

Defect of Sacramental Intention: The Background of *Apostolicae Curae*

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In 1896 Pope Leo XIII's *Apostolicae Curae* declared definitively that the Anglican orders of the past and of his own day were 'absolutely null and utterly void'. His principal reason was defect of sacramental form, but to that was added a second reason, namely, defect of sacramental intention. In other words, the sacrament of holy order was not conferred among Anglicans on account of the deficient form found in their Ordinal dating from the reign of King Edward VI, but also on account of a defective internal intention to perform the sacrament on the part of Anglican ministers. Leo wrote,

With this intrinsic *defect of form*, then, there was joined a *defect of intention*—of that intention which is likewise necessary for the existence of a sacrament.

Concerning the mind of intention, inasmuch as it is in itself something interior, the Church does not pass judgement: but in so far as it is externally manifested, she is bound to judge of it.

Now if, in order to effect and confer a sacrament, a person has seriously and correctly used the due matter and form, he is for that very reason presumed to have intended to do what the Church does. This principle is the basis of the doctrine that a sacrament is truly a sacrament even if it is conferred through the ministry of a heretic, or of one who is not himself baptized, provided the Catholic rite is used.

But if, on the contrary, the rite is changed with the manifest purpose of introducing another rite which is not accepted by the Church, and of repudiating that which the Church does and which is something that by Christ's institution belongs to the nature of the sacrament, then it is evident, not merely that the intention necessary for a sacrament is lacking, but rather that an intention is present which is adverse to and incompatible with the sacrament.¹

So the bull takes the view that whereas the performance of a sacrament requires that its minister intend to do what the Church

does, in the case of Anglican orders the ministers have lacked this intention and instead have had an intention exclusive of the sacrament. This is the 'defect of sacramental intention' with which we are principally concerned in this essay, and its reality is deduced by the Pope from the change in rite introduced by the Anglicans in the reign of Edward VI, a change which he says was made with the clear purpose of repudiating something which the Church does, something that belongs to the very nature of the sacrament on account of Christ's institution of it. In other words, the fact that a rite was introduced with the purpose of excluding something essential to the sacrament of order makes it evident that the ministers who used the rite also had an internal intention to exclude that same essential element and so intended something contrary to what the Church does. And given that intending to do what the Church does is required for the validity of the sacrament (as is defined by the Council of Trent), in the case of Anglican orders no valid sacrament is conferred.

In this essay I shall explore this notion of 'defect of sacramental intention' in more detail by examining the opinions of some of those on the theological commission that looked into the whole question of Anglican orders prior to the Pope's decision. This commission met on twelve occasions in 1896, meeting first on 12 March and for the final time on 7 May. It was unable, however, to reach a common view. Then the Pope had his personal theologian, Fr Raffaele Pierotti OP, make a summary of all their position papers, to which Pierotti also added his own opinions. This document was then given to the Holy Office on 28 May for the latter to make a recommendation to the Pope. It was this process which resulted on 13 September in the publication of *Apostolicae Curae*.² I shall now examine what certain of the theologians involved had to say on the matter of sacramental intention, and thus explore its theological content in more detail.

The first member of the commission I shall consider is the Jesuit Italian theologian, Fr E. M. De Augustinis.³ De Augustinis took the view not only that a definitive ('doctrinal') decision in favour of the nullity of Anglican orders had never been taken, but also that these orders were in fact valid. He held both that the first ministers of Anglican ordinations were themselves validly consecrated bishops, and that the Anglican rite itself was valid. He held moreover that the ministers had an intention sufficient for the validity of the act of ordination. De Augustinis presumes that a minister of a valid sacrament must have the intention of doing what the Church does. To this presumption, De Augustinis and all Catholics were bound, as we have said, by the Council of Trent. So De Augustinis began his

argument for a sufficient intention on the part of the chief minister in question, namely Barlow, the consecrator of Abp Parker, by determining what is *not* required if one is to intend to do what the Church does. De Augustinis states that it is *not* the common teaching of theologians that a minister must intend the *purpose* or *effect* of a sacrament. Error about the purpose or effect of the sacrament is not incompatible with a true intention to confer the sacrament, in which case the sacrament is validly conferred. In support of this he quotes St Thomas Aquinas: even if a minister lacks faith concerning the sacrament he confers, 'despite his lack of faith he can intend to do what the Church does, even if he judges that this is nothing. An intention of this nature is sufficient for the sacrament.'⁴ The faithless minister, even if he does not intend the purpose or effect of the sacrament, still performs the sacrament by his intention to do what the Church does.

De Augustinis asserts this to be defined by Trent. In support he cites St Robert Bellarmine's dismissal of those who had asserted that Trent defined that for validity the minister must intend not only the *act* of a sacrament itself but also the *end* (that is, the purpose) of the sacrament for which the sacrament was instituted. Bellarmine pointed out quite correctly that Trent in fact only taught that the minister must intend to do what the Church *does*. It did not say (as Bellarmine's opponents seemed to suppose) that the minister must intend to do what the Church *intends*. That is to say, the minister need only intend the act of the sacrament itself, not its end or purpose. In proof of this, Bellarmine cites the practice of the Church in not rebaptising Pelagians, Zwinglians or Calvinists, even though none of the ministers of their baptisms would have intended the effect of removing original sin.

