the third species, the ordinary would not be competent to make the transfer, since such a parish would be notably inferior. Following his method of reasoning, one could acknowledge the admissibility of transferring the pastor of a second grade parish to one of the third order.

Now the problem presents itself as to how to decide the equity of a transfer from a parish in the higher brackets of the first order to one in the lower brackets of the second order, or, in the same circumstances, from one of the second to one of the third. In such a case it is evident that, even if a diocese had so graded its parishes, the problem could not be solved as easily as Suarez seems to imply. Consequently it would be the duty of the ordinary to be most circumspect in his judgment, and it appears that in the light of this duty he would generally be obliged to seek advice in this matter to insure an equitable decision, even in merely proposing the transfer. It is evident that, should any question arise as to the inferiority of the parish in a compulsory transfer, the ordinary is strictly required to avail himself of the counsel of discreet and judicious men.[217]

In an effort to reduce this matter to a concrete application, Augustine[218] maintained that the importance and size of the parish, as well as the amount of the income deserved consideration. Coronata[219] suggests that attention be given not only to the objec-

[216] *Op. cit., loc. cit.*
[217] Canon 2165.
[218] *A Commentary on Canon Law*, VII, 447.
[219] *Institutiones Iuris Canonici*, III, n. 1601.

tive elements of dignity, or to the fact that the parish is a city parish in which the care of souls can be more easily and readily organized, but also to the subjective elements which, such as a more salubrious climate or other preferable living conditions, prove more highly desirable to the particular pastor. These considerations will be given further attention in the detailed treatment of the reasons which may be alleged by a pastor who is unwilling to accept the proposed transfer.

When all these things have been considered and it has been decided by the parish priest consultors to the satisfaction of the ordinary that the parish is notably inferior, what mode of action is left to the ordinary if he should still be convinced that the transfer of the particular pastor is warranted for the good of souls? While the occurrence of such a case seems somewhat far-fetched and unlikely, yet, being within the realm of possibility, the case can exist in fact. It appears that the only course open to the ordinary is that he immediately seek the required special faculties from the Holy See, and leave it to the judgment of the Sacred Congregation of the Council or the Sacred Congregation for the Propagation of the Faith to determine whether the parish is so notably inferior as to disallow its pastoral office to be filled by means of an administrative transfer.

Since it is definitely established by law that the ordinary is incompetent of himself to transfer a pastor to a notably inferior parish,[220] he would be exposing the act of transfer to invalidity inasmuch as in his incompetence he lacks the necessary power to effect it.[221] Furthermore, the direct handling of the case by the Roman authorities would eliminate the confusion which could later arise in the event of recourse.[222] It is almost certain that the pastor, altogether apart from any knowledge of the decision of the parish priest consultors, and simply in view of the recognizable condition of the parish, would be firmly convinced in his own mind that he had a justifiable reason for opposing his transfer, and consequently would have recourse against the inequitable decision of the ordinary.

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[220] Canon 2163, § 2.
[221] Cf. *supra*, p. 192 with pp. 186–188.
[222] Cf. canon 2146.

In requesting the special faculties for such a case the ordinary must send all the acts of the process which have been completed up until the time when the petition was lodged with the Holy See. Hence he must send a certified copy of the invitation for transfer, an authentic copy of the written refusal of the pastor including mention of the reasons alleged by him, and a certified record of the discussion held between the parish priest consultors and himself. If perchance the pastor refused to accede to the proposed transfer in view of some subjective reason such as the unfavorable climate of the section in which the parish is situated, then a medical certificate should also be included if one has been presented by the pastor in confirmation of his allegation. Again, if with regard to construction, finance or medical matters an expert or specialist was employed in the process by the ordinary or by the pastor, his testimony must likewise be transmitted with the petition. Finally, the ordinary must emphasize the particular qualities of the pastor in relation to the needs of the parish which make him stand out above all others as the logical and only choice for that parish. In a word, as is required for recourse to these same Sacred Congregations,[223] everything that can reasonably aid them in arriving at an equitable decision in the matter should be included by the ordinary.

Concerning the other restriction placed upon the ordinary it suffices to say that definite norms have been established for the conducting of the process and one of them is very necessarily to be observed, since its observance is expressly demanded for the validity of the transfer.[224] These precautions and safeguards, which will be considered in the next section of this chapter, have been incorporated in the law for the sake of protecting the rights of the pastor against every possibly imprudent or prejudiced action on the part of the ordinary.[225]

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[223] Cf. Suarez, *De Remotione Parochorum*, nn. 115 and 22.
[224] Canon 2164-2167.
[225] Cf. *supra*, pp. 84–88.

SECTION IV

The Procedure for the Compulsory Transfer of the Removable Pastor

ARTICLE I. THE REASONS FOR THE REMOVABLE PASTOR'S REJECTION OF THE PROPOSED TRANSFER

Canon 2164. *Si parochus consilio ac suasionibus ordinarii non obsequatur, rationes in scriptis exponat.*

This canon considers the situation in which the removable pastor, after having received the paternal invitation which proposed the transfer, either immediately or after mature consideration, decides that he is unwilling to accept the transfer. In such an event he is obliged by law to submit his reasons for his refusal, and these must be put down in writing.

Although Blat[226] includes the irremovable pastor as well as the removable one as subject to this law, it must be maintained that, strictly considered, the law in canon 2164, refers only to removable pastors, since it forms part of the procedure referred to in the second part of the preceding canon which exclusively mentions the removable pastor.[227] Hence it can be affirmed that this procedure again differs from that required for the transfer of irremovable pastors, because the law does not prescribe any formality in this regard, nor does it strictly demand that he give any reasons for his refusal. These reasons, in the case of the irremovable pastor, are merely indirectly required through the obligation which he has in charity to accept the transfer, and must be put down in writing only in the event that the ordinary should decide to seek the special apostolic faculties necessary for demanding the transfer of an irremovable pastor.

The first requirement of law is that the removable pastor propound a reason or reasons in justification of his refusal of the proposed transfer. The question now arises: what is the nature of these reasons and of what must they directly take account? At

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[226] *Commentarium Textus Codicis Iuris Canonici*, IV, n. 763.
[227] Cf. canon 2163, § 2.

the outset it should be stated that evidently the reasons alleged by the pastor cannot directly repudiate the cause which motivated the ordinary in proposing the transfer to him in particular and in seeking his consent for it, since that cause is the good of souls, which consists in the greater supernatural welfare of the Church as a whole, concerning which the ordinary alone is the capable judge.[228]

However, inasmuch as the consideration of the supernatural utility for souls in its nature of a just cause for the transfer depends upon certain facts or acts pertaining directly to the pastor, the latter may repudiate the cause for the transfer by denying the existence of these facts, or by endeavoring to evince the impossible accomplishment of those acts which the ordinary treats or assumes as constituting the reason for the pastor's greater usefulness in the parish to which the transfer is proposed.[229] This is evident from the fact that, if it can be proved that certain circumstances of place or person militate against the existence of these facts or against the accomplishment of these acts in the new parish, the good of souls will not be enhanced there. These circumstances may bear a relation either to the earlier possessed parish, or to the parish yet to be obtained, or even in certain situations to the pastor himself.[230]

A few examples will clarify the nature of the causes which may be propounded by the pastor as testimony that there is no direct promise or assurance of a more fruitful ministry in the parish proposed in the invitation for transfer, which testimony may serve to prove that the greater utility of the Church will not be attained by his transfer to that parish. Those things which directly concern the parish which is to be obtained through transfer will be considered first. A particular pastor may have endeared himself to the souls of his parishioners, and thus have also endeared the Church to them. If in view of this the ordinary asserts or supposes that this pastor can and will likewise accomplish the same good result in the new parish, the inhabitants of which have drifted away from

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[228] Cf. Noval, *De Processibus*, II, n. 613.

[229] Noval, *De Processibus*, II, n. 613.

[230] Cf. Suarez, *De Remotione Parochorum*, n. 118; Coronata, *Institutiones Iuris Canonici*, III, n. 1603.

the Church and religion, the pastor possibly can allege with full right that there will hardly be any place for his acts of zeal or for any likely fruitful result in the second parish, inasmuch as among its parishioners there are many of great influence who are both spiteful and hostile to him.[231]

Again, if in any way the pastor has come to learn that the diligence which he has manifested in the hearing of confessions in his church, or that the solicitude which he has shown for the sick, is the consideration that underlies the proposed transfer, he can possibly allege that he will not be able to carry out these functions so assiduously in the new parish because of the inclement weather of that particular section of the diocese or territory, or because of the hardships of travel there.[232]

In a similar way, if the transfer was proposed in view of a pastor's special ability in the matter of building or repairing or otherwise maintaining parish property, it may be possible for him to allege his advancing years or declining health as a reason for not feeling able to assume the responsibilities which would rest upon him in the new parish.[233]

In a like manner the pastor can possibly allege that, because of the fact that many of his close relatives reside in that parish, his freedom of action may be limited, and that from the side of the other parishioners he could easily be suspected of showing favoritism towards his relatives.[234]

Likewise it may be possible for the pastor to assert that in view of his different mental temperament and training he does not feel suited to the particular class of people of which the parish is composed. They may be predominantly of the intellectual class, and thus he, plagued with a bothersome sense of inferiority complex, may be of the opinion that he will not live up to expectations, and as a result will not accomplish the supernatural good for which the transfer has been proposed.[235]

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[231] Cf. Noval, *De Processibus,* II, n. 613.

[232] Cf. Noval, *op. cit., loc. cit.*

[233] Coronata, *Institutiones Iuris Canonici,* III, n. 1602; Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 389.

[234] Cf. Suarez, *De Remotione Parochorum,* n. 118.

[235] Cf. Augustine, *A Commentary on Canon Law,* VII, 447.

The pastor can also for his rejection of the proposed transfer offer reasons which derive their validity from a consideration of the earlier possessed parish. Consequently he may possibly maintain that in consideration of the ultimate success of a particular activity or project which he has already begun, whether of a spiritual or of a material nature, he deems it imperative to continue with that particular work until it is completed, lest his generous investment of effort and energy will yield but a disproportionately small return in the rightfully anticipated good of the undertaking.[236] Accordingly, as a confirmatory reason the pastor may allege that the planned work cannot turn out as fruitfully or the contemplated project as successfully, if another pastor were to be appointed in the same parish, since he himself had attained a degree of success in this regard only after many years of arduous endeavor which in endearing him to the hearts of his parishioners finally made this activity possible. It may be assumed, were he to be changed, that the good of souls would suffer, whether the thing to be achieved was of a purely spiritual nature, or even of a material one, such as the raising of sufficient revenue for the completion of a new church or school which may be sorely needed by the parish.

The cause of refusal can potentially also be related to the pastor himself. It is evident that in equity he has the right to demand that the parish offered him be not notably inferior to the one which he already possesses. This right has been granted to him in law.[237] Consequently, should he feel in conscience that the ordinary has not fully considered the respective qualities of the two parishes in question, he can present his reasons, based on the circumstances of income, of size,[238] of climate,[239] and the like, to show that the proposed parish is notably inferior and consequently proves non-acceptable to him.

Again, it seems that he can propose reasons which pertain to his own state of health or age, if perchance these factors militate

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[236] Cf. Suarez, *De Remotione Parochorum*, n. 118.

[237] Canon 2163, § 2.

[238] Cf. Augustine, *A Commentary on Canon Law*, VII, 447.

[239] Cf. Coronata, *Institutiones Iuris Canonici*, II, n. 1601.

against his being transferred,[240] in that he does not feel capable of gaining a proper pastoral acquaintance with an entirely new group of parishioners, or in that he foresees that the climate will be injurious to his health. It naturally follows that these circumstances can in one way or another imply that the pastor's ministry in the parish of his prospective assignment will not be relatively more useful.[241]

Finally, it appears that he may ask to be excused from accepting the transfer even in consideration of immediate relatives who, because of their advanced age, or ill health, and the like, depend almost entirely upon the personal assistance which he can now give them, and who could not reasonably be expected to move to the new locality.[242] Since his solicitude for their welfare as well as the frequent trips of great distance which he would be required to make in their behalf could, at least indirectly, prove a hindrance to his ministry, the desired utility of the Church could accordingly not be attained.

These examples readily manifest that there are many reasons which the pastor can propose as having a definite effect upon whether or not the hope which prompted the proposal by the ordinary will be achieved by the pastor's transfer. Hence, the ordinary should maturely consider these causes and, if necessary, make every reasonable effort to ascertain their objective truth. In doing this he may even call in witnesses, as was noted above,[243] to aid him in his investigation of the truth. It seems that he can also call in other priests who, knowing the particular circumstances of the pastor even more completely than the parish priest consultors, can testify more readily on the point whether the circumstances alleged in the reasons actually obtain.

Again, the ordinary may call in a doctor of medicine to ascertain whether the pastor's health is as precarious as it is claimed to be, or whether the general state of his health would actually preclude

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[240] Vermeersch-Creusen, *Epitome Iuris Canonici,* III, n. 363; Coronata, *op. cit.,* n. 1603; Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 389; Augustine, *A Commentary on Canon Law,* VII, 447.

[241] Cf. Suarez, *De Remotione Parochorum,* n. 118.

[242] Cf. Suarez, *De Remotione Parochorum,* n. 118.

[243] Cf. *supra,* pp. 140 ff.

on the part of this pastor the doing of more useful work in another parish.[244] It seems that the ordinary may also seek the advice of the diocesan building commission in testimony concerning the true conditions of the parochial property of the parish proposed in the invitation for transfer. Perhaps from this the ordinary could more readily determine whether the efforts to be expended in repair or renovation would be of such a nature as unduly to tax the pastor who is in a state of somewhat uncertain and infirm health.

In like manner, as already affirmed, it appears that, in view of the mind of the Church to accord every right to safeguard justice, the pastor can also request that witnesses be permitted to appear in his behalf to confirm his contentions. The ordinary, with the due observance of all equitable demands,[245] should ordinarily admit them, that is, whenever he feels that their testimony may be helpful to him in rendering a fully equitable decision in the matter. In the admitting of these witnesses, whether *ex officio* or in behalf of the pastor, as also in the recording of their testimony, the norms of canons 2145 and 2142 must be scrupulously observed.[246]

The legislator demands that these reasons be given in writing. Consequently it is not simply optional for the pastor, but rather a matter of legal obligation that he use this means for the protection of his established rights.[247] The element of lawfulness in the process depends upon the strict observance of this prescription.[248] The reason for this legislative norm is clear, since the justice of the cause of transfer is based upon certain facts or certain personal qualities, with which no one is more conversant than the pastor himself. Consequently he should manifest to the ordinary freely

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[244] Cf. Suarez, *op. cit.*, formula 7, p. 311.

[245] Canon 2145.

[246] Cf. *supra*, pp. 140 ff. and p. 124 ff.

[247] Wernz-Vidal, *Ius Canonicum*, VI, n. 772, #3.

[248] Cf. Suarez, *De Remotione Parochorum*, n. 118; Coronata, *Institutiones Iuris Canonici*, III, n. 1603. Both of these writers seem to imply that with reference to these reasons at least their consignment to writing is demanded for validity. This conclusion, however, does not seem to follow either from the wording of the law, or from the particular rôle which this factor of recording may have in the process.

and clearly the reasons why he feels that the facts and qualities considered by the ordinary as pertinent in the case would be of little use in the parish to which the proposed transfer would assign the pastor. If these reasons are given in writing, then both the ordinary and parish priest consultors will be in a position to give them the required mature consideration.[249]

However, since the consigning of oral statements to writing by a notary accomplishes the same end, it seems that the ordinary in accord with the norms of canon 81 can dispense in a particular case from this prescription of law for any just cause,[250] and allow the pastor to give his reasons in the presence of the notary or the chancellor, who will consign them to writing and witness the signature of the pastor by signing the document himself.[251] This document is to be preserved with the acts of the process,[252] and its required future use will serve the ordinary and the parish priest consultors when the former has summoned the latter for a hearing on the matter.[253]

If the reply of the pastor be sent by letter it is again suggested, for the reasons noted above,[254] that it be sent by registered mail with the request for a return receipt, in order that the pastor may have definite assurance that his response was received by the ordinary, and that therefore there is no possibility for considering the pastor as ignoring the exhortation of the ordinary.

