

The “Error Communis Facit Jus” Principle in the French Law

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Abstract. The *error communis facit jus* is an adagio that we can consider as synonym with an “equity axiom”. Each generation of theoreticians and practitioners of law have conserved and used this principle. We propose by this study an analysis of the old French law and the evolution of this concept till the modern times. The origins of the principle of apparent validity can be identified in the practice of the Roman jurist-consults, and even if they did not enunciate anywhere this idiom, it is certain that many of their texts draw their inspiration from the idea that the common error in a juridical situation is equivalent to the law itself.

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1. Introduction

The jurist-consults of the old French law inherited the Roman tradition. They did not come up with the equity principle, they only broadened it, they made applicable to these new hypotheses and now cases. It is stated [1] that the jurists of the old French law did not distort history by attributing the paternity of the idiom *error communis facit jus* to the Romans, because the contribution of the old law in this domain is that of only finding a suitable formula for expressing a preexistent rule of law.

The old French jurisprudence applied this idiom in the hypotheses in which certain papers had been drawn up by an incapable or incompetent civil servant. Thus, a ruling of the Parliament of Flanders from 1751 validated a sequester carried out by an executor who did not have the qualification to instrument that case; he was authorized by the Parliament to exercise his authority only up to a certain date which had already expired at the time of the sequester. But the Parliament saw it fit that, because the executor exercised his attributions publicly, the common error should validate his actions.

Also, a ruling of the Parliament from Paris, on the date of June 30th 1608 validated a codicil drawn up in front of a notary who exercised his attributions outside his territorial competency limit.

By imitating the example of the Roman law, the old French law applied the idiom *error communis facit jus* in matters of the testament, regarding the instrumental witness.

2. The French law

It is shown [2] that when a person has lost his or her civil capacity, by embracing a religious profession for example, and moves to a place where the latter is ignored, the quasi – possession of the civil capacity in which he finds himself, in that place, replaces even the civil capacity and, consequently, the testament to which this person took part as a witness must be deemed valid.

According to the above cited doctrine, a ruling of the Dijon Parliament, from February the 3rd 1656, ruled out a nullity claim invoked against a testament in which a witness who was exiled and whose conviction remained ignored took part.

The doctrine of that time applied the idiom *error comunis facit jus* to the reports in which one of the parties is an incapable person, especially to the hypothesis in which a person contracts with a married woman, thinking that her husband was deceased, but in reality him being alive. The explanation is the following: when the woman contracted there was a solid reason to believe that her husband was deceased and, consequently, that she had the power to contract without an authorization; it is the situation where a man had

been seen among the deceased after a battle and the wife receives a certificate regarding his death; under the auspices of this certificate, the woman closed several deals with different persons, after which her husband reappeared; in this case, both the woman and those who contracted with her, having as fundament these certificates (a just motive not to doubt the death of the husband) and consequently contracting, in good faith, without authorization, this good faith both of the contractors' and of the woman's must make up for the lack of authority and must maintain those contracts valid. The author continues to argue in the sense that when there has publicly been a reason to believe that a person has a capacity which, in reality he does not, the interest of the civil circuit and the social interest demand that this person be able to validly close documents which he could have closed if he had had that capacity. Therefore, the documents drawn up by the wife, in the given circumstances aren't less valid, provided that the third parties were of good faith and determined to contract by the common error [3].

Although the French jurisprudence made the application of the rule *error communis facit jus* in countless situations, the editors of the French Civil Code from 1804 did not explicitly establish it.

In the juridical literature an opinion was expressed[4] according to which the rule in question was implicitly established in the French legislation. In order to back up this point of view, we claimed that a traditional rule of law does not cease to be applicable except for three situations: it becomes obsolete, it was specifically abrogated by the new law or it is in contradiction with its stipulations.

The same opinion claims we cannot talk about desuetude in this case, because the rule is declared by the doctrine and established by the jurisprudence in more numerous hypotheses. On the other hand, there is no legal text containing the abrogation of the rule, moreover, numerous legal texts agree with it in a logical manner. This rational concordance of the legislative solutions with the rule in question can be viewed as an implicit establishment of it.

