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CHARITABLE TRUSTS FOR MASSES 1931-1956

JOHN W. CURRAN

ONE OF the major puzzles in legal history is found in cases involving bequests for Masses of the Catholic Church.¹ The point at issue is whether a bequest of money for the celebration of Masses generates a charitable trust for the advancement of religion.

In a previous article² in the *Notre Dame Lawyer* in 1931, I made a survey of the law relating to trusts for Masses. This article proposes to bring the topic up to date by examining the cases that have arisen since that time.

A New York case³ decided in 1931 that legacies for Masses are gen-

¹ O'Brien, *Bequests for Masses rarely create charitable trusts*, 3 *Jurist* 416 (1943).

Zollman, *American Law of Charities*, pp. 180-81, (1924). "Hence gifts for Masses are valid charities in America."

^{1A} Bogert, *Trusts*, § 164, p. 103, (1951). "Trusts for the purpose of having Masses said for the soul of the settlor or the souls of others fall on the dividing line between private and charitable trusts."

³ Scott, *Trusts*, Par. 371.5, p. 1994, (1939). "By the great weight of authority in the United States it is now held that a trust for Masses is a charitable trust. These cases seem clearly sound."

² Restatement of *Trusts*, § 371, Comment g (1935). "On the other hand a legacy to the priest who is to say the Masses may be a beneficial gift to the priest in consideration of his services in saying the Masses."

Bogert, *Handbook of the Law of Trusts*, p. 261, 3rd Ed. (1952). "In Ireland they were regarded as valid as honorary trusts though not legally enforceable. But even in Ireland it was held the trust for Masses was void, if it was not limited in duration to lives in being and twenty-one years, inasmuch as it was not a charity."

Bouscaren and Ellis, *Canon Law*, pp. 813-821, (1953).

^{2A} Bogert, *Trusts*, § 376, p. 144, (1953). "Arguments that trusts for Masses are invalid as charities because they have no definite cestuis, or no living cestuis are founded on a lack of understanding of the nature of the Mass and the theory of charitable trusts."

Lewin, *Trusts*, p. 99, 15th Ed. (1950). "[A]nd it has now been held that such gifts are valid charitable gifts for the advancement of religion." (The law in England has been slower crystallizing than it has in the United States).

² *Notre Dame Lawyer* 427 (1931).

³ *In re Cunningham's Estate*, 140 Misc. 91, 249 N.Y.S. 439 (Surr. Ct., 1931).

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eral legacies for religious charitable purposes. The case also properly held that legacies for Masses are not entitled to preference as a "funeral expense." The only exception to the latter rule is the funeral Mass.

In a 1932 California case,⁴ a bequest of nearly \$5,000 was made to a Pastor for Masses with no direction as to the place or places where the Masses should be celebrated. It should be particularly noted that California law (Civil Code 1313 . . . now Probate Code, Sec. 41) provided that a will must be executed more than thirty (30) days before testator's death where a gift to a religious charitable use is involved. In this case the will was executed less than thirty (30) days before the death of the testator. The plaintiff contended the facts brought the case within the statutory rule as a charitable trust for Masses was involved. The plaintiff also claimed the obligation of the Pastor did "go to the use and disposition of the money" and therefore was a charitable use or trust. The defendants claimed a direct gift to the Pastor was involved and the statutory thirty days restriction as to gifts to charitable uses did not apply. The court ruled it was a direct gift to the Pastor. Since a bequest for saying Masses is considered a charitable religious trust according to the weight of authority, this decision would be classified as extraordinary in *Zollman, On Charities*.

A 1932 Canadian case⁵ of significance in Ontario repudiated a 1916 case⁶ in the same province. The will provided that trustees pay income yearly in perpetuity to whoever may be the Rector of St. Patrick's Cathedral in Hamilton for Masses. The court said, "It follows that as the bequest here is not for a superstitious use and is a charitable bequest, the rule against perpetuities does not apply. . . ." This case places the Province of Ontario in line with the overwhelming weight of authority. The lower court in this case had declared the bequest for Masses void.

In a New York case⁷ in 1933 the testatrix left a specific sum of money to a priest for Masses. The question arose as to whether a personal gift to the priest or a religious charitable trust was involved. The court said: "Her purpose was not to make a personal gift to any per-

⁴ In re Ward's Estate, 125 Cal. App. 717, 14 P. 2d 91 (1932).

⁵ Re Hallisy, 4 D.L.R. 516, O.R. 486 (1932). Noted in 10 Can. Bar Review 552 (1932).

⁶ Re Zeagman, 37 O. L. R. 536 (1916).

⁷ In re McArdle's Will, 147 Misc. 876, 264 N.Y.S. 764 (Surr. Ct., 1933).

son." It was a religious charitable gift in trust for Masses. This seems a sound decision.