De Augustinis is also aware of the fact that heretical ministers would have conferred sacraments not simply without intending the effect that the Catholic Church intended but also according to the different positive intention of their own communities. St Thomas based the view given above that the minister who does not believe in the effect of the sacrament still validly performs it on the fact that the faithless minister still knows that the *Catholic Church* intends to perform a sacrament by means of the external action. But what if he intends to do what is done by his co-religionists, be they Pelagian, Zwinglian or whatever? De Augustinis again appeals to Bellarmine. The crucial fact is that the minister is concerned with the Church of Christ. What is crucial with regard to validity is *not* the fact that the minister fails to make the connection between the Church of Christ

and the Church of Rome. Though De Augustinis does not say so, at least at this point, this was also the common view among theologians. It was enough for the minister to intend to do what the Church of Christ does, whatever visible grouping he might happen to identify with that Church.

So a distinction has been made between intending to do what the Church *does* and intending to do what the Church *intends*, between intending the *act* of the sacrament and intending its *effect* or *purpose*. It is only required for validity that one intend what the Church does (not intends), intending only the act of the sacrament (not its purpose). De Augustinis holds that in the case of Anglican ordinations, even if the purpose or effect is not intended, the act of the sacrament itself is, and is so by way of an intention to do what the Church does. Even if it is not intended to ordain priests for the purpose of offering the sacrifice of the Mass and effecting transubstantiation (the purpose or effect of the sacrament of orders), there is still the intention to do what the Church does. De Augustinis takes texts such as the preface to the Ordinal ('It is evident ... that from the Apostles' time there have been these Orders of Ministers in Christ's Church; Bishops, Priests, and Deacons ... And therefore, to the intent that these Orders be continued ... in the Church of England ...') as plain evidence that there would have been the intention on the part of the ministers to do what the Church of Christ does. And so, together with the validity of form and the assured continuation of the apostolic succession, the validity of Anglican orders followed.

De Augustinis makes interesting use of a decree of the Holy Office issued on 18 December 1872 with regard to baptisms administered by heretics who beforehand warned the recipients that the rite would have no interior effect in the soul, at the same time mocking Catholics for believing in such effects. The Holy Office declared that such an explicit declaration did not however make the baptisms of doubtful validity. It decreed: 'For despite the error as to the effect of baptism, the intention of doing what the Church does is not excluded.'⁵ On the basis of this decree, De Augustinis takes it to be theologically certain that in the case of a minister of Anglican ordination who announced publicly beforehand that he did not intend to ordain a priest to offer true sacrifice, that declaration would not deprive him of the intention of ordaining a priest or doing what the Church does in ordaining priests. But what De Augustinis fails to do is to distinguish between (i) an error concerning the sacrament by which one fails to intend what the Church intends, and (ii) a further positive will deliberately not to will what the Church intends (a

further positive will with implications, as we shall see, as to whether doing what the Church *does* is in fact willed at all). This distinction appeared, however, in other position papers of the commission members. Moreover, though he held to the end of the commission his view that the intention was sufficient for validity, he modified his opinion on form to one of only probable or more probable validity, taking the final view that the validity of Anglican orders was in fact doubtful.

The eminent French Church historian, Mgr L. Duchesne, was among the other members of the commission.⁶ He too concluded that, though the intention was sufficient for validity, Anglican orders were ultimately of doubtful validity, that is, only possibly but not certainly valid. Having argued that the ordinations of bishops and priests (but not deacons) were celebrated by Anglicans according to a rite objectively sufficient for validity, Duchesne turned to questions of intention. Despite its objective sufficiency for validity, Duchesne held the rite to be, among other things, influenced by Protestant views on the sacraments, the sacrifice of the Mass, and the Christian priesthood. These however did not mean the suppression of all hierarchy, did not mean the confusion of the orders of bishop, priest and deacon, and did not mean the abolition of any rite of ordination. No, says Duchesne. In fact the preface to the Ordinal (which I quoted in part above in connection with De Augustinis) indicated precisely the opposite. Duchesne notes its will to conserve both ancient orders and ordination. Whatever personal, more extreme opinions might have been held by its authors and the authors of the Ordinal itself, it is only what is expressed in the documents themselves that is of account, says Duchesne.

Having established something about what I have previously called the 'purpose' of the rite or Ordinal, Duchesne goes on to the intention of those who used it, namely, the ministers of the sacrament. Duchesne deduces that the minister must evidently intend to ordain priests such as existed continually from the time of the Apostles onwards. Duchesne asserts that this is the 'essential element' in the minister's intention, differing in no way from that of a Roman or Greek bishop. At this point, however, he introduces the distinction De Augustinis failed to. That distinction is the one between mere error (the minister may think for example that nothing is conferred by the sacrament) and a positive act of the will by which the minister says that it is not his will to administer a sacrament, perform a sacred rite, or do what the Church of Rome does. For Duchesne the crucial thing is that the minister intend to do by means of the rite what the Church

does and has done from the time of the apostles. As long as there is only that single act of will, the public or private opinions of the minister or the teachings of his Church, such as on the powers transmitted in ordination, are of 'little relevance'. What would be of relevance, presumably, is a further positive act of the will rather than mere erroneous opinion. Duchesne asserts, however, that intention can only be judged by external actions. In a particular case there might be 'precise and conclusive' evidence of a such a positive intention contrary to that which the external action itself implies. Such a particular case could then be discussed. However, if a minister has celebrated his traditional rite of ordination (which, in this case, Duchesne takes to be objectively sufficient) without manifesting any such act of will, one can only suppose that he intends to ordain. As long as what the Anglican Ordinal lays down is done, one must admit sufficient intention for validity. Duchesne seems to suppose that among Anglicans there was generally only error concerning the effect of the sacrament. There may be particular cases of something more, but first evidence must be adduced in each case, so that each case can be judged individually. This procedure does not differ of course from what one would do in the case of Catholic ministers.