ARTICLE II. THE CONSULTATION BETWEEN THE ORDINARY AND THE PARISH PRIEST CONSULTORS

Canon 2165. *Ordinarius, si, non obstantibus allatis causis, iudicet a proposito non esse recedendum, debet, ut valide agat, super eisdem causis audire duos parochos consultores, et cum eis-*

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[249] Cf. Noval, *De Processibus* II, n. 613; Suarez, *De Remotione Parochorum*, n. 118.

[250] Cf. Noval, *De Processibus*, II, n. 613.

[251] Noval, *op. cit., loc. cit.;* Suarez, *De Remotione Parochorum*, n. 118; Coronata, *Institutiones Iuris Canonici*, III, n. 1603.

[252] Canon 2142.

[253] Cf. canon 2165.

[254] Cf. *supra*, p. 173.

dem perpendere adiuncta in quibus versatur tum paroecia A QUA *tum paroeciam* AD QUAM, *et rationes quae translationis utilitatem aut necessitatem suadent.*

After considering the reasons proposed by the pastor in refusing to accept the transfer, the ordinary has an alternate choice with regard to his future course of action. He may decide to forego enforcing the transfer, or he may decide to prosecute its enforcement. The latter course will naturally eventuate when the ordinary considers the pastor's alleged reasons to be without cogency. In undertaking the prosecution the ordinary is obliged by law, for the validity of the ensuing process, to seek a hearing from two parish priest consultors, to weigh with them the conditions obtaining in the two contemplated parishes, and to appraise the reasons which on the score of utility or necessity suggest that the transfer be made.

Suarez[255] maintains however that nothing seems to preclude the ordinary's taking the pastor aside privately to signify to him that he has not found the reasons alleged in the refusal to be sufficient, and that, if the pastor does not consent to the transfer, he will call the parish priest consultors and proceed according to the norms of law. It appears that such a course of action is not only unnecessary in view of the second paternal invitation which must be extended later on to the pastor,[256] but is even forbidden by the legislator, since it is indicated by the Code's incorporation of the canon which requires the counsel of the parish priest consultors under pain of invalidity that, once the pastor has manifested his unwillingness, the ordinary is thereupon bound to seek the advice of others.

Reference has already been made above[257] to the parish priest consultors' appointment, their loss of office, their designation for this particular duty, and their obligation regarding the oath of secrecy when they have been chosen to give counsel to the ordinary. It suffices here to say that, after having freely decided upon his choice, the ordinary shall designate them by means of a formal

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[255] *De Remotione Parochorum*, n. 120.

[256] Canon 2166.

[257] Cf. *supra*, pp. 128–130.

decree to that effect. This decree of designation, signed by the ordinary, and signed and sealed by the chancellor or some other notary, should include mention of the date of its issuance, of the case which is being considered, and of the names of the parish priest consultors who have been chosen for this particular matter. This decree is then transmitted either by the ordinary or by the chancellor to those whom it concerns, and the latter are thereby cited to appear before the ordinary on a certain day and at a particular hour to take the oath of secrecy, and to hold counsel with the ordinary for a consideration of the case in question.[258]

This consultation is demanded for the validity of the process. If it is omitted, then the transfer is invalid. Consequently, apart from an authorized sanation of the process, the invalid decree of transfer entails invalidity for the pastor's appointment to the parish, since an act of appointment is implied in the decree. The invalid appointment through the invalid decree would have as a result not only the nullity of the acts placed by the factual incumbent in his seeming parochial office, but also his acknowledged right to receive indemnity for whatever loss or expense he sustained through the invalid transfer.[259] Hence the ordinary has a strict and grave obligation, for the good of souls, for his own protection, and for the protection of the equitable right which the pastor has to his own parish, to seek the advice of the parish priest consultors.

The object of the examination in this consultation comprises three points, all of which must be given mature consideration. It appears that the requirements of the law for the validity of the process extends to each of these items, and hence, if one were to be omitted, the same effect would follow therefrom as from the omission of the consultation itself. A study of the phrasing of canon 2165 reveals the cogency of this conclusion. These three points to which attention must be given are: the causes alleged by the pastor for his refusal of the transfer; the conditions obtaining in the two respective parishes; and finally, the reasons which on the score of utility or necessity suggest that the transfer be made.

Noval,[260] in speaking of the reasons alleged by the pastor for his

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[258] Cf. Cappello, *Praxis Processualis,* nn. 217–218.

[259] Cf. canons 461; 1681. Cf. *infra,* pp. 239–240.

[260] *De Processibus,* II, n. 614.

refusal of the transfer, suggests that relative to these causes the ordinary shall gather suitable information in writing if possible, in order that he may present it to be read by the parish priest consultors during the hearing. This suggestion seems to be a most practical one in view of the fact that the consultors must explore every means to arrive at the truth of the reasons alleged and to measure their relative importance. The previously gathered information would be most helpful to them for attaining this end. It is their duty, then, in view of the reasons advanced by the pastor as justifying his refusal, to ascertain whether that particular pastor could exercise a more useful ministry in the new parish. Naturally their vote in this matter will be influenced by the opinion which they have arrived at in regard to the other two items demanding consideration.

Attention must also be given to the true condition of the two parishes affected by the proposed transfer. Hence the ordinary is bound to communicate faithfully his own report on their condition, neither exaggerating their advantages nor overlooking their disadvantages. The parish priest consultors in turn will openly compare whatever knowledge they have concerning these parishes with the facts alleged by the ordinary.[261] If there is harmony between the two reports, there is no need of further discussion about this particular matter. However, should there be major discrepancies, it will be the duty of the parish priest consultors to examine the matter with the ordinary to ascertain whether one or the other disadvantage which was overlooked by the ordinary is of such importance that a lack of its consideration and appraisal have occasioned the rendering of an inequitable opinion in their advice to the ordinary.

Above all, in this matter, if perchance the pastor's refusal has been based upon the contention that the parish proposed in the invitation for transfer is very notably inferior, the ordinary and the parish priest consultors must be particularly careful to measure the proportionate advantages and disadvantages. Should there be any doubt in their mind even after mature thought has been given to the matter, then it seems that they should tend in their

[261] Cf. Noval, *De Processibus*, II, n. 614.

opinion in favor of the pastor. This conclusion seems warranted in view of the gravity of the consequences which may otherwise ensue in the event of recourse, as well as in the light of the strict prohibition of the law regarding the transfer of a removable pastor against his will to a much inferior parish.[262] Further, since this species of transfer is always considered to be at least a quasi-promotion, it would be unfair to counsel a transfer which contrariwise may redound to a quasi-demotion, which thus could reflect the semblance of a penalty.[263]

Noval,[264] considering under another light the condition of the respective parishes, asserts that attention should also be given to the spiritual needs of each parish in relation to the pastor in question. In other words, the good of souls in the earlier held parish must be considered if it is to be ascertained how useful the pastor actually is in his own parish. Then the situation of the second parish should be looked into in this comparative light in order that it may be seen just how useful the pastor would actually be in the new parish.[265] This latter consideration is akin to that to which attention is given in the last element of the examination of the case by the ordinary and the parish priest consultors. This will now be discussed.

Finally, the reasons inherent in utility or necessity must be made part of the consideration in the discussion. It is evident that these reasons pertain to the parish to which the change has been proposed, since it is the good of souls in that parish that warrants the transfer.[266] As was noted with reference to the nature of the causes which can be propounded by the pastor for his rejection of the new parish, the question whether the good of souls in the second parish warrants the appointment of a pastor endowed with certain qualifications does not constitute the precise object of the discussion. The examination will revolve about the questions whether the concrete reasons proposed by the ordinary as justifying the transfer are so cogent as absolutely to demand that the

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[262] Cf. canon 2163, § 2.

[263] Cf. Chelodi, *Ius De Personis*, n. 150, nota 3.

[264] *De Processibus*, II, n. 610.

[265] Cf. also Wernz-Vidal, *Ius Canonicum*, VI, n. 771, #4.

[266] Canon 2162. Cf. Suarez, *De Remotione Parochorum*, n. 120.

good of the souls in the first parish yield to the utility of the souls in the second parish, and whether it is practically certain that the ministry of the pastor will be more useful in the latter parish.

It is assumed that in the parish proposed in the invitation for transfer there exists a particular condition which for the good of souls must be remedied, and that the ordinary as the spiritual head of his diocese or territory is in a proper position to judge this state of affairs. However, it is not so certain that this pastor, in view of the fact that he is being forced to accept the transfer, will actually exercise a ministry which will be more useful than the one which he exercises in the parish he still possesses. Nor is it evident that the situation cannot be remedied in another manner. These are the points which must be settled.

In considering the reasons advanced by the ordinary in his proposal of the transfer, the parish priest consultors will form their opinion whether in the light of the full appraisal of the case this particular priest is likely to perform the more useful ministry that is expected of him, and whether the same fruitful result could possibly be achieved through the appointment of some available priest who with respect to the conditions alleged as obtaining in the second parish might well be judged equal to the situation. If their considerations should lead them to believe that some other priest could rule as usefully, and that the conditions of the first parish appear to demand the ministry of its present pastor, they should advise against the transfer. In this instance the stability of the pastor's office, as well as the good of souls in the parish which he possesses, would take precedence over the good of souls in the parish proposed in the transfer.[267] Further, even though there were no available priest, it would still have to be ascertained whether objectively the pastor would exercise a more useful ministry in the second parish than in the one he still possesses, and again this should influence the final opinion of the parish priest consultors.

It is not expected, however, that their counsel be influenced by their conviction regarding any one element of their discussion. On the contrary, the legislator's definite and exhaustive enumeration

[267] Cf. Noval, *De Processibus*, II, n. 610.

of the things to be considered in this consultation seem to preclude that mode of action. In fact, the law seems strictly to demand that they base their judgment upon a thorough understanding of the entire matter, which however can be attained only through a comprehensive study of all three elements taken in unison. Only by acting in this manner can they be sure that their opinion will be just and equitable, and one which may be considered to be a true guide for the ordinary's future course of action in regard to this particular transfer.

Since the law requires the counsel and not the consent of the parish priest consultors,[268] the ordinary is not juridically bound to follow the advice of the parish priest consultors.[269] Although the ordinary is free in this matter, yet if the consultative vote is unanimous he is expected to follow it unless grave reasons warrant a contrary mode of action.[270] Hence, if in spite of their advice the ordinary should still persist in proposing the transfer without being influenced by any other grave cause, which in this case would hardly be unknown to the parish priest consultors, it can be affirmed that he would certainly be guilty of a transgression against both prudence and canonical equity.

With regard to the formalities to be observed in the session or sessions in which the parish priest consultors convene with the ordinary it suffices to say that the usual requirements of law are to be observed.[271] Thus, the discussion will be held in the presence of the notary who, according to his duty, shall consign everything to writing. After the entire matter has been discussed freely by both the ordinary and the consultors, their consultative vote shall be rendered in writing. It shall refer to the three elements of

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[268] Canon 2165. Cf. Suarez, *De Remotione Parochorum*, n. 120.

[269] Canon 105, 1: ". . . si consilium tantum, per verba, ex. gr.: *de consilio consultorum*, vel *audito Capitulo, parocho*, etc., satis est ad valide agendum ut Superior illas personas audiat. . ." Cf. Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 765; Beste, *Introductio in Codicem*, p. 864.

[270] Canon 105, 1: ". . . quamvis autem nulla obligatione teneatur ad eorum votum, etsi concors, accedendi, multum tamen, si plures audiendae sint personae, concordibus earundem suffragiis deferat, nec ab eisdem, sine praevalenti ratione, suo iudicio aestimanda, discedat." Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1605. Suarez, *De Remotione Parochorum*, n. 122.

[271] Cf. canon 2142.

the consultation and the respective opinion relative to these matters, and shall manifest whether according to personal conviction the transfer is justified. The document of the record of the acts, carrying the proper date and an indication of the place and the hour of the session, shall be signed by the two parish priest consultors, then by the ordinary, and finally by the notary. It is then preserved among the acts in the archives under the care of the notary, and thereupon there is no further need of counsel.[272]

ARTICLE III. THE SECOND INVITATION FOR THE ACCEPTANCE OF THE TRANSFER

Canon 2166. *Si, auditis parochis, Ordinarius translationem peragendam censeat, paternas exhortationes iteret ut parochus voluntati sui Superioris morem gerat.*

After receiving the consultative vote of the parish priest consultors the ordinary must decide either to withdraw the proposal of transfer, or to continue in his endeavor to persuade the pastor to accept the change. In the former case, although it be not prescribed by law as in the case of removal,[273] it seems fitting that the ordinary notify the pastor that the proposed transfer has been abandoned. Otherwise, as already noted,[274] the uncertainty which is felt by the pastor in regard to his stability of office may exert a deleterious influence upon his care for souls.

On the other hand, should the ordinary insist upon the proposed transfer, then he is obliged once again paternally to exhort the pastor to yield to the will of his superior. It is suggested by some of the authors consulted that the ordinary inform the pastor that both he and the parish consultors have decided that the transfer is warranted for the good of souls and that the pastor should acquiesce.[275] These authors feel that the confirmation of the transfer by the parish priest consultors would stand to influence the decision of the pastor.

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[272] Cf. Suarez, *De Remotione Parochorum*, formulary 7, p. 312; Cappello, *Praxis Processualis*, n. 221.

[273] Cf. canon 2152.

[274] Cf. *supra*, p. 184.

[275] Suarez, *De Remotione Parochorum*, n. 122; Noval, *De Processibus*, n. 615; Cf. also Cappello, *Praxis Processualis*, n. 221.

However, if the ordinary acted contrary to the advice of the parish priest consultors, what is to be said of the reasons which then can be alleged? Should the ordinary reveal that his decision is not in accord with their advice? It seems that such a revelation would definitely defeat the purpose of the exhortation, even though the ordinary were to affirm new and cogent reasons why the transfer should be accepted. Apparently it would suffice for the ordinary to mention the fact of the consultation without making known its outcome. He could then proceed to outline his own reasons why he is repeating the paternal invitation, and conclude with the exhortation that the pastor accept the change for the love of God and the salvation of souls.[276]

The Code asserts that this invitation must be given in a paternal manner.[277] Again, in consideration of what has already been affirmed above,[278] it appears that the term *paternal* applies merely to the wording of the exhortation, and not strictly to its form. In fact, practically all of the authors who have been consulted, either expressly or by implication, require that this second invitation be given according to the norms required for a true canonical admonition.[279]

Hence, if given orally, the exhortation should be given in the presence of the chancellor or the notary, or before two witnesses, be then consigned to writing, signed and sealed, and preserved in the acts of the process. If given in writing, it should be sent by registered mail with the request for a return receipt, or by means of a duly appointed messenger, and a copy of the letter, a document attesting the fact that it was sent, and the receipt of the postal authorities or of the messenger attesting its reception by the pastor or some responsible person for him, should be preserved in the processual acts.

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[276] Suarez, *De Remotione Parochorum*, n. 122.

[277] Canon 2166.

[278] Cf. *supra*, pp. 158–159.

[279] Canons 2143 and 2142. Cf. Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 766; Beste, *Introductio in Codicem*, p. 864; Suarez, *op. cit., loc. cit.;* Noval, *De Processibus*, II, n. 615; Coronata, *Institutiones Iuris Canonici*, III, n. 1605; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 359; Wernz-Vidal, *Ius Canonicum*, VI, n. 766; Fanfani, *De Iure Parochorum*, n. 149; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 384.

In addition to outlining the reasons for the transfer, the ordinary should determine a definite period of time within which the pastor is expected to inform him whether or not he is willing to accept the transfer. This is necessary, since the future course of action on the part of the ordinary, as will be seen in the commentary on canon 2167,[280] will be determined by the pastor's response, which is demanded before the completion of the last day of the specified period of time.[281] Once this exhortation is extended, the ordinary can do nothing further until he has received a reply from the pastor, or until the time-limit which was set at the pastor's disposal has expired.

ARTICLE IV. THE PRECEPT OF TRANSFER

Canon 2167, § 1. *His peractis, si parochus adhuc renuat et Ordinarius adhuc putet translationem esse faciendam, parocho praecipiat ut intra certum tempus ad novam se conferat paroeciam, eidem in scriptis significans, elapso praefinito tempore, paroeciam, quam in praesens obtinet, ipso facto vacaturam esse.*

Having received the second paternal invitation, the pastor is required to give a reply to the ordinary within the period of time specified in the exhortation, or to request a further extension of time. If he consents to the transfer, the ordinary merely has to decree the transfer in the same manner as he would have done if the pastor had acceded to his wishes after receiving the first invitation.[282]

On the other hand, in proposing his original reasons for a refusal, or even in offering new ones,[283] or by remaining silent,[284] the pastor may signify that he is still unwilling to accept the new parish. That the pastor appears to have the right to propose new reasons is inferred from the wording of the canon, "*et Ordinarius*

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[280] Cf. *infra*, pp. 211 ff.

