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# THE LEGAL BASIS FOR THE COMMON ERROR ELEMENT IN LEGAL THEORY OF APPEARANCE : MAXIM "COMMUNIS ERROR FACIT JUS"

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## Abstract:

This research aims to study the legal regulation of common error as an element of the apparent situations theory, tracing its historical development, the stages it has passed through, and the legislative, jurisprudential, and judicial positions on it. The research methodology is represented by the comparative analytical approach, through analyzing the legislative, jurisprudential, and judicial positions on common error in Iraq, Egypt, and France. The importance of the research emerges from the practical significance of the apparent situations theory. However, this is countered by the scarcity of recent studies on the element of common error. These studies do not match the practical importance of this vital topic, most of whose rulings have been formulated by the judiciary and jurisprudence in France. Therefore, we will conduct an in-depth study on the concept of common error and the mechanism of its application. The research concluded that common error is one of the elements of the apparent situations theory, and its basis is the Roman rule "communis error facit jus". Common error is an element of control, balance, and preference between conflicting interests: the interest of the right holder in not having his property expropriated, and the interest of third party in correcting their behavior with the apparent person, and the priority is given to the interest that is most taken care of, which is the interest whose owner has adhered to the limits of the law. The research recommends that the Iraqi legislator regulate the element of common error with precise, detailed provisions within the civil law, so that the path to its application is clear, and the judiciary will not find any difficulty in applying it directly.

**Keywords:** communis error facit jus, legal theory of appearance, The Good faith Principle "Bona fide", apparent ownership.

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## INTRODUCTION

The theory of apparent positions is a long-established legal theory, with roots dating back to ancient Roman law and the Praetorian Decrees. The concept of this theory can be summarized as a legal theory that prioritizes deceptive appearance over legal truth by correcting the conduct of the apparent person and arranging its legal effects as if the conduct were issued by the right holder. From the above, it is understood that the theory of apparent positions requires the presence of three persons: the first is called the apparent person; the second is the holder of the real legal position, called the right holder; and the third is the party contracting with the apparent person, called the third party. The theory of apparent positions consists of two basic elements that must be met together for its provisions to be applied: the material element and the moral element. The material element is represented by a tangible, deceptive reality that is not based on law. This element relates to the person holding the apparent position and is realized either by a voluntary act, such as a contract declared invalid, a material fact, such as possession, a court ruling, such as a ruling on the estate of an heir who is later found not to be entitled to the inheritance for some reason, or an invalid administrative procedure, such as the registration of a property by a non-specialist. The moral element, however, consists of the elements that make a third party dealing with the person holding the apparent position worthy of the protection afforded by the law. This element relates to the third party and represents the moral aspect of the theory of apparent positions, as it is psychological and does not belong to the world of sensation and movement. The moral element consists of the element of good faith and the element of common error. The latter element, represented by common error, is the subject of this research (Salah, 2002).

Common error is one of the most prominent elements of the theory of appearance, as it balances conflicting interests and prioritizes the first interest. However, this importance is offset by the scarcity of recent studies on the element of common error. These studies do not reflect the practical importance of this vital topic, most of whose rulings have been formulated by the judiciary and jurisprudence in France. Therefore, we will conduct

an in-depth study of the concept of common error and the mechanism of its application, so that our study complements the efforts made by jurisprudence and the judiciary in formulating the provisions on this error. The problem of this research revolves around the legal basis of common error. Comparative legislation does not explicitly refer to the element of common error. This has prompted jurisprudence and the judiciary in France to resort to *ijtihad* in applying the provisions of common error, followed by jurisprudence and the judiciary in Iraq and Egypt. This legislative deficiency has led to the emergence of several problems surrounding common error, most notably: the basis for applying common error, the confusion between the element of common error and the element of good faith, and the controversy surrounding the standard for applying common error. Therefore, it is necessary to address these problems with a modern study that takes into account the economic and legal transformations witnessed by the contemporary world.

In our study, we will adopt the comparative analytical approach, by analyzing legislative texts that address applications of the apparent theory, to determine the extent to which these provisions address the element of common error. We will discuss these texts and present the views of jurisprudence regarding them. We will also conduct a comparison between civil legislation in Iraq, Egypt, and France, through which the provisions on common error will be compiled into a comprehensive and comprehensive study, providing the reader with a complete picture of the provisions on this topic.

We will divide this research into two sections: In the first section, we will address the nature of common error, and in the second section, we will address the criterion of common error, as follows:

### THE NATURE OF COMMON ERROR

We will divide this axis into two sections: In the first, we will address the definition of common error, and in the second, we will address the distinction between common error and the element of good faith.

### DEFINITION OF COMMON ERROR

Common error is one of the most controversial elements of the theory of apparent positions in the realms of jurisprudence and the judiciary. Much has been said about it that is not originally part of it, and much redundancy has been introduced into it. This is due to the lack of a thorough understanding of its meaning and the lack of distinction between it and the other elements of this theory. Common error is as old as the theory of apparent positions; in fact, it was its title, as this theory was known as "Error communis facit jus". A section of French jurisprudence maintains that this rule has been linked to the theory of apparent positions since its inception in ancient Roman law, and is therefore a Roman creation. While another branch of French jurisprudence denies this, claiming that this rule originated with ancient French legal scholars, it has been mistakenly attributed to Roman law. Proponents of this view argue that although Roman law was the first to establish the theory of apparent situations, it did not formulate a comprehensive theory, but rather relied solely on the rules of justice when applying its provisions.

