A STUDY OF THE POWER SUPPLIED BY THE CHURCH IN COMMON ERROR ACCORDING TO CANON 209.

Presented to the Faculty of Canon Law
of St. Patrick's College, Maynooth,
as a thesis for the degree of
doctor.

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INTRODUCTION.

Canon 209 of the Codex Juris Canonici states that in common error and in positive and probable doubt, the Church supplies jurisdiction. It reads - "In errore communi aut in dubio positivo et probabili sive juris sive facti, jurisdictionem supplet Ecclesia pro foro tum externo tum interno." In the present study we treat only of jurisdiction supplied by reason of common error, because this is the point which presents most difficulty in practice.

As a rule, commentators on the Code treat the question of common error very briefly and very summarily: indeed, we might even say that the point is generally unsatisfactorily dealt with - especially in view of the relatively important place it holds in ecclesiastical discipline, exercising, as it does, a fairly wide influence in the practical sphere of the valid performance of official functions. Due to the fact that most commentators confine themselves to a textual interpretation of canon 209, there is at present much controversy as to the true notion of common error. Actually the doctrine that the Church supplies jurisdiction in common error - as codified in canon 209 - is very old. To arrive at the true notion of common error, therefore, it is necessary to examine the doctrine in its origin, development and application down through the centuries. Thus a comprehensive examination of the historical background is demanded, and consequently the greater part of this essay is historical. The conclusions finally arrived at, make an interpretation of the present-Code discipline on common error a relatively easy task, and hence we devote to it only the two final chapters.

SECTION I.

THE DOCTRINE OF COMMON ERROR IN ROMAN LAW.

CHAPTER I.

JUSTINIAN LAW.

It has been said of ancient Rome that her mission was war and her vocation law. That she fulfilled her mission is clear from a glance at the history of Roman military conquests. The fulfilment of her vodation is evidenced by the well-defined and highly-developed state of the legal system existing in the Roman state, long before the beginning of the Christian era - and by the influence this system has exercised on modern legal codes. Most European systems of the present day are based largely on that of ancient Rome. The Church too has, in no small measure, drawn from this same source: many canonical institutions owe their origin to Roman legal endeavour. For instance, much of the terminology and many of the juridical notions contained in Book IV of the Codex Juris Canonici - treating of judicial processes - come directly from Roman law. But instances of this are not exclusively confined to Book IV of the Code: others might be mentioned. It is interesting to note that the first and most typical case mentioned by Charles Boucaud when treating of this very question, in a paper read at the International Juridical Congress at Rome in 1934 - is that of Canon 209 (1).

Canon 209 - or at least that part of it which decrees that jurisdiction is supplied in common error - is undoubtedly a classical example of the influence of Roman law on Canon. Commentators on canon 209 unanimously agree in attributing its origin to Roman law. And it is most significant that pre-Code authors, in their treatment of the principles of common error, invariably appealed to Roman law in order to place the doctrine on a solid juridical basis. It is obvious, therefore, that in order to have a proper understanding of the principles of canon 209 a brief study of their origin and original application will be essential.

(1) "Relations inter Jus Romanum et Codicem Benedicti XV", Acta Congressus Juridici Internationalis IV , p.48.

While there are many laws in the collections of Justinian which helped to give rise to the doctrine under consideration, the outstanding case is that known as the Lex Barbarius(2) - the case to which canonical writers most frequently refer. By reason of its greater importance we shall first consider the Lex Barbarius: afterwards we shall examine the other minor, yet nonetheless important, cases which are, as it were, supplementary to the Lex Barbarius and help us to arrive at a more complete knowledge of the notion of the doctrine and its application, as obtaining in the Justinian legislation.

Following is the text of the Lex Barbarius - Digest I, 14, 3.

Ulpianus libro trigesimo octavo ad Sabinum. Barbarius Philippus, cum servus fugitivus esset, Romae praeturam petiit, et praetor designatus est. Sed nihil ei servitutem obstetisse ait Pomponius, quasi praetor non fuerit: atquin verum est, praetura eum functum. Et tamen videamus: si servus, quamdiu latuit dignitati praetoria functus sit, quid dicemus, quae edixit, quae decrevit, nullius fore momenti? an fore propter utilitatem eorum qui apud eum egerunt, vel lege, vel quo alio jure? Et verum puto, nihil eorum reprobari: hoc enim humanius est: cum etiam potuit populus Romanus servo dicernere hanc potestatem: sed et si scisset servum esse, liberum efficisset. Quod jus multo magis in Imperatore observandum est."(3)

In order to understand properly the full import of this law, and to demonstrate its relation to the subject matter under consideration, it will be necessary to make a brief analysis of the text of the law itself, and to take a cursory glance at the historical background from which it emerges.

(2) D. I, 14, 3.

(3) This reading is taken from the critical edition of the Corpus Juris Civilis - Editio Stereotypa Quinta Decima, Berolini 1928-29, from which we also take other extracts from Justinian laws.

The chief judicial officer in the Roman state was the praetor. His duty was the administration of justice between the citizens. In the beginning there was but one praetor: however, with the expansion of the Empire and the recognition of aliens by the law, it was found imperative to have extra praetors appointed - to cater for the administration of justice, firstly among aliens in the City, and secondly in the provinces. By the year 200 B.C., there were as many as six praetors. Appointed annually, following elections by the comitia centuriata - which embraced the whole body of the citizens, plebeian as well as patrician - the praetor ranked next to the Consul. At first the praetorship was confined to members of the Patrician group but under the Licinian laws in 337 B.C. it was opened to plebeians.(4) This office however could never be held by a slave. In the Roman economy slaves had no rights of any kind. As Moyle(5) puts it, "In respect of capacity of right, slavery is a condition of absolute rightlessness. A slave could have no rights against either his master or anyone else .... a slave was not a 'person' at all; he had no caput (Inst.1, 16, 4). The Roman lawyers looked upon him as a 'res', and applied to him, as an object of property, the same rules which they laid down as to domestic animals."

This being the Roman attitude towards slaves it was only to be expected that they should be excluded from holding public offices. Actually this exclusion is noted in Dig.V, 1, 12, 2 where it is stated that neither women nor slaves can hold civil offices - not because of any intrinsic incapacity but because custom would have it so.(6)

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(4) cf. Hunter, Roman Law, p.34.

(5) Imperatoris Justiniani Institutionum Libri Quattuor p.109.

(6) "Quidam enim lege impediuntur, ne judices sint, quidam natura, quidam moribus. Natura ut surdus, mutus, et perpetuo furiosus, et impubes quia judicio carent. Lege (impeditur) qui senatu motus est. Moribus, feminae et servi, non quia non habent judicium, sed quia receptum est ut civilibus officiis non fungantur."

The power of the praetor was twofold: he possessed both jurisdictio and imperium. Jusisdictio (jus dicere) expressed his power of administering the civil law. It could be summed up in these words - "do, dico, addico - uttered by the praetor in disposing of the several stages of a case. That is to say, he gave permission to bring the cause into court (dare actionem), and he appointed an arbitrator (dare judicem); he stated the law and shaped its application for the investigation of the case before the arbitrator (dicere jus); and he formally gave effect to the decision of the arbitrator by vesting through his judgment a title to property or to damages (addicere bona or damna)"(7) According to Ulpian it included the giving of possessio bonorum, the appointment of curators and the designation of arbitrators - a description incorporated in the Digest of Justinian.(8) The other element of the praetor's power, the imperium vested in him as part of the sovereign power that he possessed in virtue of his magistracy. On the imperium were based the legislative as opposed to administrative and judicial functions of the praetor."(9)

In the light of the foregoing we can readily understand the reason for Ulpian's questions. Barbarius a fugitive slave came to Rome, apparently lived the life of an ordinary free citizen, and so successfully concealed his true identity that the people elected him to the office of praetor. As a slave he was incapable of holding his office - incapable of acquiring or exercising the power of jurisdictio and imperium. What of all the judicial actions he performed during the course of his office - actions performed by virtue of the office which he was

(7) Hunter, Roman Law, ps. 41-42.

(8) Dig. II, 1.1, "Jus dicenti officium latissimum est, nam et bonorum possessionem dare potest, et in possessionem mittere, pupillis non habentibus tutores constituere, judices litigantibus dare."

(9) Hunter, Roman Law, p.42.

thought to hold? ("Quae edixit?") What of all the decrees issued by virtue of the imperium he was thought to possess? ("Quae decrevit?") Are all these official acts to be regarded as null and so devoid of juridical force? According to the strict letter of the law it would appear they should be. Ulpian however thought otherwise. In his opinion none of the acts should be reprobated. For the benefit of those who approached Barbarius in his official capacity, he considered that all official acts should be regarded as valid ("propter utilitatem eorum qui apud eum egerunt.")

It is to be noted of course that when Ulpian gave this reply at the beginning of the third century (Ulpian died 228 A.D.) it did not immediately attain the force of law. We can reasonably assume however that from common usage, based on the authority of such an outstanding jurist-consult as Ulpian, the opinion was well established and widely accepted in pre-Justinian law. The opinion may actually have attained legal force by virtue of a constitution of Valentinian III in 426 A.D.) This constitution - known as the "Law of Citations" - gave legal confirmation to all the writings of the five great jurists[10] and to all the passages quoted by them from other jurists, provided the correctness of such quotations should be verified. In case of disagreement, a majority of these authorities on any point determined the law. The opinion certainly acquired the force of a "lex scripta" by its incorporation in the Digest of Justinian which was promulgated A.D. 533.

So much for the Lex Barbarius. We now come to consider an extract from the Code of Justinian, (promulgated A.D. 529) which may help to throw more light on the state of

(10) i.e. Gaius, Papinian, Ulpian, Paul and Madestinus.

the doctrine in Justinian's time - it is taken from Cod. VII, 45, 2 and reads: "Si arbiter datus a magistratibus cum sententiam dixit, in libertate morabatur, quamvis postea in servitutem depulsus sit, sententia ab eo dicta habet rei judicatae auctoritatem."

An 'arbiter' in Roman law was a person appointed to find the facts with regard to a given case of litigation, and to pronounce sentence according to his findings - after the praetor had determined the law of the matter in the proceedings in jure. He differed from the ordinary judex in this that in pronouncing his opinion on the facts the arbiter could exercise a much wider discretion than was ordinarily open to the judex, and he could also decide from special knowledge. Besides, while there could never be more than one judex, many arbiters could be appointed for the same case.(11) From the very purpose of his function - especially from the fact that he was chosen by reason of expert knowledge in a particular case - we can conclude that an arbiter's function was more in the nature of delegated power than of a permanent office. In effect he was simply a judex delegatus - a fact which is verified by the glossator's comment on the words "Si arbiter" of the law quoted above.(12)

What this extract from the Code has in mind therefore is briefly this: A slave, who was commonly considered free, acts as a delegated judge in a particular law-suit. After sentence has been passed it comes to light that he is in reality not free.(13) Being a slave he was of course incapable of pronouncing a valid sentence. Nevertheless in

(11) cf. Sandars, Institutes of Justinian. P. LXIII.

(12) C.VII, 45, 2. gloss on words "Si arbiter" - "Si arbiter, i.e. judex delegatus."

(13) cf. C. VII, 45, 2. gloss on word "Depulsus"- "Depulsus - i.e. inventus servus et a domino vindicatus."

the circumstances, the legislator declares that this sentence has the force of a res judicata, and so is valid and binding.

This case is in many respects merely a repetition of the Lex Barbarius: there is however one interesting difference between the two. While the Lex Barbarius considers the case of a slave exercising ordinary power by virtue of a permanent office, this latter case treats of a slave performing a function by virtue of delegated power. In both cases the acts of the slave are declared valid; the conclusion is that in Justinian's legislation defects of both ordinary and delegated power were supplied by virtue of the principles of common error. This point is interesting principally because of the controversies and discussions which hinge around it in the course of the development of the doctrine later on in Canon Law.

Another very interesting question in connection with the principles of common error is raised by Novella XLIV, 1, 4. We may summarize it briefly as follows. According to this Constitution it was permissible and lawful for a Tabellio (notary) to have a helper or substitute to whom he could delegate some of his duties.(14) Apart from this one helper however, the Tabellio could not validly(15) delegate another to perform any of his functions.(16) But if this law is not observed, and if despite its prohibition a

(14) Nov. XLIV, 1, 4. "Propter tales enim eorum forte dubitationes damus eis (tabellionibus) licentiam singulis unum ad hoc constituere ... et licentiam ei dare ut delegentur ei ab iis qui veniunt ad ejus stationem et documenta; et dimissis eis interesse ...."

(15) NOTE. It is clear that the tabellio in this case could not validly appoint a second helper or substitute. The power to delegate one substitute is in the nature of a privilege granted by the Emperor. "... Propter tales enim eorum forte dubitationes, damus eis licentiam unum ad hoc constituere." Being a privilege therefore, and being restricted to the delegation of one substitute only, the delegation of a second must be regarded as absolutely ultra vires and consequently invalid. cf. B. Pontius, De Sacramento Matrimonii, Lib. V. cap. XX, n.5.

(16) Nov. XLIV, 1.4. "... et nulli omnino alteri in statione existenti, licentiam esse, ut aut delegetur ei initium, aut cum dimittuntur intersit; nisi tabellioni qui auctoritatem habet, aut qui ab eo ad hoc statutus est."

a second substitute is appointed by a Tabellio, that Tabellio is to be punished: but the acts of this second substitute are to be regarded as valid - "ipsis tamen documentis propter utilitatem contrahentium non infirmandis."(17)

A Tabellio may be described as a public notary or scrivener who drew up written instruments such as contracts wills etc.(18) In the circumstances visualized here a public notary has been invalidly appointed because of the absence of due authority or power in the person appointing. Presumably however he is commonly considered a proper and duly appointed notary, as people enter into contracts before him and have official documents drawn up by him. For the benefit of such people the legislator declares that all documents and instruments drawn up by such a notary are to be looked upon as valid. But it is certain that a notary, though he exercises a public office, does not possess the power of jurisdictio or imperium as does the praetor: his power is merely that of authoritatively witnessing; it has no relation to judicial or legislative authority. Therefore in treating of common error in Justinian's legislation we are not exclusively concerned with supplying the power of jurisdictio. Other "powers" were also supplied. Indeed the intention or purpose of the legislation we have so far examined, seems to have been to guard against the invalidity of acts or contracts whenever the public good was endangered through common error - by supplying in all public persons or officials, any power or capacity that might be lacking in them, by reason of a hidden defect, and which was necessary for the valid performance of official functions. Thus to the slave

(17) Nov. XLIV, 1, 4.

(18) cf. C. I, 2, 14; cf. also Jac. Facciolatus Totius Latinitatis Lexicon (London 1828) v. Tabellio.

who acted as praetor was supplied jurisdictio and imperium;(19) to the slave who acted as delegated judge was supplied the power to pronounce a valid sentence;(20) to the invalidly appointed notary was supplied the capacity to draw up public documents.(21)

All this is very reasonable and equitable. It would indeed be very harsh and severe on the members of a community if, through an error on their part - an error entirely inculpable - they should be obliged to suffer the many inconveniences attached to the consequent invalidity of acts and contracts. But the same inconveniences follow from invalidity of acts whatever the cause of the invalidity may be - whether it be the lack of jurisdiction in an official or the absence of any other juridical power or authority. It would scarcely be reasonable for the legislator, therefore, to declare that on account of the public utility he would supply jurisdictio to an official who lacked it, while omitting to supply the defect of any other power to other public officials, when the same public utility equally demanded it. Not that Justinian's laws have drawn such a distinction; we have sufficiently proved that they have not. But we emphasize the point here chiefly because we shall have occasion to refer to it later on, where it may have a very practical application, and so wish to bring it out here in its own proper setting.

We have spoken above of the legislator supplying certain defects: we have said that he supplied jurisdictio and imperium to the slave-praetor, that he supplied capacity to the invalidly appointed notary to enable him to draw up valid documents. In this we have anticipated just a little.

(19) D.I. 14, 3.

(20) C.VII, 45, 2.

(21) Nov. XLIV, 1, 4.

For on closer examination of those laws we have just been discussing, we find that though they certainly legislate for the validity of acts by reason of common error, they do not expressly state from whence that validating force comes. Equity demands, it is true, that these acts should be valid,(22) but where precisely does the source of this validating power lie, and how is the validation effected? The answer to this question seems to be found in the Institutes of Justinian.(23) It may be well to recall that though the primary purpose of the Institutes was to meet the need for a suitable text-book for law-students, still like the Codex and the Digest, this collection too had the force of law.

The case of interest here refers to the making of wills, and again a slave plays an important role in the matter. In order to make a valid will at Roman law "it was established that the testament should be made at one and the same time in the presence of seven witnesses, and with the subscription of the witnesses and with their seals appended, according to the edict of the praetor."(24) Certain classes of people were debarred from the function of validly witnessing - "... women, persons under the age of puberty, slaves, dumb persons, madmen .... cannot be witnesses."(25) But what of a witness who is a slave but commonly considered free? The text continues:- "Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur; postea vero servus apparuit, tam D. Hadrianus Catonio Vero, quam postea Divi Severus et Antoninus rescripserunt subvenire se ex sua

(22) cf. D. I, 14, 3, "... Quia humanius est....."

(23) Inst. II, 10, 7.

(24) Inst. II, 10, 3: For translation cf. Sandars, Institutes of Justinian, P. 167.

(25) Inst. II, 10, 6. cf. also D. XXVIII, 1 20, 7. "Servus quoque merito ad sollemnia adhiberi non potest: cum juris civilis communionem non habeat in totum, ne praetoris quidem edicti."

liberalitate testamento, ut sic habeatur firmum ac si ut oportebat factum esset: cum eo tempore, quo testamentum signaretur omnium consensu his testis liber loco fuisset, neque quisquam esset qui status ei quaestionem moveret."(26)

Briefly, this text makes it clear that the Emperors declared that they came to the aid of, or healed, a certain will which would have been invalid by reason of the fact that one of the seven witnesses to the will was a slave. And it is significant to note that the reason why the Emperors thus aided the will is recorded, viz., since at the time when the testament was sealed, this witness was commonly considered a free man. By its inclusion in the Institutes of Justinian this extract obtained the force of law, and applied ipso jure to all cases similar to that visualized in it; thus constituting a stabilized general validating principle for all wills to which a person who was occultly inhabilis to testify, might happen to be a witness. After its inclusion in the text of the Institutes there could be very little grounds for taking this extract as meaning that the Emperor would heal each will made in such circumstances by individual sanationes granted post factum - this would be contrary to the obvious significance and effect of the inclusion of a particular ruling in a work of codification such as that of Justinian. We may justifiably conclude that Inst. II, 10, 7 is intended to be what the glossators later took it to be, viz., a statement that in common error certain defects will be supplied. We shall now examine the text more closely.

In determining the validity or otherwise of a will from the viewpoint of proper witnessing, regard was had only

(26) Inst. II, 10, 7.

to the condition of witnesses at the time of signature.(27) Hence in the foregoing case the will should, by the strict letter of the law, be null - because one of the witnesses was actually a slave at the time of signature. However, the Emperor by his supreme power, because of common error (this witness was commonly considered a free-man), aids or heals such a testament. He does not dispense from the law requiring seven witnesses - nor does he say that he supplies the testimony of the seventh witness: if that were so he could just as easily supply the testimony of a seventh witness when the seventh witness was absent entirely; but there is no law to that effect. What the Emperor does say is that he "would aid or heal such a testament." The defect in this testament is due to the lack or absence, in one of the witnesses, of the juridical capacity required for the valid performance of the function of witnessing. Hence the supreme ruler bestows on the slave, for this particular occasion, the juridical capacity required by the law in order to act validly as a witness. There can scarcely be any doubt that the same solution applies to the case of Barbarius. The supreme lawgiver - whether it be the people or the Emperor - supplied in him the juridical capacity required by law for the performance of the functions attaching to his office: it conferred on him the requisite <u>jurisdictio</u> and <u>imperium</u> enabling him to perform official acts <u>ab initio</u> valid. And the same may be said of the slave who was commonly reputed to be arbiter, and of the notary who was invalidly appointed yet still commonly regarded as legitimate. To each the supreme law-giver supplied the requisite capacity to perform their respective functions validly.

(27) D. XXVIII, 1, 22, 1. "Condicionem testium tunc inspicere debemus cum signarent, non mortis tempore."

In comparing this last case of the slave testifying or witnessing a will with the three cases we have earlier examined we notice one point of difference. All cases agree in this that there is common error present with regard to a particular person: they all have it in common too, that the supreme lawgiver supplies a defect in the capacity of that particular person with regard to whom the common error exists. But while in the case of Barbarius, of the arbiter, and of the notary, all could be said to be public officials or at least exercising a public function, the slave who merely witnessed a will could scarcely be termed such. But despite the fact that this slave-witness did not exercise a public function, there is no doubt that the same validating principle applied to his act as applied to the acts of Barbarius: the text of the Inst. II, 10, 7 is unquestionable. We must conclude then that not only did the principles apply to public officials, but they also supplied the defect of capacity in others who, though not public officials, could endanger the public good by performing acts that were invalid by reason of some occult juridical incapacity. The application of the doctrine in Justinian's legislation, therefore, was very wide and comprehensive. By reason of common error the defect of delegated as well as ordinary power was supplied. By virtue of it too, not only was <u>jurisdictio</u> supplied but also the defect of any juridical capacity the absence of which, in a person about whom the error existed, would result in the invalidation of acts performed by him. And finally, it was not even necessary that this person be exercising a public office or function.

Such was the teaching of Roman law on common error. In Justinian's time, of course, the term 'common error' was not in use - its origin probably does not go back further

than the 12th century; but the doctrine corresponding to what we now understand by that term certainly was. There can be no doubting that the Roman law on the matter had a deep influence on Canon law afterwards. For that reason we have gone into some detail in our examination of the doctrine as contained in the Collections of Justinian, but feel that we have not drawn any conclusions that are not obviously implied, or even presupposed, in the text of the laws concerned.

CHAPTER II.

GLOSSATORS ON ROMAN LAW.

It is outside the scope of our work here to trace the history of Roman law in all its vicissitudes, during the centuries following the time of Justinian. A brief summary will be sufficient for our purpose.

In the beginning Justinian law had force only in the Eastern Empire. However by the victories of his generals Belisarius and Narses over the Ostrogoths, Italy became subject to Justinian, and he ordered that the civil law as sanctioned by him should prevail there also. Although during the next three centuries, the various states of Italy successively gained independence and were thus severed from Byzantine influence, still the Justinian law remained practically unaltered in Italy. This was largely due to the fact of its excellence and because it suited the needs of the age. Another reason however, which cannot be overlooked was "the influence and authority of the Church in supporting and fostering the Justinian legislation. For the Popes and Pontifical courts ranked the Roman civil law only a little lower than the Canon law and consistently upheld its authority; their influence penetrating far beyond the borders of the States of the Church, wherever an ecclesiastic found his way"(1) The same ecclesiastical influence was a big factor in the preservation of Roman law in Gaul.

But though Roman law lived on in practice, as a science during those centuries of the dark ages it was practically dead. The study of it did continue to a certain extent in the schools of Rome, Ravenna and Pavia; but no

(1) Hunter, Roman Law, p.98.

outstanding names and no important works bear testimony to any degree of proficiency or progress. With the institution of the juridical school at Bologna, however, towards the end of the 11th century, the study of jurisprudence had a celebrated revival. Credit for this revival is chiefly due to the renowned jurist Irnerius. Using the collections of Justinian as a text, he delivered public lectures and held disputations which attracted students from all over Europe - thus bringing into importance again the works of Justinian. But our chief interest in Irnerius here is the fact that he was the first of the glossators - the name given to those jurists who inscribed on the manuscripts of the Justinian laws interlineal and marginal notes explaining difficult words and passages. The glossators flourished for about a century and a half after the time of Irnerius, and their commentaries covered the whole of the Justinian books, or as we refer to them, - the "Corpus Juris Civilis." Last of these glossators was Accursius (1260). From extracts both from his own, and from the glosses of his predecessors, Accursius compiled a gloss which came into common use as the "glossa ordinaria," and constitutes the accepted gloss on the Corpus Juris Civilis.

Although the glossators showed an understanding of the doctrine of common error and of its application in general, it can not be said that they made any advance towards a fuller and more complete treatment of the subject. Apart from the introduction of a few technical terms it may be said that they left the doctrine in much the same state as it had been under Justinian. However, a few of the points they make will be of interest. Naturally, of course, the glosses of chief interest will be those made on the laws we have already treated in the previous chapter.

According to the gloss on Dig.I, 14, 3 v. Barbarius three questions are asked in this law:-

1. Whether Barbarius was a real praetor.
2. Whether his acts of administration were valid.
3. Whether he became free as a result of being appointed praetor?

As far as the second question is concerned there can be no doubt. But the answers to the first and third questions proposed here deserve a little consideration. In a subsequent gloss the first question is answered.(2) This gloss begins by quoting the opinion of some who contend that the question is not answered in the text, but nevertheless hold that Barbarius was not a real praetor: Chief argument for their position is based on the rule - "Quod talis fuerit medio tempore, qualis postea deprehenditur."(3) but Barbarius was discovered to be a slave after he had been in office for some time; he must therefore have been a slave also during his term of office; and thus could not be a real praetor. Accursius however insists on the contrary opinion. Arguing from the text - "sed nihil ei servitutem obstetisse ait Pomponius"(4) he asserts that the question is answered, and answered in the affirmative, viz., that Barbarius was a true praetor.(5) To the argument adduced by the opposing view that because Barbarius was afterwards discovered to be a slave, he must therefore have been a slave during his term of office, Accursius makes a further appeal to the text of the Lex Barbarius to prove that Barbarius had attained freedom by his appointment to the praetorship. He recalls the words of the text, "sed et si scisset (populus Romanus) servum esse, liberum effecisset."(6) and remarks that the Roman

(2) D.I. 14, 3 gloss on words "Functus sit."

(3) cf. C.IV. 55, 4:- "Sed quoadusque probaveris quae intendis status tuus esse (is) videtur, qui in te post manumissionem deprehenditur."

(4) D.I. 14, 3.

(5) D.I. 14, 3, gloss on words "Functus sit:" "Tu dicas huic quaestioni responderi ibi supra "sed nihil .. etc." et sic fuit praetor. (6) D.I. 14, 3.

people would have made Barbarius free, rather than have the office usurped. But in this case when the people did not even know Barbarius was a slave - is he still made free? The glossator asserts that he is - in order that men might not be deceived.(7)

To both questions then Accursius answers in the affirmative: Barbarius was a real praetor, and he was free. We do not intend to criticize the arguments drawn from the text of the law by the glossator in support of his opinion, even though there are obvious objections. Our object here is, rather to ascertain as closely as possible the notions of the glossators with regard to the mode of supplying of jurisdiction or power, in so far as they can be deduced, from their attitude to these two questions. There can be no doubt that the glossator knew that a deficiency had to be supplied in the case of Barbarius. But how was this done? From the fact that Accursius held Barbarius to be a real praetor, it must follow as a logical consequence that he must have regarded the supplying of the deficiency as consisting in one act on the part of the legislator - one act by which he rectified the position, as it were, once for all, and endowed the slave-praetor with habitual power for the duration of his office. It is most unlikely, of course, that the jurists of that period examined the problem from the point of view as to whether Barbarius possessed or enjoyed jurisdictio per modum habitus or per modum actus. But in tracing the development of any given doctrine, we feel that one is justified in designating the various stages of progress by recognized modern technical terms, provided it can be established that they correspond with the actual notions and ideas of the writers of the period under consideration.

(7) D.I. 14, 3, gloss on word "Effecisset" - "Credimus quod fecisset potius quam dignitatem eriperet. Sed an hoc casu quando ignoravit fuerit liber? Dic quod sic, ne homines decipiantur."

In the present instance there can be little room for doubt; the position adopted by Accursius implies that the acts of Barbarius were valid as a natural consequence of his official position, and therefore, according to our terminology, he possessed and exercised jurisdiction "per modum habitus."

As we have just noted, the glossators held that Barbarius was a real praetor. Later on jurists and canonists referred to him as a praetor putativus, and this term came to be applied to all officials who were found to be in the same circumstances as Barbarius, i.e. commonly reputed to be an official though in reality incapable of holding office by reason of a hidden defect. The glossators however seem to have been the first to use the term - and in a context very similar to that discussed above, so much so that it seems inconsistent with the opinion that Barbarius should be termed a real praetor.

The context in which they use the term has reference to the question discussed in the previous chapter - whether a will is valid, if among the seven witnesses required by law there is included one who is incapax by reason of being a slave but who is commonly reputed free.(8) We have seen already that when determining the juridical position of wills from the viewpoint of proper witnessing, regard must be had only of the condition of witnesses at the time of signature.(9) But Cod. VI, 23,1, directs that the will be regarded as valid provided the witnesses were either free, or generally believed to be free, at the time of signature.(10) This rule is

(8) Inst. II, 10, 7: cf. also C. VI, 23, 1.

(9) D. XXVIII, 1, 22.

(10) "Testes, servi an liberi fuerint, non in hac causa tractari oportet: cum et tempore, quo testamentum signabatur, omnium consensu liberorum, loco habiti sint.."

neatly summed up by the glossator - "Quo tempore consideratur conditio vera vel putativa ut valeat testamentum".[11] Here the terms conditio vera and conditio putativa are placed on the same footing in so far as each of them produce the same legal effects, though in different ways,[12] but a real distinction is maintained between them. One wonders why the same distinction was not made and applied in the case of one who was a real praetor and one who was only commonly reputed to be such, as was Barbarius - especially seeing that the glossators realized that both laws (D.I, 14, 3 and C. VI, 23, 1,) were based on the same principle, for in the very next gloss[13] we read "Error ergo communis aliquid facit ut ff. de officio Praet.L. Barbarius"[14] Probably however, if they had discussed the question, the glossators would have held the slave in this case to be a real witness, even though they referred to his condition as putativa. And so they could refer to the condition of Barbarius at time of appointment as putative, but nevertheless regard him as a real praetor.

However, the question is not one of great importance: our chief object in mentioning the point is to introduce the new term putativa which shall be frequently met with in later chapters. And if there is really inconsistency in the teachings of the glossators in holding Barbarius to be a real praetor, while distinguishing between the conditio vera and putativa of a slave-witness in a very similar context, it can easily be accounted for by the immature and undeveloped notion of the doctrine at this period.

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(11) Cod. VI, 23, 1, gloss on word Signabatur.

(12) i.e. conditio vera produces the effect by reason of capacity possessed in accordance with law, conditio putativa, by reason of capacity supplied by the legislator.

(13) C. VI; 23, 1, gloss on word "Omnium."

(14) NOTE. "ff. de officio Praetoris L. Barbarius, D. I, 14, 3; This was the old method of quoting the Corpus Juris Civilis.

To the glossators too we are indebted for the introduction of the term "Error Communis." It is beyond all question that the idea conveyed by this term, according to the mind of the glossators, corresponds exactly to the cases we have been discussing so far, - the cases of the slave praetor and the slave witness who were commonly reputed to be free. Not so clear, however, are the expressions in which the term error communis is usually found. Up and down through the notes of the glossators we find phrases such as "... et sic communis error facit jus."(15) "Error communis aliquid facit"(16), "circa factum error communis facit jus;"(17) while in another context the term is enshrined in verse(18) - "Et error communis facit jus ut patet his versibus:-

"Error communis jus efficit, ut manifestat
Testificans servus, qui liber creditur esse."

It is difficult to determine the exact meaning of these phrases chiefly due to the vagueness of the Latin word "jus." This term can signify either a subjective right or an objective norm of law. The phrase "Error communis facit jus" might mean that because of common error there is conferred on an individual (about whose capacity the error exists) the right to have certain of his actions regarded as valid. Or it may mean that common error constitutes an objective norm or law, by which are rendered valid certain acts of one about whose capacity the error exists.

But whatever the attitude of the glossators on this particular point may have been, it is at least clear that they used the phrases as a trite and concise summary of the principle contained in the laws we have been examining - D.I, 14, 3, Inst. II, 10, 7. etc. This much can be deduced from the

(15) D. XXXIII, 10, 3 gloss on words Usum Imperatorum.

(16) C.VI, 23, 1 gloss on word "Omnium."

(17) D.I. 14, 3, gloss on word "Reprobari."

(18) Inst. II, 10, 7 gloss on words "Omnium consensu."

fact that the phrases are found principally among the glosses on these laws, or if used elsewhere they refer back to these laws, especially to the Lex Barbarius.(19)

In concluding our examination of the writings of the glossators we would wish to draw attention to a further point - not because there is anything new or more advanced in it, but rather to stress the unity and continuity of teaching between Justinian's legislation and the glossators. This point is that the glossators did not confine the influence of the validating effects of the principle of the Lex Barbarius to the supplying of jurisdiction. They realized that by reason of the principle there could be supplied deficiencies with regard to capacity to witness wills, - "Communis error jus efficit ut manifestat testificans servus qui liber creditur esse."(20) Likewise the principle applied to the supplying of the <u>authoritas</u> to a notary invalidly appointed or otherwise invalidly holding office. - "Item nota hic aliud optimum argumentum quod ubicumque tabellio perdit officium suum (quod est propter multas causas: ut quia ministraverit scripturam alienatione rei sacra .....) quod non ideo debent vitiare sua instrumenta."(21) Just as in Justinian's legislation therefore, the purpose of the doctrine according to the glossators seems to have been that it should supply any defect of juridical power or capacity - independently of whether the person about whom the error prevailed was a public official or not, - whenever the public utility demanded.

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(19) e.g. C. VI, 23, 1, gloss on word <u>Omnium</u> - "Error ergo communis aliquid facit <u>ut</u> ff. de officio Praetoris L. Barbarius."

(20) Inst. II, 10, 7 gloss on words "<u>Omnium consensu.</u>"

(21) Nov. XLIV, 1, 4, gloss on word "<u>Documentis.</u>"

SECTION II.

THE DOCTRINE OF COMMON ERROR IN CANON LAW FROM THE TIME OF GRATIAN TO THE 17th CENTURY.

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Having examined the doctrine of common error in Roman Law, we now come to treat of it in ecclesiastical legislation. We shall find that for many centuries the Church had no express positive legislation on the point, and that the teaching was introduced into ecclesiastical discipline by custom and use. Adverting to the need for some such supplying principle, canonists borrowed the principle of Roman Law, which we have examined above, and applied it to canonical matters: by the constant and consistent application of this principle to canonical matters the doctrine became firmly established in ecclesiastical jurisprudence. In the present section we shall treat of the introduction into, and the early development of the principle in, Church Law. In the first chapter we shall examine the doctrine from the time of Gratian to the end of the 14th century: in the second we shall discuss the teaching of the 15th and 16th century canonists.

C H A P T E R I.

INTRODUCTION OF THE DOCTRINE TO CANON LAW.

ART I. THE INFLUENCE OF GRATIAN.

Born in Tuscany, John Gratian (Joannes Gratianus) was a Camaldolese monk of the monastery of Sts. Felix and Nabor at Bologna. The date of his birth is unknown as is also that of his death, but he certainly died before the Third Latern Council (1179), which refers to him as already dead - perhaps even before 1160.(1) Gratian was the author of the collection of laws generally referred to as the "Decretum Gratiani" or simply the "Decretum," which constitutes the first part of the "Corpus Juris Canonici." In his work, the author set out to remedy the deficiencies and shortcomings of pre-existing collections, and especially to reconcile the discordances in them. The importance of his work may be measured by the fact that it marks the beginning of a new era in the science of Canon Law.

But while emphasizing the merit of the "Decretum" as a collection of laws, its legal authority must not be overestimated. It is the work of a private individual and consists of excerpts from Sacred Scripture, canons of many Councils and Synods, letters of Roman Pontiffs and extracts from civil law, as well as what are termed Dicta Gratiani - or private opinions inserted by the author himself. This collection was never approved by the Church as an authentic code of law. Even after its revision and correction carried out by the Correctores Romani (1564-1580) it did not become authentic, because the approval given by Gregory XIII(2) applied to the text of the revisers - not to the canons contained therein.(3) The extracts and canons constituting

(1) cf. A. VAN HOVE. Prolegomena, n.343.

(2) Brief "Cum pro Munere Pastorali." July 1st 1580.

(3) cf. GASPARRI, Praefatio to the Codex J.C. - "Gratiani Decreto publica nullo tempore accessit auctoritas."

the Decretum, therefore, have exactly the same legal force and authority as they would have if they had never been inserted in the collection - they acquired no further authority by reason of their inclusion. These points are essential for a proper critical examination and true evaluation of the text of the Decretum, one of the canons of which we are now about to consider.

This Canon to which we refer - c.1, C.III, q.7, - is the first and apparently sole direct reference to the question of common error in the whole of the Corpus Juris Canonici. We quote the text: "Infamis persona, nec procurator esse potest, nec cognitor. Tria sunt quibus aliqui impediuntur, ut judices non fiant (natura, ut surdus, et mutus et qui perpetuo furiosus est et impubes, quia judicio careant. Lege, qui senatu amotus est. Moribus foeminae et servi, non quia non habeant judicium, sed quia receptum est ut civilibus officiis non fungantur). Verumtamen, si servus dum putaretur liber, ex delegatione sententiam dixit, quamvis postea in servitutem depulsus sit, sententia ab eo dicta rei judicatae firmitatem tenet."

Gratian has introduced this canon with the note, "Dixit enim Sancta Romana Synodus, thus giving the impression, at first glance, that the whole canon was a decree passed by that Council. Such is not the case. The only section of this canon taken from the Roman Synod is the first sentence - "Infamis persona, nec procurator esse potest nec cognitor." The remainder is inserted by Gratian himself and is taken from various sources in the Code and Digest of Justinian. For this we have the authority of the "Correctores Romani."(4)

(4) cf. Notationes Correctorum, Corpus Juris Canonici, (Editio Lipsiensi) ad c.1, C.III, q.7. "Prior pars huius capituli usque ad versam "cognitor" habetur in Epistola 2 Felicis I, in qua refert Synodum a se habitam .... Reliqua vero huius capiti videntur esse Gratiani, sumpta tamen fere ad verbum ex l. quum praeter, Versic quidam enim ff. de judiciis, quemadmodum et in sequenti capite multa colliguntur ex variis legibus Digestorum et Codicis."

A glance at the Roman laws referred to will suffice to prove this beyond all doubt. The section of the canon commencing "Natura ....." is taken word for word from D.V, 1, 12. And the section commencing "Verumtamen ....." - which is our chief interest here - is only a slight variation of C.VII, 45,2. For the sake of comparison we recall the text of this law - "Si arbiter datus a magistratibus cum sententiam dixit in libertate morabatur, quamvis postea in servitutem depulsus sit, sententia ab eo dicta habet rei judicatae auctoritatem." As can be seen the variations in the wording between this law and the text of Gratian are very slight: indeed the difference in wording is due to the fact that Gratian incorporated in his text the explanations and notes of the glossators with regard to this law.(5) The inclusion of these comments of the glossators is easily understood when it is remembered that Gratian compiled his collection about the year 1140 at Bologna, just when the glossators on the Corpus Juris Civilis were at the peak of their fame. The text of c.1, C.III, q.7, vers. "Verumtamen ....." therefore is essentially the same law as that contained in C.VII, 45,2, and as such it retains and enjoys the legal force of that law. Hence when subsequent canonists refer to c.I, C.III, q.7 and quote it as a basis for their doctrine of common error they are quite justified in doing so; not because the text has any juridical force by reason of its inclusion in the Decretum Gratiani - but because the text has legal force by reason of the fact that it is, in effect, an authentic law of Justinian. The precise force or authority this text enjoys in relation to Canon law will be determined later when we shall be treating the general question of the relation between civil law and canon. For the present it will be sufficient to note that this text of Gratian has the same legal standing as the Lex Berbarius which Gratian did not mention.

(5) cf. Supra Sec. I, ch.1. Footnotes (12) & (13).

To assess the value of this text in so far as it indicates the extent to which the doctrine of common error obtained in canonical jurisprudence at the time of Gratian is not easy. It can certainly be said, however, that Gratian realised the necessity for such a supplying principle in canon law, and that he was convinced that Roman law supplied the defect of that principle.(6) Obviously he intended that if a slave commonly reputed free was ever appointed an ecclesiastical judge his sentence should be regarded as valid. Furthermore from the fact that it was a law declaring that an infamis could not be procurator or judge(7) which was the occasion of his mentioning the Roman law teaching, we can presume that he intended that the sentences pronounced by a judge who was de facto infamis but generally not known to be so, should also be regarded as valid; but to what extent this represented the teaching of his time we cannot judge. It would be very rash indeed to conclude from this text that the doctrine of common error was an accepted thing at this time. On the contrary from the general drift of the text - and especially from the rigid adherence to the minute details of the Roman law - we can safely assume that it is a pioneer attempt to introduce the doctrine to Canon law. It is the private opinion of a great jurist which points out as it were a lacuna in ecclesiastical law and indicates a process by which this lacuna could be rectified.

To sum up, therefore, we may say of Gratian that he raised an important question in canonical jurisprudence and pointed the way to its solution. And the subsequent growth and evolution of the doctrine of common error in Canon law may,

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(6) NOTE. Gratian attached the same legal force to Roman legislation as to the ecclesiastical canons so long as it did not contradict the latter. - cf. Dictum Gratiani post c.4, C.XV, q.3.

(7) c.1, CIII, q.7 - ex Romana Synodo.

in no small measure, be attributed to the initiative and influence of this great canonist.

ARTICLE II. THE GLOSSATORS ON THE CORPUS JURIS CANONICI.

Unlike the Decretum Gratiani, the Decretals of Gregory IX are an official and authentic collection of laws. Compiled by Raymond of Pennafort at the request of Gregory IX and consisting chiefly of decrees of Councils - both general and particular - of decretals of earlier Pontiffs and of decretals from previous compilations, this collection was formally approved by that Pontiff as the official Code of Canon Law in 1234.(1) Thus whatever its legal force might previously have been, each chapter or canon in this collection henceforward enjoyed the force of universal law. From a legal viewpoint therefore this collection is notably more valuable and important than the Decretum.

A notable feature of the Decretals of Gregory IX is the absence of any direct reference to the question of common error. There are a few what we may call indirect references, but so vague and unconvincing are they that we might well pass them over, were it not for the fact that the glossators introduced the subject of common error in their comments on these particular canons. Some authors, however, have held that the doctrine is officially recognized in the Decretals; they claim that it is confirmed and canonised by virtue of the fact that the decretal "Ad probandum (c.24, X, 11, 27) confers the force of law on the dictum Gratiani(2) of which we

(1) cf. Constitution "Rex Pacificus." Sept. 5th 1234.

(2) c.1, CIII, q.7. Vers. Verumtamen.

have spoken in the preceding article.[3] To ascertain if such a claim is justified an examination of the decretal in question will be necessary: A dispute had arisen in a certain convent as to which of two candidates for the office of Abbess had been validly elected. The matter was referred to Pope Innocent III who commissioned three judges to inquire into the case and give a decision on their findings. The judges decided in favour of the claims of candidate A. But candidate B appealed from this sentence on the grounds that one of the judges in the case was publicly excommunicated. Pope Innocent upheld the appeal and declared the sentence invalid, - "quod unus ex delegatis judicibus qui eandem sententiam protulerunt excommunicationis vinculo esset publice innodatus quando sententia lata fuit .... eandem sententiam constiterit infirmandam."

The inference from this decision, because of the emphasis on the word "publice innodatus," is that had the excommunication been merely occult the sentence would have been valid. This conclusion is actually drawn by Bernard Parmensis (+ 1263) author of the glossa Ordinaria on the Decretals of Gregory IX.[4] This is a perfectly legitimate conclusion with which we fully concur, but to assert that the text itself is a confirmation of the dictum Gratiani, c.1, C.III, q.7 is scarcely correct. To hold that this decretal legislates for the case of common error would be equivalent to attributing the same legal force to a law legitimately drawn up and promulgated, and to a conclusion drawn by commentators from that law. But there is obviously a vast difference

(3) e.g. cf. Wiestner, Inst. Can. II, 1, 82 apud Ojetti Comment. in Codicem, De Personis. p.216. - "Hoc Gratiani dictum ad vim legis secundum eundem auctorem (Wiestner) erectum est a Greg. IX inserente in suam collectionem responsum Innoc. III, in c.24, X, II, 27.

(4) c.24, X, II, 27, gloss on word "Innodatus."

between the two. A law is the wish of the legislator expressed in words. If commentatoßs should later draw conclusions from the formula of words used - however legitimate their conclusion may be - so long as they would entail a different or distinct wish or intention on the part of the legislator they cannot be regarded as laws, nor as enjoying the force of law; an essential element of a law is lacking, viz., the wish or intention of the legislator.

However this does not deprive the decretal in question of all title to importance. Though it did not canonise the doctrine of common error, at least it occasioned the first real attempt to apply the principles, proposed by Gratian, to strictly canonical matters. For, as we have noted above, the glossator Bernard Parmensis concluded from the wording of this decretal that a person who was occultly excommunicated could validly pronounce judicial sentences - because, the excommunication being occult, he would in the common opinion, be considered free and absolved.(5)

As Bernard refers to both the dictum Gratiani (c.1, C.III, 2.7) and the Lex Barbarius (D.I, 14,3,) as a basis for his opinion we may take it that he regarded the incapacitating effect of excommunication in Canon law as the counterpart of Roman Law's state of slavery. It was indeed equivalent to the state of slavery in so far as it affected the capacity of a person to perform juridical acts. It is very important to remember that at this period in the history of Canon law all excommunication had the effect of depriving the person excommunicated of <u>all jurisdiction and juridical power.</u>

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(5) c.24. X, II, 27, gloss on word <u>Innodatus</u> - "aliud si occulte quia tunc nec ipse, nec alii ipsum tenebatur vitare: quia divinare non poterant .... unde cum communi opinione liber et absolutus habeatur et credatur, quidquid interim facit valet ut 3.q 7.c. infamis, vers. verunntamen (i.e. c.1, C.III, q.7.) ff. <u>de offic.</u> praet, l. Barbarius.