A will contest in a 1933 Missouri case⁸ arose out of facts in which the testator devised and bequeathed the remainder of his property to Conception Abbey for pious use for himself and his family. It is to be noted that the court stated: "It is admitted that the words 'for pious use' appearing in the will, mean for the purpose of having said or held, Masses of the Catholic Church." It further stated: "Such bequests are universally held, so far as we have been able to find, to be, not individual bequests, but charitable trusts." The opinion pointed out the very significant fact that the celebration of a Mass for a person also inures to the benefit of the public. If the benefit to the public is lacking there is no charitable trust.

Another New York case arose in 1934⁹ where the plaintiffs contended the devise of the remainder of an estate to the priests of Mt. Lebanon, Syria, to pay for Masses for the repose of the soul of the testator was indefinite and was also void because the funds involved were to be expended in a foreign country. The court decided that a valid charitable trust for Masses had been created and stated: "Nor does it matter that funds are to be expended in a foreign country."

In the landmark English case¹⁰ of *In Re Caus* income from a fund was to be expended for Masses for twenty-five years and a foundation Mass was to be celebrated forever. Lewin in discussing this case remarked that under the old law (until 1919) trusts for Masses were void as superstitious purposes and added "it has now been held that such gifts are valid charitable gifts for the advancement of religion."¹¹ This case shows in action an important side-reaction of a religious charitable trust, *viz.*, it does not violate the rule against perpetuities even if it goes on forever. A private trust can only be for a limited time.

Until the *Caus* decision the question of whether a trust for Masses was a charitable trust remained unanswered in England. The *Pemsel* case¹² classified religious trusts as charitable.

⁸ *In Minturn et al. v. Conception Abbey*, 227 Mo. App. 1179, 61 S.W. 2d 352 (1933).

⁹ *In re Stephen's Estate*, 150 Misc. 27, 269 N.Y.S. 614 (Surr. Ct., 1934).

¹⁰ *In re Caus, Lindeboom v. Camille*, 1 Ch. 162 (1934). This case is commented upon in 8 Aust. L.J. 217 (1934) and 1 U. of Toronto Law J. 186 (1935).

¹¹ Lewin, *Trusts*, p. 102, 14th Ed. (1939).

¹² *Income Tax Commissioners v. Pemsel*, A. C. 531, 580 (1891).

In a 1936 New York case,¹³ a direction in a will authorized executors to put aside a sum of money for celebration of Masses. The court held a valid charitable trust for religious uses was involved. The following year another New York case¹⁴ reiterated the rule that a charitable trust for Masses is valid.

Australia in 1938¹⁵ recognized as valid precatory charitable trusts for Masses. The hearing in this matter involved two cases, one in which it was held that the doctrine of marshalling would be applied (the earlier rule was contra on account of the Mortmain Act). In the other case the testator did not state the manner in which the gift for Masses should be expended. The court filled in the administrative detail by recognizing the doctrine of *cy-près*—meaning the court allows the gap to be filled as near as possible to the intention expressed. As a general rule a court of chancery leans over backwards to uphold a charity.

A 1939 New Jersey case,¹⁶ by way of dicta, said a trust for Masses is a charitable use, but because of indefiniteness the trust failed. The defective provision read:

“I direct the Masses shall be held every year for my sister and myself and my relatives unable to pay for Masses, Seventy-five dollars per year for each of my sisters and myself, and Twenty-five dollars per year for the others.”

Two priests were bequeathed sums of money for Masses for the repose of the soul of the testatrix. The priests died before they received the full amount of their legacies. The Massachusetts court¹⁷ said: “It is settled in this commonwealth that this purpose comes ‘within the religious or pious uses which are upheld as public charities. . . .’” The court also pointed out that in a trust for Masses, “the legatees (priests) named are intended to take not for their own use but for the purposes directed . . . that the omission of the words in trust is immaterial . . . and that the legatees-trustees named having deceased before satisfaction of the legacies, the courts will supply a trustee to carry into effect the controlling purpose of the testatrix.” This is another sound decision.

¹³ In re Semenza's Will, 159 Misc. 487, 288 N.Y.S. 556 (Surr. Ct., 1936).

¹⁴ In re Korzeniewska's Estate, 163 Misc. 323, 297 N.Y.S. 997 (Surr. Ct., 1937).

¹⁵ In re Byrne (1938) Q.S.R. 346. Noted in 12 Aust. L. J. 299 (1938).

¹⁶ Gallagher v. Venturini, 124 N.J. Eq. 538, 3 A.2d 157 (1938).

¹⁷ Mahoney v. Nollman, 309 Mass. 522, 35 N.E. 2d 265 (1941).

The question of whether money to be expended for Masses is a funeral expense arose in a 1942 New York case.¹⁸ The court said: "It is evident therefore that the Masses contemplated by the testatrix were not to be celebrated as an actual integral part of the funeral services and consequently cannot be considered a funeral expense." A sound decision.

