JURISDICTION
IN THE
CONFESSIONAL.

A PAPER READ IN SUBSTANCE BEFORE
THE SOCIETY OF THE HOLY CROSS,
At the September Synod, 1872.

BY THE REV.
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E. G. W.

CAMBRIDGE,
Feast of the Holy Name, 1873.
JURISDICTION IN THE CONFESSIONAL.

DEAR MASTER AND BRETHREN,

The question on which I have, at the request of a recent Chapter, to address the Synod to-day is one which has been mooted before. It formed the subject of a considerable controversy in the year 1849. Messrs. Dodsworth, Alliss, and Maskell addressed a joint letter to Dr. Pusey, inviting him to state his opinion as to the Jurisdiction required by a priest in order that he might rightly exercise the office of a Confessor. The statements contained in that letter, and others subsequently published, went to the impugning of the practice of many priests at that period, and notably that of Dr. Pusey himself. The reply made by Dr. Pusey was a volume, in the form of a letter to Mr. Upton Richards, entitled, "The Church of England leaves her Children free to whom to open their griefs." That volume I need scarcely say is characterised by all Dr. Pusey's usual exuberant and diffuse learning. Many of the Society are of course acquainted with this reply, and it may therefore perhaps appear at once somewhat needless and somewhat presumptuous that I should enter on a discussion, however brief, of the same topic. My justification must be twofold. First, as a matter of fact, there appears at the present time to be a variety in practice, and a considerable diversity of opinion, on this matter. If the Society can in any degree lessen this diversity, it is clearly most desirable that it should do so. Secondly, I venture to think that though Dr. Pusey's book is most exhaustive and conclusive on one point of the controversy, it does not seem to be equally
so on another. What those two points are I will state directly. It is on the latter of them that I have to address you.

The general question may be stated thus—Is it necessary that a priest should possess any power or authority other than that given to him in ordination, in order that he may rightly—"that is, validly as well as licitly"—absolve any penitent who may come to him? This general question involves two others. First, as regards the penitent—May he make his confession to any priest he chooses? If he may not do so, of course follows, e converso, that not every priest may absolve. The second question is as regards the priest himself, independently of the penitent. That is, assuming that penitents may go to any priest duly qualified and be rightly absolved, or, in other words, assuming that, in free pensularity, the penitent has no Superior appointed for him, but is permitted to submit himself to whom he will, what then is the nature of that qualification? Who is a duly qualified priest? Now it is the first of these questions—that, namely, which regards the priest—that I conceive Dr. Pusey has most conclusively answered. He has shown that in the Anglican obedience (I use an indefinite term to express an indefinite thing) there is no such person as the "propria seconia" of the Lateran Council, as strictly understood—that is, that penitents are not bound to confess to their Parish Priest, or to any particular priests, but that when the needs of the conscience require, they are at liberty to go to any duly qualified priest, or "discreet and learned minister" as the exhortation expresses it. Less than this, indeed, could not well be deduced from that exhortation. But Dr. Pusey goes further; and from the fact of the freedom he has thus indicated he draws, or seems to draw, the conclusion that therefore every priest is with us duly qualified, or a "discreet and learned minister"; and consequently that any priest may, at any time and place where he may choose, receive all penitents who may come to him, and may duly absolve them. Now this conclusion, which, whether Dr. Pusey really intended it or not, has been very generally inferred from his book, appears to me not only to be wider than the premises, but to be opposed to the principles as well as to the enactments of Canon Law. The opinion, which is somewhat widely prevalent, is that every power and authority required for the due administration of the Sacrament of Penance is conferred in ordination; so that, as the newly-ordained priest rises from his knees, the "Accipite Spiritum Sanctum" just pronounced, he is that moment a duly qualified confessor for every soul within the Anglican obedience—the words of ordination make him, ipso facto, a "discreet and learned minister." If this proposition be true, it appears to me that it would be difficult to point to a more thorough state of ecclesiastical anarchy than it would seem to indicate. To justify this opinion I must ask you to allow me to re-state certain well-known principles of Canon Law.

The question before us is a question of jurisdiction—the right juris dicendi. For, as Catholic Theology in opposition to various Protestant methods teaches us, the priest, when acting as confessor, occupies the position of a judge; and this by virtue of the potestas legandi at solvendi. Now the idea of Jurisdiction is one which is based on the more fundamental of Government, or, in canonical language, of Hierarchy. By the term Hierarchy is meant to be expressed the form with which our Lord endowed the Church with sovereignty. It is the expression of the sum total of the powers of the Church. Or, as Devotes [Inst. Jur. Can. I. 75] defines it, "Hierarchy apta definitor potestas a Christo suis Apostolis eorumque legitimis successoribus tribuit ut Ecclesiam regant et divina religionis mysteria in ea celebrant.

And so the Pseudo-Dionysius [De Celesti Hierarchia, c. Illi, tom. i. p. 41, ed. Antw. 1634.]

Now Hierarchy is twofold. There is first the Hierarchy of Order, and secondly the Hierarchy of Jurisdiction. The distinction is a fundamental one in Canon Law, and in fact by far the greater part of that law is based upon it. It is one therefore which is universally recognised by the Canonists and admitted by the Theologians. C. Thomas [22e, 39, 3] thus defines it, "Duplex est spiritualis potestas una quatenus sacramentalis aliud jurisdictionalis." Using philosophical terms, Order is σάκἄνα, Jurisdiction is ἑξωσαγωγή. Cranmer gave the former to his Church, that she might have the possibility of spiritual goods. He gave the latter that she might have those spiritual goods rightly administered. The distinction is no mere subtlety. It is a real, and not simply a mental distinction. Very little consideration will indeed suffice to show the necessary and practical character of it. If the law-
fullness and validity of priestly acts depended only upon the power of order, how would schematically ordained priests differ from catholic priests? They do differ, because, though both have order, the latter only can have jurisdiction. So again, the distinction between Metropolitans and their Comprovincialis, so far as it is more than one of honour, is of course founded on difference in jurisdiction. It is necessary to insist on this point, because some, while admitting the formal distinction between order and jurisdiction, seem to think that it is only convenient and theoretical, and may be safely disregarded in practice. That, in fact, jurisdiction, though different from order, is yet conveyed at the same time and by one and the same action; so that every validly ordained priest has jurisdiction as well as order. Such an opinion, as I hope to show, is entirely opposed to the teaching of the approved Doctors of the Church, and is fraught with most serious consequences, and is liable to produce grave dangers and disorders.

To multiply authorities would be simply to quote every Canonist who has ever written. Thus Barossa [Jur. Eccles. I. i. 32] says, "Jurisdiction is not necessarily joined to order by consecration." And Devotus [Inst. iur. Can. I. 85] says, "Potestas hece, qua jurisdictionis dicitur, ut regiminis, non a coheret ordinis potestati ut ab ea sejungi non possit." And S. Thomas [In 4 Sent. 17. 3. 2] "Ad effectum aliquam duo requiruntur potestas activa in agent et materia debita in suscipiente. Ideo ad effectum ligand et solvendi requiritur et potestas clavium qua datur in ordine et materia debita, ac substitut qui habetur ex jurisdictione. Unde oportet confiteri asecordi et non nisi propio. Sed proprius asecordor duplex est. Vel ex jurisdictione ordinaria sicut parochialis aecordor, vel episcopalis, vel papa; vel ex jurisdictione delegata, sicut ille cui committit potestatem sedendi aliquis horum trium."

Jurisdiction then is a power distinct from and supplementary to Order. The power of Order comes direct from God; as the intervention of the Minister of the Sacrament of Order is strictly ministerial or mechanical. It is otherwise with Jurisdiction. God is of course the Sole Fount of Jurisdiction; but He has lodged this power in the bosom of the Church, and from her, by the individual acts of her rulers, it is given to those who are qualified to receive it; it is an essential part of the gift of sovereignty. Order, being an immediate gift of God, is immutable or indelible. Jurisdiction, on the other hand, is mutable, and dependent upon conditions themselves the subject of human ecclesiastical law.

Jurisdiction is thus defined by Reissenstuel [San. canon. Unit. I. 29. 3] "Jurisdiction est potestas publica juris dicendi." This is of course the most general and formal definition. He more explicitly defines it when [n. 5] distinguishing between jurisdiction passive, or the capacity for exercising jurisdiction, and jurisdiction active, which alone is properly called jurisdiction, he describes it as the "facultas et potestas exerceendi [sutoriatis]." Ferraris a. d. gives this definition, "Jurisdiction definitor quod sit facultas alienas habendi publicas auctoritates et eminentiam super alios ad eorum regnum et gubernationem." Referring once again to Dr. Pusey's book, it would seem that the definition or description which he gives [p. 23] cannot be accepted as sufficient or accurate. He says that jurisdiction is an authority vested in each priest, which he may exercise whenever any, according to the law of the Church, submits himself to it; and secondly, that it is an authority over certain individuals given to a certain priest. Dr. Pusey appears to rely on the statement of De Paude: "In that way in which authority is in man, it is equally in every priest; but the Superior gives him the matter but no power, except when he ordains him." What De Paude says is just what Reissenstuel says—that we must distinguish that which may improperly be called jurisdiction, which is rather a capacity, from jurisdiction proper. Dr. Pusey's statement seems at once too wide and too narrow. It is too wide, because it attributes jurisdiction proper to every priest; it is too narrow, because it does not express the limitation of jurisdiction except in one particular way: it is imperfect, because it mingles with the general definition the particulars of a special case. As we have seen, the more general and accurate description is—Jurisdiction is the faculty or power of exercising, using, and putting into activity a power or authority already bestowed, and is necessary for the licit, and in some cases valid, exercise of such power or authority.