Regardless of the source of the principle of "Error communis facit jus", the established view among most jurists is that the theory of apparent situations bore this name -Error communis facit jus- before it was established with its current name. However, although this theory bears the name "common error," this error alone was not sufficient for its provisions to be applied. Rather, its elements, represented by material appearance, good faith, and common error, must be combined. The combination of these elements ensures the theory's effectiveness in acquiring rights. The term "Error communis facit jus" persisted until the mid-nineteenth century, when it was replaced by other terms, such as "the theory of apparent situations" and "the theory of appearance". This was when French jurisprudence adopted this theory and significantly developed it. However, this jurisprudence was unable to ignore the concept of common error. Due to its historical roots, this concept has remained a stable element of the theory of apparent situations (Ulubaih, 1993).

In its early stages, the concept of common error was based on a collective illusion or a common, mistaken belief among people, generated by an apparently incorrect situation. However, some have attempted to mitigate the requirement that everyone share in the error in order to achieve the characteristic of commonality. This is done by arguing that the prevalence of error should not be understood as a universal belief, as this would be impossible and would lead to the loss of this element's importance. Indeed, it often constitutes an obstacle to the application of the theory of apparent positions, undermining the principles of justice and the stability of transactions—the principles for which the theory of apparent positions was formulated. Therefore, if a common error is not firmly established among some who are aware of the reality of the apparent position, this does not detract from the possibility of its implementation, as long as it is shared by a number of people who constitute the majority. The requirement of commonality was further mitigated when the characteristic of commonality began to shift from its literal meaning to a metaphorical one. For this characteristic to be achieved, it is sufficient for only one other person to commit the error. After that, it is assumed that any person would commit the same error if they were placed in the other person's position.

It must be taken into account that discussing common error only applies when the theory of apparent positions meets its other conditions. Thus, our discussion of common error assumes the fulfillment of the material element of the theory of apparent positions in the manner previously explained. It also assumes that the person with the apparent position dealt with the third party based on his actual position. Finally, it assumes that this third party was acting in good faith and was ignorant of the true position of the person with whom he dealt. However, all of these elements are insufficient to apply the ruling of the theory of apparent positions, by correcting the action based on an incorrect appearance, stripping the right from its owner and placing it in the possession of a third party. This is because this is considered a serious measure that affects the immunity of acquired rights and wastes the logic of the law, which requires that the action be carried out by a person with legal authority over the property, while the person with the apparent position does not possess this authority. The material element alone is weak and cannot justify giving priority to the interest of the third party over the interest of the person with the actual position. Because this would allow anyone who usurps another's property or legal position to benefit from this illegal act, the theory of apparent positions was not created to protect the apparent interests of the person. Furthermore, the good faith of a third party, when unaware of the true position of the person with whom they are dealing, is not sufficient to prioritize their own interests over those of the person with whom they are dealing. Their ignorance may be due to their own mistake, naivety, or lack of caution. Had they exercised a certain degree of care, the truth would have been revealed. Given the insufficiency of these elements to establish the apparent position, the concept of common error emerged as a balancing and weighting factor between conflicting interests. Through this, the theory of apparent positions was regulated, and its scope of application was limited to cases where the interests of society and the principles of justice, stability of transactions, and legal security required it (Sarhan, 2022).

Although the theory of apparent situations is one of the established theories in law, and legislators have addressed it with many applications, the most prominent of which are the formality, the apparent heir, the apparent creditor, the actual partnership, and the apparent capacity, and these applications find their provisions clear and explicit in civil laws, especially the Iraqi Civil Law No. 40 of 1951, these laws addressed the material element of the theory of deceptive appearance, and addressed the element of good faith, without referring to the element of common error. Due to the lack of explicit texts defining the meaning of common error, controversy has erupted in legal jurisprudence over the meaning of common error. Numerous definitions have been proposed by the majority of jurists for this error. One approach in jurisprudence relied on a numerical criterion to define common error. One defined it as a belief contrary to the apparent truth. This belief is not attributed to a third party alone, but rather to the majority of those surrounding the actual position (Jamiei, 1955). Another defined it as an error based on the idea of generality, i.e., it is shared among people, such that everyone takes this imaginary situation as true (Sarhan, 2022). A third said, A common error is a general error that is committed by the majority, if not everyone. Based on this, an apparent error is not worthy of protection unless it is likely to deceive the general public and the majority. If it is likely to do so, then the consequences arising from it must be protected (Yusef, 1989). This approach has been criticized because it relies on a numerical criterion that oscillates between everyone being deceived by the apparent truth, or at least the majority being deceived by this illusion. Therefore, the apparent truth is ineffective in protecting third party unless it deceives everyone or the majority, such that they believe the apparent situation is the legal reality and that the person in the apparent position has jurisdiction over the transaction. The author of this criticism argues that the corruption of this criterion is clear because consensus on the illusion of the apparent truth is impossible. This leads to the theory of apparent situations being confined to a very narrow scope, losing its importance derived from the principles of justice and the stability of transactions. These principles cannot be ignored because they are linked to the public interest. Furthermore, a transaction based on the apparent situation concerns only its parties, and therefore there is no justification for speaking of the majority or the whole. Furthermore, the difficulty surrounding this criterion lies in the means by which the illusion of the majority or the whole is measured. Another approach defines common error as an error that arises from an incorrect appearance. It is considered the fundamental foundation of good faith, as it is characterized by an excusable error that cannot be overcome and results in the complete validity of the legal act based on it (Namour, 1992). This definition is also criticized because it equates error with mistake, making one equivalent to the other. This description is inaccurate, given that a mistake is a defective external behavior, whereas error is a moral element that affects the soul, generating within it a belief contrary to the truth.