Duchesne draws his distinction between error and positive will directly and explicitly from the *De Sacra Ordinatione*, published two years previously and written by the distinguished canonist, Mgr Pietro Gasparri. 'Mgr Gasparri gives a very good résumé of it,' Duchesne says. Gasparri was a yet more distinguished expert on the sacrament of marriage, and it was largely in connection with marriage and its indissolubility in particular that the distinction has had a significant history.⁷ The Church had traditionally treated non-Christian marriages as true and valid marriages, and Pope Innocent III determined with regard to polygamous non-Christians living in the Christian Kingdom of Jerusalem, that on conversion to Christianity they would be taken to be validly married to a single wife. This decretal reinforced Christian presumption of the validity of non-Christian marriages, even where divorce or polygamy was practised. The fact that potential converts felt thus discouraged from conversion, on account of their being held to be bound in practice to the first of their wives, suggested to Jesuit missionaries working in Asia from the sixteenth century onwards, as well as to their theological colleagues, that marriages were invalid when formed where divorce was possible by law or custom, so that converts might contract a new but valid marriage. Other Jesuits, however, such as Juan de Lugo, maintained the conventional line. He discussed the

case of Coptic non-Catholic Christians who married in the belief that their marriages could be dissolved for specified reasons. De Lugo concluded that such a marriage was only null if they did so because they knew divorce to be lawful and would not have married otherwise—in such cases there was an implicit intention to exclude indissolubility, a limitation of their general intention to marry. But unless such a limiting intention was present, those marrying would be doing so with a general (unlimited) intention to marry, which would implicitly contain the will to marry indissolubly, even if they were in error over indissolubility. It was thus that de Lugo guarded the presumption in favour of validity. Innocent III's decretal was to remain the law: in 1634, the Congregation for the Propagation of the Faith ruled against the missionaries that marriages in Japan were presumptively valid, and in 1669 the Holy Office ruled that it was inexpedient to define the matter any further.

In 1754 Pope Benedict XIV declared null a marriage between two Calvinists who had made a marriage contract which allowed for dissolution if the wife failed to remain 'decent and pure'. The reason the Pope ruled in this way was because the intention to exclude indissolubility was a constitutive part of what was contracted. In other cases where there was intention to exclude indissolubility, the same declaration had not been granted, so the Pope said, because this intention had not been made part of the agreement in those cases. However, in 1877 the Holy Office made a judgement concerning the inhabitants of the mountain regions of the American diocese of Seattle, Washington. The Methodist ministers of the area believed that marriage was dissoluble, and Catholic missionaries found that some people married before the Methodist ministers for no other reason than that they believed they could thereby contract a marriage that was dissoluble. While recognising Benedict XIV's teaching that an invalidating intention was only such if reduced to an agreement, the Holy Office also recognised that a 'common and almost universal persuasion' in favour of divorce, while not making valid marriages impossible, might also make it possible that marriage might be contracted with an intention to exclude indissolubility, an implicit if not an explicit invalidating contractual condition. By investigating each case the bishop could determine from such things as the 'arguments, presumptions, and morals of the region' whether there was a definite will to contract only conditionally. Things had in fact moved beyond Benedict XIV: 'custom of divorce' might now be taken into account in determining whether there was an intention to exclude indissolubility, as much as Benedict's explicit condition set down in

the agreement.

Gasparri approved of the Holy Office's decision. And so when he came to publish his celebrated *De Matrimonio* in 1891, five years before *Apostolicae Curae*, he wrote that an intention against indissolubility nullified marriage. This intention was internal, a 'mental condition' against the substance of marriage. Evidence for this mental state is in no way limited to an explicit agreement—this reflected the influence on Gasparri of the 1877 decision of the Holy Office. Gasparri was also clear that 'a simple error of law' was no cause of invalidity. Provided one had the simple intention to enter a true marriage as instituted by God, an error about the nature of marriage was not invalidating, but only a positive act of the will against something essential. However, because of the presumption in favour of validity, one will presume that there is no more than error until a positive act of the will has been proved to be fact. It was Gasparri's analysis which was to become accepted, despite the fact that the Holy Office had once more appealed, in the same year as the appearance of *De Matrimonio*, back to the older principle that an intention was not invalidating unless reduced to an agreement. In 1913 a rota judge in the celebrated case Noonan dubs 'Castellane-Gould' invoked Gasparri's distinction. Two years later another judge in the same case spoke of the 'common opinion' that if someone marrying 'by his positive will simply and absolutely intends a dissoluble bond, the marriage is null'. Since 1912 Gasparri's principle had also been present in the draft Code of Canon Law, which was drawn up by Gasparri himself. The Code was approved in 1917 and came into effect the following year. Canon 1086 read: '1. Internal consent is presumed to be in agreement with the words or signs used in the marriage ceremony. 2. But if either party or both parties by a positive act of the will exclude marriage itself or all right to the conjugal act or some other essential property of marriage, the parties contract invalidly.' The 1932 and final edition of *De Matrimonio* cited in favour of the new law the Holy Office's instruction of 1877 and some of the rotal opinions given in the Castellane-Gould case. The presumption, however, was left by Gasparri in favour of validity and the presence of mere error rather than a positive act of the will: such an invalidating act of the will always needed to be proved in each case.