Jurisdiction is either in foro exterhoe, or in foro conscientiae. It is of the latter kind that we are now concerned. All
jurisdiction may be further divided into ordinary and delegated. How these two classes, and more especially the latter, may be acquired, is the point to which I have to ask your attention. But before doing so I may just advert to two opinions which have been entertained on the previous question, viz. as to whether jurisdiction is necessary to the exercise of the confessor's office. One is that, though without proper jurisdiction a priest would be guilty of irregularity in giving Absolution, yet that the Absolution so given is valid though illicit. The argument in support of this opinion is drawn from the analogy of the other Sacraments. In regard to them it is of course true (not even excepting Matrimony, if we exclude the decree *Tamelets* of the Tridentine Canon Law) that the Sacrament is valid though illicit. Suarez [in 3. D. *Th. Disp.* 24. sec. 2] thus speaks of the opinion, “Inter Catholicos quidem dixerunt omnes sacerdotes ex vi sua ordinatio et divini juris esse sufficientes ministros hujus sacramenti; etsi quavis possit ecclesia prohibere aliquibus sacerdotibus et hoc sacramentum ministret non tamen possit officere quin eorum absolution sit valida." But he demonstrates how entirely baseless is this opinion, and how completely void of authority it is. It is founded, in fact, on a false analogy. Jurisdiction in the case of the Sacrament of Penance is of the essence of the Sacrament, but it is not so in the case of the others. The point is not simply that the Church has power to restrain priests, either by general positive law or by the action of her executive, from the exercise of their functions in Absolution; or in other words, that they have jurisdiction until she takes it way; but that until the Church gives to priests something more than they have through the power of Order, they not only are restrained from the exercise of these functions, but are absolutely powerless. The position is one not of restraint, which implies the possession of power, but of defect, implying its absence; and the action of the Church or her executive is positive, not negative.

The other opinion is that jurisdiction is only required when the penitent is compelled by positive law to make his confession. In such case, it is argued, the priest must have such jurisdiction as will make him the priest to whom the law refers, otherwise the obligation of the law would not be fulfilled by the penitent. But if the confession be a purely voluntary act on the part of the penitent, or at least an act to which he is impelled only by conscience, and his belief as to what the Church teaches to be the Divine law, then, it is argued, no jurisdiction is required; because the jurisdiction given by external means, either a jure or personaliter, is correlative and commensurate with external positive human law only. But a voluntary confession not being made under such law, it follows that the correlative jurisdiction is not required. And hence it is argued that, in respect to the Anglican obedience, no such jurisdiction is required. That is of course assuming the position as to confession so often taken by Anglican writers, but to which I do not desire to pledge myself. This very opinion had found some supporters in the Roman obedience. Suarez thus reports the opinion, which you will observe is substantially identical with that which I have just sketched [*ibid* sup. n. 2]. “Alti tandem distinctiones usi sunt de confessione non necessitate sed voluntaria facta.” That is, that jurisdiction was required for the confession *ex precepto* made once a year in accordance with the Lateran Canon *Omnia utriusque sexus*, but not for other confessions. But he refutes this, saying, “Hec autem sententia non minus est falsa quam praecedens quia necessitas jurisdictionis in ministro hujus sacramenti non est ex precepto ecclesiæ sed ex intrinsecæ ratione, et institutione hujus sacramenti per modum judicii.” That is, that the need of jurisdiction arises not from any positive enactment, but from the very nature of the Sacrament itself. And so [*n. 7] he further argues that absolution pronounced without jurisdiction is not only irregular but void, for “In alis [sacramentis] quantumvis ecclesiæ non movet ministerium a sacro ministerio alienum sacramentum, nihilominus sacramentum ab illo datu validum est, hic ille poccet in ministrando quin nulla conditio sublatæ fuit necessaria ad sacramentum; in hoc autem sacramento, si ecclesia non concedat, vel juris est jurisdictionem et hoc modo [that is, either by want of concession or by deprivation] prohibeat ministerium, non solum poccet aecedos qui tenent absolvere, sed etiam nihil fact. Et ratio est quia illa non est tantum prohibito, sed etiam ablatio aliquis conditionis seu potestatis necessaria in ministro ad valorem tali actus, quam potestatem nos diximus esse jurisdictionem.”
On the general question Suarez [n. 5] says, "Dicendum ergo est per se loquendo non omnes sacerdotes ecclesiæ esse sufficientes ministros ad conficiendum validæ hoc sacramentum, per se ob defectum aliqùus rei necessariæ ex parte ministeri." And he adds "Hīsec assertio est communis theologorum." Thus the Council of Trent [Sess. xiv. ch. 7] says, "Since the nature and order of a judgment require this, that sentence be passed only on those subject to that jurisdiction, it has never been firmly held in the Church of God, that the absolution which a priest pronounces upon one over whom he has not either an ordinary or a delegated jurisdiction ought to be of no weight whatever." Notice to the same effect are frequent in conciliar decrees. Canon 7 of the second Council of Seville, a.t. 619 [Mansi 10. 559] is as follows, "Nam quavis cum episcopo plures illis [i.e. sacraments] ministeriorum committis sit dispensatio, quodam novellae ecclesiasticæ regulis sibi prohibita noventer sit praebiterorum..., consecratio, sicut constitutio altaris..., si quisdem ecclesiae eius aedificio conficit, sed nec publice quidem in missa quemquam poniunt omnium reconcileatur. Sed neque coram episcopo licet praebiteros... poniunt omnibus praebiteros sui reconcileatur." 

So far as regards reasons and authorities for the necessity of jurisdiction ordinary or delegated.

Ordinary jurisdiction is that which is acquired a jure: it attaches to some office or position, and is independent of the will of a superior, and continues in the holder so long as he is in lawful possession of the said office or position. It is thus defined by Suarez [qui sup. n. 6], "Jurisdictionem ordinariam dignarii habere est, qui ex vi proprii mancipis et officii est superior aliæ. Et presenti materia [sc. pontificia] dignarii illi habere cui ex officio sunt pastores animalium qui proprie etiam possent habere jurisdictionem alius commodi." Sylvester [Summa S. X. v. Jurisct.] reckons four ways in which ordinary jurisdiction may be conferred, viz., by—1. lex inanimata, 2. lex animata, 3. custom, 4. consent. But the latter two are more generally reckoned as conferring only delegated jurisdiction, as the possession so acquired is in reality dependent on the will of a superior; or, if in certain special cases it could be shown to be not so, then it would fall under the head of jurisdiction given by lex inanimata.

Generally, then, it is reckoned that there are two sources only, 1. lex inanimata, that is to say, that the jus commune of the Church has attached jurisdiction to certain offices or benefices to which are attached the care of souls; 2. lex animata, or the supreme legislative power, which is so rarely exercised that we may for practical purposes leave it out of consideration. Jurisdiction thus acquired is limited in three ways: 1. quod tempus, 2. quod locum, 3. quod personas. That is, it lasts only so long as the possession of the benefice, etc., lasts, and ceases together with the determination of such possession; it can only (per se legem) be exercised in a certain place or places; and it only extends over certain persons. The same observations apply to delegated jurisdiction, except with regard to time, as to which I shall have something further to say presently. Those who possess ordinary jurisdiction in foro pontificio are classed by Suarez [xxx. 1. 1. & c.] in three orders: 1. Summus Pontifex, 2. Bishops, 3. Parochii. Under the latter head are included Vicarii perpetui—Vicars, or, generally, Incumbents as we should commonly say in English. Archepiscopi, Prelates of Religious Orders, or heads of Religious Houses being Priests, and in general "omnes quibus ex jure vel ex privilegio speciali commissa est cura aliquarum animarum." This last clause must of course be understood only of those who hold such offices in such sort as to be irremovable except by judicial process, but not of those holding only durante bene placito.

As the term propria sacrosa will be frequently employed, I may as well say that I use it as understood by S. Thomas and S. Bonaventura. Thus the latter says [In 4 Sent. dist. 17. p. 3. art. 1. q. 2] the proprii sacros a is either, "1. Qui unicae potest confitentem absolvit a se propria autoritatem evo per commissam vel demandationem; ut pote sunt illi qui habent privilegium dum praebent audiendi confessiones.—2. Omnis illi qui ex propria autoritate vel officio tanguam praebetur ordinario potest absolvit, ut episcopus et sacerdos parochianus.—3. Qui administrat sacramenta et cui commissa est specialis cur." And S. Thomas [In 4 Sent. 17. 3. 2], "Proprii sacrosa duplex est. Vel ex jurisdicione ordinaria sicut parochialis sacerdos, vel episcopus, vel papa vel ex jurisdictione delegata, sicut illi qui committit potestatem audiendi aliquis horum trium."
Delegated jurisdiction is that which is granted by a superior either directly expressly and explicitly, or indirectly tacitly or implicitly. Such jurisdiction is dependent as to its limitation in every respect on the will of the superior. The consent or commission by which it is granted is revocable at any moment. Now as regards the question of delegated jurisdiction, there are several important practical points to which I must ask your attention.

The manner of delegation may be divided into two heads, 1. direct, 2. indirect. Or as Suarez says, "Potebant autem duobis modis jurisdiccionem concedi seu delegari—primo directe concedendo jurisdictionem accepto ut quando parochus assumit sacerdotoem aliquem idoneum consilietorem ad tempus ve episcopus aut papa clieni committere hoo munus secundo ex parte potestatis ut quando aliqui concessitur facultas eligendi confessorem [Lisp. xxvi. pref.]." Under each of these heads occur various conditions and limitations.