A 1942 District of Columbia case¹⁹ involved the construction of the following provision:

... All the rest, residue, and remainder of my estate and property . . . I give, devise and bequeath, in fee simple and in absolute estate, unto Holy Name Cathedral, State and Superior Streets, Chicago, Illinois, for masses for the repose of my soul.

This was held to be a valid religious charitable trust as a devise to the Catholic Bishop of Chicago, as a corporation sole, and owner of the designated cathedral, as trustee.

The decision is sound as it is in accord with the rule that the details of the administration of a charitable trust will be left to be settled by the trustee under the superintendence of a Court of Chancery. In other words a charitable trust will not fail because its settlor did not specify every detail of its administration. A trust will not fail for the want of a trustee.

One of the bad side reactions of placing a trust for Masses in the category of an outright gift of the legal and equitable titles was evidenced in a 1943 Delaware case.²⁰ One party contended an outright gift for Masses to the Catholic Bishop of Wilmington was a personal gift to the Bishop.²¹ If so, the gift to the Bishop under Delaware law was void as the statute restricted gifts to those in ecclesiastical office. The opponents contended a charitable trust for Masses was involved and that the Bishop was a trustee. Therefore it was contended the restrictive statute did not apply as it was not a personal gift to the Bishop but a gift to the Bishop as trustee. The court held the charitable trust theory was the proper theory and the intention of the testator was fulfilled.

In this case the private trust theory, *viz.*, that the case involves a

¹⁸ *In re De Molina's Estate*, 35 N.Y.S. 2d 24 (1942).

¹⁹ *Sedgwick v. National Savings & Trust Co.*, 130 F. 2d 440 (Ct. App. D.C., 1942).

²⁰ *Delaware Trust Co. v. Fitzmaurice*, 27 Del. Ch. 101, 31 A. 2d 383 (1943).

²¹ The will provided a sum for Masses should be paid to the Catholic Bishop of Wilmington to be distributed by him in his discretion within one year after testatrix's death among the priests of his diocese.

private trust for Masses, was improperly suggested and not upheld. It was also pointed out that no formal words need be used to create a charitable trust for Masses. The opinion likewise pointed out that one of the fruits of a Mass is a public benefit even though the Mass is celebrated for the soul of one person.

Reverend Kenneth R. O'Brien and Daniel E. O'Brien have written several erudite articles on Masses,²² one of which was entitled *Cardinal O'Connell's Bequest for Masses*.²³ The bequest read: "First—To the Society for the Propagation of the Faith, Boston Branch, 49 Franklin St., Boston, the sum of \$2,000 for Masses for the repose of my soul."

Among other questions, the authors asked if the above provision of the will created a trust. Was the trust for a charitable use and therefore a charitable trust? To answer that question one might ask if a contract, a gift on condition, an equitable charge, a power in trust, a bailment, or an agency had been created. The nuances of all of these legal relations are often hardly perceptible to the mind. But a refined analysis would cause one to declare that a charitable trust for the advancement of religion had been created by Cardinal O'Connell. The \$2,000 was impressed with a trust. The Society for the Propagation of the Faith was under a duty to select priests and tender them stipends for saying the Masses. Tax-wise and otherwise the true solution is a charitable trust.

Bogert states: "In nearly all states trusts for the purpose of having masses said for the soul of the settlor or for the souls of others are valid charitable trusts for religious purposes."²⁴ Scott's view is: "By the great weight of authority in the United States it is now held that a trust for masses is a charitable trust."²⁵ The Restatement of Trusts likewise states trusts for Masses are charitable.²⁶

An enlightening case²⁷ arose in New York in 1944. It sounds a warning as to pitfalls to be avoided in drawing up a will containing a provision for the celebration of Masses. The court said the failure of

²² 3 Jurist 416 (1941); 4 Jurist 284 (1944); 48 Dick. L. Rev. 179 (1944); 17 So. Calif. L. Rev. 144 (1943).

²³ 25 Boston U. Law Rev. 260 (1945).

²⁴ Bogert, *Handbook on Trusts*, p. 261, 3rd Ed. (1952).

²⁵ 3 Scott on Trusts, Par. 371.5, p. 1994 (1939).

²⁶ 2 Restatement of Trusts, Par. 371G (1935).

²⁷ In *re Hofmeister's Estate*, 48 N.Y.S. 2d 351 (1944). Referring to the direction in this will, the Court stated: "The aforesaid direction is void for want of definiteness. No specific money has been directed to be set aside and no time limit expressed.

the testator to provide specific money for the Mass stipends in addition to express a time limit made the provision in the will void for indefiniteness.