A third approach defines common error as that collective error that is bound to be made by any person, regardless of their degree of caution and attention. It is the error that even a rational, discerning person falls into, despite their deep research and meticulous investigations. In this sense, common error is an error that cannot be removed, or an error resulting from force majeure. This definition is also criticized because it exaggerates the power of the illusion generated by the apparent situation. Requiring the impossibility of anticipating and preventing error greatly restricts the theory of apparent situations, as there is no error that is impossible to anticipate or prevent, even with a great deal of research and inquiry into the truth (Haleba, 2005). In light of the above, we can define a common error as: a delusional belief generated by an incorrect appearance,

which no one can avoid with due care. In order for the theory of apparent situations to apply, a third party must fall victim to this error. The apparent appearance is then realized, and the apparent appearance is negated by its absence. Through this error, the interests of the right holder and the third party are balanced, with the first interest being given priority.

## COMMON MISTAKE AND THE ELEMENT OF GOOD FAITH

The principle of good faith is one of the fundamental principles upon which all branches of law are based, particularly civil law. The roots of this principle go back to the early days of Roman law, where the need for it arose due to the decline of morals, the prevalence of fraudulent transactions, and the exploitation of people by merchants. This necessitated the existence of a moral standard to govern the conscience of the community. Since then, the principle of good faith has been adopted in all positive laws of all times and places, until it reached us today. It has become a fundamental pillar upon which legislation is built. It is stipulated in Article 150/1 of the Iraqi Civil Code, which states, A contract must be executed in accordance with its provisions and in a manner consistent with the requirements of good faith. This corresponds to Article 148/1 of the Egyptian Civil Code No. 131 of 1948, which states, A contract must be executed in accordance with its provisions and in a manner consistent with the requirements of good faith. Article 1104 of the French Civil Code, issued in 1804, states, Contracts must be negotiated, concluded, and executed in good faith. This provision is considered a matter of public policy.

The standard of good faith has sparked a jurisprudential debate that has led to the emergence of several theories, most notably: the theory of good faith in the subjective sense, according to which good faith is achieved by the absence of fraud and intent to harm others—that is, by ignorance of the fact and the absence of intentional harm to others. To verify the principle of good faith according to this theory, one must refer to the person himself and prove whether or not they are aware of the truth. The theory of good faith in the objective sense, according to which good faith is achieved by observing the objective requirements that comprise this principle, such as honesty, justice, good performance, trust in dealings, custom, and law. To ensure that a person adheres to these requirements, and to judge whether he is of good or bad faith, the degree of care that this person exerts in managing his daily affairs is not taken into account, but rather his behavior is measured by the behavior of an ordinary person. The syncretistic theory, whose proponents combine the subjective and objective theories in defining the meaning of good faith, holds that good faith has a dual meaning: it combines the subjective meaning, according to which good faith is achieved by mere ignorance and the absence of fraud, and the objective meaning, according to which good faith is a behavior. Therefore, it is not achieved by mere ignorance, but rather requires the diligence of an ordinary person. The absence of either of these two meanings negates the principle of good faith. A fourth theory gives good faith a triple meaning. In addition to the subjective and objective meanings, it claims the existence of a third type, which it calls "legal good faith." Good faith, in this sense, is neither subjective, resulting from the absence of fraud, nor objective, resulting from observing the objective requirements of good faith. Rather, it is achieved by applying the law correctly. According to this sense, anyone who adheres to the rule of law in their dealings is considered to be in good faith, while anyone who fails to do so is considered to be in bad faith, regardless of their intent or the behavior they adopt. This foundation of good faith stems from the assumption that people are aware of the content of the legal rule and must respect its existence and content, in accordance with the established legal principle that "ignorance of the law is not an excuse." Since the legislator has assumed knowledge of the legal rule and imposed its provisions on those addressed by it, it is as if they have made observing the law an act of good faith and violating it an act of bad faith, regardless of the individual's intent or the behavior they adopt (Ibrahim, 2006).

We agree with the first theory, the theory of good faith in the subjective sense, and support our position with the following arguments and justifications:

1. By examining the legal texts specific to the principle of good faith, we find that they are more consistent with the subjective standard of good faith than with other standards. This includes Article (1148) of the Iraqi Civil Code, which states: A person who possesses something while unaware that he is infringing upon the rights of another is considered to be acting in good faith. The possessor's good faith shall not cease until the time he becomes aware that his possession constitutes an infringement upon the rights of another. Article (965/1) of the Egyptian Civil Code states: A person who possesses a right while unaware that he is infringing upon the rights of another is considered to be acting in good faith. Article (966) of the Egyptian Civil Code states: A person who possesses a right while unaware that he is infringing upon the rights of another is considered to be acting in good faith. These texts do not require any interpretation or explanation, as they clearly indicate that the Iraqi and Egyptian legislators have adopted the subjective meaning of good faith, because they have made knowledge of the truth or ignorance of it the decisive factor in determining whether good faith is achieved or not, and they did not require any other condition such as the diligence of an ordinary man. In addition to the above, what strengthens our conviction about the adoption of the subjective standard by Iraqi, Egyptian and even French



legislators is that they have made the principle of good faith a matter of public order and prohibited any agreement to exclude it. These laws allow contracting parties to agree to mitigate or exempt the debtor from liability resulting from failure to perform his obligation. However, this agreement is invalid if the failure to perform is due to his fraud or gross error. Having made the principle of good faith a matter of public order and prohibited any agreement to exclude it, this compels us to say that these laws have adopted the subjective standard of good faith. However, if we were to accept the objective standard of good faith, which is achieved by exercising the care of an ordinary man, we would fall into a dilemma from which it is difficult to escape. If we argue that it is permissible to agree to something contrary to the principle of good faith, we would be violating explicit texts prohibiting such an agreement. If we argue that it is impermissible to agree to something contrary to it, we would be violating explicit texts permitting parties to agree to mitigate or exempt from contractual liability in cases other than fraud and gross negligence.