The first point to investigate is, Who may delegate jurisdiction?

All priests having ordinary jurisdiction as proprii sacerdotes in cure of souls can delegate the jurisdiction they thus possess to others. Thus Victoria [Sum. Sacr. 149] says, "Ex commissione proprii sacerdotis vel papae, vel episcopi, vel parochii possimus alium, vel clerico seculari vel fraterni, expositis conditionibus". And Suarez [xxiv. 2. 6.] "Pastores animerum possunt hanc jurisdictionem aliis committire. Unde illi dicuntur habere hanc jurisdictionem delegare quum situm illum ex commissione et propriae per se non possunt eam aliis subdelegare." Again Sylvester [Summa Sum. a. v. Confessor. I. 4] says, "Queritur quis possit licenciam ad audientiam confessionis? Et dico quod omnis proprius sacerdos qui habeat eum potest affiliationem audiendi, potest hoo alteri committere. Est autem ordinarius primo quemque habet eum animeram per electionem unde licentiae potest quomlibet sublimum ad confitendum alieni. Et secundo quinque ex officio sameo hoc habet iure non sit per electionem. Et tertio gerens vicem curat per legem aut consuetudinem." The general rule is that every one who has ordinary jurisdiction can delegate to others. So Sylvester [Summa Sum. a. v. Delegatus 1], "Queritur quis possit delegare? Dico quod quilibet ordinarius." And Suarez [xxvi. 1. 3]

"Generalissimae regulae est posse delegare hanc jurisdictionem omnem qui illam habent ordinariam." The principle is clearly indicated both in the canon Inter Cetera of the Lateran Council, as well as in the Omnia utrique sexus of the same Council. And he adds, "Parexus respectu suarum officiorum potest hanc jurisdictionem committere seu delegari ... ut recte notavit Navarrus et doctores omnes." The importance of this principle is very great. Its application to the right of the parochus to delegate his authority is further shown by the gloss of Lyndwood v. Ad Vicariam in the Constitution of Otho De Inst. Vic. [ed. Oxon. p. 24]

"Quidam sunt Vicarii mercenarii et sic convicarii rectorum, qui ad tempus assumuntur temporales ad placentum rectorum et suis licentias episcopi, et tales missas et et alia sacramenta vice rectorum recte ministrant. Inane et vicarius perpetus huic modo convicarii tempore habere potest in adjutorium suum et suis licentias episcopi cum tameo statuto provinciae vel synodali non impedit." And so the gloss on v. in propriis personis in the same constitution.

It will thus be seen that every beneficed priest in cure of souls can, without any licence being required from the bishop, delegate jurisdiction to another priest to hear the confessions of his, the delegate's subordinates. And further, to exercise all such jurisdiction in foroقضائي the delegate himself stands possessed of. But as much as every parish priest—I mean when I use this term the rector, vicar, or perpetual curate of a Church—has by virtue of the exolution in the Communion Office jurisdiction over all who come to him, it follows that every such priest can, without licence of the bishop, give to another priest jurisdiction to hear the confessions of all who may come to him at the church or other place, within the parish, appointed for the hearing of confessions. But when it is said sine licentia episcopi, it must be clearly understood that this does not mean in opposition to the bishop. The latter may prevent the delegation here spoken of, either by restraining the parochus, or by forbidding the delegate to act. For it is a general principle that the superior can restrain the inferior. "Prelatus superior potest hanc delegationem impetrare seuti potest casus reservare." [Suarez, xxvi. 1. 8.] The superior cannot indeed directly restrain the inferior who has ordinary juris-
Jurisdiction, in the exercise of that jurisdiction as regards its essential matter. Thus he cannot prevent his hearing the confessions of his subditi, though by reserving cases he might prevent his giving absolution without referring to him in such cases. Nor can he directly take away the right of delegation. But he can practically do so, because he has a right to say, “I forbid you to delegate your jurisdiction except to such priests as I approve.” So if a bishop distinctly pro-mulgate, in a proper official manner, a direction that no priest not belonging to the diocese is to officiate within it without his permission, then no parochus could delegate except to such priest as had that permission. If the diocesan rule were that no foreign priest might officiate for more than (say) a fortnight without the bishop’s permission, then a parochus might delegate jurisdiction within that period, but not for longer. Similarly, if the diocesan has prohibited any priest nominating, no parochus within that diocese could delegate jurisdiction to him. You will, I think, perceive that many practical questions of the present day are solved by the above considerations.

On the other hand, you will of course note that, if the bishop gives jurisdiction to any priest for either a part or the whole of the diocese, such priest may absolve within the limits of any parish within such diocese, or such part of such diocese, whether the parochus consents or not. [Stevens, id. supra, 8.] This point is applicable to the case of assistant curates among ourselves, and vicarages in France. Assistant curates receive their jurisdiction direct from the bishop, and not from the parochus. Their jurisdiction is a delegated jurisdiction, given to them explicitly by the terms of their license, by which they are empowered to “perform all ecclesiastical duties belonging to the said office.” It is very important that this should be borne in mind—the fact, I mean, that the jurisdiction of an assistant curate in foce pietatis is independent of the parochus, and not derived from him. The parochus, of course, inasmuch as the external government of the church and parish belong to him alone, can regulate the external arrangements as to the hearing of confessions. But he cannot forbid any of his subditi making their confessions, if they choose to do so, to the assistant curate, nor can he forbid the latter to hear confessions, either in toto, or those of a certain class; and this for the sufficient reason that the parochus is not the ordinary from whom the assistant has received his jurisdiction, but the bishop. But the inferior cannot restrain the jurisdiction of his superior, whether that jurisdiction is exercised personally and directly or by delegation. There is no difference whatever in a parochus attempting to restrain the jurisdiction of the assistant and his attempting to prevent the diocesan from hearing confessions in his parish. He has no more power to interfere in the one case than in the other. Thus Suarez [xxvi. I. 12] says distinctly—“Parochus non potest prohibere parochinum suum quocumque confitatur religioso habenti privilegium ad audiendas confessiones et aliorum acerrimae ad episcopo exposito et ab illo jurisdictionem habenti.” Whether the parochus has a right to forbid the assistant hearing confessions in the church or vestry, may, perhaps, be doubtful. It might be argued that, just as the parochus can undoubtedly prevent the assistant preaching or baptizing, or indeed taking any part in the services of the church, so he can forbid him hearing confessions at the church; and if the assistant did so in spite of the prohibition, the absolution so given would be invalid through defect of jurisdiction quoad locum. But the argument is not a sound one; for, first, the parochus cannot wholly prohibit the assistant from exercising his functions. He may do so unquestionably in all but two cases; the one is, that as all priests in cura of souls—assistants as well as parochus—are bind on all Sundays and Festivals to say Mass for their parishioners and penitents, therefore the parochus is strictly bound to afford each of his assistants the opportunity of doing so on such days, and the assistants have a clear canonical claim to the use of the altar on such days; but of course at such times, within canonical hours, as the parochus may choose to appoint. This disposes by itself of the whole ground of the argument. The other case is, as I contend, the case of confessions. And the reason is the same in both, viz., that the saying Mass on certain days, and the hearing the confessions of such as apply to him, are duties personally attaching to every priest in cura of souls by virtue of that position, and cannot, except in special circumstances of necessity, be discharged but by himself. But the duty of discharging these functions connotes the correlative right to say Mass and hear confessions.
Jurisdiction

We must now enquire what qualifications are required in the priest who receives delegated jurisdiction. The chief point is whether he must be one approved by the bishop. And here I would remark that it is not uncommon at the present day to find a considerable confusion existing in many minds as to the distinction between approbation and licence. It has even been assumed that because there is absolutely no trace of any such formal approbation being given, or special license for hearing confessions being issued by English bishops in post-Reformation times, that therefore there is no jurisdiction required, and the simple priest may as rightly and validly give absolution as the diocesan himself. But "approbation" has nothing whatever to do with jurisdiction. In its present form it belongs simply and solely to the Tridundtian Canon Law. "Approbation" is nothing more than the formal certificate of the bishop that a certain priest is duly qualified as far as casuistical and other knowledge is concerned, and is in other respects fit for the sacred work of the tribunal of penance. But the "approbation" is not enough; the "approved" priest must obtain jurisdiction, either ordinary or delegated, before he can take his seat in the confessional. According to the modern Roman discipline, jurisdiction can only be legally delegated to an approved priest, though if it were given to one not approved the absolution given by such priest would be valid. But the pre-Tridundtian Canon Law, with which alone we are concerned, made no such condition necessary. Thus Suarez states positively [xxvi. 1. 1] that jurisdiction may be delegated to any priest, but, "ut rite fiat (that is according to the modern discipline) necesse est ut tellar sacerdos sit approbatis viae formam concedi Tridundtianam. Nor is any special form in any way needful. "Deum est quod nil alicium formam esse ad hoc specialiter requisitum praestare quod delegat sufficienter explicit voluntatem suam, supposita potestate, nam quibuscumque verbis, signis, ant scripturis hoc fiat ad huma effectum officium." [ubi sup. 13]. All that is necessary is that the delegate should be idoneus, not technically but morally, and physically; that is, that he should know the difference between mortal and venial sins, and how and when to give absolution and impose penance, that he should be one of a right life and conversa-

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...
and every parochius who reads that exhortation individually, grants the faculty of choosing a confessor—how far limited by the words “discretis et lector” I will consider presently—it is obviously a matter of much importance to know what are the consequences which follow upon the granting such faculty, and the conditions of the grant.