[281] Cf. canon 34, § 3, 3°.

[282] Cf. *supra*, pp. 174–175.

[283] Cf. Noval, *De Processibus*, II, n. 616; Suarez, *De Rematione Parochorum*, n. 124.

[284] Beste, *Introductio in Codicem*, p. 864; Suarez, *op. cit., loc. cit.*; Noval, *op. cit., loc. cit.*

adhuc putet," since the word *"adhuc"* seems equivalent to the phrase *"non obstantibus novis allegationibus parochi."* Consequently it cannot be maintained that by advancing new reasons the pastor manifests either irreverence or disrespect toward his ecclesiastical superior, nor can it be claimed that he is disobedient to ecclesiastical authority.[285] In fact, in receiving these new reasons and upon being influenced by the cogency the ordinary may even at this time withdraw his proposal of transfer.[286] Canon 2167, in using the clause, *"et Ordinarius adhuc putet translationem esse faciendam,"* implicitly considers this possibility, for the word *"adhuc"* implies that the Ordinary has not changed his mind, although he could have, after having received the pastor's second refusal of the transfer. As noted above, if the ordinary decided not to enforce the transfer, he should inform the pastor about that decision.[287]

By way of analogy with what has already been affirmed above with regard to the manner of making a reply to the ordinary,[288] and also in the light of canon 2164, it becomes evident that the pastor should signify in writing, or at least in the presence of the ordinary and notary, whether he accepts or rejects the parish which has once again been proposed to him in this second exhortation. The same reasons that were advanced in the consideration of the response to the first paternal invitation demand here also that juridical proof of the tenor of the pastor's second reply be made available, and that the document be preserved in the acts of the process. Again, it is suggested that a written reply be sent by registered mail with the request for a return receipt to insure its safe delivery to the ordinary.

In the event that the pastor has remained silent, the ordinary has the obligation of investigating the reason for this silence before he may decisively consider the pastor as unresponsive, or his refraining from making a response as tantamont to a refusal. Consequently the ordinary must be certain that the pastor has received the second invitation in which a specified time for a reply has been

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[285] Cf. Noval, *De Processibus,* II, n. 616.
[286] Suarez, *De Remotione Parochorum,* n. 124.
[287] Cf. *supra,* p. 184.
[288] Cf. *supra,* p. 173.

defined; that the pastor has not been legitimately impeded from answering; or that he has not already replied by letter, which for one reason or another has not come to the attention of the ordinary. It is only after he has obtained moral certitude that the pastor's silence is deliberate, that the ordinary can proceed as though the pastor had expressly refused to comply with the repeated exhortation.[289]

If the ordinary, once he has definitely ascertained that the pastor has rejected the proposed transfer, is still intent upon transferring the pastor against his will, he is required to observe the following mode of procedure. He shall command the pastor by precept to repair to the new parish within a certain time. This precept is to be given in writing. In it the ordinary declares that after the expiration of the time-interval granted to the pastor for going to his new parish a vacancy will *ipso facto* set in for the parish which for the present is still in the pastor's possession.[290]

In the words of canon 2167, § 1,[291] are contained the most explicit directions to be followed by the ordinary. He must command, enjoin and threaten the pastor. The words of the canon also establish the manner in which the ordinary is to issue the command, precept and threat, namely, in writing. In other words, this canon indicates for the ordinary not only his right but also his duty of commanding, by way of a definite threat, that the pastor do something within a specified period of time, and this precept must be given in writing. In this instance the pastor is commanded to go to the second parish within the time allotted by the ordinary under the threat that his presently held parish will become *ipso facto* vacant if he should fail to obey the ordinary's command.

The ordinary must communicate this precept to the pastor in writing. Although in ordinary circumstances the law attributes juridic force to a precept when it is given in the presence of two witnesses,[292] in the present instance the law is much more severe in its demand by exacting that the precept be in writing. Conse-

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[289] Cf. *supra*, p. 178.

[290] Cf. canon 2167, § 1.

[291] ". . . praecipiat ut intra certum tempus . . . in scriptis significans, elapso praefinito tempore, paroeciam, . . . ipso facto vacaturam esse . . ."

[292] Canon 24.

quently the ordinary is never allowed to dispense himself from the observance of this form, for as Noval seems correctly to affirm,[293] the words *"in scriptis"* point to an absolutely necessary form which the ordinary must observe when he commands, enjoins and threatens the pastor. Further, in view of the fact that there is no mention of a separate decree of transfer, it is evident that this precept is equivalent to that decree. Hence the ordinary is obliged to employ the same method as is required for issuing a decree, and therefore must consign this act to writing and authenticate the document.[294]

Another reason which can be advanced in confirmation of the assertion that this precept must always be in writing is the fact that the precept implicitly contains the bestowal of the new parish upon the pastor. Since the appointment to an office must always be consigned to writing, it follows that the precept which includes such an appointment must also be consigned to writing.[295] Needless to say, an authentic copy of this precept must be preserved in the archives of the diocese.[296]

If the communication be sent by registered mail or by means of a messenger, then the requirements for a true canonical admonition must be observed.[297] Hence if the communication is sent by mail it should be registered with the request for a return receipt from the postal authorities, and a record must be made by the notary that the communication was made in this manner. If it was issued by means of a messenger, mention should be made of that fact by the ordinary. Also the messenger must testify in writing whether or not the precept was received by the pastor, and also when and under what circumstances.[298]

The Code does not determine how long a period of time the

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[293] *De Processibus,* II, n. 616. Coronata, *Institutiones Iuris Canonici,* III, n. 1606.

[294] Blat, *Commentarium Textus Codicis Iuris Canonici,* IV, n. 767; Noval, *De Processibus,* II, n. 616; Coronata, *Institutiones Iuris Canonici,* III, n. 1606.

[295] Cf. canon 159. Cf. *supra,* p. 174.

[296] Cf. canon 2142.

[297] Coronata, *Institutiones Iuris Canonici,* III, n. 1606.

[298] Cf. *supra,* pp. 154–156.

"tempus certum" should be. Hence it seems to leave it to the prudent judgment of the ordinary to define the matter in each individual case. However, it seems that the norm of the decree *"Maxima cura,"*[299] which established a maximum period of ten days, may well be used as a guide for the fixing of a reasonable period of time, since authors, either expressly or by implication, appear to consider ten days as the usual time allotted to the pastor for evincing his obedience to this precept.[300]

The ordinary must be very clear in his designation of the specified time-limit in order that there may be no question in the pastor's mind as to how much time has been granted him for his compliance with this precept. If the ordinary has not definitely stated the manner in which this time is to be computed, the general norms of the Code regulate its computation. In this event the time set at the pastor's disposal will not begin to lapse until the day after the reception of the precept by the pastor.[301] The pastor, unless legitimately impeded, is required to leave his parish before midnight of the last day of the determined period of time and take up his pastoral duties in the new parish. It is not enough that he inform the ordinary that he intends to repair to the new parish, but he must actually take possession of it. This is expressly demanded by the words of canon 2167, § 1.[302]

Noval,[303] however, holds that it is sufficient that the pastor signify to the ordinary that he accepts the transfer. Again, he even allows the pastor to propose new reasons for his continued refusal to accept the transfer. The wording of the law, as already noted, appears definitely to preclude the granting of this concession to the pastor. In view of the severity of the wording of the law it seems quite evident that this precept actually has the effect of a decree of appointment within the sphere in which the law makes

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[299] S.C. Consist., decr. 20 aug. 1910, canon 10, § 4—*AAS*, II (1910), 641. *Fontes*, n. 2074.

[300] Cf. Augustine, *A Commentary on Canon Law*, VII, 448; Coronata, *Institutiones Iuris Canonici*, III, n. 1606; Suarez, *De Remotione Parochorum*, formula 7, p. 313; Cappello, *Praxis Processualis*, n. 224.

[301] Cf. canon 34, § 3, 3°.

[302] ". . . ad novam se conferat paroeciam . . ."

[303] *De Processibus*, II, n. 617.

it possible to issue an appointment. The appointment, however, exists in the form of a precept in view of the fact that a benefice cannot be conferred upon one who is unwilling to accept it.[304] It is evident, then, that when he has taken possession of the new parish the pastor must inform the ordinary to that effect, for the sake not only of proving the fact of his submission to the will of his superior, but also of precluding the need of any investigation by the ordinary for ascertaining whether perhaps he was legitimately impeded from complying with it. Such an inquiry is required of the ordinary before he may declare the vacancy of the first parish.[305]

If the pastor has remained adamant in his refusal to accept the transfer, and accordingly has not repaired to the new parish before the expiration of the period of time specified by the ordinary, the parish at which he remained becomes *ipso facto* vacant.[306] His act of non-compliance has forfeited for him the continued possession of the parish. This forfeiture takes effect the moment the allotted time-period has expired, and no decree of the ordinary is necessary to make the loss of the parochial benefice effective in law. Any forthcoming decree of the ordinary[307] is merely the declaration of an accomplished fact. Consequently, any acts of jurisdiction exercised exclusively on the basis that they are authorized through the possession of the pastoral office are invalid, for that office is no longer possessed by its erstwhile pastoral incumbent.[308] However, until the parish has formally been declared vacant by the ordinary, common error could obtain, and in such a contingency the Church does supply the necessary jurisdiction to render valid the acts which otherwise would have remained null and void.[309]

In substance the ordinary's precept should mention the name of the pastor; the names of both parishes, the fact of the observance of the canonical norms of procedure throughout its various steps; the repeated refusals of the pastor; the period of time conceded to

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[304] Cf. canon 1436. Cf. *infra*, pp. 229–233.

[305] Cf. canon 2167, § 2. Cf. *infra*, pp. 217–219.

[306] Canon 2167, § 1.

[307] Canon 2167, § 2.

[308] Cf. canons 451 and 197 with 208. Cf. also canon 183, § 1.

[309] Cf. canon 209. Cf. *infra*, pp. 225–226.

the pastor as the interval within which he is to take possession of the new parish; and finally the sanction attached to his disobedience if he refuses to make the change. The precept should be dated, signed by the ordinary, signed also and sealed by the chancellor or some other notary, and communicated to the pastor in the manner prescribed above.[310]

ARTICLE V. THE FORMAL DECLARATION OF THE VACANCY OF THE PARISH RELINQUISHED

Canon 2167, § 2. *Hoc tempore inutiliter transacto, paroeciam vacantem declaret.*

By this prescription of law, if the pastor has not repaired to the new parish within the period of time prescribed in the precept of transfer, the ordinary has the right and, so it appears, the duty to declare vacant the parish which previously became *ipso facto* vacant. This action implies the mere declaration of a juridic fact and consequently is retroactive, since it adds nothing new regarding the status of the relinquished parish.[311] In fact, the declaration of the vacancy of the parish is made simply in protection of the parishioners, lest they think that through continued residence of the pastor in the parish he is still to be considered as their canonical pastor.[312]

It is evident that the parish does not become *ipso facto* vacant if the pastor legitimately has been impeded in any way from carrying out the demands of the precept mentioned in paragraph one of canon 2167. Hence the ordinary should be most circumspect in this regard. Before making his declaration, he must have moral certitude that the pastor was actually disobedient. Consequently, with the norms of canon 2149, § 1, as a guide,[313] he must make a thorough investigation with regard to several points.[314]

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[310] Cf. canon 2143. Cf. *supra*, pp. 153–156.

[311] Cf. canon 17, § 2.

[312] Suarez, *De Remotione Parochorum*, n. 127.

[313] Cf. Noval, *De Processibus*, n. 617.

[314] Cf. Beste, *Introductio in Codicem*, p. 864; Noval, *op. cit., loc. cit.*; Coronata, *Institutiones Iuris Canonici*, III, n. 1607; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 767; Suarez, *De Remotione Parochorum*, n. 127.

The ordinary must first ascertain that the precept was actually communicated to the pastor. Once this fact is certified, the ordinary must find out the time of its occurrence. Then he must endeavor to discover whether or not the pastor was legitimately impeded from taking canonical possession of the new parish within the specified time. It may happen that the pastor was ill at the time, or that in his immediate family there was grave illness which may have kept him close to his home, which perhaps was a great distance from his own parish or the new one. Again, severely inclement weather, extremely arduous travel conditions and the like, may have rendered it impossible for him to make the journey to the second parish. Such excuses certainly would point to legitimate reasons for the pastor's non-fulfillment of the precept of transfer.

Although it is admitted, in these cases, that normally the pastor could at least have notified the ordinary of the particular circumstances which prevented him from carrying out the issued command, it could well be that the pastor was lawfully prevented from doing even this.[315] Then, too, there is the possibility that he actually did write a letter to the ordinary in order to notify him to this effect, but that the letter became lost and was never delivered. Consequently every possible angle must be investigated in the scrutiny which is demanded on the part of the ordinary.[316]

If after making this investigation the ordinary has any doubts about the non-compliance of the pastor, he certainly should not declare the parish vacant. Rather, again being guided by norms enacted for an analogous situation,[317] he should either issue the precept once again, or grant the pastor an extension of time to obey the one already issued. The latter is the natural course to take when there is a reasonable doubt that the pastor is being hindered from replying to the original precept.[318]

On the other hand, should the ordinary have moral certitude

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[315] Cf. Suarez, *De Remotione Parochorum*, n. 127; Coronato, *Institutiones Iuris Canonici*, III, n. 1607.

[316] Cf. *supra*, pp. 177–178: wherein are given suggested norms for the making of this investigation.

[317] Canon 2149, § 2.

[318] Cf. Connor, *The Administrative Removal of Pastors*, p. 105.

that the pastor is in bad faith, it appears that he has no choice in the matter, and must declare the parish vacant.[319] However, authors are not in agreement on this matter. Suarez[320] argues from the preceptive force of the words in canon 2167, § 2.[321] He feels that, had the legislator meant that the ordinary was to be allowed a choice in this matter, he would have used words to that effect. He infers that the law would then have read *"declarari potest,"* rather than *"declaret."* Hence he is of the opinion that this formal declaration of vacancy must necessarily be made by the ordinary.

Wernz-Vidal[322] and Coronata,[323] however, tend to treat the non-submissive pastor with more leniency. The former authors maintain that, should the pastor persist in objecting to the transfer, the ordinary is free to leave him in the parish, for, as they affirm, there is no question of a sentence which must necessarily be pronounced as in the case of any procedure which is truly judicial.[324] Coronata argues from another point of view. Asserting that the ordinary can by allowing the pastor to remain in his parish be indulgent towards him when he has ruled his parish well, Coronata maintains that prudence demands that the ordinary should do so. As the reason for his opinion this author asserts that, if the ordinary had to issue the declaration of the vacancy of the parish, he might thus be compelled entirely to forego the services of this pastor, whom at the very moment he wants to advance to a more useful service, in view of the fact that at the time there is no other parochial vacancy which this pastor could be asked to fill.

Of these opinions, the one of Suarez seems more tenable. In fact, his doctrine seems the only one which can be held. This is maintained in view of the fact that the formal prescript of law[325] demands that the ordinary issue a precept which imposes an obligation, the transgression of which obligation stands juridically

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[319] Cf. Suarez, *De Remotione Parochorum*, n. 127.
[320] *Op. cit., loc., cit.*
[321] ". . . , paroeciam vacantem declaret."
[322] *Ius Canonicum*, VI, n. 772, #7.
[323] *Institutiones Iuris Canonici*, III, n. 1607.
[324] *Op. cit.*, VI, n. 772, #7.
[325] Canon 2167, § 1.

requited in the act of deprivation of the parochial office,[326] or at least in the act of the pastor's removal.[327]

Were the legislator to permit the ordinary to allow the non-submissive pastor to return to the parish (there can be no question of retaining the vacant parish) when in the circumstances its vacancy already stands effected by the law, then the same legislator would appear to be in open contradiction with himself. Moreover, such indulgence on the part of the ordinary, were it permitted, would seem to be equivalent to the placing of a premium on disobedience and, in fact, would encourage it. On the other hand, the while the law severely frowns upon irreverence and disrespect for ecclesiastical authority,[328] it clearly manifests that a non-responsiveness of this sort may not be passed over or ignored without the application of some juridical sanction. Finally, the opinions both of Wernz-Vidal and Coronata lack an actual basis in law for their support.