Gasparri was not only the great expert and architect of the Church's law on the sacrament of marriage: he was also a member of the commission which investigated Anglican orders back in 1896.⁸ His final opinion was that the orders were probably invalid, based on

arguments concerning the rite itself and intention. As for the latter, Gasparri judged it to be probably but not certainly defective. He was aware that defect of intention was the argument most often used in his time against the validity of Anglican orders, as indeed it was until *Apostolicae Curae* shifted the emphasis to form. Gasparri's starting-point is that if it can be proved that Anglican bishops did not have the proper internal intention to ordain at some point in Anglican history, then invalidity would be entailed. Investigating whether this defect had been proved in the external forum, he first considers arguments in favour of validity before considering arguments against. From the preface and the Ordinal he concludes that the ministers would have had the intention to do what the Church does, which of course is sufficient for validity, unless it could be proved otherwise that the ministers did not share the view of the Ordinal on this point. Another argument to the same conclusion was that ordinations performed according to this Ordinal were regarded, in the reign of Mary I, as invalid but not those performed by schismatic or heretical bishops according to Catholic rites, treating the ordinations declared invalid as such only on account of rite and not on account of intention. Moreover, Paul IV seemed to do the same.⁹

On the other side, Gasparri considers the argument that by using an Ordinal created by heretics with heretical intentions, the minister is clearly shown to be not intending to do what the Catholic Church does. Gasparri refers to Pope Zacharias, who excused a priest for mispronouncing the form of baptism since the priest had no desire of introducing error or heresy: the baptism was valid. Gasparri draws out the implication from the judgement that if a priest *did* change the form 'out of the desire of introducing an error or heresy', the change would be a clear sign of the minister's intention not to do what the Church does, and the baptism would be invalid. Other theologians are quoted, including St Thomas, who says that if one intends by the change to introduce another rite not accepted by the Church, the sacrament would seem to be invalid, because the minister does not seem to intend to do what the Church does.¹⁰ The argument would be that Anglican orders are invalid because the Ordinal was composed to introduce error or heresy by a new rite. Gasparri takes the argument to be plausible but not conclusive. First of all, it would invalidate all sacraments where non-Catholic rites are used, something Gasparri is not prepared to admit. Furthermore, it is not necessary for the validity of a sacrament to intend to do what the Church does in the sense of using only rites used in the Catholic Church. Gasparri takes it as sufficient that the minister intend to do with a non-Catholic rite what

the Catholic Church does with a Catholic rite. Can one then necessarily conclude in the external forum from use of a non-Catholic rite that the minister does not have the intention of doing what the Catholic Church does? To answer this question, a question pertaining to revealed theology, Gasparri says that inspiration can be taken solely from the *doctrine and practice* of the Church, which is the guardian of Christ's will in the sacraments, and all a priori theories must be left aside.

Gasparri turns first to how the Church has dealt with questions of the validity of heretical or schismatic baptism. In these cases, he says, the Church has been concerned with only one thing: whether the matter and form were exactly observed. If these have been observed, that was the end of the matter without further attention to other differences: the baptisms were valid. If form or matter or both were not observed, they were invalid, but by reason of defect in the rite (form, matter or both) rather than in intention. In support Gasparri quotes a reply of the Holy Office from 1830, where it is only essential matter and form that are at issue and intention is not mentioned. Gasparri then says that the same can be said of ordinations: the Holy See had in fact also declared valid the orders of several heretical or schismatic sects which had clearly suppressed or changed Catholic rites, replacing them with ones coloured by heretical ideas, *but which had nevertheless retained the essential matter and form*. Gasparri concludes that a change in rite creates only the presumption in the external forum that the minister does not have the intention of doing what the Church does. This, he says, is what St Thomas meant in the quotation above, and no more. This presumption can on occasions give way to stronger presumptions which prove that the minister *did* have the intention of doing with his rite what the Church does with its own rite. An example of such a stronger presumption would be conservation of the proper matter and form. However, if there was indeed change rather than conservation on this point, one could conclude to a defect of intention, but that would be superfluous, says Gasparri, because one would already have found the sacraments invalid on the ground of the rite used (in other words, defect of form, matter, or both). Such a defect in the rite is invalidating, even if a minister used it with the (correct) intention to do what the Church does.

Having laid out the doctrine and practice of the Church, Gasparri now returns to the question of whether the change in rite in Anglican ordinations meant that the ministers did not have the intention of doing what the Church does: how in this particular case do the doctrine and practice of the Church apply? The change in rite

gives us first of all the *presumption* that the minister does not intend to do what the Church does. Next however we must look to see whether the essential elements of ordination have been conserved. On the one hand, if they have been conserved, then a presumption in favour of validity will prevail in the external forum. On the other hand, if they have not been conserved, the presumption in favour of defect of intention will remain, but invalidity will have been established on the basis of the rite, rendering concern with the minister's intention superfluous. The whole thing then will turn on defect of the essential form or matter. In the case of the Anglican Ordinal, Gasparri in fact took the rite for the diaconate to be 'probably sufficient' for validity, that for priesthood to be 'barely possible' for validity, and that for bishops to be 'seriously probable' for validity, helping him towards his final verdict on Anglican orders as one of probable invalidity.