The first consequence is, that by this grant the priest chosen by the penitent receives jurisdiction over him. This Suarez [xxvii, prae.] clearly shows. In the faculty (not necessarily an official document) accorded to the penitent is necessarily involved also the grant ex parte superioris of the correlative jurisdiction. “Sunt enim haec quasi relativa et connexa, subjectio unius et jurisdictione alterius; etideo uno concessa, alii concedi nonesse est.”

This faculty may be acquired in three ways: 1. a jure; 2. ex commutanda; 3. personaliter. A jure—this Suarez reckons as twofold; and that the Pope alone has the right a jure divino to choose his confessor. A jure ecclesiastico bishops and their superiors, as well as inferior exempt prelates, have the faculty [xxvii, 2, 4.] The faculty is not terminated uno acto, but extends to the choice of any number of confessors. No special cause is needed for its grant, the simple wish of the penitent is sufficient reason.

One case, or rather class of cases, must be more particularly considered. That is, where it may be rightly presumed that the penitent has acquired this faculty ex vi circumstantiae. Presumption, I may observe, must never be de futuro, but strictly de presenti. These cases are, when the parochius is ignorant, and likely to be an unfit confessio; when he is absent, and has left no representative; when he is dead or taken suddenly ill; if, when asked to hear the penitent’s confession, he refuses to do so or cannot do so; or if the penitent has any reasonable cause for not confessing to the parochius, and knows that such cause is known to him. There is a certain divergence of opinion whether in these cases the penitent may choose another confessor. So far as my study of the subject extends, it appears to me that the balance of authoritative opinion is decidedly in favour of his doing so.

And this chiefly on the ground that the grant of all jurisdiction to priests in foro penitentiae is in favorem penitentis, and not as a mere personal gift to themselves, or as it were an appendage of dignity. Thus S. Bonaventura [In 4, Sent, dist. 17, 3, 1, 2] says, as to liberty of confessing to other than the proprius aecardos, that there are three cases in which the penitent may do so: 1. If the proprius aecardos has given the other priest leave to hear confessions. 2. If the other priest has leave either in pias or in casum from the superior; and such leave is commonly granted, he says, on account of the general ignorance, &c. of parochii. 3. Though people ought to confess to their proprius aecardos “si sint boni et idonei,” yet “si parochiius habeat causam legitimam propter quam rationabiliter refugiat ipsum vel quia sollicitud ad matum vel quia timet revelationem confessionis vel quia semper est et ideo, &c,” then he may freely go to another priest. Suarez [xxvii, 2, 12] says, “De omnibus fideibus pro aliquo casu inventur quaedam specie de jure in cap. Placit 9, q. 2, de Pontem. d. 6, ubi multi intelligunt concessam esse cuiuslibet fidei facultatem eligendi confessionem si proprius aecardos est ignomus.” And he says that Navarra and others think that this at once frees the penitent. But he himself thinks that he ought to go to the bishop; but if the bishop also be ignorant, then the penitent is free. On the contrary, Victoria [Summ. Sacr. 146] holds that in case of moral or physical disqualification of the proprius aecardos, and the refusal of the superior to grant a facultas eligendi, that the penitent must be content with slighting an act of contrition. He admits, however, that the authority of De Paludes is against him. I may also add that Sylvester [Summa Sum. a v. Conrcessorum, i, 14] says that if the proprius aecardos refuses to hear the confession, and does not send the penitent ad confessorem determinatum “videtur ei (io penitenti) tacite dare licentiam ut pro ea vicc confirming cur voluerit.” And Martinus [Theologia Moralis, ii 11, 2] seems to take the same side. You will, I think, agree with me that unhappily at the present time among ourselves there are a very large number of penitents who on the above principles must be presumed to have the facultas eligendi circi independently of whatever interpretation the exhortation may be made to bear. They have also, as you will perceive, an important bearing upon the question of our penitents making their confessions when in dioceses out of England. My own advice in all such cases would be—go to the proprius.
aceros of the place where you are; tell him without any reserve what your ecclesiastical position is; he will probably, if not certainly, refuse to hear you; but by such refusal he at once frees you, and, as Sylvester expressly says, gives you tacitly permission to go to another priest, and in giving that permission, gives to the priest you choose the jurisdiction he needs.

The second way in which the facultas eligendi may be acquired is ex consuetudine. That is, of course, not the custom of certain persons choosing their confessors, but the custom of the superior tacitly permitting a certain class to do so. There are two cases in which this custom prevails [Suarez, xxvii. 3. 2], viz., in the case of all secular priests, both parochial and simple priests, and in the case of those who have only venial sins to confess, and who are therefore not bound to go to their propria aceros. The remaining way in which the faculty may be acquired is by personal grant from the superior. This may be given either individually, or to a class of the subditi, or even to the whole body. It may be granted not only by the immediate, but by any superior. Thus, if the bishop grant such faculty, no licence is needed from the parochus, and so on. And, on the other hand, the superior can, if he should see fit, reverse the permission accorded by the inferior; but all who have ordinary jurisdiction in foro pomeritiarum may grant the faculty: "omnis ille qui habet jurisdictionem ordinaria in foro foro respectu aliorum lidelium posset illis concedere habeam facultatem eligendi confessorem; dummodo confessor habeat conditions requisitias ut ipsi possit eam jurisdictionem ei delegare: haec enim est semper lax facultas intelligenda" [Suarez, xxvii. 1. 1.]

Hence the bishop and the parochus, as well as every one included under the latter title, can grant this faculty.

The permission to choose a confessor is to choose one who is fit, "idoneus." Who is a "aceros idoneus" in respect to the tribunal of penance? Clearly every one who has ordinary jurisdiction must be presumed to be idoneus. Thus Suarez [xxvii. pref.] says, "omnis ille qui habet jurisdictionem in foro foro ratione sui munere suscipitur idoneus, et id quod sufficit ut reputetur idoneus ad talis munus susceptum etiam ut sit idoneus ad hoc sacramentum ministerium." That is, the penitent may prima facie take

it that such priest is idoneus. But if he is morally sure that such priest is wanting in the essentials which constitute "fitness" for the office of confessor, then the fact of the possession of ordinary jurisdiction would not constitute a sufficient test, and the penitent would have no right to submit himself to such a confessor. For to do so would not be rightly and duly to submit himself to the power of the keys, inasmuch as the confessor, ex hypothesi, would be one who would not know how to use the keys. And not only is it not permitted to a penitent who has the facultas eligendi to go to a priest who is not idoneus in other respects, even though he have ordinary jurisdiction, but he could not licitly confess even to his parochus "si positi sunt idonei constat scientiam illius sacerdotis respectu conscientiae sum non esse sufficientem, quia veritas praeterens est presumptio" [Suarez xxviii. 2. 9]. Now fitness in the minister of the Sacrament of Penance consists in three things: 1. Petitas, 2. Bonitas, 3. Scientia. Petitas is two-fold, natural and supernatral. Natural—that is, that the confessor must be physically and mentally capable of hearing and understanding the penitent. Supernatural—in that he must have the power of order. Bonitas is not of course necessary for the absolution pronounced by the confessor to be valid. He may be a heretic or anything so long as he has not been visited with ecclesiastical censure. But as the facultas distinctly requires, ex jure communi, that the penitent shall not choose one whom he knows to be unfit, and therefore the implied grant of jurisdiction is restricted, it would follow that jurisdiction does not pass to a confessor not idoneus, if the fact be morally known to the penitent, and hence that the confession and the absolution following would not only be illicit, but invalid; though in the case of confession made to the propria aceros, if not idoneus, it would be only illicit, but not invalid. [cf. Suarez xxviii. 1. 4 &c.] I would remark, with regard to our own present necessities, that under this head I should certainly be disposed to reckon the fact of the proposed confessor not being one who himself used confession as distinctly disqualifying him for the office. Indeed, it would seem to be exceedingly important to warn our people that they do not make their confessions to such priests.
As to the third qualification, scientia, it is sufficient that it be a minimum—that is, that the priest knows how to distinguish mortal from venial sins, and when and how to give absolution and assign penance. Though, of course, the science needed for the guidance of souls is very much more than this, still this minimum is sufficient that a priest may licitly absolve in most cases.

But now comes the question, whether the penitent is free to choose a priest who does not possess ordinary jurisdiction. The canon law anterior to the Council of Trent differs from the Tridentine discipline. According to the latter, no priest not having ordinary jurisdiction can hear confessions unless he is approved by the bishop. But it was, as we shall see, different under the older canon law, and it is this only which we need consider.

The present point extends not only to the case of the priest chosen by a penitent who has the facultas eligendi, but is an inquiry as to whether, under the older canon law, any further condition was necessary that a priest might be an idoneus judex delegatus in foro penitentiae. Of course, when the bishop is the delegator no question can arise. It is only in the case of either the direct delegation by the archbishop, or the indirect delegation through the penitent, that there could be a doubt.