The subjective standard leads to adopting the true meaning of good faith, because the meaning of intention is limited to a person's internal psychological motives and has no relation to that person's external behavior. The objective standard, however, makes good faith a matter of external behavior unrelated to intentions. Since the principle is to interpret words in their literal sense without the need for evidence, and metaphor is only resorted to when the truth is impossible, there is no justification for abandoning this truth (the subjective standard), especially since Iraqi law has adopted the true meaning of good faith.

3- Good faith is always presumed, and it is up to anyone who claims otherwise to prove it. However, this presumption cannot be reconciled with the objective standard of good faith. This standard conflates good faith with the element of fault in civil liability, and fault is presumed in many cases. Since fault negates good faith, this means that bad faith, not good faith, is presumed. The subjective standard, however, transcends this confusion between the principle of good faith and fault. According to this standard, good faith remains an internal decision made by a person in the face of a specific problem, while fault is an external behavior that violates the duties to which the person has committed himself or to which the law has obligated him. Therefore, fault, even if presumed, never negates the principle of good faith. (Juma, 1977)

The conclusion from all of the above is that good faith has a subjective standard, achieved by the absence of fraud and intentional error. With this statement, we have succeeded in removing the confusion that the reader encounters in the explanations of jurisprudence regarding the concept of common error. This confusion results from the adoption by some commentators of the apparent situations theory of the objective standard of good faith. This statement should entail abandoning the concept of common error, as it is confused with what is known as the objective meaning of good faith. However, they insist on considering common error as an independent element of the apparent situations theory, attempting to give this error a concept independent of good faith. However, they fail to do so, because good faith, according to the objective standard, and common error produce the same result. Adopting the subjective standard of good faith, however, leads to overcoming this problem, because it makes good faith an internal psychological element, while common error becomes an external behavior. This is the prevailing opinion held by the pioneers of the theory of apparent situations, as they explicitly stated that good faith has a subjective meaning, and what is claimed to be an objective meaning of good faith is nothing but a common mistake (Salah, 2002).

## THE COMMON ERROR STANDARD

We will divide this axis into two sections. In the first section, we will address the views of legal jurisprudence regarding the common error standard, followed by the second section, which we propose.

## JURISPRUDENTIAL VIEWS

Legal jurisprudence has proposed several standards regarding common error, the most prominent of which are the following:

First: The Numerical Standard: In its early stages, the concept of common error was linked to the numerical standard. Under Roman law, it was required that common error be truly shared among individuals, and this standard continued to be applied for many years. This viewpoint was embraced by a group of prominent figures in traditional French jurisprudence, who were known as commentators on texts or textual worshippers. These jurists, foremost among them the jurist Henri Mazot, considered common error to be a general error and must be truly shared among people. However, this does not mean that the error must be shared absolutely. Rather, it is sufficient that it be shared by a number of individuals who constitute the overwhelming majority. There is no objection then if this error is not deeply entrenched among some individuals, provided they are somehow aware of the reality of the apparent situation. Proponents of this approach justify their opinion by arguing that the application of common error represents a departure from general rules, rules that require the protection of established acquired rights. For this departure to be justified, the common error must be so strong and persistent

that it can be said that the public interest, represented by stability and legal security, is in imminent danger that must be avoided (Benmoussa, 2021).

However, this viewpoint was not accepted by jurisprudence, which responded to it with harsh and destructive criticism. The most prominent point made by its opponents was their claim that while the numerical criterion is consistent with sciences that deal with numbers and calculations, such as mathematics and geometry, it is not consistent with the law, especially when we are dealing with the hidden secrets of the soul. If we stipulate that everyone must make mistakes, that would be impossible, because at least the apparent holder of the position, who has bad intentions, usually obtained his position through fraud. If we only require plurality without consensus, it would be difficult for us to control the number that would achieve common error. Moreover, a transaction based on apparent status concerns only its parties, and therefore there is no logical justification for speaking of all or the majority. For example, If a debtor pays what he owes to an apparent creditor, there is no point in investigating the minds of third party and the extent of their knowledge of this creditor, because they are not connected to the transaction from which the debt arose in any way. They do not acquire any rights from it, nor are they subject to any obligations. They may not even be aware of its existence, and therefore it would be absurd to include them in it. Furthermore, the adoption of a numerical standard may not provide a single application of the theory of apparent status, due to the difficulty of its implementation. Consequently, it limits this theory to a very narrow scope, thereby losing its importance derived from the principles of justice, stability of transactions, and legal security. These principles cannot be ignored because they are linked to the public interest (Muslim, 1977).

Second: The Individual Standard: The French jurist, Potier, believes that social security is only threatened if there are reasonable grounds for people to believe in the truth of the false incident. This danger, represented by common error, is measured by a subjective, individual standard, by looking at the person who made the mistake without taking into account third party and what they believed about the apparent truth. Some support this view by criticizing the division of error into types, such as errors that impair the will and common errors, and dividing these types into degrees, such as personal errors, objective errors, and common errors. He argues that error is a single stage that does not tolerate diversity or gradual progression, and the image of this error is when a specific person falls into the illusion of a certain truth. The advantage of this common misconception is that it allows for the expansion of the scope of the theory of apparent situations to accommodate more applications. This concept is also in harmony with the speed of transactions, which prevents the contracting party from investigating what lies beyond the apparent. This speed reflects the evolution of society, which has moved from a state of stagnation to a state of movement. This requires keeping pace with legal systems that enshrine and protect this transformation, rather than standing in its way.