Every excommunicated person was in effect an excommunicatus vitandus.(6) This law continued in force till 1418 when the Constitution "Ad Evitanda" of Martin V effected a change in the discipline. This fact explains the reason for the necessity of the supplying of jurisdiction in the case of an occultly excommunicated person who might be appointed judge; without supplied jurisdiction all the judicial sentences of such a judge would be invalid, with consequent detriment to the community.

An occultly excommunicated person might best be described as an excommunicatus who was commonly considered free or absolved; or in other words, one whose excommunication was generally unknown.(6a) But there was another expression which denotes this same idea and which seems to have had its origin about this time. Pope Lucius III had defined an occult crime as one "quod ab Ecclesia toleratur," as opposed to a notorious crime which signified that the delinquent had been canonically convicted of it.(7) This same definition came to be used with reference to occult excommunication and occult infamia, the implication probably being that the community as such could not be aware of the incurrence of a censure by a particular person until he had first been convicted according to canonical procedure. The result was that the glossators sometimes speak of the acts of an excommunicatus or an infamis(8) as being valid as long as he is tolerated by

(6) cf. c.14, X, V, 39; also c.14, X, V, 39 gloss on words "Denunciatus non sit;" also T. Sanchez, De Matrimonio, Tom. I, lib. III disp. 22, n.33.

(6a) cf. Summa Sylvestrina, I, v. Excommunicatio. III. n.2.

(7) c.7. X, III, 2.

(8) "Infamia" was incurred as a penalty for the commission of certain crimes, a list of which is given in c.9, C.III, q.5, e.g. homicide, sacrilege, adultery, incest, perjury, etc.

the Church ("donec ab Ecclesia toleratur").(9) And from this onwards we shall find the expressions "donec ab Ecclesia toleratur," "quamdiu ab Ecclesia toleratur," "dummodo ab Ecclesia sit toleratus," constantly recurring in connection with this subject of common error. The term toleratus excommunicatus from the time of the glossators till the issuance of the Constitution "Ad Evitanda" simply meant an occult excommunicatus.

The severe discipline with regard to the censure of excommunication brought home to the glossators the necessity of having jurisdiction supplied to judges who were occultly excommunicated, or who were otherwise incapax. And even though Joannes Teutonicus denied that the principles of the Lex Barbarius would supply jurisdiction defective by reason of excommunication,(10) there is sufficient evidence to indicate that there was at least a widely accepted opinion existing at the time of the glossators in favour of such an application. For in examining the annotations of the glossators we find a few contexts where the principles of the Lex Barbarius are expressly applied to the case of one who is occultly excommunicated.(11) Incidentally the glossators did not consider the question of applying these principles to the case of one who had been publicly excommunicated ⊖ for them, it was strictly confined to cases of occult excommunication. Other contexts reveal that they applied these principles also to the case of an infamis - again provided the infamia was occult.(12) Likewise they applied

(9) e.g. cf. c.1, C.III, q.7, gloss on words Quod Judex - "Hic quaeritur an crimonosi vel infames possint esse judices? Et quidem si non tolerantur ab Ecclesia, non possunt; si tolerantur, bene possunt, et tenet eorum sententia, ipsi tamen peccant judicando.

(10) c.1, C.III. q.7. gloss on word "Dum putaretur."

(11) e.g. c.24, X, II, 27 gloss on word "innodatus;" c.12, C, II, 25, gloss on word "Publice" in fine.

(12) c.1, C.III, q.7, gloss on words Quod Judex; c.13, X, I, 3, gloss on word "Infamen."

them to the case of a judge who was occultly a slave,[13] as was the case in Roman law.

But beyond stating the fact that the acts of an occult excommunicatus or infamis or slave are valid, the glossators are silent with regard to the doctrine of common error.[14] There is no doubt that they recognized the existence of the doctrine, but they gave no details with regard to conditions required for its application etc. All the indications are that the notion of the doctrine and its application as conceived by the glossators was very rudimentary and undeveloped. To illustrate this we may take as example their attitude towards the question of the application of the principles of common error to the internal forum. From a gloss on the decretal "Dudum"[15] we can justifiably conclude that the glossators did not regard these principles as applying to the internal forum. The historical background to the decretal was briefly this: A certain Dean (decanus) had presumed to accept and retain simultaneously, two benefices, with the care of souls attached to each - contrary to the ruling of a Decree of the 4th Lateran Council, which declared that on acceptance of a second benefice the first was ipso jure vacant. The Archdeacon and Chapter of Canons brought the case to the attention of the Roman Pontiff. In the decision against the Dean we read the words - "In suae quoque salutis et multarum animarum dispendium praedictas parochiales ecclesias retinebat, cum earum cura, qua jam privatus fuerat ipso jure, ad eum nullatenus pertineret: et sic per ipsum easedem animae damnabiliter sunt deceptae."[16]

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(13) c.13, X, I, 3, gloss on word "Servum" -"Quia talis judex esse non potest, nisi communi opinione pro libero se gerat et habeatur quo casu tenet ejus sententia ...."

(14) NOTE. The glossators did not use the term "common error;" communis opinio was their phrase cf. c.24, X, II, 27 gloss on word Innodatus; c.1, C.III, q.7, gloss on words Dum Putaretur; c.13, X, 1,3, gloss on word Servum.

(15) c. 54, X, 1, 6.

(16) c. 54, X, 1, 6.

We are chiefly interested here in the interpretation given by the glossator to this last phrase, "et sic per ipsum eaedem animae damnabiliter sunt deceptae." The glossator notes that it would appear that all the absolutions imparted by that prelate were invalid because, since he had ceased to hold the benefice, he no longer had any power of binding or loosing by virtue of it. Yet, he proceeds to assert that those souls shall not thereby be lost; they shall be saved "propter fidem quam habebant de Sacramento," that is by reason of desire or ex voto[17] - but not by reason of valid absolution. In view of the fact that the glossator seems to advert to the presence of common error ("cum crederent illum adhuc esse suum praelatum"), it seems strange that he did not declare the absolutions valid on the basis of supplied jurisdiction according to the principles of the Lex Barbarius[18]. The obvious conclusion is that the glossator did not consider the internal forum as being within the scope of the validating force of these principles. However we cannot rule out the possibility that the glossator may not have considered the case from this viewpoint: it is quite possible that being accustomed to associate the notion of common error with judges who were occultly excommunicated or occult slaves, he may not have adverted to the possibility of having the conditions realized in an unusual case such as that contemplated in this decretal. But whichever alternative be correct the truth of our original assertion is not discredited, viz., that the glossator's notion of the doctrine and its application was very rudimentary.

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(17) cf. c.4, X, III, 43, - "... quamvis talis (i.e. baptizatus a se ipso) continuo decessisset ad coelestem patriam protinus evolasset, propter Sacramenti fidem, etsi non propter fidei Sacramentum." Alexander III.

(18) c.54, X, I, 6 gloss on word "Deceptae" --- Sed numquid valebit illis absolutio illius talis Parelati, sive poenitentia per illum imposita? Non videtur; quia nullam potestatem habet ligandi, vel solvendi .... In isto casu non credo, quod perirent, non quia ille hoc posset, sed propter fidem quam habebant de Sacramento, cum crederent illum adhuc esse suum Praelatum, et ita in sola fide salvantur ...."

Due credit however must be given them for what they did accomplish. They advanced the doctrine a stage further from the state in which Gratian had placed it. And though their writings on the subject were admittedly meagre, they at least set a headline for subsequent commentators, and helped to make possible the development that was soon to be effected.

ARTICLE III. EARLY DECRETALISTS.

The Decretalists may be described as the successors of the glossators. They differed from the glossators only in this that, while the latter inserted their comments and explanations of the Decretals in the margin of the official text itself, the Decretatists' commentaries took the form of formal treatises. These commentaries while being completely distinct from the text of the Corpus Juris Canonici itself, had that text as basis, and usually followed the order obtaining in the text. The commentaries of chief interest here are those of Innocent IV and Hostiensis.

A. Innocent IV.

First in order of time and of importance is the commentary of Pope Innocent IV (Sinibaldus Fliseus 1254) - the first instance of a canonical writer in the Chair of St. Peter.[1] This commentary, or "Apparatus" as it is called, was compiled about the year 1251,[2] and as the great glossator Bernard Parmensis died in 1263, this work can be regarded as contemporaneous with the "glossa Ordinaria" on the Decretals of

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(1) cf. Cicognani, Canon Law, p.332.

(2) cf. A. Van Hove, Prolegomena, n.456, 2.

Gregory IX. Yet there is no comparison between the notes of the glossators and the commentary of Innocent as far as their respective treatment of the question of common error is concerned. Innocent displays a much keener awareness of the existence of the doctrine and the conditions required for its application. It may justly be claimed that he is the first canonical writer to make a scientific approach to the whole question. There are four chief points to be treated in connection with Innocent's teaching on the doctrine of common error:- (a) Necessity of a title,

(b) Its application to delegated power.

(c) Its application to non-jurisdictional power.

(d) Its application to the forum internum.

We shall treat briefly of each of these in that order.

(a) Necessity of a title.

Our opening extract from Pope Innocent's writings marks the beginning of a long controversy which continued right up to the publication of the Codex Juris Canonici - whether an office holder requires a "titulus coloratus" to his office in order that his official actions may be rendered valid by reason of common error. The occasion is his treatment of the decretal "Nihil" de Electione.(3) Legislating on the confirmation of elections - the election of all ecclesiastical officials required confirmation with the sole exception of the Pope(4) - this decretal lays down that those office-holders who have no Superior under the Holy See shall, immediately on their election, approach the Supreme Pontiff either personally or by properly authorized representatives, to obtain confirmation of their election.

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(3) c. 44, X,I, 6.

(4) cf. D. XXIII, c., 1; c,17, X, 1, 6.

But those who live far away from Rome i.e. outside the boundaries of Italy, shall, in the meantime while awaiting confirmation, administer their charge, enjoying all the rights and privileges of their office - with this one exception, that they cannot alienate ecclesiastical property. From this arises the question asked by Innocent: what of the case where the person elected exercised his office according to the instructions of this decretal, but being afterwards found unsuitable was removed from office without ever having obtained confirmation of his election - what of the official acts performed by him in the meantime?(5) In reply, Innocent quotes laws supporting the opinions both affirming and denying the validity of the acts in such a case: then in his customary manner, he proceeds to give his own solution. In doing so, however, he wanders beyond the obvious limits of the question and seems rather to make it an occasion for the expression of his views on the subject of common error. In this light then, we must accept the extracts which follow.

He commences: "Dicimus quod omnes qui habuerunt canonicum ingressum licet postea fiant haeretici vel symoniaci, ratum est quod fit ab eis quousque tollerentur.(6) Here he visualizes an ecclesiastical official legitimately instituted according to canonical requirements, but who afterwards becomes a heretic, and thereby ipso facto incapable of holding office or of validly exercising it(7) - and he declares that the official acts of such a person are to be regarded as valid as long as he is tolerated ("quousque tollerentur.") And as we have already seen, this is equivalent to saying that his official acts are to be regarded as valid as long as the defect under which he labours remains occult, or correspondingly as

(5) cf. Apparatus ad c.44, X, 1, 6.

(6) Apparatus ad c.44, X, 1, 6.

(7) cf. c. 49, X, V, 39; c.8, C.XXV, q.1 - "Et quod ab infidelibus vel haereticis factum fuerit omnino cassabitur."

long as he is commonly reputed to be a real official. On the other hand he continues, "cassantur acta si in principio non haberet canonicum ingressum, ut quia symoniace vel per intrusionem .... assumptus est."(8) It is not quite clear whether Innocent is here speaking generally of the invalidity of acts performed by an official who has acquired an office without proper canonical institution, or whether he intends to declare invalid the acts of such an official even when through common error he is generally considered genuine. From the general context however, and especially from the contrast so noticeable and striking between the two phrases, "qui habuerunt canonicum ingressum" and "si a principio non haberet canonicum ingressum," it would seem that he has the question of common error in mind in the second case just as he had in the first. From this we may conclude that Innocent demanded that an official should have a canonical title to the office he held, in order that the principles of common error might have effect; in other words, that he should have acquired the office through the normal canonical procedure - canonicus ingressus-- though de facto he was not a real official because of a hidden incapacitating defect.

That this was the attitude of Innocent is verified by his remarks in a different context. Vindicating a decision given by Pope Innocent III, he says that this decision(9) is not contrary to the prescription of the Lex Barbarius which states that sentences pronounced by one who is in possession of an office are valid even though that person was not really praetor: "sed ibi respondent, illud ideo esse non quia in possessione erat: quia vere judicandi potestatem acceperat ab imperatore, et omina alia faciendi quae ad praetorem

(8) Apparatus ad c.44, X, 1, 6.

(9) cf. 8, X, III, 36.

pertinebat: licet non esset legitimus praetor sed per obreptionem."(10) Innocent is really quoting the opinion of others here,(11) but from the sentence immediately following it is certain that this is his own opinion also - "Et idem dicendum est in quolibet praelato confirmato: et de hoc nota supra e nihil de electione," which is the chapter we have been quoting from above.

Interpreting Dig. I, 14, 3, as signifying that the acts of the slave - praetor Barbarius were valid not solely because he was in possession of the office and was commonly considered a real praetor, but also because he had been appointed to the office by the proper authority, Innocent applies the same ruling to Canon law. Common error alone is not sufficient - the ecclesiastical official about whose capacity the error exists must have been commissioned by the proper authorities; he must have received proper canonical institution before the validating principles become effective.(12)

(b) Common Error and Delegated Power.

An interesting feature of the teaching of Innocent IV on this question of common error is that he did not recognize the application of the doctrine in the case of the exercise of delegated jurisdiction - or at least of delegated jurisdiction for one case only. Appreciating the fact that the whole purpose of the doctrine was to provide for the public or common utility, he failed to see how this common utility could be verified when jurisdiction was delegated for one individual

(10) Apparatus ad c.8, X, III, 36.

(11) NOTE. The subject of "respondent" is found a few sentences earlier viz. "Certi quidam ....."

(12) This opinion is also stated in another context in the commentary of Innocent on c.44, X, 1, 6. "Sed de istis non confirmatis dicunt aliqui quod si aliqua fecerit in judicio vel etiam extra judicium ex officio, ut emancipationes, et similia quod propter errorem communem et utilitatem publicam valet, ff. de.officio Praetoris Lex Barbarius. Quominus posset responderi quod ibi ideo tenet quia erat praetor confirmatus a praefecto praetoris, vel ipsa electione, sed non confirmatus nec electus non est praelatus." Note the first use of the term error communis in canonical jurisprudence.

case. The context in which this opinion is expressed is is the commentary of Innocent on c.22, X, 1, 3. According to this decretal certain judges had been commissioned to examine and give judgment on a particular case in connection with a convent of nuns; the rescript by virtue of which these judges had been delegated was invalid by reason of obgeption; their sentence therefore was declared invalid. To the objection that this sentence should be regarded as valid by virtue of the Lex Barbarius - because the nuns, being ignorant of the defect in the rescript, considered the judges to be properly appointed - Innocent replies that the acts of Barbarius were valid "propter utilitatem multorum qui habuerunt necesse agere apud eum .... hic autem cum causa una tantum commissa sit, non est multa utilitas subditorum. Unde propter hoc non est tolerandus iste processus."(13)

It must be emphasized, however that Innocent is speaking only of delegation for one case; it does not necessarily follow from this that he would hold the same view if the delegation were general or ad universitatem causarum, such as that of a general legate of the Holy See.(14) He does not advert to this latter possibility. He does mention, in another context, this distinction between ordinary and delegated judges in connection with the application of the doctrine of common error, but there also he has in mind delegation for one case only.(15) In the absence of explicit reference to it we can only surmise what Innocent's view on the point might have been. But from the reason given for his not applying this doctrine to cases of delegated power, viz., "non est multa utilitas subditorum" we can deduce that he had in mind only delegation for individual cases; for the power of jurisdiction obtained by virtue of general delegation so closely approximates in effect to that acquired by virtue of an office, the same

(13) Apparatus ad c.22, X, 1, 3.

(14) i.e. a general legate as contemplated in c.2, X, 1, 30.

(15) cf. Apparatus ad c.23, X, 1, 29. "Secus autem in delegato qui vult illam causam tantum quae in delegatione continetur

distinction could scarcely be said to apply in its regard. So that when we quote Innocent as holding that the principle of the lex Barbarius do not apply to delegated jurisdiction, we should qualify the statement to this extent that general delegation is not explicitly included by him, and that, from the context, he appears to refer exclusively to delegation for individual cases.

(c) Application of Common Error to Non-Jurisdictional Power.

It is worthy of note that Innocent IV did not confine the efficacy of common error to the validating of acts performed by virtue of jurisdiction. If he did not explicitly state it, he at least strongly implied that common error could have the effect of validating the official acts of a notary. He defines a public document as that which carries authority "sine adminiculo vivae vocis alicuius notarii, qui forte mortuus est."(16) If it is objected that the person who drew up a particular document was not a legitimately designated notary, the burden of proving that he was a real notary rests with the party introducing the document. This could be proved either by witnesses or by a public document attesting to the fact that such a notary was legitimately appointed. Furthermore he declares that it would be sufficient if it could be established by means of witnesses that the person in question publicly exercised the office of notary, "Crederem autem quod sufficeret si per testes probaretur quod publice officio notarii fungebatur .... ff. de officio. Praet. l. Barbarius, C. De Testibus l, I"(17) - thereby implying that the document was equally authoritative whether the notary was really legitimately designated or only commonly reputed to be

(16) Apparatus ad c.1, X, II, 22.

(17) Apparatus ad c.1, X, II, 22.

notary due to the fact that he publicly exercised the office. That this is the implication intended by Innocent himself is clear from the laws he quotes as the basis of his teaching, viz., ff. de officio Praet l, Barbarius (D,I, 14, 3) and C. De Test. l, I, (C. III, 23, 1.) both of which we have discussed in an earlier chapter.(18) In that chapter we have seen too, that in Roman law, it was certainly recognized that common error supplied the necessary capacity to a putative notary in order that he might validly draw up public documents, but this statement of Innocent is the first indication we have of its obtaining in Canon law also.

(d) Application of Common Error to the Internal Forum.

When treating of the glossators above we mentioned that they appeared to confine the application of the principles of common error to the external forum, as shown by their interpretation of that passage in the decretal "Dudum" (c.54, X, 1, 6,) - "Et sic per ipsum eaedem animae damnabiliter sunt deceptae." The same can scarcely be said of Innocent, for when he declares valid all the acts performed by those prelates who, after canonical institution, had become heretics(19) he makes no distinction between acts pertaining to the external and acts pertaining to the internal forum. Hence we should seem justified in maintaining that he regarded as valid all sacramental absolutions imparted by them, just the same as all the judicial sentences pronounced by them, and all the other acts of administration pertaining to the external forum.

Yet when he is confronted with an explicit and concrete question as to whether the principles of common error cover the

(18) cf. Supra Sec. I, ch. 1.

(19) cf. Apparatus ad c. 44, X, 1, 6, "Dicimus quod omnes qui habuerunt canonicum ingressum licet postea fiant haeretici, vel symoniaci, ratum est quod fit ab eis quousque tollerentur."

case of sacramental confession, Innocent seems to be hesitant and doubtful. Evidence of this is had in his explanation of the passage quoted above from the decretal "Dudum." He offers two alternative solutions[20] - (1) "Potest dici animas non deceptas cum ab omnibus habeatur praelatus et valet poenitentia ab eo recepta. Veniam enim meruit quia ignorans deliquit. D. VIII, c.8." As he states it here, it is clearly a case of common error, but Innocent suggests holding for the validity of the confessions on a completely different basis - by appealing to the words of St. Paul, - "I obtained the mercy of God because I did it ignorantly in unbelief."[21] But evidently he is not so sure of this, for he immediately adds that if anyone who confessed to this putative prelate should afterwards discover that he was not a real prelate, that person should confess and obtain absolution anew. (2) The second solution is more to the point - "Vel potest dici quod vere absolvit quamdiu toleratur a Superiore." Here he undoubtedly suggests the efficacy of common error with regard to the internal forum. But he suggests it in none too confident a manner. He seems to put it forward as a possible alternative solution to the question, rather than as his own considered and definite opinion, which is usually introduced by more forceful terms such as "Dic," "dicimus;" "dicendum est," etc. The hesitancy with which he forwards the opinion obviously indicates that it is something new; we may safely assume that he was the first to have given expression to it. Much credit is due to Innocent for this, for it marks the beginning of a new stage in the development of the doctrine under consideration.

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(20) Apparatus ad c.54, X, 1, 6.

(21) I. Tim. 1, 13. cf. also D.VIII c.8 - quod simpliciter erranti potest ignosci.

B. Hostiensis.

Despite the apparent doubt and hesitancy of Innocent on this point just discussed, it is interesting to note that another great canonist of this period, who was practically a contemporary of Innocent, put it forward as certain that the principles of common error apply even to the internal forum. This canonist was Henry of Segusio - better known as Hostiensis (+ 1271). Commenting on this same phrase in the decretal Dudum he follows the same lines as Innocent and holds for the validity of the absolutions conferred on the penitents in question for the same reasons.(22) Continuing, he states that certain authors were of the opinion that the penitents in the circumstances should receive absolution anew from a real priest, when they had discovered the true state of things; the laws quoted by them in support of this opinion being de Poen c. Omnis utriusque sexus and de Presbyteris non baptizatis c. Veniens. This is, in effect, a repetition of the opinion of the glossators seen above, which held for the invalidity of the Sacrament of Penance in this case, but for the salvation of the souls concerned per fidem Sacramenti. The laws referred to as a basis for the opinion are c.12, X, V. 38 which decrees that each person must confess at least once yearly to his own pastor, or to another priest with the permission of his own pastor previously obtained; and c.3, X, III 43, which decrees that a non-baptized person cannot be ordained, and if de facto he is ordained he does not receive the character of Orders - even though he is generally believed to be baptized. These laws, according to the sponsors of the opinion, imply that the application of the principles of common error is excluded in matters pertaining to the internal forum -

(22) Lectura in Quinque Lib. Decr. ad c.54, X, 1, 6. "Excusantur autem animae subditorum propter justam ignorantiam arg. D. VIII, c.8, Consuetudo, et quia praelatus ab ecclesia toleratur C.VIII, q.4, c. nonne.

and hence that the penitents concerned in the present case, on realizing the true state of things, must confess and be absolved again.

Hostiensis very ably denies their contention and refutes the basis on which they place it. We quote verbatim - "Tu dicas hoc esse consilium cautum; non tamen est de necessitate juris. Nam qualiscumque sit presbyter vere absolvit ex quo curam tenet dummodo servet formam Ecclesiae, quamdiu probabilis est ignorantia et ab Ecclesia toleratur ut in praemissis juribus et ff. de officio Praetoris, L. Barbarius. Nec obstat de Poen.c. Omnis utriusque sexus quia loquitur quando quis scienter vadit ad extraneum Sacredotem: nec obstat de Presbyteris non baptizatis, c. Veniens. quod loquitur quando fundamentum sacramentorum desst ubi quidem superaedificari non potest."(23) There is no difficulty in discerning the mind of Hostiensis on the point; from this passage it is apparent that he is convinced of the application of the principles to the internal forum - provided all the requisite conditions for common error are fulfilled.

But though there is no difficulty about the meaning of this passage, there is however one phrase in it which appears somewhat strange and unfamiliar, viz., "quamdiu probabilis est ignorantia." There is, of course, a very close relation between the notions ignorance and error. Ignorance may be defined as the absence of due knowledge; error is simply a false judgment. Ignorance is a negative thing; error is positive in so far as a positive judgment is made about something. Obviously, however, the error or false judgment is merely a consequence of ignorance. In law both ignorance and error are regarded as the same and are governed by the same

(23) Lectura ad c.54, X, I, 6.

norms, at least in so far as they are the cause of acts.(24) It is quite intelligible then that Hostiensis should refer to ignorance - it being more fundamental than error. And we shall see that canonists of a later date often refer to ignorance and error quite indiscriminately in connection with this subject of common error.(25) Less familiar however is the expression "probabilis ignorantia." In no modern text-book do we find a division of ignorance into "probabilis" and "improbabilis:" no theologian or canonist of the present day speaks of ignorance as being probable. However, during the 13th century when Hostiensis wrote, the term "ignorantia probabilis" had a definite meaning: it was used in opposition to "ignorantia crassa et supina." This can be deduced from c.2, 1, 2 of the Decretals of Boniface VIII(26) first part of which decrees - "ut animarum periculis obvietur, sententiis per statuta quorumcumque Ordinariorum prolatis, ligari nolumus ignorantes dum tamen eorum ignorantia crassa non fuit aut supina." The meaning is obvious: those who are ignorant of the statutes of their Superiors, provided their ignorance is neither crass or supine, are not bound by those statutes. The gloss on this decretal puts the same thing in different terms(27) - "Nota ex principio capitis quod statuta Episcorporum vel quorumcumque habentium potestatem statuendi, non ligant probabiliter ignorantes qui possunt praetendere justam causam ignorantiae." The same expression is used by Joannes Andreae.(28) And, if we may anticipate a little, the same distinction is found in the writings of Panormitanus.(29)

(24) e.g. cf. VERMEERSCH-CREUSEN, Epitome I, n.229 "In jure tamen aequiparantur."

(25) cf. e.g. Baldus, Comm. in Dig. I, 14, 3. Lect. I, n.25: Panormitanus, Comm. ad c. 13, X, 1, 3, n.12.

(26) i.e. "Liber Sextus Decretalium" - promulgated by the Bull Sacrosanctae 3 Mar. 1298.

(27) C. 2. 1, 2, in VI gloss - "Casus."

(28) c.2, I, 2, in VI gloss on words "Ut Animarum" - Et ejus duo sunt dicta: primum quod statuta Ordinariorum non ligant probabiliter ignorantes .....

(29) Comm. ad c. 13, X, I, 3. "Et in casu aut erat ignorantia probabilis, et sustinetur propter probabilem ignorantiam ... Aut ignorantia non erat probabilis sed crassa et supina, et tunc actus est nullus, si impedimentum ex se inducebat nullitatem."

Hence we may safely assume that "ignorantia probabilis" corresponds to what is known at the present day as "ignorantia invincibilis," or equivalently inculpable ignorance. Therefore when Hostiensis wrote "quamdiu probabilis est ignorantia et ab Ecclesia toleratur" he simply demanded that the error should be based on ignorance which was inculpable: if it were based on crass or supine ignorance (and therefore culpable) the principles of the lex Barbarius would not apply. In saying, therefore, that common error produced certain effects, Hostiensis did not include all categories of error: he inserted a very definite qualification as to the quality of the error - thus limiting to a certain extent the scope of the application of the principle, and marking also a further step in the development and clarification of the doctrine.

C. Other early Decretalists.

There is little else worthy of note on this subject of common error in the writings of Hostiensis. Nor do any of his contemporaries at the close of the 13th century make any further contribution to the development of the doctrine. They reiterate much of what we have already seen - the repetition of which would be superfluous. There is one point in their writings however which we would wish to emphasize again, viz., that they invariably visualized common error as a safeguard, ensuring the validity of the official acts of a public official, whatever the nature of his power might be; they did not confine or restrict its influence to acts performed by virtue of jurisdiction alone - they made no distinction whatever with regard to the nature of the power or authority in question. It was sufficient that the official in question be a public official, and that he be acting by reason of his office. Thus Innocent IV often refers

to acts performed "ratione officii" or "ratione publici officii" when treating of the application of the doctrine.(30) That this is the attitude of other writers also is shown by their continual application of the doctrine to the official acts of a notary - the most common example of a public official who does not enjoy the power of jurisdiction. In terms which are practically an exact repetition of the words of Innocent, which we have discussed earlier in this chapter, Hostiensis makes the application to the acts of a notary.(31) Giulelmus Durantis (+ 1296) puts the same thing in very clear terms. Replying to the question as to the position of acts performed by one who exercised the office of notary, but who was later discovered to have held the office invalidly, this canonist writes - "Dic quod si habuit privilegium ab eo qui potestatem habuit creandi notarios, licet postea appareat eum non posse notarium esse puta quia servus esse .... tunc instrumenta ejus valebunt, ut patet in Barbario quia fuit a populo electus, et ideo ejus sententiae valuerunt."(32)

It is interesting to note that Durantis follows Innocent IV in demanding canonical institution by the proper authority in order that an official might benefit by the supplying principle of common error. Thus he qualifies the above statement by inserting "Si habuit privilegium ab eo qui potestatem habuit creandi notarios," and in the next sentence he continues "Si vero nullum privilegium habuit, tunc communis error non potuit eum facere notarium." In passing we might

(30) E.g. cf. Apparatus ad c.44, X, 1, 6; ad c.8, X, I, 4; ad c.1, X, II, 22, etc.

(31) Lectura in v. Lib. Dec. ad c.1, X, II, 22 - "... Sed et sufficeret si probaretur per testes quod tempore illo quo fuit factum instrumentum quod nunc in dubio revocatur, officio notarii sive tabellionis publice fungebatur .... ff. de offic. Praet. L. Barbarius, c. de Test. L. 1 ...."

(32) Speculum Juris, Tom. I, De Instr. Editione § Restat videre n. 32. NOTE. Guilelmus Durantis is better known as "Speculator."

mention another sponsor of this opinion - Guido de Baissio (i.e. Archideaconus + 1313), who makes this confirmation by the proper authority just as essential for validity as any other factor: "Nam quamdiu toleratur, omnia quae gerit, sustinetur propter confirmationis tuitiorem."(33)

Reviewing very briefly the writings of 13th century canonists we can say that they did much to further the development of the doctrine of common error. But though they defined the limits of the application of the principles and to some extent at least, determined the conditions required for their application, still their treatment of the whole question is rather incidental: we arrive at a knowledge of their teaching on the question solely from applications made by them in particular cases; they do not give a comprehensive or detailed discussion of the doctrine itself. This position is easily understood however, when we recall that it was only in the 12th century that the revival of civil jurisprudence as a science had taken place. The Church itself had no positive legislation on the subject of common error: the Canonists therefore were dependent on civil law in the matter - and to a certain extent on the teaching of civil jurists. So, until such time as the civil jurists had themselves evolved a studied treatment of the question as contained in their own laws, (such as in Dig. I, 14, 3, etc.) it could scarcely be expected that the doctrine would be found in a highly-developed form in the writings of the Canonists.

It was only in the 14th century - over two centuries after the revival - that we find the first really efficient and speculative treatment of the subject by civil jurists.

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(33) Erraarationes super Decreto ad c. 37, C.XIII, q.2.

For this we are indebted to two eminent jurists - Bartolus de Saxoferrato (+ 1357) - with whom originated a new method of commenting on Roman law, and whose followers came to be known as Bartolists - and especially Baldus de Ubaldus (+ 1400), an expert in both civil and ecclesiastical law, who wrote commentaries on both the Justinian collections and on the Decretals of Gregory IX. We shall discuss the writings of these jurists in the following article.

ARTICLE 4. CIVIL JURISTS OF THE 14th CENTURY.

The teaching of these two jurists - Bartolus and Ubaldus - may be summarized by saying that it provides an answer to three main questions :-

1. How does common error produce its validating effect?
2. What is the purpose of the doctrine?
3. What conditions are required that it may produce its effect?

We shall treat of each in order.

1. How does common error produce its validating effect?

When examining the writings of the glossators on Roman law we saw that, according to them, Barbarius by virtue of his appointment as praetor became a free man and was a real praetor.(1) Such were the effects of common error according to them; and as such, these effects were very radical - radical in so far as they implied the healing of the deficiency at the very root by deleting all personal incapacitating defects, as it were, by one act, thereby rendering the person in question a real official, and capable from the very beginning of office of performing valid acts. From this we concluded that the notion of the glossators with regard to the

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(1) cf. D. I, 14, 3 gloss on words "Functus sit."

question as to how common error produced its effects, seems to have been that, with the general sanation of personal defects in the beginning, all subsequent official acts were automatically valid in the normal way; hence common error really conferred habitual capacity on the official for the duration of the term of office; and this in the case of a judge or prelate would mean habitual jurisdiction.

Accursius who compiled the glossa Ordinaria died in the year 1260. It is interesting to note that Bartolus who wrote practically a century later subscribed to this opinion of the glossator, viz. that Barbarius by virtue of his appointment became free and was a real praetor.(2) He admits, however, that the point was disputed and quotes from authorities holding the contrary opinion, viz., that Barbarius was not a real praetor.(3) This latter opinion seems to have gained support rapidly, for not long afterwards Baldus de Ubaldus could refer to it as being the "communior opinio." Some of the arguments put forward by Baldus in support of this more common opinion are worthy of note:-

1. ".... qui secundum legem creatus non est, verus praetor non est ..... adeo ut etiamsi perceperit commodum officii, tamen officium non dicatur habere .....

2. Cum rationes huius legis sint aequitas et publica utilitas et illae rationes foveant actibus Barbarii, sed non Barbario; ergo acta valent, sed Barbarius non est praetor, et sic invenitur administratio dignitatis ubi non est dignitas."

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(2) Comment. In Dig. ad I, 14, 3, Lect. I. n.3 - "Quaero numquid iste (i.e. Barbarius) fuerit liber? Et tenet glossa quod sic, maxime ne homines decipiantur legis authoritate .... Dico quod glossa bene dicat ..... n.4. Quaero numquid iste fuerit vere praetor? Et determinat glossa quod sic. Ultramontani centrarium ... Dico tamen quod glossa bene loquitur."

(3) Comment. in Dig. ad I, 14, 3 Lect. I. n. 3 "... Et tenet glossa quod sic .... Ultramontani ut Petrus, Jacobus de Ravenna, Cynus et Guilelmus tenent contrarium ....."

3. Si autem veleris tenere communem opinionem quod Barbarius non habebat veram praeturam nec libertatem, dic quod una quaestio tantum solvitur in litera, scilicet quod gesta valeant ....."(4)

From these and other arguments Baldus concludes - "Ex illaa est communior opinio quod Barbarius non fuit praetor, scil. vere, sed jurisdictione, scil. quoad ordinata per ipsum."(5)

The arguments are obviously reasonable and convincing; they are supported by the statement that the opinion is the more common. There is a definite change over from the teaching of the glossators - there must consequently be a corresponding change in the notion as to how common error produces its effect, or the manner in which official actions are rendered valid. Under this opinion there can be no question of a general sanation of incapacitating defects thus conferring habitual capacity on the official concerned - such as we visualized above. Here there is no such sanation - Barbarius according to this view remains <u>incapax:</u> he is not a real praetor - "Barbarius non fuit praetor, scil. vere, sed jurisdictione, scil. quoad ordinata per ipsum."(6) Baldus here seems to imply that barbarius became praetor for each individual official act performed by him; that the necessary capacity was supplied to him for the valid performance of each succeeding act; that jurisdiction was supplied to him <u>per modum actus.</u> He leaves no doubt that this is his meaning when farther on in the same context he writes - "et sic Barbarius habuit jurisdictionem <u>actu</u> et <u>non habitu.</u>" This is admittedly a notable advance in the theory of common error; indeed we may well say that it is the first really theoretical discussion on the subject.

(4) Comm. in Dig. ad I, 14, 3. Lect. I. n. 14,15. 35.

(5) Comm. in Dig. ad I. 14, 3, Lect. I. n. 17.

(6) <u>BALDUS</u>, Comm. in Dig. ad I, 14, 3. Lect. I. n.17.

2. What is the purpose of this doctrine?

The purpose or reason of this law, which states that as a result of common error certain acts are rendered valid, is the public utility. This is made clear by Bartolus who, in answer to the question why the judicial acts of a judge who is inhabilis should be regarded as valid, replies - "Publica utilitas, ne tot acta coram eo pereant."(7) Baldus states the same thing.(8) It may be well to emphasize that Baldus insists that, in order that this law may have effect, it must be the public utility that is at stake; private utility is not considered. Replying to an objection arising from the application of D. XII, 2, 17, the objection alleging that this law should have the same effect as D. I, 14, 3, Baldus distinguishes between the exercise of a public office for private utility and its exercise for the public utility. - "Ibi (i.e. D. XII, 2. 17) erat officium authoritate publicum sed utilitate privatum; hic (i.e. D.I. 14, 3) omnino publicum. Unde hic versatur utilitas publica, ibi non, et sic non obstat."(9) He does not give any rules as to how to determine when the exercise of an office may be said to be for public and when for private utility. But one thing he does stress: public utility is not necessarily or exclusively connected with acts pertaining to or deriving from universal jurisdiction. Quoting Cynus(10) as saying that the public utility does not enter into the question when one is dealing with a particular case, Baldus by way of refutation, points out that the public character of jurisdiction is verified not only when its application is universal, but equally when it

(7) Comm. in Dig. ad I, 14, 3 Lect. I. n.5.

(8) Comm. in Dig. ad I, 14, 3 Lect. I. n. 25.

(9) Comm. in Dig. ad I, 14, 3.Lect. I, n. 27.

(10) NOTE. The writings of Cynus and other contemporaries are not available.

is particularized.(11) This seems to run counter to the opinion of Innocent IV holding that the Lex Barbarius does not apply in the case of delegated jurisdiction because the utilitas multorum is not verified.(12) Baldus does not explicitly advert to this question, but we feel justified in holding that in view of his attitude, as revealed in the above context, he would draw no distinction between ordinary and delegated jurisdiction so far as the application of the principles of common error is concerned: he would regard the public utility as being at stake in the exercise of delegated jurisdiction just as in that of ordinary.

3. What conditions are required in order that common error may have effect?

This question concerns the conditions required besides common error in order that this law may apply. In the wide sense the "publica utilitas" could come under this heading also, in so far as there can be no question of the application of the doctrine unless the public utility is involved: in this sense it is a conditio sine qua non. But the conditions which chiefly interest is here concern the official, and the qualifications required in him, in order that his actions may benefit by the law.

We have already seen that Innocent IV required that an official should have a canonical title to the office he holds - otherwise common error would avail him nothing.(13) Innocent himself, however, noted that this view was not universally accepted in his time.(14) The question now

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(11) cf. Comm. in Dig. ad I, 14, 3. Lect. I. n. 36 - ".... male loquitur (i.e. Cynus), quia jurisdictio est juris publici in universali et in singulari."

(12) cf. INNOCENT IV, Apparatus ad c. 22, X, 1, 3.

(13) cf. Apparatus ad c. 44, X, I, 6.

(14) cf. Apparatus ad c. 44, X, I, 6. "Alii dicunt, sed non placet, quod quamdiu est in possessione Episcopatus etiam non confirmatus, valent non solum praedicta, sed alia omnia quae facit, ne illudatur contrahentibus."

makes a reappearance couched in slightly different terms: instead of inquiring whether ingressus canonicus is essential, it is asked whether the authoritas Superioris is required. The discussion of the question by Bartolus obviously indicates a continuance of divided opinion on the matter. He quotes two authorities - Jacobus de Ravenna and Guilelmus de Cuneo - as holding the view that the official must have authority from the proper Superior, and mentions three authors - Patrus, Cynus Pistoriensis and Dinus Mugellanus - as holding the contrary, viz., that such authority is not necessary. Bartolus himself subscribes to this latter view.(15) In support of this view he draws an argument from Nov. XLIV, I, 4.- We had occasion to refer to this extract when discussing the teaching of Roman law on the subject of common error. Briefly the case contemplated is that of a person who has acted for some time as notary and who is commonly regarded as a legitimate notary, though, in fact he has never been appointed by the Superior having the authority to do so - his official acts are regarded as valid "propter utilitatem contrahentium." The inference obviously is, that since the acts of this putative official were regarded as valid when no proper Superior had appointed him, then the authoritas Superioris cannot be regarded as an essential factor for the valid operation of the principles of the Lex Barbarius. It is clearly a strong argument in favour of this view.

It must be noted, however, that Bartolus is not consistent in his teaching on this point, for in another context he veers completely around to the contrary opinion. Thus, commenting on God. XII, 50, 7 he writes - "Ex fine legis nota quod licet aliquis habeatur et reputatur pro publico officiali, et revera non sit ex eo quod non fuerit

(15) cf. Comm. In Dig. ad I, 14, 3, Lect. I. nn. 5, 6.

legitime ordinatus, vel quia reputatur tabellio cum non sit, vel judex cum non sit, quod acta facta per eum nullius sint momenti, et ipsi faciens punitur."(16) Here he denies the validity of the facts of such officials because they have not been legitime ordinatus viz., appointed and constituted according to the requirements of law by the Superiors having power to do so. He implies then that common error avails nothing when the official invalidly holds office by reason of defect of form in his appointment; the only occasion when it does apply is when the invalidity is due to a personal incapacitating defect. He states it thus - "... hic obstat Lex Barbarius, ff. de officio Praetoris, quia quandoque quis est electus solemniter, tamen propter defectum personae non potest esse, et tunc facta per eum valent cum sint publica ut ibi (i.e. Lex Barbarius); quandoque quis potest esse, sed non electus secundum formam debitam et tune facta per eum non valent."(17) The theory seems to have been that without proper canonical appointment a person could not be regarded as a public official - and consequently could not validly perform public acts - however much he might be considered so by public repute.

It would be difficult to say which of these opinions Bartolus ultimately favoured. The latter view certainly seems to have been the more widely accepted one at this time. It is the view adopted by Baldus(18) - and indeed it is the view which stood practically unopposed for more than two centuries after this time.

(16) Commen in Cod. ad XII, 50, 7, n.2.

(17) Commen.in Cod. ad XII, 50, 7, n.3.

(18) Comm. in Dig. ad I, 14, 3, Lect. I. n.29. "Ecce quidam tamquam tabellio confecit longo tempore instrumenta; postea apparet quod non est tabellio quia creatus fuit a non habente potestatem a Principe vel a rege. Certe ille nullus est et instrumenta sua sunt nulla, quia non sunt facta a publica persona." cf. Also Lect. II, n17 and Lect. II, n.5.

Baldus next raises the question whether the official under consideration is required to be in good faith with regard to his own status. In other words is it necessary that the official be ignorant of the fact of his incapacity, or does the law supply even if, realizing his incapacity, he deliberately and in bad faith performs the functions of the office which he invalidly holds? Baldus notes that a person may be in bad faith in a twofold manner: (a) when de facto he is incapable of holding office and realizes this; (b) when de facto he is capable of holding office but is convinced of the contrary. But bad faith is no obstacle; he writes - "Nota quod quis quaerere potest quasi possessionem jurisdictionis etiam cum dolo et mala fide."(19) Nor does the firm conviction that one is acting invalidly impede the validating influence of this law - "Ista tamen opinio non est curanda in judice, quia quod facit, valet ex virtute jurisdictionis. Unde etsi Barbarius credidisset sua gesta non valere, tamen valent per hanc legem.(20)

An examination of the writings of the great Baldus would not be complete without a reference to what probably is his most distinguished comment on the whole subject. One would not expect to find it at this comparatively early period in the history of the doctrine - perhaps it is because one has been accustomed to associating it with modern discussion and controversies on the point. The extract reads:- "Et per hoc puto quod si Barbarius non exercuisset nisi unicum actum ille unicus actus valeret, et de aequitate ita valuit primus quem fecit, sicut ultimus."(21) In this Baldus

(19) Comment. in Dig. ad I, 14, 3 Lect. I. n. 29.

(20) Comment. in Dig. ad I, 14, 3 Lect. I. n. 29.

(21) Comment. in Dig. ad I, 14, 3 Lect. II, n. 18.

reveals a very clear knowledge of the exact nature of common error. He puts us on our guard against the idea that common error is to be estimated according to the number of people who actually approach the official in question in his official capacity: common error is determined rather by the estimation of the community independently of how many or how few members of the community actually approach the official in this way. The passing of almost six centuries has taken nothing from the value or truth of this statement of Baldus: we shall meet the point again in later chapters.

In the present chapter we have made many references to Roman law; and in the present article especially, most of our quotations have been taken from the jurists' commentaries on Roman law. It may be asked by what right they find a place in a work purporting to be canonical. By way of conclusion to this chapter we may very profitably give a brief summary of the relation between, and the influence exercised by, Roman law on Canon law.

Roman law was a well-developed system and an ancient institution at the time of the foundation of the Church. When Justinian had it systematically codified in the 6th century, the Church was still comparatively immature, and only gradually developing as it were a legal system suitable to Its own purpose and end. It was inevitable that this system should have much in common with the already existing civil system; for, as Cicognani puts it, "why should the Church disregard the large body of civil laws relating to judicial proceedings, contracts, certain matrimonial impediments, the law of domicile and prescription, and the like, which had already been wisely established and were in common

use?[22] Roman Pontiffs gave their approval to this attitude towards civil law.[23] Pope Nicholas I, (867) referred to Roman laws as "venerandae leges Romanae."[24] Gratian seems to have attached the same value and importance to Roman legislation as to the ecclesiastical canons, the only qualification being that the civil laws should not in any way be contradictory to the ecclesiastical. This is exemplified by the numerous quotations from Roman law found in his "Decretum;" and it is expressly stated in one of his dicta.[25]

Towards the end of the 12th century Pope Lucius III, (1185) gave official recognition to Roman law as being supplementary to Canon law - by admitting its authority in cases where Canon law was silent.[26] Some time later Pope Honorius III (1227), while not abrogating this principle of Lucius III, nevertheless declared that there were only very few cases in which it could apply.[27] These were the official pronouncements on the matter, but in practice it seems that the Decretists and Decretalists followed the principle of Gratian, and were unanimous in holding that ecclesiastical causes could be decided indiscriminately by either civil or canon law, provided the civil law did not contradict the latter.[28] These commentators may not have expressly stated so, but that this was their attitude is clearly illustrated by their writings.[29]

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(22) Canon Law. p.123.