In substance the ordinary's decree whereby the parish is declared vacant will name the pastor; indicate both parishes; refer to the non-submission of the pastor to the earlier precept; make the declaration of the fact that his parish has become vacant in view of the prescription of canon 2167, § 1; and finally prescribe the manner in which the decree is to be made public.[329] It is evident that the formal declaration shall appear in writing, be authenticated by the notary, and be promulgated in such a way that those whom it concerns, particularly the parishioners of the vacated parish, may have certain knowledge that their non-responsive erstwhile pastor no longer retains his pastoral office in that parish. Likewise, the declaration shall be intimated to the pastor himself, whether by registered mail with the request for a return receipt, or through a messenger,[330] and of course an authentic copy which attests the fact of this intimation as well as a record of the fact of the promulgated declaration shall be preserved among the acts of the process which are to be placed in the archives of the diocese.[331]

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[326] Cf. Wernz-Vidal, *Ius Canonicum*, VI, n. 773.

[327] Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1607.

[328] Canon 2331, § 1.

[329] Cf. Suarez, *De Remotione Parochorum*, formulary 7, pp. 313–314.

[330] Cf. canon 2143.

[331] Canon 2142.

CHAPTER IX

The Effects of the Procedure for the Administrative Transfer of Pastors

SECTION I

The Canonical Effects of a Valid Transfer

In considering the juridical effects of the transfer of a pastor accomplished in the manner demanded by the foregoing procedure, one must give attention to the prescription of the law as enacted in canon 194, relating to the effects of the transfer of any cleric from one ecclesiastical office to another.[1] According to this canon, unless other provision is made in the law or by means of the prescript of a legitimate superior, the mere notification of the transfer is not sufficient to produce the juridical effect, namely the vacancy of the first office and the possession of the second one. What is required is the taking of canonical possession of the second office. Until such time the appointed cleric still retains all juridical rights to the first office and enjoys no competency in the new one.

ARTICLE I. THE CANONICAL EFFECTS OF THE PRECEPT OF TRANSFER

The question here arises regarding the juridical effects or the canonical force of the precept by which a pastor is ordered by his ordinary to take possession of the new parish within a specified time. For an answer to this question one must give primary attention to the nature of the precept. It is asked whether this precept should be regarded merely as a penal one which the pastor can resist without any moral implication, or whether it strictly

[1] § 1. "In translatione prius officium vacat cum clericus alterius possessionem canonice capit, nisi aliud a iure cautum sit vel a legitimo Superiore praescriptum."

§ 2. "Reditus prioris officii translatus percipit donec aliud occupaverit."

imposes also a true moral obligation. If it is solely of a penal nature, then, the pastor may be said to have the choice either of obeying the precept by repairing to the parish offered him in transfer, or of accepting the loss of his own parish through his act of non-submission. On the other hand, if this precept imposes a true moral obligation, then the pastor is bound by strict obedience to his ecclesiastical superior to take possession of the new parish, and in the event of non-compliance, in addition to suffering the consequences, namely the deprivation of his parish, he becomes guilty of sin.

It appears that this precept is not purely penal, and that consequently no choice is allowed to the pastor in the matter of accepting or not accepting the transfer. He is bound to obey the command of his ordinary. This appears evident from the right accorded to the ordinary, namely of transferring an unwilling removable pastor to another parish which is not of a notably or much inferior class.[2] If on the other hand, the pastor were not bound by obedience to comply with the demands of the ordinary's precept by which he is commanded to betake himself to the new parish, this right would not be verified. In such an event the norm of canon 2163, § 2, would reflect a law which is devoid of all juridical efficacy.[3]

Moreover, there are no grounds for maintaining that the pastor has a choice in this matter. In fact canon 128 sets up the general rule that clerics are bound to enter upon and to fulfill faithfully whatever office has been conferred upon them by their ordinary.[4] Although it is evident that the efficacious power for effecting the transfer of an unwilling pastor is not to be inferred from this canon, since the necessity of which it speaks seems rather to be referred to the first office and not to the second one,[5] this same canon at least reveals the mind of the Church relative to the manifestation of obedience to ecclesiastical authority. Finally, it is to

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[2] Cf. canon 2163, § 2.

[3] Cf. Suarez, *De Remotione Parochorum*, n. 216; Wernz-Vidal, *Ius Canonicum*, VI, n. 773; Coronata, *Institutiones Iuris Canonici*, III, n. 1606.

[4] "Quoties et quandiu id, iudicio proprii Ordinarii, exigat Ecclesiae necessitas, ac nisi legitimum impedimentum excuset, suscipiendum est clericis ac fideliter implendum munus quod ipsis fuerit ab Episcopo commissum."

[5] Wernz-Vidal, *op. cit.*, VI, n. 773, nota 6.

be recalled that it is not customary for the legislator to use his legislative right simply with a view to establishing laws that are purely penal in character.[6] Hence the opinion supported by Suarez,[7] Coronata,[8] Wernz-Vidal[9] and Blat[10] appears to be the only tenable one.

Attention will now be given to the manner in which the pastor is obliged in obedience to take possession of the parish to which he is being transferred, and to the problems whether he can immediately begin to exercise his parochial functions, whether he obtains full title to the new parish, and whether the first parish becomes *ipso facto* vacant. According to law a cleric is forbidden on his own authority to take canonical possession of a benefice to which he has been appointed. Further, the canonical possession or corporal institution of a beneficiary rests with the ordinary of the place or his delegate.[11] The manner of the formality which is to be employed in the installing of a beneficiary is left to the prescriptions of particular law or to legitimate custom, or, for a good reason, the ordinary may expressly dispense in writing from this requirement. In the latter case the dispensation takes the place of the canonical possession.[12]

In relation to the decree of transfer, the few authors who treat of this particular matter[13] are of the opinion that in its effect the decree of the transfer embraces not only the appointment of the pastor to the new parish, but also a dispensation from the customary solemnities required for a formal installation. In stating his opinion, Suarez[14] argues from the customary form of expression employed in canon 2167, § 1. However, he merely asserts that this is the basis for his assertion, without giving any further

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[6] Cf. canon 2214, § 2. Cf. Wernz-Vidal, *Ius Canonicum*, VI, n. 773.

[7] *De Remotione Parochorum*, n. 126.

[8] *Institutiones Iuris Canonici*, III, n. 1606.

[9] *Ius Canonicum*, VI, n. 773.

[10] *Commentarium Textus Codicis Iuris Canonici*, IV, n. 767.

[11] Canon 1443.

[12] Canon 1444.

[13] Suarez, *De Remotione Parochorum*, n. 126; Wernz-Vidal, *Ius Canonicum*, VI, n. 772, #4; Coronata, *Institutiones Iuris Canonici*, III, n. 1606.

[14] *op. cit., loc. cit.*

explanation. Coronata[15] and Wernz-Vidal[16] assert that the precept or decree seems to have the inherent force of a dispensation granted by the ordinary, and then refer to Suarez as confirming their statement. All three, however, maintain that it seems better to have the pastor take canonical possession in the customary manner, or that in the absence of this formality the ordinary expressly state in the precept or decree that he is dispensing the pastor from the due solemnities.

What is to be said of these opinions? It appears that the law strictly insists upon some form of formal installation apart from the mere letter of appointment, which in this case is implied in the precept or decree of transfer. This is inferred from the canons mentioned above.[17] Consequently the precept or decree of transfer itself, which gives the pastor merely a *ius ad rem* with reference to the parish obtained through the transfer, does not confer canonical possession upon the pastor. Yet, a priest cannot validly exercise any pastoral functions until the ordinary or his delegate has granted him canonical possession of the parish to which he has been appointed, since he acquires the care of souls only when he takes canonical possession according to the norms of canons 1443–1445.[18] Therefore, it is essential that the pastor observe the formalities prescribed by the law, unless the ordinary has, in the precept or decree of transfer, expressly dispensed him from these solemnities. Otherwise he cannot be said to be the pastor of the new parish, nor will the parish of his earlier incumbency become vacant until the expiration of the period of time specified in the precept or decree as the interval within which he is commanded to repair to the second parish.[19]

It cannot be maintained that there may be in existence a custom of such long standing that it allows this law to be disregarded. As already stated above with regard to parishes in the United States,[20] no legitimate custom can have run its full course of legal prescrip-

[15] *op. cit., loc. cit.*
[16] *op. cit., loc. cit.*
[17] Cf. canons 1443 and 1444.
[18] Cf. canon 461.
[19] Cf. canon 2167, § 1.
[20] Cf. *supra*, pp. 94–95 and 111.

tion, since these parishes have not been considered as benefices long enough to allow this. Hence, when the pastor has received merely a letter of appointment which apart from the formality of taking canonical possession, or of an express dispensation therefrom, requests him to repair to a certain parish within a specified time, such a manner of procedure is to be considered an abuse which should not be tolerated. In fact, it seems to expose the pastor's ministry not only to the danger of illicit but even of invalid acts whenever these acts for their proper authorization rest on the exclusive claim which derives from a validly held pastoral office. This appears to follow from the explicit wording of canon 461,[21] which states that a pastor obtains the care of souls from the moment that he takes canonical possession according to the norms of canons 1443–1445. As has already been noted, until such time as he does this, he does not have the care of souls, nor consequently does he have the power of jurisdiction for the internal forum. Thus, any acts touching the internal forum would be invalid unless he had faculties or jurisdiction other than that conceded by virtue of his office. Should he moreover exercise the power of confessional jurisdiction outside of his diocese for those who consider themselves to be his subjects,[22] that exercise would be invalid. However, in view of the fact that the parishioners have a mistaken notion about the necessity of a solemn installation, the suppletory principle of canon 209 suffices in the case to shield these acts against invalidity. The element of common error is realized *in fact* because the priest is commonly regarded as the legitimate pastor of the parish to which the parishioners belong.

Again, without a special act of delegation by the diocesan ordinary he would not be competent to assist as the official witness at any marriage in the parish. Although assistance at marriage is not an act of jurisdiction, nevertheless, being among the matters of legal favor it is put on a par with jurisdiction, and thus arises the use of such terms as *delegation* and *delegated,* which words are proper to the power of jurisdiction.[23] Furthermore, the power to

[21] "Curam animarum parochus obtinet a momento captae possessionis ad norman can. 1443–1445; . . ."

[22] Cf. canon 881, § 2.

[23] Cf. Gasparri, *Tractatus Canonicus de Matrimonio* (ed. nova, 2 vols., Romae: Typis Polyglottis Vaticanis, 1932), II, n. 936.

assist at a marriage is possessed in virtue of the office of pastor, and is acquired from the day that the pastor takes canonical possession of his benefice.[24] Hence, were he to assist at marriages *as pastor,* such marriages would be invalid. If he were to assist in virtue of a supposed delegation granted to him through the faculties of the diocese, such an assistance would likewise be invalid, since as a particular delegation, it could not have been specified with reference to the contracting parties, and since as a general delegation it could have been given solely to parochial assistants, to which class he does not belong.[25]

In this instance it is asked, in view of the fact that assistance at marriage is not strictly an act of jurisdiction, whether the suppletory principle of canon 209 is applicable. Authors are commonly united in teaching that it is applicable, not only in the light of canon 6, 2°, but also by reason of canon 20. However, it is necessary, as in the case of the performance of strictly jurisdictional acts, that the postulated conditions be present, namely, that the putative pastor rules over and administers the parish under such circumstances of common error that he is commonly regarded by the parishioners to be their true pastor.[26]

In consideration of the consequences of laxity which flow therefrom, the foregoing of the formality of corporal installation in office appears to be a most serious matter and one which calls for real amendment. Hence attention must be given to the necessity of a formal installation, and the observance of the law should strictly be adhered to by the local ordinaries. As stated in the law, the formality of the installation may be omitted in only those circumstances which in the judgment of the ordinary constitute a good reason for dispensing from the formal solemnities. In such a case, as already stated, this dispensation must be given expressly and in writing.[27]

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[24] Canon 1095.

[25] Cf. canon 1096, § 1.

[26] Cf. Miaskiewicz, *Supplied Jurisdiction According to Canon 209,* The Catholic University of America Canon Law Studies, n. 122 (Washington, D. C.: The Catholic University of America Press, 1940), pp. 256 and 254; 227–228.

[27] Cf. Canon 1444.

Now, can it be affirmed that the precept or decree of transfer inherently contains the force and effect of this dispensation? Canon 1444, which allows the granting of this dispensation, is most explicit in its use of the words: *"expresse in scriptis dispensaverit."* Certainly, then, unless the ordinary expressly dispenses in the precept of decree of transfer, it cannot be maintained that the precept of decree implicitly points to the effected granting of such a dispensation. The very fact of the demand in the precept or the the decree that a pastor repair within a specified time to a new parish seems to have no more force than any letter of appointment whereby a priest is told to take over his duties before a particular day. Nor does it seem, as is stated by Suarez,[28] that the canon which treats of the precept of decree of transfer[29] implies that this force should be attributed to the precept or the decree. The canon merely says: *"ut intra certum tempus ad novam se conferat paroeciam."*

In view of the general legislation regarding the taking of possession of a parochial benefice it appears that in the just quoted words of the law it is implied that the pastor who is ordered to betake himself to the new parish do so simply in accordance with the customary manner and with the due solemnities. This opinion seems to be confirmed by the doctrine of canon 20. In the lack of a particular prescription of law with regard to this matter, the general principles of law which regulate a cleric's entrance upon an ecclesiastical office must be observed.[30] Hence the opinions of those authors[31] who hold that for the foregoing of these solemnities the ordinary implicitly grants a dispensation through the very fact that he issues a precept or decree of transfer is without foundation in law, and consequently appears to be untenable. In fact, since they themselves, as noted above,[32] seem to mitigate their opinion in one way or another, they appear to give evidence of their own uncertainty with regard to this matter.

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[28] *De Remotione Parochorum,* n. 126.

[29] Canon 2167, § 1.

[30] Cf. canons 194, § 1; 461; 1095, § 1, 1°; 1444.

[31] Suarez, *De Remotione Parochorum,* n. 126; Coronata, *Institutiones Iuris Canonici,* III, n. 1606; Wernz-Vidal *Ius Canonicum,* VI, n. 773.

[32] Cf. *supra,* p. 224.

Once, however, the transfer has been accomplished and the pastor has taken canonical possession of the second parish, from that moment he becomes the true pastor of that parish and becomes the bearer of all the rights and duties that belong to a pastor. The care of souls belongs exclusively to him[33] and he obtains the right to all the revenues that accure to him in virtue of his pastoral office.[34] At the same time the first parish becomes *ipso facto* vacant.[35] This follows naturally in view of the fact that the pastor cannot possess two residential benefices, inasmuch as they are incompatible,[36] since the offices attached to them cannot be fulfilled by him at one and the same time.[37]

However, until such time that the pastor has taken true canonical possession of the second parish, either formally or in virtue of a dispensation, he continues as the pastor of the first parish as long as the time-limit set for the execution of the transfer has not expired.[38] In consequence he possesses all the rights and duties proper to a pastoral incumbency in the first parish for the restricted period of time here indicated. These rights and duties encompass both the spiritual matters in the care of souls,[39] and also the temporal prerogatives which relate to a pastor's exclusive right to the beneficial income of the parish[40] and to the prerequisites, stole fees and offerings which according to approved custom or fixed statute pertain to the pastor.[41]

ARTICLE II. THE CANONICAL EFFECTS OF THE DECREE OF VACANCY

When the pastor has refused to accede to the ordinary's precept to take possession of the second parish within a specified period of time, the parish which he possesses becomes *ipso facto* vacant.[42]

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[33] Cf. canons 461–470.
[34] Canons 463; 1409; 1472–1473.
[35] Canon 194, § 1.
[36] Cf. canons 151 and 1439.
[37] Cf. Suarez, *De Remotione Parochorum*, n. 126.
[38] Canon 2167, § 1.
[39] Canon 461.
[40] Canon 194, § 2.
[41] Canon 463, § 1.
[42] Canon 2167, § 1.

Thereupon, all other requisites duly observed,[43] the ordinary issues a decree declaring the first parish to be vacant.[44] As already noted, this decree is nothing but a formal declaration of a vacancy that has already been accomplished. The question now arises whether the pastor at the very moment of the expiration of the set time-limit becomes the pastor of the parish proposed in the transfer.