Again in New York in 1949 the legality of a provision in a will relating to the celebration of Masses was determined.²⁸ The court ruled a charitable use or trust was created.

In Ohio in 1949 a provision in a will was contested on the grounds it was indefinite. It read: "The balance of my estate to go for Masses for the repose of the souls of myself and my beloved wife, Maria Di Fronzo."²⁹ The court, after holding a gift for the saying of masses is valid in Ohio, added by quoting from another case: "[I]f the founder describes the general nature of a charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of Chancery." The case can be cited to show neither a priest nor a Church need be named. The case is also important because it states one of the fruits of the Mass is the benefit to the public. The doctrine of *cy-près* was used as a general charitable religious trust was involved.

As you travel through the cases it is apparent the law is crystallizing. In a 1952 New York case³⁰ involving a trust for Masses the priest named to receive \$200 for stipend money for Masses died fifteen years before the testatrix. The Surrogate Court appointed the Pastor who succeeded him in his place to receive the money and celebrate the Masses. It also said bequests for masses are for religious and charitable purposes.

The New York Personal Property Law Sec. 12 was cited in holding a bequest for the saying of masses is for a religious and charitable purpose.³¹ In this case the testator provided in his will, "In the event of my death, I wish that all my estate be converted into cash and after all expenses are paid that the remainder be given to the Missions for Masses for the Poor Souls." It appeared there was no organization bearing that name. Evidence was admitted concerning the testators' background and circumstances under which he made the will. As a result the bequest was given to the Society for the Propagation of the Faith under the *cy-près* doctrine.

²⁸ In re Lawless' Will, 194 Misc. 844, 87 N.Y.S. 2d 386 (Surr. Ct., 1949).

²⁹ Lanza v. Di Fronzo, Ohio Probate, 92 N.E. 2d 299 (1949). A note on this case in 26 Notre Dame Lawyer 162 (1950) concludes that it will be followed in Ohio in the future.

³⁰ In re Liebeck's Will, 109 N.Y.S. 2d 147 (Surr. Ct., 1951).

³¹ In re Dobbin's Will, 206 Misc. 64, 132 N.Y.S. 2d 236 (Surr. Ct., 1953).

Another New York case³² in 1953 repeated the rule in the state that a gift for Masses to a religious corporation is valid.

CONCLUSION

During the past twenty-five years this survey shows that bequests for Masses are valid charitable trusts for the advancement of religion. In the cases where the alleged trust for Masses failed, it was either because of the indefiniteness in the provision in the will or because the true nature of the Mass was misunderstood.

It should be noted that instead of the usual bequest of money for Masses, a case might involve a devise of land for Masses. Logically, a religious charitable trust is involved in the latter case as in the former. In England, the Mortmain and Charitable Uses Acts of 1888 (51 & 52 Vict.)³³ and 1891 (54 & 55 Vict.)³⁴ must be satisfied, otherwise the land will be forfeited. The 1888 Mortmain and Charitable Uses Statute in substance provides that every assurance of land to or for the benefit of any Charitable Uses unless made according to the requirements of this act is void.

In the United States, due to the constitutional guaranty of religious freedom by the First Amendment as fortified by the Fourteenth Amendment, the States in general do not have the English type of Mortmain Statute. But in many of the States there are statutes that restrict the time within which a will involving a charitable gift must be executed (30 days to one year) before death.³⁵

Since 1931 the survey shows that cases involving bequests for Masses arose in Australia, California, Canada (Ontario), District of Columbia, Delaware, England, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania,³⁶ and Ireland.³⁷

The survey further shows that bequests for Masses usually generated charitable trusts for the advancement of religion in accord with the natural moral law.

³² *In re Leitiser's Estate*, 125 N.Y.S. 2d 133 (1953).

³³ *Law Journal*, 1887-1888, p. 256.

³⁴ *Law Journal*, 1891-1892, p. 352.

³⁵ Newman on Trusts, 2nd Ed., 1955, pp. 171-72; 2 Bogert on Trusts, § 326, 1953; Bogert, Handbook on Trusts, (1952) 3rd Ed., p. 289-91; 3 Scott on Trusts, § 362.4 (1939); Restatement on Trusts, § 362, (1935); Restrictions upon the Creation of Charitable Trusts, 29 Can. Bar Rev. 621 (1951); Mortmain in Canada and the United States.

³⁶ *Duffy Estate*, 2 D. & C. 2d 250 (Penn., 1955).

³⁷ *Kelly Estate*, 1932 I.R. 255 (1932).

The point at issue mentioned in the opening paragraph of this article relating to charitable trusts for Masses has about crystallized wherever the common law prevails. The law has in its historical development turned full circle and is again at its original starting point. The judges have practically made the issue *functus officio*. Contests involving the legality of charitable trusts for Masses will continue as a matter of course, but according to the overwhelming weight of authority without avail.

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