However, while this criterion is valid for error as a defect of will, it is inconsistent with common error. Common error, as we have seen, is an element of weighting and balancing between conflicting interests—the interest of the real person and the interest of a third party. The effect of this error is the deprivation of the real person's ownership for the benefit of a third party. It is neither fair nor logical to attribute this serious effect to a mere illusion of truth by a third party. This illusion may be due to the negligence, lack of caution, or lack of intelligence of the third party. Had the third party exerted some effort in investigating and investigating the truth, the truth would have been exposed. Furthermore, protecting a third party who has committed an error by correcting their behavior with the apparent person is not an end in itself; rather, the purpose of protecting them is the public interest, which is achieved by stabilizing transactions and maintaining legal security. This goal does not exist if we accept the individual criterion of common error. Moreover, the law imposes an obligation on third parties to inquire and investigate the truth. If they neglect to do so, and their negligence results in the failure to uncover this truth, they are considered at fault, and they alone bear the burden of their negligence and error. Therefore, they are not permitted to demand correction of the action based on the theory of apparent situations. The error of a third party in failing to investigate the truth does not negate the material element of the theory of apparent situations, because this element resides in the apparent person and the third party has no connection to it. Furthermore, this error does not negate the element of good faith, because this element is achieved by mere ignorance of the truth. However, this failure to investigate the truth negates the condition of the impossibility of knowing the truth, and thus eliminates the common error (Abdulrahman, 2005). Third: The Double Standard: Given the shortcomings surrounding the two previous standards; A third trend in French jurisprudence has adopted a dual standard for measuring the occurrence of common error. This view does not rely on the numerical standard absolutely, nor does it rely on the individual standard in all cases of common error. Rather, it balances the two, relying on the numerical standard at times and the individual standard at other times. However, proponents of this approach disagreed on the cases in which one standard should be adopted at the expense of the other. Two opinions emerged in this regard:

First: Considering the position of French jurisprudence on the concept of common error, which relied in some applications on the numerical standard and in third party on the individual standard, some jurisprudence has held that the decisive factor in determining the standard by which common error is measured is the type of transaction. If the transaction in which the error occurred concerns ownership, the numerical standard prevails.

If the error occurred within the scope of representation or agency, the individual standard prevails. Proponents of this view justified their position by citing the importance of ownership and its influential role in social stability. Therefore, it must be protected by strict legal systems. In the context of apparent ownership in particular, transactions related to it pose a significant risk to the various rights of the parties to the contractual relationship. This requires that the purchaser investigate the truth of this ownership. If they are unable to uncover the truth and make a mistake about the seller's capacity, this mistake must be so serious that it is shared by all or a majority of the parties. Conversely, within the context of apparent agency, the only condition for the error is that it be legitimate. The number of people who made the mistake is irrelevant, and the possibility of determining the truth through investigation is not taken into account. Rather, the error is assessed individually, by looking at the third party alone and assessing the reasons that prevented them from obtaining the truth (Benmoussa, 2021).

However, this view has not been without criticism. French jurisprudence itself, in some of its applications, relies on the numerical criterion to establish the validity of a transaction based on apparent agency, while in other applications, it favors the individual criterion to establish the validity of transactions based on apparent ownership. If this indicates anything, it indicates that French courts did not seek to adopt a fixed approach to controlling the element of common error. Rather, they sought, through this flexibility, to provide appropriate solutions for each individual case. Another flaw of this view is its exaggerated emphasis on the importance and seriousness of apparent ownership over apparent agency, without considering that apparent agency itself sometimes has consequences no less significant than the actions of the apparent owner (Poumarede, 2010).

The second view: Proponents of this view argue that the decisive factor in applying the numerical or individual standard is the nature of the transaction in which the common error occurred, whether the transaction is civil or commercial. If the transaction is civil, the numerical standard prevails, because such transactions are characterized by slowness and caution on the part of the contracting parties. This requires each contracting party to strive to uncover the truth. If they fail to find the truth despite this, this means that the apparent situation is so strong that it can mislead anyone, and therefore, third parties are excused for their error and deserve protection. Commercial transactions, which are characterized by speed and movement, and which require greater trust between the parties involved, and which often do not allow them the opportunity to know what lies behind the appearance, must be limited to the individual standard of common error. It is sufficient for the error that affected the will of another and led them to enter into a contract to be legitimate, without considering third party and the extent to which they actually or hypothetically fell into this error. Rather, it is sufficient for this mistaken belief to have affected the will of another alone.

However, this view has not received support from jurisprudence, claiming that while this view was applicable in the past, it has proven to be ineffective in the present. This is because speed and trust in transactions have become a dominant characteristic of all transactions, both civil and commercial (Benmoussa, 2021).

Fourth: The abstract standard: The abstract standard within the scope of common error refers to measuring the behavior of third party in terms of the possibility of anticipating and avoiding the apparent situation, based on the behavior of a normal person, abstracted from their personal circumstances and surrounded by the same external circumstances as the perpetrator. This standard is purely objective, transcending the personal circumstances of third party and the degree of care they exercise in their affairs in general. Furthermore, it does not consider third party and the extent to which they fall into the erroneous belief in the truth of the apparent situation. In other words, this standard does not consider the parties to the relationship or third party to verify the presence of common error. It is not an individual standard that takes into account the personal circumstances of third party and their ability to avoid falling into error. Nor is it a numerical standard based on the number of individuals who participated in the error. Rather, it is an objective standard that looks at the circumstances, not the individuals. This view has been adopted by the majority of jurists who wrote on the theory of apparent situations (Mubarak, 2015).