Again, few authors treat of this matter. Suarez[45] maintains that he does. Coronata[46] affirms that it is not entirely certain that the second parish is conferred upon such a pastor. Noval,[47] for the very reason that he deals with the obligation of the ordinary to provide for the pastor who has been deprived of his parish, appears to imply that the pastor does not *ipso facto* become pastor of the second parish.

Suarez[48] and also Beste,[49] who supports the opinion of Suarez, argue from the fact that the law[50] declares the ordinary capable of transferring even an unwilling removable pastor. They maintain that this prescript of law constitutes an exception to the one which forbids under pain of invalidity the bestowal of an ecclesiastical benefice upon a cleric who is unwilling to accept it or does not expressly declare his acceptance.[51]

Beste merely states the argument. Suarez even endeavors, despite his earlier statement relative to canons 1436 and 2163, § 2, to find a possible juridical balance between these two canons. He asserts that the appointment to the first parish is simply supplemented by means of the transfer to the second parish, and that consequently the earlier made appointment retains its juridical identity even upon the effected transfer to the second parish. Thus, Suarez seems to imply that inasmuch as the pastor accepted

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[43] Cf. *supra*, pp. 217–219.
[44] Canon 2167, § 2.
[45] *De Remotione Parochorum*, n. 126.
[46] *Institutiones Iuris Canonici*, III, n. 1606.
[47] *De Processibus*, II, n. 617.
[48] *Op. cit., loc. cit.*
[49] *Introductio in Codicem*, p. 864.
[50] Canon 2163, § 2.
[51] Cf. canon 1436.

the first parish willingly, the effect of that act of willingness attaches also to the acceptance of the second parish, even though there is question of an enforced transfer. In view of the wording of canon 1436[52] this argument certainly appears to be fallacious, since not only does the pastor show himself unwilling to accept the second parish and withhold his express acceptance of the transfer, but apart from the case in which he remains silent, he also expressly manifests his refusal. Consequently one cannot base a compelling argument on a presumed implicit acceptance such as is spoken of by Suarez.

Relying upon canon 2163, § 2, the same author adds that, if the ordinary cannot effectively assign a parish to a removable pastor who is unwilling to accept it, then the ordinary cannot really transfer such a pastor. At most one could say that in such a case the ordinary can deprive the pastor of his own parish in view of his reluctance to acquiesce in the ordinary's desires.[53]

Although at first glance this author's argumentation seems to invite a sympathetic hearing, it is far from convincing. In view of the very specific and rigid law relative to the canonical filling of benefices,[54] it does not seem possible that any benefice, parochial or otherwise, can validly be conferred upon one who is unwilling to accept it. Moreover, Suarez appears to argue in a vicious circle when he implies that the appointment to the first parochial benefice has juridical continuity in the transfer to the second parish. This is the very point of the argument. In the case as considered here the pastor has in consequence of his unwillingness to accept the second parish lost possession of the first parish, and hence his canonical incumbency there is no longer a thing of reality. Moreover, the very fact of the priest's refusal of the second parochial benefice very clearly manifests that the appointment to and acceptance of the first parish were acts which were exclusively applicable to that parish. Hence it cannot be affirmed that the transfer to the second parish is but a supplementation of the act of appointment to the first parish, and that the matter of acceptance in relation to the two parishes in question remains identical, so that the

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[52] ". . . clerico invito et provisionem non *expresse acceptanti*. . . ." Italics inserted by the writer.

[53] *De Remotione Parochorum*, n. 126.

[54] Canon 1436.

earlier willingness to accept the first parish cancels out, as it were, the later refusal to accept the second parish.

Consideration will now be given to the assertion of Suarez that canon 2163, § 2, would be without force if one maintained that the second parish was not *ipso facto* conferred upon a pastor who has shown his reluctance to accept the new parish. It must be admitted that this seems to be a rather forceful argument. However, the enforced and executed transfer to the second parish does not seem to preclude the observance of the law enacted in canon 1436. The meaning of canon 2163, § 2, appears to imply that the ordinary has the right, after using every means to effect the submission of the pastor's will to his own, to command that the pastor change his mind and accept the parish proposed to him in the initial invitation for transfer. In other words, it manifests that the stability of the removable pastor does not have precedence over the particular good which the ordinary feels will be done for souls by means of this transfer. Moreover, a consideration of the severity of the precept reveals that the concession which is granted to the ordinary with regard to reluctant pastors is adequately upheld in law. The very fact that the law allows the ordinary to issue a precept by which a pastor, though he has always exercised a successful and praiseworthy ministry, is threatened with the deprivation of his parish, sufficiently supports the prerogative of the ordinary relative to the compulsory transfer of a pastor, since such a severe measure can be looked upon as a means of changing the will of the pastor so that the transfer ultimately can be effected. Again, the very nature of the precept discloses that the enactment of canon 2163, § 2, is not without force. In view of the fact that the pastor is bound by strict obedience to accept the new parish, it becomes evident that the ordinary is accorded a real right in virtue of this canon, and consequently the affirmation that a parish cannot be conferred upon a reluctant pastor in no way detracts from the power of the ordinary. Otherwise this precept would have merely a penal force whereby the pastor would be given the choice of accepting the transfer or of suffering the deprivation of his parish in consequence of his non-compliance with the precept of the ordinary, which, as has been seen, is not the case.[55]

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[55] Cf. *supra*, pp. 222–223.

Another argument in support of the writer's contention may be drawn from the fact that the law in canon 2167, § 1, speaks of a precept rather than of a decree. It appears that, were the ordinary in pursuance of an *ipso facto* effected deprivation of the first parish able to confer a parish upon a pastor who adamantly manifests his refusal to accept it, then the legislator would have allowed the ordinary to issue a decree rather than a precept to that effect. It seems, then, that inasmuch as the legislator did not provide for such a mode of procedure, it may be affirmed that his lack of doing so was motivated by his respect for the prescription of law contained in canon 1436, which consequently must be considered as effectively applicable even with regard to the process of transfer.

Finally, the prescription of law as found in canon 1444, § 2, must not be overlooked. According to this canon, the local ordinary must define a certain time within which one is to take canonical possession of his benefice. When this interval of time has elapsed, and the one upon whom the benefice was conferred has not taken canonical possession of it, the ordinary is to declare the benefice vacant according to the norm of canon 188, § 2, unless a just cause can be alleged on the part of the beneficiary for his failure or lack of taking possession. Hence, in view of the fact that a pastor who has refused to obey the precept of the ordinary in the matter of transfer has thereby failed to take canonical possession of the second parish, it can be affirmed that he has lost all right to that parish for the reason that through his neglect to take canonical possession the parish has *ipso facto* become vacant,[56] and it is then the duty of the ordinary to declare that fact.[57] Thus it can hardly be asserted that such a parish is *ipso facto* conferred upon the reluctant pastor who is disinclined to accept it.

Noval,[58] for the very reason that he considers how the ordinary is to provide canonically for a pastor who has been deprived of his parish in this manner, implicitly denies the opinion of Suarez and Beste. Recalling a prescription of law in the process for the removal of irremovable pastors,[59] which considers the case of the

[56] Canon 188, § 2.
[57] Canon 1444, § 2.
[58] *De Processibus*, II, n. 617.
[59] Canon 2149, § 1.

non-submissive pastor who stubbornly refuses to reply to an exhortation to resign his parish, he maintains that, since the restriction mentioned in canon 2149, § 1, relative to the future appointment for such a pastor is not repeated in the process of transfer, the ordinary is not exempted from the obligation of granting an appointment to the reluctant pastor. He argues that the prescription of canon 2149, § 1, with regard to this restriction is a true penalty which however, since it is not expressly restated in the title of the transfer of pastors cannot be invoked in this instance. He bases his conclusion on the fact that the law does not allow an extension of penalties from one case to another, even though there be present an equally grave reason for invoking these penalties.[60] This author's treatment of that point manifests that he considers that the transfer of a pastor is not effected in consequence of the *ipso facto* sustained deprivation of the first parish.

With regard to Noval's opinion it may be affirmed that, in view of the pastor's praiseworthy conduct previous to his refusal to obey the precept of the ordinary, the pastor has not sacrificed his right to an equitable appointment by the ordinary. However, since the law in canons 2162–2167 does not reveal any specific enactment adaptable for the particular need in such a case, it appears that the norms of canons 2154–2156 may be used as a guide.[61] Consequently, being obliged at least in charity[62] to do his best in making proportionate compensation to the pastor,[63] the ordinary should as soon as possible,[64] with the advice of the parish priest consultors who have already had a part in the process of transfer,[65] decide what particular appointment would be best suited for such a pastor. It appears that the ordinary is obliged to discuss with the parish priest consultors the question merely whether the erstwhile pastor should be given another parish, a non-parochial benefice, some kind of office, or a pension. Thus it seems that

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[60] Cf. canon 2219, § 3.

[61] Canon 20.

[62] Cf. Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 382. Fanfani (*De Iure Parochorum*, n. 145) maintains that this obligation is one of justice.

[63] Noval, *De Processibus*, II, n. 585.

[64] Canon 2155.

[65] Canon 2154.

the ordinary alone is the judge regarding the specific qualities of these,[66] since the wording of canon 2154 requires merely that the type of appointment of canonical assignment be discussed. The vote of the parish priest consultors is solely of a consultative nature.[67]

Nothing seems to militate against the ordinary's determination to offer the same parish that was designated in the original invitation of transfer. Realizing that he has been deprived of his former parish, and having had time to think the matter over, the pastor may have become quite willing to accept this parish under the circumstances in which he finds himself. However, in view of the previous constant refusal of the pastor, or also by way of deserved retribution to him, the ordinary may see fit to grant another parish, and even of an inferior grade. Again, in consideration of the pastor's previous satisfactory record, and for the fostering of good will, which prudence in the administration of the diocese may demand, the ordinary can bestow a parish equally as good as the one of which the pastor was deprived, or even one of a superior grade.[68]

The granting of another parish seems generally to be the more feasible way of providing for such a pastor, since there are many indications that he will carry out a praiseworthy ministry in the new parish. In view of a reply of the Pontifical Commission for the Authentic Interpretation of the Code, it is not required, when the pastor be given a new parish, that he submit to the examination required by canon 459, § 3, 3°.[69]

Could the ordinary allow the pastor to be reinstated in his former parish? Although strictly considered such a possibility does not seem to be precluded, inasmuch as the pastor neither culpably nor inculpably has done anything in that parish which necessitates his removal from it, yet it seems alien to the spirit of the law to allow the ordinary this concession. As already affirmed,[70] such an indul-

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[66] Suarez, *De Remotione Parochorum*, n. 76; Beste, *Introductio in Codicem*, p. 861.

[67] Cf. canon 2154 with canon 105.

[68] Cf. Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 354.

[69] P.C.I., resp., 24 nov. 1920, ad 3—*AAS*, XII (1920), 574.

[70] Cf. *supra*, p. 220.

gence on the part of the ordinary could all too readily be interpreted in the light of placing a premium on the pastor's lack of cooperative submission to the will of the ordinary. Consequently, prudence as well as the desire of the Church not to abstract from the pastor's unresponsiveness appears to demand that such a reassignment to the former parish be not granted.

Should conditions warrant it, the pastor may be given a non-parochial benefice or an office of a non-parochial nature. It has been suggested that he could be chosen to act as a chaplain in a hospital or at a religious house, or to act as a notary or in some similar capacity in the diocesan curia, or as a teacher in a college or in a seminary.[71] In view of the temperament of the particular pastor, such a disposition of the case may prove the most suitable one, since it may be more likely that he will adapt himself to one of these offices than to an incumbency in another parish after his deprivation.

In adaptation to the circumstances connected with the transfer,[72] it appears, as may be inferred from the wording of canon 2154, § 1, that there would hardly be any occasion to grant an ecclesiastical pension to the priest who refused a new parish offered in transfer. The process of transfer revolves about a pastor who has shown himself quite capable of ruling a parish and of taking care of souls in a praiseworthy manner. Hence his services could always successfully be employed in another branch of ecclesiastical service.

It has already been stated that a reassignment for the pastor must be made as soon as possible.[73] According to canon 2155, which has reference to a pastor who has resigned at the request of the ordinary, or who has been removed by him, the future assignment of office may be intimated in the decree of removal. Hence, in the process of transfer, it appears that likewise the new assignment may be indicated to the pastor in the decree by which the ordinary declares his parish to be vacant. However, if it be

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[71] Cf. Suarez, *De Remotione Parochorum*, n. 78; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 354; Noval, *De Processibus*, II, n. 515; Coronata, *Institutiones Iuris Canonici*, III, n. 1593.

[72] Cf. Canon 2154, § 1: ". . . prout casus ferat et adiuncta permittant."

[73] Canon 2155.

not done at this time, then as suggested by the authors,[74] a month seems to be the maximum time in which to decide upon and inform the pastor about his future status. However, the circumstances of the pastor as well as the possibility of scandal on the part of the people are to be reckoned with as a determining factor in estimating this. In view of particularly unique conditions even a month's time may be too long a period for delaying with the pastor's assignment to some particular ecclesiastical office or responsibility.[75]

Another question arises with regard to the conduct of the pastor once his parish has *ipso facto* become vacant. He may have decided upon having recourse to the Holy See, as by law he is allowed to do,[76] and hence he may be averse to leaving the parish. However, as will be seen in the next chapter,[77] since this recourse does not have a suspensive effect, the pastor no longer possesses that parish, and consequently has lost the right of residence in the parish house, and in fact over everything that belongs to the parochial benefice. In canon 2156, § 1, in treating of removal, the Code has already considered this question. Nothing in law seems to preclude the employment of this enacted prescription for the sake of applying it in the process of transfer.[78] The pastor, then, has the obligation of leaving the parish house as soon as possible. By this term is meant the place of residence of the pastor as pastor, which in some way, whether through ownership or rental, belongs to the parochial benefice.[79]

Coronata,[80] following the opinion of Suarez,[81] holds that in the event of recourse a pastor is not obliged to leave the parish house. However, both authors add that the ordinary, for a grave cause,

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[74] Coronata, *Institutiones Iuris Canonici*, III, n. 1593; Noval, *De Processibus*, II, 591; Suarez, *De Remotione Parochorum*, n. 83; Beste, *Introductio in Codicem*, p. 861.

[75] Suarez, *op. cit., loc. cit.;* Noval, *op. cit., loc. cit.*

[76] Canon 2146.

[77] Cf. *infra*, pp. 248–249.

[78] Cf. canon 20.

[79] Cf. Suarez, *De Remotione Parochorum*, n. 85; Noval, *De Processibus*, II, n. 592; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 355.

[80] *Institutiones Iuris Canonici*, III, n. 1592.

[81] *Op. cit., loc. cit.*

can require that the pastor take up residence even outside the parish. Strictly considered it appears that the ordinary has every right in view of the vacancy of the first parish to demand that the pastor leave the parochial house. Moreover, with relation to the new assignment made for such a pastor, it may become imperative that he take up his residence elsewhere, especially if he has been assigned to a new parish, so that his residence is required there. However, if the ordinary should leave the former pastor to act as administrator, which manner of procedure, especially if recourse is pending with the Holy See, may be the more feasible arrangement for this former pastor in certain cases, it follows that this priest would have every right to retain his residence there and in fact it would be obligatory for him to do so.

Whenever such an erstwhile pastor is required to leave the parochial house, it is also demanded that he leave everything that belongs to the parochial benefice,[82] since he is entitled only to those things which are his personal property.[83]

In estimating the reasonable limit of time implied in the word *"quamprimum,"* Coronata[84] and Suarez[85] agree that the maximum period should not extend beyond one month. Noval,[86] however, in special regard of the dignity of the priesthood and the edification of the people, limits this period to one or two weeks. Connor,[87] appearing to uphold the opinion of the former authors, suggests as a practical norm that the ordinary would do well to specify a definite time within which the pastor is to give up his residence in the parochial rectory. This latter suggestion seems a prudent one, since, besides removing all doubt in the matter, it furnishes the ordinary certain ground in proceeding with the ultimate infliction of a penalty, even in the nature of a censure,[88] in the event of the pastor's pertinacious refusal to leave the rectory.

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[82] Cf. canon 2156, § 1. Cf. Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 355.

[83] Augustine, *A Commentary on Canon Law*, VII, 433.

[84] *Institutiones Iuris Canonici*, III, n. 1592.