There are two opinions. The first is, that in order that a priest may be idoneus, he must either be one having ordinary jurisdiction circa aliquum populum, or that he must be approved by the bishop as idoneus. This opinion rests chiefly on the gloss v. Alenon, cap. Omnis utrique sexus [ex Decret. Greg. v. 38. 13:] "executio iure iurisdictionem habendi—hoc dico propter illos sacerdotes sive seculars sive regulars, qui non habent ordinis executio iurisdictionem sacerdotalis: ut sunt illi qui non sunt a populo electi, vel qui ab episcopo populo non praeidentur." Panormitanus [Super Decretalia in cap. Omnit. 14. fol. 161] says, "Porro iuxta cai data est licentia eligendi ilibi confessorem potest confiteri non curato." Stress was also laid upon the gloss on v. specialis cap. I. in Clement. de Prive, "hic de penitentia non dicatur quae etiam [sc. privilegia] de licentia sacerdotis proprii recipin non possit a presbytero non habente curam;" and also on the canon of the Spanish Council I have before cited, and on a passage in the 4th epistle of Damascus. And so Melchior Canus [Rel. de Paeit. vi. p. 981. Op. Om. ed. 1668] holds that the confessor must be one approved, but not necessarily having jurisdiction otherwise than through the choice of the penitent. He admits, however, that the contrary opinion is the common one, viz., that the confessor must be idoneus a jure divino et naturali, and not necessarily by any formal or official attestation.

This second opinion is undoubtedly the most common; in fact there can be no question but that, unlike the pre-Tridentine law, every penitent who had the facultas eligendi conceded to him was free—unless of course the faculty made any express condition to the contrary—to choose any priest as his confessor, whether such priest were only simplex, or one having ordinary or delegated jurisdiction whether he was one formally approved, or whether he was wanting in such official qualification, so long only as he was idoneus a jure divino et naturali. And the confessor so chosen received jurisdiction indirectly through the penitent from the proper sacerdos who had given the faculty. Before adding authorities in support of this statement, let me just observe that it is quite sufficient for us in England to follow the pre-Tridentine discipline—that, namely, founded on the law of the Lateran Council. There need be no divergence of opinion as to this point of practice between those of our brethren who would be more disposed to hold to the authority of the Council of Trent, and those who take a different line. For canons of discipline, even of a general council, do not strictly bind or override former discipline, more especially if they are in restriction of greater freedom or privilege, unless they have been duly and canonically promulgated, not simply ad orbem, but in provincial synod. As a matter of fact the Tridentine decrees have never been so promulgated in the provinces of the Anglican obedience, and hence, whatever their intrinsic value, we are not and cannot be bound by them in matters of discipline, however valuable they may be, and however right it may be to have regard to them by way of counsel. Indeed, so far from the Tridentine canon law being binding upon us, it is not universally binding even in the Roman obedience.

But let me ask your attention to a few authorities for my previous statement. De Palude [In 4 Sent. d. 17. A. 18. ed. 1582]
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sagt, "Scelendum autem quod in absoluto poenitentiale principaliter consideratur potestas ordinis, secundario potestas jurisdictionis. Unde sive deutori licentia auxiliandi; sive confitendo licentia confitendi, vel confessori eligendi, sufficit quae tace quasi cedit aliqua juris summ." Soto [In 4 Sent. d. 18. q. 8]: "His tamen non obstentius [sc., consideration drawn from the places of the Corpus Juris already referred to] non est timendum quia vos volumini eligere valeant, et hoc est opinio communi. Et ratio est quod ad absorptionem solum requiratur potestas ordinis et jurisdictionis; et quidem potestatem ordinis quonque sacerdos habet, et jurisdictionem illi qui privilegium concessit per ecclesiasticum qui se confit." Medina [Codex Confess. Tract. ii. q. 31], after elaborately discussing the contrary opinion, concludes that "Opposium tamen videtur tenendum cum theologis et probatur primo quia episcopi qui habent a juro licentiam quae possunt sibi eligere confessorem virtute huicmodi licentiae possunt simplicem sacerdote eligere et velat absolutionem ut est communis practica et consuetudo; igitur etiam parochianus habens licentiam ad curato vel episcopo vel alio ordinario poterit virtute talis licentiae eligere sacerdote simplicem." Sylvester [Summa Summa, c. Confessor, i. c. 6] having carefully criticized the opposite arguments, asserts, "Nec olim; quia dicis quod nihil potest et quod est sacerdos habet potestatem iurisdictio et solvendi et jurisdictionem in habitu, licet exercitum non habet ex decet eubiturum sine materia tamquam. Unde cum sibi materiae exhibeberit per talern licentiam exercere potest suam potestatem et absolvit quam habet propria auctoritate." Franciscus à Victoris, a canonist whose authority is acknowledged as of the very greatest weight, although his works are now so exceedingly scarce as to be little known, says [Summa Stauramentorum, 160]: "Quaevis utrum qui habet auctoritatem eligendi confessores per suas vel alia ratione quonque posse eligere simplicem sacerdotem nondum expositionum ad iudiciales confissiones. Responeo absque quod sine quo posse scrupulo potest eligere quislibet sacer- dotem. Ratio est quia in hoc solo differt sacerdos habens jurisdictionem ab non habente quod ille habet materia, hic autem non; et hinc nihil aliud deficit ut hoc ut possit absol- vere, nisi materia circa quem exercet potestatem quan acceptum fuit ordinatus. Cum ergo recipiunt bussas [ac] deutor potestas subjiciendi eum vel volunt etiam talis sacerdos electus

habet materia et jurisdictionem circa illum, unde nihil ibi defict. Et ita tenendum est." At the risk of being tedious, I must ask you to allow me to finish this part of our inquiry by quoting to you the opinion of Suarez, as he has gone so very fully into the subject, as to who is a sacerdos idoneus. He clearly comes to the conclusion that it is competent to the parochus to delegate his jurisdiction to a simplex sacerdos without any licence or approbation from the bishop, and that it is also competent to the penitent who has a facultas eligendi, to choose a like priest. Suarez thus sums up the question [Disp. xxviii. 8]: "Dico ergo primo parochus ante Concilium Tridentinum ex vi juris communis poterit et valido et licito suam jurisdictionem committere cuiqueus sacerdos qui secundum naturalis seu divinum jus idoneus esset ad hunc sacramentum ministrandum; etiam si quidem jurisdictionem vel episcopi approbationem non habebat. Probatur quia in delegante erat potestas, quae hoc convenit illi ex vi ordinis jurisdictisonis, et hanc non erat iusta aut impudica, ut suppossumus, quia ex parte ipsius parochii nullem erat jus positum prohibens illi delegationem, inamo neque sine est [sec. post Tridentinum] ut infra videbimus. Rursus ex parte alterius extremi in sacerdote erat capacitas, et nullum etiam erat jus specialiter requirens in illo alterutrum ex dictis conditionibus quia neque in concilio, aut pontificio decreto ostendit poterit, neque etiam ex extrema rei sequitur; nam cui comitabatur oves tanguam ordinario pastori etiam poterat commits cura assumendae dignitum et sufficientem coadjutorum; et ideo quon- diu hoc non prohibebatur sensibatur commune. Atque hoc modo possit respondere illos antiquos canones negantes posse sacerdotes reconciliali penitentibus sine licentia episcopi: non qui a parochio habet licentiam, mediate saltam constitut habere ab episcopo, quoniam id non prohibet. Quamvis forte illi canones loquuntur, vel de reconciliacione quae debat de publicis penitentiis vel de co tempore quo episcopi erant quasi immediatius pastores suarum dioecesium, abseque divisionem parochiarum per propria beneficia. Semper tamen [I ask your attention to this, subintelligendo est conditio, dummodo talis sacerdos non sit specialissimus suspensus, vel prohibitus ab episcopo, nam haec ipsa condition in jure divino aut naturali fundata est." And then he in like manner proves that the penitent, having faculty to choose his confessor, may choose any priest idoneus a juro.
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divino et naturali. [n. 8.] “Dico secundo, standing in jure antiquo, per generalem facultatem datum ad eligendum confessorum eligi potest quibus sacramentum jure divino idoneos, absque alia conditione aut approbatione jure humano requisita. Probatur codem fundamento quia nullo ostendit potestibus jus ubi hoc sit praecepturum. Unde si superior dans facultatem expresso declararet in hoc sensu illam dare, dubii non potest quia talis facultas est facta valida.” He explains this latter sentence thus: [n. 7] “Ex quo ulteriorius inferius quamvis deretur facultas per horam generalis verba, sacerdotes idoneam, non ultrae limitandum aut necessario interpretandum de sacerdote declarato idoneum publicum auctoritate, aliud vero dictis modis; quia hoc declaratio aut limitationi non habitur in jure, neque est necessaria ex vini solius rationis quia ails modi potest sufficienter constare: de idoneitate confessores; sollicit per experientiam, aut publicam famam seu notitiam aut per aliorum fide dignorum testimonium.”