Thus a reference is made to the stipulations of art. 2279 (the possession in good faith of a certain thing leads to the gaining of the right to property over the chattels), art. 549, art. 650 (in real-estate issues, the owner that gained a building in the virtue of title of property which was vitiated keeps the gainings for him or herself, if he or she was of good faith), art. 2265 (the owner of good faith which has a just title of property may invoke the usucaption from 10 up to 20 years). In these situations we can notice that two conditions must be met for the rule to apply: good faith and common error.

On the other hand, it is stated that possession creates an apparent property situation, because it is, by definition, a state of fact consisting of owning a thing for oneself and exercising a psychologically natured power as well as other acts of material use and disposition, as an owner, over it. This appearance of property gives rise and enables, in the eyes of everyone, the belief that the possessor is the owner. It is often that this belief may coincide with the juridical reality because in most of the cases the possessors are also owners. But when the belief is not according to the law (to the real juridical situation), namely when the possessor is not also the owner, there is without a doubt a common error. The public opinion is misled by exterior manifestations of the property. Or, such a situation is equivalent to the law itself[5]. We cannot agree with such an opinion because, as it was specified in the specialized literature, the possession as a fact can mislead the common people because they don't know that it comes from a non-owner, and it represents only a part of the material component of the appearance.

Also, a reference is made to the stipulations in art. 1240 C. civ. – the payment made in good faith to the one who is in possession of the claim, namely to the one who creates the appearance of a creditor, sets the debtor free of any obligation. In this case, the one who is in error is the debtor. It has no importance if it's one person or several united debtors; the possibility of a common error occurring is not influenced by the number of people who are in error, because it (the common error) arises from an apparent situation in which the interested persons were involved.

A reference is made in the same way regarding the stipulations concerning the putative marriage – art. 201, 202. C. civ.

The mention of these law texts, the author of this opinion states, was made with the purpose to emphasize that good faith together with the fact of possession, which gives rise to the common error, plays

an important role in the French legislation. The harmony between the adagio *error communis facit jus* and the legal dispositions can be cited to support the tacit establishment of the idiom in the French legislation[6].

To help support the same idea a notice of the State Council from July the 2nd 1807 is referred to (the notice had the value of an interpretative law). The context was the following: the mayoralty secretaries issued out, under their signature, a great number of excerpts from civil status registries, when only the registrar of births, deaths and marriages had that competence. These excerpts were used later on in court, and served as basis for many of the decisions taken there. Under these circumstances, the State Council was consulted[7] in relation to the validity of those specific excerpts. It decided that: „... de tout temps et dans toutes les législations, l’erreur commune et la bonne foi ont suffi pour couvrir, dans les actes et meme dans les jugements les irrégularités que les parties n’avaient pu prévoir ni empêcher” (... the common error and good faith have always been sufficient in all legislations to cover up the irregularities which the parties involved could not foresee or prevent).

By studying the French jurisprudence of the 19th century we can notice that it applied in countless times the rule *error communis facit jus*.

We can emphasize three areas in which the application of this rule is found: actions carried out by a public officer outside the law, papers closed by an incapable person and, finally, alienation or real rights constitution papers signed off by an apparent owner.

The common element of all the jurisprudential solutions is that of acknowledging appearance, which generates common error, the value of the law itself.

Regarding the category of papers illegally instrumented by a public officer, although we have several solutions at our disposal, we will only analyze three of the most significant ones:

1. The decision of the court of Bastia from January the 21st, 1846 goes a bit further than just the validation of a document written by a public officer whilst breaking the legal conditions and validates the documents drawn up by a person who doesn’t even have the rank of a public officer, but which he or she exercised publicly. In 1794 a part of Corsica which was under English dominion rebelled. Mr. Casabianca wanted to marry Ms. Limarola in the town of Vallecalle. The civil state registries, which, according to the law of that time, had to be sent to all the localities in France had not reached Corsica yet. The town of Vecalle, where the general headquarters of the insurrection could be found, had no registrar. The person who wed people was the priest of that community. The marriage between the two took place under these circumstances. Mr. Casabianca died in the year 1840, not before he left all his inheritance to his children. Ms. Guerini, his niece, cites the two children to divide the successional possessions after their father, claiming that as long as the marriage was not performed by an authorized register, the children cannot be qualified as being legitimate ones, consequently, they are incapable of taking advantage of the testamentary stipulations. The court of Bastia denied Ms. Guerini’s demands and validated the marriage in question..