[85] *De Remotione Parochorum*, n. 85.

[86] *De Processibus*, II, n. 592.

[87] *The Administrative Removal of Pastors*, p. 134.

[88] Cf. canon 2331, § 1. Cf. Coronata, *Institutiones Iuris Canonici*, III, n. 1592.

If the ordinary has specified a set period of time this would be reckoned according to the general norms of law, unless he defined otherwise. Hence, the lapse of this period would begin the day following the reception of the notification of vacancy, and would conclude with the end of the last day of the period allotted by the ordinary.[89]

An exception is made in canon 2156, § 2, for the infirm priest who is unable to be conveniently moved from the rectory. Since this canon considers the removal of a pastor, perhaps because of infirmity, it appears that its application is restricted to the process of removal. With relation to the process of transfer one will naturally presume that the pastor is in good health, and even though in the meantime he should have contracted a brief illness, it is expected ordinarily that he could be transferred from the parish house to a home in the neighborhood, or even to a hospital if necessary. Hence, with Coronata[90] and Augustine[91] it may be affirmed that only the bed-ridden, crippled or paralyzed priests can be acknowledged as having any claim to the favor of continued residence in the parish house. Therefore, unless stricken with a sudden serious illness, the pastor who has been deprived of his parish under the process of transfer will not benefit from this equitable exception as sanctioned in the law.

SECTION II

The Canonical Effects of an Invalid Transfer or Deprivation

As was pointed out in different chapters of the present treatise, the transfer accomplished according to the administrative process can be invalid for various reasons. It may be invalid by reason of the lack of competency on the part of the active subject, who, in view of not being previously authorized, or in view of acting outside of the legally restricted time-limit for action, or in view of lacking the needed delegation, has not the power of effecting

[89] Cf. canon 34, § 3, 3°.

[90] *Institutiones Iuris Canonici*, III, n. 1592.

[91] *A Commentary on Canon Law*, VII, 434.

the valid transfer of a pastor or of those who are considered equivalent to a pastor.[92] Again, a transfer may be null by reason of the nature of the parochial benefices about which the change revolves. These may be reserved to the Holy See, or the appointment to them may have devolved upon the Holy See through the negligence of the ordinary.[93]

Further, it has been shown that the reluctance of an irremovable pastor to accept a transfer withdraws him from the competency of the ordinary to such an extent that, were the latter simply in view of his own native power to effect such a compulsory transfer his act would be invalid.[94] Finally, it has been manifested that the omission of a formality required by law under the pain of nullity in the conducting of the process, unless it be remedied by the Holy See, renders both the process and the transfer or deprivation invalid.[95]

Now, what is to be said of the effects of these transfers when the process or the execution has been accomplished invalidly? It naturally follows that the appointment, inherent in the precept of transfer, is also invalid. Consequently the pastor does not legally possess the new parish, and his right to it can be lawfully challenged.[96] However, if he has had peaceful possession of the parochial benefice for three years, and has been in good faith regarding his possession, even though his title to it is invalid, he acquires the benefice by legitimate prescription.[97]

If he knows however that the transfer is invalid, and yet, upon having lodged a recourse with the Holy See, has repaired to the second parish out of obedience, then the Holy See's confirmation of the precept of the ordinary would sanate such a transfer, and the title to the parish would legitimately be acquired in view of the supreme power which the Roman Pontiff exercises over all benefices and ecclesiastical offices.[98] On the other hand, if the Holy See upheld the pastor in his recourse, it will generally also

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[92] Cf. *supra*, p. 120.
[93] Cf. *supra*, p. 113.
[94] Cf. *supra*, pp. 186–189.
[95] Cf. *supra*, p. 204.
[96] Canon 147.
[97] Canon 1446.
[98] Cf. canons 218 and 1431.

make the decision with regard to the future status of the pastor, as will be noted in the next chapter of this study.[99]

In the event of an invalid transfer through which the pastor has suffered harm or expense, he has a right to redress from the ordinary in proportion to the injury sustained.[100] However, in all probability, this too will be taken care of by the Holy See should it reverse the decision of the ordinary.

With regard to the parochial functions which the putative pastor performs in the parish obtained through an invalid transfer, it follows that all those acts for the authorized performance of which he relied solely upon the possession of the pastoral office are done invalidly. However, as affirmed above,[101] since he has taken possession of his benefice, and presumably in a canonical manner, he is immediately considered by the parishioners as the lawful possessor of the parish. Once he begins to act as such the element of common error is realized in fact. Consequently the suppletory principle enacted in canon 209 renders these acts valid as long as this common error persists, whether the putative pastor has acted in good or in bad faith. Of course this principle cannot be invoked *lawfully* in the face of conscious knowledge of the invalid character of the transfer.

Obviously, however, such invalid appointments made through an invalid transfer would not be rendered valid in view of the subsequent error about the person so appointed. Hence, until the possessor in good faith has attained title to the parish through legitimate prescription, the suppletory principle alone will serve to guard against invalidity the various acts performed by the putative pastor in exclusive reliance upon the possession of the pastoral office.

In the event of an invalid process for any of the reasons spoken of above, then, inasmuch as the invalid act of transfer entails also an invalid deprivation of the first parish, this parish, although vacant *in fact,* does not become vacant *in law,* unless the decision of the ordinary is upheld by the Holy See. In this latter event the defects of the ordinary's action would implicitly be healed.

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[99] Cf. *infra,* pp. 255–257.

[100] Canon 1681.

[101] Cf. *supra,* pp. 225–226.

SECTION III

Corollary on the Manner of Proceeding in Effecting a Series of Transfers

In view of the canonical effects of the administrative transfer of pastors a problem arises with regard to the manner in which the ordinary is to proceed in effecting a series of transfers among his pastors. Among the authors consulted there is no mention of this question with the exception of Vermeersch-Creusen,[102] who merely mention that the ordinary must advert to the prescription of canon 150 when he is planning such a series of transfer. An attempt will now be made to suggest a legal mode of procedure.

Canon 150, to which these authors refer, declares that any bestowal of an office which is not *de iure* vacant according to the norms of canon 183, § 1,[103] is *ipso facto* invalid. Moreover, the canon asserts that even though the office becomes vacant before the unlawful appointee has taken possession, the appointment is still invalid because it was made at a time when there was no vacancy. The canon further adds that any promise of the same office, regardless of the one by whom it was made, is without a juridical effect. In view of the severity of this law the ordinary must be most cautious in the manner in which he accomplishes any series of transfers.

It is now asked how the ordinary should proceed in order not to jeopardize the validity of these transfers. In answer to this question it appears that certain hypotheses must be carefully considered if there is to be certification for the validity of the procedure. It is presumed in each of these hypotheses that the parish in question is *de facto* and *de iure* vacant, and that the specific condition of the parish postulates the appointment of a priest endowed with particular qualifications. It is further presumed that the ordinary, after considering the situation and the qualifications of his priests, has decided that there is a certain pastor who alone appears to be the one demanded for that parish. At the same time the ordinary has decided to accomplish a series of transfers in effecting the desired change of appointments.

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[102] *Epitome Iuris Canonici*, I, nn. 269, 310.

[103] Cf. *supra*, p. 98.

In this event the ordinary may either orally propose the transfer, whether personally or through a delegate, or he may send the canonical invitation in writing. The pastor may immediately accept the transfer. If he does so the matter will be facilitated, since the ordinary can then declare a certain day for the taking of canonical possession of the newly assigned parish. However, a more feasible method may be suggested. He may immediately declare vacant the parish from which the transfer is being made, and then allow the pastor to remain in the parish as an administrator until he takes canonical possession of the new parish within the prescribed time. Thereupon the ordinary can proceed to fill the vacancy occasioned by the transfer of the first pastor by extending to a second pastor a canonical invitation to accept a transfer to the parish which has just been vacated. If this pastor accepts the proposed parish, the ordinary can follow the same mode of procedure as suggested for the first transfer, and this may be continued until all the vacancies in the series of transfers have been provided for by the ordinary.

However, should the first pastor seek a period of time in which to consider the proposal of transfer, a difficulty presents itself, since a delay will be occasioned by this request for time. In such a case it does not seem that the ordinary can continue to extend his canonical invitations for transfer to the other pastors in question, since the same would be equivalent to a promise of an office which is not yet vacant. Consequently such an invitation would have no effect in law.[104] However, if he had done so, then in the event that the next pastor has accepted the proposed change the ordinary could not decree his transfer until, upon receiving an affirmative reply from the first pastor, the ordinary has decreed the latter's transfer and the vacancy of the parish possessed by him.

On the other hand, should the first pastor refuse to accept the change, the ordinary must then proceed according to the norms of 2165–2167 to effect the transfer of the unwilling pastor. Thus another delay would ensue. In such a case, until this pastor has taken possession of the second parish within the period of time

[104] Canon 150, § 2.

specified in the precept of transfer, the ordinary cannot validly confer his parish upon the second pastor contemplated in this series of transfers, unless of course, with all the requirements properly observed,[105] the parish has become *ipso facto* vacant by way of deprivation.

The same situation would obtain were there question of the transfer of an irremovable pastor who is unwilling to accept the change. Until that pastor has actually been transferred in virtue of the required apostolic faculties and according to the norms established by them, his parish could not be conferred upon the second pastor.

In like manner, should anyone of the succeeding pastors included in this particular series of transfers elect to delay his acceptance, the consequent transfers could not be accomplished until his parish has become vacant according to law.

Finally, in the event that a recourse (which has already been alluded to, and which will be treated specifically in the next chapter) has been invoked within the ten days' time set at the pastor's disposal, the ordinary cannot validly transfer another pastor to the parish of the one who has lodged this recourse with the Holy See.

It is in view of the possibility that the consequent appointments which are inherently contained in a decree of transfer can quite readily become exposed to the danger of invalidity that a particular caution is indicated on the part of the ordinary. It was in view of this important consideration that it was thought serviceable to include the foregoing suggestions. In matters such as the presently considered one, in which one must heed certain prescribed formalities if his act is to stand unchallenged as a valid act, it is imperative that all these formalities be fully observed.

In view then of these considerations, it is evident that the practice of foregoing the procedure of extending a canonical invitation to pastors in a series of transfers, and of merely advising them of the fact of their transfer by letter or through an announcement in the diocesan newspaper, is to be considered an abuse, since it is

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[105] Cf. canon 2146, § 3, and S.C.C., *Romana et Aliarum: De fatalibus ad recurrendum*, 14 ian. 1924—*AAS*, XVI (1924), 162–165.

definitely against both the spirit and the letter of the law. Nor can it be claimed that there may be in existence a custom of such long standing that it allows the norms of canons 2162–2167 and of canon 150 to be disregarded. As already stated above with reference to parishes in the United States,[106] no legitimate custom can have run its full course of legal prescription, since these parishes were not declared canonical parishes until the promulgation of the Code. Hence the aforementioned practice cannot be regarded as a lawful custom and consequently it cannot be considered as a legal mode of procedure.

Furthermore, such a practice exposes the respective appointments of these pastors to invalidity. In such an event any acts which for their proper authorization rest on the exclusive claim which derives from a validly held pastoral office would be performed invalidly. However, as affirmed above,[107] once they have taken possession of their benefices, and presumably in a canonical manner, they are considered by the parishioners as the lawful possesors of the parishes. When they begin to act as such the element of common error is realized in fact. Consequently the suppletory principle enacted in canon 209 alone renders these acts valid as long as this common error persists whether the putative pastors have acted in good or bad faith.

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[106] Cf. *supra*, pp. 94–95 and 111.
[107] Cf. *supra*, pp. 225–226.

CHAPTER X

Recourse to the Holy See

ARTICLE I. THE FACT OF THE RECOURSE

Canon 2146, § 1. *A definitivo decreto unicum datur iuris remedium, idest recursus ad Sedem Apostolicam.*

§ 2. *Quo in casu ad Sanctam Sedem omnia acta processus transmittenda sunt.*

§ 3. *Pendente recursu, Ordinarius parocciam vel beneficium quo clericus privatus sit, alii stabiliter conferre valide nequit.*

A consideration of the canons special to the process of transfer[1] reveals that there is no specific mention of recourse from the precept of transfer through which there is imposed upon the pastor the moral obligation of accepting it. Nor, indeed, is there any particular prescription of law which treats of the pastor's right to challenge the declaration of the vacancy of his original parish, which has *ipso facto* become vacant through his continued refusal to accede to the command of the ordinary. Is the pastor accorded this right in the process of transfer?

When one considers the preliminary canons[2] common to all the processes of the third part of the fourth book of the Code,[3] it becomes evident that recourse to the Holy See, the only remedy in law which is allowed against a definitive decree of the ordinary, is permitted to a pastor who has been involved in any of these processes. However, in the present particular instance, namely, in the case wherein a pastor is ordered to accept a parish within a certain time under the threat of his own parish becoming vacant by his non-acceptance of the second one, can it be maintained that such a precept has the force of a definitive decree?

As already noted,[4] by nature this precept seems to be equivalent

[1] Canons 2162–2167.
[2] Canons 2142–2146.
[3] Canons 2147–2194.
[4] Cf. *supra*, p. 214.

to a decree, since there is no additional mention of a decree of transfer.[5] Moreover, an earlier consideration of the juridic force of this precept revealed that it is commonly regarded as imposing a moral obligation upon a pastor to accept the transfer in obedience to his ecclesiastical superior. This opinion appears to have a firm basis in law. Consequently, the pastor has no choice but to obey the precept.[6] In other words, this precept appears to be equivalent to a decree of the ordinary by which he would state that a certain pastor of a particular parish is transferred from that parish, and from a certain date will become the pastor of another specified parish. The only reason why a declaration cannot be made in this manner is that a benefice cannot be conferred upon one who is unwilling to accept it.[7] Consequently, the precept can be regarded as the equivalent of a definitive decree against which the pastor is allowed the right of recourse to the Holy See.

Since the second paragraph of canon 2167 definitely speaks of a decree of deprivation, although it be merely declaratory of a situation which already obtains, it seems quite clear that recourse is allowed also against such a definitive decree. Again, the very fact that this is merely a declaration of a vacancy, which *ipso facto* has already been effected in consequence of the pastor's non-compliance with the precept of transfer, appears to offer a confirmatory argument in favor of the definitive effectiveness of the precept itself. Consequently the recourse against the decree of deprivation is in reality primarily directed against the precept by which the vacancy has been effected.

A consultation of the authors regarding the fact of recourse in the process of transfer reveals that some affirm this right as belonging to the pastor,[8] others do not mention it at all, and still

[5] Cf. Noval, *De Processibus,* II, n. 616.

[6] Cf. *supra,* pp. 222–223.

[7] Canon 1436. Cf. *supra,* pp. 229 ff.

[8] Suarez, *De Remotione Parochorum,* n. 128; Vermeersch-Creusen, *Epitome, Iuris Canonici,* III, n. 363; Coronata, *Institutiones Iuris Canonici,* III, n. 1607: Blat, *Commentarium Textus Codicis Iuris Canonici,* IV, n. 741; Cocchi, *Commentarium in Codicem Iuris Canonici,* VII, n. 389. Noval (*De Processibus,* II, n. 508), however, appears to restrict this right to recourse to the case in which it is invoked against the declaration of the vacancy of the parish.

others gratuitously[9] maintain that the procedure ends with the declaration of the vacancy of the first parish, and that inasmuch as the title on transfer makes no mention of recourse the latter would be useless.[10] However, even the authors who expressly admit recourse are always ready to caution the pastor that in most circumstances this remedy should not be sought, since it would be rather indiscriminate to do so. Suarez[11] and Coronata,[12] in speaking of recourse in general, maintain that in most cases there would be little usefulness in recourse unless the reasons alleged for the action of the ordinary were obviously unjust. They add that any defects in procedure could easily be healed, and should a decree be attacked merely on these grounds, all other things being equal, it could easily be remedied by the Holy See, which would thus uphold the action of the ordinary. Vermeersch-Creusen,[13] Beste[14] and also Coronata[15] caution that recourse should not be counselled unless the ordinary has manifestly violated natural equity. It seems, however, that the authors could have considered the situation in which a superior, being incompetent in view of any of the reasons mentioned above,[16] has presumed to prescribe a transfer of a deprivation without having the necessary power to effect what he prescribed.

ARTICLE II. THE NATURE OF THE RECOURSE

In consequence of the fact that the process of transfer is administrative in nature and not a judicial process, the ordinary's verdict can never be a sentence, but must always be a decree.[17] In view of what has been said of the juridical force of the precept which is issued in the process of transfer, it may be considered as a pre-

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[9] Cf. canon 2146.