(23) cf. c. 16, C.XI, q.1; c. 16, C.XXV, q.2; c.44, C.XXIII, q.5.

(24) cf. c.1. C. XXX, q.3.

(25) Dictum Gratiani post c.4, C.XV, q.3. "Sed sicut circa huius operis initium praemissum est, toties legibus Imperatorum in ecclesiasticis negotiis utendum est, quoties sacris canonibus obviare non inveniuntur.

(26) c.1, X, V, 32. (27) cf. c. 28, X, V. 33.

(28) cf. A.VAN HOVE, Prolegomena, n. 445, Note 3.

(29) A. VAN HOVE, Prolegomena, n.233 writes on this point - "Principium nulla dispositione canonica est expresse statutum, praxi sanctae Sedis et Synodorum est introductum per scriptores et collectores collectionum canonicorum est affirmatum."

From all this we can understand the importance of the position filled by jurists such as Bartolus and Baldus in their role as authorative commentators on the Justinian laws. When later canonists had of necessity to appeal to Roman law in order to supplement deficiencies in the ecclesiastical code it was only natural that they should accept the civil law as expounded by these jurists. Hence the great influence exercised by these jurists on the development of canonical doctrine in general - and on the doctrine of common error in particular. In the following chapters we shall examine the results of this influence as portrayed in the writings of subsequent canonists.

C H A P T E R II.

TEACHING OF 15th AND 16th CENTURY CANONISTS.

While emphasizing the importance of the civil jurists and their influence on canonical teaching, the immediate effects of this influence must not be exaggerated. It must not be imagined that canonists as a result, proceeded to include in their commentaries an ex professo treatment of the theory of common error. Rather, they continued to treat of it incidentally, making application of it whenever the occasion presented; and making what explanations or qualifications they might deem necessary on such occasions. But in these explanations and qualifications they display a more confident note and reveal a more well-defined notion of the doctrine than did earlier canonical writers.

During this period of the 15th and 16th centuries a couple of names stand out in pre-eminence - Nicolaus de Tudeschis (1445) - better known as Panormitanus[1] - and Felinus Sandeus (1503).[2] From the writings of these and others such as Joannes Baptista de Salis[3] Sylvester Prierias,[4] S. Antoninus, Covarruvias Leyva, and Martinus de Azpilcueta[5] we shall be able to obtain a fairly accurate and complete knowledge of the state of the doctrine at this time. It will be more simple and convenient to treat these two centuries as one unit; there is no outstanding change to be found in the teaching of the canonists between the beginning and the end of this period. There are some points it is true,

(1) NICOLAUS DE TUDESCHIS was Archbishop of Panormitanus from whence he acquired his name: we shall refer to him in these pages as PANORMITANUS.

(2) NOTE. There were other eminent canonists at this period - Joannes ab Imola, Joannes de Sancto Georgio, Augustinus Berouis, Joannes a Ripa etc. but their works are not available.

(3) Otherwise known as TROVAMALA: wrote "Summa Roscella."

(4) i.e. Mazolinus Sabaudus O.P.; wrote "Summa Sylvestrina."

(5) Generally referred to as NAVARRUS.

on which there is slight divergence of opinion - these shall be noted; but generally speaking they may be said to be in agreement. A brief survey of the salient points in their teaching will suffice.

A. Nature of defect of capacity in which common error supplies.

Panormitanus limited the extension or scope of the principle when he declared that common error is of no avail whenever the defect of capacity is due to an impediment of the natural law. Replying to the question whether a sentence should be retracted which was passed by a judge who laboured under an occult impediment, he makes a distinction: if the impediment arises from the natural law e.g. if the judge is insane, then the sentence must be regarded as null and void, "quia tolerantia nihil operatur circa impedimentum naturale."(6)

This point is very reasonable and intelligible, for if the natural law demands the fulfilment of a certain condition for the validity of any act or contract and this condition is not fulfilled then it is beyond the power of any human legislator to supply the defect. An inferior legislator cannot by his own authority, abrogate, change or dispense from the laws of a superior legislator; hence when an inferior legislator declares that by reason of common error the required capacity to validly perform certain acts is supplied, the capacity in question must be required by virtue of his own law, or rather the defect in question must be an absence of some condition required by that inferior's own law. The Church, then, can only supply defects which arise as a result of the absence of conditions or qualifications required

(6) Commentaria ad c. 13, X, I, 3.

by Her own positive laws: She cannot encroach on the domain of either the natural or divine positive law. This latter is brought out clearly by Panormitanus in another context. By reason of divine constitution the power of Orders is necessary that one may validly absolve, and ordain. The Church cannot change this constitution, nor can She dispense from it. She could never give to one who had not received the power of Orders, the power to validly absolve or ordain - not even in common error. Panormitanus points out therefore that the principles of common error apply only in relation to defect of jurisdiction, but do not apply in the case of defect of the power of Orders: hence a person who is ordained by one who is commonly reputed to be bishop, but who de facto is not a bishop, is not validly ordained.(7)

It is of interest to note that at least one author has put forward the view that common error applies even in the case of an impediment of the divine law; Mascardus asserted that if a person confesses to one who is commonly reputed to be a priest but in reality is not, then both confession and absolution are valid.(8) However, we need not pay much attention to this, because some lines further down in the same context he contradicts this statement and falls into line with the teaching of Panormitanus quoted above.(9)

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(7) Commentaria ad c. 2, X, III, 43 ad finem - "Notatur quod communis error seu opinio facit valere gesta. Ista enim procedunt in dependentibus a jurisdictione, non autem in dependentibus ab ordine .... Ex quo infertur quod qui ordinatur ab eo qui putabatur episcopus cum non esset, nullam ordinem recepit."

(8) cf. De.Probationibus, Vol. II Conclusio 649, n. 14.

(9) cf. De Probationibus, Vol. II Conclusio 649, n. 98.

B. Quantity or extent of error.

We have seen that Hostiensis insisted that common error would not supply the defect of jurisdiction or of any other capacity, if the error were based on ignorance that was crass or supine.[10] This teaching is reiterated by Panormitanus, and by Felinus Sandeus.[11]

Panormitanus now makes a further attempt to circumscribe the notion of common error. He asserts that a defect or impediment in an official may be publicly known in one place, and occult in another: yet the acts of this official performed in the place where the fact of his incapacity is still occult, are rendered valid by virtue of common error. He ascribes the opinion to Joannes Andreae and describes it as "most true." (Verissimum). By way of proof he notes that in the case of Barbarius it would seem certain that in his place of origin he must have been known for what he really was - a slave - yet when he came to Rome and was appointed praetor, his official acts were valid by reason of common error.[12] Panormitanus does not define what would constitute a "Locum" or place in this connection, though the fact that he refers to "locum judicii"[13] would seem to suggest that it need not necessarily be very large. Felinus Sandeus taught that the error need not be one which involves all the people: he would regard error as being common if the official concerned were considered habilis by all those who knew him - "omnibus scientibus et cognoscentibus."[14]

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(10) cf. Commentaria ad c. 13, X, I, 3 nn. 12, 13.

(11) cf. Commentaria ad c. 13, X, I, 3, n.5. - "Dispositio L. Barbarius ff. de Offic Praet. habet locum etiam in delegato ... Fallit istud primo quando ignorantia inhabilitatis esset supina."

(12) Commentaria ad c. 13, X, I, 3, n. 13.

(13) Commentaria ad c. 13, X, I, 3 n. 13 - "Nam verisimle est quod in partibus suis erat notarium illos esse servos, et tamen actus sustinetur si in loco judicii putabantur liberi."

(14) cf. Commentaria ad c. 24, X, II, 27, n.3.

Probably the extent to which an official would be known would depend on the size or extension of the area for which he was acting as official: thus, generally speaking, the number of people who would know a pastor would be limited according to the extent of the parish; a bishop would be known, or at least known of, by all those living within the confines of his diocese. It would seem correct to conclude then, that according to the notions of Felinus, error could be designated common if it was the common opinion of those who lived within the territory to which the official in question was appointed. We put this forward as a suggestion however rather than as a definite conclusion.

C. Necessity of Good Faith on the Part of those who benefit.

Despite the use of the expression "ab omnibus scientibus et cognoscentibus" by Felinus (15) it is clear that he did not require that each and every individual member of the community should err, in order that common error be realized; nor did he require that each and every one who knew, or knew of, the official should be in error with regard to that individual's capacity. He intended the term "omnibus" to be interpreted morally rather than mathematically. That this is true is clear from a particular case discussed by him, and by most commentators of this period and later. The case was that of the <u>few</u> who might happen to know of the existence of an impediment in a public official, while the community at large were in ignorance of it - whether these few could benefit by the error of the others, or whether the fact of their knowledge would impede the validating effect in their case. The very

(15) cf. Commentaria ad c. 24, X, II, 27, n.3.

fact of their asking the question straightaway proves that these commentators did not require mathematical unanimity of error in order that common error might be realized. The answers given to this question are in general agreement, but not in every detail.

The question seems to have originated with Joannes Calderinus: both Panormitanus and Felinus Sandeus attribute it to him.(16) Speaking of the case where the parties alone are ignorant of the impediment under which the judge labours, while all others in the community know of the existence of this impediment, Panormitanus declares that the ignorance on the part of the parties concerned cannot be regarded as probable - and therefore there can be no claim for the validity of the sentence through the influence of common error. He then goes on to treat the converse case, viz., if the parties to the case know of the impediment while all others are ignorant of it. By way of reply he quotes the opinion of Calderinus .... "dicit Calderinus quod gesta ab excommunicato quatenus procedit in favorem scientis sunt nulla aut retractanda, quia cessat favor in sciente .... quod est verbum valde notabile .....":(17) this latter remark would indicate that Panormitanus is in agreement with the opinion which he quotes. It can scarcely be said, however, that Panormitanus gives a complete answer to the question here: the question proposed by him referred to an impediment in the judge i.e. impediment in general: the answer refers only to a particular individual impediment, viz., excommunication. It may be asked what was his opinion on this point in relation to other occult impediments of the positive law, such as occult dismissal from or

(16) cf. Panormitanus, Commentaria ad c. 13, X, I, 3. n.13. FELINUS SANDEUS. Commentaria ad c. 24, X, II, 27, n.8.

(17) Commentaria ad c. 13, X, I, 3, n.13.

loss of office etc. In other contexts in which he refers to this point, Panormitanus always seems to treat of excommunication.(18) Nevertheless we feel justified in attributing to him the same teaching with regard to the other impediments on the grounds: (a) that he uses the example of excommunication as being that of most frequent occurrence: (b) that the reason he alleges in the case of excommunication applies also in the case of the other impediments, viz. "quia cessat favor in sciente."(19) It may be well to note here that Sandeus in his treatment of the point expressly refers to all impediments.(20) We shall now examine briefly the opinions on this question.

In the writings of both Panormitanus and Felinus Sandeus there is evidence of indecision or uncertainty as to the exact consequences. Thus Panormitanus, following the opinion of Calderinus, asserts - "gesta ab excommunicato quatenus procedunt in favorem scientis sunt nulla aut retractanda:"(21) and Sandeus - "... licet caeteri ignorent, tamen gesta in favorem scientis sunt nulla aut irritanda."(22) In these contexts both authors seem doubtful as to the position; they imply that it is possible that such acts are ipso facto null and void - and at least if they are not ipso facto null then they should be rescinded. Yet both these authorities state elsewhere without any doubt or qualification that such acts are valid, but that they should be rescinded in order to penalize those who knowingly approached an incompetent official(23)

(18) e.g. cf. Commentaria ad c. 24, X, II, 27, n.16.

(19) Commentaria ad c. 13, X, I, 3, n.13: cf. also Commentaria ad c. 24, X, II, 27, n.16.

(20) cf. Commentaria ad c.24, X, II, 27, n.8: and ad c. 35, X, I, 3, n.30.

(21) Commentaria ad c. 13, X, I, 3, n.13.

(22) Commentaria ad c. 13, X, I, 3, n.5.

(23) cf. PANORMITANUS, Commentaria ad c.24, X, II, 27, n.16. "Collatio beneficii per excommunicatum occultum ei qui sciebat illum excommunicatum tenet mero jure ratione publici officii conferentis, tamen iste cui facta est collatio poterit privari illo beneficio ut puniatur in eo in quo deliquit: participavit nempe cum persona prohibita ..."; cf. Felinus Sandeus, Commentaria ad c. 24, X, II, 27, n.8.

According to this view then, the acts performed by a public official in favour of the few in the community who are aware of his incapacity, are valid, but those persons act unlawfully in thus approaching him and by way of penalty for their unlawful action the act of the official placed in their favour should be rescinded. This opinion seems to have met with general favour for it was adopted by other writers such as Socinus,(24) Bertachinus,(25) and Sylvester.(26)

This question had a very practical bearing on the Sacrament of Penance. Following the view just referred to, it logically follows that if a person knowingly confessed to an occultly incapacitated confessor (who was commonly reputed to be habilis)that person sinned gravely in doing so. Sylvester adverts to this and asserts that such a person is bound to repeat such a confession - hence implying the absolution conferred to be invalid.(27) The invalidity however is not due to the defect of power of jurisdiction in the confessor, but, as Medina(28) points out, to the absence of the required dispositions in the penitent. For, by committing grave sin in the act of receiving absolution he has placed an obstacle to the valid reception of absolution. This teaching is merely a logical application of the generally accepted opinion of the time that it was unlawful to approach a merely putative official knowingly (i.e. in bad faith). Generally speaking the act placed by that official in favour of those who were in bad faith would be valid, but in the case of the

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(24) cf. Regulae Juris et Fallentiae, Lit. G. Reg.CCX.

(25) cf. Repertorium, Pars I, Lit. C. verb "Collatio" n.70.

(26) cf. Summa Sylvestrina, Pars I, v. Excommunicatio, III, 5.

(27) cf. Summa Sylvestrina Pars I, v. Confessor, I, n.16. Nota secundo, quod qui excommunicato occulte scienter confitetur extra casum necessitatis, mortaliter peccat, et confessionem iterare tenetur ..."

(28) J. MEDINA. De Poenitentia, de Restitutione et de Contractibus, Tom. I, Trac. II, De Poen. Q.XXII - Absolutio autem Sacramentalis ab excommunicato occulto impensa non ita tenet, quia ejus defectus, per publicas leges humanas suppleri non potest eo quod absolutio impensa actu peccanti, seu obicem ponenti, de jure divino est nulla.

Sacrament of Penance the unlawfulness of the action of such as were in bad faith would render the reception of the Sacrament not only unlawful but also invalid.

D. Application of Common Error to the Internal Forum.

Much of this discussion presupposes that the principles of common error apply to the internal or Sacramental forum. Express references to this point during the 15th century seem to have been few. But, as we remarked in an earlier chapter, when the commentators say that all the acts of a putative prelate are valid it is practically certain that they intend to include those which pertain to the internal forum: besides, it is significant that none of these commentators expressly exclude the latter. Panormitanus does make a passing reference to the point when treating of c. Dudum (i.e. c. 54, X, I, 6), and follows the opinion put forward by Hostiensis, which we have already seen.(29)

During the 16th century references are more frequent and leave no doubt about the prevailing attitude. Baptista de Salis has it explicitly - "Et per praedicta habes quod si confessor excommunicatus tamen occultus et toleratus audiat confessiones, quod confessiones factae cum eo valent nec sunt iterandae postea superveniente scientia."(30) The same is repeated practically verbatim by Sylvester.(31) And towards the end of the century Navarrus writes - "Si quis ipso jure suo titulo et possessione juris privaretur ... et a Superiore toleraretur, eo casu gesta per ipsum in conscientiae foro valerent."(32) Other authorities could likewise be quoted,

(29) cf. Commentaria ad c.54, X, I, 6, n.20.

(30) Summa Roscella v. Confessio Sacrament. III, n.41.

(31) cf. Summa Sylvestrina v. Confessor, I, n.15.

(32) Opera Omnia, tom. I, De.Poen. D, VI, c. Placuit, n.179.

but sufficient has been said to show that this was the accepted opinion of the time - that it had become established as the only reasonable and tenable opinion on the matter.

E. Necessity of a Title.

Whether treating of its application to the internal or to the external forum, commentators of this period were practically universally agreed that the authoritas Superioris or canonical institution was required in order that common error might have effect. A brief summary of the evidence will suffice here.

Panormitanus bases his opinion on the Lex Barbarius. This law according to him has a twofold fundament - common error and the authoritas Superioris; for the slave who was considered free had received office from the legitimate authority. Both common error and this intervention of proper authority were equally essential; one without the other was of no avail.(33) All acts of an intrusus therefore were to be regarded as invalid - intrusus being the term used to designate a person who had acquired an office by means other than those recognized by law.(34) Though the validity of this argument might well be challenged, it nevertheless went for long unquestioned. The opinion was taken for granted by most commentators, the result being that no effort was made to bring further arguments in support of it. Sandeus is content with saying - "... publica authoritas cum quasi-possessione capacitatis sufficit."(35) Baptista de Salis, speaking of confession, says that if a person unknowingly

(33) cf. Commentaria ad c.44, X, I, 6, n.11.

(34) cf. BALDUS. Commentaria ad c.44, X, I, 6, n.3. Intrusus i.e. "qui non intrat per ostium, id est qui non habet canonicum ingressum."

(35) Commentaria ad c.22, X, I, 3, n.3.

confesses to an intrusus the confession is invalid and he is bound to repeat the confession whenever he learns the truth: should he never learn the truth then he will be saved per fidem Sacramenti.(36) Sylvester holds this same view.(37) And this teaching is found unchanged in the writings of Navarrus at the end of the 16th century.(38) Thus far then we find practical unanimity among authorities on a question that was soon to be the subject of lively controversy - resulting ultimately in the establishment of the contrary view. Of this we shall see more later.

F. Common Error and Delegated Jurisdiction.

Another question which was discussed at this time, and which seems to have received a satisfactory solution, was, whether the doctrine applied in the case of delegated jurisdiction. We have met the question in a preceding chapter when discussing the writings of Innocent IV. His name figures here again, in so far as his teaching on this point is recalled by commentators of the 15th and 16th centuries, and rejected by them. It will be remembered that Innocent denied the application of the principles of the Lex Barbarius in the case of delegated jurisdiction: Panormitanus expressly states that in his time authors commonly denied this teaching,(39) while later on Sandeus asserts that all authorities opposed it.(40) When treating of the writings of Innocent on this point it will be remembered, too, that we pointed out that probably at least,

(36) Summa Rosella, v. Confessio Sacramentalis, III, n.41.

(37) cf. Summa Sylvestrina, Pars I, v. Confessor, I, n.15.

(38) cf. Opera Omnia, Tom. I, de Poen. D.VI, c. Placuit, n.180.

(39) cf. Commentaria ad c. 22, X, I, 3, n.10.

(40) cf. Commentaria ad c. 22, X, I, 3, n.3.

this canonist denied the application of the principles only to delegation ad unam vel alteram causam. However, this does not make any material difference in the present case, because the arguments advanced by Panormitanus purport to prove that common error applies to all categories of delegation - whether it be ad universitatem causarum or ad unam causam tantum.

The three chief arguments put forward by Panormitanus in support of his rejection of Innocent's contention are based on three laws we have already seen, viz., c.1, C.III, q.7: Cod. VII, 45, 2: c.24, X, II, 27. The argument from the first two is, that in both these cases there is question of a slave, who is commonly considered free, being delegated as judge, and his sentence in each case is declared valid. We have already examined the juridical force or value of the dictum Gratiani referred to here (i.e. c.1, C. III, q.7) and found that it is merely a repetition of Cod. VII, 45, 2. In effect then the two arguments advanced by Panormitanus here may be combined in one. But from the words of Cod VII, 45, 2 - "Si arbiter datus a magistratibus, cum sententiam dixit, in libertate morabatur, quamvis postea in servitutem depulsus sit, sententia ab eo dicta habet rei judicatae auctoritatem" - and from the annotation of the glossator stating that an arbiter is a judex delegatus,(41) there can be no doubting the validity and force of this argument of Panormitanus: it satisfactorily proves that common error applies in the case of delegated jurisdiction.

An equally forcible argument is that drawn from c.24, X, II, 27. We have already seen that from the emphasis on the

(41) cf. C. VII, 45, 2, gloss on words "Si arbiter."

word publice in this decretal[42] the glossators concluded that if the excommunication were occult, the sentence would have been valid by reason of common error. But the decretal expressly states that the judges in question were delegated, for one particular case only. Though the glossators did not make explicit mention of this point it is obviously implicitly contained in their teaching that they considered the principles of common error as applicable to delegated jurisdiction - even to delegation for one case. Hence Panormitanus is quite justified in the conclusion he draws viz., "Nota ibi publice innodatus - quod gesta judice etiam delegato publice excommunicato sunt ipso jure nulla, secus si non esset publice excommunicatus sed toleratus, ut hic probatur a contrario sensu. Et ex hoc infertur quod tolerantia operatur etiam in delegato, et valeant gesta, si communi opinione reputabatur habili."[43]

By way of answer to the objection put forward by Innocent - that when an official is delegated for an individual case there can be no question of the public utility being at issue - Panormitanus asserts that, when a Superior delegates for a particular case, the act of delegation itself implies an exercise of authority which is at once juridically public and fully verifies the notion of public utility, because the Superior delegates in his capacity as a juridical person.[44]

(42) NOTE. The relevant passage in this decretal reads: ".... quod unus ex delegatis judicibus, qui eandem sententiam pratulerunt excommunicationis vinculo esset publice innodatus, quando sententie lata fuit ... eandem sententiam constiterit infirmandam."

(43) Commentaria ad c. 24, X, II, 27, n.2.

(44) Commentaria ad c.22, X, I, 3, n.10. "Potest dici quod cum superior committit causam, in ipsa commissione versatur jus publicum, et utilitas publica, quia committit jure publico, L. 3, ff. de juris. omn. jud. Unde commissio facta a jure publico non debet vitiari propter vitium personae judicis clandestinum."

Sandeus refers to the explanations given by various authors as to how the public utility is involved in the exercise of delegated jurisdiction. Among them he quotes Joannes ab Imola as holding that the public utility is involved in the case of delegation even for a particular occasion, because it is in the interests of the community at large, that justice be properly ministered to each individual member of the community: and Baldus as holding that it is sufficient if the public utility be verified or realized in the quality of the office in question, even though it is not involved in each individual act of exercise of this office.(45) Sandeus does not make any suggestions on the matter himself: he is satisfied that these arguments suitably refute the objection proposed by Innocent IV and reiterates that it is the opinion of all that the principles of common error apply to delegated jurisdiction. Philippus Decius too, testifies that this is the common opinion,(46) and we shall see later that this view has seldom been questioned by subsequent canonists.

G. Conclusion.

By way of summary, we shall now make a brief examination of the principal examples or cases of the application of the doctrine given by authors at this period. This will help considerably towards a fuller understanding of the notion of common error prevailing at this time. The cases in which common error could be regarded as being verified may be reduced to two main headings:-

(1) that of a person appointed to an office while labouring under an occult incapacitating impediment, thus rendering his possession of the office de jure invalid from the beginning:

(45) Commentaria ad c. 22, X, I, 3, n.3.

(46) cf. Commentaria ad c. 13, X, I, 3, n.38.

(2) that of a person validly instituted in an office, but who afterwards for one reason or another loses office or is deprived of it, thus rendering his possession of the office de jure invalid from the moment of loss or privation.

(1) The first example envisages the case of a person who a priori is incapable of validly receiving or holding office on account of an occult incapacitating impediment: as long as the impediment remains occult the official in question will be commonly reputed legitimate and his official acts will be valid. Such was the case of Barbarius - he was a slave and therefore inhabilis, at the time of his appointment to the office of praetor. In canon law incapacity arising as a result of the censure of excommunication was the example most frequently cited at this period. A few words with regard to excommunication may not be out of place here.

We have already seen that according to the earlier ecclesiastical discipline every excommunicated person was in effect an excommunicatus vitandus: whether he was publicly or occultly excommunicated, whether the excommunication was latae or ferendae sententiae, the person excommunicated was deprived of all jurisdiction and juridical power.(47) From this arose the teaching that, in the case of an occultly excommunicated person who held an office, all his acts should be regarded as valid by virtue of common error - that is, as long as the fact of his excommunication remained occult. Such a person was referred to as an excommunicatus toleratus. With the issuance of the Constitution "Ad Evitanda" by Martin V in 1418 the term excommunicatus toleratus acquired a new meaning in canonical jurisprudence: in this Constitution

(47) cf. c.14, X, V, 39; also c.14, X, V, 39 gloss on words "Denunciatus non sit."

it was given a determined juridical signification in opposition to the term excommunicatus vitandus. By an excommunicatus vitandus was meant one who had to be shunned by the faithful: and a person became a vitandus in either of two ways:- (a) if the sentence of excommunication which was passed on him were formally published, or made known by the judge in special and express form: (b) if he incurred the penalty of excommunication by reason of sacrilegious violence against a cleric so notoriously that the fact could in no way be dissimulated or excused. All other persons who were excommunicated, but who did not fall under either of the above categories, were called Tolerati.(48) The law no longer obliged the faithful to abstain from intercourse with such excommunicated persons: neither did the law deprive these excommunicati tolerati of jurisdiction or juridical power. Hence if an excommunicatus toleratus (in the sense described here) exercised an office his official acts would be valid by law; so that henceforward there was no necessity for the invocation of the saving principles of common error where the acts of such a one were concerned.(49)

But though the term toleratus was thus given a specific meaning in canon law with relation to excommunication, it is noteworthy that canonists continued to use it in its original sense with relation to the doctrine of common error; we find them referring to a judex toleratus and a praelatus toleratus which simply signifies that the judge or the prelate labours under an occult defect. Thus we find Henriquez (+1608) expressly defining it - "Nunc ille dicitur toleratus qui

(49) cf. FELINUS SANDEUS. Commentaria ad c.35, X, I, 3, n.30; COVARRUVIAS Y LEYVA. Opera Omnia, Comm. ad c. Alma mater, de Sent. Excom. in VI, Pars I, 6, n.7; - DOMINICUS DE SOTO, Comm. in Quart. Sent. Tom. I, Dist. I, q.5, Art.6.

(48) For text of this Constitution "Ad Evitanda," cf. Codicis Juris Canonici Fontes, Vol.I, n.45.

communi errore populi habetur pro legitimo pastore judice aut electore."[50] We shall meet it often in similar contexts when discussing the writings of later canonists.

(2) The second example mentioned above is the case of an official who is secretly deprived of, or secretly loses the office to which he had been validly designated. Panormitanus states the principle clearly - "Cum is qui se gerebat pro praelato fuit electus et confirmatus seu eidem provisum per Superiorem tamen postea aliquid gerit, propter quod fuit privatus ipso facto praelatura .... et tunc si ista privatio fuit occulta tenent omnia gesta."[51] One exception however was made to the rule of the application of common error in the case of occult cessation of office, or occult revocation of jurisdiction; this exception was the cessation of delegated jurisdiction by reason of the death of the person delegating, re jam integra. Guilelmus Durantis (1296) in his day had held that on no account could the acts performed by a delegate in such circumstances be held as valid.[52] Few authors make reference to the point, but Panormitanus strongly favours the opinion just quoted. His reasons are that by the death of the person delegating, jurisdiction in the delegate is extinguished; ignorance of the death of the former cannot confer jurisdiction; nor can common error confer jurisdiction in this case.[53] He denies the existence of an analogy between this case and that envisaged in the Lex Barbarius. In the case of the Lex Barbarius, the validity of acts was due to both common error and the fact that Barbarius had received office from the proper Superior, the authority of

(50) Summa Theol. Mor. Lib. XIII, c.7, n.6.

(51) Commentaria ad c.44, X, I, 6, n.12.

(52) Speculum Juris, Tom. I, Tit. de Judice delegato, Restat, n.5.

(53) cf. Commentaria ad c. 20, X, I, 29, n.10.

this Superior having continued. In this case however the jurisdiction of the Superior has ceased - only common error remains, which of itself is not sufficient to render official acts valid.(54) His opinion goes back to the more fundamental question as to the necessity of the authoritas Superioris as well as common error: and we have seen that at this period this authority of the Superior was universally regarded as essential.

The question did not arise however in the ordinary cases of occult privation of office, occult revocation of jurisdiction etc; in these cases the authority or jurisdiction of the Superior who conferred the office still continued in force, and hence there is unanimous agreement that in such circumstances, the doctrine of common error applied. For this we have already quoted Panormitanus. Among many others holding the same opinion we may mention Baptista de Salis(55) Sylvester(56) and Navarrus.(57)

We should like to emphasize, finally, that whether the authors of this period were treating of the case of an occult impediment which existed previous to appointment, or of an impediment which arose in the official subsequent to his appointment, they were unanimous in holding that the doctrine only applied in the case of a public official exercising a public office. Time out of number we meet the phrase "gesta valent ratione publici officii," or similar phrases, when

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(54) cf. Commentaria ad c.20, X, I, 29, n.11.

(55) cf. Summa Roscella, v. Confessio Sacr. III, n.41.

(56) cf. Summa Sylvestrina, Pars, I, v. Confessor, I, n.15.

(57) cf. Opera Omnia, Tom.I, De Poen, Dist. VI, c. placuit, n. 179.

they treat of common error and its force.(58) Besides, just as we noted with regard to earlier canonists, the officials most frequently referred to are prelate,(59) judge,(60) and notary,(61) all of whom are public officials, fulfilling as they do all the conditions required according to the definition of the term, as laid down by Sylvester in this connection, viz., appointment by virtue of public authority for the public utility.(62)

Thus, though the canon lawyers took the doctrine of common error directly from Roman law and established it in canonical jurisprudence by use and custom, it is noteworthy that they modified the Roman practice on this one point. For we have already seen when discussing Roman law doctrine that it was not necessary that a person be a public official in order that his acts should benefit by the validating influence of common error; in Roman law, common error would supply juridical capacity to a private person exercising a private function, as for instance to a slave witnessing a will.(63) But from its very introduction to Canon Law, common error has always been associated with public officials only.

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(58) e.g. cf. PANORMITANUS, Commentaria ad c. 34, X, V, 39, n.9. ad c.8, X, II, 14, nn. 27, 45; ad c. 24, X, II, 27, n. 16. FELINUS SANDEUS Commentaria ad c. 24, X, II, 27, n.3. SYLVESTER, Summa Sylvestrina Pars, I, v. Excommunicatio, III, 5. COVARRUVIAS Y LEYVA, Opera Omnia, Tom. I, Comm. ad c. Alma Mater, de Sent, Exc. in VI, Pars, I, 7, n.9. NAVARRUS, Opera Omnia, Tom. II, cap, IX, n.9.

(59) e.g. cf. PANORMITANUS, Commentaria ad c.44, X, I, 6, n.11.

(60) e.g. cf. PANORMITANUS, Commentaria ad c.24, X, II, 27,n.2.

(61) e.g. cf. PANORMITANUS, Commentaria ad c.8, X, III, 50,n.21

(62) cf. Summa Sylvestrina, Pars I, v. Excommunicatio III, 2. "Tertia est quod officium publicum est duplex, scil. publicum authoritate et utilitate, id quod communi authoritate fulcitur, et ad communem utilitatem ordinatur, uti tabellionatus ....."

(63) cf. Above, Sec. I, Ch. I, p.12; cf. also Inst. II,10,7.

SECTION III.

THE DOCTRINE OF COMMON ERROR FROM THE BEGINNING OF THE 17th CENTURY TO THE PROMULGATION OF THE CODEX JURIS CANONICI.

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Though the Council of Trent made no express legislation with regard to the doctrine of common error, still certain pronouncements of the Tridentine Fathers exercised a certain influence on the evolution of the doctrine in subsequent years. Most important of these was the Decree Tametsi,[1] by virtue of which parties could be married validly only before the pastor of the parish where at least one of the parties had a domicile or quasi-domicile - or before another priest with this pastor's or the Ordinary's permission. We may also mention the decree "Quamvis Presbyteri," which legislated on the necessity of jurisdiction and approbation by the Ordinary in order that a confessor might validly hear confessions. This did not introduce any radical change into the discipline with regard to the necessity of jurisdiction, but it did introduce a change to this extent that, as a result, only the Ordinary could approve of confessors. Pastors continued to enjoy jurisdiction ex officio and could still delegate this power, but they could not give approbation.[2] These decrees - especially the former - were the occasion of the awakening of interest of the theologians

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(1) Sess. XXIV. Dec. de Ref. Mat. cap. 1. "Qui aliter quam praesente parocho, vel alio sacerdote de ipsius parochi seu Ordinarii licentia ... matrimonium contrahere attentabunt, eos Sancta Synodus ad sic contrahendum omnino inhabilis reddit et hiuiusmodi contractus irritos et nullos esse decernit."

(2) Sessio XXIII, Decret. de Ref. Ord. Cap. XV, "Quamvis presbyteri in sua ordinatione a peccatis absolvendi potestatem accipiant, decernit tamen Sacrosanta Synodus, nullum etiam regularem, posse confessiones saecularium, etiam sacerdotum, audire, nec ad id idoneum reputari nisi aut parochiale beneficium, aut ab Episcopis per examen, si illis videbitur necessarium, aut alias idoneus judicetur, et approbationem, quae gratis detur obtineat."

(+ canonists ?)

in the question of common error. It was inevitable that merely putative pastors would assist at marriages and that putative confessors would hear confessions. They had to determine, therefore, whether, when and under what circumstances such marriages and confessions would be valid. The answer to these questions, as found in their writings, will form a continuation of the history of the doctrine of common error.

In view of the influence exercised by these decrees of the Council of Trent, in giving rise as it were, to a new phase in the history of the doctrine, it may be suggested that a more apt point of division in its treatment would have been the Council of Trent itself, rather than the end of the 16th century. However, we consider the division here adopted to be justified, on the grounds that the reformations and revised descipline, introduced by the Council of Trent, are first fully reflected in the writings of the early 17th century theologians, rather than in the works of the canonists who flourished during, and immediately following, the Council.

In the present section we shall devote a chapter to each of two main questions which arise, viz., (1) the application of the principles of common error to the act of assistance at marriage and to other non-jurisdictional acts: (2) the notion of common error itself. Before treating these two main questions, however, we shall speak in the opening chapter of various minor questions which arise in connection with the subject: some of these questions we have already touched upon, others are new; and while they may not, perhaps, play an essential part in the ultimate development of this essay, still a work on this subject of common error would not be complete without some reference to them.

CHAPTER I.

VARIOUS QUESTIONS ARISING IN CONNECTION WITH THE DOCTRINE.

The questions to be discussed in this chapter may be conveniently summarized under five headings as follows:-

(1) The necessity of a title.
(2) The licit use of common error.
(3) The application of the principles to delegated jurisdiction.
(4) The principles of common error as the source of Canons 207, 2; 430, 2.
(5) The principles of common error with relation to probable jurisdiction.

We shall now treat of these in order.

ARTICLE I. NECESSITY OF A TITLE.

In the preceding chapter we referred briefly to the opinion which, for all practical purposes, was unanimous in holding for the necessity of the "authoritas Superioris" in order that common error be effective. Thus Petrus de Arragon (+ 1595) writing at the end of the 16th century avers that it is the common opinion of all authorities - and the true opinion - that the acts of a putative prelate are valid provided two conditions are fulfilled, viz., that the prelate has been appointed auctoritate superioris and that he be commonly regarded as prelate (i.e. common error).(1) The same opinion is expressed by the Spanish Jesuit theologian Henriquez (+ 1608) in the following terms, "Ille dicitur toleratus qui communi errore populi habetur pro legitimo pastore, judice aut electore: dummodo duo habeat, primo titulum saltem coloratum a praelato, aut auctoritate legis: secundo ut ratione publici officii exerceat jurisdictionem."(2) This seems to be the first occasion on which the expression titulus coloratus occurs. The author

(1) cf. De Justitia et Jure, Quaest. LX, Art VI.

(2) Summa Theol. Mor., Lib. XII, Cap. 7, n.6.

does not offer a definition of the terms, but from the context in which it is found, it is obviously synonymous with the expression auctoritas superioris, which is described by Petrus de Arragon thus: "auctoritas Superioris, hoc est, quod fuerit talis prælatus seu judex auctoritate Superioris constitutus."(3) Henriquez has this in common with preceding authors, also, that he neglects to put forward arguments in support of the view he adopts - probably because of the lack of opposition to this view.

Thomas Sanchez (+ 1610) - whose exposition of the whole question of common error must be regarded as the most outstanding and most complete in the whole history of the doctrine(4) - makes little attempt to adduce arguments in favour of this opinion. Denying even the probability of the contrary opinion, he is content to reiterate the argument of Panormitanus alleging that the Lex Barbarius has a twofold fundament - error communis and auctoritas Superioris - both of which are equally essential.(5)

A title may be defined as the cause by reason of which a right is acquired. This title may be real and true, it may be invalid, it may be merely apparent or non existent. To describe these various categories or classes of titles authors are accustomed to use concise and descriptive expressions, such as titulus legitimus, titulus verus, titulus invalidus, titulus coloratus, titulus existimatus, titulus praesumptus etc. It is to be noted however that all authors are not consistent in applying the same definition to each of

(3) De Just. et Jure, Quaest. LX, Art. VI.

(4) cf. De S. Matrimonii Sacramento, Lib.III, Disp. XXII.

(5) cf. De Mat. L,b. III, Disp. XXII, n.49; cf. also PANORMITANUS. Comment. ad c.44, X, I, 6, n.11.

the above terms.[6] Hence an important factor to be considered in the study of each individual author, will be the exact signification of the terms as used by him. This of course will be easily found either in his preliminary definition of terms or from the context. However, at least two of the above terms have consistently received the same signification from all, viz., titulus existimatus and titulus coloratus. A titulus existimatus is had when a person is commonly regarded as an office-holder (e.g. judge, prelate, etc.) when de facto the office has never been conferred on him. A titulus coloratus (coloured title) is had when a person has been appointed to an office by a legitimate superior, the appointment being invalid, however, by reason of an occult defect. In his definition of coloured title T. Sanchez emphasizes that it is not sufficient if the office be conferred by any Superior whatsoever - it must be the legitimate Superior having the power to do so.[7] Hence, he concludes, if the Superior delegating or appointing is himself an intrusus, though a real prelate in the estimation of the community, the person delegated or appointed cannot be said to have a coloured title, - and is therefore incapable of performing valid acts, The same is true of a real Superior who delegates in a case over which he actually enjoys no real power.[8]

Among other sponsors of the theory requiring a coloured title we may mention Flaminius Parisius (+1603)[9] Nicolaus

(6) e.g. Compare T. SANCHEZ, De. Mat. Lib. III Disp. XXII, n.61 - "... at concurrit titulus praesumptus scilicet licentia et a superiore potenti concedere, data ..." with DE ANGELIS Prael. Juris Can. T. IV, Pars. I, Lib.II, Tit. I, n.25 - "Titulus praesumptus, seu existimatus, dicitur quando vulgo creditus datus, qui reipsa datus non fuit a Superiore."

(7) De Mat. Lib.III, Disp. XXII, nn. 2, 48, 51, 61.

(8) cf. De Mat. Lib. III, Disp. XXII, n.51.

(9) cf. De.Resignatione Beneficiorum, Tom. II, Lib.XI, q.1, n.20

Garcia (+1613),[10] and the Jesuit Theologians Joannes de Salas (+1612,[11] Reginald (+1623),[12] Suarez (+1617,[13] Lessius (+1623),[14] and Laymann (+1635).[15] The first real exponent of the contrary view was Basilius Pontius (+1629) in his treatise: "De Sacramento Matrimonii Tractatus." It is true, this opinion had been put forward before his time, but it was proposed in a tentative manner. Bartolus a Saxoferrato held it at one stage and quotes others for the same view, but later he seems to favour the other.[16] To Pontius must go the credit of being the pioneer of the opinion, not so much because he was the actual originator of it, but rather its vindicator, in so far as he put forward solid and convincing arguments in support of it. In the light of this it can be easily understood why Antoninus Diana (+1663) could refer to this opinion some years later as being a <u>new one</u>.[17]

Pontius lists three main arguments to prove his contention that no coloured title is required.[18]

(a) Quoting the decretals c.9, X, I, 31[19] and c.13, X, I, 2,[20] as proving that jurisdiction can be acquired by

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(10) cf. De Beneficiis, Tom.I, pars. V, c. IV, n.281.
(11) cf. De Legibus, Q. XCVI, Trac. XIV, Disp. X, 3 n.14.
(12) Theol. Mor. Lib. I, n.98.
(13) De Censuris, Tit. XX, Disp. II, Sect. IV.
(14) De Justitia et Jure, Lib. II, c.29, Dub. 8, n.65.
(15) Theologia Moralis, Tom.I, Lib. I, Trac. IV, c.22, n.9.
(16) cf. Above, Sect. II, Ch.I, Art.4.
(17) cf. Resolutiones Morales, Tom.I, Trac.III, Resol. 19, n.3.
(18) De S.Matr. Lib. V, cap.XX, nn. 3, 4, 6.
(19) This decretal reads: "Respondemus quod cum sit in canonibus diffinitum, Primates, vel Patriarchas, nihil juris prae caeteris habere, nisi quantum sacri canones concedunt vel prisca illis consuetudo contulit ab antiquo."
(20) This decretal reads: Nisi forte his quibus delinquentes ipsi deserviunt ex indulgentia, vel consuetudine speciali, jurisdictionem huiusmodi valeant sibi vindicare.

means of prescription and of custom, Pontius maintains that it is not true to say that jurisdiction is always obtained directly from the legitimate Superior. Therefore, it can be acquired also through common error without any intervention on the part of the legitimate Superior.

(b) By virtue of Nov. XLIV, 1,4 the acts of a putative notary, who has not been appointed by the legitimate Superior having power to do so, are declared valid. Therefore, appointment by the proper Superior cannot be an essential factor: in other words a coloured title is not required, common error alone suffices. We have seen this argument already and its force can scarcely be doubted.

(c) The third is not listed formally as an argument by Pontius, but rather as a confirmation of a conclusion which he draws as a result of his not requiring a coloured title. He emphasizes the grave perturbation that would follow from the invalidty of all the Sacraments conferred by a parochus existimatus who has not a coloured title.(21) The obvious implication is, that since the purpose of the doctrine of common error is precisely to prevent such grave inconveniences and perturbations, there seems no reason for restricting its influence to the case where a coloured title is had.

That these arguments carried weight and force is demonstrated by the influence they exercised on subsequent writers. Very soon afterwards F. de Castro Paleo (+ 1633) could refer to the opinion as both reasonable and probable.(22) Likewise Joannes Sanchez (+ 1624) who asserts that this opinion

(21) De Mat. Lib.V, cap. XX, n.6. "Hic quaeso lector animadvertat, quanta animorum perturbatio sequeretur, si omnia sacramenta matrimonii et confessiones fuissent invalida."

(22) cf. Opus Morale, Pars, V, Trac. XXVIII, Disp. II, Punct. 13, 10, n.9.

proposed by Pontius is much more conducive to the promotion of the common good than the opinion requiring a coloured title.(23) Among many others who regarded the opinion as probable were Vericelli (+1656),(24) Diana who recommended it to confessors as such,(25) Hurtado (+1659) who declares it safe in practice,(26) Leander (+1663),(27) and Tamburini (+1675).(28)

Despite the views of these, authors, however it must be admitted that the weight of theological and canonical opinion during the 17th century still favoured the view requiring a coloured title. Many names could be mentioned here,(29) but as they to a large extent merely repeat what had been said by their predecessors, we shall consider only the objections raised by de Lugo (+1660) to the contention of Pontius. De Lugo's main argument is that greater evils and greater inconveniences would follow as a result of the application of the theory expounded by Pontius and his adherents, than those which this theory is intended to prevent. For, he says any person could set himself up as a legate of the Pope and, by means of forged letters, deceive the people into believing that he was a real legate; and immediately such a legate was commonly regarded as a real legate, then by virtue of common error all his acts would be valid.

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(23) cf. Selectae Disputationes, Disp. 44, n.3.

(24) cf. Quaestiones Morales et Legales, Trac. II, Q.XXV, n.15.

(25) cf. Resol. Moral., Tom.I, Trac.III, Res. 19, n.3.

(26) cf. Resol. Moral. Pars, II, Trac. XII, cap.I, Dub.VII, n. 2019.

(27) cf. De Sacramentis, Tom. I, Trac.V, Disp. XI, q.102.

(28) cf. Theol. Mor. Tom. II, Lib. V, c. IV, VII, n.17.

(29) e.g. TRULLENCH, Opus Morale, Tom. II, Lib. VIII, c.1, Dub, 10, n.4; CANDIDUS, Disquisitiones Morales, Disq. III, Art. X, n.2; BARBOSA De Officiis et Potestate Parochi, Pars, II, c.XVII, n.33; THESAURUS-GIRALDUS, De Poenis Eccles. Pars I, cap.VI.