Despite the prevalence of this view and its adoption by most jurists, to the point that it has become almost established as a standard for measuring common error, it has not escaped criticism. Some have attacked it, arguing that the standard of the ordinary person is a unit for measuring error, not error. Error is an internal psychological matter, while error is an external behavior. Therefore, there is no room for subjecting them to the same unit of measurement. Furthermore, in the case of error, we use the behavior of the ordinary person to measure the behavior of the perpetrator in order to hold him accountable. Common error, on the other hand, is far removed from the behavior of others. Because this error relies on the strength of appearances, and since the apparent situation is a material fact, we cannot use a special means to control people's behavior to measure material facts. However, advocates of the abstract standard were not helpless in responding to these criticisms and defending their point of view. One of them argued that considering the standard of the average person as a means of measuring personal error does not prevent its application to common error. This is because the standard here does not address error as a psychological element, but rather addresses material evidence and whether or not it is surrounded by circumstances and conditions that generate the erroneous belief in the average person. If this evidence is not sufficient to reverse the truth, common error is negated. Another responded to

these criticisms by saying that the assertion that there is confusion between error and mistake when adopting the standard of the average person fails to understand the reason for adopting this standard. Because we want to measure the behavior of third party by the behavior of a normal person to prove that the error committed by the other was not the result of their negligence and recklessness, but rather, even if this other had taken the care of a normal person in investigating the truth, they would not have been guided to it. The author of this response goes on to say that criticizing the criterion of the normal person, on the grounds that it is a unit for measuring human behavior and that by applying it to common error it becomes a unit for measuring material facts, is a rejected statement; because common error affects the will of the other, and therefore proving this error is done by referring to the will and behavior of this other, not by resorting to the material element of the theory of apparent situations, because this element is supposed to be fulfilled with its conditions before addressing common error (Salah, 2002).

### THE PROPOSED STANDARD (THE RELATIVE STANDARD)

Having completed our presentation and discussion of the views of jurisprudence regarding the standard by which the element of common error is regulated, we must offer our own opinion on this topic. In our opinion, all of the previous standards fall short of regulating the concept of common error in a manner that achieves the desired goal of this concept, which is to balance conflicting interests and prioritize the interest that is most favored. Instead of the previous standards, we propose a flexible standard that is compatible with this goal and has the potential to achieve it optimally. Our view is embodied in the relative standard. The intended meaning of the relative standard is not to rely on a fixed standard to verify the existence of common error. In our view, this error is generally realized when third party exercise the care of an ordinary person in searching and investigating the truth. In some cases, a lower degree of care is sufficient for its occurrence, while in other cases, it is only realized when third party exercise greater care than an ordinary person. The degree of caution a third party must observe depends on the third party's profession, the strength of the apparent error, the behavior of the right holder, and the circumstances of the contract.

Regarding the impact of a third party's profession in determining the standard of common error, some jurisprudence holds that the third party's profession plays a significant role in determining this standard in some cases. A professional must be more diligent and vigilant than an ordinary person in searching for and investigating the truth. In all cases, an ordinary person is not required to exercise more than the care of an ordinary person to invoke common error. However, if the conduct falls within the scope of a third party's profession, they may not invoke common error unless the deceptive appearance is so strong and woven that even a careful professional cannot detect its falsity. A professional is more capable than an ordinary person of uncovering the truth of an incorrect appearance, and therefore, it is illogical to treat them in the same manner. For example, in the context of apparent agency arising from the agent exceeding the limits of his authority, if the act the agent intends to conclude requires a special agency, while his agency is general, this is easy to understand for a professional, but more difficult for the average person (Al-Murtada, 2021).

As for the strength of the apparent position and its role in determining the standard of common error, the stronger and more convincing this position is, the less diligence is required. When the appearance is less severe than the first case, the greater the diligence required. When an incorrect appearance is based on an official document, such as a court ruling, a legally mandated publication, such as a real estate deed, or the apparent status of an employee, this appearance is taken as evidence of the occurrence of common error. Considering that the law considers the apparent appearance of these situations to be the truth for third parties, it does not permit them to investigate the underlying facts. This is out of respect for the authority of judicial rulings, to ensure the strength and effectiveness of registration, and to protect public office. Therefore, it is difficult for third parties to arrive at a truth that contradicts what is established by a judicial ruling, registration records, or the apparent status of the employee. These difficulties resulting from the strength of the appearance can constitute a strong judicial presumption for the judge in proving the occurrence of common error (Benmoussa, 2021). As for the circumstances of the contract and their impact on determining the standard of common error, if there are circumstances that justify a third party's failure to investigate and uncover the truth, then common error is established merely by the third party's ignorance of the apparent person's status, even if they could have ascertained the truth had they exercised the care of an ordinary person. For example, if there has been a previous and repeated dealing between a third party and an agent, custom here does not require the third party to verify the agent's agency each time. Therefore, if the agency ends suddenly without the third party's knowledge and the agent continues to conduct business with this third party as an apparent person without any evidence of the termination of the agency, this action is enforceable against the principal merely because the third party was unaware of the termination of the agency, based on the provisions of apparent agency. The General Assembly of the French Court of Cassation established this principle in a decision issued in 1962, in which it explicitly stated that the belief formed by a third party regarding the extent of the agent's powers is legitimate if the