Gasparri then considers another argument for defect of intention, where it is deduced not from changes in the rite but from the doctrine of the Anglican Church of which the ministers of the sacrament were representatives. The ministers will not have the intention at least of doing what the Church does, because their intentions will have been determined by the doctrines of their Church, which exclude Catholic beliefs on the Mass and the sacrament of order. Gasparri recognises the strength of this argument with regard to Barlow, the consecrator of Parker, who rejected the sacramental nature of order and the reality of sacramental character. However, he does recognise the difficulty in determining the doctrine of the Anglican Church both in the past and in his own day on such questions as the sacrifice of the Mass, but he does conclude that at the end of Edward's reign and during that of Elizabeth, the Anglican Church did indeed reject the sacrifice of the Mass. Even if the Anglicans were reacting against abuses, they probably went too far in their reaction, as seems to be shown by the obvious meaning of the Anglican Article XXXI ('the sacrifices of masses ... were blasphemous fables, and dangerous deceits') and the surrounding facts, such as the wide liturgical changes (for example, the destruction of altars). But how far do such heresies vitiate the intention of the minister of ordination?

Everyone admits, Gasparri says, that heresy does not necessarily bring about invalid sacraments, and, if valid, sacraments will not presuppose a defective intention. Examples are the Nestorians and Monophysites and, at least as far as baptism is concerned, Gasparri takes the matter to be defined by Florence and

Trent. In the case of orders, however, does a denial of the essential truth of the sacrament fatally undermine the general intention of doing what the Church does? The question is of course relevant to all the sacraments, and once more Gasparri turns to the *teaching and practice* of the Church for illumination. He invokes the example of baptism where warning is given beforehand that there will be no internal effect in the soul, the very same example De Augustinis had used in favour of the validity of Anglican orders. The answer is, of course, that their error did not exclude the *intention of doing what the Church does*. Likewise, on the question of the marriage of a Jew who accepts the reality of dissolution, he quotes Innocent III, and on the marriage of Calvinists Benedict XIV, both upholding the validity of such marriages despite erroneous belief concerning indissolubility. Gasparri concludes: '[A]ccording to the doctrine and the practice of the Church, even when heresy contradicts the essence of the sacrament it does not necessarily exclude the intention of doing what the Church does.' He explains that intention is an act of will and that the correct intention can exist quite happily in the soul of the heretical minister who for example may give no thought to his heresies while administering the sacrament. Even if he thinks erroneously about his heresy at the time (for example, while baptising, thinking that baptism has no interior effect), this belief can happily co-exist with the intention to do what the Church does, this intention being in no way affected or undermined by the heresy. He quotes Benedict XIV on marriage to the effect that the general will carries more 'weight' than the private error. Consequently the administration of the sacrament is directed solely by the intention to do what the Church does and not by the concomitant heresy which in no way affects the will, remaining an error rather than being the minister's intention.

We now see the distinction between error and positive will at work. Gasparri claims that if the act of will to do what the Church does *were* affected by a heresy contrary to the substance of the sacrament—so that the minister of *order* would want both to do what the Church does but also not to confer grace or impress a character, or the minister of *marriage* would want both to do what the Church does and not to celebrate a sacrament or contract an indissoluble bond—then the sacrament would be invalid because the intention to do what the Church does would not really exist. In these cases there have been two contradictory and mutually exclusive acts of the will, and Gasparri refers to Benedict XIV on marriage and his own *De Matrimonio*, and I have already given an account of developments concerning marriage above. The question here facing Gasparri is how

these general principles are to be applied to Anglican orders. He says that he must conclude that the heresies held by the Anglican ministers will not necessarily invalidate their sacraments, unless one could prove that as they conferred orders the bishops drew on heretical doctrines in such a way as positively to limit their intention. Such a limitation on their intention to do what the Church does cannot simply be read off from the fact of holding heretical opinions. It cannot therefore be assumed but must be *proved* in the external forum. Having concluded thus, Gasparri asks what proofs there might be.

From a letter of 2 October 1894 written by Cardinal Vaughan to M. I. D. Howell, he takes the example of a bishop announcing beforehand to an ordinand, who was in fact later a friend of Vaughan's and reported it to Vaughan, that he was not going to ordain him 'as a sacrificing priest'. Gasparri asks whether this is a case of 'simple concomitant error' as in the Holy Office's judgement on certain baptisms already referred to, or was it a real condition by which the ordination would have been rendered invalid? Gasparri states that in a case of doubt one presumes simple error only. Moreover, he says, this was only an isolated incident to be judged individually, and is not to be used in general discussion. Vaughan had suggested that though the warning was unusual, it might have indicated an underlying intention which was not uncommon. Vaughan had also asked: 'And are there no Anglican prelates now who would declare emphatically that in ordaining they do not intend to make sacrificing priests?' Gasparri points out that such a hypothetical will is not relevant. A non-Catholic getting married *might* have declared they did not intend an indissoluble bond *had they thought to do so*. But given that they had not thought to do so, their marriages are valid, and the same would prevail in the case of baptism, *mutatis mutandis*. What is at issue was whether the Anglican bishops *had actually* or *did actually* declare that they did not intend some essential element of holy order.