Likewise, heretics could pretend to be bishops, could easily lead the people to believe that they were real bishops, and on the strength of this deception, and consequent common error, would be capable of validly performing the functions and duties of a real bishop. Such a state of things would tend to the promotion and encouragement of fraud and deceit by evil-minded pretenders, rather than to the promotion of the common good. In order to prevent such grave dangers it is absolutely necessary that a coloured title be required, as well as common error, in order that the acts of a putative official be valid.(30) This argument is repeated almost verbatim by the Jesuit theologian Haunoldus (+1688)(31) who describes it as the only real argument of weight in favour of the view requiring a coloured title. There seems much truth in this statement of Naunoldus, for the majority of subsequent authors whether maintaining the one opinion or the other almost invariably refer to it, either to uphold or reject it, according to the side of the controversy they sponsor. Thus Reiffertuel (+1703), for instance, relies on this argument as a basis for his view on the question.(32)

It would be monotonous and useless to follow the controversy in all its detail through the 18th and 19th centuries. To do so would entail the continuous repetition

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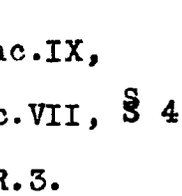
(30) De Justitia et Jure, Disp. XXXVII, § III, n.23. "Sequitur enim, quod si aliquis malitiose se legatum Papae fingat, et ostendat bullas falsas in testimonium suae potestatis, eo ipso istius acta futura sint valida in utroque foro, sicut si esset verus legatus Papae. Item haeretici qui si episcopos fingunt, et potestate illa facta decepiunt rudes et rusticos non minorem habebunt potestatem jurisdictionis circa illos quam si veri Episcopi, dum adesset error communis; haec quidem durissima sunt, et conducerent ad fovendos nequissimos simulatores in suis fraudibus. Merito ergo requirimus ad valorem gestorum per judicem false existimatum, quod habeat titulum coloratum ...."

(31) cf. De Justitia et Jure, Tom, V, Trac.II, cap. 1, n.24.

(32) cf. Dus. Can. Univ. Lib. II, Tit. I, n.200.

of arguments for and against, objections and counter-objections - and all to no purpose. For, as we shall see in due time, this controversy ended with the publication of the Code of Canon Law: hence a detailed study of it here will have no practical bearing on the conclusions we may reach as a result of this study. It will be sufficient to say that the controversy continued. The opinion favouring the necessity of a coloured title remained, as it were, "in possession" and claimed the larger number of supporters.(33) Yet there were many who favoured the less strict view.(34) There can scarcely be any doubt as to the probability of this latter view, nor as to the safety of following it in practice. In the period immediately preceding the promulgation of the Code we find Bucceroni(35) referring to this opinion as most probable: Noldin describes it as probable:(36) and Gasparri is satisfied that jurisdiction is supplied in common error even without a coloured title - at least from the reflex principle that the Church supplies jurisdiction in dubio juris.(37)



(33) Following are some who held this view:-
LACROIX, Theol Mor. Tom II, Lib. VI, Pars.I, n.115.
ROSSIGNOLI, De. Mat. I, Praenot. XXX, n.9.
SALMANTICENSES. Cursus Theol.Mor. Tom II, Trac.IX, c. VIII, Punct. IV, n.54.
F. SCHMIER, Jus Can. Univ. Lib. II, Trac.I, c.VII, § 4 n.30.
JANSEN, Theol. Mor. Unive. Casus XCIX, n.5, R.3.
CONCINA, Theol. Christiana, Tom IX, Lib.II, Diss. II, c IV, n.31.
SASSERATH, Cursus Theol. Mor.Pars, IV, Trac. I, Diss. V. Q.I, n.119.

(34) e.g. WIESTNER, Inst. Can. II, I, n.88.
SCHMALZGRUEBER, Jus Eccles. Univ. II, I, n.21.
RONCAGLIA, Univ. Mor.Theol.II, Trac.XIX,Q.V. c.1,R.III.
ANGELUS A SANCTA MARIA, Brev.Mor.Carmel., Pars II, Tract.XI, c.IX, Sectio II, Sublectio I, n.26, etc.

(35) cf. Inst. Theol. Mor. III, n.769.

(36) cf. Summa Theol. Mor. (1911), III, n.355.

(37) Trac. Can. de Mat. Vol.I, n.913. "Proinde stante hac controversia jurisdictio videtur suppleri, ex principio saltem reflexo, quod nempe Ecclesia in dubio juris jurisdictionem supplet."

ARTICLE II. - LICIT USE OF COMMON ERROR.

At the outset it may be remarked that this question of the licit use of common error falls almost entirely within the domain of Moral Theology, and as such does not merit detailed consideration in an essay that is primarily canonical. We shall be satisfied, therefore, with giving a very brief outline of the teaching of theologians on the point, which will consist mainly in noting the modification the teaching underwent during the course of the 17th century. The question must be examined from two viewpoints:- (a) from that of the faithful - or at least those few - who are aware of the existence of an impediment in the official, and consequently know that he possesses no habitual jurisdiction or power: (b) from that of the official himself who is aware of his own defect of power.

A. Licit Use of Common Error by the Faithful.

As this question may arise in relation to both the external and internal forum, it will be more convenient to treat the two cases as separate questions: hence we shall discuss the lawfulness of using common error in matters pertaining to - (1) the External forum; (2) the Internal forum.

(1) - External forum:

It will be recalled that when examining the writings of earlier canonists, we found them generally agreed in their opinion on this question.(38) According to the majority, if a few members of a community knew, for instance, that a

(38) cf. Above Section II, Chap. II, Par.c.

particular judge was inhabilis (while the community at large regarded him as habilis and therefore as a real official), and if these few approached this putative judge as parties to a litigation, the official acts of the judge in favour of such would be valid, but should be rescinded as a penalty for their having approached an official, whom they knew to possess no jurisdiction. According to these authors then, the procedure was valid but gravely illicit. This view was accepted by Thomas Sanchez in its main outline - with one slight but important modification... He too declared the procedure to be valid and as a general rule to be annulled,(39) but pointed out that in certain circumstances the procedure could be even lawful and therefore not subject to annulment. The reason why the acts should be annulled according to the earlier canonists, was in order that the parties might be suitably and properly punished for invoking the ministrations of one, whom they knew to be a merely putative official. Sanchez argues that if, by reason of circumstances, the parties in question did not act unlawfully by approaching such an official, then there could be no question of the imposition of a penalty - hence no question of the annulment of acts by way of penalty. As an example of circumstances that would thus change the aspect of the case, Sanchez quotes that of a person who, despite the fact he knows of the incapacity of a particular judge, is nevertheless compelled to seek his ministrations because he is not in a position to approach another is properly constituted.(40) In other words, as Garcia(41) puts it, if

(39) cf. de Mat. Lib. III, Disp. XXII, n.45.

(40) De Mat. Lib. III, Disp.XXII, n.45. "Intelligo tamen retractanda esse in odio illius scientis quando sciens ipse deliquit adeundo eum judicem, quem noverat alibi denunciatum ... secus si minime deliquit ... nullam admitteret culpam, si non habens alium judicem, apud quem causa agat, hunc adeat, ac proinde non venit in poenam retractanda sententia."

(41) cf. De Beneficiis, Tom.I, Pars, V, c.IV, n.312.

the person concerned cannot approach another judge or official without grave inconvenience, he is quite justified in approaching one whom he knows to be merely putative.

Basilius Pontius goes a step further. Treating of this point he asserts that the same principles apply to the few who are aware of the defect in the judge, as apply to the majority of the community who are in genuine error. As far as the external forum is concerned, there is for him no exception to the general rule - given common error, the consequential benefits apply equally to the majority who are ignorant of, and to the minority who knew of, the existence of the incapacitating defect in the public official. He puts forward the following arguments as proof of his contention: Laws are made in consideration of general or common contingencies. When a law states that acts are valid when performed by one who is thought to be a legitimate judge, it caters for all the members of the community within which the conditions for common error have been verified; and just as the error of one is not sufficient to fulfil the requirements of common error, so neither does the knowledge of one impede the validity of acts.(42) What may be regarded as a second argument is his criticism of the statement of Sanchez referred to above. Sanchez had admitted that circumstances could render it such that a person would be justified in approaching a putative judge; Pontius contends that the circumstances will always be such as to render such a course of action lawful. For, he argues, as the impediment of the judge is ex hypothesi occult, the manifestation of that impediment by the individual concerned may be unlawful,

(42) cf. De Mat. Lib. V, c.XIX, n.17.

or it may be futile (if, for instance he could not prove it in foro externo), or it may even be contrary to the public good.(43)

These arguments seem to have influenced later writers: the former especially appealed greatly to many theologians. Among others we may mention Lessius,(44) de Castro Paleo,(45) and Bonacina(46) - who adopted this view and repeated this argument as the basis for it. After this time there were no further theories put forward on the matter. Indeed, not all moralists touched on the question - they were more concerned with the question in so far as it had reference to the internal sacramental forum. Of those who do mention it, however, the majority(47) favour the opinion of Pontius.

(2) Internal Forum:

With regard to this question Sanchez applies the same principle as that used by him when dealing with the external forum. According to him, the sacramental confession made in the circumstances under consideration is valid from the point of view of jurisdiction in the confessor. - for jurisdiction is conferred on him by law by virtue of common error. But if the penitent approaches this confessor without a justifying cause he commits grave sin thereby, and thus renders the sacrament invalid by reason

(43) cf. De Mat. Lib.V. C XIX, n.17.

(44) cf. De Justitia et Jure, Lib. II c.29, Dub.8, n.66.

(45) cf. Opus Morale, Pars V, Trac. XXVIII, Disp.II, Punct. 13, § 10. n.10.

(46) cf. Opera Omnia Mor., Tom.I, De Mat., Q.II, Punct.VIII, n.35.

(47) e.g. cf. PASSERINUS, De Hom. Stat et Offic., Tom II, Q.87, n.348; LACROIX, Theol. Mor. Tom,II, Lib.VI, Pars I, n.114; ROSSIGNOLI. De Mat.I, Praenot, XXXI, n.11.

of lack of due dispositions.[48] An example of such a justifying cause would be, for instance, if the pastor of a particular penitent is de facto inhabilis, there is no other confessor to whom the penitent may have recourse, and it is either necessary or obligatory for the penitent to receive the Sacrament.[49] A justifying cause, therefore, renders the Sacrament both valid and lawful; absence of this cause renders it not only unlawful, but also invalid. In this the case differs from that of the external forum where the unlawfulness of an act does not necessarily entail invalidity.

Pontius, too, makes special mention of this question. And in view of the liberal attitude adopted by him when treating of the external forum, it is somewhat surprising to find him advocating a very restricted and indeed harsh discipline in this case. We have seen that for him, as far as the external forum is concerned, a justifying cause always existed; now he says that with relation to the internal such a justifying cause never exists. For, he argues, if the penitent is in danger of death then the confessor has jurisdiction from another source (every priest having jurisdiction in such circumstances). If the penitent is not in danger of death, then he can approach another properly constituted confessor; if no other confessor is available and it is not a time of precept, then there is no necessity to confess; if it is a time of precept and no other confessor is available, then he must be regarded as

(48) De Mat. L b. III, Disp.XXII, n.46. "Extra hos casus peccaret lethaliter fatendo illi .... et consequenter tunc confessio esset nulla ratione obicis per poenitentem appositi."

(49) cf. De Mat. Lib. III, Disp. XXII, n.46.

not having a copia confessarii, and therefore the precept does not oblige.(50)

It is difficult to understand why this outstanding theologian should propose such widely divergent norms for two cases so closely related. His position can scarcely be regarded as consistent, especially as he fails to give any satisfactory explanation as to why a justifying cause should always exist in the former case, and never in the latter. The basis of the justification in the former case was the inconvenience accruing either to the party concerned or to the community in general - surely that same inconvenience should justify the same act in the latter case. We admit, of course, that conditions prevailing in each of the fora differ, but certainly not to such a drastic extent.

Others too made reference to this question. Reginald declared that, despite the existence of common error, only those who were in genuine error and good faith could be validly absolved(51) - thus implying that those who may be in bad faith cannot be validly absolved. So also Manriquez,(52) Rodriquez,(53) and Thesaurus-Giraldus.(54) Passerinus seems to take his stand at the opposite extreme, holding for validity in all cases.(55)

Others make a distinction between the case where the confessor himself knows of his incapacity and the case where

(50) cf. De Mat. Lib. V, Tit, XIX, n.18.

(51) cf. Theol. Mor., Lib.I, n.99.

(52) cf. Quaestiones Morales et Vic. Pars II, QXLIII, nn.4,7.

(53) Summa Casuum Conscientiae, Pars I, c.LX, n.3.

(54) cf. De Poen. Eccles. Pars II, Absolutio, c.II.

(55) cf. PASSERINUS. De Hom. Stat, et. Offic. Tom.I, Q.87, n.348. NOTE: It is to be noted however that in this context the author is speaking in general terms of validity in all cases: he might have made exception for the case of Sacramental Confession had he adverted to it.

he does not. Joannes Sanchez seems to have been the first to propose this solution. According to him, the validity or invalidity of the absolution depends on the consciousness or otherwise of the confessor, with regard to his own incapacity. If the confessor is ignorant of his own defect of power, all confessions will be valid. The only case where invalidity results is, when the confessor knows of his own defect, and the penitent knows that the confessor thus realizes his true position: in that case the confessor sins by imparting absolution, the penitent by seeking it.(56) The position then is, that the confessor, by deliberately usurping jurisdiction sins gravely: the penitent by co-operating in this sin of the confessor also sins gravely, with the result that the confession is invalid. The same opinion is voiced by Hurtado. He admits, however, that for certain grave reasons, the penitent may seek absolution from a confessor whom he knows to be conscious of his own defect of power; such reasons would be the fulfilling of the precept of annual confession or the gaining of a jubilee indulgence.(57)

That exhausts all the theories proposed by moralists with regard to the lawfulness of seeking absolution in bad faith (i.e. when aware of the confessor's defect) from a merely putative confessor. Generally speaking it may safely be said that the most widely accepted view in subsequent times was that the penitent required a just cause in order to receive absolution lawfully and validly in such circumstances: and a just cause was had if a penitent could not conveniently approach another legitimately constituted confessor. Bargilliat sums up this teaching concisely: "Sed etiam idem

(56) J. SANCHEZ, Selectae Disp., Disp. 44, n.3.

(57) cf. HURTADO, Res. Mor., Pars II, Trac. XII, n.2020.

privatus qui scit defectum licite uti potest ejusdem Superioris ministerio in casu necessitatis aut utilitatis specialis seu causae rationabilis, e.g. quando commodo alium adire nequit .... At si desit aliqua rationabilis causa abstinendum ab illius Superioris officio; alioquin peccaret ille privatus, atque in foro poenitentiali, invalida foret absolutio, defectu dispositionis in poenitenti."(58)

B. Lawful Use of Common Error by Official.

The question of the lawful use of common error by a putative official who knows of his own defect of power does not receive the same attention from moralists and canonists as the preceding. Naturally there was not the same difficulty or doubt with regard to the position of such an official. If he realized that he possessed no habitual jurisdiction or power, he could not easily be justified in usurping this power, or at least in forcing the Church to supply the deficiency. Hence it is not surprising to find the common opinion declaring that such a person acts gravely unlawfully in so doing. Many state it absolutely;(59) but usually it was admitted that if he had a just cause for forcing the Church to supply jurisdiction in this manner, such an official could be regarded as acting lawfully. As examples of a just and reasonable cause, Bargilliat mentions the following - if confession is necessary in order that a penitent may fulfil a precept, and the penitent cannot conveniently approach another legitimate confessor; if the penitent would otherwise be forced to wait a considerable time for confession, etc.(60) This latter opinion was the

(58) Prael. Juris Can. n.208.

(59) e.g. cf. LESSIUS, De Justitia et Jure, Lib.II, c.29, Dub.8, n.66. LACROIX; Theol. Mor. Lib.VI, Pars I, n.114.

(60) cf. Prael Juris Can., n.208.

accepted teaching in pre-Code jurisprudence.(61)

ARTICLE III. - COMMON ERROR AND DELEGATED JURISDICTION.

In an earlier chapter we have seen it was generally agreed during the 15th and 16th centuries that the principles of common error applied equally to officials who were reputed to have ordinary power, and those reputed to have delegated power. Panormitanus called it the common opinion in his time - Sandeus referred to it as the opinion of all authors.(62) During the period under consideration here, the same attitude was adopted by authors to this question; indeed it is probably true, to say that it has been the least controverted of all the questions that have arisen in connection with the subject.

For T. Sanchez, this opinion is the more probable - "multo probabilior" he calls it. By way of proof he merely repeats the arguments used by his predecessors who shared this view - arguments from Roman law and the Decretum Gratiani. We have already discussed the merits of these, so they need not delay us here.(63) But one point emphasized by Sanchez is worth noting. It will be recalled that Bartolus had stated that the principles of common error would not apply if a delegate held office invalidly, by reason of a defect in the actual act of commission or appointment - that they would apply only to the case of personal defects. Contrary to this, Sanchez declares that it is immaterial whether the defect is in the person of the delegate or in the actual act of delegation - jurisdiction will be supplied provided the other conditions for common error are verified in the case.

(61) e.g. cf. D'ANNIBALE, Summula Theol. Mor., I, n.79, footnote 76; LEHMKUHL, Theol., Mor. II, n.504.

(62) cf. Above, Sec.II, Ch.II, Par. f.

(63) cf. Above, Sec.II, Ch.II, Par.f.

If therefore the act by which a legitimate Superior appoints a delegate be invalid by reason of non-fulfilment of some essential legal formality, the delegate cannot be a true or real official - nevertheless jurisdiction will be supplied to him provided the other requisites for common error are present. The basis for this opinion is, that there is no reason why jurisdiction should be supplied in the case of a personal defect, and not in the case of defect of commission,(64) provided, of course the defect in each case is one which lies within the power of the Church to supply, i.e. provided it is not an impediment of the divine or natural law.(65)

Basilius Pontius agrees with Sanchez on this question of common error and delegated jurisdiction. He explicitly states that the principles apply to a delegated judge - whether he be delegated for one or more cases.(66) Lessius, too, makes explicit mention of this same point, emphasizing the fact that the principles apply even in the case of a delegatus ad unam tantum causam.(67) Fagnanus refers to this as the common opinion in his time.(68) And if we judge by the number of canonists who give this same answer, there can be no doubting the truth of this statement; there is practical unanimity among pre-Code authors that the principles of common error apply equally to delegated and ordinary jurisdiction.(69)

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(64) T. SANCHEZ, De Mat., Lib.III, Disp.XXII, n.19.

(65) cf. T. SANCHEZ, De Mat., Lib.III, Disp. XXII, n.27.

(66) cf. De. Mat., Lib.V, C.XIX, n.11. "Colliges eam doctrinam locum habere non tantum in judice ordinario, sed etiam in delegato, vel ad unam vel plures causas fori externi."

(67) cf. De Justitia et Jure, Lib.II, C.29, Du,8, n.66.

(68) cf. Commentaria, Tom.III, ad c. 2, X,V, 20, n.4.

(69) e.g. cf. DE LUGO, De Justitia et Jure, Disp.XXXVII, 3 n.26. PIRHING, Jus. Can., II, I, n.86.
REIFFENSTUEL, Jus. Can. Univ. I, III, n.234.
BARGILLIAT, Prael. Juris. Can., n.204.
D'ANNIBALE, Summula Theol. Mor., I, n.79, footnote 76.
MARC. Inst. Mor. Alphons., II, n.1754.

ARTICLE IV. - COMMON ERROR AS THE SOURCE OF CANONS 207 § 2. and 430 § 2.

On reading Canon 430 § 2 of the Codex Juris Canonici, the relation between it and the subject of common error may not be immediately apparent. It reads:-

> "Nihilominus, excepta collatione beneficiorum aut officiorum ecclesiasticorum, omnia vim habent quae gesta sunt a Vicario Generali, usque dum hic certum de obitu Episcopi acceperit, vel ab Episcopo aut Vicario Generali usque dum certa de memoratis actibus pontificiis notitia ad eosdem pervenerit."

On closer examination, however, it will be noticed that even if this canon had never been incorporated in the Code, practically all those acts of Vicar General and Bishop respectively as considered here, would nevertheless be valid in virtue of jurisdiction supplied to them by reason of common error. For, granted that the jurisdiction of a Vicar General ceases on the death of the Bishop, or by the translation, revocation or resignation of the same, if the Vicar General is unaware of any of the above events, then, in normal circumstances at least, it is most unlikely that the community as a whole would be aware of them: and given this general ignorance or unawareness of the community on these matters, there is immediately place for the application of the principles of common error.

The same remarks hold good with regard to Canon 207 § 2, which states :- "Sed potestate pro foro interno concessa, actus per inadvertentiam positus, elapso tempore vel exhausto casuum numero validus est." In fact the remarks are even more true when applied to this canon, because the occurrence of a case such as contemplated above, without the presence of genuine common error, will be so rare that the canon

appears to be practically superfluous. The force of these remarks will be better understood after a brief examination of the traditional teaching on these two points before the promulgation of the present Code.

A. Canon 430 § 2.

The decretal "Relatum" of Gregory IX,(70) makes it clear that, on the death of the Superior delegating, the jurisdiction of the delegate automatically ceases "si res jam integra sit." This decretal had led Guilelmus Durantis to the conclusion that the jurisdiction of the delegate expired in all cases on the death of the Superior delegating, and that there was no possibility of acts being validly performed by such a delegate, even though he was in absolute ignorance of the death of the Superior.(71) He does not seem to have adverted to the contingency that the whole community, as well as the delegate, might be invincibly ignorant of the death of the Superior, and hence he did not state whether this fact would change the aspect of the case. It is obvious, of course, that it is one thing to have the delegate alone ignorant or unaware of the death of the Superior, but quite another thing to have the whole community in that state. Panormitanus, we have seen,(72) noted the distinction between the cases, and the possible difference between the effects of both in so far as the validity of the acts of the delegate were concerned. But to both hypotheses he gave a very decisive negative answer. In the former, the acts could not be valid, because the ignorance of the delegate could not supply jurisdiction. In the latter case, the principles of the Lex Barbarius could not apply because of the absence of one of the essential factors viz., authoritas Superioris.(73)

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(70) i.e. c. 19, X, 1, 29: cf. also c.20, X, I, 29.
(71) cf. Speculum Juris, Tom.I, Tit. De Jud. Del. § Restat,n.5
(72) cf. Above Sec.II, Ch.II. Par.g.
(73) cf. PANORMITANUS, Commentaria ad c.20, X,I, 29.

Various objections could be offered against this interpretation and application of the Lex Barbarius, but they would scarcely be relevant just now, since our object at the moment is not so much to criticize views and opinions, but rather to discover the views of the various commentators on this point, and especially to note any changes there may have been in their teaching.

The first indication of such a change is found in the writings of Flaminius Parisius. Speaking of the resignation of benefices made to, and accepted by, a Vicar having a special mandate from the bishop of the place to acdept such resignations, Flaminius asserts that even if the bishop had died before the acceptance of a particular resignation - the vicar being unaware of his death - the resignation must still be regarded as valid and effective: the reason assigned being - "propter communem errorem et publicam utilitatem."(74) Flaminius quotes as his authority for this opinion a decision of the Roman Rota(75) but he does not propose any arguments based on the text of the Lex Barbarius, nor does he attempt to disprove the arguments put forward by Panormitanus. This holds also for Henriquez,(76) who claims that many learned men held this opinion.

Thomas Sanchez also accepted this tdaching and set out to put it on a sound juridical basis, by showing that the case in question fulfilled all conditions required according to the proper interpretation of the Lex Barbarius. As we have previously so often seen, these conditions were two-fold - common error and a coloured title, i.e. from a Superior having power to confer it. Both of these, he contends, are realized in the present case: ex hypothesi there

(74) cf. De Resig. Benefic. Tom.I, Lib. VII, q.24, n.33.
(75) Rota Decision - 27th. Jan. 1546: text not available.
(76) cf. Summa Theol. Mor., Lib.X, s.22, n.3, in comment. lit. P.

is common error, because the community is ignorant of the death of the Superior who delegated: and there has been a title conferred by the legitimate Superior - the fact that the title no longer exists is secret(77) - and, therefore, as Pirhing puts it later, it must still be regarded as a coloured title.(78)

From this time onwards there was absolute unanimity on the point: this opinion was accepted by all who mentioned it. Among others we may mention such names as Filliucius, Candidus, Pontius, Rossignoli, Potestas, and Reiffenstuel.(79)

In the beginning the question referred to delegated jurisdiction in general - viz., whether the acts of a delegate are valid if they are performed after the death of the Superior re jam integra, while the community as such does not know of his death. It is very noticeable however, that instead of treating this question in general, many authors began to discuss a particular application of it, viz., the application to the case of a Vicar General. The Vicar General exercises ordinary, not delegated jurisdiction. Yet the fact that his power is dependent for its existence on the continuance in office of the bishop who appoints him, made this question as applying to the Vicar General a very important and practical one. As his jurisdiction extends over the whole diocese, and includes the capacity to perform important administrative functions, it was essential to determine exactly the status of the acts performed by the Vicar General

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(77) cf. T. SANCHEZ, De Mat. Lib.III, Disp. XXII, n.59.

(78) cf. Jus Can. II, I, n.86.

(79) cf. FILLIUCIUS, Quaest. Mor., Tom.I,Trac.VII, Cap.8,n.215.
CANDIDUS, Disquisitiones Morales, Disq. III, Art.X, n.4.
PONTIUS, De Mat., Lib.V, C.XXIV, n.4.
ROSSIGNOLI, De Mat., Praenot, XXXI, n.11.
POTESTAS, Examen Ecclesiasticum, Tom.I, Pars, IV, c.V, n.3264.
REIFFENSTUEL, Jus.Can. Univ., I, II, n.234.

in the contingency here visualized. It was a case, too, that arose more frequently than that of the cessation of delegated jurisdiction properly so called. Hence we find authors such as Candidus(80) Potestas(81) and Rossignoli(82) treating explicitly of this question as applying to the case of the Vicar General - giving the solution we have seen above with regard to the general question.

The New Code makes two changes in this accepted discipline in relation to the office of Vicar General: it extended it in one way and restricted it in another. It extended it, by establishing the norm that all acts are valid, independently of whether the community as a whole is in error or not, provided the Vicar General himself is ignorant of the extinction of his power, having as yet, got no certain notification of the death, resignation or translation of the bishop. The restriction is that the validating effect is limited to a certain extent - it does not apply to the conferring of benefices and ecclesiastical offices.

It must be noted however that this law applies only in the case when a Vicar General is ignorant of the cessation of his jurisdiction. The extinction of delegated jurisdiction properly so-called follows the rules of Can. 207 §1, and after its extinction, acts can only be valid by virtue of jurisdiction supplied in common error, in the manner we have seen it applied above.

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(80) cf. Disq. Mor., Disq. III, Art.X, n.4. "Tum quia quamvis mortuo episcopo potestas Vicarii expiret, et si Vicarius, incertus de morte, concedat litteras dimissorias ad Ordines, valerent, quia communi errore habetur ut Vicarius legitimus."

(81) cf. Examen. Eccles., Tom.I, Pars. IV, c.V, n.3264 - "Sequitur secundo quod si mortuo Episcopo vel revocato Vicario Generali, communiter ignoretur mors Episcopi vel revocatio Vicarii, valent acta ipsius ex jurisdictione quam tradit Ecclesia ratione communis erroris et tituli colorati."

(82) cf. De Mat., Praenot. XXXI, n.11.

B. Canon. 207 § 2.

The second law referred to as having its origin closely associated with the doctrine of common error - Canon 207 § 2 - needs very little explanation. It treats of the cessation or extinction of delegated jurisdiction for the internal forum: the same principles apply therefore as obtained in relation to the external forum. The case considered here is that of a priest who, having been granted jurisdiction to hear confessions for a stated length of time or for a given number of cases, inadvertently oversteps his faculties by hearing confessions after the stated period has elapsed, or by exceeding the specified number of cases. In these circumstances the canon declares such confessions to be valid. We shall briefly review the traditional teaching on this point.

Speaking of the ways in which it was customary for priests to be approved for the hearing of confessions Henriquez(83) states that sometimes a bishop approved confessors for a period of one year only (for certain reasons then prevailing). He goes on to say that if such a confessor (approved for one year) continued to hear confessions after the year had elapsed, those confessions would be invalid, because he could no longer be regarded as idoneus et approbatus: in other words because he would have no jurisdiction. In a footnote, however, Henriquez admits that in such circumstances the confessions could be valid by reason of common error - "Si tamen vere est doctus, et communi errore vulgi censetur adhuc approbatus valeret absolutio."(84)

Sanchez reiterates this statement, declaring it to be most probable that so long as the fact of privation of jurisdiction remains occult, with consequential common error,

(83) cf. Summa Theol. Mor., Lib.VI. Cap. VI, n.3.

(84) cf. Summa Theol. Mor., Lib.VI, Cap.VI, n.3, commento lit. 1.

the acts of the person thus occultly deprived are valid. The reason given by him is - "quia est error communis ortus a justo tituli initio"(85) Pontius teaches the same doctrine:(86) likewise Candidus who quotes from Sanchez almost verbatim.(87) One of the few to oppose this teaching was Bonacina. His ground for objecting was, not that the principles of common error did not apply to the internal forum, but because he did not consider the coloured title in this case to be sufficient.(88) This objection however, could scarcely be regarded as carrying much weight in view of the argument of Sanchez just mentioned above, and especially in view of the fact that so many authors, when treating of the parallel case in relation to the external forum, considered the title to be quite sufficient (i.e. a title which at one time was valid but now no longer exists - its extinction however being still occult). Besides, by the many who taught that no coloured title was necessary, this objection would not even be considered. We can understand, then why Potestas refers to the opinion of Henriquez, Sanchez, Pontius and the others as the common teaching.(89)

The new legislation as contained in Canon 207 § 2 of the Codex Juris Canonici differs from the traditional teaching in this, that it no longer requires that the community as a whole should be ignorant of the cessation of jurisdiction in the confessor. It is sufficient if the confessor himself does not advert to the fact that his jurisdiction has ceased: the main factor is the inadvertence of the confessor, not the ignorance of the community. As a corrollary

(85) De Mat., Lib. III, Disp. XXII, n.58.
(86) De Mat., Lib. V. Cap.XIX n.16.
(87) cf. Disp. Mor., Disq. III, Art.X, n.4.
(88) cf. Opera Omnia Moralia, Tom I, De Mat. Q.II, Punct. VIII, n.29.
(89) cf. Examen Eccles. Tom I, Pars, IV, c.V, n.3269.

of this canon therefore, if the confessor should continue to give absolution with full knowledge and advertence to the fact that his jurisdiction had ceased, these absolutions should be invalid. But here again, jurisdiction would be supplied to him by reason of common error - if the fact of cessation of jurisdiction was generally unknown. And, as we said in the beginning of this article, this will almost invariably be the case: for it is only on a very rare occasion that the terminus ad quem of a confessor's jurisdiction will be common knowledge - hence it will only be very rarely that the exact time of cessation of a confessor's jurisdiction will be generally known. It was this consideration which led us to say at the outset that, in view of the jurisdiction supplied by the Church in common error, this canon 207 § 2 appears to be practically superfluous. However the Church, in such important matters, wishes to cater for all possible contingencies - those of rare and those of frequent occurrence - and on this ground, at least, the inclusion of this Canon 207 § 2 is justified.

ARTICLE V. - COMMON ERROR AND PROBABLE JURISDICTION.

Canon 209 of the Codex Juris Canonici declares that in common error and in positive and probable doubt, the Church supplies jurisdiction for both the external and internal forum. It is not by mere accident that common error and probable doubt have been so closely linked together by the codifiers of ecclesiastical law: these two notions have always been associated with each other, not because of any marked similarity in the notions themselves, but principally by reason of the fact that they produce the same juridical effect. And while not wishing to give a detailed treatment of the evolution and application of the principle that in positive and probable doubt the Church supplies

jurisdiction, we shall try to show here, as briefly as possible, how the doctrine of common error was, to a large extent, responsible for the rise and firm establishment of the other.

While the doctrine that jurisdiction is supplied in common error may be said to be ancient, having had its origin in Roman law, the same cannot be said of that of the supplying of jurisdiction in probable doubt. In fact, by comparison the latter may well be regarded as of recent origin, for it does not seem to have arisen earlier than the 16th century. From the commencement of the 17th century, however, both theologians and canonists have been very conscious of it, and it is noticeable that while they generally take for granted that jurisdiction is supplied in common error, they go to great trouble in order to prove the same with regard to probable doubt. In proving this, many put forward the argument that, because the same inconveniences and evil-consequences would follow from invalidity of acts by reason of actual lack of jurisdiction in the case of probably doubt, as would follow in the case of common error if no jurisdiction were supplied, jurisdiction should therefore be supplied equally in both cases. Others try to show that the case of probable doubt is actually the same as that of common error - and therefore governed by the same principles.

The Jesuit Theologian Henriquez adopts the first of the arguments just mentioned. Speaking of a <u>dubium juris</u>, he says that if the confessor and penitent are led, by the opinion of expert theologians, to believe that the former enjoys jurisdiction in a particular case, then the Church clearly confers jurisdiction (that is, in the contingency that the opinion is false and that the confessor did not actually enjoy habitual jurisdiction). He bases his view on the analogy that jurisdiction is thus conferred in common

error - "ut confert etiam jure antiquo sacerdoti occulte excommunicato habenti titulum parochis,"(90)

The connection between the two is put more strikingly by Sanchez. As a corrallary of his teaching on common error he proposes the following case:(91) If there are two opinions as to whether a particular priest is the legitimate minister of the Sacrament of Penance or marriage, whether the jurisdiction or licence given to him is legitimate, whether the bull by which he had received authority is withdrawn, or whether it extends to this particular case - how do all the acts performed by that priest, in such circumstances, stand? His reply is, that even if the opinion which holds he is not the legitimate minister be true, or if it be true that he really enjoys no habitual jurisdiction, or that the bull has actually been revoked, as long as the truth remains hidden and as long as the opposite opinion is considered by theologians to be probable, then all the acts of such a priest are valid. His reason is that in those circumstances all the conditions required for the operation of the principles of common error are verified, viz., common error, a coloured title, and the defect of jurisdiction is one which can be supplied, by human ecclesiastical authority.(92) Thus Sanchez reduces the case of probable doubt to terms of common error, and decides it on those principles.

It is difficult to criticise the argument. There certainly appear to be sufficient grounds for his claiming

(90) cf. HENRIQUEZ, Summae Theol. Mor., Lib.V, c.XIV, n.3. NOTE: The author did not mention explicitly a dubium juris - but that is obviously what he implies when he says: "Quando ignoratur jus difficile et confessarius ac poenitens inculpate putant per sapientium opinionem.... adesse jurisdictionem."

(91) cf. De Mat., Lib. III Disp. XXII, n.65.

(92) SANCHEZ, De Mat., Lib. III, Disp. XXII, n.65. - "quia est communis error, titulusque praesumptus, collatus a legitimo Superiore et defectum illum jurisdictionis ministri, aut licentiae potest jus humanum supplere."

the presence of a coloured title - at least in the cases mentioned by him, as for instance where there is doubt as to whether the bull by which the confessor acquired jurisdiction has been revoked. With regard to the common error essential there seems to be a difficulty. There can be no doubting the real distinction that exists between error and doubt - error presupposes a previous judgment about something, a false judgment it is true, but at least a definite decision has been made: whereas doubt entails the withholding of definite judgment by reason of the existence of two conflicting yet reasonable alternatives. It is not possible to have these two states of mind consistent in the one mind in relation to one and the same object. However Sanchez probably means that while the confessor might be in doubt as to whether he really had the requisite faculties, the community as such might well be in complete ignorance even of his doubt - being deceived by the fact that he has a title - and therefore in common error with regard to his jurisdiction. If the community knows of the existence of the two conflicting opinions, and is itself therefore doubtful, it is scarcely possible that it could at the same time be said to be in common error. However, this latter contingency will, in the normal course of events, be rare, as the ordinary community will not usually be well versed in theologically probable opinions. Viewing it in this light, we may conclude that, as a general rule, what Sanchez states is true.

While Suarez gives the most exhaustive and clearest exposition of the question to date - which he opens by saying that he has scarcely found any treatment of it in earlier authors - it will be seen that he follows the same lines as Sanchez in proving his point.(93)

(93) cf. De Sacramentis, II, Disp. XXVI, Sect. 6, n.7.

Distinguishing between a dubium proprie dictum and dubium improprie dictum, he says the former is a purely negative state in which the intellect is drawn to neither opinion on account of the absence of any positive and probable foundation for either - this type of doubt is not considered here: dubium improprie dictum, on the other hand, is had when the intellect is able to make a probable and reasonable judgment in favour of one opinion, which however, does not exclude the possibility that the contrary opinion may still be true, hence does not exclude the fear of error. Suarez then goes to show how, by two distinct argumentations, a confessor who is in dubio improprie dicto as to whether he has jurisdiction, may be certain in practice that absolutions imparted by him are valid. The first of these - and the one that interests us here - is as follows: Recalling the principles of the Lex Barbarius, he says that if a person is commonly reputed to be pastor while in point of fact he is not, because, for instance, he has obtained the benefice by simony, all the absolutions administered by such a pastor are valid, "ne communis ignorantia populo noceat." It is the same in the present case because a probable opinion is sufficient to give rise to this common estimation or repute mentioned above. And the same reason is also present, because this ignorance or error which arises as a result of the probable opinion of experts is common and public, and can be detrimental to the common good and injurious to the community, if in reality the minister lacks jurisdiction.(94) Therefore, in this case too, the Church supplies jurisdiction if de facto the minister lacks it, because the probable opinion followed was incorrect.

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(94) cf. De Sacramentis, II, Disp. XXVI, Sect. 6, n.7.

This argument is essentially the same as that of Sanchez. He goes further than Sanchez, however, in one point; Suarez' thesis is that not only do the penitents in these circumstances validly receive absolution, but the confessor also lawfully imparts it. For, ex hypothesi, the confessor has a solidly probable opinion in his favour: though he can not solve the speculative doubt, he can solve the practical doubt: he is certain that if the opinion he follows is not the true one, jurisdiction will still be forthcoming by virtue of common error. And it is lawful to follow a probable opinion in moral matters, because in so doing one is, in practice, certain that one is not committing sin.(95)

With an authority such as Suarez putting forward this view, it was only to be expected that his teaching should influence that of later theologians. There is abundant evidence of this influence. For instance, Ludovicus à Cruce gives three arguments to prove that jurisdiction is supplied in probable doubt - his second argument is practically a verbal repetition of what we have already seen in the writings of Suarez.(96) Incidentally, a Cruce claims himself responsible for the acceptance of this opinion by Suarez in the beginning - and says that it was this argument that convinced the master-mind that jurisdiction is supplied in

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(95) cf. De Sacramentis, II, Disp. XXVI, Sec.6, n.7. - "quia tunc non obstante tali dubio, videtur esse licitum sacramentum hoc ministrare, quia tale dubium speculativum est, et non practicum, cum in moralibus licitum est uti opinione probabili: nam qui ex illa operatur, moraliter certus est practice non peccare."

(96) cf. Disputationes Morales in Tres Bullas Apos., Appendix, De Opinione Probabili, Dub.II, n.3. "Sic ergo in proposito, quia probabilitas opinionis praebet titulum coloratum, et causat communem errorem opinantium illam esse veram, Ecclesia tunc supplet defectum, conferens confessariis sequentibus illam opinionem veram jurisdictionem, quia in hoc casu eadem prorsus ratio militat ac in praecedentibus supra relatis, cum ignorantia quae nascitur a sententia probabili Doctorum sit communis et publica, et cedere possit in grave detrimentum animarum si Confessarii absolventes juxta probabilitatem illius opinionis carerent sua jurisdictione."

probable doubt.(97) Though a small minority asserted that this doctrine could be deemed no more than probable - among which minority we find Franciscus de Oviedo(98) - the overwhelming majority regarded it as certain that jurisdiction is supplied by the Church in probable doubt. And though various arguments were employed to prove it, a very common one was undoubtedly that we have been discussing here. To mention but a few representative names we may list those of Bonacina, Granado, Leander, Passerinus, Salmanticenses, Mazzotta and Voit.(99)

With that, we think, sufficient has been said to demonstrate how closely associated these two juridical notions have always been, and how the doctrine of common error exercised such a telling influence on the establishment of the teaching that the Church supplies jurisdiction in probable and positive doubt. By way of conclusion we should like to make reference to a very interesting point, which may well be regarded as a paradox in canonical history. Discussing the controversy that existed in pre-Code jurisprudence as to whether a coloured title was an essential requisite in order that the supplying principles of common error might operate,

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(97) cf. Disp. Mor. in Tres Bull. Apost., Appendix, De Opin. Prob. Dub. II, n.3 "... atque haec de hac secunda via, de qua cum Compluti existerem, consului Sapientissimum Magistrum Fransiscum Suarez, qui cum in ea esset opinione non licere uti jurisdictione probabili in administratione Sacramenti Poenitentiae, certe ob praedictum modum dicendi mutavit sententiam et postea illam typis mandavit 4, Tom. de Poen. Disp. XXVI, Sec.6. n.7."

(98) cf. Trac. Theol. Schol et Morales, Trac.V, Cont. III, Punct.4, n.33.

(99) cf. BONACINA Op.Omnia Mor.,Tom.I, De Mat., Q.II,Punct.VIII n.26.
GRANADO, Commentaria in Univ. 1ae 2ae St.Thom., Tom.II, Cont.II, Trac.XII, disp.4,§ 4, n.58.
LEANDER, De Sac. Lib.I, Trac.V, q.103:
PASSERINUS, De Hom. Stat. et Offic.Tom.II, Q.87, n.357. /n.75.
SALMANTICENSES Curs. Theol.Mor.Tom.I, Trac.VI, c.XI, Punct.V.
MAZZOTTA, Theol. Mor. Trac. VI, Disp. II, Q.I. c.2,§ 3.
VOIT. Theol. Mor. Tom II, Trac.II, C. IV, n.746.

Gasparri remarks: "Proinde stante hac controversia jurisdictio videtur suppleri, ex principio saltem reflexo, quod nempe Ecclesia in dubio juris jurisdictionem supplet."(100) In the beginning the principle that jurisdiction is supplied in probable doubt, flowed from the doctrine of common error: here we find a development in the doctrine of common error being justified and confirmed by the invocation of that very principle which had, so to say, emanated from itself. ?

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(100) Trac. Can. De Mat., Vol.I, n.913.

C H A P T E R II.

COMMON ERROR AND NON-JURISDICTIONAL ACTS.

In a later chapter when treating of post-Code teaching on the supplying principles of common error, a very important and practical question of interpretation will arise viz., whether Canon 209 (in which the doctrine of common error is codified) intends to restrict the application of the principle to the supplying of jurisdiction alone. In other words, the question will arise as to whether the legislator intends to exclude the application of the validating principle in the case of acts, which are not performed by virtue of the power of jurisdiction - in the case of acts which we may call non-jurisdictional acts? In order to give a proper and complete answer to this question later, it will be necessary to make a brief study here of the traditional canonical doctrine on the point.

Under this category of non-jurisdictional acts we find three distinct types discussed by authors in relation to common error, viz., (1) acts of assistance at marriage; (2) acts of a public notary, and (3) acts performed by virtue of dominative power. Having examined each of these in turn, we may be able to define what was the determining factor with regard to the matter to which the supplying principles of common error applied, according to pre-Code teaching.

ARTICLE I. - COMMON ERROR AND ASSISTANCE AT MARRIAGE.

A. Assistance by virtue of Ordinary Power.

The Tridentine decree Tametsi[1] conferred on the pastors of parishes in which it was published, a position of importance with regard to the celebration of marriage which

(1) Sess. XXIV, Dec. de Ref. Mat., Cap.1.

they previously never enjoyed, or rather with which they were previously never burdened. Henceforth, in those places where the decree had been promulgated, every marriage had to be celebrated before the parochus proprius of one of the parties to the marriage, or before the delegate of that pastor or of the Ordinary: the non-compliance with this rule rendered the marriage invalid. The fact that his assistance was necessary for validity made the question as to who was the parochus proprius a vital one: in every case it had to be ensured that the priest assisting at the marriage was the parochus proprius - or at least his properly constituted delegate.

Naturally, the question was soon raised as to the validity of a marriage celebrated before a parochus putativus i.e. one who is merely reputed to be pastor. Is such a marriage to be regarded as valid? Is the defect of power in the putative pastor supplied by reason of common error, thus rendering the marriage valid?