circumstances allow the third party not to investigate the correct limits of these powers. The court then referred in some of its decisions to circumstances that allow a third party not to investigate the truth, including: ongoing dealings between the apparent person and a third party, a low value of the contract, a moral barrier between the third party and the apparent person, and the reputation of the apparent person (Huet, 2003). As for the behavior of the real person and its impact on determining the standard of common error, it is the most important behavior affecting the standard by which the common error element is measured. This is because this person has an interest that is opposite to the interest of the third party. If the latter's interest is achieved by correcting their behavior with the apparent person, then the former's interest is achieved by nullifying this behavior. Therefore, it is natural for their behavior and contribution to creating the deceptive appearance to have an impact on determining the standard of common error. The greater the degree of negligence of the real person and their contribution to creating the deceptive appearance, the less diligence the third party must exercise to establish the common error element. The less negligent the real person and their contribution to creating the deceptive appearance, the greater the degree of diligence required to establish the common error element. The reason behind this significant impact of the behavior of the real person on determining the standard of common error is that common error is a balancing factor between the interests of the real person and those of the third party, with the latter's interest being given priority. This priority is given to the interest whose owner adheres to the limits of the law and does not deviate from these limits. Whenever the right holder adheres to the limits of the law and does not allow a deceptive appearance to be created at his expense, his interest takes priority in order to preserve his acquired rights and uphold the principle of relativity of contracts, according to which the effect of the contract - especially its obligation - is limited to its parties and does not extend to the liability of third parties. Therefore, this third party - meaning the right holder - is not liable towards the contracting party with the apparent person if the latter succeeds in deceiving him. An example of this is the sale of someone else's property and the agent exceeding the limits of his agency, as the sale contract is not valid against the right holder, and the agent's exceeding is not binding on the principal, as long as the right holder and the principal have adhered to the limits of the law and did not allow a deceptive appearance to be created. It does not matter after that if the person with the apparent position - the seller and the agent in the previous example - succeeds in deceiving the third party and pushing them into contracting with him; This means that the third party did not exercise due diligence to ascertain the truth, and that their delusion is due to their own negligence and lack of caution, not to the strength of the appearance and its ability to persuade. This renders the third party's interest unworthy of consideration, as negligence should not lead to any preference for a third party at the expense of the real person. The theory of appearance cannot be a means for negligent individuals to evade the legal duty of inquiring about the truth. However, if the real person did not abide by the limits of the law and contributed to creating the false appearance, then in this case there is room to favor the interests of the third party who acted based on this deceptive appearance. However, in this case, a distinction must be made between the real person's contribution to creating the apparent situation, whether it was intentional, through gross negligence, or through negligence: If the real person contributed to creating the deceptive appearance intentionally, by conspiring with another person to create an apparently false situation, as in the case of a fictitious person. Or if the real person's contribution to creating the deceptive appearance was through gross error, such as if such a person sold or rented his business premises and left the seals and printed matter bearing his name at the disposal of the buyer or lessee, leading third party to believe that this person was acting as the former's agent. An example of gross error by a real person is if the principal unusually restricts the powers of his agent in dealings and fails to take any measures to enable those dealing with this agent to be aware of these restrictions. In such cases, the interests of the third party take priority over the interests of the real person. Common error occurs simply because the third party is ignorant of the true nature of the apparent person, even if they could have known the truth had they exercised the vigilance and care of an ordinary person. Requiring such care from a third party means giving priority to the interests of the real person despite their deceit and bad faith, especially if the third party's daily management of their affairs does not reach the level of care that an ordinary person would. Therefore, requiring such care from them to correct their dealings with the apparent person will prevent such correction. Thus, the law favors the person of bad faith, the real person, at the expense of the person of good faith, the third party. This is contrary to justice and logic, which always favor good faith. It is neither just nor logical to seek, for someone of bad faith, means to evade the consequences of his fraud and bad faith (Ciacli & Mihnea, 2011). This ruling is merely an application of the general rules according to which the standard of the ordinary person is the basis for regulating individual behavior. However, anyone who follows the legislative position in this regard will notice that the law departs from this principle whenever one of the parties commits fraud or a serious error, as it is satisfied with the subjective standard for the other party, even if it does not take into account the care of the ordinary person. For example, in the case of a mistake as a defect of will, if the other party was aware of this mistake or could easily have known of it, then they would have committed fraud by failing to alert the other contracting party to the existence of the mistake. Therefore, the legislator, with regard to the person whose will is defective due to the mistake, suffices with a subjective standard for applying the provisions of this mistake. Similarly, if the contracting party was unaware of the illegitimacy of the reason that prompted the