[10] Augustine, *A Commentary on Canon Law*, VII, 448; Coady, *The Appointment of Pastors*, p. 112.

[11] *De Remotione Parochorum*, n. 24.

[12] *Institutiones Iuris Canonici*, III, n. 1578.

[13] *Epitome Iuris Canonici*, III, n. 313.

[14] *Introductio in Codicem*, p. 864.

[15] *Institutiones Iuris Canonici*, III, n. 1607.

[16] Cf. *supra*, p. 238.

[17] Cf. canon 1601 as compared with canon 1868, § 1.

cept with the juridical force of a definitive decree. Consequently the only remedy in law against it is that of recourse, and not that of appeal.

The Code definitely excluded the metropolitan or any other intermediate superior from handling the recourse, since their competency extends only to appeals,[18] and consequently the right to take cognizance of the recourse belongs exclusively to the Holy See. Further, the positive law[19] establishes the fact that not the Sacred Roman Rota, but only the Sacred Congregations enjoy competency in this matter. In view of the nature of the process of transfer there are only two Sacred Congregations which have the authority to render decisions in this matter. They are the Sacred Congregation of the Council and the Sacred Congregation for the Propagation of the Faith. The former enjoys competency relative to recourse interposed by secular diocesan pastors,[20] while the latter is competent to receive the recourse of quasi-pastors in the mission territories subject to that Sacred Congregation.[21] In the possible event of doubt regarding the proper competency the recourse may be sent to the Secretariate of State, which in turn will forward it to the proper authority.[22]

The recourse against the precept of transfer or against the declaration of vacancy must be characterized as existing *in devolutivo,* i.e., the effectiveness of the action of the ordinary is sustained while the recourse is pending. This is inferred from the fact that canon 2146, § 3, expressly mentions the *suspensive* effect of recourse in relation to the bestowal of the vacated parish upon another. This suspended effect, the while the recourse is pending, postulates that the recourse was lodged within the time allotted by the law for the making of the recourse.[23] Otherwise that is, if this recourse contained and implied a completely suspensive effect, the legislator would not have added this further particular prescrip-

[18] Cf. canons 274, 7°; 1594, § 1.
[19] Canon 1601.
[20] Canon 250, § 5.
[21] Canon 252, § 3.
[22] Suarez, *De Remotione Parochorum,* n. 20.
[23] Cf. S.C.C., *Romana et Aliarum: De fatalibus ad recurrendum,* 14 ian. 1924—*AAS,* XVI (1924), 162–165.

tion of law, for it would have been useless to do so if the recourse already was fortified with a universally suspensive effect.[24]

A few remarks concerning the suspensive effect of recourse in relation to the bestowal of the vacated parish upon another seem necessary at this point of discussion. This suspension of the ordinary's power to confer the parish permanently upon another is a departure from the general rule. However, in view of the consequences which would ensue[25] if the Holy See reversed the decision of the ordinary, the reason of this law becomes obvious especially when there is question of invalidity with regard to the executed transfer or effected deprivation. In the latter cases the vindicated pastor would have a strict right in law to resume his duties in the parish from which he had been transferred or of which he had been deprived.

Since the Holy See may be approached at any time,[26] and since the use of recourse as such is not, as is the use of appeal, conditioned within a fixed time-interval,[27] it is asked whether the ordinary's power of validly conferring the vacated parish permanently upon another is indefinitely subjected through the possible means of a recourse with a suspensive effect to the good pleasure of the pastor who has been transferred from or deprived of his parish. The Code is silent concerning the time within which the recourse must be made, and consequently many pastors took advantage of this circumstance. Some, even after having notified the ordinary of their intention of lodging recourse, neglected to do so for many months and sometimes for years.[28]

When this condition of affairs was brought to the attention of the Holy See, which realized that it went counter to the very thing intended, namely, the greater good of souls, the Holy See established a definite period of time within which this recourse, if it was to have this unusual effect, had to be lodged against the decision of the ordinary. Accordingly the Sacred Congregation

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[24] Cf. Noval, *De Processibus*, II, n. 510.

[25] Cf. *infra*, pp. 254 ff.

[26] Canons 1569 and 1601.

[27] Cf. canon 1634. Cf. also Suarez, *De Remotione Parochorum*, n. 21.

[28] Cf. S.C.C., *Romana et Aliarum: De fatalibus ad recurrendum*, 14 ian. 1924—*AAS*, XVI (1924), 162–165.

of the Council decreed that this particular suspensive effect would obtain with regard to the bestowal of the parish upon another only when the pastor had recourse within ten days—which were to be calculated according to the norms of canons 34, § 3, 3°, and 35—after having received intimation of the ordinary's final decree, and on condition that he informed the ordinary that he had lodged recourse with the Holy See.[29]

The animadversions prefixed to this reply of the Sacred Congregation of the Council bring out the fact that it has a wider scope than the particular question submitted, since they deal with recourse in general. It is pointed out in these animadversions that the limiting of recourse as distinguished from appeal, in point of time, is unusual in the Code, and that in this instance there is a special reason for doing so. Inasmuch as the recourse referred to here has a suspensive effect, it is rightly limited, and in this case takes on the character of an appeal. Consequently it can be inferred, in the light of this preliminary discussion and in view of the requirements of natural equity, that, if a recourse is to be fortified with a suspensive effect, it must be invoked within ten days. Hence, inasmuch as canon 2143, § 3, prevents the ordinary from permanently appointing a pastor to the vacated parish, the further deduction that the recourse must be lodged within ten days naturally follows.[30]

As intimated in the reply of the Sacred Congregation of the Council, the ten day period allotted for recourse is reckoned according to canons 34, § 3, 3°, and 35. Hence, the day on which the parish which is relinquished *ipso facto* becomes vacant[31] does not count in the computation of the ten days allotted to the pastor, so that he is allowed ten complete days to lodge a recourse after that day. Further, since the response of the Sacred Congregation of the Council specifically mentions canon 35, it seems that this ten day period is *"tempus utile,"* that is, time available to the pastor to exercise his rights. Consequently that time does not lapse

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[29] S.C.C., *Romana et Aliarum: De fatalibus ad recurrendum,* 14 ian. 1924—*AAS,* XVI, (1924), 162–165.

[30] Cf. Noval, *De Processibus,* II, n. 509; Meier, *Penal Administrative Procedure Against Negligent Pastors,* p. 200.

[31] Cf. *infra,* pp. 251–252.

if the pastor is ignorant of his rights or is legitimately impeded from acting during that time.[32]

Now with reference to the recourse that may be invoked against the precept of transfer, the question arises as to when the set time-period of ten days begins. Is it computed from the day following the reception of the precept, or is it calculated from the day following the taking of possession of the second parish? Again, in relation to the pastor's deprivation of his parish, must the opening day on which recourse can be lodged coincide with the day after his parish *ipso facto* has become vacant, or can he wait for the opening day of the ten day period until he had been notified of the vacancy by the ordinary?

Consideration will first be given to the case in which the pastor accepts the second parish. Being aware that the transfer is manifestly invalid, he may have repaired to the second parish merely to avert the arising of scandal among his parishioners. In this instance, it seems that he could avail himself of the ten days following upon the taking of possession of that parish. This conclusion is based in the fact that the precept does not become effective with regard to the vacancy of the first parish until the pastor has accepted the second one. At least, if the transfer should be invalid, the first parish would have to be considered vacant, as it actually is *in fact,* even though it would not be so *in law.* If one argue analogously from the case of a decree of deprivation of which the notification to the pastor causes him to be considered as no longer possessing his parish,[33] and consequently extends to him the right of invoking a recourse during the ten days following the reception of that notification, it appears that in like manner the pastor who is transferred could calculate the time allotted to him by law for the lodging of a recourse from the time at which his first parish became vacant by his acceptance of the second parish, for in the two cases the juridical effect, namely, the reputed vacancy of the parochial benefice, is identical.

It seems that the same may be maintained in the case of the

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[32] Cf. canon 35: "Tempus *utile* illud intelligitur quod pro exercitio aut prosecutione sui iuris ita alicui competit ut ignoranti aut agere non valenti non currat; . . ." Cf. also Coronata, *Institutiones Iuris Canonici,* I, n. 56.

[33] Cf. canon 192, § 2.

pastor who because of his non-compliance with the precept of transfer is *ipso facto* deprived of his parish. In this instance the parish purportedly becomes vacant at the expiration of the time fixed in the precept of transfer, about which effect the pastor has already been notified in the precept itself.[34] The declaration of vacancy, on the other hand, being merely declaratory, establishes no added juridical effect. Consequently, as stated above, since the recourse is directed primarily against the precept of transfer which the pastor has ignored,[35] it naturally appears to follow that the time allotted for the invoking of recourse should be computed from the day following the automatic effect of the precept, which indeed is the same as that produced by a definitive decree of deprivation.[36]

ARTICLE III. THE PROCEDURE IN THE RECOURSE

The pastor must notify his ordinary of the fact that he interposed a recourse. Upon receiving this notice the ordinary is obliged to forward all the acts of the process to the Holy See, that is, to the Sacred Congregation of the Council, or to the Sacred Congregation for the Propagation of the Faith,[37] or, in the case of doubt, to the Papal Secretariate of State.[38] In this country the ordinary can do this indirectly by sending the acts to the Apostolic Delegate in Washington, who in turn will forward the acts of the process to Rome.[39] The ordinary must always send these acts, for before considering the case the Holy See would ask for them.[40]

Now it is asked: what are the acts of the process spoken of in canon 2146, § 2? According to canon 1642, § 1, *"acta processus"* are understood as those acts which pertain solely to the formalities of procedure as opposed to the *"acta causae,"* which regard the merits of the case. The very nature of the matter, in this instance, indicates that there can be no doubt that the *acts of the process* include both the acts of procedure and the acts which have regard

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[34] Cf. canon 2167, § 1.
[35] Cf. *supra*, p. 246.
[36] Cf. canon 192, § 2.
[37] Cf. canon 2146, § 2, and Suarez, *De Remotione Parochorum*, n. 20.
[38] Cf. Suarez, *op. cit., loc. cit.*
[39] Cf. Beste, *Introductio in Codicem*, p. 855.
[40] Cf. Suarez, *op. cit.*, n. 22.

to the merits of the case, and consequently all the acts must be forwarded to the Holy See.[41]

These acts will include everything from the first invitation for transfer to the precept ordering the transfer, and in the event of a declaration of vacancy, also the decree of the ordinary to that effect. They will also embrace the reasons alleged by the ordinary, the counter allegations of the pastor, the discussion with the parish priest consultors and their appraisal, the decision of the ordinary after this discussion, the additional reasons, if any, advanced by the pastor, and finally the precept of transfer. It is only with these acts before them that the Sacred Congregations may be in a position adequately to review the case and to render a just and equitable decision. It is not necessary, and in fact seems imprudent, to send the original acts, since these should be kept in the archives of the diocese. Hence certified copies[42] or, as if often done at the present time, photostatic copies of the originals may be sent.[43]

ARTICLE IV. THE EFFECTS OF THE RECOURSE

The suspensive effect of the recourse with regard to the vacated parish has already been considered.[44] Pending a recourse which has been invoked within the time allotted by law, that parish cannot validly be bestowed upon another in a permanent manner. In looking into the reason of this suspensive effect, Suarez[45] contends that it is granted by the Code because the parish is not yet vacant according to the norms of law. But in the light of canon 2146,

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[41] Cf. canons 2146, § 2; 1642, § 1. Cf. Noval, *De Processibus*, II, n. 512; Suarez, *De Remotione Parochorum*, n. 22; Coronata, *Institutiones Iuris Canonici*, III, n. 1578; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 346; Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 741; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 204.

[42] Cf. canon 1890. Cf. also Blat, *Commentarium Textus Codicis Iuris Canonici*, IV, n. 741; Cocchi, *Commentarium in Codicem Iuris Canonici*, VII, n. 573.

[43] Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: Bruce, 1938), p. 282.

[44] Cf. *supra*, pp. 249–252.

[45] *De Remotione Parochorum*, n. 23.

§ 3,[46] this cannot be a tenable conclusion. If there be question merely of the licitness of the transfer or of the deprivation, the parish is considered vacant *de facto* and *de iure* until the Holy See has actually reversed the decision of the ordinary through its authoritative intervention.[47]

This conclusion naturally follows from the fact that the recourse can be invoked merely with a non-suspensive effect. If one were to hold the opinion of Suarez, one would also have to affirm that equivalently the recourse has a completely suspensive effect, that is, both in regard to the decision of the ordinary as well as with respect to the bestowal of the earlier held parish. Suarez himself denies to the recourse this double suspensive effect,[48] and rightly so, since no other conclusion can be drawn from the law.[49] Hence it is evident that the decision of the ordinary remains in effect. Granted the fact of a valid transfer or deprivation, the parish is and remains vacant.

A consideration of the various hypotheses relating to the effects of recourse is now in order. First of all it is assumed that the recourse has been properly invoked within the ten days available time. The Holy See, after reviewing the case, confirms the decision of the ordinary. In such a case the validity and licitness of the transfer or the deprivation of the pastor is sustained. Consequently the ordinary is free to appoint in the usual manner a new incumbent to the parochial benefice with reference to which the transfer or the deprivation was effected, that is, by following the prescriptions of the law in this respect.[50] However, if in defiance of the prescription of canon 2146, § 3, the ordinary has already conferred the parish or benefice upon another before receiving this authoritative confirmation of his precept, then such a bestowal is invalid. Accordingly he would be obliged to reappoint the incumbent in order that the latter may have valid possession of the parish or parochial benefice.

There is another possibility to consider. The Holy See may

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[46] Cf. *supra*, pp. 248–249.
[47] Cf. Noval, *De Processibus*, II, n. 514. Cf. also canon 1465, § 1.
[48] *Op. cit., loc. cit.*
[49] Canon 2146, § 1 and § 3.
[50] Cf. canons 451; 453; 457; 458; 459; 1438.

reverse the precept of the ordinary. Granted that the recourse was made within the allotted time, if the act of transfer or of deprivation was valid, even though unlawful, the parish is vacant in consequence of the precept, for the recourse interposed against it is without a suspensive effect. Should the Holy See desire that the pastor be reinstated in his former parish then the pastor who has been vindicated will need a new installation in that parish, unless the Holy See has dispensed from that requirement, or has made another equivalent disposition in the case.[51]

Not all authors, however, seem to be in agreement concerning this, as has already been mentioned. Suarez,[52] in maintaining that the earlier held parish does not become vacant *ad normam iuris* the while a properly invoked recourse is pending, adds that, should the decision of the ordinary be reversed, the titulary can return to the parish or remain in it as before without a new bestowal of the parochial benefice. Vermeersch-Creusen[53] seem to imply the same when they say that the full effect of the decree of the ordinary is suspended. Wernz-Vidal,[54] in stating that the ordinary cannot definitely change the state of things during the time of recourse, perhaps imply the same doctrine. Fanfani,[55] in commenting upon the word *"stabiliter,"*[56] endeavors to make a distinction by saying that the ordinary can, if it so pleases him, suspend the pastor from the office of pastor the while the recourse is pending, but that nevertheless the pastor still retains possession of the benefice.

In view of what has already been asserted, and in the light of the interpretation of canon 2146, §§ 1 and 3, the opinions of these authors are entirely contrary to the law, and even to their own observations concerning the substantially non-suspensive effect of the recourse.[57] Hence there is need of a new bestowal of the

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[51] Cf. Noval, *De Processibus*, II, n. 514; Cf. also Connor, *The Administrative Removal of Pastors*, p. 140; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 207.

[52] *De Remotione Parochorum*, n. 23.

[53] *Epitome Iuris Canonici*, III, n. 346.

[54] *Ius Canonicum*, VI, n. 740.

[55] *De Iure Parochorum*, n. 142.

[56] Cf. canon 2146, § 3.

[57] Cf. Suarez, *De Remotione Parochorum*, n. 23; Wernz-Vidal, *Ius Canonicum*, VI, n. 740; Vermeersch-Creusen, *Epitome Iuris Canonici*, III, n. 346.

parish, since the recourse neither suspends the validity of the precept nor does it modify its essential character. This is substantiated by Noval.[58] When he speaks of recourse in general, he emphasizes the fact that in no way is the validity of the decree or the validity of the removal made dependent upon the confirmation or the non-confirmation of the decree or dismissal.