The application to our own case of what I have just laid before you will be at once perceived. There can be no question but that laity as well as clergy of the Anglican obedience have, by virtue of the exhortation, the faculties eliciendi confessores granted to them in the most unequivocal manner. The only point about which there can be any doubt is, whether the words “discreet and learned” are to be taken by way of limitation, or whether they are simply equivalent to “idoneum.” If the latter, then there can be no doubt but that all of us may choose any priest we like as our confessor, and that he can licitly and validly absolve us, subject to certain restrictions, quod locum, which I shall presently describe, and supposing him not to be prohibited by the diocesan, and to be idoneus a jure naturali. But the doubt is whether “discreet” is or is not a technical term. Let me put before you such evidence as I know of on either side. Let us take first the opinion that “discreet” is a technical word. In a note on p. 104 in his book, “The Doctrine of Confession,” Mr. Carter gives the following as the opinion of Dr. Irons, as to the meaning of discreet: “This is a term well known in Canon Law. It does not mean any common virtue which a man may attribute to himself, but definite virtue ascertained by the bishop or ordinary. ‘Discreet’ canonically means, approved by the bishop as discreet, and

‘learned,’ approved by the bishop as learned. They are technical terms. Thus a priest may be discreet for one thing and not for another. Lyndwood says, that Rural Deans may hear confessions in their own parishes (because they are parsones), but they may not hear them elsewhere, because they are not discreet, i.e., specially commissioned for such an exercise of their powers.” Now Du Cange a v. Discretus, says “apud Scriptores nostros mediæ aevi non semel occurrit vir discretus pro viro prudenti.” Vossius [De Vitaet Verborum, s. v.] inveighs strongly against the use of discretus as equivalent to prudent. But the force of his invective is lost unless we admit that mediæval writers did use the word in this sense. Du Cange, who relies on the statement of Vossius, must, I think, have drawn too hastily a conclusion from his words. The only certainly technical use I know of is, that the representatives sent to the general chapters of religious orders from the provincial chapters, or rather from the chapters of the dependent houses, were called Discreti [see André, Dict. du Droit Canon s. v.]. And in convents Discretus was a title given (I quote from Du Cange) to these “quiis reserum secretorum in cuncta cura adeo secresium consilia admittatur et ut fratres maturi in monasteriis vivant.” Discretus was also used in a quasi technical sense as a title of honour applied to high officials. Thus Robert de Beauchamp, temp. Henry III., addresses a certificate, “Domino et missis meis thesaurarius et baronibus de sacrarulis . . . vestris discretioribus, etc. [see Madox, Formulare Anglicanum p. 5, n. xi.]” Latham in his excellent edition of Johnson’s Dictionary draws a distinction between “discreet” and “discrete.” The former he gives as equivalent to prudent, circumspect, &c., the latter as the equivalent of discretus—distinct, detached. But I think I may say (and I have the authority of an eminent bibliographer, to whom I recently put the question, with me) that this distinction of spelling cannot be really drawn, nor, if it could be, would it be possible to build securely upon it. I may however mention that in both the folio London editions of May and June, as preserved in the Cambridge University Library, the word is spelt discretely (meaning, according to Latham, separated). The same spelling is employed in the Worcester quarto of the Second Prayer Book. I may also refer to one passage in a modern though old-fashioned writer,
Mede, in his Diatriba, p. 191, ed. 1642, says, "Nay it is very probable that to show their despisition of the poor Gentiles, and to pride themselves on their prorogative and discretion from them, &c."

Doubtless it is due to my less varied reading, but I must say that, so far as my knowledge of canon law goes, I must arrive at quite a different conclusion from that maintained by Dr. Irons. So far from being aware that discreet is "a term well known in canon law," I should have said that it was quite unknown in a technical sense, except in the very limited instances I have given above, which, though, as you will doubtless think, not touching our case very nearly, are still the nearest I know of, or after considerable pains have been able to discover. I shall be exceedingly obliged to any of the Society who will kindly give me any nearer references.

Dr. Irons refers in a general manner to Lyndwood. But Lyndwood's authority appears to me to go directly against him. Thus the decree De confessorebus of the Council of Oxford, cap. Quoniam de Poenit. (p. 326, ed. Oxon.) runs thus, "Quoniam nonnullum ob defectum confessorum et quia decani rurales et persone erubescentis forte conferri suo praebito, immittat pecuniam animarum; velut haec morbo moderi, statutas ut cori confessores prudenter et discreti per singulos archidiaconatus apseicipi loci statutum." Lyndwood's gloss on discreet shows clearly enough, even if the structure of the sentence did not, what is the meaning to be attached to the word. He says, "Discrete quidem faciendae est confession." And then, in order to explain who is discreet, he refers us to the gloss on cap. omnis utrimumque sacris. Now that famous canon says that the priest to whom a penitent goes who is allowed to choose his confessor, must be "saceros discretos et deatus, etc." And a note of the Corpus Juris refers us further as to discreetus to Peter Lombard's description of a confessor, On turning to the famous Master of the Sentences [v. dist. 19. Quaen. E.] we find he says, "ex his satis perpenditur quidam cecat esse saceros qui alios ligit et solvit, discretus et justus; aliquem mortificat sepe animus quin non moriuntur et virificat quin non vivant et in malodictionem iudicium. Is there in all this the least trace of discreetus being a technical word? It is perfectly clear that it is used wholly in a moral sense. And this is confirmed by the Master's use of indiscreetus a little further on [30 c.], where he considers the case of a penitent to whom a "sacerdos indiscreetus" had given an improper penance. Further I may remark that the canon Quodt, etc. confirms this, by its use of the phrase, "postquam ab annos discretionis perverterit," which the gloss on the word explains, "Id est cum est dol capax quis tunc potest poccere." Again, the Constitution of Edmund, De penitentia (Lyndwood, p. 330) has, "nisi in casibus cum sacerdos non poterit, vel absorbs sit, vel studet vel indiscretus non valit." Here again indiscretus is clearly not used technically. But in his gloss on v. discreetis cap. In causis De judic., Lyndwood completely disposes of the case. I presume this is the canon Dr. Irons refers to. It runs thus: "Statutim ut decani rurales nullam causam matrimoniali de cetero audire presumant, sed caram examinatio non nisi discreet viris committatur." On this Lyndwood says: "Hie autem discreetio idem est quod divisionis, scientia, discursus vel quorumlibet rerum consideratio ad quod tendat, et dicitur discreetio omnium virtutum esse matter. Et haec discretion considerari debet in hac materia maxime ut in eis talis causa committitur sciat discernere circa ea que in talibus causis a parte Justi Canone sunt ponderanda. Sed namque decanus rurales ex missiones speciali possit cognoscere in causa matrimonialis si sit vir discreetus et jurefrontus,... Undo si talis decanus ruralis alias sit ad talia discreetus scio, et idemus bene potest talis causa sibi committere." I confess this seems to me to point to an entirely different conclusion, not only as to discreetus, but as to rural deans, to what Dr. Irons draws. And once again I submit there is no trace of discreetus meaning anything technical. I think I know everything that is said in Lyndwood about rural deans, and yet I certainly do not know anything which can support Dr. Irons' statement. On the contrary, it would appear from the Constitution Quodt in quidem of Olhe, that rural deans could do more than only hear the confessions of their parishioners. They were à jure the confessors of the clergy of their deaneries. I know of no statement that they were not discreet to hear confessions. The instances, however, in which Lyndwood uses discreetus and indiscreetus in the moral sense are extremely frequent. Thus in the gloss on Altorius parochianus, in cap. Sacerdos de Poenit. he gives as one of
the exceptions to the rule that people must confess to their propria sacros, "quando propria sacros indicatur est;" there can be no shadow of doubt what the use of the word is here. On the whole I must submit to you that Lyndwood does not use discreet in a technical sense. That the word was used in mediæval and contemporary times, and by canonists, as equivalent to prudent is quite certain. Thus, to mention only one place in Suarez, he uses the word thus in xxxvii. 2. 18. I have already shown that the Canon Omnium utriusque sexus so uses it. There is a similar use in the decretal of Gregory IX. [Ex Decret. Gregory, v. 38, 16] "Ne pro dilatatione veniam in periculum imminentem animarum permitamini episcopi et alii superiores meum minoribus Prelatis exemptis it etiam preter sui superiores licitiam providum et discreetum sibi possint digere confessorem." We have seen that such confessors need not have jurisdiction otherwise than through this faculty, and that he need not be approved, and indeed Melchior Canus (p. 360), in a marginal note, expressly takes it so in reference to this case, though he disputes certain inferences, so that it is quite clear that the Corpus Juris itself uses discreet not in the technical sense. As to contemporary usage, let me only remind you of "discreetly, advisedly, and soberly" in the Marriages Service; "discreet" in Genesis xli. 33, and Titus ii. 5; and lastly, of Shakespeare's use of it [Coriolanus III. 1]—

"Less fearful than discreet,
You love the fundamental part of state
More than you doubt the charge of it."

From all this evidence I must ask you to draw your own conclusions. I cannot myself entertain any doubt but that the words "discreet and learned" have not a technical meaning in the sense of indicating any licence or approbation or appointment by the bishop. But does it necessarily follow that they are no more than a somewhat pleonastic equivalent of "sacerdos idoneus?" I can scarcely think so. Here, indeed, I can only give you my opinion, and ask you to consider whether the grounds of it are of any weight. The point is one on which direct evidence is not forthcoming; we have nothing but presumption and analogy to guide us. First, then, I remark that general liberty to go to a confessor other than one's propria sacros is a custom of the Anglican

obedience only, but obtains throughout the whole Western Church. Everywhere the faithful go to whom they will; but with limitation. The confessor must not be simplex sacros. Thus Benedict XIV. [Inst. xviii. 9] says, "Apparet confessionis precepto satisfacere qui peccata sus culitbat probato sacerdoti confititatur." Nor does this limitation militate against what I have already drawn your attention to, as to the freedom of the choice where there is the facultas eliendi, because this is not properly a case of such facultas, inasmuch as, as we have seen, it cannot be generally gained by custom. Hence probato here must mean one having ordinary or delegated jurisdiction, either as a curator or ex privilegio. Next I notice that the exhortation is read by one having ordinary or delegated jurisdiction, who says, "Let him come unto me, or to some other discreet and learned minister," thereby putting himself into the class of the "discreet and learned." Now what is it that differentiates the priest who uses these words? what gives him a right to call himself a "discreet and learned minister?" "No man beareth witness unto himself;" so it cannot be simply an assertion that he possesses the moral and intellectual qualities of a good confessor. Nor can it be only that he is so by virtue of his ordination, because if so, all priests would necessarily be "discreet and learned," as part of the indissolubility of Holy Order, and then the words would be a somewhat offensive redundance. We are then, I think, thrown back on the possession of jurisdiction (ordinary or delegated) as the sole possible differentiating factor. This it is that points a priest out as being, a jure ecclesiasticō, "discreet and learned" in foro sacerdotis, because prima facie it is to be presumed that, unless he were so, he would not have obtained such jurisdiction; though we know, unhappily, that at the present time in the Anglican obedience it would be the exception rather than the rule to find ourselves able to act on such prima facie presumption when choosing a confessor, because we should be reluctant to admit that the priest "discreet and learned" a jure ecclesiasticō is now but too often not "idoneus" a jure naturali. I submit to you then, with some considerable confidence, that the words "discreet and learned" are a limitation on the freedom of the person in choosing a confessor, and are a direction to him to choose one
who has ordinary or delegated jurisdiction, and that if the
penitent does not do so, his choice will then be an invalid
choice, and the absolution pronounced be null and void
through defect of jurisdiction.