There are further reflections made by Vaughan, however, which Gasparri thinks to be important from another point of view, 'clear indications' in support of the view that it can be presumed that the Anglican ministers had a positive intention not to confer any power to offer sacrifice. Gasparri notes that this is the precise point in the controversy surrounding the intention of the minister of Anglican ordinations. These 'clear indications', which need to be investigated as to whether they in fact support this presumption in the external forum, are as follows: careful elimination of references to sacrifice from the Ordinal, destruction of altars and their replacement with tables, the suppression of the Mass and its replacement with a

communion service. Gasparri replies, however, that first the presumption is in fact open to question, since the orders were not questioned by Queen Mary or Pope Paul IV on the ground of defect of intention,¹¹ that secondly the presumption only obtains in the case of those bishops who took part in such sacrilegious activities, and that finally it seems not even to do so in the case of those who were authors of these sacrileges. Gasparri brings forward the example of Abp Cranmer. How is it to be concluded from the fact that in summer 1552 Cranmer eliminated all references to sacrifice from the Ordinal to the idea that at the ordinations he performed a year later he then had a positive will to exclude the power of offering sacrifice? Gasparri replies that he has not found a satisfactory answer to these points. In other words, these considerations have not made the intention absolutely manifest.

However, these points have not wholly removed 'every trace of doubt and anxiety', he says, doubt and anxiety that these sacrileges may indeed be indications of defective intention. To show why, he puts forward the hypothesis of a particular country in which Reformers removed from their marriage service all reminders of indissolubility, having preached in strong terms by writings and by word of mouth against indissolubility. Then suppose that in the midst of all these activities a Reformer got married according to the expurgated marriage service. Would we be unjustified in suspecting that this Reformer had excluded indissolubility and thereby rendered the marriage suspect in the external forum? Gasparri clearly thinks that we would not be unjustified in this suspicion and takes it to be the same in the case of Anglican orders. He takes it as only natural that such men, who conducted so violent a campaign against sacrifice, would have had the positive desire not to confer the power of sacrificing. Gasparri writes, 'From that consideration, in my humble opinion, a shadow falls across all Anglican ordinations.' Moreover, the shadow 'becomes darker still' when one sees the tacit exclusion of the 'ministry of the altar' from ordination to the diaconate, and so on. Gasparri sums up: '[I]t seems to me incontestable that the Anglican Church, especially in its early days, denied at least the Eucharist as a sacrifice. Thus the rites themselves of the diaconate and the presbyterate seem to a certain extent to exclude all power concerning sacrifice. It must be presumed that the bishops, particularly those who were hostile to the notion of sacrifice, would have brought their intention in line with this exclusion, even if it was not absolute.' In other words, defect of intention was to be *presumed*, though it was not proved. Such was Gasparri's cautious and carefully-argued position,

which called for the conditional ordination of Anglican clergymen to be ordained to the Catholic priesthood.

At the conclusion of his report on the commission to the Holy Office,¹² Pierotti gave his own recommendation: that Anglican orders should be declared null (in other words, not simply doubtfully valid but absolutely invalid) on the ground of defect of form and defect of intention. When he treats of the intention of the minister, Pierotti begins by making it clear that this is a case in which the minister is using a form that has been changed (even if only in a minor way) precisely for the purpose of introducing or promoting heresy. He quotes here from Pope Zacharias and St Thomas. Pierotti concludes that in order to judge validity or invalidity correctly, one must consider not only whether there has been made a change in rite but also whether it was deliberate and whether it was with the intention of introducing another rite not accepted by the Church, with the intention of introducing heresy. On Pierotti's view, if such an intention was externally manifested either on the part of the one who introduced the change or the minister who makes use of the altered form (or even more if both), then the sacrament is to be judged invalid on account of both defect of form and defect in the minister's intention. For Pierotti the intention to introduce heresy was quite clear from an investigation of Cranmer's theology, the Anglican Articles, and so on. Now it is quite clear how Pierotti can conclude a defect in the minister's intention if the minister *himself* externally manifests it. How though one can conclude a defect in the minister's intention from the manifest intention of the author of the rite is not made so clear at this point, but it must be that Pierotti supposes from the fact that a minister uses the altered rite that he has manifested a defect of intention on his own part, the minister no doubt bringing his intention into line with the heretical purpose of the Ordinal.

One key difference between Pierotti and Gasparri was Gasparri's more cautious approach. While Gasparri concluded from the state of affairs at the Reformation that defect of intention was to be presumed, Pierotti takes external considerations to make defect of form *evident*. There appear to be two different judgements as to the strength of the evidence adduced: while it gave Gasparri a presumption of defect, Pierotti seems to have taken it to show that defect of intention was evident. In all this Pierotti comes closer to the members of the commission who supported absolute nullity.¹³ I quote from the historical and theological exposition penned by the commission members from Westminster, Canon James Moyes, Dom Aidan Gasquet, and the Franciscan Fr David Fleming: 'The

conclusion is inescapable that Parker's Consecrator or Consecrators did not employ a form which was valid ... nor did they have the intention of doing what the Church does. For they openly and violently denied not only some of the *effects* of Holy Orders, but even the sacramental nature of Orders and their institution in any sense by Christ, teaching that Orders are *only an external call* and admission; finally, they positively intended to exclude Orders in the sense of the Church, and manifested their intention beyond doubt.'¹⁴ Defect of intention was thus joined to defect of form to argue for absolute nullity. Again it seems that Moyes, Gasquet and Fleming were claiming that it was evident or manifest that the ministers of the sacrament in the case of Abp Parker had a positive will to exclude the substance of the sacrament. And such a view seems to appear again in the exposition contained in *Apostolicae Curae*: 'But if ... the rite is changed with the manifest purpose of introducing another rite which is not accepted by the Church, and of repudiating that which the Church does and which is something that by Christ's institution belongs to the nature of the sacrament, then it is evident, not merely that the intention necessary for a sacrament is lacking, but rather that an intention is present which is adverse to and incompatible with the sacrament.'¹⁵