other contracting party to conclude the contract, as long as this reason was psychological and its concealment was due to the fraud of the second contracting party, the standard relied upon to verify the first contracting party's knowledge of this reason is a subjective standard, not the standard of a reasonable person. The contract is not invalidated unless the first contracting party had actual knowledge of the illegitimate reason. The situation is no different with regard to common error; the principle is that it is measured by an objective standard, namely the standard of a reasonable person. However, the subjective standard is reverted whenever the deceptive appearance results from the fraud or gross error of the real person. However, in our opinion, this ruling is taken into account if the application of the theory of apparent situations does not cause harm to other persons, such as the creditor of the real person and his special successor. However, if the real person deliberately created the apparent situation with the intention of causing harm to his creditors or special successor, as if the real person was under interdiction and prohibited from disposing of his money, but it remained in his possession as a guardian thereof, then he allowed the creation of a deceptive appearance in order to squander his money to the detriment of his creditors. Or if a judicial ruling was issued in favor of a specific person, ruling that he owns the money in the possession of another person, but he was lax in implementing this ruling to the detriment of his creditors. In these cases, if the apparent person disposed of the money to a person in good faith, the previous ruling does not apply, which stipulates that the interest of a third party outweighs the interest of the real person without taking into account the care of the third party in inquiring into the truth. This rule applies when the benefit of nullifying a contract concluded between an apparent person and a third party accrues to the real person. However, if the property subject to the contract is a right of other persons, such as a creditor or a special successor of the real person, the balance to be achieved in the common error must be between the interests of these persons and the interests of the third party. If the third party exercises the vigilance of an ordinary person, the common error is achieved, and their interests are more deserving of care. However, if the third party does not exercise such vigilance, the common error is not achieved, and therefore the interests of third party are more deserving of care. Sufficiently applying a degree less than the diligence of an ordinary person constitutes an exception to the rule and, as it appears, also a penalty for the person who committed fraud. However, if this penalty does not affect the real person himself but rather other persons of good faith, this exception must be suspended and the rule must be reverted to, since the cause for its application is absent. Legal rulings, like Sharia, revolve around their causes, whether existing or not, and when the cause is absent, there is no longer any room for requiring a ruling. Moreover, the exception must remain limited to its specific case and cannot be expanded upon. In the words of the Iraqi Civil Code, what is proven to be contrary to analogy cannot be used as an analogy for other cases (Al-Zalmi, 2014). If the real person's contribution to creating the false appearance was not intentional or grossly negligent, but rather resulted from their negligence, which was not gross, then in this case the third party and their degree of care in investigating and investigating the truth are considered. If they exercised the care of a reasonable person but were unable to uncover the true appearance and avoid falling into error, then in this case, a common error is established, resulting in the correction of the third party's conduct with the apparent position holder and the enforcement of this conduct against the real person. However, if the third party entered into the contract with the apparent person without any caution, and they could have uncovered the false appearance had they exercised the care of a reasonable person in investigating the truth, then in this case, their interest is not worthy of protection. As long as the right holder did not contribute to creating the deceptive appearance intentionally or through gross negligence, it is neither just nor logical, nor necessary for the stability of transactions, to give priority to the interests of a third party over the interests of the right holder simply because of their ignorance of the truth. This is because we are dealing with a situation in which both the right holder and the third party have deviated from the bounds of the law by failing to observe the necessary due diligence. The former should not have allowed their assets to be squandered or managed by their representatives in a manner that would mislead third party and lead them to believe in the validity of the false appearance arising from these assets. The latter should have investigated the validity of all the circumstances surrounding the contract and not entered into the contract blindly, unaware of whether the other party owns the property or not, and whether the agent is acting under a valid power of attorney within the limits of the powers granted to him by the principal, or is merely claiming the existence of a power of attorney despite its nonexistence, or that his power of attorney has expired, or that he has exceeded the limits of his authority. Since this is the case, it is preferable to maintain the status quo, by not stripping the real person of his property against his will. This is a serious procedure and should not be relied upon simply because of the real owner's slight negligence in managing his property. The basic principle is that acquired rights are legally protected and may not be infringed upon without the owner's will, except in the public interest. The public interest in applying the theory of appearance is generally achieved when the deceptive appearance is so woven that a third party cannot uncover its true nature with the vigilance of an ordinary person. As long as this condition is not met and the failure to uncover the true appearance is due to the negligence of a third party, there is no justification for deviating from this principle by stripping the real person of his property against his will for the benefit of a third party who contracted with the apparent person (Codrea, 2013). The above should not be understood as meaning that the real person's error is a necessary condition for applying the apparent conditions theory. Most

jurisprudence in France, Egypt, and Iraq has settled on not considering the real person's error a condition for correcting the actions of the apparent person. It has permitted the application of the apparent condition rule as long as the circumstances justify a third party's belief in the validity of the false appearance, regardless of whether the real person contributed to creating the deceptive appearance or not. Furthermore, French courts, after previously considering the real person's error and their contribution to creating the deceptive appearance necessary for correcting the actions of the apparent person, abandoned this condition in 1962 and began applying the apparent condition theory without considering the necessity of an error on the part of the right holder. Egyptian courts, however, still consider the real person's error a necessary condition for applying the apparent conditions theory. Regarding the common error criterion in cases where the real person's error is absent, as long as the latter did not contribute to creating the deceptive appearance, whether intentionally or negligently; Naturally, this is one of the cases in which strict adherence to the vigilance and diligence of a normal person in searching and investigating the truth is most necessary (Costa, 2010). Finally, the relative standard allows for the application of the numerical standard in the realization of common error, when everyone or the majority of people fall into error, believing the deceptive appearance to be true. This actual sharing of the error is taken as evidence of the difficulty of uncovering the truth, even with the necessary diligence. However, this evidence is simple and can be refuted by proving that the deceptive appearance was not so strong that it would be difficult for a normal person to detect it, and that the fact that third party were mistaken about its truth is due to their lack of dealings with the apparent person. This is because individuals' interest in knowing the truth when it relates to the transaction they intend to enter into is stronger than this interest in cases where the truth has no connection to their dealings. In the first case, they exert efforts in searching and investigating the truth that may even exceed what the average careful person would exert. In the second case, they are satisfied with the appearance that comes to their ears or eyes as it is, without bothering themselves with the effort of investigating the truth. Therefore, this last case cannot be conclusive evidence of the occurrence of a common error, but rather it is a simple presumption that can be proven otherwise. In all cases, the assessment of this presumption is up to the trial judge (Raimbault, 2010).

## CONCLUSIONS

The research revealed that common error is one of the elements of the apparent status theory. Its foundation is the Roman maxim "Error communis facit jus". It is an element of control, balance, and balancing between conflicting interests: the interest of the right holder in not being expropriated, and the interest of others in correcting their conduct with the apparent person. The priority is given to the interest whose owner has adhered to the limits of the law. The research revealed that good faith is a subjective standard, achieved merely by the ignorance of others of the truth. Common error, however, is not achieved merely by the ignorance of others of the truth of the contracting party. Furthermore, it is necessary that the third party cannot know the truth even if they exercise due diligence in investigating and inquiring into the truth.

The research revealed that there are no explicit texts in comparative legislation regarding the provisions of common error. However, jurisprudence and the judiciary have settled on the consideration of common error as a well-established element in the application of the apparent status theory.

We concluded from the research that the most appropriate standard for measuring the occurrence of common error is the relative standard, as it takes into account all circumstances. The circumstances surrounding the apparent situation and its individuals, and the delicate balance between conflicting interests cannot be achieved by any of the standards proposed by jurisprudence. According to the relative standard, common error generally occurs when a third party exercises the care of an ordinary person in searching and investigating the truth. In some cases, a lower degree of care is sufficient for it to occur. In other cases, it only occurs when the third party exercises a greater degree of care than an ordinary person. The degree of caution that a third party must exercise is linked to several factors, most notably: the third party's profession, the strength of the apparent situation, the conduct of the right holder, and the circumstances of the contract.

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