Meier,[59] in treating of the effects of recourse, asserts that Reilly[60] seems confused on this point when he says that, if the pastor had recourse within ten days, his parish will still remain vacant and he can return to it without the necessity of a new provision. It is evident that the latter author is confused, since, as Meier well points out, it can be asked how this could be possible when *de facto* the pastor is deprived of the parish and *de iure* it is vacant. Consequently the pastor in such a case, in order that he may be considered in fact and in law as the true pastor of that parish, always needs a new installation or a dispensation from the same.[61] However, in this event, since the process and the act of the ordinary are valid, it may seem imprudent to the Holy See to reinstate the pastor in his previous parish. Hence the Holy See may provide for this case by conferring another parish of equal rank or dignity upon the vindicated pastor.[62]

Another possibility, wherein the decision of the ordinary is manifestly invalid, presents itself. In this instance, the Holy See may heal the action of the ordinary, or it may reverse his decision. In the former case, in view of the fact that the first parish is both *de iure* and *de facto* vacant, the ordinary is free to confer the first parish upon any priest whom he decides to be capable of fulfilling that office. On the other hand, should the Holy See uphold the recourse of the pastor, inasmuch as the first parish was never vacant in law in consequence of the invalidity of the transfer or of the deprivation, then the vindicated pastor can return to his former parish without the necessity of a new installation, unless the Holy See has provided for the case in some other way.

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[58] *De Processibus*, II, n. 574.
[59] *Penal Administrative Procedure Against Negligent Pastors*, p. 207.
[60] *The Residence of Pastors*, p. 68.
[61] Cf. canons 1443; 1444.
[62] Cf. Suarez, *De Remotione Parochorum*, n. 23.

But, if the Holy See reverses the decision of the ordinary simply because of the unlawfulness of his action, and at the same time makes provision for the vindicated pastor by giving him another parish in view of the fact that another priest has already been installed in the earlier held parish, then this latter priest, if he is to remain in that parish, needs a new installation. This is evident, for the suspensive effect of the recourse with regard to the bestowal of the earlier held parish remains in force regardless of the ordinary's decision to the contrary when he appointed a pastor to that parish.

What is to be said of the case in which the recourse has not been invoked within the ten days' available time? This may happen when a pastor, who has been transferred from or deprived of his parish, finally becomes aware of the apparent invalidity of the action, especially in view of the ordinary's incompetence in the matter of transfer. Inasmuch as the pastor has not taken advantage of a timely recourse with the effect of suspending the ordinary's right of conferring the vacated parish permanently upon another, the ordinary may already have bestowed that parish upon some other priest. In this event, should the Holy See vindicate the pastor by declaring that the transfer or the deprivation was invalid, then the earlier held parish never was *de iure* vacant. Consequently the bestowal of that parish upon some other priest would likewise have been invalid.[63] Moreover, the vindicated pastor is still the pastor of that first parish, and needs no new installation should the Sacred Congregation direct that he retain that parish. However, should the Holy See, in order to offset any confusion, make some other provision, it may well be that it will also convalidate the appointment of the new incumbent.

If, on the other hand, the vindication of the pastor results on the grounds of the unlawfulness of the decision of the ordinary then the new pastor who has taken canonical possession of the first parish actually possesses that parish validly. Should the Holy See direct that it be returned to the former pastor, it will be necessary to ask for the resignation of the new pastor and to reinstall the former one. Again, the Holy See will probably instruct the ordinary as to the manner of proceeding in such an instance.

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[63] Canon 150. Cf. Suarez, *De Remotione Parochorum*, n. 23.

According to Suarez,[64] once the ordinary knows that a pastor has taken recourse even after the lapse of the ten days available to produce the suspensive effect spoken of in canon 2146, § 3, he should not confer the parochial benefice permanently upon another. The authors correctly point out that nothing, however, prevents the ordinary from doing this but that the foregoing of an appointment is indicated out of deference to the Holy See. The wisdom of this can easily be seen in the event that the Holy See declares the decision of the ordinary to be invalid. However, in view of special circumstances it may be necessary to confer the parish upon some other priest. In such an event, since he is not forbidden by law to make a permanent appointment,[65] the ordinary may, especially with a view to averting more serious consequences relating to the good of souls, confer the parochial benefice upon some other priest.[66]

ARTICLE V. THE CONDUCT OF THE PASTOR WHILE THE RECOURSE IS PENDING

In the event that a pastor is fully convinced that he is being invalidly transferred, his normal reaction would be to object strenuously to the change which is being imposed upon him. However, prudence often seems to suggest that he repair to the new parish, lest great scandal arise among his parishioners, which indeed may redound to the detriment of souls and render disservice to the utility of the Church as a whole. Although it may occur more readily in relation to an irremovable pastor, it may also happen that a removable pastor has every right to believe that for one reason or other his transfer is manifestly invalid. In such an event, to preclude scandal and its consequences, the pastor may submit. However, nothing appears to militate against his manifesting, not only to the ordinary, but even to his parishioners, that he is leaving out of obedience to his ecclesiastical superior, and

[64] *De Remotione Parochorum*, n. 23. Cf. also Reilly, *The Residence of Pastors*, p. 68; Connor, *The Administrative Removal of Pastors*, p. 140; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 219.

[65] Cf. canon 2146, §§ 1 and 3; Cf. also canon 204, §§ 1 and 2.

[66] Cf. Reilly, *The Residence of Pastors*, p. 68; Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 210.

that he is lodging recourse with the Holy See against the decision. The protection of his own good name seems to allow him this right. Nevertheless, out of respect for the ecclesiastical authority of the Church, and to preserve for it a good esteem among the people of his parish, it appears that he will do well to affirm his obedience to and acceptance of whatever decision the Holy See may render.

On the other hand, should the pastor by his resistance to the precept of transfer be deprived of his parish, his conduct should be such that it cannot reasonably be alleged that he has done anything detrimental to the good of souls or to the ecclesiastical authority of his superior. Consequently he must avoid everything that may raise the occasion of scandal. Accordingly he should not manifest any resistance to the new priest who is to take his place. Nor should he endeavor to arouse antagonism on the part of his parishioners against him. Finally, under no circumstances should he endeavor to enlist the protection of the civil authorities to sustain his claim. Should he do any of these things, not only would he hurt his own cause, as well as that of the Church as a whole, but he would expose himself to the infliction of the penalties of the Church which could be imposed upon him, since the law adequately provides penalties for such disobedience and insubordination.

The Code allows the ordinary to punish contumacy in proportion to its gravity, and at times even permits the recalcitrant cleric to be punished with excommunication, interdict, and suspension according to the gravity of the offense.[67] Again, the law provides for the punishment of those who either directly or indirectly impede the exercise of ecclesiastical jurisdiction whether of the internal or the external forum by having recourse to any civil authority. It declares that such offenders *ipso facto* incur excommunication reserved in a special manner to the Holy See.[68]

Moreover, the law affords that if, for the purpose of impeding the exercise of ecclesiastical jurisdiction, a pastor should presume either to incite the people or to promote public feeling in his

[67] Cf. Canon 2331, § 1.
[68] Canon 2334, 2°.

behalf, or to arouse the people by word or by writing, or to take any other similar action, he must be punished at the discretion of the ordinary, according to the gravity of the offense, and if necessary, even with suspension. The Code adds that the ordinary shall punish in the same manner any priest who stirs up his people in any way so as to impede the entrance into the parish of a priest who has been lawfully appointed as pastor or as administrator of that parish.[69]

Finally, in order to fortify the authoritative prerogatives if the ordinary, the legislator provides that, should anyone persist in the possession of an office, of a benefice, or of a dignity in contravention of a legitimate deprivation, or if anyone for the purpose of retaining possession machinates lawless hindrances and illegitimate delays, he shall, upon previous admonition, be compelled by means of a suspension *a divinis* or through other suitable punishments, and in the last resort, even by deposition, to forsake his office.[70]

In either instance, whether the pastor has lost his original parish through a transfer or through an *ipso facto* effected deprivation, he should, pending the recourse, peaceably await the decision of the Holy See, and upon hearing the verdict be prepared to submit to it with all reverence and obedience.

On the other hand, the ordinary has the reciprocal obligation of providing for the pastor who has been deprived of his parish because of his non-compliance with the precept of transfer. It seems that this obligation can be fulfilled in much the same manner as has been suggested in an earlier chapter of this study.[71] Hence the ordinary may give such a pastor an incumbency in another parochial benefice, or he may appoint him to a non-parochial benefice or to an office of a non-parochial nature. However, nothing seems to militate against the ordinary's appointing such a pastor as an administrator of his original parish, and if conditions allow this mode of procedure it may often be a feasible one, especially in

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[69] Canon 2337.

[70] Canon 2401. Cf. Meier, *Penal Administrative Procedure Against Negligent Pastors*, p. 213; Connor, *The Administrative Removal of Pastors*, p. 137; Fanfani, *De Iure Parochorum*, n. 147; Wernz-Vidal, *Ius Canonicum*, VI, n. 757; Suarez, *De Remotione Parochorum*, n. 87.

[71] Cf. *supra*, pp. 233–236.

view of the fact that the earlier held parish cannot be bestowed permanently upon another if the recourse has been invoked within the ten days' available time. In any event, the ordinary should as soon as possible, and as it seems, with the advice of the parish priest consultors who have already had a part in the process of transfer,[72] decide what particular appointment would be best suited for such a pastor in order that a suitable provision may be made for his sustenance while the recourse is pending.

[72] Cf. *supra*, pp. 233–234.

CONCLUSIONS

The administrative process of the transfer of pastors as considered in Book IV, Part III, Title XXIX, of the *Code of Canon Law*, originated with the promulgation of the Code. The generic reason demanded by law for the proposal of the transfer of a pastor is the good of souls in the parish to which the transfer is to be made. This reason, however, must be specifically indicated by the ordinary in the invitation for transfer.

The active subject of the process of transfer is the local ordinary. In some instances, however, his power of jurisdiction has been so limited by the law that any transfers attempted in contravention of these restrictions would be invalid. One or other of the ecclesiastical superiors included under the term *Ordinarius loci* becomes incompetent to effect a particular transfer by reason of a lack of authorization, or because of a restriction with regard to the vacancy of a see, or by reason of the reservation to the Holy See of a particular irremovable benefice, or also because the appointment of a pastor to even a removable parish has devolved upon the Holy See, or by reason of the inferior quality of the parish to be assigned, or, finally, because of the reluctance of an irremovable pastor to accept a proposed change of parishes.

The passive subjects of the administrative process of transfer embrace all physical pastors, properly so called, of the secular clergy; all secular quasi-pastors; all secular parochial vicars enjoying full parochial rights and duties as vicars of those moral persons in whom has been placed the vested title in the care of souls; and all secular parochial assistants upon whom has been conferred an ecclesiastical benefice in virtue of their status as assistants.

The procedure of administrative transfer demands the presence of a notary for the lawfulness of the process. In view of the doubt in law, should the notary not be present, the process may be considered to be valid until a decision to the contrary is received from the Holy See.

The invitation for a proposed transfer, which can be extended to irremovable and removable pastors alike, although paternal in nature, should be communicated in a canonical manner because of its legal effect. The second paternal invitation which is extended to an unwilling removable pastor must also be communicated in a canonical manner.

In a voluntary transfer a pastor, by his written or notarized oral acceptance of the parish proposed to him by the ordinary, does not resign the parish which he originally possesses, but merely surrenders the right of stability which he has in the pastoral office. He thereby accords the ordinary the right of removing him from his parish and of appointing him to another without the necessity of resorting to an acquisition of special faculties from the Holy See, or of instituting a special process to enforce the transfer.

The prescription of law which demands, for the validity of the process, the consultation between the ordinary and the parish priest consultors extends to a consideration of all three elements required as the object of this discussion.

The precept of transfer which is issued by the ordinary after the second refusal by the removable pastor must be given in writing. This precept has the effect of a definitive decree. It is not simply penal in nature, and consequently it imposes a moral obligation upon the pastor to accept the transfer in obedience to his ecclesiastical superior.

The *ipso facto* resulting deprivation occasioned by the precept in relation to which the pastor has refused to accept the transfer does not implicitly confer the second parish upon the pastor. His parish simply becomes vacant, and hence adequate provision remains to be made for his future.

The precept of transfer does not inherently grant a dispensation to the pastor to excuse him from taking canonical possession by the observance of the solemnities required by particular law and lawful custom. If the ordinary desires that the pastor forego these formalities he must, on the basis of a just cause, expressly grant the dispensation in the precept of transfer. Before or upon taking canonical possession of his parochial benefice the pastor is obliged to make a profession of faith and take the oath against modernism.

If a priest presumes to take over the duties of a pastor without, however, having observed the formalities demanded for the taking of canonical possession, or without having obtained a dispensation therefrom, he does not become the true pastor of the parish. It appears that his functions performed as pastor are invalid, and the suppletory principle of canon 209 can alone safeguard his acts of jurisdiction and his assistance at marriages against invalidity.

In effecting a series of transfer the ordinary must be certain that each of the subsequent parishes involved in the transfers is vacant. It is better, then that he declare each relinquished parish vacant upon the acceptance of the new one, and allow the former pastor to act in the capacity of an administrator until he takes possession of the parish which he has accepted.

In consequence of an invalid transfer the pastor has the right of redress against the ordinary for any harm which has been suffered or for any expense which has been incurred as a result of the invalid act of his superior. Further, all his acts of jurisdiction and any assistance at marriages in the new parish are invalid. Again, it is solely the suppletory principle of canon 209 that can rescue these acts from invalidity.

Recourse to the Holy See is allowed against the precept of transfer. To obtain the favor of the suspensive effect in relation to the bestowal of the earlier held parish permanently upon some other priest during the time that recourse is pending, the pastor must lodge his recourse within the ten days' available time accorded him by law. This time begins the day after he has taken canonical possession of the new parish, or the day following his *ipso facto* effected deprivation of his own parish in consequence of his act of non-compliance with the precept of transfer.

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ABBREVIATIONS

AAS—Acta Apostolicae Sedis.

AER—American Ecclesiastical Review.

AkKR—Archiv für katholisches Kirchenrecht.

ASS—Acta Sanctae Sedis.

Coll. Lac.—Collectio Lacensis.

Dataria Ap.—Apostolic Datary

Fontes—Codicis Iuris Canonici cura . . . Gasparri editi.

Hardouin—*Acta Conciliorum* etc.

Hartzheim—*Concilia Germaniae* etc.

HPR—Homiletic and Pastor Review.

Mansi—*Sacrorum Conciliorum Nova et Amplissima Collectio.*

MGH—Monumenta Germaniae Historica.

MPG—Migne, *Patrologia Graeca.*

NRT—Nouvelle Revue Théologique.

P.C.I.—Pontifical Commission for the Authentic Interpretation of the Code.

S.C.C.—*Sacred Congregation of the Council.*

S.C. Consist.—*Sacred Congregation of the Consistory.*

S.C. Ep. et Reg.—*Sacred Congregation of Bishops and Regulars.*

Thesaurus—Sacrae Congregationis Concilii Resolutiones.

BIOGRAPHICAL NOTE

WILLIAM ANTHONY GALVIN was born March 16, 1912, at Fall River, Massachusetts. He completed his grammar school education at St. Mary's Parochial School of that city. After spending one year at Henry Lord Junior High School, and three years at B.M.C. Durfee High School, in Fall River he was graduated in 1929. He matriculated at St. Charles College, Catonsville, Maryland, in the fall of 1931. After two years of college training he made his philosophical studies at St. Mary's Seminary, Baltimore, Maryland, and received the degree of Bachelor of Arts from that institution in 1935. In the fall of 1935 he entered the Sulpician Seminary and at the same time enrolled in the Catholic University of America, Washington, D.C., to pursue graduate studies in the School of Social Science. He was ordained to the priesthood in Fall River, Massachusetts, June 3, 1939, and the same year received the degree of Master of Arts in Sociology from the Catholic University of America. In September of 1939 he reentered the Catholic University of America to pursue graduate courses in Canon Law. From this institution he received the degree of the Baccalaureate in Canon Law in June 1940, and the degree of the Licentiate in June 1941. After serving as a parochial assistant and as a member of the Diocesan Tribunal of the Diocese of Fall River, he returned to the Catholic University of America in the fall of 1945 to complete his graduate courses in Canon Law.

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