It seems to me to be a matter requiring investigation as to whether Gasparri's caution would be viewed as excessive today in the light of the great number of declarations of nullity of marriages granted in more recent times on the ground of defect of intention. In support of this suggestion I shall cite one case, one judged *coram Civili* of the Rota on 9 December 1992.¹⁶ This declaration of nullity was made on the grounds of a positive will to exclude children and a positive will to exclude the right to conjugal acts performed in a human manner on the part of the husband. Silvio himself was absent from the trial, but as *Civili* wrote in his decision, 'The party's confession is by no means necessary when the judge is able to achieve that certitude with other means taken from the acts and proofs, which he is to weigh in his conscience.' In cases such as this one, such 'other means' may be 'presumptions in conjecturing from known and determined facts immediately after the celebration of the wedding'. These determined facts, taken very largely from Zilma's testimony (which was for good reason taken as reliable) included Silvio's failure to consummate the marriage in a human way, instead breaking Zilma's hymenal membrane on the edge of her bed and demanding anal and oral sex, which Zilma for her part attempted to resist. It is from the establishment of these facts by such testimony

that Civili deduced presumptions from which he reached certainty that the marriage was null and void. These presumptions were that Silvio had a positive act of will to exclude the right to sexual relations in a human manner and a positive act of will to exclude children. How Civili moves from these 'vehement' presumptions to certainty is not clear, but he concludes from these presumptions that: 'By his very manner of acting in the intimate life after marriage, the respondent most clearly showed that he contracted marriage with the intention of gaining the greatest carnal pleasure and at the same time avoiding means which would assure the woman's pregnancy.'

Again, it is not clear to me how Civili moves from his presumptions of a defective intention to the respondent 'most clearly' manifesting his defective intention in his acts. But given that he does so, one might suppose that were Gasparri's hypothetical marriage case to come before a tribunal today, the presumption that Gasparri's Reformer excluded indissolubility when he married might easily pass into a judgement of nullity. Likewise, if Gasparri were more cautious on this hypothetical case than a judge might prove today, perhaps Gasparri's caution concerning the nullity of Anglican orders might also begin to appear somewhat excessive in the light of later developments concerning marriage (which I leave as a question for further consideration elsewhere). But be that as it may, Pierrotti and the rest certainly made a 'leap' from presumption back in 1896 that the cautious Gasparri simply could not make. But would he have made it, given the publication of *Apostolicae Curae*? In his position paper, Gasparri had considered the traditional attitude of the Holy See that Anglican orders were invalid. There he wrote: 'Thus the practice and the decisions of the Holy See opposed to the validity of Anglican ordinations, while carrying great weight in the scales of theologians, do not seem to settle the question.' Now however a decision had been made on 13 September 1896 that could only have weighted Gasparri's scales to the floor: 'Therefore adhering entirely to the decrees of the Pontiffs our predecessors on this subject, and fully ratifying and renewing them by our authority, on our own initiative and with certain knowledge, we pronounce and declare that ordinations performed according to the Anglican rite have been and are completely null and void.'

Leo thus definitively ended the issue and his judgement was generally taken by theologians as falling under the secondary object of infallibility (a classification recently affirmed by the Congregation of the Doctrine of the Faith regarding *Ad Tuendam Fidem*).¹⁷ At any rate Leo himself wrote shortly afterwards that it had been his intention to deliver a final judgement and settle the question

completely, and that all Catholics were bound to receive the decision as being 'fixed, ratified and irrevocable'. Would this exercise of papal authority have weighted the scales for Gasparri in such a way that he would have made a leap from presumption to certainty on the matter of defect of intention? I suggest that it would not have done so necessarily, though it would no doubt have caused Gasparri to leap from a general verdict of 'doubtful validity' to 'absolute invalidity'. I say this because as a general matter of interpreting documents of the Church's teaching authority, it is only to be supposed that the irrevocable and definitive declaration itself is an exercise of infallibility and not the reasons that may be given for the judgement. As an analogy, the canonisation of a saint is commonly taken to be an exercise of infallibility, but this infallibility is not taken to extend to the details presented in the sermon preached at the canonization ceremony as to why the saint has been judged to be holy and in heaven. Likewise it would have been legitimate to have firmly adhered to the absolute nullity of Anglican orders, while giving only religious allegiance of will and intellect to the Pope's reasons for declaring nullity. Thus, given the nature of such allegiance, Gasparri might still have held that only a presumption was licit in the narrower case of defective intention.