2. The appliance of the common error rule is also manifested in the Court’s ruling from Alger, February the 22nd 1858, in the Arvezit versus Chaudron business. Mr. Arvezit demanded that he be put in possession of his wife’s inheritance, in basis of a testament which he received in Orleansville from the Civil Commissariat’s secretary. He objected that this person was not qualified to receive a testament and, consequently, it was nullified. The tribunal from Alger ruled in favor of nullifying the testament, but the decision was refuted by the Court of Alger. We think it’s important to emphasize the motivation of the ruling: “taking into consideration the fact that it is well known that, according to ordinance from December the 30th 1842, the secretaries of the civil commissariats have proceeded in receiving the public testaments in all Algerian territories where notaries could not establish themselves ..., considering that the common error cannot be questioned, because it was judged as already being a principle in our new law, as it is in our old law, the fact that the putative capacity, based on common error replaces the real capacity,... the testaments received from the secretaries of the civil commissariats will be protected from the common error, generating today, as always, the same effect as the law”.

3. Finally, the ruling of the Civil Chamber of the Court of Cassation from August the 7th 1883, can be considered as an application of the rule *error communis facit jus*. The mayor of Montrogue was replaced, from his position of registrar by a municipal councilor, Mr. Girardin. He was the 21st member of the

municipal council. M. Gerardin officiated three weddings. These marriages were annulled by the public ministry based on the reason that mister's Gerardin delegation was not made according to the law. The right to represent the mayor belonged, first of all, to the assistants, then, in case they were unable to carry out their appointment, this right would be due to the first municipal councilor, in the order from the roster.

In front of the Court of Cassation, it was claimed that the nullity resulted as a consequence of the illegal delegation had to be covered by the common error. M. Gerardin read an official report which stated that he acted as a result of being appointed by the mayor. It was affirmed that he had an apparently legal situation, generating a common and invincible error, because you could not ask of the future spouses to verify the legality of the municipal councilor's delegation that officiated their wedding.

The Civil Chamber of the Court of Cassation decided that the unlawfulness of the appointment could not nullify the marriages in question.

Regarding the juridical papers closed by an incapable person, the 19th century French jurisprudence has made possible the appliance of the rule *error communis facit jus* in the relations between the third parties of good faith and the incapable persons[8].

We will hark back to the alienation or real rights constituting papers, which were drafted by an apparent owner (or apparent heir) in another research paper dedicated to the apparent property. We only wish to mention that the jurisprudence maintains the validity of the documents which were signed between the apparent titular and the third parties of good faith, on the basis of the common and invincible error.

3. Conclusions. Modern connections

The beginning of the 20th century coincides with the moment in which the expression "the theory of law affiliation" was born. It was first used by L. Crémieu, in his article *De la validité des actes accomplis par l'héritier apparent* (About the Validity of the Documents written by the Apparent Heir)[9].

In the French doctrine and jurisprudence of that time, the idiom *error communis facit jus* was studied and applied in regard to the apparent heir, apparent owner, apparent warrant and apparent marriage [10].

Over the last couple of years, important studies have been conducted in the French doctrine related to the theory of appearance in law[11], studies which sometimes outlined diverging opinions, but which g contributed to the establishment of this theory in the science and practice of law.

In the end, we would like to emphasize the phenomenon of translation, involved in this research. We used generally French bibliographical sources, which we analyzed and exposed finally in English. In this context, we can quote Speranța Milancovici, who notes that after all, "the translation is an art. An art based on science." [12]

4. References

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