The theologians of the early 17th century had already realised that the act of assistance at marriage did not entail the exercise of true jurisdiction. They saw a difference between the act by which a pastor assisted at marriage, and the act by which he conferred absolution or, indeed, the act by which he administered the other Sacraments. He conferred absolution by virtue of the power of Orders and the power of jurisdiction: he administered the others by virtue of the power of Orders alone. But assistance at marriage was different. This function was performed not by virtue of Orders, nor of jurisdiction, but by virtue of the fact that he was appointed an authoritative witness to the ceremony. Henriquez brings this out very clearly when he writes:-

"Sola enim praesentia illius requiritur qui est possessione parochiae, etiam absque ullo verae jurisdictionis usu, et ministratione Sacramenti."(2) Bonacina has something similar "Ratio nostra est tum quia haec assistentia auctoritativa non est proprie actus jurisdictionis."(3) Later on Fagnanus calls the pastor a testis auctorizabilis with regard to assistance at marriage.(4)

But though they realized this, still, these theologians had no hesitation in applying the principles of common error to acts of assistance at marriage by putative pastors, just the same as they applied them to confessions heard and absolutions conferred by these same pastors. In other words, they regarddd all the official acts of such pastors as valid, independently of the source or nature of the power by virtue of which each individual act was performed. This had been the traditional interpretation of the doctrine before the Council of Trent, when the general terms "omnia gesta" or "gesta" were customarily used to describe the extent of application of the principle. It was merely a matter of form that post-Tridentine theologians should add the item of assistance at marriage to the "gesta" of the pastor. From the very beginning this was done by all who adverted to the question - by Henriquez,(5) T. Sanchez(6) Lessius,(7) Pontius,(8) and Bonacina.(9) That it continued

(2) Sum. Theol. Mor., Lib.XI, c.3, n.4.

(3) Op. Omn. Mor., Tom I. De Mat., Q.II, Punct.VIII, n.21.

(4) cf. Commentatia ad c.1, X, V, 8, n.139: cf. also LESSIUS, De Just. et Jure, Lib. II, c.29, n.68.

(5) Summ. Theol. Mor., Lib.XI, c.3, n.4. "Sat est pro matrimonio praesentia illius qui communi errore reputatur parochus proprius."

(6) De Mat., Lib. III, Disp.XXII, n.60. "Breviter ... si absque titulo collato a legitimo Superiori intrusus est, non valet matrimonium ... Si autem titulum habuit a legitimo Superiori, invalidum tamen ob vitium occultum, valet matrimonium

(7) cf. De Justitia et Jure, Lib.II, c.29, n.67.

(8) cf. De Mat., Lib. V, c.XIX, n.19.

(9) Op. Omn. Mor., Tom.I, De Mat., Q.II, Punct. VIII, n.27. "Primo colligi potest, validum esse matrimonium cui

(continued end of page 118.)

so, is evidenced by the testimony of innumerable authors from this time to the publication of the Code. To say that it was the common opinion in pre-Code teaching would scarcely be doing it justice: it would be a fairer reflection to say that we have not found one author, who held that the principle did not apply in the case of the assistance at marriage by a putative pastor.

It is true, of course, that in many cases authors held that the marriage would be invalid if the pastor in question did not have a coloured title. But the invalidity in that case would follow as a result of the defect of a coloured title, which, as we have seen, was regarded by many as essential - not from any intrinsic reasons preventing the operation of the principles with regard to the act of assisting at marriage.

B. Assistance by Virtue of Delegated Power.

We have seen that the decretalists generally taught that the principles of the Lex Barbarius applied to delegated as well as ordinary jurisdiction - a teaching which continued unchanged to the promulgation of the Code. We have just seen that commentators and theologians placed the act, by which a pastor assisted at marriage, on a par with an act placed by virtue of jurisdiction, at least as far as the principles of common error were concerned. It was only to be expected then, that the application of the Lex Barbarius to delegated assistance at marriage and to delegated jurisdiction should also go hand in hand. That this was so will be evident from the following survey of the question.

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(9) (continued): assistit parochus, habens titulum invalidum ob vitium aliquod occultum, aut habens beneficium incompatibile sibi collatum a legitimo Superiore. Ratio est quia adest titulus coloratus cum errore communi absque impedimento juris naturalis aut Divini."

By virtue of the Tametsi decree, the pastor or Ordinary could delegate another priest to assist at a marriage at which they themselves had, by reason of office, the right to assist. It is to be noted that the decree laid down that the Ordinary or pastor could delegate another priest. Thomas Sanchez raised an interesting question: Would the marriage be valid if the pastor delegated a lay person who was commonly considered to be a priest? At first glance such a marriage would appear to be invalid because a lay person could not receive valid delegation to assist, by reason of the decree Tametsi which required that the person delegated be a priest. Nevertheless, Sanchez declared such a marriage valid, because all the conditions required for the application of the Lex Barbarius are fulfilled, viz., common error, a coloured title (delegation by the pastor), and the impediment or incapacity arises merely from positive ecclesiastical law: for it is not required by either the divine positive or natural law that the official witness to a marriage contract be a priest.(10) This case visualizes an incapacitating defect in the person delegated, but it is evident from an earlier context, that Sanchez holds the same view when the defect of authority is due to a vitiated act of delegation.(11)

With Sanchez thus setting the lead, as it were, other commentators followed his reasonable and logical application. Pontius accepted it without hesitation, and explicitly applied it to delegation both ad universitatem causarum and ad unam causam.(12) Among others we may mention Bonacina,(13)

(10) T. SANCHEZ, De Mat., Lib. III, Disp. XXII, n.19.

(11) T. SANCHEZ, De Mat., Lib. III, Disp. XXII, n.19. "Sed verius est etiam quando vitium est circa commissionem factam a legitimo Superiore: dum communiter id vitium ignoratur, valere gesta per delegatum, nisi jus in poenam casset."

(12) Cf. De Mat., Lib.V, c.XIX, nn. 11, 19.

(13) cf. Op. Omn. Mor., Tom.I, De Mat., Q.II, Punct. VIII, n.3(

Schmalzgrueber,[14] Pichler,[15] and Filliucius.[16] Though all authors did not explicitly advert to the question it is significant that none denied the application. Indeed for many of those who made no explicit reference to the point, a safe analogy may be drawn from the fact that they regarded the principles of the Lex Barbarius as applying to delegated jurisdiction.

Among the more modern writers who held this same view, we may note Rosset,[17] Murray - who like Pontius, made explicit mention of delegation ad unam causam[18] - D'Annibale,[19] Wernz[20] and Gasparri,[21] who declares the marriage to be valid even if the person delegated and commonly considered a priest is really a woman.

The testimony of such authoritative canonists furnishes us with sufficient evidence to claim with safety that the application of the principles of the Lex Barbarius to the act of assistance at marriage, by virtue of delegated authority, was a well-founded and widely accepted teaching in pre-Code jurisprudence.

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(14) cf. Jus Eccles. Univ. IV, III, n.188.

(15) cf. Jus. Can., IV, III, n.22. "Sufficit, etiam si laicus vel clericus inferior sacerdoti, substituatur modo communi errore habeatur pro sacerdote."

(16) cf. Quaes. Mor., Tom X, P. I, cap. 6, n.206.

(17) cf. De Sac. Matrimonii, n.2223.

(18) De Imped. Mat., n.403.

(19) cf. Summa Theol. Mor., III, n.461, note 64.

(20) cf. Jus Dec., IV, n.180, II, note.213. "Quodsi quis communi errore habeatur Sacerdos, qui revera laicus est, delegatio eidem facta valori assistentiae et matrimonii non obstat."

(21) cf. Trac. Can. de Mat., n. 1129.

ARTICLE II. - COMMON ERROR AND THE ACTS OF A NOTARY.

We have had occasion to refer many times already to the application of the principles of common error to the acts of a putative notary. In Roman law we found explicit legislation on the point.(22) Innocent IV gave an indication that the same principle applies in Canon law.(23) Hostiensis taught the same doctrine, which was re-echoed by many pre-Tridentine jurists, both civil and ecclesiastical.(24) In the post-Tridentine period there is no change in outlook: a very brief examination of the evidence will suffice.

Sylvester had described the office of notary as a public office - public from the point of view both of authority and utility, viz., it is an office established by the public authority, its purpose being the promotion of the public or common utility.(25) The office was never regarded as one which brought with it the power of jurisdiction.(26) Nevertheless, just as in the case of assistance at marriage, canonists and theologians continued to apply the principles of common error to the acts of a putative notary, for the same reasons as applied in the case of defect of jurisdiction. Usually indeed, they made no distinction between acts performed by virtue of jurisdiction, and acts performed by virtue of any other power. The nature of the power exercised was never considered, but rather the nature of the office: if the office was of its nature a private one, common error would not apply: if it was public

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(22) Nov. XLIV, 1, 4: cf. Above Sec.I, Ch.1. PP. 7, 8.

(23) cf. Apparatus ad c.1, X, II, 22: cf. Above Sect.II, ch. 1. Art.III.

(24) cf. Above, Sec.II, Chs. I, and II.

(25) cf. Summa Sylvestrina, Pars I, v. Excommunicatio III, n.2.

(26) e.g. cf. T. SANCHEZ, De Mat. Lib. III, Disp. XXII, n.54. LESSIUS, De Just. et Jure, Lib. II, c.29. n.67.

however, then granted common error, the acts of the office-holder would be valid. We stressed this point when treating of the pre-Tridentine authors and noticed that the expression "gesta ratione publici officii valent," was very frequently used in this connection. We find a typical example of the same thing in the writings of Suarez. Replying to the question as to the validity or otherwise of documents drawn up by a notary who is excommunicated, he says: "Loquimur autem per se et ex vi excommunicationis quae publica et nota sit: nam si sit occulta, ex superioribus jam constat generalis regula, acta ab excommunicato occulto ratione publici muneris valida esse .... quia ob publicam utilitatem, ipsa Respublica seu Ecclesia supplet illum defectum juxta l. Barbarius ff. de offic. Praet."(27)

Here we see that Suarez speaks of a public office and says that the general rule applies, that acts performed by a putative public office-holder are valid: the fact that in the context he is treating of the acts of a notary makes it obvious that he intends the general rule to apply to non-jurisdictional as well as to jurisdictional acts. This is explicitly stated by Lessius who makes express mention of non-jurisdictional acts - ".... supradicta procedere etiam in iis, quae geruntur ex officio publico quamvis non sint actus jurisdictionis, ut in instrumenta Tabellionis ...."(28) Passerinus too makes this clear.(29) Among many others holding this same view we may note such

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(27) De Censuris, Disp. XVI, Sect.V, in initio.

(28) De Just. et Jure, Lib.II, c.29, n.67.

(29) De Hom. Stat. et Offic., Tom. II, q.87, n.351. "Nec obstat, quod notarius non habeat jurisdictionem, quia ratio ob quam gesta per eum ex lege valida sunt, est communis utilitas, quae militat etiam ubi quis se intrudit in officium jurisdictionem non habens."

names as Flaminius Parisius,(30) T. Sanchez,(31) J.Sanchez,(32) Pontius,(33) and Zoesius.(34) During the 18th century we find Reiffenstuel,(35) Schmalzgrueber(36) and Mayr O.F.M.(37) among those who favoured it.

From this imposing weight of evidence we feel justified in asserting that the traditional teaching has been, that the application of the supplying principles of common error has not been restricted to the supplying of jurisdiction alone, but rather to the supplying of any power or capacity required by any putative public official, in order that he might validly perform the functions of his office. The fact that authors of the 19th century make little or no reference to acts of a notary when discussing common error, does not weaken the claim: the theologians had no practical reason for treating of the case of putative notaries: the question did not retain much interest for canonists either, by reason of the rareness of occurrence and its relative unimportance. But even if they do not make explicit application of the principles to the acts of a notary, it is very significant that at no time has this application been denied: their silence, therefore, may be justifiably interpreted as signifying agreement.

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(30) cf. De Resig. Benef., Tom.I, Lib. VII, q.24, n.46.

(31) cf. De Mat., Lib. III, Disp. XXII, n.54.

(32) cf. Selectae Disputationes, Disp. 44, n.3.

(33) cf. De. Mat., Lib.V, c.XIX, n.3.

(34) cf. Comm. in Jus Can. Univ., Lib. II, Tit. XXII, n.7.

(35) cf. Jus. Can. Univ., II, XXII, n.268.

(36) cf. Jus. Eccles. Univ., II, XXII, n.10.

(37) Trismegistus Juris Pont. Univ., Lib. II, Tit.XXII, Punct. X, n.52.

ARTICLE III. COMMON ERROR AND DOMINATIVE POWER.

Ecclesiastical jurisdiction may be defined as the public power of governing, ruling or directing baptized persons towards their supernatural end. It is the special name given to the authority by which the legitimately appointed Superiors in the perfect society of the Church rule or govern their subjects. Within this perfect society - the Church - there have arisen numerous private or imperfect societies, such as Religious Orders, Congregations, Confraternities, etc.: the authority by which the Superiors in these imperfect societies rule their subjects is called dominative power. Membership of these imperfect societies, of course, does not entail exemption from subjection to the duly constituted Superiors of the perfect society, viz., Roman Pontiff and Ordinaries. In effect, membership of such societies really means that the members come under a twofold authority, viz., they become subject to the Superiors of the imperfect society by legitimate adscription to it, while they still remain subject to the Superiors of the perfect Society, having already become subject to them by the reception of Baptism.(38)

Because of their practically universal extension and importance, the Supreme Pontiff, by a special privilege, has conferred jurisdiction on the Superiors of certain of these imperfect Societies. Superiors in such a privileged society therefore enjoy a two-fold power over their subjects - dominative power in so far as their subjects are members of this particular society, and jurisdiction in so far as their subjects are members of the perfect society, the Church. In other words, by virtue of this privilege, the subjects, as members of the Church, are withdrawn from the authority of

(38) Canon 87.

the usual Superior in the Church - the local Ordinary - and are placed instead, under that of their own Religious Superior. This is called the privilege of Exemption; it is enjoyed by all Religious Orders and by certain Religious Congregations. Superiors in non-exempt religious Societies however, exercise dominative power only over their subjects - the local Ordinary exercises jurisdiction over the members of such bodies in so far as they are members of the perfect society.

When speaking of dominative power, however, it must be kept in mind that its exercise is not confined merely to Superiors of non-exempt religious: exempt religious Superiors also exercise it - in their relations with their subjects, as members of the particular religious body in question. Therefore, superiors of exempt religions exercise the same power over their subjects, qua sodales, as the Superiors of non-exempt religions do over theirs. As a corrollary of this, it follows that if a Superior in an exempt religion is invalidly appointed, his official acts in relation to his subjects, qua members of the Church, will be invalid by reason of defect of jurisdiction, while his official acts in relation to the same subjects, qua members of the religion, will be invalid by reason of defect of dominative power. Consequently when we ask whether dominative power is supplied in common error it is important to remember that the question refers to the case of a Superior in an exempt religion, just as well as to that of a Superior in a non-exempt body.

Very few pre-Code authors have given this question any consideration, and those who have referred to it, have done so only very summarily and, we may say, confusedly. First to raise the question seems to have been Thomas Sanchez;

at least he treats of it, and as he invariably gives many references to preceding authors for almost all opinions put forward by him, it may be taken that he is breaking new ground when he proposes a view without quoting other authorities either for or against. Speaking of the annulling of private vows and of those having power to do so, Sanchez treats in detail of the case where there is doubt as to whether the person annulling is the true father, or the legitimate guardian or master, or the legitimate religious Superior as the case may be. He lays down the rule that if, after having used sufficient diligence to ascertain the truth, the doubt still continues, [illegible] can each annul the vow. Then he considers the case where a vow has been annulled in such circumstances, and it is afterwards discovered that the person annulling was not really the legitimate Superior - in that contingency Sanchez regards the annulment as being invalid, and therefore that the obligation of the vow continues.(39) Though this seems to be a case of probable doubt rather than common error, still Sanchez regards it as the latter, and gives as a reason for the invalidity of the annulment in the circumstances, the fact that the principles of common error apply to acts of jurisdiction but not to "actus dominii" - "Quia quamvis in iis quae jurisdictionis sunt, error communis cum titulo satis sit ad valorem juxta l. Barbarius, ff. de Offic. Praet., at id non efficit ut actus dominii valeant, sicut non valeret venditio servi existimati talis. Nec etiam hic error efficit ut vota conditionem imbibitam habeant. Quod est fundamentum potestatis irritandi."(40)

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(39) cf. Opus Morale in Praec. Dec., Tom.I, Lib. IV, c.32, nn. 15, 16.

(40) Opus Mor. in Praec. Dec., Tom.I. Lib. IV, c.32, n.16.

It is noteworthy that Sanchez here does not say that the principles of common error do not apply to acts performed by virtue of dominative power, but rather that they do not apply to "actus dominii." He quotes as an example, the act of selling a person who is generally reputed to be a slave - but who, due to some mistake, in reality is not: common error does not render such a contract valid. This is quite true. Such a contract is invalid simply because one of the conditions for a valid contract of sale is absent, viz., the object being sold does not belong to the person selling. There could be no question of the application of common error in such a case: the purpose of the doctrine of common error is to supply the defects of power in a putative official: it will not supply a defect of ownership in order to render valid a contract of sale entered into by an official. We agree, then, with Sanchez when he says "error communis non efficit ut actus dominii valeant," but this does not prove that common error does not apply to acts performed by virtue of dominative power. He seems to confuse potestas dominii and potestas dominativa. He says in effect that common error does not supply dominative power (when speaking of the invalidity of the annulment of a vow by a putative Superior), but to illustrate it, he gives an example showing that common error does not supply potestas dominii.

Bonacina, who follows Sanchez closely, gives the same solution to the question of the vow annulled by a putative father - "quia error non confert potestatem dominativam."(41) He makes explicit mention of the fact that error does not confer dominative power: as a corrollary of this he condludes:- "Ob id non est valida venditio

(41) Summa Theol. Mor., Tom.II, Disp. IV, Q.II, Punct.VII, § II, n.23.

rei alienae, quae proprie putabatur, nec est valida venditio hominis liberi, qui servus putabatur." Here he, too, obviously confuses dominative power with ownership.

De Castro Paleo adheres closely to the opinion voiced by Sanchez and Bonacina whom he quotes. The reason alleged by him for the non-application of the principles to dominative power is because no law makes express mention of this point.(42) Others who defend the same view are Trullench(43) and Leander,(44) but they merely repeat the observations of Sanchez and fall into the same confusion on the point.

One author only seems to have put it forward as an absolute view that dominative power is supplied in common error. This was J. Martinez de Prado. He bases his view on the fact that the reasons for which the deficiency is supplied in the case of jurisdiction apply equally in the case of defect of dominative power,(45) an opinion which is regarded as probable by the Salmanticenses.(46)

CONCLUSION.

Such is the history of the teaching on the question. From an historical viewpoint the position is obviously not very enlightening. At first glance the weight of opinion (such as it is) would certainly seem to be contrary to the applying of the common error principles to dominative power. On closer examination, however, it will be seen that the views

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(42) cf. Opus Morale, Pars III, Trac. XV, Disp. II, Punct. IV, n.10.

(43) cf. Opus Morale, Tom.I, Lib. II, c.II, Dub. 34, n.11. "Respondeo negative, quia error non confert potestatem dominativam: sic non est valida venditio hominis liberi, qui servus putabatur."

(44) cf. Quaest. Mor., Tom V, Trac. I, Disp. XVI, Q.95.

(45) Theol. Mor. Quaest. Praec., Tom.II, Cap. XXXI, Q.13,n.10. ".... quia a paritate rationis id quod dicitur de supplenda jurisdictione videtur militare in supplenda potestate dominativa ... ne semper sint anxii illi quorum vota sunt irritata a potestate dominativa, an illa sit solum existimata et non vera."

(46) cf. Cursus. Theol. Mor., Tom.IV, Trac.XVII, c.3, P.VIII, n.71.

pût forward by the authors quoted above do not influence the question as it exists today: the notion of dominative power as conceived by 17th century theologians differed vastly from the notion obtaining in modern canonical jurisprudence: therefore the opinions voiced on this question by 17th century theologians as applying to their notion, cannot be validly applied to the notion of dominative power as it now exists. The following brief remarks may help to show the truth of our contention.

We have seen above that the typical example of an act performed by virtue of dominative power given by Sanchez, Bonacina, de Castro-Palao and de Prado is the act of irritation of a private vow by a father or religious Superior. Now, a private vow is not an act which brings with it juridical effects: it does not engender any rights or obligations recognised or sanctioned by public authority. The annullment of such a vow affects only the conscience of the individual for whom it is annulled: it is entirely a private matter. Obviously, therefore, there is no place for the supplying of power, in this case, to enable a putative father or a putative Superior to validly annul such a vow: for, we have seen many times already, that the principles of common error apply only to acts performed by reason of a public office - a condition not realised here. Hence with Creusen(47) we may say, that we agree with the solution given by these authors to this particular case, but in so doing, do not in any way jeopardise the possibility of having the principles of common error apply to dominative power.

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(47) cf. Acta Congressus Jurid. Int., Vol. IV, "Pouvoir Dominatif et Erreur Commune" Pp. 191-192.

It may be asked why Sanchez and the others should take this particular case as a typical example of an act of dominative power. Why did they not take, for instance, the act by which a religious Superior admits an aspirant to novitiate, or a novice to religious profession? Precisely because they did not regard these acts as exercise of dominative power. It must be remembered that at this time all religious Societies existing in the Church enjoyed the privilege of exemption - for this we have the explicit testimony of Sanchez(48) - and therefore the major Superiors in these bodies all enjoyed the power of jurisdiction. It was only natural then that all the official acts of such Superiors who enjoyed jurisdiction should be looked upon as acts of jurisdiction. Not until the non-exempt religious congregations had begun to flourish later in the 17th century, and in the following centuries, were canonists able to determine with any degree of precision what functions of a religious Superior's office involved the exercise of jurisdiction, and what functions pertained to the domain of dominative power. It was for this reason we said above that the notion of dominative power, as it now stands is so different from that which prevailed at the time Sanchez and the others wrote.

In view of all this we would consider the following points as being worthy of special note here. Sanchez,(49) Bonacina,(50) Trullench(51) and Leander(52) as we have seen,

(48) cf. Opus Mor: In Praec. Dec., Lib.V, c.IV, n.74. "Nec Episcopus, cum hodie Superior religiosorum non sit (omnes enim illi privilegium exemptionis habent.")

(49) cf. Opus Mor. in Praec. Dec., Tom.I, Lib.IV,c.32, n.15.

(50) cf. Sum. Theol. Mor., Tom.II, Disp. IV, Q.II, Punct.VII, § II, n.23.

(51) cf. Opus Morale, Tom.I, Lib.II, Cap.II, Dub.34, n.11.

(52) Quaest. Mor., Tom. V, Trac.I, Disp. XVI, Quaest.95.

give as their example of dominative power the act by which a father or religious Superior annuls the private vow of a child or subject. They thus give, as an example, an extreme form of dominative power - the most private form possible. Obviously however, there is a notable difference - at least from the point of view of juridical importance - between the act by which a religious Superior annuls the private vow of a subject, and the act by which the same Superior admits a novice to religious profession. In the case of the former the juridical effects are non-existent: in the case of the latter there follows a host of juridical effects - new obligations and new rights, arising as a result of the fact that the individual, thus admitted to profession, acquires a new status in the perfect society; by that act he passes from the lay to the religious state. Consequently it must be admitted that this latter act of the religious Superior approaches more closely to the notion of a public act than does the former; hence the function of admitting novices to profession approximates more closely to the notion of a public function or office, than does the function of annulling private vows.

It is on this point, we think, that the solution of the question, whether dominative power is supplied in common error, ultimately hinges. If it could be established that a religious Superior possessing dominative power exercised a public office in the execution of any of the functions attached to his office, then the principles of common error would apply. For it has been made abundantly clear, in the course of this treatise - and especially in the course of the present chapter - that the guiding principle, accepted by all, in regard to this matter has been, that, in common error any power of capacity that is wanting to a public official is supplied to him: the fact that he is a <u>public</u> official is the determining factor:

whether the power attached to the office he holds is that of jurisdiction or not, does not matter. Thus, Trullench who, in one context, denies that dominative power (as he visualizes it) is supplied in common error,(53) in another context explicitly affirms that the supplying principles apply to all acts - both jurisdictional and non-jurisdictional - which are performed by virtue of a public office.(54)

It is significant that we find at least one instance of the problem being solved along these lines in pre-Code teaching. For Thesaurus-Giraldus explicitly state that the act, by which a putative religious Superior admits a novice to profession, is valid, not because this act is an exercise of jurisdiction, but because it is an act performed by virtue of a public office. In support of their position they refer to a decision of the Sacred Congregation of Regulars, which declares valid the profession of a nun admitted by a merely putative Abbess.(55) This opinion of Thesaurus-Giraldus, and the decision of the Sacred Congregation referred to (the date of which is not given), may not have constituted a probable opinion, and could not be regarded as representing pre-Code teaching on the matter; but, at least, it serves as a concrete example of the potentialities attached to approaching the question from this viewpoint. We shall return to this point in its proper place in a later chapter.

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(53) cf. Opus Morale, Tom.I, Lib.II, Cap.II, Dub.34, n.11.

(54) Opus Morale, Tom. II, Lib.VIII, c.1, Dub.10, n.8: "Procedunt etiam supradicta in iis quae geruntur ex officio publico, quamvis non sint actus jurisdictionis."

(55) THESAURUS-GIRALDUS, De Poenis Eccles., Pars I, cap.VI. "Item procedit in potestate conferendi beneficia, vel confirmandi, quia dicitur publicum officium potestate et utilitate, et generaliter, quod titulus coloratus cum communi errore reddat validos omnes actus, qui ex tali officio publico geruntur, licet non sint actus jurisdictionis formaliter, ut assistentia parochi in matrimonio contrahendo .... et idem dicendum de actu admittendi ad professionem qui non est actus jurisdictionis, sed publici officii ... et Sacra Congregatio Regularium declaravit in una Adomarien. validam fuisse professionem Monialis admissam ab Abbatissa illegitima, vel vidua quam Episcopus deputaverat, qui tamen super tali impedimento non poterat dispensare: sed ad eum pertinebat deputare Abbatissam."

CHAPTER III.

THE NOTION OF COMMON ERROR.

Probably the least-discussed of all the questions and difficulties which arose in connection with the doctrine of common error in the course of its long history, was that most obvious of all questions: What is common error? We do not imply that this question was disregarded entirely. Some authors explicitly mentioned it - but such references were brief; others showed their views on the question by their application of the doctrine. But whether they expressed their views explicitly or only implicitly, it is very noticeable that all of them seemed to take the answer for granted. It is true there was a slight divergence of opinion as to what type of error was envisaged here - but on the main question as to how to determine when this error could be regarded as common, there was practical unanimity till the end of the last century - we may even say till after the promulgation of the New Code: To us who associate the notion of common error with endless controversy at the present day, this may seem strange. It is nevertheless true, as a glance at traditional teaching will show. For convenience and order, we shall discuss the question under two heads already suggested:- (a) What type of error is required - and suffices? (b) When can this error be said to be common. We may put these briefly thus:- (a) Definition of Error: (b) Definition of Common Error.

A. Definition of Error.

Error may be defined as a false judgment of the intellect resulting from ignorance about a given point. We have seen that earlier commentators had used the terms ignorance and error indiscriminately when treating of the subject of common error; we noted especially the use of the

expression ignorantia probabilis as opposed to crass or supine ignorance.(1) Consequently, when we find Reginald,(2) Sanchez,(3) Bonacina(4) and others making this same distinction with regard to error, and insisting that the principles of the Lex Barbarius apply only when the error is probabilis, it is obvious that they are repeating the teaching of those earlier commentators and merely substituting the term error for that of ignorantia. The intention of both those earlier and the present writers was to exclude any error which arose as a result of crass or supine ignorance from participating in the benefits of the Lex Barbarius. It is a very reasonable and logical restriction - merely an application of the principle, "Nemini fraus sua patrocinari debet" - a restriction which has been accepted by all subsequent authors.(5)

A point, however, about which there was not this same unanimous agreement was, whether jurisdiction was supplied equally in the case of error juris as in error facti (the error in both cases being ex hypothesi communis). Again the terminology may not appear familiar, but the signification is clear. Error juris is error arising from ignorantia juris - ignorance of the existence or extension of a law, e.g. if a person is ignorant of the fact that every priest needs

(1) cf. Above, Sec.II, Ch.I, Art. III, Footnote 25.

(2) cf. Theol. Mor., Lib.I, n.99.

(3) cf. De Mat., Lib.III, Disp. XXII, n.8.

(4) Op. Omn. Mor., Tom.I, De. Mat., Q.II, Punct. VIII, n.25.

(5) e.g. cf. LAYMANN, Theol. Mor., Tom.I, Lib.I, Trac.4, c.22, n.9;
HAUNOLDUS, De Just. Et. Jure, Tom.V, Trac.II, c.1, n.89.
SCHMALZGRUBBER, Jus Eccles. Univ., II, Tit.I, n.20;
PIRHING, Jus Can., II, I, n.84.

jurisdiction in order to hear confessions, and thinks that a "simplex sacredos" is capable of doing so: error facti is error arising from ignorantia facti - ignorance as to the fulfilment of conditions required for the application of a law in a particular case, e.g. if a person knows that a priest requires jurisdiction in order to validly absolve, but is ignorant of the fact that this particular priest does not possess jurisdiction. The case visualized in the Lex Barbarius, which is the basis of all canonical doctrine on common error, was clearly one of common error of fact (error communis facti).(6) The question was raised as to whether the principle was thereby restricted to the case of common error of fact alone, or whether it also applied to common error of law (error communis juris).

Earlier commentators did not refer to the question - and comparatively few authors of the 17th century, and later, discuss it. It is worthy of note that T. Sanchez, who gave a very exhaustive treatment of common error, fails to mention it. He is content with giving the general qualification that the error should at least be probable, thus giving the impression that if the error can be regarded as probable, then it is immaterial whether it is error juris or error facti.

A small number of writers however denied the parity between the effects of error of fact and error of law, chief of whom were Mascardus,(7) Garcia,(8) and Joannes Sanchez.(9) Neither Mascardus nor Sanchez offer any reasons for their opinion. In fact it is not so clear that the latter really

(6) NOTE: These expressions communis error facti, and communis error juris must not be confused with those of communis error de facto and communis error de jure, which we shall meet later.

(7) cf. De Probationibus, Conclusio 649, n.100.

(8) cf. De Beneficiis, Tom.I, Pars.V, c.IV, n.304.

(9) cf. Select. Disp., Disp. 44, n.10.

intended to exclude the application to error of law properly so-called, for it would seem from the context that he had in mind not so much error juris as dubium juris. In the context he is treating explicitly of the problem referred to in a previous chapter, viz. whether jurisdiction is supplied by the Church in the case of probable doubt. He appears to confuse these two notions which are really distinct and separate.(10) Whatever doubt there may be with regard to the teaching of Sanchez, however, there can be no doubt that Garcia denied the application of the Lex Barbarius to the case of error of law: his reason being that these principles do not apply "quando jus resistit."(11) This same reason is given by Gobat in similar terms: "quia jura detestantur ignorantiam juris."(12)

It is true that ignorance of law has never been looked upon with favour, as is manifest from Regula 13, Reg. Jur. in VI, which states: "Ignorantia facti, non juris, excusat." Laws abhor ignorance of themselves, and do not confer benefits and privileges on such as are ignorant of them. But another principle must be kept in mind - a principle established by use and custom, though not by positive ecclesiastical legislation - viz., that a certain type of ignorance does enjoy the favour of the law, in so far as the Church supplies jurisdiction whenever common error is present: common error, that is, arising out of probable

(10) J. SANCHEZ, Selectae Disp., Disp. 44, n.10 - "... advertunt tunc errorem conferre jurisdictionem quando est circa factum, non quando error versatur circa jus; quando aliquis ergo Sacramentum ministrat ex opinione probabili cum periculo irritandi illud, si forte a parte rei vera non sit, opinio ex errore juris procedit, non facti ...."

(11) De Benef., Tom.I, Pars. V, c.4, n.303.

(12) Op. Mor. Omn., Tom. I, Pars. I, Trac. VII, n.107.

ignorance. And since common error could arise as a result of ignorantia juris - ignorance which is excusable and inculpable in view of the circumstances in which the community may be placed - this objection put forward by Garcia and Gobat can scarcely be regarded as insuperable.

The Jesuit Theologian, Laymann, refers to this question and adopts the view that the Lex Barbarius applies to all common error whether it be error of law or of fact.(13) So also Vericelli who contends that even though the Lex Barbarius speaks of error of fact, its dispositions must be extended to include error of law which is invincible. He bases his opinion on analogy - "propter identitatem rationis, lex extendenda est in favorabilibus.(14) Perhaps the best reason of all in favour of this view is that given by Lacroix, who, adverting to the objection that laws do not favour ignorance of themselves, asserts that even if a community is in common error by reason of error of law, acts placed in favour of this community will be valid: (1) because the common good demands it; (2) because the laws do not distinguish between common error of law and common error of fact.

Considerations such as these most probably led the majority of theologians and canonists to take the matter for granted. The only qualification made by the majority was that the error should be probable: they did not distinguish between error of law and error of fact: it is logical to conclude, then, that their intention was to include all common error that could be regarded as probable. A strong indication of the truth of this assumption may be found in the commentary of Schmalzgrueber.(16) Declaring to be valid

(13) cf. Opera. Tom.I, Lib.I, Trac. IV, c.22, n.9.
(14) Quaestiones Morales et Legales, Trac.II, Q.XXV, n.12.
(15) cf. Theol. Mor., Tom.II, Lib.VI, Pars I, n.113.
(16) cf. Jus Eccles. Univ., II, I, n.20.

all the sentences pronounced by one who is merely reputed to be judge by the probable and common error of the people, he goes on to give his reason for inserting the word probable - "Dixi autem probabili errore, aliud esset si gesta essent a judice existimato per crassum et supinum, aut ex liquidi et manifeste juris ignorantia provenientem errorem ...." Here he says that error cannot be regarded as probable if it arises from a patent and manifest ignorance of the law, thereby implying that probable error can arise from ignorance of law which is not so manifest - or ignorance of law which is inculpable. He makes no distinction between error of fact and error of law - he includes both under the term error probabilis. Whether common error arises therefore, from error of law or error of fact, provided this error is probable, the principles of the Lex Barbarius apply. And we may safely assume that is the attitude of all those authors who demand that the error be probable, viz., that they speak indiscriminately of both error juris and error facti.(17)

A couple of authors(18) appear to restrict this teaching somewhat by admitting common error of law in relation to an obscure or doubtful law, and denying that the principles would apply if the ignorance concerned a clear and unambiguous law. But in practice this goes back to the principle of Schmalzgrueber, viz., that common error of law suffices if it is probable: for error of law that is common and probable could scarcely arise with regard to a law that is clear and unambiguous. D'Annibale perhaps, best sums up the teaching on the point - "Error autem communis est si eo loco ubi aliqui

(17) e.g. cf. VERNIER, Theol. Pract., Tom.I, n.92: BAILLY, Theol. Dog. et Mor., Tom.IV, De Poen., C.IX, Art. II, p.336; CRAISSON, Manuale Tot. Juris Can., Tom. I, n.298.

(18) i.e. DE ANGELIS, Prael. Juris Can., IV, I, n.25, and ICARD, Prael. Juris Can., Tom.I, n.285.

jurisdictionem exercet .... ea praeditus esse publice existimetur: seu facti error versetur, seu juris ..... dummodo error juris sit probabilis."(19)

B. Definition of Common Error.

Earlier commentators had adverted to the fact that common error could be verified in one place with regard to a particular official, while in another place it could be publicly known that this person was really inhabilis - and they had agreed that the Lex Barbarius applied, in such circumstances, in the place where the incapacity or defect was generally unknown.(20) This interpretation was unanimously accepted by all subsequent writers. Thomas Sanchez for instance states it thus - "Sufficit tamen si sit communis error in eo loco ubi actus gestus fuit, quia ibi impedimentum erat occultum, quamvis in alio notorium esset."(21) Authors also as a rule, advert to the possibility that an impediment which at one time was publicly known in a certain place, could, with the passing of years slip from the memory of the people, so that common error could then arise in this same place, because the impediment in the official referred to had now become occult.(22)

But when may an error in a given place be regarded as common error? Sanchez gives the impression that discussion of this question is superfluous, for he simply says the error ought to be "common" - the error of one or two does not suffice. He seems to imply that the meaning of the term "common" is too clear to need definition. This is probably

(19) Summula Theol. Mor., Tom.I, n.79, Footnote 72.

(20) cf. Above, Sec. II, Ch. II, Par.B.

(21) De. Mat., Lib. III, Disp. XXII, n.9.

(22) e.g. cf. SANCHEZ, De Mat., Lib. III, Disp. XXII, n.10.

the explanation for the fact that so many authors[22a] during the 17th and 18th centuries adhered to a stereotyped treatment of this particular point, which ran something like this "Dixi error communis: non tamen sufficit error unius vel duorum vel paucorum; debet esse communis."

Actually the first attempt to determine or define the term was made by Thomas Hurtado. Having raised the question as to how many persons would be required, and sufficient, in order to render an error common, he prefaces his reply by remarking that he has not seen the question discussed by any author. In his opinion, error can be regarded as common when it is public - and it is public when the greater part of the community is in error.[23] This interpretation is favoured also by Vericelli, who has something worthy of note to say with regard to the notion of "place" in connection with this matter. According to him, common error is had if the greater part of the community, for which a certain priest is appointed, is in error about that priest's jurisdiction. For instance, in a large city which has a population of 500,000, it would be practically impossible for a priest to obtain jurisdiction by reason of common error, if it were necessary that the whole population should be in error - because the greater part of that population would never even know, or know of, that priest. Therefore, it is sufficient if the greater number of those to whom the

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(22a) e.g. cf. REGINALD, Theol. Mor., Lib.I, n.99;
BONACINA, Op. Omn. Mor., Tom.I, De.Mat., Q.II, Punct.VIII n.25;
HAUNOLDUS, De Just. et Jure, Com. V, Trac. II, c.1, n.19;
PASSERINUS, De Hom. Stat. et Off., Tom.II, Q.87, n.349;
PIRHING, Jus. Can., II, I, n.84;
GUERRERUS, Theol. Mor. D.Aug., Tom.I, Trac.VII, Disp.IV, § XVII, n.537;
SCHMALZGRUEBER. Jus. Eccles. Univ., II, I, n.20.

(23) Res. Mor., Pars II, n.2016. - "Sed existimo tunc censeri errorem communem, quando est publicus: tunc autem est publicus quando in maiori parte existit et caeteri scientes taceant."

priest actually ministers be in error.(24) There can be no doubting the reasonableness and feasability of this assertion. It squares with the expression of Felinus Sandeus when he said that a person should be reputed to be a real judge by "omnibus scientibus et cognoscentibus:"(25) we have seen that this should generally correspond to the people within the territory under the jurisdiction of the judge in question. Most probably it was this same idea that Sanchez and the others had in mind, when they spoke of an official whose incapacity was publicly known in other places, but occult in the "place" where he was acting as official. It is certainly what later authors have in mind, as can be deducted from statements such as - "Sufficit autem ad errorem communem, ut vitium ignoretur in eo loco, pago, seu oppido ubi exercetur jurisdictio;"(26) and "Error autem communis est si in eo loco ubi aliquis jurisdictionem (v.g. ubi parochum agit,) ea praeditus esse publice existimetur."(27)

With regard to the norm given by Hurtado and Vericelli to determine when an error may be said to be common, it amounts to this that the error must be estimated in a moral rather than a mathematical manner. Hurtado asked the question - how many persons must be in error in order that it be common error? He does not go into mathematical figures to give a precise and detailed answer. He simply declares the error to be common if the greater number are in error:

(24) VERICELLI, Quaest. Mor. et Leg., Trac. II, Q.XXV, n.15. - "... tum quia error communis non dicitur respectu totius populi, sed respectu ejus multitudinis, quae ea jurisdictione utitur; alioquin in magna civitate quingentorum millium hominum, fere numquam posset ex errore communi sacerdos habere jurisdictionem, quia maior pars populi numquam talem sacerdotem novit; quare sufficit si error sit pro maiori parte illius multitudinis qui petit ab eo Sacramentum."

(25) cf. Above, Sec. II, Ch.II, Par. B.

(26) LEQUEUX, Sel. Quaes. Jur. Can., Quaes. XIX, n.69.

(27) d'ANNIBALE, Summula Theol. Mor., Tom.I, n.79, Footnote 72.

in other words, of the community taken as a moral unit can be said to be in error. This may be regarded as the accepted teaching on the point during the 19th century and in pre-Code jurisprudence. Different authors stated it in slightly different terms, all of which, however, may be regarded as meaning substantially the same thing. Some few, as for instance F. Schmier,(28) followed the definition of Vericelli and said error was common if the greater part of the community was in error (maior pars communitatis). Others stated it to be common if the incapacity of the official was unknown to all or nearly in the community (omnes aut fere omnes): among these we may mention Bailly,(29) Scavini,(30) Noldin,(31) Murray(32) and Marc.(33) Another description of common error favoured by some was, when the incapacity of an official was unknown to all or the greater number (omnibus vel saltem plerisque); in this group we find Moullet,(34) Schmitt,(35) Voit,(36) and Haine.(37) Santi simply describes it as common in the following terms, - "quoties quis

(28) Cf. Jus. Can. Univ., Lib.II, Trac. I, c.VII, § 4, n.29.

(29) cf. Theol. Dog. et Mor., Tom.IV, c.IX, Art.II, p.336.

(30) cf. Theol. Mor. Tom.III, Disp. I, C.IV, Art. II. Q.6.

(31) cf. Summa Theol. Mor. III, n.354. It is interesting to note Noldin's application of this principle to a confessor. He writes: "Ut aliquis per communem errorem habeatur confessarius requiritur aliquod factum e.g. exercitium muneris confessarii per aliquod tempus peractum, ex quo loci fideles eum passim pro confessario habent; non sufficit ut quis semel more aliorum confessiones excipiat."

(32) cf. De Imped. Mat., n.399: "Error debet esse communis... Quid vero dicendum si ex parochianis, qui v.g. numero duo millia sunt, centum aut ducenti bene norint parochi titulum vitiosum esse, errore ceteros occupante? Auctores non statuunt, et quidem statueri non potuerunt proportionem exactam inter scientes et errantes, qua posita error esset vel non esset communis. De casu autem dato haec mihi decenda videntur. 1. Vix fieri potest quin tituli invaliditas cito omnibus aut fere omnibus parochianis nota fieret; 2. Stante proportione ista, puto errorem jure communem vocario posse."

(33) cf. Inst. Mor. Alphons., II, n.1754.

(34) cf. Comp. Theol. Mor., Pars. II, p.148.

(35) cf. Epitome Theol. Mor., Lib. V, § 82, n. II.

(36) cf. Theol. Mor., Tom. II, n.744.

(37) cf. Theol. Mor. Elementa, Tom.III, De Poen., Pass II, Q. 73, R.I.

publice et in populo existimatur esse verus et legitimus judex,"(38) and D'Annibale - "si in eo loco ubi aliquis jurisdictionem exercet .... ea praeditus esse publice existimetur."(39) Many, however, were content to follow the 17th century tradition by stating that the error must be common - emphasizing that the error of one or a few is not sufficient.(40) Their attitude to the question seems to have been that the answer was too obvious to necessitate further definition, and may best be summarised by the sentence with which Berardi dismisses the subject - "Quid sit error communis et quomodo distinguatur a privato, per se patet."(41)

From convincing evidence such as this, we feel absolutely justified in stating that the traditional teaching of canonists and theologians demanded a real, true and actual error on the part of the whole community, or at least the greater part of it (i.e. of the whole community taken as a moral unit), in order that it could be said to be common. Perhaps the truth of this conclusion may be even more forcibly brought home, by an examination of the various applications of the doctrine as found in the writings of pre-Code authors - in which applications they implicitly, and as it were, unconsciously give their notions as to what common error really is.

It will probably have been noticed, in the course of this essay, that the term "official" occurs very frequently. This has not been without reason. For, if one fact stands

(38) Prael. Juris Can., II, I, n.14.

(39) Summula Theol. Mor., I, n.79, Footnote 72.

(40) e.g. VERNIER, Theol. Prac., I, n.92;
LEQUEUX, Selectae Quaes. Jur. Can., Q.XIX, n.69, Par.III;
BOUIX, Trac. de Judiciis, I, Pars I, Sec.IV, c.I, § 3, Prop. II;
CRAISSON, Man. Tot. Jur. Can., I, n.297.:
DE ANGELIS, Prael. Jur. Can., Tom. IV, Pars. I, Tit. I, n.24.
ICARD, Prael. Jur. Can., n.284.

(41) Praxis Confess., IV, n.147.

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out in history of this matter, it is that all authors connected the notion of common error with an official or office-holder who exercised a public office. Officials most frequently mentioned were Bishop, pastor, confessor, judge and notary. And, though there was almost universal agreement on the question of the application of the principles to the case of delegated officials (even if delegated for one case,) there can be no doubt that the primary purpose of the doctrine, according to all authorities, was to safeguard the community from the evils, grave inconveniences and confusion which would follow from a succession of invalid acts, performed by one or other of the officials mentioned above, who exercised a quasi-permanent office. In other words, the chief purpose of the doctrine was to ensure the validity of acts performed by an official who enjoyed habitual power.(42) This being their attitude to the purpose of the doctrine, there will be little difficulty in determining their notion of common error itself. To treat of each individual author on this point, if it were possible, would certainly not be feasible. But we feel justified in taking the teaching of that outstanding canonist, Schmalzgrueber, as a fair reflection of the general consensus of opinion.(43) Schmalzgrueber summarises the application of the doctrine in the following six points:-

" 1. Valent acta Episcopi, vel alterius praelati, cuius electio propter quodcumque juris humani impedimentum fuit nulla, si ejus nullitas publice ignoretur .....

2. Valent absolutiones collatae a Sacerdote, et coram eo celebrata matrimonia, etsi verus parochus non sit quia vel intrusus, vel ad animarum cura ab Episcopo non approbatus; modo pro legitimo parocho communiter sit habitus ....."