With regard to the work of the commission on Anglican orders I have illustrated the principle that while error does not exclude the intention to do what the Church does on the part of the minister of a sacrament, an intention against something of the substance of the sacrament *does* so exclude, and this is the essence of 'defect of sacramental intention'. The principle is now the foundation of a great many of the very many declarations of nullity of marriages granted by the Church in recent years. The sacrament of orders and Anglican orders themselves have been my concern, however, in illustrating this idea. Consequently I cannot end without asking what can be said of the possibility of such defect of intention among Anglicans today with regard to this sacrament.¹⁸ Certainly ecumenical progress between Catholics and Anglicans on the nature of the eucharist and order, rooted largely in the Anglo-Catholic movement and the theological renewal of the Second Vatican Council, suggests that such general defect of intention can no longer be certain or even presumed. It may however arise in individual cases, as may error in perhaps more cases, but that is not substantially different, I submit, from the situation in the Catholic Church.

Nevertheless sufficient intention alone cannot guarantee validity or return the latter to a communion once that communion has

lost apostolic succession. However, as part of a confluence of new circumstances, not least the participation of Old Catholics in some ordinations of Anglicans, a renewed sufficient sacramental intention has a crucial part to play.¹⁹ But what of the irrevocable nature of Pope Leo's declaration of nullity? Does that in fact exclude this 'new context'?²⁰ I submit that it does not, given the scope of the declaration: '[W]e pronounce and declare that ordinations performed according to the Anglican rite *have been and are* completely null and void.'²¹ The declaration, irrevocable as it may be, applies only to Anglican ordinations from the sixteenth century to Leo's own day. No judgement is made about any future Anglican ordinations. No doubt a judgement that Anglican ordinations *will be* completely null and void could legitimately be deduced from the declaration itself, but *if and only if* Anglican orders continued to remain what they were in Leo's time without significant change. If however they were to undergo changes so significant as the reintroduction of apostolic succession, manifest sufficient intention for validity, and so on, then Anglican orders altered to such a degree would no longer be the *same orders* against which Leo exercised his irrevocable judgement. The judgement may remain irrevocable, but only with regard to what lies in its scope, with the 'Anglican orders' of the 'new context' falling instead outside that scope.

- 1 C. Hill and E. J. Yarnold SJ (eds.), *Anglican Orders: the documents in the debate* (Norwich: Canterbury Press, 1997), p. 276f.
- 2 The documents are collected in English translation in Hill and Yarnold, *op. cit.*
- 3 *Ibid.*, pp. 121–149, esp. pp. 142ff.
- 4 ST IIIa, q. 64, a. 9 ad 1.
- 5 DS 3102.
- 6 Hill and Yarnold, *op. cit.*, pp. 83–119, esp. pp. 105–9.
- 7 See J. T. Noonan, Jr., *Power to Dissolve. Lawyers and Marriages in the Courts of the Roman Curia* (Cambridge, Massachusetts: Belknap, 1972), esp. ch. 5, and F. Clark SJ, *Anglican Orders and Defect of Intention* (London, New York and Toronto: Longmans, Green, and Co., 1956), ch. 6.
- 8 Hill and Yarnold, *op. cit.*, pp. 33–82, esp. pp. 49–62.
- 9 In fact a letter written in 1555 by Cardinal Pole to the Bishop of Norwich indicates that right intention was included in what Julius III called the 'customary form of the Church' such that defect of intention was also urged at that time against ordinations performed according to the Edwardine ordinal. See *ibid.*, p. 6.
- 10 ST IIIa, q. 60, a. 8.
- 11 But see n. 9.
- 12 Hill and Yarnold, *op. cit.*, pp. 201–263, esp. pp. 240ff.
- 13 *Ibid.*, pp. 151–198.
- 14 *Ibid.*, p. 196.
- 15 *Ibid.*, p. 276f.
- 16 I take my account from the *Proceedings of the Thirty First Annual Conference of the Canon Law Society of Australia and New Zealand*, pp. 129–132.

- 17 See Clark, *op.cit.*, pp. 8–10.
- 18 Clark, *ibid.*, esp. pp. 42ff., has shown how Anglican responses to Catholic assertion of defect of intention have classically rejected the requisite intention being an *internal* rather than external one. An upshot of this would be that classical Anglican theology should have difficulty in accepting the declarations of nullity of marriage granted in the Catholic Church on the basis of defect of (internal) intention.
- 19 On the conditional ordination of Fr Graham Leonard, see the documentation in the 30 April 1994 number of *The Tablet*.
- 20 This is the phrase used by ARCIC I.
- 21 Hill and Yarnold, *op. cit.*, p. 277 (my emphasis).

“Monstrous Propositions” of a Dominican¹

**Rodolph Suffield & David Urquhart
on the Morality of War**

Tony Cross

When, as a student at Oxford, Johnson “took up Law’s *Serious Call* . . . expecting to find it a dull book”, he found it “quite an overmatch” for him.² Taking up David Urquhart’s *Effect on the World of the Restoration of Canon Law . . . a Vindication of the Catholic Church against a Priest*³, I found myself in somewhat similar case—struck by the moral passion and remorseless logic. Urquhart’s luckless opponent was the Dominican friar, Fr. Rodolph Suffield—celebrated English Dominican preacher of the 1860s. Urquhart (1805–77) was an eccentric Scottish aristocrat, a Protestant papalist, who succeeded in pushing his concern over the morality of war on to the preparatory documentation of the first Vatican Council. Suffield (1821–91), by the late 1860s profoundly antagonistic to ultramontanism, left the Church to become a Unitarian minister shortly after the promulgation of the Infallibility Decree. It is perhaps timely to recall their contestation as contemporary British foreign policy impales itself upon the horns of its current moral dilemmas.