I would also offer to you one further consideration in sup-
port of the opinion I have advanced. It is this,—that to
assume that no limitation was placed on the choices of the
confessor would be to impugn the authorities of the Anglican
obedience; a very grave degree of carelessness, if not criminal
neglect, in regard to the regulation of the highest depart-
ment of the pastoral office. This may seem strong language.
It is not so strong as that used on this very point by
Melchior Canus, though the scope of what he contemplates
is much less. It is not the case of millions of souls that he
is speaking of, but only of the comparatively limited number
to whom in the Roman obedience the faculties eligendi is
granted. Considering the fact that those who have it there
are ordinarily quite capable of wisely, or sufficiently well,
choosing their confessor, and considering also the unques-
tionable fact that, as we have seen, the older discipline was
clearly against him, you will probably agree with me that
his words are unnecessarily severe. Still he says, “Si
summus Pontifex instituerit judicis in his interiori omnes
sacerdotum simplicis sine aliquo examinatione et probatione
peccati mortali quod non est existens cum anno
Pontificis in general et publica concessione.” [Clement.
vi. p. 951.] And again: “Proteraea causae estque:
summus Pontifex si examen et probationem
idonei confessores relinquat arbitrio curiæ ministri popularis.”
[Ibid. p. 952.] But I should, for my own part, scarcely
think these sentences too strong were they applied, mutatis
mutandis, to our own case. The supposition I combat seems
to me to be one without any parallel, and full of difficulties
both practical and theological. Those difficulties are how-
ever, I venture to think, obviated by considering the words
“discern and learned” to be a limitation of choice to those
who have jurisdiction, either ordinary, or delegated to them
by some one having ordinary jurisdiction, viz., bishop, paro-
clers, &c., or at least to those who have the right to hear
confessions ex priviligen. Such are regulars, if they are
such canonically speaking; that is, if they are recognised by
ecclasiastical authority; for mere voluntary unrecognised
association cannot acquire privilege. Others, again, are
graduates in theology, according to Melchior Canus, who
as a rigorist cannot be suspected of attributing privilege
where it is doubtful. He says, in answer to the objection
that the principle he had laid down would often exclude
penitents from seeking the guidance of learned theologians
who might be of great assistance to them, “Hinc ego
responsus quasmodi viros in theologiam magistros ascendisse
habebi probat eos enim solet ab episcopi
examinari.” [Ibid. p. 954.] Whether there are others to
whom the privilege may be extended, I confess seems doub-
tful. It might be argued that, whatever position is accepted
by a bishop as a title for holy orders may, so long as it is
occupied, be considered as a qualification for the office of
confessor. I did at one time entertain this opinion, but subse-
cquent consideration induces me to doubt its tenability; and
certainly, though arguable, it cannot be positively proved.

But this brings us to the consideration of the case of
doubt in respect to jurisdiction. This may arise from
various causes, which will readily suggest themselves to
you. In addition to such, I beg to suggest, on my part,
the whole question we have just been considering. It must,
I mean, be at least considered doubtful whether “discern
and learned” may not be a limitation. What then are the
principles regulating practice where there is doubt as to
jurisdiction? The line to be followed is generally indicated
as the opposite of the condemned proposition, “Non est
illudium in sacramentis sequi opinionem probabilum de
valore sacramenti relictæ tutiora.”

Now doubt is of two kinds, as Suarez [xxv. 6] points
out:—1. Proprium se, pro eo negativum—the mind being in
suspense, and unable to decide by any positive judgment.
2. Improprium se causa rationis formalis, quamvis
determinare possit forse judicium probabil, spectet
in qua potest esse dubitatum, et variebus, qui potest utrique pari
judicare secum probabilis vel secum probabilis quavis altera
sit probabilis, et a contrario. Now what the doubt is of the
former kind, the general rule is, that it is never lawful to
exercise the office of confessor, except when there is very
great necessity. This may arise in two cases:—1. In articulo
In certain special conditions of the penitent, e.g., when he is bound to say mass, or to communicate, or cannot avoid doing either without giving scandal, and his conscience requiring him to go to confession, he cannot go to a confessor other than one whose jurisdiction there is doubt, without either—1. grave incommode—2. danger of making a bad confession—or 3. danger of causing the name of an accomplice, or partner in sin, to become known. But there is the condition attached, if absolution is given in such case, "ut habeat sub conditione et cum omnibus iuro et confessionis." When the doubt is of the second kind, namely, that there may be sufficient jurisdiction, but, on the other hand, there is a contrary opinion, which is at least probable; in this case it is permissible to confess to a priest about whose jurisdiction there is such doubt, if recourse cannot be had to another. Suarez [ubi sup.] says, "Primus modus dicit esse potest hoc ipsi quoque minister iuxta probationem doctorum sanctum et omnibus habere jurisdictionem ad ministrandum hoc sacramentum quandoque illa utitur re vera illam habere ex iis suis obsecratione. Et hoc primum in iure rei gestionis est ut qui communi exstimationem et opinione magistratium gerat, licet in re ipsa non munus illud vero titulus non obtineat, nihilominus gesta eis valent propter commune bonum. Ergo in presenti quia probabiles opinio sufficit ad iure commune exstimationem verissimae est ecclesiam suppleri defectum si fortasse aliquid in re manet et confirmatur ex universali ecclesie consuetudine quae est sufficiente signum jurisdictionis. Est autem universalis ecclesiae usus ut sacerdotes securius ut stabilem jurisdictionem in administratione ejus sacramenti,"

And so if a priest is mistaken as to his jurisdiction, and acts bona fide, or in canonical language, cum titulo colmate, that is with a defect in his jurisdiction of which he is unaware, then, notwithstanding the defect, the absolution he pronounces is both licit and valid, because the Church is held to supply the defect—so communiter docet. But if he conceal the defect, or merely imagines without any ground that he possesses jurisdiction, that is if he acts sine titulo colmate, then the common opinion is, that the absolution is void; but some affirm that if the penitent is acting bona fide, the Church in this instance also, supplies the defect (cf. Ferraria v. Confessorius J. 34—40).

There remain two more points to which I must ask your attention: they may however be discussed very shortly. The first is as to the duration of jurisdiction. We have been discussing jurisdiction quoad personas, we must discuss it quoad tempus and quoad locum.

As to ordinary jurisdiction there is no difficulty; that of course lasts so long, and no longer, than the possession of the munus out of which it flows lasts.

Delegated jurisdiction may be given either for a fixed time or not. If the time be fixed, it determines with the lapse of that time. If no limit of time be fixed, it continues until revoked. But jurisdiction may be limited as to time by the circumstances of its grant, as well as by explicit limitation; "si concessio sit ad actum limitatum, vel ad materia determinatum, istam non extenditur; propter rationem factam que comed modo locum habet in presenti." [Suzex, xxvi. 3. 2.] Thus jurisdiction is determined by the accomplishment of the act for which it was granted, but lasts until such act is accomplished. For instance, in the case of a penitent having the facultas ligandi, that faculty, as we have expressly seen, is not terminated una ovo, that is by the choice of one confessor, but extends to the choice of any number. Now when a penitent chooses N. as his confessor, N.'s jurisdiction extends over the penitent in regard to everything which forms the matter of the confession then made, and is not terminated until absolution has been given. So that if N. in the exercise of the potestas ligandi refuses absolution until a certain act, an act of restitution for instance, or some similar thing was performed, the performance of which he had a right to demand as a condition of giving absolution, the penitent remains under N.'s jurisdiction until that act is performed, nor could he under such circumstances
go to another priest, and get absolution and remission of the
penance, without N.'s leave. But directly the absolution is
given N.'s jurisdiction ceases, and the penitent is free to go
to another confessor. And even if he continues to go to N.
habitu alloys, still N. cannot acquire any habitual jurisdiction
over him, but simply gets jurisdiction each time quod
actum. In other words, the penitent is not N.'s subject
except during the interval that elapses between his kneeling
down in the confessional and his receiving absolution. Of
course N.'s jurisdiction extends further per accidens, as the
penitent is bound to fulfill those things which N. in the
rightful exercise of that jurisdiction compelled him to. You
will, I need perhaps scarcely remark, of course perceive that
I am not saying anything as to the tie subsisting between a
director and his spiritual pupil—that is a matter belonging
to canon law, but to moral and ecclesiastical theology.