(42) NOTE: By this we do not wish to imply that the principles of common error do not, or should not, apply to delegated power. What is implied is, that the conditions required in order that common error be verified were determined to cater primarily for the case of ordinary or habitual power. But if these conditions are actually fulfilled with relation to a case of delegated power, then obviously the principles will equally apply.

(43) Jus Eccles. Univ., II, I, n.22.

"3. Eadem acta, sententiae, et absolutiones subsistunt, quantumvis episcopus, vel alius praelatus excommunicatus, suspensus, vel jurisdictione et ipsa praelatura, et beneficio, vel officio privatus fuisset, modo communi errore existimetur adhuc praeditus jurisdictione sufficienti ..... 4. Ea ipsa valebunt quantumvis impedimentum unus, vel alter sciverit, modo ii a quibus gesta sunt, pro veris judicibus communi errore sint habiti: quia leges non privatam, sed communem aestimationem attendunt ..... 5. Imo valori a se actorum non oberit mala fides ipsius judicis, parochi aut confessarii, scientes se carere jurisdictione, modo communi errore existimetur hoc praediti ..... 6. Denique eadem acta valent, etsi una, vel utraque pars sciat, judicem coram quo contrahunt matrimonium, legitima potestate instructum non esse, modo communiter habeatur pro vero judice, aut vero parocho, ob eandem rationem ..... "

That this statement represents the accepted teaching is borne out by the fact that later authors refer to it as the classical exposition of the doctrine - de Angelis,(44) for instance, writing more than a century later, quotes these six points verbatim, and proposes them as a practical and safe guide in all questions pertaining to common error. Analysing the six applications given above, we find that each one envisages an official in a given community labouring under an incapacitating impediment which renders him incapable of validly holding, or of validly performing the functions attached to, the office he is thought to hold. The community knows that this official in question is exercising the function of bishop, pastor or judge as the case may be - but it is not aware of the fact that he labours under an impediment. The members of the community do not pass a formal judgment to the

(44) cf. Prael. Jur. Can., Tom. IV, Pars I, Tit. I, n.31.

effect that they consider this particular person to be a real and legitimately constituted bishop, pastor or judge. They simply know he exercises the functions pertaining to one or other of these offices, and accept him as a real official without further question, because, being ignorant of the occult impediment, they have no reason to doubt his legitimacy. Strictly speaking, perhaps their attitude might be defined as that of "common ignorance" rather than "common error." Yet their attitude or state is not one of absolute ignorance in the sense of a merely negative absence of knowledge: there is a positive element involved in so far as their acceptance of the official is based on a positive fact or fundament, which leaves no reason for doubting his legitimacy as an official, viz., the fact that they all know he has been appointed to the office, or know that he actually performs the functions of the office. Whether we refer to their state as that of ignorance or error makes little difference. The point we wish to emphasise, and the point which is made abundantly clear by the extract quoted above, is that this state or attitude of the people is an actual state - they actually know that a particular person exercises a certain office, and are aware of no reason for doubting his title to do so legitimately: their error is an actualised fact.(45)

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(45) NOTE: We have said that many authors could be quoted to substantiate this contention. Following are a few - T. SANCHEZ, De Mat., Lib. III, Disp. XXII, nn. 5 & 6. ".... quibus ut occureretur, utrumque jus decrevit omnia gesta per eum dum communis error durat valida esse, ac si verus judex esset ..... Oportet autem adesse communem errorem quo ille verus judex existimetur;" FIRHING, Jus Can. Univ., II, I, nn. 83 & 84. "Requiritur autem ad valorem sententiae et actorum per talem judicem, imprimis error publicus sive populi, videlicet ut ille defectus judicis sit occultus, adeoque ut vulgo sive communiter habeatur pro vero et legitimo judice;" REIFFENSTUEL, Jus Can. Univ., II, I, nn. 197, 198. - "Jus utrumque decrevit, stante communi errore, gesta per putativum judicem esse valida, ac si verus judex existeret ..... Inter condiciones requisitas ad hoc, ut actus judicis putativi valeant, ea est praecipua quod interveniat error communis: hoc est quod talis communiter existimetur esse legitimus judex;" cf. also LEGA, De Jud. Eccles. I, n.352.

A further point: Though we have seen the purpose of the doctrine to be the prevention of evils and inconveniences arising from the invalidity of a succession of acts performed by a putative official, it must be remembered that the number of such acts exercises no influence in determining whether common error is present or not. Common error consists in the attitude of a community in regarding a particular person as a real and legitimate official: it is not gauged by the number of people who actually approach this person in his official capacity, nor by the number of times: it may be realised even without the performance of a single act by the putative official concerned. Baldus de Ubaldis had pointed this out in his time.(46) Lehmkuhl too expressly states it(47) - "Errorem vero communem ut distinguas ab errore paucorum non id considerari debet, utrum multi an pauci eum adierint qui legitima potestate destitutus erat: sed utrum pauci multive defectum potestatis cognoverint, an potius eum potestate legitima praeditum esse putaverint." This is an important point to keep in mind - for, if one were to estimate common error by the number of people who actually approach a putative judge, confessor or pastor in his official capacity, the way would be immediately open to erroneous notions and false conclusions. It may well be that the consideration of this false mode of estimating common error, played some part in leading the Jesuit theologian, Bucceroni, to evolve a new theory as to the notion of common error - a theory which he alone of all pre-Code authors advocated, and which is really a contradiction of the teaching of all other pre-Code authorities.

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(46) cf. Above, Sec. II, Ch.I. Art. IV.

(47) Compend. Theol. Mor., n.843.

According to Bucceroni[48] there are two categories of common error, viz., common error de facto and common error de jure. The former is that which we have been considering all along - the case where the community, or at least the greater part of it, is actually deceived into thinking that a particular priest, for instance, is a legitimately appointed and approved confessor, when in reality he is not. The latter - common error de jure - is had whenever conditions or circumstances are such that public error, or an error of the community, can, and - in the normal course of events - should follow as a result of them. Common error de jure therefore consists not in the actual fact of deception of the community, but in the placing of a fact which could deceive the community if, and when, the community adverts to that fact. For Bucceroni, it is sufficient if common error in this sense be realised in order that the Church supply defect of power.[49]

The context in which this theory appears is as follows: A certain priest Titius, had heard the confessions of a community of nuns, and those of pupils resident in the convent, without proper approbation or jurisdiction - an essential condition in the rescript granting him the requisite faculties had not been realised. The question was asked whether these absolutions were valid. Bucceroni evidently assumes that there could be no question of common error de facto in the circumstances - because the case deals only with a small group of people, viz., a community of nuns; nevertheless he declares all the absolutions to be valid because

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(48) cf. Casus Conscientiae, II, Casus 129, n.6, Pp.170-172.

(49) cf. Casus Conscientiae, II, Cas. 129, n.6, p. 172: "Quare error communis intelligi non potest error de facto et in actu secundo; sed error communis de jure et in actu primo i.e. in tali rerum statu seu conditione, ut error publice seu communitatis sequi naturaliter possit et debeat: si res nempe naturalem cursum suum sequatur."

of common error de jure. Common error de jure is verified because of the presence of a circumstance (status rerum) which of its nature, could deceive many into believing him to be a legitimate confessor. This circumstance was the fact that he had obtained a rescript conferring the due faculties - the invalidity of the rescript due to the non-fulfilment of an essential condition being occult. The author, however, did not require such a forceful circumstance as an apparently valid rescript: he regarded it as quite sufficient if any simplex sacerdos commenced to hear confessions publicly, for he says in another context - "Huiusmodi rerum status profecto habetur, semper ac confessarius publice exerceat munus confessarii, ita ut publice confessarius existimetur, et ideo multorum possit confessiones audire."(50) Thus the very fact of a priest entering a public confessional, and commencing to hear confessions (independently it would seem, of how many or how few penitents may be present), is something (status rerum, conditio) which of its nature could deceive many into believing that he enjoys jurisdiction, constitutes, therefore, common error de jure, and so renders valid the confessions heard by him - even though his action may never actually become known to any save the few who were present at the time.

The chief argument given by Bucceroni in favour of his theory is a merely negative one. He declares that the interpretation of common error as signifying common error de facto cannot operate properly in practice, because of the doubts that must always exist as to when exactly it is realised. For, taking the case of a priest who commences to hear confessions publicly but without jurisdiction, none

(50) Casus Conscientiae, II, Casus 129, n.5, P. 169.

of his absolutions would be valid until after he had absolved almost the whole community, thus giving rise to the situation where the last few penitents (the minor part of the community) would be validly absolved, and all the others who had come first (the majority) would be invalidly absolved. Furthermore the difficulty arises as to where exactly the dividing line is to be drawn between those who are validly and those who are invalidly absolved, thus creating doubts even in the minds of those last absolved about the validity of the absolution received by them.(51)

We do not intend to go into the merits of this argument here; we shall meet it again in greater detail in a later chapter. But there is one criticism which we should wish to make with regard to another argument which Bucceroni puts forward in favour of his theory. He at least insinuates that certain earlier writers had actually favoured his view - chief of these being d'Annibale.(52) It will be well to quote the passage from the work of D'Annibale to which he (Bucceroni) refers: "Error communis est si eo loco, ubi aliquis jurisdictionem exercet, v.g., ubi parochum agit; ea praeditus esse publice existimetur ....; seu *facti* error versetur seu *juris* .....; dummodo error *juris* sit probabilis".(53) The implication intended by Bucceroni, by inserting this extract in a context treating of common error *de jure*, is that D'Annibale used the words *error facti* and *error juris* to signify the same thing as he himself understood by his own terms, *error communis de facto* and *error communis de jure*. But obviously there is a vast difference in the signification

(51) cf. Casus Conscientiae, II, Casus 129, n.6, Pp.171-172.

(52) cf. Casus Conscientiae, II, Cas. 129, n.5, P. 169.

(53) D'Annibale, Summula Theol. Mor., I, n.79, footnote 72.
NOTE: The words underlined are given in italics by Bucceroni.

of these terms. D'Annibale spoke of error of law and error of fact according as the error concerned the existence or extension of a law, or referred to the fulfilment of conditions required for the application of a law in a particular case. And, as we saw earlier in this chapter, he was merely repeating the generally accepted teaching of authors when he said that common error could arise as a result either of error of fact or error of law, provided the error of law was probable. Obviously this has no connection with the signification attached by Bucceroni to the terms common error de facto and common error de jure: these terms do not signify common error arising as a result of error of fact and error of law; they signify, rather, common error that is already actualised and common error that is to-be-actualised.

It is clear then, that Bucceroni's appeal to the authority of D'Annibale is absolutely unfounded, and based on a misinterpretation of terms. It is clear that neither can any other author be quoted by him as advocating his opinion. Nor does any other pre-Code author writing after Bucceroni's time accept or endorse this new theory. Therefore we can conclude that the unanimous opinion - if we except one lone author - in pre-Code doctrine, demanded that the error should be common error de facto, viz., a real error into which at least the greater part of the community has actually been led. This conclusion shall have a very practical bearing on our ultimate definition of the notion of common error - which we shall see in the following chapter.

SECTION IV.

THE DOCTRINE OF COMMON ERROR IN POST-CODE JURISPRUDENCE.

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When the Codex Juris Canonici came into force on May 19th 1918, the teaching that the Church supplies jurisdiction in common error attained, for the first time, the status of a written ecclesiastical law. True, the doctrine had been long recognized, but as we have seen, it originated not from a written ecclesiastical norm, but from the universal acceptance by canonists and theologians - with the approval of the Church - of a principle of Roman Law (Dig.I, 14, 3). Until the promulgation of the Code the doctrine enjoyed the status of jus consuetudinarium: after the promulgation of the Code it became a lex scripta. From the point of view of force or authority there is, of course, no difference between these two forms of jus. The lex scripta, however, has an advantage over the former in this that it is more defined: the express words of the legislator are had by which his will may be ascertained: jus consuetudinarium is of its nature somewhat more vague, and hence more subject to divergencies in its interpretation with consequent controversies.

In canon 209 of the Code the statement of the doctrine is contained in a few words - "In errore communi aut in dubio positivo et probabili sive juris sive facti, jurisdictionem supplet Ecclesia pro foro tum externo tum interno." By the omission of all reference to the necessity of a coloured title, it is clear that the Supreme ecclesiastical legislator no longer demands the presence of such a title, in order that the acts of a putative official may enjoy the benefit of the supplying principles. Obviously the legislator knew of the existence of the controversy; his silence with regard to the question, then, can only be interpreted as signifying

his wish that such a title is no longer essential. Post-Code commentators are unanimously agreed on this.(1) With the final settlement of this, the most controverted question with regard to the whole subject in pre-Code jurisprudence, one might well expect to find general agreement on the principles and their application henceforward. But another controversy arose in its place. This time the point at issue was to determine when precisely common error is realized - or what precisely is the notion of common error. In the preceding chapter we found this question had met with all but unanimous agreement in pre-Code teaching: post-Code teaching produced varied opinions. In the opening chapter of this section we shall examine these various views on the matter, criticize them from a juridical viewpoint and propose what we consider to be, according to the mind of the legislator, the true notion of common error. In the second chapter we shall discuss the various applications of the principles.

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(1) e.g. cf. Cappello, De Mat. N. 663, "Parochus putativus, scil. ille quem errore communi, etiam sine titulo colorato, fideles pro parocho legitimo habent, valide assistit; nam ecclesia supplet..... Olim controversia erat, num sufficeret error communis sine titulo colorato... Hodie certum est, titulum coloratum non requiri" ..... CORONATA, Inst. Jur. Can. I, n.292. Ante Codicem plures auctores ad hoc ut Ecclesia suppleret jurisdictionem requirebant, praeter errorem communem, etiam titulum coloratum: Codex communiorem sententiam titulum non requirentem canonizavit.

C H A P T E R I.

THE NOTION OF COMMON ERROR.

As we have just outlined above, we shall treat this question under three headings. The opening article shall be devoted to a statement of the theories concerning the notion of common error: in the second we shall give a criticism of one of these theories, viz., common error de jure: and in the final article we shall propose that particular definition of common error de facto which we consider most justified in view of the principles for interpretation as laid down in the Code itself.

ARTICLE I. VARIOUS NOTIONS OF COMMON ERROR.

Speaking generally it may be said there are two main schools of thought with regard to the notion of common error: one holding that the error must be de facto common; the other, following the lead of Bucceroni, contending that error which is de jure common suffices. But the exponents of the common error de facto theory do not agree amongst themselves in determining when precisely the error may be regarded as common. One group follows the traditional teaching which gave the word "common" a literal or proper interpretation signifying moral unanimity: another section adopts a more modified view and advocates an interpretation which gives the term an "improper" signification. Hence for convenience we may treat the views under the following heads:- (a) Common Error de fadt cum propria significatione: (b) Common Error de facto cum impropria significatione: (c) Common error de jure.

A. Common Error de facto cum propria significatione.

During the post-Code period there is a noticeable tendency on the part of many canonists and theologians to give as wide and as comprehensive a meaning as possible to the term common error. Their attitude seems to have been to stretch its meaning to the utmost limit. Relatively few, therefore, can be quoted as upholding the traditional doctrine in demanding that all or most of the community should be in error. Among these we may mention Prummer who writes: "Error dicitur communis qui inficit omnes fere incolas aliciuis loci,"(1) Chelodi,(2) too, strongly favours this interpretation. Gougnard,(3) Ojetti,(4) Ferreres(5) and Cocchi(6) also share this view.

B. Common Error de facto cum impropria significatione.

Writing in the Jus Pontificium (Vol. XVI, 1936, P.159) F. Claeys-Bouuaert purports to give the considerations or reasons which led so many writers before him to the conclusion that the term common error must be taken in a less restricted and improper sense. These authors, he says, having adverted to the fact that the purpose of this law is to provide for the general or common good, have interpreted common error as being correlative with common good. But the common good is sometimes regarded as the good of many as opposed to the good of one or two or relatively few private persons. Hence

(1) Manuale Theol. Mor., III, n.413.

(2) cf. Jus Can. de Personis, n.130. "Error dicitur communis saltem juxta saniorem doctrinam, si eo loco, ubi quis jurisdictionem exercet, publice ea praeditus esse existimetur moraliter ab omnibus, licet unus vel alter cognoscat re vera deficere."

(3) cf. Trac. de Poen. N.28.

(4) cf. Comm. In Cod. J.C. Lib. II, P.218.

(5) cf. Compend. Theol. Mor., II, n.651.

(6) cf. Comm. in Cod. J.C., Lib. II, Pars, I, n.132.

they understood common error in the sense of "error of many." By imputing such a process of reasoning to them we feel that Claeys-Bouuaert is giving the authors in question more credit than is due to them. For in reality the majority are content to state their views without making any attempt to substantiate them. Thus Arregui[7] simply states that common error is "error omnium vel complurium alicuius loci fidelium:" he does not give any reason as to why error complurium should suffice. Neither do Noldin-Schmitt put forward any proof for the statement that common error is verified if a large or notable part of the faithful in a given place thinks that a particular priest enjoys true jurisdiction.[8] Even Vermeersch fails to provide a basis for his assertion that common error is error multorum.[9] The same is true of Merkelbach who follows the interpretation just mentioned.[10]

The only author who made any attempt to justify this wide interpretation of the term in its improper signification, seems to have been E. Jombart S.J. The reasons advanced by him in support of the theory that common error means "error of many" are briefly: (1) If moral unanimity or error of the majority were required, it would be on very rare occasions only that the Church would be called upon to supply jurisdiction - which is contrary to the intention of the legislator: (2) Granted that moral unanimity or the error of the majority is required, how can this unanimity or majority be calculated or computed?[11] Arguing, therefore, from the

(7) Summarium Theol. Mor., n.602.

(8) cf. Theol. Mor. III, n.347.

(9) cf. Theol. Mor. III, n.459.

(10) cf. Summa Theol. Mor., III, n.586.

(11) cf. Nouv. Rev. Theol. L. (1923), L'Erreur Commune, P.172.

relative uselessness of the law, if the term common error were to be interpreted strictly, and from the difficulty encountered in calculating when precisely there is common error present according to the norms of the strict interpretation, Jombart reasons that common error must be taken to mean "error of many."

He then asks the question: How many people would be necessary and sufficient to constitute "multi" in this context? He insists that this is a case for moral estimation rather than mathematical calculation; for, he says, just as it is impossible to give an exact mathematical answer to those questions of the ancient Greek Sophists - how many grains of corn are required to make a heap?, and how many hairs must a person have so as not to be regarded as bald? - so it is likewise impossible to give a precise mathematical answer to the question under consideration here. While maintaining that the estimation must be a moral one, Jombart emphasized the fact that common error is something relative: in order to have common error there must be a certain ratio or proportion between the number in error and the number in the whole community. Thus a considerably greater number would be required to be in error in a large city parish, than in a village of two hundred inhabitants.(12)

Vermeersch, as we have already seen, also holds that common error means error multorum. But he goes further than Jombart in this that, while the latter restricted the notion of common error to a certain ratio between the number in error

(12) cf. Nouv. Rev. Theol. L. (1923) L'erreur Commune, P.172 - "La notion d'erreur commune requiert une certaine proportionalité, un nombre plus considerable dans une paroisse de Paris que dans un village de deux cents habitants. Nous admettons sans peine avec l'Epitome que l'erreur de cent personnes habitant in college suffirait. Par contre, l'erreur de cent personnes, disseminées a Montematre dans la foule des grands jours, ne semble pas meriter le nom d'erreur commune."

and the number in the community in each particular case, Vermeersch proposes 200 people as an absolute figure. In other words, however big a community might be, if 200 members of that community were in error, then error multorum was present - and the notion of common error verified.(13) Taking multi in the relative sense, as Vermeersch permits - in relation or proportion, that is, to the number of people composing the community - the term could be verified by a figure much smaller than 200. Indeed the only limit placed by him is that the community in question must be composed of at least ten persons - to conform to the dictum of Reiffenstuel (Lib. V, Tit, I, n.249) that ten persons constitute a populus. Hence he considers it sufficient for common error if many members of a convent composed of ten nuns be in error.(14) It may be noted that Jombart, too, was of the opinion that a convent of nuns is a community capable of effecting common error.(15)

Such then are the various notions of common error as expressed by those authors who require error de facto. But before passing on to treat of the theory of common error de jure, it may be well to have a clear idea as to what exactly authors had in mind when they spoke of common error de facto. It must be emphasized that though these authors disagreed among themselves as to what number of people would actually constitute an error as common, they were in full

(13) cf. Theol. Mor. III, N. 459. "Error communis est error multorum sive absolute multi sint, puta 200, sive sint multi relative ad numerum fidelium qui paroeciam vel communitatem componant."

(14) cf. Theol. Mor. III, n.459. cf. Also WOUTERS, Manuale Theol. Mor., I, n.103.

(15) cf. Nouv. Rev. Theol. L. (1923) L'Erreur Commune P.177. Footnote I. "Il ne nous semble pas tellement évident que l'erreur des vingt moniales d'un Carmel (milieu très fermé, très isolé, complètement séparé et independent de la paroisse ne puisse être appelée erreur commune, si l'on admet la relativité de cette notion. Salvo meliori judicio."

agreement with regard to the question of the nature of common error de facto. For all of them it might be described as an "attitude" of a community, or the people of a certain place, in thinking or believing an official to have true jurisdiction or power, when in reality he has not. Most authors seem to find it difficult to define this "attitude" precisely: Jombart gives the best and most complete treatment of the point. Briefly his thesis is this.(16) Common error is had whenever a cause from which the error springs, has actually come to the knowledge of the public. It is sufficient, therefore, if a fundament has been placed - a fundament which is de facto public in the sense that it is actually known to the community - a fundament which of its nature deceives that community into thinking that a particular confessor, for instance, enjoys true jurisdiction. The classical example given by the author (and much quoted by later writers) will illustrate the meaning more clearly: The pastor announces at Sunday Masses that a strange priest will hear confessions in the parish church on Friday of the coming week. On the day stated a strange priest arrives in the Church and proceeds to hear confessions. Actually the pastor has forgotten to obtain the requisite faculties for the strange priest. What of the case? According to Jombart, the fact that the pastor had announced the coming of a strange priest to hear confessions was a fundament actually and generally known, a fundament which was sufficient to lead the people to believe that the priest, who was due to come for confessions on the Friday following, would have the requisite faculties for hearing those confessions. This fundament thus generally known constituted common error, so that even if only one or two, or a few people approached the strange priest

(16) cf. Nouv. Rev. Theol. L. (1923) L'Erreur Commune, P.173.

for confession on Friday, the absolutions conferred on them would be valid by reason of common error. In order to have common error, he argues, it is not necessary that many people be actually fully conscious of the error, in the sense that they should have formed an explicit judgment such as - "I am convinced that this priest, whom I see here, has the requisite faculties for hearing confessions." It suffices if they believe in a general and indeterminate way, that on Friday next a strange priest endowed with the required jurisdiction will come to their Church to hear confessions. It is true that in this latter state or attitude the error is in the minds of the people only in a hidden and confused manner; but it is ready to assert itself in a formal proposition at the first opportunity presented. Even before it has been clearly formulated it is nonetheless a real error, at least virtually.(17)

Thus, for instance, if any member of the congregation, who had heard the pastor's announcement, should be asked on Friday whether this strange priest had the requisite faculties for hearing confessions, he would undoubtedly answer in the affirmative. If that same member were never asked for his opinion as to the legitimacy of this particular confessor, his opinion or attitude though remaining unexpressed, would nevertheless remain the same. The fact that there is an explicit formulation of it, does not essentially change his attitude. Perhaps the clearest manner of expressing the attitude is to call it an implicit rather than a virtual error. Jombart does, in fact, refer to it as such; for, in summing up his teaching on the question, he says that it is solidly probable that if, as a result of a public fundament being

(17) cf. Nouv. Rev. Theol. L. (1923) L'Erreur Commune, P.173.

placed, an error exists in the minds of many in an implicit and rather indeterminate way, the Church immediately supplies jurisdiction.(18)

Vermeersch conveys the same idea in fewer words. For him, also, common error is realized if the fundament of the error be public or actually known to many: it is sufficient if the elements of an erroneous judgment, with regard to the jurisdiction of a certain priest, exist in the minds of many.(19) This is really equivalent to the implicit error spoken of by Jombart. Noldin-Schmitt follow the same line of thought - "Cum error significat aliquod judicium mentis, requiritur tamquam fundamentum erroris communis aliquod factum pluribus notum, ex quo fideles sine culpa, saltem gravi, erronee judicent, hunc sacerdotem habere jurisdictionem; utique non opus est judicio formali. Aliud autem est mera nescientia sine fundamento."(20) By asserting that a formal judgment is not necessary, the author seems to regard an implicit judgment or error as being sufficient. And with the last phrase Noldin-Schmitt bring out very forcibly the fact that this error of the people though implicit, is nonetheless very positive. The existence of the fundament (which ex hypothesi is publicly known) affords a legitimate basis and a positive reason for the attitude of the community in regarding a certain priest as a properly constituted confessor. Hence though error is a false judgment arising out of ignorance, and though common error may, in one sense, be said to be common ignorance (i.e. ignorance

(18) cf. Nouv. Rev. Theol. L. (1923) L'Erreur Commune, P.173. - Il est donc serieusdment probable, que si par suite du fondement public de l'erreur commune, l'erreur regne dans les esprits d'une maniére implicite et assez indeterminée, l'Eglise supple le jurisdiction sans attendre que beaucoup se trompent d'une facon explicite et parfaitement précise."

(19) cf. Theol. Mor. III, n.459 - "Arbitramur satis esse fundamentum erroris sit publicum seu notum multis i.e. ut elementa erronei judicii de talis sacerdotis jurisdictione sint in multorum mente."

(20) Theol. Mor. III, n.347.

of an occult impediment or incapacity in the confessor) it must be emphasized that common error does not arise entirely from ignorance, as signifying a mere negative state or complete lack of knowledge. There must always be present that fundament - that public fact which gives a positive reason for believing that the priest in question already has jurisdiction.(21)

All this is in keeping with the traditional notion of the nature of common error. The only difference that may be noted is that in pre-Code jurisprudence the public fundament, according to many authorities, had to be a titulus coloratus: for others a titulus existimatus sufficed. In effect the fundament which post-Code authors speak of is nothing other than a titulus existimatus. Needless to remark, if there is actually a titulus coloratus present, then of course the fundament or reason for believing the confessor, pastor, etc. to be real, is all the stronger.

To sum up therefore: In order to have common error de facto two conditions must be fulfilled:-

1. There must be a fundament placed - a fact which of its nature leads the community (the majority, nearly all or many etc. according to the various views already seen with regard to the number required) to believe, through no culpability on its part, that a particular priest, pastor, etc. has true jurisdiction.

2. This fundament must be public - i.e. this fact must be actually known to the community (the majority ... etc) This second condition is all-important, as we shall see presently ih treating of common error de jure. When these

(21) cf. Also O'NEILL: I.E.R. XXII, (1923) The Meaning of Common Error, P. 299-300. ".... There must be some substantial basis for the misapprehension, some external fact that gives ground for it."

two conditions are fulfilled then common error de facto is is present.(22) It is immaterial whether authors refer to it as "implicit" or "virtual" error: they are agreed on the notion, the name is of minor importance.(23)

C. Common Error De Jure.

The theory of common error de jure represents the utmost limit to which the interpretation of Cn. 209 could be pushed. Originating with the Jesuit Theologian, Buccer-oni, towards the end of the 19th century, this theory may be said to have been resurrected by another Jesuit author - F.M. Cappello - not long after the publication of the Codex Juris Canonici. Since its re-introduction by Cappello, quite a large number of authors - both canonists and theolog-ians - have adopted it.(24) In view of what we have just seen of the notion of common error de facto, it will be easy to understand the notion as visualized by those who propose common error de jure.

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(22) cf. S.R. Rotae Decisiones seu Sententiae XIX (1927), P. 456. "Enimvero propter errorem communem putativus est capellanus militaris, si talia adsint adjuncta publica ut milites secundum communiter contingentia inducantur in errorem quo eum habeant ut praeditum titulo capellani militaris, dum revera non est quia v.g. e suo capellani officio excidit."

(23) e.g. cf. CLAEYS-BOUUAERT, Jus Pont. XVI, (1936), De Conceptu Erroris Communis in Cn. 209, P. 163 - Referring to the theory of Vermeersch (Theol. Mor. III, n.459) he writes: "Quod vocat cl. Auctor fundamentum erroris publicum in eo consistere videtur, quod multi perspectum habeant factum e cuius notitia concludendum ipsis est, facili et immediata deductione, adesse jurisdictionem. De cuius praesentia judicium forsan non est explicitum, sed saltem implicitum, utpote immediate in alia notione contentum."

(24) e.g. cf. VERMEERSCH-CREUSEN, Epit. Jur. Can. I, n.322. NOTE: This theory as found in the Epitome must be attributed to Creusen: a footnote to the text actually admits that Vermeersch teaches otherwise, (in his Theol. Mor. III, n.459). Cf. also WERNZ-VIDAL, Jus Canonicum, II, n. 331: AERTNYS-DAMEN, Theol. Mor. II, n.359; WOUTERS, Man. Theol. Mor., I, n. 103; DAVIS, Mor. & Past. Theol. III, n. 249; BESTE, Introductio in Cod. p. 221; SABETTI-BARRETT, Comp. Theol. Mor., n. 770,Q.12. CORONATA, Inst. Jur. Can., I, n. 292.

Bucceroni, as we have seen earlier, had defined common error as a "state or condition of things" from which public error, or error of the community could, and should, naturally, follow.(25) Cappello repeats this definition, at least in effect, though in slightly different terms. He says that not only is it probable, but practically certain, that in order to have common error it is sufficient if a fundament of error is placed - a fundament, which in view of the circumstances, will necessarily lead into error.(26) Coronata, who uses the term "cause" instead of "fundament," gives what is probably the best and most complete statement of the theory. He writes "..... sed sufficit, uti videtur, ut causa posita sit ex qua multi et fere omnes in errorem inducantur, vel saltem ex communiter contingentibus induci possint, licet forte de facto pauci prorsus vel etiam unica persona erraverit et illa jurisdictione usa sit."(27) Wernz-Vidal use the term "public fact," but obviously with the same signification as the terms "cause" and "fundament:" "Ergo potius dicendum est tunc haberi errorem communem in sensu canonis cum datur factum publicum quod per se natum est inducere in errorem, non unum vel alterum, sed quoslibet promiscue ita ut potius per accidens sit, quod unus vel alter ob peculiares ipsius circumstantias in errorem non inducatur."(28)

(25) Casus Conscientiae, Casus 129, n.6, P. 172.

(26) Cf. De Sacramentis II, (De Poen), n.341 - "Et error potest dici communis .... quatenus errant virtute, licet non actu, quatenus nempe ex aliquo <u>facto externo et publico</u>, quod nature sua inducit in errorem fideles necessario, attentis circumstantiis, in errorem inducuntur"

(27) Inst. Jur. Can., I, n.292.

(28) Jus Can., II, n.381. <u>NOTE</u>. While agreeing with Claeys-Bouuaert (Jus Pont. XVI, (1936), P. 164) in saying that this extract taken in itself could be interpreted as a statement of the theory of common error <u>de facto</u> (e.g. if the author had in mind a public fact already known to the community), there are very strong indications from the context that it is common error <u>de jure</u> the author intends to uphold: for in the immediately preceding sentence he is criticizing the impracticability of the common error <u>de facto</u> interpretation.

According to this theory, then, common error is had whenever any fundament, cause or public fact is placed, which of its nature can and - in ordinary circumstances - should lead many into error. Common error is present immediately this fundament cause or fact has been placed, even though its existence may be known only to one or a few persons, and even though its existence may never actually become known to anyone save that one or those few persons. For this reason Creusen refers to common error de jure as interpretative common error, i.e. error which would be common if the fundament should become generally known.(29) As an example of a fundament of its nature sufficient to deceive many of all, Cappello(30) gives the case of a priest who enters a confessional in a public church. The very fact that it is a public Church to which all have free access: the fact that the priest is in the confessional and prepared to hear confessions: and the fact that the rector of the church, whose duty it is to prevent abuses, does not hinder this priest from hearing confessions: all these circumstances necessarily lead one to the conclusion that this priest must be a real confessor. Therefore, in these circumstances, common error is already verified and renders valid all the confessions heard by that priest, whether they be few or many.

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(29) cf. Epit. Jur. Can. I, n. 322. NOTE I. F. CLAEYS-BOUUAERT (Jus. Pont. XVI, (1936), De Conceptu Erroris Communis in Can. 209, P. 159) and A TOSO (Jus Pont. XVIII (1938), P. 167) also refer to common error de jure as interpretative common error.
NOTE II. Bouuaert-Simenon refer to it as Virtual common error - cf. Manuale Jur. Can. I, n.363. "Sufficit probabiliter error communis virtualiter seu de jure tantum, quamvis non de facto: i.e. sufficit ut illi tantum de facto versentur in errore, qui per circumstantias sunt in occasione judicandi de jurisdictione vel ipsa fruendi, dum alii forsan majore numero, ne quidem de jurisdictione cogitant, sed per se caderent in errorem si in occasione essent judicium ferendi."

(30) cf. De Sacramentis II, (De Poen.) n.342.

It will be noticed that there is a marked resemblance, at least in terminology, between the two theories as outlined here. The exponents of both theories speak of a public fundament cause or fact. The essential difference between them lies in the fact that they do not both give the same meaning to the term public. For the common error de facto theory a public fundament signifies one already actually known to the community (to the majority, many etc.): for the common error de jure theory it signifies one which is placed in such circumstances that it can become known to all or many. At first glance this may appear to be a very slight difference. On closer examination, however, the variance between the two becomes more noticeable. It will become more apparent still, when we come to examine the vastly divergent effects consequent on the practical application of the respective theories.

By way of justification of this interpretation which reduces the notion of common error to that of mere interpretative error, Cappello proposes five main arguments. Many subsequent authors adopted Cappello's opinion; they were usually content, too, to accept it on the strength of the arguments put forward by him. Invariably these authors repeat one or other of his five reasons - or perhaps a variation or combination of them. Following are the arguments:-(31)

(1) The very fact that the fundament is external and public renders the error itself external and public or common. To quote verbatim - "Eo ipso quod fundamentum erroris seu factum inducens natura sua fideles in errorem, est externum et publicum, etiam error dici potest, et quidem rationabiliter externus et publicus seu communis."

(31) cf. De Sacramentis II, (De Poen.) n.341.

(2) Admitting that the opinion requiring common error de facto is correct, then an investigation must always be made with regard to the number of those who have actually erred: in other words all the parishioners of a certain parish, or the inhabitants of a given place must be asked whether they consider Titius a real confessor: and this procedure would not only be difficult and disturbing but practically impossible.

(3) Supposing (though not conceding) that in a particular case this interrogation (no. 2) could be made, it would still prove nothing in favour of the opinion holding for the necessity of common error de facto - (a) because a law must cater for what universally and commonly happens, not for extraordinary and particular cases; (b) because certitude about the number of those in error could never be had.

(4) Besides, even before commencing this interrogation, it would be necessary to decide just precisely how many people would be required to be in error, in order to constitute the error common in each particular case, according to the greater or smaller number of inhabitants in the district, village, city, etc: it would have to be decided whether the error of 30, 50, or 100 would suffice. But to attempt this would be ridiculous, and certainly could not be in keeping with the intention of a wise legislator.

(5) In canon 209 the Code purposely decided the controversies that existed in pre-Code teaching. Hence it can be rightly supposed that the legislator wished to define the position clearly and finally, in such a way that there would be no further room for doubts and anxieties. But if the common error de facto theory is admitted the way is

necessarily opened to many doubts and anxieties: all of which is really contrary to the purpose of the law and the mind of the legislator.

Such are the arguments proposed by Cappello to prove this theory of common error de jure. It will be noticed that of the five, the first and last are the only positive arguments listed - the only ones with a semblance of a juridical basis. The others are merely negative, and could be more fittingly termed objections to the theory of common error de facto. It will be recalled that the same remark applied to the arguments of Bucceroni: his justification for the new interpretation was the unproven assertion that the theory of common error de facto could not work out smoothly in practice. The objections of Cappello are merely an elaboration of this idea.(32) In the following article, we shall endeavour to interpret the canon of the Code in question (Cn. 209) in the light of the principles laid down by the Code for the proper interpretation of its own laws. In doing so we hope to show that the theory of common error de jure has no legal foundation. And in doing so we also hope to answer the objections of Bucceroni, Cappello and the others, by showing that the application of the doctrine is both practical and simple when common error is interpreted as signifying common error de facto.

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(32) NOTE. We have said above that subsequent authors generally repeat one or other of Cappello's arguments - usually an objection against the theory of common error de facto. Here are a few examples of such: GOYENECHE, Juris Can. Summa Princ. Lib. II, P.219 Footnote 19, - Dicitur omnes moraliter sumpti, quod difficile captu est. Puto sufficere ut error dicatur communis ut talis causa ponatur de se sufficiens ad communiter errorem inducendum WOUTERS, Man. Theol. Mor., I, n.103. "... item probabiliter, satis est fundamentum erroris communis positum esse ut si nomen sacerdotis jurisdictione carentis confessionali affixum est. Ratio petitur ex eo quod secus saepe difficile determinaretur, utrum necne error communis adesset." BESTE, Introd. in Cod., P. 221. "Ex adverso, admissa contraria opinione, semper foret inquirendum in singulis casibus, quot errantes mathematice requirerentur spectato numero fidelium in loco, ad constituendum errorem de facto comunem, et num numerus reipsa sufficiens fuisset errore deceptus, ut quis beneficio talis erroris frueretur."

ARTICLE II. CRITICISM OF THE COMMON ERROR DE JURE INTERPRETATION.

The sole and primary object of interpretation of law is to determine what the intention of the legislator was when he framed the law - to discover the mind of the legislator. Interpretation, therefore, does not consist in attributing to a certain combination of words a meaning which could have been intended by the legislator, nor a meaning which would have been intended if the legislator had adverted to certain circumstances overlooked by him, nor even a meaning that should have been intended by him if he were to make the best possible law. Interpretation is the procedure by which is determined the meaning actually intended by the legislator at the moment he framed the law. The most fundamental and most obvious means of arriving at a knowledge of this intention of the legislator, is by an examination of the words used by him in expressing his intention - by an examination of the words in their text and context. To ensure that this means be properly employed, the Supreme ecclesiastical legislator lays down that in the interpretation of the laws of the Code, the words must be understood according to their proper signification.(33)

The proper signification (propria significatio) may be verified in any of three ways.(34) It may be the natural signification of the word, which arises from the original and primeval imposition of names on different things. It may be the usual signification, which is the natural signification either confirmed or changed by common usage. The usual

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(33) cf. Canon 18 - "Leges ecclesiasticae intelligendae sunt secundum propriam verborum signifcationem in textu et contextu consideratam; ....."

(34) cf. A. VAN HOVE, De Legibus Eccles. n.252.

signification becomes juridical if it is determined by the use of jurists or legal experts, or if it is defined by law itself. Of these three, the usual signification may be regarded as being most fully and completely the proper signification: but the natural and juridical signification also come within the meaning of the term, and so must be accepted if such exist in a particular case.

Interpreting canon 209 (In errore communi ..... jurisdictionem supplet Ecclesia ....) in the light of this principle, giving the words their proper signification, we may note the following points:-

(1) Error: The proper signification of the word "error" or "to be in error" is that a false judgment already actually exists (i.e. according to both the usual and the juridical signification). It is not sufficient that the error should exist, as it were, in a fundament not yet known to the mind: for, according to all, the word "error" is applied not to one who is about to err, nor to one who will err, or who would or should err, but only to one who here and now errs. This is the proper signification of the term, and the signification to be assumed here unless the legislator expressly states that the term is to be given an improper or special signification. But neither from canon 209, nor from any other canon, does it appear that the term should be given such an improper signification. Moreover in all other cases or matters in which the term "error" appears, no author (not even those who advocate the common error de jure theory) suggests that it should be taken to mean a future or interpretative error.

(2) Common Error: The proper signification of the term "Common" may be said to be general or usual. Whatever dispute there may be about the exact number required to be in

error, in order that error may be called common, there can be no doubt that this error should exist in fact - and not merely in a fundament that can and may become known to this required number. For an error which does not yet de facto exist, or at least which exists only in the minds of those few who are aware of the existence of its fundament, cannot be said to be common, since in reality it affects nobody, or at most only those few who, ex hypothesi, know of the existence of the fundament. (35) As Vermeersch rightly remarks: "Verum nostra sententia, non sufficit ut pauci sic errent propter causam quae alios etiam deciperet. Tunc enim nullus error communis adest; sed adesset si." To give the words "common error" an interpretative signification such as Vermeersch here visualizes, would obviously be giving the words an improper signification. But this improper signification cannot be accepted, unless the legislator gives an express indication to this effect. And again there is no indication given in this canon, or elsewhere, that such is the intention of the legislator. (36)

(3) But even granting, for the sake of argument, that the meaning of the words is not apparent, that there exists a real doubt as to whether the term common error is to be interpreted as meaning common error de facto, or is to

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(35) Theol. Mor., III, n.459.

(36) These two arguments are very concisely summarized by V. DALPIAZ - Apoll. VII, (1934), De Conceptu Erroris Communis juxta Can. 209, P.490 "Hoc tantummodo negavimus et iterum negamus, errorem nempe communem etiam tunc haberi si ponatur publice factum, quod multos in errorem inducere possit, etiamsi paucos tantum, imo neminem in errorem inducat. Et quaesivimus: Si nemo erret, ubinam error? Et si pauci tantum errent, ubinam error communis? Num admittendum est Codicem incosiderate seu inconsulte usum fuisse verbo error Communis? Nonne ab ipso Codice tamquam norma interpretationis principium statuitur: 'Leges ecclesiasticae intelligendae sunt secundum propriam verborum signifcationem in textu et contextu consideratam.'"

be understood as signifying common error de jure, there can still be no juridical case made for the latter theory. Canon 6, n.2, states: "Canones qui jus vetus ex integro referunt, ex veteris juris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi;" It is true that the doctrine of the supplying of jurisdiction did not exist in the form of a written ecclesiastical law before the promulgation of the Code: nevertheless this doctrine comes within the scope of Canon 6, n.2, for this canon uses the term jus which includes law, both written and unwritten. But Canon 209 is a mere repetition of the jus vetus in so far as it repeats the doctrine as commonly taught and applied in pre-Code jurisprudence. This canon, therefore, must be interpreted according to pre-Code teaching, as found in the writings of approved pre-Code authors. But we have already seen that all pre-Code authors - with the exception of Bucceroni - understood common error as meaning, not interpretative or de jure error, but real, genuine, actual error. The term must, therefore, be given the same signification in post-Code teaching.

(4) We have said that the purpose of interpretation is to discover the mind of the legislator, in so far as his mind or intention is expressed in his words. The legislator, on his part, is presumed to have used the words best calculated to express his mind or intention. This is especially true of the laws of the Code, for we are assured by Cardinal Gasparri that there is nothing in the Code which has not been discussed and debated at least four or five times, perhaps even eleven or twelve times.(37) The term common error, as we have seen, had an accepted and determined meaning in pre-Code teaching - it had the traditional meaning corresponding

(37) cf. Preface to the New Code, P. XLI.

to what we now call common error de facto. When drawing up the Code of Canon Law, the legislator knew this term, and was aware of its traditional and accepted meaning. Is it possible that, while the legislator wished to change from the traditional notion of common error to that of common error de jure, he still adhered to, and used, a term which had an accepted meaning that was opposed to this new interpretation? If such was the intention of the legislator, could he be said to be using words best calculated to express his intention? If he wished to introduce such a radical change in the notion of common error, would he not have given evidence of this intention, by expressing the doctrine in new or different terms - terms that would be more appropriate and more expressive of the new notion? Or, if he wished to retain the old term, would he not at least have given some indication that he wished the term to be understood in a different sense from heretofore? But he has used this same term, common error, and he has given no indication that he wishes to have it interpreted in any but the traditional fashion. According to the norms for interpretation, therefore, we are obliged to interpret the term according to this traditional signification.

(5) There is another consideration of considerable importance which is worthy of note. It treats of the absurd consequences resulting from the acceptance of the common error de jure interpretation, and from its application in practice. For, granted that common error is verified as soon as a public fact or fundament has been placed - a fact which of its nature can, and may, lead many into a false judgment - it immediately follows that any priest who publicly hears confessions, or publicly assists at marriage, in any part of the world, even though he may have never been approved, performs these functions validly by reason of jurisdiction

or power supplied by the Church. The very fact that a priest (approved or unapproved) - enters the confessional in a church, he places a fundament which could deceive the community into believing him to be a properly constituted confessor, he thereby creates, as it were, common error and ensures the validity of all absolutions imparted by him from the very outset. Similarly, by assisting at marriage in a public Church or in any public place, a priest likewise places a fundament calculated to deceive the community, again creates common error and so ensures the validity of the marriage. Consequently it would be practically impossible to find a case of a confession or a marriage that would be invalid by reason of defect of jurisdiction or authority in the minister. Vermeersch adverts to this when he writes: "Aliter intellectus error communis permitteret validas absolutiones omni sacerdoti ubique terrarum. Satis foret ut se promptum diceret ad audiendam confessionem."(38) Dalpiaz puts it more forcibly: "Et revera quinam jurisdictionis actus fori sive interni sive externi adhuc invalidi esse possent, si Ecclesia dicenda esset jurisdictionem semper suppleri simul ac iidem actus ponantur 'per factum publicum' quod per se natum est inducere in errorem, non unum vel alterum sed quoslibet promiscue? Exceptis illis - absque dubio perpaucis - occulto omnino positis, ceteri omnes habendi essent tamquam validi."(39)

Now the supreme ecclesiastical legislator has taken the greatest care to lay down clear and strict norms with regard to jurisdiction itself, its acquisition, delegation, cessation etc. (Cc. 196 seqq.): he has gone into minute detail with regard to the jurisdiction required by a priest in order

(38) Theol. Mor. III, n.459.

(39) Apoll. VII, (1934), P.81. cf. also TOSO, Jus Pont. XVIII (1938) PP. 161-162.

that he may validly hear the confessions of the ordinary faithful, of religious men, and of religious women (Cc. 872 seqq. and Cc. 518-529): and he has carefu6ly stated who may validly assist at the celebration of marriages ex officio, and what licences and permissions are required by one who has not the right to assist ex officio (Cc. 1094-1096). Are we to regard all these canons as mere collections of useless and superfluous norms - norms which cannot have any practical application in the ordinary course of events. Such, in effect, is the teaching of the advocates of the common error de jure interpretation. For in giving canon 209 the signification they propose, there is no further need - at least as far as validity is concerned - to worry about fulfilling the requirements and conditions of the canons just quoted: for, given a public fundament, the Church supplies all defects of power. The advocates of this theory would imply that, by virtue of canon 209, the legislator wished to undermine the force, import and necessity of those canons referred to above. They would imply that the legislator has framed many laws which in theory seem important, but which, in practice, are rendered useless, superfluous and impractical. Obviously an interpretation, which has the consequence of attributing to a wise and prudent legislator the establishment of such unreasonable and superfluous norms, cannot be regarded as a true reflection of that legislator's real intention and wish. Hence we cannot accept the contention of those who interpret common error as meaning common error de jure.(40)

(40) cf. A. TOSO, Jus Pont., XVII (1937) P. 97: cf also Jus Pont. XVIII (1938) P. 162 - "Etenim si modo descripta Cn. 209 interpretatio recipi posset, actum esset de cc. 873 seqq. et 1095 seqq. necnon de compluribus aliis, qui, ad validatem actus, jurisdictionem ordinariam aut delegatam requirunt vel, ut Cn. 1096 ad valide agendum conditiones quasdam opponunt; tum enim, amplificato usque ad absurdum ambitu Cn. 209, numquam adesset jurisdictionis defectus, quin simul ab Ecclesia suppleretur; quod uti patet, nemo qui sanae sit mentis admittere potest."
cf. also DALPIAZ, Apoll., VII (1934), P. 81. - "Fautoribus autem contrariae sententiae haec praesertim quaestio poni potest. Admisso principio de errore interpretativo tantum,

(continued end of p.176)

6. In the light of what we have just seen it may be opportune here to criticise the arguments advanced by Cappello in attempting to prove his theory of common error de jure. While the foregoing five points are obvious deductions from the application of the canonical principles of interpretation, it is very significant that Cappello, and the other exponents of the de jure view, make little or no reference to these principles. Indeed, they seem to have been very cautious not to appeal to these principles - especially those of Canon 18. Of the five arguments put forward by Cappello, it is true that two may be said to have the semblance of an appeal to the principles of interpretation: the other three, as we have already noted, are merely objections against the practicability of the common error de facto theory. For the present, we wish to confine ourselves to juridical arguments based on official norms of interpretation: hence we shall conclude this article with a refutation of the two arguments which purport to place the theory of interpretative common error on a juridical basis.

(a) It will be recalled that Cappello's first argument ran thus: "Eo ipso quod fundamentum erroris seu factum inducens natura sua fideles in errorem, est externum et publicum, etiam error dici potest, et quidem rationabiliter externus et publicus seu communis." His line of argument seems to be something like the following: "The fundament of the error is public and external: consequently the error itself can be said to be public and external. But public and external is equivalent to common. Therefore, if the

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(40) (continued): seu de jure, quid de praescriptis fiet tam claris, tam strictis, tam gravibus quibus Codex institutum de jurisdictione ecclesiastica sartum ac tectum esse voluit? Nonne legis firmitas in discrimen vocatur, ac pernicioso arbitrio via sterneretur, quod 'nervum ecclesiasticae disciplinae' penitus disrumperet?"

fundament of the error is public and external, the error itself must be regarded as common." It is difficult to discover a logical trend of reasoning in the statement: it is noteworthy, too, that there is a complete absence of explanations or proof. Against it we may note the following.

Criticising this argument Claeys-Bouuaert emphatically denies that a fundament of error, i.e. a fact or state of things which offers an occasion for error, can be said to be public unless it is already known to many. From this alone it derives the characteristic of publicity, viz., from the fact that it is de facto and really apprehended by, and known to, many. For, according to all peoples, he says, and in all languages, a thing is said to be public only when it is perceived or apprehended by many.(41) We do not agree with this criticism unreservedly, chiefly because the term "public" has been given many different meanings by the Code itself. Thus a public crime, according to canon 2197, is one that has been already divulged or one that has occurred, or is now placed, in such circumstances that it can be prudently judged that it will easily be divulged. A public matrimonial impediment on the other hand, according to canon 1037, is one whose existence can be proved in the external forum: if it could be proved by means of an official document, therefore, it would be public in the sense of the canon, even though nobody was actually aware of its existence.

We do not deny that Cappello was correct in referring to a fundament as being public, because it was placed in such circumstances that it could be prudently judged that it could, and should, become generally known - as in the case

(41) cf. Jus Pont., XVI, (1936), P. 161.

of canon 2197. Besides, the fundament will almost invariably be known to two or three, and hence there will usually be sufficient witnesses to prove its existence in the external forum - as in the case of canon 1037. We admit then, that Cappello is justified in referring to a fundament as being public even before it has actually been perceived or apprehended by many. We admit, too, that Cappello may be justified in using the term "public" in reference to an error that may flow from this public fundament, even before many people have actually fallen into that error, i.e. in using it with reference to error, in the same sense as it is used as regards crimes or impediments in canons 2197 and 1037. But we do not admit that, because an error is thus termed public, it must necessarily be regarded as common. While he may be free to choose any of the recognised meanings of the term "public," and apply it to error, he is not free to say that public error is equivalent to common error, until he first establishes that the sense in which he uses the term "public" corresponds to the accepted signification of the term "common." In the present case he cannot establish this: for, his notion of public error is one into which many people can fall, because of a public fundament which has been placed: while common error has the accepted and determined signification (which he is not free to change) of one into which many, or the majority of a given community, have already been actually drawn.

Briefly, then, we may conclude by agreeing with Cappello when he asserts that, if the fundament of error is public, the error itself may also be regarded as public: and by disagreeing with him when he contends that, if the fundament of error is public, the error itself may be regarded as common.(42)

(42) cf. DALPIAZ, Apoll., VII, (1934), P. 80. "Sed duo haec - factum scilicet publicum et error communis - aequiparari semper non possunt, quia ex facto publico error communis non semper sequitur."

((b) The second argument in which we are interested here is as follows: "In canon 209 the Code purposely decided the controversies that existed in pre-Code teaching: hence it can be rightly supposed that the legislator wished to define the position clearly and finally, in such a way that there would be no further room for doubts and anxieties. But if the common error de facto interpretation is admitted, the way is necessarily opened to many doubts and anxieties: all of which is contrary to the purpose of the law, and the mind of the legislator. Ergo." Against this the following points may be noted:

(1) Granting that the legislator wished to put an end to all controversies, doubts and anxieties, it is clear that the only controversies he could intend to settle would be those already in existence at the time he formulated the law. He could scarcely be said to have intended to settle controversies which had not yet arisen: less still could he have intended to settle controversies which he had no reason to suspect might arise(43) - controversies which would be due solely, as Claeys-Bouuaert states it,(44) to the subtlety of commentators. We grant, then, that the legislator wished to settle the controversy that existed in pre-Code jurisprudence, viz., with regard to the necessity of a coloured title. But there was no pre-Code controversy with regard to the interpretation of the term common error: it enjoyed a traditional signification corresponding to our common error de facto.

(2) For the purpose of argument, let us concede what Cappello contends, viz., that, by interpreting common error in the sense of common error de facto, the way is

(43) cf. MERKELBACK, Summa Theol. Mor., III, n.586.
(44) cf. Jus Pont., XVI, (1936) p. 162.

opened to doubts and anxieties. Then the following points could be made:

(a) We can be practically certain that the doubts and anxieties which arise at the present time, as a result of such an interpretation, are neither more numerous nor more serious than those which resulted from the same interpretation in pre-Code times. But being familiar, as he was, with the practical application of this doctrine in pre-Code times, it can be safely assumed that the legislator was aware of both the advantages and disadvantages attaching to this interpretation: he knew of any defects there might be in its application: he knew of the doubts and anxieties that were wont to arise as a result of it. If he had considered these defects of the traditional interpretation sufficient to necessitate a change of doctrine, he could easily and simply have changed it. But he did not change the doctrine. He framed the law in terms which clearly indicated a retention of the traditional notion of common error.

(b) Moreover, even if we assume that the legislator, when framing the law, did not advert to the doubts and anxieties which would arise as a result of the practical application of this interpretation, the position is not altered. For, as we have already said, the purpose of interpretation is to discover the actual wish and intention of the legislator, as expressed in the words of the law - not what his wish or intention <u>would</u> have been, had he adverted to certain circumstances or facts actually overlooked.

These two latter points are based on the assumption that Cappello's contention is true, viz., that the interpretation of the term, as meaning common error <u>de facto</u>, opens the way to doubts and anxieties. If the contention

is false, of course, then obviously there can be no argument drawn from it. Actually, if the common error de facto interpretation is properly understood and applied, there is little or no danger of the doubts and anxieties, of which Cappello speaks, being realized; this we hope to show in the article immediately following. Suffice it to say, for the present, that whether this statement of Cappello be true or false, no argument in favour of the common error de jure interpretation can be drawn from it.

By way of summary, therefore, we may safely assert that all the rules and norms of interpretation weigh against the interpretation of Cappello, and the many others, who advocate the principle of common error de jure. From the arguments - both positive and negative - listed above, we feel justified in concluding that this interpretation has no juridical basis, and cannot be regarded as intrinsically probable.

ARTICLE III. THE TRUE NOTION OF COMMON ERROR.

Having established that the term common error must be interpreted as signifying common error de facto, as opposed to interpretative common error, we now come to determine when precisely it may be said that common error de facto is realized. We have seen, in the opening article of this chapter, that there are divergent views on this point. By some, the term is given a strict interpretation, and is taken to signify an error that is morally unanimous, with regard to a given community, or at least an error in which the greater part of the community is involved. Others interpret common as signifying a notable part of the community. While still others say that common error simply means the error of many. Which

of these views are we to accept? Again, the answer will be provided by the application of the principles of interpretation.

Canon 209 must be understood according to the proper signification of the words, taken in their text and context.(45) The proper signification of a word, we have seen, may be either the natural, usual or juridical meaning that has been attributed to it. Thus, if a particular term has been given a particular and technical meaning by the constant use of canonists, this technical meaning is called the juridical signification. In an earlier chapter(46) we went into some détail to show that, in pre-Code jurisprudence, the term common error had acquired a certain accepted signification, from the constant and consistent use of canonists and theologians: it signified an error shared in by all, or nearly all, the members of a given community, or at least by the majority of them. When the legislator used the term in canon 209, therefore, it was obviously this signification he had in mind; and, by virtue of canon 18, this is the signification he has commanded canonists and commentators to attribute to it still.

It is difficult to see any justification for the opinion of those who give an interpretation other than this. Noldin-Schmitt cannot advance a legal basis for the statement that common error means an error of a notable part of the community. More arbitrary still is the opinion of Vermeersch, Jombart and Merkelbach, holding that the term signifies error of many! If the legislator had intended that jurisdiction be supplied by reason of the error of many,

(45) cf. Canon 18.

(46) cf. Above, Sec. III, Ch. III.

would it not have been much more simple and reasonable for him to state "In errore multorum .... Ecclesia jurisdictionem supplet?" It was not by mere accident that the words "In errore communi" were used, rather than "In errore multorum" or "In errore magnae partis communitatis," etc. The legislator had a purpose in using the phrase error communis; by it, he wished to convey a definite notion - a notion that this phrase had traditionally been known and understood to express, viz., error of at least the majority of the members of a given community.

Perhaps the biggest break with tradition is the attempt, made by Vermeersch, to establish an absolute standard for determining the notion. It might be possible to lay down a relative figure that would constitute an error as common with regard to a community of a given size: but the statement that the error of 200 people will always constitute common error - irrespective, that is, of the size of the community in question - must certainly be regarded as unreasonable. Mathematical formulae are alien to the juridical science. Excepting those cases in which the law itself expressly demands mathematical computation, juridical notions cannot be defined in terms of figures: usually there are too many circumstances and contingencies to be taken into consideration to allow of that. We have seen that Jombart condemned such an attitude when treating of the question as to how many people would be required to constitute multi.(46a)

(46a) cf. Nouv. Rev. Theol., L. (1923) P. 172 - Ceux qui reclaimeraient un index nombre chiffrant tous les cas, ou une formule algebrique d'une exactitude minutieuse, nous rapelleraient les sophistes de la grèce antique, aux questions captieuses: Combien faut-il de grains de blé pour faire un tas? Combien faut-il avoir gardé de cheveux pour n'être pas chauve?"

We agree with Jombart in this condemnation. We feel justified in saying that the vast majority of authors would agree with Jombart in this: at least, very few make any attempt to reduce the notion of common error to concrete figures.(47) We may safely say, therefore, that the absolute norm of 200, as proposed by Vermeersch, must be rejected. We grant that the figure might constitute an absolute norm for determining the notion of multi: but, for reasons stated above we do not admit that the terms 'error of many' and 'common error' are synonymous.

Criticism of Jombart's Arguments: It will be recalled that Jombart was the only author who advanced reasons in support of his contention that common error signifies error of many. It will be opportune to consider these arguments at this stage.

A. The first argument runs thus: 'If moral unanimity, or error of the majority, were required, it would only be on very rare occasions that the Church would be called upon to supply jurisdiction - which is contrary to the mind of the legislator.' Against this we may make the following observations:-

(1) Granting it to be true that our interpretation would render the cases in which the Church would be called upon to supply jurisdiction very rare, it may be asked how this state of things can be shown to be contrary to the mind of the legislator? We have sufficiently proved, both in this article and in the preceding, that the legislator could have only one thing in mind, when he used the term 'common error' in canon 209. The legislator was at liberty to frame

(47) NOTE. L. WOUTERS (Man. Theol. Mor., I, n. 103) favours the opinion of Vermeersch in making 200 an absolute standard.

the law in different words, if he considered the traditional signification of this term to be too restrictive, or too not sufficiently comprehensive, in its application: he could have used terms which would admit of the application of the supplying principles to more varied and more numerous cases. But since he has used this term without giving any indication that he wished to have its meaning changed, we must presume that this restriction of the number of cases to which it applies is in accordance with his mind on the matter.

(2) The law of canon 209 - like that of all the other canons in the Code - has for its purpose the promotion of the common good. But it is for the legislator to determine what norm or rule is best calculated to promote this common good. If the legislator promulgates a law which, on being interpreted according to the proper signification of the words, is somewhat limited in its application or scope, it must be presumed that he considered the interests of the common good to be best served by such a limited application. Unless the legislator has given some other indication of a contrary intention, the mere rarity of cases or occasions involving the application of a particular law, does not justify one in attributing to the words of the law an improper singification.

(3) If the occasions in which the Church can be called upon to supply jurisdiction are rare, we can safely assume that they are not notably more rare now than before the promulgation of the Code. But all authorities seem to have been satisfied with the law, in this respect, before the promulgation of the Code. There is scarcely any basis for believing that conditions have so changed as to demand a law of wider scope and application now.

By this we do not wish to suggest that conditions cannot and do not change in the course of time: we do not contend that a law, which is suitable in one century, must necessarily be suitable also in the next. Nor are we opposed to the initiative and originality of Canonists in developing juridical science. It is only natural that conditions should change with the passage of time, necessitating a consequential change in law. And as canonical history proves, many juridical institutes and notions owe their origin and development to the initiative of brilliant canonists. But while necessarily favouring the development of juridical science and the clarification of juridical notions, it must be emphasized that this development and clarification should be in accordance with canonical principles. Juridical science must emanate from sound principles, and must develop along sound juridical lines.

B. The second argument put forward by Jombart is as follows: 'Granted that moral unanimity in error is required, or the error of the majority, how can this unanimity or majority be calculated?'

Jombart himself supplies the answer to this objection.(48) Having attempted to prove that the term 'common error' cannot mean error of the majority because of the difficulty attaching to the calculation of such an error, he asserts that common error must mean 'error multorum.' He proceeds to state that the term "multi" cannot be mathematically defined, but must be estimated in a moral sense. But from the point of view of facility of calculation, the term 'error multorum' holds no advantage over that of 'error of the majority.' For it would be no more difficult to make a moral estimation of the notion of 'majority,' than it would be to morally estimate the notion of 'multi.'

(48) cf. Nouv. Rev. Theol., L. (1923) P. 172.

Common Error to be Morally Estimated: From the viewpoint of facility in computation therefore, there seems no reason for taking the term common error in any but its proper signification. In practically every case that will arise a certain conclusion can be reached as to the presence or absence of common error, when this moral estimation is used. There will be no necessity to have recourse to those detailed mathematical calculations, which the opponents of the common error de facto interpretation appear to connect inseparably with its application in practice. Generally speaking, from the facts and circumstances of the case, the solution will be clear, either from the fact that the greater part of the community is manifestly in error, or from the fact that obviously only a few are deceived. As in so many other canonical matters, a reasonable and prudent judgment on the point always suffices. And if, in a particular case, there is doubt as to whether the error can be termed common, then canon 209 itself solves the doubt. A positive and probable doubt as to the existence of common error (i.e. as to the sufficiency of numbers in order to constitute the error an error of the majority) involves a positive and probable doubt as to whether jurisdiction is had by a certain official, in which case the Church supplies the defieiency.(49)

It will usually be a simple matter to make this estimation. For, keeping in mind what we have already seen in a previous article, that in order to have common error de facto it suffices if a fundament or cause, capable of

(49) Canon 209 - "In errore communi aut in dubio positivo et probabili sive juris sive facti, jurisdictionem supplet Ecclesia pro foro tum externo tum interno." Cf. CLAEYS-BOUUAERT, Jus Pont. XVI (1936) P. 162. "Quodsi in aliquo casu remaneat dubitationi locus, ipse canon 209, ne loquamur de puri Probabilismi applicatione, suppeditat solutionem. Dicit nempe, in dubio probabili sive juris sive facti, supplere Ecclesiam. Quod dubium probabile versari sane etiam potest circa sufficientem errantium numerum, in ordine ad errorem vere communem constituendum. Via igitur illa indirecte moraliter certa affulgebit conclusio."

deceiving, is already known to the community as a whole or to the majority of its members, it can be seen that it will not be difficult to make an estimate of those in error. For example, if the fundament has consisted in an announcement made at Sunday masses, it will be easy to determine whether the greater part of the community was present at those Masses. If the fundament took the form of a notice in the local newspapers, again, a moral estimation can easily be made: judgment can prudently be passed according to the number who are wont to read the local newspapers. On the other hand, if the public fundament consisted in an announcement made to a small congregation at Mass on a mid-week morning, it could not be prudently judged that common error was immediately present. Not until some indications or proofs could be had that the congregation had spread the announcement generally - and so made the fundament known to the community as a moral unit - could it be asserted that common error was realized.

Criticism of Cappello's Objections: We referred in the preceding article to objections, put forward by Cappello, against the feasibility of the interpretation of common error as signifying common error de facto. Strictly speaking, Cappello had intended these as arguments in favour of his common error de jure interpretation, and as such we should have treated of them when refuting that interpretation in the preceding article. However, as these arguments or objections are answered chiefly by the fact that the term common error is to be estimated in a moral sense, we thought it more appropriate to postpone their treatment till the present context. We shall now examine them briefly:

(1) In the first of these objections, Cappello claims that if the opinion requiring common error de facto is admitted, then an investigation must always be made with regard to the number of those who have actually erred; this investigation would entail the interrogation of each member of the community in question, with some such formula as - 'Do you consider Titius a real confessor, a real pastor, etc.?' Such a procedure would be both disturbing, and practically impossible.(50)

This argument might carry some weight if, by common error de facto, were understood an explicit and expressed formal erroneous judgment by the majority of a given community But such is not the case. It suffices if there is placed a public cause or fundament (of its nature calculated to deceive) which is known to the community as a whole. As Vermeersch states, it is sufficient that the elements of an erroneous judgment exist in the minds of those concerned: in other words an implicit error suffices. And in order to discover whether such elements of an erroneous judgment - or an implicit error - exist in the minds of the majority, it will not be necessary to interrogate individual members of the community on the matter. It will be sufficient if it can be prudently judged, that the existence of the fundament has come to the knowledge of the greater number. The extent to which the existence of the fundament will be known will depend, as we have already suggested, on the circumstances of each individual case. It will be seen that the above objection arises chiefly from a misunderstanding of what is really meant by the term common error de facto.

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(50) cf. De Sac. II (De Poen.) n.341, 2°.

(2) The second argument is merely a corrollary of that just discussed,(51) is dependent on it and presupposes it to be true. But as the argument outlined above cannot be accepted, there is no need to consider this second in detail: it, too, can be regarded as the result of not having properly understood the true notion of common error de facto.

(3) The third objection may be termed the standard objection against the theory of common error de facto, viz., 'Granting that common error de facto is required, it will be necessary to decide how many people must be in error, in order to constitute the error common - whether the error of 30, 50, or 100 will suffice. But any attempt to so determine it would be ridiculous, and contrary to the mind of the legislator.'(52)

In answer to this we should like to emphasize again that in computing common error we are not concerned with the number of people, for instance, who actually approach a putative confessor to obtain absolution: we are concerned only with the number of those who think this confessor real and legitimate, irrespective of how many or how few may actually seek absolution from him.(53) It may be stated that in the vast majority of cases in which common error is verified, it exists even before the illegitimate confessor commences to hear confessions. In these cases, all confessions are valid from the beginning - however few in number the

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(51) cf. De Sac., II (De Poen.) n. 341, 3: This argument reads: "Dato et non concesso quod huiusmodi interrogatio in aliquo casu particulari fieri possit, exinde tamen nihil sequeretur in favorem alterius opinionis: tum quia lex, ex ipsa sua natura, non respicit casus extraordinarios et particulares, sed ea quae communiter et universaliter accidere solent; tum quia certitudo circa numerum errantium in casu, numquam haberi posset."

(52) cf. De Sac. II (De Poen.) n. 341, 4.

(53) cf. CAPPELLO, De Sac. II (De Poen.) n. 340.

penitents may be. It is an injustice to the common error de facto interpretation, to state absolutely for instance, that if 200 people went to confession to a strange confessor, the confessions of the first 99 people would be invalid because there was no common error: after the confession of the 100th person, however, common error was verified and the confessions of all those who followed would be valid. It is unjust to make this absolute statement, because in the generality of cases such as this, common error will be verified from the beginning - if, for instance, the whole 200 regarded the confessor as real from the beginning, and provided, in the circumstances, this number could be taken as morally representative of the community in question - and therefore all confessions will be valid from the beginning.

In rare cases, however, it may happen that common error is not verified from the beginning, but arises merely as a result of the fact that many people actually approach a certain putative official. This is the case that Cappello seems to have chiefly in mind here: it is the case, too, on which Bucceroni based his chief argument in favour of his common error de jure interpretation.(54) The example usually given is the following: A strange priest - unapproved and unannounced - enters the confessional in a public church, to hear confessions. As he enters it, there are only a few penitents present. While hearing the confessions of those present, a few more penitents arrive: and in this way more penitents continue to come in groups of one, two or three, so that the priest remains in the confessional absolving for a couple of hours. When precisely is common error realized in this case?

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(54) cf. Casus Conscientiae, Casus 129, n.6. Pp. 171-172.

At the outset, we must admit that common error was not verified from the beginning in this case. We have presupposed that the strange priest's coming was unexpected and unannounced: and the fundament of error (the act of entering a public confessional) was, ex hypothesi, actually known to only a few people. Yet the principle stated above still applies to this case: common error will be verified when the number of those, who have approached the priest for confession, is sufficient to enable one to prudently judge that the greater number in the community know of the existence of this fundament. From the moment that this prudent judgment can be made all the confessions will be valid.

We admit that it is not easy to determine the precise moment when common error is verified in this case: we admit too that, as a result of this teaching, those who have gone first to confession have been invalidly absolved, and those who came later received valid absolution. But these apparent difficulties in the practical application of common error de facto, in this particular case, do not change the position in the least. The chief reason for this, is that the particular case visualized here must be regarded as being of relatively rare occurrence - presupposing as it usually does, a deliberate usurpation of jurisdiction by a priest - and therefore does not pertain to the cases which the legislator primarily had in mind when establishing the law. Secondly, though Cappello holds the contrary,(55) it can easily be shown that the common good does not necessarily demand that the confessions of the first should be valid in this case, just the same as the confessions of the latter. As we have pointed out earlier, it is for the legislator to determine what norms will best

(55) cf. De Sac. II (De Poen). n.340, Footnote 4.

promote the interests of the common good. If the application of a law, when interpreted according to canonical rules, leads in a particular case to a situation such as that considered here, we must conclude that the legislator considers even this position to be conducive to the common good.

Actually the position is both reasonable and intelligible. If the legislator considered that it would be always contrary to the common good to have any confession invalid by reason of defect of jurisdiction, he could have decreed that the Church would supply jurisdiction even in the case of private error. But he has not laid down that the Church supplies jurisdiction in the case of private error. Jurisdiction is supplied only in common error - and this means common error as we have explained it. Obviously therefore, the legislator must have considered the common good to be best promoted, in certain cases, by the invalidity of confession arising from the defect of jurisdiction in the minister, e.g. in cases of private error with regard to the power of the minister. There is no reason why he should not also consider it to be in the best interests of the common good, that the confessions of some should be invalid in the case under discussion, while the confessions of others should be valid. Moreover canonists are not justified in reading the term 'common error' to mean the equivalent of 'private error,' just because the proper signification of the former term involves an effect which they consider contrary to the common good.

Examples of Cases in which Common error is Realized: It will probably be asserted by many that this teaching, which interprets common error as signifying common error de facto, is too strict. Many will probably object, as Jombart did, that if common error is to be interpreted thus, then it will

be only very rarely that jurisdictions will be supplied by the Church in common error. The fact that Cappello's teaching has become fairly widespread and constitutes an extrinsically probable opinion, has given rise to a general belief that the validating effects of canon 209 are all-embracing. In practice it amounts to this that common error is being invoked as providing jurisdiction in practically all cases where confessions have been heard by any unapproved priest. In view of this general attitude, the common error de facto interpretation is somewhat strict. Nevertheless the cases in which it will apply are by no means rare, as the following examples will show.

(1) Titius, a priest, has been duly appointed pastor of a certain parish; he has been notified of the fact by the Episcopal Curia, and the parishioners are aware of the appointment through an announcement made at the Sunday Masses or in the local newspapers. Through ignorance of the law or inadvertence to it, Titius arrives in the parish assigned to him and proceeds to perform the duties of pastor (hears confessions, assists at marriages etc.) without having gone through the legal formality of 'canonical instutition' (Cc. 1443-44). What of all the official functions performed by this pastor?

The announcement at Sunday Masses, or in the newspapers, of the appointment of a new pastor, is a fundament sufficient to justify the parishioners in regarding the priest in question as a real pastor, on his arrival in the parish. When this fundament becomes generally known - when it can be prudently judged that the majority of the parishioners know of that announcement - the requisites for common error are fulfilled, and despite the defect of canonical institution, all the acts of that putative pastor will be valid by reason of

power supplied in common error. This rule holds also, for the appointment of all other public ecclesiastical officials, e.g. bishop, vicar general, vicar capitular, official, judge, etc.: thus a typical case of common error would be had, if a vicar capitular were appointed as a result of an election that was occultly invalid. (Cc. 431, §1, & 148 § 1.)

(2) Titius, a priest, has been appointed pastor in a certain parish, has validly taken possession of his parish and has performed his duties as such for some time. After a lapse of a few years however, he is deprived of his office, e.g. by reason of a sentence of excommunication which has been passed on him, or by reason of a decree of removal by the local Ordinary. Refusing to relinquish his office, he continues to exercise its duties. The parishioners remain in ignorance of the fact that he has been deprived of his office.

Here there are numerous circumstances present which lead the parishioners to believe that he is a true pastor, as, for example, his appointment to the parish, his exercise of the functions of pastor over a period of time: these circumstances are known to all; and ex hypothesi, the community has no reason for believing that he is not still a real pastor. Hence in this case also, common error de facto is verified. This rule applies also to all other officials mentioned above, who have lost or have been deprived of their office occultly, and who continue to exercise it, eithernin good faith or bad. But it applies only as long as the community remains in ignorance of the privation or loss.(56)

(56) NOTE. It is of interest to note that the Sacred Roman Rota has based a decision of 'non constat de nullitate matrimonii' on an application of the principles of common error in circumstances similar to those contemplated here - cf. S. Romanae Rotae Decisiones seu Sententiae XIX (1927) P. 453.

(3) Similar to the above is the case of a priest who has been appointed to an office for a given period of time or a determined number of cases, and who advertently or inadvertently performs functions pertaining to that office after the time appointed has elapsed, or after the specified number of cases has been exhausted.

The public will not usually see the letters of appointment, and hence, as a rule, will not know the limits of a priest's office either as regards time or number. When the priest in question performs actions in excess of his mandate, the community will still have every reason for regarding him as acting lawfully, because a fundament known to all, exists. Common error continues therefore, until such time as the fact of lapse of the appointed time or completion of the stated number of cases becomes generally known.

These three examples were the typical examples of common error as contemplated in pre-Code jurisprudence. The fact that until the 17th century a coloured title was held as essential, necessarily exercised a restricting influence on the number of cases to which the doctrine would apply. From the 17th century onwards, with the growth of the probability of the opinion that a coloured title was not really essential, the application became less restricted: intruders into offices were considered as coming under the benefits of the law, provided the fact of their intrusion was occult. More recently canonists and theologians began to discuss the question of a priest who, on his own authority and without approbation, sets himself up as a confessor, or who is invited by the pastor to hear confessions in a particular church, while the pastor forgets to procure for him the requisite faculties. The following are examples of the application of the common error principles to such cases:

(4) The pastor announces at Sunday mass that two priests from another diocese will hear confessions in the parish church on the Friday following. The pastor forgets to obtain faculties for the priests, who duly arrive and hear confessions in the Church.(57)

Here again there is common error present according to our interpretation, if it can be prudently judged that the majority of the parishioners know of the announcement made by the pastor. If it can be prudently judged that such is the case then all confessions are valid from the outset, even if only one or two people actually approach these priests for absolution.

(5) The application might be pressed still further. Titius, a strange priest - unannounced and unapproved - enters a confessional in full view of a crowded Church, and commences to hear confessions.

The fact that he was seen by all entering the confessional, is sufficient fundament to have all believe that Titius is properly qualified to hear confessions. The absolutions imparted by him will be valid from the beginning, provided it can be prudently judged that the congregation present represents the greater number of the people of the place.

(6) Lastly we have the case referred to above: A strange priest - unapproved and unannounced - enters the confessional in a public church. As he enters it, there are only a few penitents present. While hearing the confessions of those present, a few more penitents arrive: and in this way more penitents continue to come in small groups, so that the priest remains in the confessional absolving for a couple of hours.

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(57) cf. VERMEERSCH, Theol. Mor., III, n.459; cf. also LYDON, Ready Answers in Canon Law, P. 235.

As we noted above, common error is not verified from the beginning in this case. But it will be verified when, from the number of those who have approached the priest for confession, it can be prudently judged that the greater number in the community know that this strange priest is hearing confessions: and from that moment all the absolutions imparted by him will be valid.

These six examples just outlined cover fairly completely the application that common error de facto may have in practice. They show, too, that the scope allowed by this interpretation is not so limited or restricted as might at first be expected. One further point now remains to be treated. We have referred many times in these pages to the error of a community, and to the error of the majority of the members of the community, when attempting to define the notion of common error de facto. It may be well to determine what constitutes a community in this regard - what community is capable, so to speak, of effecting common error.

Community Capable of Effecting Common Error: Explicit references to this point in pre-Code teaching were very few. Implicit references however were abundant. For, from the examples of the officials with regard to whom common error might arise, officials such as pastor, vicar general, bishop, judge, etc., we could conclude that the community in question in each case would be the members of the parish or diocese respectively. D'Annibale(58) makes explicit mention of 'parish,' and it will be recalled that Lequeux(59) considered it sufficient for common error, if the people of a 'district' or 'town' were deceived. More often, authors simply spoke of a 'place.'

(58) cf. Summula Theol. Mor., I, n. 79, Footnote 72.

(59) cf. Sel. Quaes. Jurl Can., Quaes. XIX, n.69, Par. III.

On the strength of this, there can be no doubt that the members of a particular parish constitute a community capable of effecting common error. Further, it can scarcely be regarded as doing violence to the word 'place' if we interpret it with Lequeux as signifying 'district:' under this heading would come the district served by an auxiliary parochial church: hence common error could be effected by the community which constitutes the congregation of an anxiliary church or "Church of ease."

Some modern commentators would be much more lenient. The only limit that Vermeersch,(60) for instance, places with regard to the size of the community, is that it must consist of at least ten people. In this he is followed by Wouters.(61) Aertnys-Damen,(62) though not mentioning figures, assert that error of a small community suffices. Hombart(63) suggests that a community of twenty enclosed nuns should be capable of effecting common error: he makes the suggestion rather hesitantly howevef, and leaves himself open to correction ("Salvo meliori judicio.")

By way of criticism of these views, we would suggest that the question will be solved according to the nature of the community, rather than by the number of members. The doctrine of common error has traditionally been applied to the supplying of power to a public official. If it can be established that an official in a given community exercises a public office, then that community is capable of effecting common error. In the course of the next chapter we hope to establish that a religious society as such, ar an individual province of such a society, is a community capable of effectin

(60) cf. Theol. Mor., III, n.459.
(61) cf. Man. Theol. Mor., I, n.103.
(62) cf. Theol. Mor., II, n.359.
(63) cf. Nouvl Rev. Theol., L (1923) P. 177, Note 1.

common error. With regard to individual houses of a religious Society or province (prescinding from the case of religious houses which are sui juris), we are of opinion, that they are not, of their nature, sufficiently public to enable the Superior in them to be regarded as a public official - and hence the community in such a house would not be capable of effecting common error. We shall meet this question more in detail in the following chapter.

Summary: Such then is the true notion of common error, and the outlines of its application in practice. To sum it up very briefly, there are three main guiding points to be remembered:-

1. There must be present some fundament, cause or fact which of its nature is calculated to deceive people into thinking, that a certain official has been legitimately constituted, and enjoys the requisite power for the fulfilment of official functions.

2. This fundament, cause or fact must be actually known to at least the majority of the members of the community.

3. A moral estimation with regard to the number in error is sufficient. Hence common error is verified if, from the circumstances, it can be prudently judged that the majority in the community actually know this fundament, cause or fact has been placed.

C H A P T E R II.

APPLICATION OF THE PRINCIPLES OF COMMON ERROR.

When we speak of the application of the principles of common error in the present context, we refer not to the individual cases to which the doctrine may apply, but rather to the different categories or classes of juridical power which may be supplied by the Church in virtue of common error. Post-Code canonists have not been in agreement in their teaching with regard to the exact extent to which the defect of power is supplied by virtue of common error. Thus, there has been a certain amount of controversy as to whether the supplying principles apply to delegated jurisdiction - especially to the case of special delegation. Again, though it is the practically unanimous opinion that ordinary 'power' to assist at marriage is supplied, it has been disputed as to whether the principles apply in the case of a priest who has obtained a general or special licence to assist at marriage. A third question raised by a few authors, is whether the principles supply the defect in the case of a person who exercises dominative power. Lastly it could be asked whether they supply the defect of 'power' in a parish priest, in order that he may validly confer the Sacrament of Confirmation as extraordinary minister according to the decree Spiritus Sancti Munera[1] in cases in which the conditions laid down in this Decree are not fulfilled, though they are commonly reputed to be. In the present chapter we shall treat of these four questions in turn.

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(1) A.A.S. Vol. XXVIII, 3. Oct. 1946, Num. 11, Pp. 349-358.

ARTICLE I. - COMMON ERROR AND DELEGATED JURISDICTION.

So far in our treatment of the notion of common error - which in reality amounts to the interpretation of canon 209 according to canonical norms - we have been content to make reference to jurisdiction in a general way. It may be well to examine the term 'jurisdiction' in this canon, to ascertain precisely what its extension is, viz., to determine whether it includes both ordinary and delegated power, or whether it applies to ordinary power of jurisdiction alone.

There can, of course, be no question of the principles not applying to ordinary jurisdiction. It is important to note however, that the term jurisdiction must be taken in its proper signification, as including legislative, executive and judicial power: so that the Church supplies all or any of these branches of jurisdiction, according as the occasion arises and the requisite conditions for common error are fulfilled. Hence besides supplying jurisdiction for the validity of sacramental absolutions (which is the most usual form, perhaps, in which the supplying principles of canon 209 operate), jurisdiction is also supplied to constitute valid laws (e.g. to a putative Ordinary), to grant valid rescripts and dispensations, and to pass valid judicial sentences in the external forum. All this is certain when there is question of ordinary power of jurisdiction. Do the same principles apply with regard to delegated jurisdiction?

We must distinguish here between jurisdictional power that is universally delegated and that which is specially delegated. Universal delegation is had when a superior commits to another all the power attached to his office, or at least all that pertains to one branch of his office. Special delegation is that which is given for a particular case, or a

determinate number of cases.(2) Obviously these two forms of delegation entail different juridical consequences - hence we shall examine the relation between the principles of canon 209 and each of these in turn.

A. Universal Delegation.

The discussion of this question is practically superfluous, for it is clear that canon 209 includes jurisdictional power that is universally delegated within its scope. A few considerations will put this beyond doubt:-

1. Canon 209 uses the word Jurisdictio, without distinguishing between ordinary power and delegated. And where the law does not distinguish, neither should we.

2. Furthermore, pre-Code authorities, from the 16th century onwards, unanimously taught that the principles of common error applied equally to ordinary and delegated jurisdiction.(3) By virtue of canon 6 n.2, the term jurisdiction in canon 209 must be interpreted in the light of this traditional teaching. Hence we conclude that the principles of canon 209 must apply to universally delegated jurisdiction.

3. All post-Code commentators agree in interpreting canon 209 as applying to such universal delegation. This is evidenced by the fact that modern commentaries and discussions on common error seem to concentrate on the case of a priest who hears confessions and absolves, while he does not possess the requisite faculties to do so; and almost invariably, the case considered is not that of a pastor invalidly holding office, but of a simple priest or confessor who has omitted to obtain the required delegation, or whose delegation has for some reason been invalid.

(2) cf. CORONATA, Inst. Jur. Can., I, n.287.

(3) cf. Above. Sec. III, Ch.I, Art. III.

Even Toso, who advocates the view that the Church does not supply jurisdiction, unless the defect is due to an invalid title to an office in the strict sense, admits that It does supply in cases of delegation ad universitatem causarum.(4) His reason for admitting this is, because power delegated ad universitatem causarum provides, as it were, a foundation for the constitution of an ecclesiastical office. His opinion however, with regard to the necessity of an office, as a condition for the operation of the principles of common error, can scarcely be regarded as tenable. We admit that pre-Code canonists very often, or even usually, spoke of an ecclesiastical office in this connection: but that they did not intend to confine the application of the principles exclusively to the case of offices, is clear from the abundant examples of cases, in which they apply them also to delegated jurisdiction. It is much more reasonable to hold that the principles apply to universal delegation, because the common good and public utility would be injured by the invalidity of acts resulting from an invalid general delegation, just as gravely as if the invalidity of acts followed from an invalid title to an office.(5)

B. Special Delegation.

This question may be solved along the same lines as above. The following considerations would seem to indicate that the principles apply even to the case of delegation for one case only:

1. According to canon 209 the Church supplies jurisdiction in common error. As we noted above, the law does not distinguish between ordinary and delegated jurisdiction.

(4) cf. Jus Pont. XVII, (1937) P. 102.

(5) cf. BADII, Inst. Jur. Can., I, n.149.

We may reasonably conclude therefore, that the legislator wishes the canon to apply to all three classes of jurisdiction - specially delegated jurisdiction included.

2. Following the norm of canon 6 n.2, and interpreting the term 'jurisdictio' according to the accepted teaching of pre-Code authors, we come to the same conclusion. For if we except Innocent IV[6] and a few more early authors mentioned by Sanchez,[7] all are in agreement that the principles of the Lex Barbarius apply to delegated jurisdiction. True, they do not all say explicitly that they apply to the case of special delegation. A certain number however, do explicitly state the point, as for instance, Sanchez, Pontius and Lessius:[8] and the fact that the remainder are aware of this, yet do not question or contradict it, adds force to the presumption that their failure to distinguish, signifies their assent to the view that no distinction is to be made between general and special delegation.

A noted opponent of this view however is Toso.[9] Arguing from the traditional notion of common error - and especially from the purpose of the doctrine - he contends that the principles of canon 209 do not apply to delegated jurisdiction for one case only. The primary purpose, he says, and raison d'être of this doctrine, according to the unanimous teaching of authors, was to anticipate and forestall the grave inconveniences and injurious consequences accruing to a particular community, as a result of a series of invalid acts placed by one who was considered a real official, but de facto was not. But such a position could

(6) cf. Apparatus ad c. 22, X, 1, 3.

(7) cf. De Mat. Lib. III, Disp. XXII, n.

(8) e.g. cf. T. SANCHEZ, De Mat., Lib. III, Disp. XXII, n.16; PONTIUS, De Mat., Lib. V, C. XIX, n.11; LESSIUS, De Just. Et Jure, Lib. II, c.29, Dub. 8, n.66.

(9) cf. Jus Pont., XVII, (1937) P. 103.

only arise in the case of an office holder exercising ordinary power, or at most in the case of one who was exercising generally delegated jurisdiction. The inconveniences and evil effects visualized here, could not arise in the case of delegation for one case only - the private good of the parties concerned would be at issue in that case, but not the common good. Therefore, the traditional doctrine did not include delegation for one case under the benefits of the Lex Barbarius.

Against this, however, it should be pointed out that the ratio seu finis legis is not always the safest norm of interpretation. While we admit that the reason for the Lex Barbarius was primarily to forestall the evil consequences referred to by Toso - a fact which we have had occasion to emphasize during the course of this study - it does not necessarily follow that all circumstances, which would not offer an occasion for the realization of these evil consequences, were excluded from the ambit of the application of this law. The law was made for the purpose of avoiding certain grave evils; certain conditions were laid down governing the application of this law. There is no reason to believe that the law would not apply to all cases which measured up to the required conditions, even though in particular cases, the grave evils which originally motivated the law were not imminent. To put this in another form: Because a particular case would not, in itself, constitute a reason sufficient to motivate the legislator to establish a law, it does not follow that a law which is established from other motives, but which also covers this particular case, should be regarded as not applying to this particular case. To our mind, it would seem sufficient, if, in the particular case in question, all the conditions laid down for the application of the law were verified. Thus in the case

of canon 209, if common error, as determined in the preceding chapter, is present, then the conditions of the law are fulfilled, and it would seem to be immaterial whether the putative official is reputed to be authorized to perform the juridical act or acts by reason of an office he is thought to hold, or by reason of general or special delegation he is considered to have obtained.

As a further argument in favour of his view, Toso tries to show that in practice there will never be any need for the supplying of jurisdiction in the case under consideration. But despite the fact that he makes some questionable assumptions,(10) he merely proves that, in practice, it will rarely occur that common error will be verified with regard to the authority of a person who has been delegated for a particular case. This we readily admit.(11) But rarity of occurrence of a particular case should not militate against its benefitting by the principles of canon 209, provided it fulfils the conditions required by that canon, viz., provided common error is actually present. For the particular cases in which these conditions are fulfilled therefore, we prefer to apply the solution stated at the outset.

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(10) e.g. cf. Jus Pont., XVII (1937) P. 104 - "Quod attinet ad incapacitatem delegati, scilicet propter excommunicationem, suspensionem, etc., paucis res expeditur: aut enim censura per sententiam inflicta est, vel declarata, aut minus; si primum, error communis amplius extari non potest, ac proinde Ecclesia jurisdictionis defectum non supplet ...." Is he not assuming too much in saying that common error could not exist with regard to the authority of a priest who has been suspended by a sentence? The general public may never even hear of such a sentence. Besides, the fact could be publicly known in one place, and absolutely occult in another.

(11) NOTE. Cappello adverts to this rarity of cases - cf. De Sac. III (De Mat.) n.671 - "Error communis ubi agitur de hoc aut illo sacerdote perculiariter delegato seu de licentia in casu particulari concessa, vix haberi potest."

ARTICLE II - COMMON ERROR AND ASSISTANCE AT MARRIAGE.

We have seen in a previous chapter(12) that the act of assisting at marriage by a priest, was never regarded by pre-Code authors as an exercise either of the power of Orders or of jurisdiction. It was always regarded simply as an act of official witnessing. The same is true of post-Code jurisprudence. It is accepted by all, that a priest assists at marriage merely in the capacity of a qualified or a legally authorized witness - testis auctorizabilis he is usually called.(13) Despite this however, it is certain that the prescriptions of canon 209 apply to this act of assistance, just the same as to acts of jurisdiction. Treating in turn of the act of assistance at marriage by virtue of ordinary power and by virtue of licence or delegation, the following considerations should prove this assertion.