Delegated jurisdiction, when it is acquired personally,
may be lost not only by the revocation of the grant by the
delegator himself, but by his superior. A distinction must
however be drawn between the two cases. For whereas
"si qui delegavit suo sequitur sine ullo causa potest revocare
non solum valide sed licite, per se loquendo, quia utitur jure
suo et quasi re propria," it is otherwise when the superior
revokes a grant made by an inferior ordinary; for, "superior
non potest revocare delegacionem factam ab inferiori sine
aliaque rationabili causa, idque non tam propter jus acquisitum
a delegato quam propter jus ipsius delegantis, quod habet ex
ei suis jurisdictionibus ordinatis, quod habet ex commitente
filam actum; nec potest hoc usum privatum sine rationabilis
causa." Hence si evidenter sit injusta revocatio, videri potest
nulla, quia est privare alterum irrationaliter invitum re
sum." [ Suarez, xxi. 3. 3.]

Delegation is not determined by the death, suspension,
or excommunication of the delegator when he is a prelate—
that is to say, delegation in fo
cio pontifici; for it is otherwise in fo
cio exter
cum; thus the power of the vice-general comes
ipso facto on the death of the bishop. But the contrary
principle, as I have just said, applies to the case of jurisdiction
in fo
cio pontifici, "quia delegatio hujus jurisdictionis
non est pensanda per regulas justitiae, ut sic dicam, sed
gratiae: regula autem gratiarum est, ut non expirat per mortem

constatantia." [Suarez, ubi sup. 7.] And the same, generally
speaking, holds with regard to the jurisdiction delegated by a
parochus: "Ultimo loco dicitur est de parochio qui dele-
gavit jurisdictionem suam assumendo aliquem in vicarium,
seu coadjutorum suum propriam tantum auctoritate absum
approbatione vel confirmatione episcopi. In quo censeo con-
sulendum esse consuetudinem, nam videtur hoc pendere ex
voluntate episcoporum iacta vel expressa."

[ Ibid. 13.]

The next and last point is as to jurisdiction quod locum.
In the case of ordinary jurisdiction this gives the right of
exercising the office of confessor within such bounds as the
manna, or beneficium through which the jurisdiction comes,
extends to, or affects. The jurisdiction of a parochus extends
throughout his parish, and so on. Similarly the extent
quod locum of delegated jurisdiction is defined either ex-
pressly in the grant, or else extends within the same limits as
that of the ordinary who grants. If the ordinary—be he
bishop or parochus, &c.—delegates jurisdiction in general
terms, then it extends generally. But if he indicates a certain
place, it extends per se loquendo only to that place. Thus
when a bishop licenses an assistant curate, there is a special
designation of the place where the "ecclesiastical duties" are
to be performed, and therefore he has jurisdiction quod locum
only within the bounds of the parish. I have said per se
loquendo, for the proprius sacerdos can hear the confessions
of his subdi, whereasver they may be. Thus Victoria
[San. Secu. 151] says, "Queritur uti potest proprius
sacerdos a su diagamatione utrum curatus in uno episcopatu
patui a quod sit st forum in ali episcopatu. Res-
pondeo, omnino quod sit. Quia sit sine stipendio judicii, et
neminem sit injuria." And so Suarez [xxv. 1. 17], "Queritur
an jurisdictione terminatur locis aut personis id est an possit
exerceri intra terminos diocesis, vel parochiae circa qua-
cunque personas in existentibus: vel et contrario solum circa
personas proprias talis diocesis ubiqueque existit? Res-
pondeo jurisdictionem terminari personae et non loci episcopatu
termini. Itaque episcopus potest absolvere subsidiis auum
si cum illa simul versetur extra diocesam suam, vel potest
illi dare facultatem eligendi confessorem ubiqueque existit.
Ratione est quia hoc sacramentum per se requirit jurisdictionem
in personam, quia illa judicanda est; hoc autem juris-

dictio nec aquiritur nec admittitur ratione presentis vel absque loco. Italiaae aequium habeas jurisdictionem ab episcopo in omne suo subdito potest absolvit aliquem eorum etiam arbo extra diocesin inveniantur: quia illa circumstantia loci nihil refert ad hoc sacramentum, nec tollit aut dat jurisdictionem. So also Reginaldus [Francis Pene-
tentier I. 8. 93] there is however some divergence of opinion as to whether this power extends to those priests who only have delegated, as well as to those who possess ordinary jurisdiction. St. Sylvester [v. Conf. I. 14] asserts the negative. But Reginaldus concludes against him, that no distinction can be drawn. Soto also [In f. Sent. xvi. 4. 3, § Aliud vero] takes the same view. Victoria, as we have seen, distinctly asserts that the proprius sacerdos has this power. But the proprius sacerdos, as S. Thomas says, "duplex est vel ex jurisdictione ordinaria vel ex delegata" [In f. Sent. d 17. 3. 2]. We may therefore certainly conclude that every priest, who has the title of proprius sacerdos can absolve his subditi, that is, all those to whom he is the proprius sacerdos, whereas ever they and he may be.

I will ask you, however, to observe carefully the principle on which this proceeds. Ubi persone ibi locum. It is the same principle by which in civil and international law an ambassador's residence is reckoned, for the purpose of legal acts, as a part of the country of the sovereign by whom he is accredited. The presence of the ambassador, and of sub-
jects of the crown whose representative he is, constitute the place where they are, even if it be merely a temporary hired house, a part of their native country, so that, e.g., a marriage solemnised therein, according to the law of their own country, and not according to that of the foreign country where they physically are, would be a valid ceremony. In fact they are morally and legally considered in their own country, though physically in a foreign one. Now this is really the principle which governs the case we have been considering. The proprius sacerdos and his subditi are for the purpose of jurisdiction in foro penitentiario considered to be morally and canonically as in their own diocese or parish, though physically they are in a foreign diocese or parish. But this principle must not be further extended, for it is only in favorem penitentiae. The priest can do all such acts, as he could do at home in respect to such penitents, but he can do such acts only; he cannot absolve any penitent who is not his subdili ex jure. Just as the ambassador (if he have commission so to do from his own sovereign) might give judicial decisions in respect to his own countrymen with regard to matters arising within the necessary precincts of his residence—that is, he could act as a judge; but he could not therefore judge anyone who came to him, though he might do so if in his own country. We must carefully hear those principles in mind, as they are of the highest practical importance, and as otherwise we might arrive at the conclusion that there was really no such thing as the limitation quod locum, and be landed in the absurdity, as Reginaldus [ubi supra] says, of supposing that once a priest obtained jurisdiction as a confessor, he became so for the whole world—confessor totius orbis—whosoever he might be. It follows however from the above considerations, that though the proprius sacerdos may absolve his subditi wherever he and they are (he cannot, however, do so in a church without leave, tacit or expressed, of the rector—in the canonical sense—of that church), yet he cannot, when out of his own parish or locality within which he has jurisdiction, absolve anyone else; and so he would not be able to hear even a penitent who had the posesitas eligebat. That is, if he only proceeded on the strength of his own jurisdiction. For of course, if he obtained the leave of either bishop or parochus he could do so, because then he would be acting on jurisdiction delegated from such bishop or parochus, and not on his own original jurisdiction. This, as applied to our own case, of course proceeds on the view as to "dictum et lectionem" which I have urged on your attention. But even if you decline to accept that view, you would still have to grant that if the penitent chooses a simplex sacerdos as his confessor, such priest, inasmuch as he must somehow have jurisdiction quod locum, cannot hear confessions in a church without the permission, much less against the will, of the rector. Whether he could do so elsewhere, I confess, I can give no opinion. Indeed, this seems to me one of the many difficulties—insoluble, as I believe, on any principles of canon law—in which that hypothesis lands us. The practice of the mendicant orders, in hearing confessions ever.
at the market cross, is the only thing at all parallel to a practice which I must, with all due deference to the great names amongst us which are now against me, call a state of utter ecclesiastical anarchy. But it is only apparently parallel, because the mendicant friars had jurisdiction delegated to them, and were expressly granted privileges; how far, however, conducive to ecclesiastical order, or the good of the Church, history must tell us.

It only remains to sum up the conclusions I have endeavoured to present to you as regards the necessities of our own position. They are chiefly these. Jurisdiction is necessary for valid absolution. It belongs to all beneficed priests in cure of souls, and cannot be taken from them, so long as they hold their benefices and are not suspended by valid ecclesiastical sentence. It also belongs to all assistant curates, being delegated to them directly by the bishop. It can also be delegated to any priest by any parochus, unless the proposed delegate be inhibited by the bishop, or there be any diocesan statute, or custom having the force of statute, to the contrary. Such delegation may be temporary or permanent, if the diocesan do not object. But no priest can absolve unless he have such jurisdiction. All the faithful of the Anglican obedience have the right to choose their own confessor so long as they choose a priest who has ordinary or delegated jurisdiction, or at least a graduate in theology. Priests may hear the confessions of their subditi, that is, of those who are domiciled in their parishes, however they may be. But they cannot hear anyone else except within their own churches, or parishes unless they have permission from an ordinary, either the parochus or his superior. Prelates, e.g., superiors of religious houses, if recognised by the bishop or superior ecclesiastical authority, have jurisdiction over the members of their own houses, and may hear the confessions of any besides who come to them in their own monasteries; but they cannot absolve elsewhere without permission as above. The expression "discreet and learned," though not a technical expression, yet means more than bonae a jure divino et naturali, and must be taken to mean one having jurisdiction. It is extremely doubtful whether a title to holy orders is a sufficient qualification. It is not permissible to act on doubtful jurisdiction, unless in cases of extreme necessity, and then only subject condition.