1. Assistance by Virtue of Ordinary Power.

1. At first glance canon 209 would appear to restrict its validating effects to jurisdictional acts alone: a strict interpretation of the term 'jurisdictio' would obviously engender this impression. But we have seen earlier that as this canon is merely a repetition of a well-established and, to a large extent, well-defined pre-Code doctrine, it must be interpreted according to the norm of canon 6, n.2. In order to understand the full import and significance of this canon, recourse must be had to the teaching of approved pre-Code authors. In our study of the traditional teaching we found that the doctrine applied generally to the supplying of juridical power to a public official, independently of the nature of the power in question in a particular case. With regard to the act of assistance at marriage therefore, we

(12) cf. Above Sec. III, Ch.I, Art.1.

(13) cf. GASPARRI, De Mat., II, n.932.

found pre-Code authors unanimously agreed that the principles of the Lex Barbarius applied to this act. Though the principles of the Lex Barbarius, were usually referred to, by these authors, in terms of the Church supplying jurisdiction, they nevertheless made it very explicit that they intended them to apply also to assistance at marriage: so that, in this matter at least, they placed the act of assistance at marriage on a par with a jurisdictional act. Hence when the ecclesiastical legislator summarised and codified the doctrine on common error - "In errore communi ... jurisdictionem supplet Ecclesia ...." - it must be assumed that he used the phrase in the traditional sense attributed to it in this context, viz., as applying not only to jurisdiction strictly speaking but also to that which was accepted as being on a par with jurisdiction - the act of assisting at marriage.

2. Canon 20 of the Code states: "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 ...." Thus the legislator permits the words of a law to be extended, in certain circumstances, in order to apply to a matter which does not come under the proper signification of the words of this law, and which is not explicitly regulated by another prescription of law. This process is called analogy. The basis of analogical extension as visualized here is a similarity of case and parity of reason; these two considerations demand that matters for which express positive laws are lacking, should be governed by the same rule as is laid down for similar cases.(14) An accidental similarity does not suffice; there must be a fundamental juridical similarity,

(14) cf. BESTE, Introd. In Cod., P. 84.

i.e. an analogy may only be drawn from a law which is made to achieve, in another matter, the same object as it is desired to achieve in the case for which there is no express norm. The question under discussion seems a perfedt example. The Church supplies jurisdiction in common error: the purpose is the common good, viz., to anticipate and prevent the inconveniences and evils, resulting from the invalidity of acts performed by one who is merely a putative official. This is precisely the object it is desired to achieve, and for which an express norm is lacking, in regard to acts of assisting at marriage in common error - to prevent the evils consequent on the invalidity of marriages resulting from the defect of capacity to assist. There is therefore, a complete parity of reason between the two cases. There is also an obvious similarity of case; for both the act of jurisdiction and the act of assisting at marriage are performed by virtue of power attached to the holding of a public office. With such a similarity of case and complete parity of object, there can be little doubting the analogy that exists between the performance of acts of jurisdiction by a putative pastor, and the acts of assistance at marriage by the same putative pastor. By virtue of canon 209 the Church supplies jurisdiction in the first case; by virtue of canons 209 and 20 She supplies the authority to authoritatively assist in the second.(15)

3. If there is lacking an express prescription of law with regard to a particular matter, canon 20 states that a norm must be taken from laws "latae in similibus." It also

(15) cf. CAPPELLO, De Sac., III (De Mat.) n.670. "Nihilominus huiusmodi assistentia maximam habet analogiam cum jurisdictione; idcirco quae dicuntur de jurisdictione, dicenda quoque sunt aliqua ratione de assistentia, ita ut praescriptum can. 209 applicandum sit etiam assistentiae matrimonio ...."

declares that in the same circumstances the deficiency may be supplied by a norm taken from the "praxis Curiae Romanae." The practice of the Roman Curia, therefore, can constitute an official canonical norm: for instance, if a particular interpretation of a certain canon, as contained in a series of decisions of the Roman Rota, would constitute a suitable norm for a matter in which an express ruling is lacking, this interpretation can and must be regarded as an official binding norm. At least one decision of the Sacred Roman Rota has given an interpretation of canon 209 which constitutes a suitable norm for the case under consideration: in this decision, canon 209 is interpreted as supplying authority to a putative chaplain in order that he may validly assist at marriage.(16)

While we do not wish to suggest that one decision of the Rota would constitute a practice of the Roman Curia, it is nevertheless significant that no other decision implies a contradiction of the attitude adopted in this case: and besides, the definitive and confident terms, by which the prescription of canon 209 is applied to the case, are noteworthy.

4. Another element which may attain the status of a recognized canonical norm, in the case where an express pre-Scription of law is lacking, is, according to canon 20, the common and constant teaching of recognised authorities. There can be no doubt that the common and constant teaching of authorities has been, that the prescriptions of canon 209

(16) cf. S.R. Rotae Dec. seu Sent. XIX (1927), Pp. 453 sqq. This decision of "non constat de nullitate" is based on the fact that common error existed with regard to the putative chaplain's authority to assist. In the law of the case (P. 456) we read: "Valide assistit matrimoniis, qua parochus, is qui est parochus putativus, nam "In errore communi aut in dubio positivo et probabili sive juris sive facti, jurisdictionem supplet Ecclesia pro foro tum externo tum interno."

apply also to assistance at marriage.(17) This common opinion of authorities therefore constitutes a norm which must be accepted and followed, since there is lacking, in the case of assistance at marriage by a putative official, an express prescription of law.

From these arguments, drawn from the principles of interpretation laid down by the Code, we may justifiably conclude that, besides supplying jurisdiction in common error, the Church also supplies authority to a putative pastor to validly assist at marriage.

II. Assistance by Virtue of Delegated Power.

We have established that the principles of canon 209 apply also to the act of assistance at marriage, but primarily with reference to ordinary power. It may be asked if the same principles apply to the acts of assistance by one who has obtained a general or special licence to assist. We shall treat of the cases of general and special licence separately.

(a) General Licence to Assist.

By virtue of canon 1096, §1, this question will have reference exclusively to the acts of assistance by *Vicarii cooperatores* or curates, to whom alone the Ordinary or pastor is permitted to give general licence to assist at marriages. With regard to the question itself, it is important to note the striking equivalence placed between jurisdiction and assistance at marriage, both by the Code and by the Pontifical Commission for the Interpretation of the Code, especially with reference to delegation of these powers. Thus the Code,

(17) We give examples of a few who teach this: GASPARRI, De Mat., II, n.936; CAPPELLO, De Sac. III (De Mat), n.670; CLAEYS-BOUUAERT-SIMENON, Man. Jur. Can., I, 363; MERKELBACH, Summa Theol. Mor., III, n.846; MAROTO, Inst. Jur. Can., I, n.694; VERMEERSCH-CREUSEN Epit. Jur. Can., II, n.392; FERRERES, Comp. Theol. Mor., II, n.1075; ARREGUI, Summ. Theol. Mor., n.793; PRUMMER, Man. Theol. Mor., III, n.762.

speaking of those who may assist at marriage, declares in canon 1094 that only the Ordinary of the place or the pastor, or a priest delegated by either of these can validly do so. Similarly, in canon 1096 § 1, it lays down that only vicarii co-operatores can be given general delegation to assist. And by its replies of 28th Dec. 1927, the Pontifical Commission sanctioned the use of the terms delegation and subdelegation with regard to the concession of licence to assist at marriage.(18)

Having established an authoritative juridical basis, such as this, for the equivalence between the granting of licence or power to assist at marriage, and the delegation of jurisdiction, we may justifiably conclude that the principles governing the general delegation of jurisdiction apply equally to the general delegation of power to assist at marriage. But we have seen, in the preceding article, that the prescriptions of canon 209 apply to acts performed by one who is reputed to possess delegated jurisdiction ad universitatem causarum. The prescriptions of canon 209 therefore, must also apply to the acts of assistance at marriage by a vicarius cooperator who is reputed to have general delegation.

Furthermore, not only do commentators regard the act of assisting at marriage as being on a par with jurisdictional acts, but they also regard the granting of licence to assist at marriages as being equivalent to delegation of jurisdiction. Thus Gasparri(19) writes, "..... licet enim assistentia matrimonio non sit actus jurisdictionis, tamen in favorabilibus juxta loquendi usum, actui jurisdictionis aequiparatur; unde verba: delegatus, delegatio ad assistendum, quae verba propria

(18) A.A.S., Vol. XX (1928) Pp. 61-62.

(19) cf. De Mat., II, n.936.

sunt potestatis jurisdictionis." And Cappello - "Nihilominus huiusmodi assistentia maximam habet analogiam cum jurisdictione; idcirco quae dicuntur de jurisdictione, dicenda quoque sunt aliqua ratione de assistentia."(20) And as their teaching is in conformity with traditional doctrine, as is evidenced by the number of pre-Code authorities who taught this same doctrine,(21) we have no hesitation in declaring that, by virtue of canon 6, n.2, the teaching of these post-Code authors is correct.

Very few canonists or theologians would question this teaching. Practically all who discuss the question agree in giving the same answer. One exception however would appear to be Toso. Though this writer explicitly states in one context, that the principles of common error apply to jurisdiction that is universally delegated,(22) he nevertheless seems to imply, in another context, that they do not apply with regard to general delegation to assist at marriage. It may be well to quote his words verbatim:(23) ".... Deinde nunquam Ecclesia supplet defectum mandati Ordinarii vel parochi, in clerico qui matrimonio adsistat; non enim in adsistendo jurisdictionem aliquam exercet, sed tantum Ordinarii vel parochi uti testes qualificati, personam gerit. Proinde sine legitimo mandato nihil agit (Cn.1095,2) et nihil est quod Ecclesia suppleat ad normam canon 209. Si autem supplet quando agitur de loci Ordinario vel parocho,

(20) De Sacramentis, III (De Mat.) n.670; cf. also DE SMET, De Spons. et Mat., n. 118 - "De caetero applicanda sunt hic principia generalia in materia delegationis jurisdictionis. Ita locus esse potest suppletioni Ecclesiae quatenus valida sit assistentia praestita a Sacerdote, qui errore communi reputatur delegatus ...." CLAEYS-BOUUAERT, Jus. Pont XVI (1936) P. 160. M. FALLON, Ir. Ecc Rec. LII (1938) PP. 438-439. JOMBART, Nouv. Rev. Theol. L (1923) P. 172.

(21) cf Above, Sec. III, Ch. II, Art I.

(22) cf. Jus Pont., XVII (1937) P. 102.

(23) Jus. Pont., XVII (1937) P. 105.

non est defectus mandati qui suppletur, sed titulus Ordinarii vel parochi, quo occulte carent: ita ut quoties utilitas publica huiusmodi titulum requirat ad actorum nullitatem vitandam tituli defectum Ecclesia suppleat in omnibus. Sed hoc in officiis ecclesiasticis contingit, non autem in mera substitutione testis."

We do not agree that Toso is correct in contending that when the Church supplies in the case of the Ordinary or the pastor, that it is the title of the Ordinary or pastor that is supplied. It is more correct to say that the Church supplies, per modum actus, the requisite authority or capacity enabling the Ordinary or the pastor to validly assist at marriage. We state this on an analogy with the words of canon 209, which declares that the Church supplies jurisdiction. It does not say the Church supplies a defect of title: it does not say the Church supplies what is lacking in order to validate the possession of a certain office by a particular cleric, in order that he may validly perform the functions of that office; it merely says that the jurisdiction itself is supplied. The necessary power is supplied therefore while the title continues to be invalid. There seems no reason why the same rule should not apply to assistance at marriage. Surely the Church can supply the authority required for validly assisting at marriage, without it being necessary to supply the defect of title in the cleric who assists.

Furthermore, if, as Toso suggests, the Church supplies the defect of title, then the cleric in question, is, for the time being at least, a real official, and performs the acts validly by reason of his office. But the traditional notion has always been that common error never effects any change in the status of the cleric concerned.

Jurisdiction was always regarded as being supplied directly to him at the moment required, without necessitating any indirect or mediate process of concession, involving a change in the real status of the cleric in order to make him, as it were, capable of receiving it and of validly exercising it.

Similarly in the case of invalidly delegated jurisdiction. Here the title will be the act of delegating or commissioning. In common error the Church does not supply the defect of title, i.e. so that the act of delegating is, as it were, validated for the time being; it merely supplies the defect of jurisdiction resulting from the defect of proper delegation.

Consequently, we cannot agree with Toso when he says that, without a legitimate mandate a cleric can never validly assist at a marriage - not even by virtue of canon 209. His reason for this assertion - that the Church does not supply a mandate, but only a defect of title - is not valid. We shall consider a concrete example. We take the case of a curate (Vic. cooperator) who has been given general delegation by the Ordinary, by virtue of a rescript, to assist at all marriages in the parish to which he is assigned: we suppose that the rescript is <u>de facto</u> invalid because of obreption - but this fact is not known to the parishioners. According to Toso, even though the parishioners may be in common error with regard to the authority of the curate to assist at marriages, none of the marriages at which he may happen to assist will be valid - bedause he has not a legitimate mandate from the Ordinary. In other words, the Church does not supply authority when the defect is due to an invalid commission or delegation. But this does not coincide with accepted teaching - that in common error the power or authority required to validly perform certain actions is supplied to the cleric who lacks it, independently of the

cause of his lacking it, viz., whether it be a personal incapacitating defect, or a defect in the person delegating, or a defect in the act of delegation itself. All that is required is, that common error be verified, and that it be within the power of the Church to supply the deficiency of power in the particular case.

There is no reason to believe therefore, that the Church does not supply authority or power that is defective by reason of defect of mandate, any more that that She does not supply the same power that is defective by reason of an invalid title to an office. Hence even if Toso does insist that a delegated cleric, in assisting at a marriage, merely acts as a substitute for the Ordinary or pastor ("gerit personam parochi"), there is no reason why the Church cannot give this cleric the capacity to validly act as substitute in common error. Certainly it is within the scope of the Church's power to supply capacity to a cleric, in order that he may validly act as substitute for the Ordinary or pastor.

(B) Special Licence to Assist.

Having already established that the principles governing jurisdiction, and its delegation, apply equally to assistance at marriage and the delegation of authority to assist, it is only logical to conclude that, what has been said above,(24) with reference to the application of canon 209 to jurisdiction delegated for one case, should also apply to delegation to assist at one marriage. The fact that a few authors deny the application of the principles to the case of delegation for one marriage,(25) does not alter the

(24) cf. Above Art.I.

(25) e.g. cf. TOSO, Jus Pont., XVIII (1938), P.165: CLAEYS-BOUUAERT Jus Pont., XVI (1936), P.161; JOMBART, Nouv. Rev. Theol. L (1923) Pp. 363-364.

position, because the reasons which led us to assert that common error applied even to specially delegated jurisdiction apply equally here.

It is true that the case will seldom arise in practice; but circumstances can be visualized in which it could arise. For instance, if it were announced at public masses on Sunday that a certain priest would assist at a particular marriage on the following Wednesday, there would be sufficient foundation for the people to believe that the priest mentioned, would be legitimately authorized to assist. Hence if the priest in question actually assisted at the marriage, but due to some oversight or misunderstanding had failed to obtain the necessary delegation, there would be common error present with regard to his authority to assist. And in such a contingency, with the conditions for the application of canon 209 thus realized, it would be rather severe and scarcely reasonable, to adopt the opinion holding for the non-application of this canon to the case - and for the consequent invalidity of the marriage.

ARTICLE III - COMMON ERROR AND DOMINATIVE POWER.

Having established that the prescriptions of canon 209 apply to acts of assistance at marriage, we can equivalently state that the application of the supplying principles is not exclusively confined to jurisdictional acts. Is it possible that Canon 209 applies to other non-jurisdictional acts, besides that of assistance at marriage - to acts performed, for instance, by virtue of putative dominative power? In other words, could it be established, on a solid juridical basis, that the Church supplies dominative power in common error? The following considerations may provide a solution to the question.

1. To begin with, we admit that no argument can be drawn from the context, in which canon 209 is found, in favour of the view that this canon intends to include dominative power as well as jurisdiction. Though the heading of the Title,(26) which reads "De Potestate Ordinaria et Delegata," could be interpreted as referring to both the power of jurisdiction and dominative power, an examination of the canons in this title would seem to show that the legislator had not got dominative power in mind. As Cruesen points out, of the fifteen canons included in this title, one (can. 210) deals with the power of Orders - the remaining fourteen either explicitly or implicitly treat of jurisdiction: indeed but for the inclusion of canon 210 the title might well read: "De Potestate Jurisdictionis."(27)

2. But while canon 209 cannot be said to refer directly to dominative power, it may be contended that an analogy exists between this canon, decreeing that the Church supplies jurisdiction in common error, and the matter under consideration here, for which an express norm is lacking. For, let us take the example of a person who has been elected major superior of a non-exempt religious Congregation or Society, but invalidly so, because of illegitimacy of birth(28) - the fact of illegitimacy not being known to the members of the religion. In the course of six years of office, this superior performs many official functions and duties: he receives aspirants into the novitiate; he admits many novices to first profession, and many temporarily professed to perpetual profession: he enters into many contracts on behalf of the Religion, etc. The evil consequences and inconveniences accruing to the religion as a whole and to its individual

(26) i.e. Cod. Jur. Can., Lib. II, Pars I, Tit.V,
(27) cf. CREUSEN, Acta Cong. Jur. Int. 1934, IV, p.185.
(28) cf. canon 504.

members, as a result of the invalidity of so many important juridical acts, are apparent. It is possible that quite a number would pass their whole life, living in a community to which they did not in reality belong; they would not be bound before God by the promises and vows they had publicly made; they would have no real title to share in the spiritual and temporal privileges attaching to membership of that particular religion. The religion as such, would be gravely affected by the nullity of contracts entered into by the putative superior.

To prevent and forestall such injurious consequences, there is no express law stating that, in common error, the Church supplies dominative power to such a Superior. But the parity of reason or object between this case, and that visualized by the law of canon 209, would seem to demand that the norm of canon 209 should be extended to include the case of dominative power also. There are other points too, common to both cases, which denote a definite juridical similarity: in both cases, there is question of the performance of juridical acts: in both cases, the nullity of the act results from the absence of a condition or circumstance, required by reason of positive ecclesiastical legislation: in both cases, it is within the power of the Church to supply the capacity required to effect the validity of the acts. With such similarity of case and obvious parity of reason, it would seem certain that there is verified an analogy of law according to the requisites of canon 20: hence it would seem that, by virtue of canons 209 and 20, the Church supplies dominative power in common error.

Such, in outline, is the chief argument put forward by Creusen[29] to prove his contention, that the supplying

(29) cf. Acta Cong. Jur. Int., IV, P. 185.

principles apply to dominative power. Creusen is the foremost advocate of this view. Very few authors advert to this question, but those who do, all seem to favour the opinion just stated. Maroto(30) favours the application of all the canons of this Title (i.e. Lib. II, Pars I, Tit.V) to the case of dominative power, but bases his teaching chiefly on a false deduction from the rubric of the Title - "De Potestate Ordinaria et Delegata." Coronata(31) holds for the analogical application, as also do Vermeersch-Creusen.(32)

3. Apart altogether from analogy however, it may be quite possible to establish that canon 209 is intended to apply directly to dominative power.

As we pointed out in an earlier chapter,(33) when we speak of the supplying of dominative power, we have two types of officials in mind - (a) Major Superiors of exempt Religions, and (b) Major Superiors of non-exempt Religions. For, it will be remembered, that though major superiors of exempt religions exercise jurisdiction over their subjects, as members of the Church, this does not alter the fact that these superiors exercise only dominative power over these same subjects, as members of the religion. Therefore, the question vitally affects both exempt and non-exempt religions.

Toso would make a distinction between exempt and non-exempt religions with regard to the application of these principles to dominative power, and would restrict the application to those acts performed by a putative exempt religious

(30) cf. Inst. Jur. Can., I, n. 694.

(31) cf. Inst. Jur. Can., I. n. 275.

(32) Epit. Jur. Can. I, n.311. "Quia si certa de re desit expressum praescriptum legis ... norma sumenda est ... a legibus latis in similibus, a generalibus juris principiis' ut can. 20 explicite asserit, principia hoc titulo expressa poteatati dominativae in communitatem ex analogia juris applicari posse censemus."

(33) cf. Above Sec. III, Ch. II, Art. III.

superior. The basis for this opinion is his contention, that the doctrine of common error had the traditional signification, that the Church supplied not only jurisdiction, but also any other power required by a putative official, in order that he might validly perform all the functions of his office - provided that office entailed the exercise of jurisdiction. Thus a major exempt religious Superior exercises the power of jurisdiction: dominative power is accessory to this power of jurisdiction. If he were merely a putative Superior, then jurisdiction would be supplied to him by reason of common error, and, according to the interpretation just given, so also would dominative power, by virtue of its being accessory to jurisdiction.(34)

It could scarcely be held in the case of a major exempt religious Superior however, that dominative power is accessory to his power of jurisdiction. The power which primarily and most fundamentally attaches to his office is dominative: indeed, it is the power of jurisdiction which is added on, which is, as it were, accidental to his office: hence in reality we may say that jurisdiction is the accessory in this case. The conclusion drawn by Toso on the basis of dominative power being accessory to jurisdiction therefore, can by no means be regarded as unqiestionable.

We suggest the following approach to the question as being more in keeping with traditional teaching. Traditional doctrine did not confine the application of the supplying

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(34) cf. Jus. Pont., XVII (1937) P. 102. "In primis certum est, Ecclesiam in errore communi defectum potestatis supplere quod attinet ad omnia et singula acta, sive jurisdictionalia sive non, quando agitur de officio ecclesiastico, cui competat jurisdictionis potestas ordinaria vel ad universitatem causarum delegata saltem in foro interno: nempe ex gr. quoties agitur de Episcopo, aut Vicario generali, aut Officiali, aut Moderatore Generali vel provinciali religionis exemptae.. in officium intrusis vel potestati destitutis propter invaliditatem aut cessationem tituli;" cf. Also P. 100 of same article.

principles to officials who exercised jurisdiction, but rather applied them to the supplying of the juridical capacity, required for the valid performance of official acts, to all putative public officials. As we have noted many times already, the important factor always was that the official should be a public official - independently of whether he possessed the power of jurisdiction or not. Thus we saw in Roman law,(35) that not only was jurisdiction supplied in common error, but also the capacity to act validly as a notary. So also in Canon law, common error was regarded as supplying the capacity to act validly as a notary, and the authority to assist validly at marriages(36) - neither of which functions entail the exercise of jurisdiction, or are necessarily connected with an office to which is attached the power of jurisdiction. Authority to assist at marriage, it is true, is generally associated with the exercise of an office in the strict sense, i.e. as a participation in the power of Orders or jurisdiction, but the office of notary has never been regarded as suchI it has never been closely associated with jurisdiction, nor with a jurisdictional office.

Yet the office of notary has always been looked upon as a public office. To recall but a few who regarded it as such, and who applied the principles of common error to it, we may mention T. Sanchez(37) Suarez,(38) Lessius,(39) Passerinus,(40) Schmalzgrueber(41) and Reiffenstuel(42) -

(35) cf. Above Sec. I, Ch.I.

(36) cf. Above Sec. III, Ch. II, Arts., I-III.

(37) De Mat., Lib. III, Disp. XXII, n.54.

(38) De Censuris, XVI, Sec. V, in prin.

(39) De Just. et Jure, Lib. II, c.29, Dub. VIII, n.67.

(40) De Hom. Stat et Offic. Tom. II, q.87, n.351.

(41) Jus Eccles. Univ., II, XXII, n.10.

(42) Jus Can. Univ., II, XXII, n.268.

certainly sufficient weight of authority to prove that the teaching was well-founded and widely accepted. As we have said already therefore, it can certainly be claimed that in pre-Code jurisprudence power was supplied to all putative public officials in common error, whatever the nature of the required power might have been.

Was it the intention of the legislator, in drawing up canon 209, to change the traditional teadhing on this point? At first glance, the phrasing of this canon would seem to indicate that such was his intention. It must be remembered however, that this canon is but a repetition of pre-Code doctrine, and as such must be interpreted according to the teaching of approved pre-Code authors: on the basis of canon 6, n.2 therefore, it would seem that the pre-Code applications, noted above, still apply. It may be objected that the exclusive mention of jurisdiction in canon 209 is to be interpreted as signifying the legislator's intention, that the principles should no longer have effect with regard to non-jurisdictional acts. But we can reply that pre-Code authors generally spoke of the Church as supplying jurisdiction, when summarizing this doctrine - yet they had no hesitation in applying the principles to provide for the validity of non-jurisdictional acts in certain circumstances. In view of this positive indication to the contrary, it cannot be claimed as certain, that the exclusive mention of jurisdictional power in this canon, signifies the legislator's intention of excluding non-jurisdictional power from the scope of its validating principles. It is at least gravely doubtful if such were his intention. Hence in accordance with the norm of Canon 6, n.4, - "In dubio num aliquod canonum praescriptum cum veteri jure discrepet, a veteri jure non est recedendum" - the accepted pre-Code teaching must be retained. It seems certain therefore, that the principles of canon 209 must be interpreted as supplying

to any putative public official, the power or capacity required by him for the valid fulfilment of his office - always presupposing, of course, that the defect of power can be supplied by the Church, i.e. provided the defect is not due to the absence of a condition required by the natural or divine positive law.

The point now to be decided is, whether a major Superior of any religion can be regarded as a public official, in the sense in which public is used with reference to the doctrine of common error. It will be recalled that in pre-Codd doctrine, there was no recognised opinion by which the principles of common error were expressly applied to the supplying of dominative power as such. The reason for this was, as we have seen,(43) that the 17th and 18th century jurists did not regard the Superior of a non-exempt religion as holding a public office - chiefly because the juridical status of non-exempt congregations was not defined at that period.

In recent times canonists have given some consideration to the question of the precise character of religious Societies. Worthy of special note is Larraona(44) who divides dominative power into two classes, viz., public and private. Arguing from the character of non-exempt religious Societies - especially those of Pontifical Right - a character which is, to a very large extent, public and universal, he contends that the power of governing such Societies must be regarded as public, and in no way to be compared with the authority exercised by the heads of mere private Societies, such as confraternities and pious unions etc. Contending

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(43) cf. Above Sec. III, Ch. III, Art. III.

(44) cf. Acta Cong. Jur. Int. Vol. IV, "De Potestate Dominative Publica in Jure Canonici," Pp. 147-180.

that the religious state is a recognised public state in the Church, and that a religious Society is in many ways placed on an equal footing with a diocese, he concludes that the power of governing such a society must also be looked upon as public power.(45) If therefore, as Larraona contends, the power of ruling in religious societies as such is a public power, then the major Superiors of such societies must be regarded as public officials - and are therefore officials whose official acts would benefit by the supplying principles of canon 209.

This contention of Larraona, however, is not accepted by all. In an article treating of Dominative Power in the Ephemerides Theologicae Lovaniensis,(46) G. Kindt, while not rejecting the above distinction, asserts that it has not been proved. He notes too, that Larraona has not given a definition of what precisely he means by public power, and at least implies that the term public power can only be applied to jurisdiction.(47) It is not our intention to criticise the respective merits of these views here, because even admitting that Larraona's distinction between public and private dominative power is not proven, and admitting the power of jurisdiction to be the only power of ruling which can strictly speaking be called public, the particular point at issue here is not affected. We do not wish to establish that dominative power, as exercised by major Superiors of religious societies, is a public power according to all

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(45) Larraona sums up his thesis briefly thus: "Ex dictis hoc criterium generale enuntiare possumus: quae de potestate publica in Codice et generatim in jure post Codicem dicuntur, nisi ex natura rei vel a textu legis supremo gradui potestatis publicae, i.e. verae jurisdictionis reserventur, intra propriam provinciam et verae jurisdictionis reserventur, intra propriam provinciam et pro gradu characteris publici aliis inferioribus publicis potestatibus, directe vel analogice servatis analogiae normis, applicare debemus." (cf. Acta Cong. Jur. Int. Vol. IV, P. 178.)

(46) cf. Ephem. Theol. Lov. 1942, Fascic 3-4, (July-Dec.) Pp.

(47) cf. Ephem. Theol. Lov. 1942, Fascic 3-4, Pp. 260, 261.

standards, but it would seem that it can be established, that this power is public in the sense required in the present context. This can be shown by a comparison of the public character of a notary's power, with the character of the power possessed by a major religious Superior.

The office of notary was described by Sylvester as a public office, by reason of the fact that it is established by public authority for the purpose of the public or general utility.(48) Analysing the nature of the office it is easy to see the correctness of this description. A notary is appointed by the Ordinary - who participates in the power of ruling in the perfect society, the Church. He is appointed by the Ordinary to perform certain duties pertaining to the Ordinary's office - duties which the Ordinary cannot attend to personally, yet which are necessary for the proper functioning of his office, and therefore necessary for the general good - since that is the primary purpose of the Ordinary's office. Therefore, though there is no jurisdiction attached to his office, a notary nevertheless exercises a public offiod in so far as he participates to a certain degree (as an authorised representative of the Ordinary), in the function of ruling in the perfect society, and thereby of directing the faithful towards their supernatural end.

Comparing the office of a major religious Superior with the foregoing, we can claim that he is constituted by public authority. For, he belongs to a body which has been publicly approved by the Church, and has been constituted in his office in accordance with norms laid down by the public ecclesiastical authority, in the general law of the Code, and in the Society's Constitutions. And there can be no doubt

(48) cf. Summa Sylvestrina, Pars I, v. Excommunicatio III, n.2: cf. also Above, Sec. II, Ch. II, P.

that the office is established for the public utility. It is the major Superior of a religious body who admits novices to profession, thereby involving a transfer of those persons from one recognised ecclesiastical state to another, viz., from the lay to the religious state. A Superior who has power to effect such a radical change in the state of individual members of the Church - a change which involves the assumption of so many new obligations, and the acquisition of so many new rights and privileges - must be regarded as one constituted for the purpose of the public utility. Such a Superior is certainly participating to no small degree, in the general mission of the Church, which is the sanctification of souls, and is sharing with the Supreme Pontiff in the responsibility for the fulfilment of that mission. Consequently just as a notary exercises a public office - though not possessing jurisdiction - by participating in the functions of the Ordinary, so also a major religious Superior, while not possessing power of jurisdiction, must also be regarded as a public official, by reason of the fact that he has been commissioned by public ecclesiastical authority to perform functions, which exercise such a proximate and important influence on the fulfilment of the general mission of the perfect Society.

Whatever views may be held as to the nature of dominative power in religious bodies, therefore, it would seem certain that the Church steps in to supply the defect of this power to major Superiors. It seems very hard to deny that the notion of public utility - and this lies at the root of common error doctrine - is decidedly in question here also. By way of illustration we can cite a few instances to support this contention: In clerical bodies we have the admission of aspirants by the major Superior, their reception into the institute, their promotion to Orders (e.g. Titulo

Missionis), their later attainment of active and passive suffrage; we have also all the juridical acts placed by the major Superior in the realm of administration - entering into contracts, etc. Is not the public utility gravely injured, if all these acts are invalid by reason of the fact that the major Superior invalidly holds office as a result of an occultly invalid election?

To summarise this argument very briefly: Canon 209 must be interpreted according to accepted traditional teaching. Traditional teaching has applied the principles of common error to the supplying of power to all public officials - independently of the nature of their power - the exercise of whose office involved the public utility. The office of major Superior of a religious institute is public in the sense envisaged here, and its exercise certainly involves the public utility. Therefore Canon 209 must be interpreted as supplying dominative power to a major religious Superior, who has been invalidly constituted, but who nevertheless is considered by all to be a real Superior.

4. To conclude then, we may review the foregoing thus: The argument drawn from analogy, by Creusen, may perhaps be questioned by some. If Larraona's distinction between public and private dominative power were definitely and firmly established, then the argument drawn from the fundamental basis of the doctrine of common error, would be placed beyond all doubt. But even prescinding from Larraona' distinction, the evidence seems sufficiently convincing to justify the assertion that, arguing from the fundamental basis of the doctrine, dominative power is certainly supplied in common error.

ARTICLE IV. - COMMON ERROR AND THE CONFERRING OF CONFIRMATION BY THE PASTOR?

By virtue of the recent decree Spiritus Sancti Munera issued by the Congregation of the Sacraments, 14th Sept. 1946,(49) parish priests or their equivalent(50) have the power of validly and lawfully conferring Confirmation under certain conditions. Briefly the conditions required are:- (1) that the persons to be confirmed must be in real danger of death from sickness: (2) that these persons must be actually dwelling within the parish or territory: (3) that the ordinary minister of Confirmation cannot be conveniently obtained. It is not our purpose to treat of the juridical points that might arise with regard to the interpretation of this decree: our sole interest is to determine whether the Church supplies the requisite power to a putative parish priest, to enable him to validly confer Confirmation in the circumstances envisaged here.

To give an example: Canon 157 lays down that the Ordinary who accepts the resignation of a certain office-holder, cannot validly confer the same office on any person who is related to the resigner, in either the first or second degree of consanguinity or affinity. Now, A. resigns from his parish, which resignation is duly accepted by the Ordinary. The Ordinary appoints B. to the vacant parish, but is unaware of the fact that B. is a first cousin of A. (we are supposing that the existence of this relationship between A and B is occult). Consequently the appointment of

(49) cf. A.A.S. Vol. XXXVIII, n.11, 3 rd. Oct. 1946, Pp. 349-358.

(50) cf. Decree Spiritus Sancti Munera I, n.1, where those enjoying this power are specified:- (a) Parish priests having their own territory: (b) Vicarii as described in canon 471 and Vicarii Oeconomi (canon 472): (c) Priests to whom the full care of souls with all the rights and duties of parish priests are exclusively and permanently assigned in a definite territory having its own church.

B to the vacant parish is de jure invalid. Are we to regard all those Confirmations conferred by this parish priest B, in accordance with the above-mentioned decree, as invalid?

To begin with, ex hypothesi, there is common error present. It is obvious therefore, that all sacramental absolutions imparted by this pastor, and all marriages at which he assists by virtue of his office, are valid. Furthermore, we have already seen the purpose of common error doctrine to be, to supply, not only the power of jurisdiction, but also any other power required by a public official in order that he may validly perform the functions of his office. It would seem logical and reasonable to conclude therefore, that in the case of B, the Church supplies the necessary 'power' required by him in order that he may validly confer Confirmation.

The only reservation made, with regard to the supplying of defect of power, is that made by all who discuss the question of common error, viz., that the defect of power is not due to the absence or non-fulfilment of a condition required by the divine or natural law. The Church has no power to dispense from such conditions, neither can She supply the defect caused by their absence. Thus the Church could not supply the power to validly absolve, to one who has been invalidly ordained: neither could She supply the power to validly ordain, to one whose episcopal consecration has been invalid. In the case of a putative parish priest however, his lack of power to validly confirm is not due to the non-fulfilment of any condition required by divine law. While admitting that the ordinary minister of Confirmation has always been a bishop, and granting that the non-episcopal ministers, having the faculty de jure of confirming, have always been of some ecclesiastical dignity, there is no reason to believe that the incapacity of an ordinary priest, with

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regard to the conferring of confirmation, is due to the absence of some condition required by divine law. This is apparent from the fact that ecclesiastical authority does actually delegate to ordinary priests the power to confirm. If an impediment of the divine law existed, whereby an ordinary priest could not validly confirm, then the Church could not remove that impediment, nor dispense from it. That She does, in point of fact, permit ordinary priests to confirm, excludes the possibility of such an impediment. And from the fact that no such impediment exists, and that the Church does grant this power to parish priests, it necessarily follows that She can also supply this power in cases of deficiency.

The case might be favourably compared with that of sacramental absolution. In order that he may validly absolve, a priest requires the power of Orders and the power of jurisdiction - or authorisation. The first is obtained through valid priestly ordination, the second through commission by ecclesiastical authority: and this latter is supplied by the Church in common error. Likewise in order that a parish priest may validly confirm, he must have the power of Orders and authorisation. Again, the first is obtained through valid priestly ordination, the second through commission by ecclesiastical authority: this latter too, can be, and is, supplied by the Church in common error.

When a putative parish priest confers Confirmation therefore, in accordance with the prescriptions of the decree Spiritus Sancti Munera, all the conditions required for the application of canon 209 are fulfilled. There is:- (a) common error - (b) with regard to the power of a public official - (c) and this power can be supplied by the Church. It would be unreasonable and illogical, then, to hold anything other than that the Church does supply this power.

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APPENDIX I.

THE LICIT USE OF COMMON ERROR.

The treatment of the question of the licit use of common error has come to be confined almost exclusively to the case of sacramental absolution. The reason for this, is because the case of sacramental absolution is the most practical - being that which arises most frequently in practice - and also the most important from the viewpoint of the spiritual welfare of the faithful. We shall confine our brief treatment here to this case also, but it is to be understood that the principles enunciated will apply also to other matters in regard to which common error may be realised. As we have seen in an earlier chapter (1) the question refers both to the confessor who knows of his own defect of power, and to the relatively few members of the faithful who may be aware of this defect.

In post-Code jurisprudence the teaching of pre-Code authors is commonly retained. There is abundant evidence to show that a grave cause or grave necessity, is commonly regarded as being necessary to justify a confessor in using jurisdiction supplied by the Church by reason of common error. Thus Coronata,(2) Cocchi,(3) Merkelback,(4) and Vermeersch-Creusen(5) all speak of grave necessity. Wouters,(6) and Aertnys-Damen(7) speak of the necessity of a grave cause, while Maroto(8) and Bouuaert-Simenon(9) require a reasonable

(1) cf. Above, Sec. III, Ch. I, Art. II.
(2) cf. Inst. Jur. Can., I., n.293.
(3) cf. Comm. In Cod. Jur. Can., Lib. II, Pars I, n.134.
(4) cf. Summa Theol. Mor., III, n.586.
(5) cf. Epit. Jur. Can., I, n.322: II, n.157.
(6) cf. Manuale Theol. Mor., I, n.103.
(7) cf. Theol. Mor., II, n.360.
(8) cf. Inst. Jur. Can., I, n.731, 5.
(9) cf. Manuale Jur. Can., I, n.363.

cause. The reason for this general demand for a grave or reasonable cause is to justify the confessor in usurping jurisdiction, or at least in forcing the Church to supply it. As examples of such justifying causes Badii[10] recalls those mentioned earlier by Bargilliat,[11] viz., if confession is necessary in order that a penitent may fulfil a precept, and the penitent cannot conveniently approach another legitimate confessor: if the penitent wishes to gain a special indulgence: if the penitent would otherwise be forced to wait a considerable time for confession. Aertnys-Damen[12] justify the use of supplied jurisdiction in cases where grave inconvenience would be caused to the faithful by the confessor's refusal to hear their confessions, or if many of the faithful could not otherwise obtain confession on the occasion of a feast. All these may be regarded as cases in which the use of supplied jurisdiction will, in practice, be lawful.

With regard to the use of supplied jurisdiction, by those of the faithful who may know of the defect of jurisdiction in the minister, the general principle may be laid down that, while a justifying cause is needed, this cause need not be as grave as that required by the minister in the same circumstances. Hence authors require a <u>just</u> cause[14] on the part of the faithful: this just cause is present when it would be really difficult or gravely inconvenient to approach a priest who is a legitimately constituted confessor. It is to be noted that a person who, without a just cause, approaches a priest, whom he knows to be incompetent, sins gravely and hence invalidly receives absolution, by reason of lack of due dispositions.[15]

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(10) cf. Inst. Jur. Can. I, n.149.

(11) cf. Above, Sec. III, Ch.I, Art. II, p.97

(12) cf. Theol. Mor., II, n.360.

(13) e.g. cf. <u>CORONATA</u>, Inst. Jur. Can.I, n.293 - "Ad licite utendum jurisdictione quam supplet Ecclesia in errore communi communiter auctores gravem necessitatem requirunt. Leviorem causam admittunt communiter auctores sufficere pro fidelibus potentibus quam pro sacerdote utente."

(14) e.g. cf. <u>WERNZ-VIDAL</u>, Jus. Can. II, n.382: <u>JORIO</u>, Theol. Mor. III, n.512: <u>BOUUAERT-SIMENON</u>,Manuale Jur.Can.I,n.363.

(15) cf. <u>BOUUAERT-SIMENON</u>, Manuale Jur.Can.I, n.363, Footnote 4: "In Sacramento Poenitentiae defectus justae causae obstare posset valori absolutionis, non quidem ob defectum jurisdictionis sed ob indispositionem poenitentis."

APPENDIX II.

PENALTY ATTACHED TO THE ILLICIT USE OF COMMON ERROR.

Canon 2366 reads "Sacerdos qui sine necessaria jurisdictione praesumpserit sacramentales confessiones audire, est ipso facto suspensus a divinis; qui vero a peccatis reservatis absolvere, ipso facto suspensus est ab audiendis confessionibus." The question of interest here is, whether a priest who unlawfully hears confessions in common error (according to the principles laid down in Appendix I.) incurs the suspensio a divinis mentioned in this canon.

Various views are held by canonists on this question. For those who hold that a priest commits no sin, or at most a venial sin, by knowingly hearing confessions in common error without a justifying cause,(1) there can of course be no question of incurrence of this suspension: for in the absence of grave sin all the conditions required for incurring a censure are not fulfilled. Other authors favour the view that a priest who absolves in the circumstances considered here, does incur the censure laid down in canon 2366, by reason of the fact that he commits a grave delict in so doing. Among these we may mention Wernz-Vidal,(2) Wouters,(3) and Chelodi.(4) Many authorities, however, while admitting that such a priest sins gravely, nevertheless contend that he does not incur the censure. The principal basis for this contention is that a priest who knowingly absolves in common error,

(1) cf. CAPPELLO, De Sacramentis II (De Poen.) n.343,3: In this context Cappello describes as probable, the opinion holding that it is only venially sinful for a priest to absolve in common error without a justifying cause.

(2) cf. Jus. Can., VII, n.501.

(3) cf. Manuale Theol. Mor., I, n.103.

(4) cf. Jus. Poenale, N. 89, 3.

even without a just cause, does not absolve sine jurisdictione, for by virtue of common error the Church supplies jurisdiction enabling him to validly absolve: since he does not absolve sine jurisdictione therefore, he cannot incur the penalty mentioned in canon 2366. Among others, Coronata,(5) Cerato,(6) Jorio(7) and Woywood(8) favour this view.

This latter view is a very reasonable interpretation of the words of the canon in question and certainly enjoys intrinsic probability. And by virtue of canon 2219 § 1 - "In poenis benignior est interpretatio facienda" - it would seem to be certain in practice.

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(5) cf. Inst. Jur. Can., IV, n.2077.

(6) cf. Censurae Vigentes, n.113.

(7) cf. Theol. Mor., III, n.520, R. 28.

(8) cf. Hom. & Past. Rev. XXXVIII (1938) "Unauthorized Administration of the Sacraments." P. 849.

APPENDIX III.

COMMON ERROR AND ABSOLUTION FROM RESERVED SINS.

In discussing the question as to whether a priest can validly absolve from reserved sins, by virtue of jurisdiction supplied in common error, two important points must be kept in mind. We have had occasion to mention them often in the course of this study, but their implication are brought out more forcibly in the present context. They are:- (1) Common error must not be confused with the state of mere negative ignorance.(1) (2) Common error which arises as a result of vincible or culpable ignorance of the law, does not benefit by the principles of canon 209.(2) Taking these two points in conjunction we shall be able to arrive at a satisfactory solution of the question proposed here.

In order that an unapproved priest may validly impart absolution (with regard to unreserved sins), it is necessary that the people commobly regard him as a legitimate confessor, by virtue of the fact that some public fundament or cause has been placed which, of its nature, leads them to the conclusion that he possesses the requisite power to do so. It is not sufficient if the error, with regard to the priest's power to absolve, arises as a result of absolute ignorance of the law requiring priests to have obtained authorisation, in addition to the power of Orders, before commencing to hear confessions. If the ignorance were inculpable - or probable, as earlier canonists called it(3) - then common error arising from it would benefit by the supplying principles. But ignorance of the law under consideration here, could scarcely be regarded as inculpable or probable; for with De Angelis and Icard,(4) we may assert that such ignorance could not be

(2) (1) cf. Above, Sec. III, Ch. III. P. 137 - 139
(1) (2) cf. Above, Sec. IV, Ch.I, Art.I, P. 161 - 162
(3) cf. Above, Sec. III, Ch.III, Pp. 133 - 139
(4) Cf. Above, Sec. III, Ch. III, P. 138

probable, unless there was question of an obscure or doubtful law: in the present case the law is clear and unambiguous.

The same is true of absolution from reserved sins in common error. Mere ignorance of the law, that an ordinary confessor requires special power to absolve from certain sins, is not sufficient basis for common error as envisaged in canon 209. On the other hand however, if, by reason of some fundament or cause which has been placed, the people justifiably conclude that a particular confessor does enjoy this special power, then common error with regard to this particular power is present, and the imparting of absolutions from reserved sins by this confessor will be valid. Thus, for example, the absolutions from reserved sins imparted by a priest, who had been invalidly - but occultly so - appointed to the office of Canon Penitentiary, are all valid. In order that the principles of canon 209 may apply, therefore, common error must be realised with regard to the precise power, required by a particular official for the valid exercise of his office.

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