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SEVENTY YEARS OF BEQUESTS FOR MASSES IN NEW YORK COURTS 1883-1953

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EARLY in February, 1876, one Mrs. O'Hara, resident of New York, a widow without children, discussed the drawing up of her will with her lawyer. She stated that she desired to make several gifts for charitable purposes, and, in particular, some bequests for Masses. At this time no case on bequests for Masses had appeared in New York reports.[1] Indeed, there was then no reported case in the United States in favor of the *validity* of bequests for Masses.

Cases on Bequests for Masses from the Foundation of the United States to 1876.

During this entire period only two cases[2] on bequests for Masses had been finally adjudicated in all the courts of the United States. The reports of the District of Columbia showed one case, *Newton* et al. *v. Carberry,*[3] and the reports of one Missouri case, *Schmucker's Estate v. Reel.*[4] The decisions in both of these cases were that the bequests for Masses were *invalid.*

In the District of Columbia case, Eloysa Mattingly died testate. Her will provided, in part: "1. I will that my executor pay to the Rev. William McSherry, president of Georgetown College, one hundred dollars, to be distributed equally among the clergy of the said college, for the purpose of having masses offered up for the repose of my soul. . . . 3. I will to the pastor of the Catholic Church at Newton . . . ten dollars; one-half to go to the poor of that congregation, and the other half for Masses for me. . . . 5. To Bishop Benjamin Fenwick, of Boston, ten dollars. . . ." Next of kin and heirs at law of the testatrix brought a bill in equity to set aside certain legacies, including the provisions for Masses. The executor demurred to the bill. The next of kin and heirs contended that the bequest for Masses were void as in violation of the Declaration of Rights prefixed to

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1. See Appendix.

2. Two American cases of *ejectment* from real property, in which Mass stipends were but incidentally involved, had previously been decided in Pennsylvania, one in 1798 and one in 1829. Both controversies arose over the same parcel of land. These cases were Executors of Browers v. Fromm, 1 Addison's Rep. 361, and McGirr v. Aaron, 1 Pen. & Watts 49. More detailed expositions of these two cases may be found in an article by O'Brien and O'Brien, titled: The Famous Fromm Case, in 1 The Priest 38(May, 1945).

3. 5 Cranch C.C. 632 (1840).

4. 61 Mo. 592 (1876).

the Constitution of Maryland and which was a part of the laws of that State on the 27th of February, 1801, when they were adopted and continued in force in the county of Washington by the Act of Congress of that date (2 Stat. 103), section 34 of which declared: "That every gift . . . or devise . . . to any minister . . . as such; or . . . for the support . . . of . . . any minister, . . . as such; . . . without the leave of the legislature, shall be void. . . ." The executor admitted that the "legacies" numbered 3. (and those similar) were void, as being to some minister of the gospel, as such, without the leave of the legislature.

The Circuit Court of the District of Columbia was called upon to answer two questions: (1) Was No. 1 valid? (2) Were Nos. 5, etc., valid? The Circuit Court decided: No. 1 was not valid; Nos. 5, etc., were valid. The "void legacies will fall into the intestate residuum, to be distributed among the next of kin, ..."[5] The Circuit Court reasoned: No. 1 was within the inhibition of the Declaration of Rights as "substantially a bequest to 'the clergymen of the college', not by name, but as clergymen; for it was only in that character that they could offer up the sacrifice upon the altar, which the Mass is supposed to be." [6] Nos. 5, etc., were not within the inhibition of the Declaration of Rights "being bequeathed to the several legatees personally by name, and not to them as ministers." [7]

In the Missouri case, Leopold Schmucker died testate. His will provided: "1st. I give . . . to John H. Reel two hundred dollars, to be applied to a specific purpose which I have explained to him. 2d. I give . . . to John H. Reel . . . five hundred dolars for another and specific charitable purpose which he well understands. 3d. The balance of my property . . . I give . . . to John H. Reel, to apply in charity, according to his best discretion, and I appoint said John H. Reel executor of this, my will." The will then continued: "And whereas I hope, that Mr. Reel . . . will consent to act as my executor . . . and have explained to him to what charities I desire him to appropriate the monies herein bequeathed to him, it is my will that my said executor be held to no accountability whatever for the non-performance or ill-performance of the trust herein confided to him; he will use his best discretion in the matter, and the receipt of the acting Archbishop of St. Louis of the Roman Catholic Church in Missouri or Kansas,

5. 5 Cranch C.C. 632, 637 (1840).

6. Id. at 635.

7. Ibid. Subsequent to this decision the thirty-fourth section of the Declaration of Rights of the State of Maryland, adopted in 1776, was repealed. As to this, note 68 on page 535 of 68 Corpus Juris (1934) states: "(1) by virtue of Act of Congress of July 25, 1866, 14 U.S. St. at L. 232 c. 237, a testamentary gift for religious uses or purposes within the Maryland Declaration of Rights section 34 (now section 38) was rendered valid provided it was made at least one calendar month before the death of testator . . . (2) A similar provision is now found in the Code of Laws of the District of Columbia section 1635."

shall be a full discharge to him *pro tanto* for any monies applied by him to charities according to my request." [8]

The following letter addressed to the executor was introduced in proceedings in the secular courts to determine the validity of the questioned provisions of the will: "Mr. John Reel—After I am dead, I would like you, if you please, to bestow the money I bequeathed you as follows: 1st. To the Benedictines of Atchison, Kansas, for a memorial mass for 100 years for myself and wife, $200. 2d. To be equally divided among the German Roman Catholic churches of St. Louis, for masses for myself and wife. $500. 3. The balance for masses for myself and wife." [9] When this will was made, section 13 of Article 1 of the Constitution of Missouri provided: "that every gift . . . to any minister, . . . or to any religious sect, order or denomination, or to or for the support . . . of or in any trust for any minister . . .; and every gift . . . in succession . . . to, or for such support . . . shall be void."

The St. Louis Circuit Court declared void the first, second, and third clauses, which provided for Masses. On appeal by the executor, the Missouri Supreme Court affirmed the judgment of the St. Louis Circuit Court, declaring the bequests for Masses invalid, and giving as the reasons: "It follows, therefore, that the judgment of the circuit court must be affirmed; 1st, because the will, by its bequests, gave the property to the executor in trust for certain purposes, and those purposes are not defined so that a court can carry them out; and, 2d, because if we look at the written wishes of the testator to ascertain what the trusts were, we find that they are prohibited by the constitution." [10]

In the then dim light of the American authorities in respect to bequests for Masses, Mrs. O'Hara's lawyer expressed grave doubt as to the probability, in case of a contest, that the New York courts would uphold the validity of a bequest for Masses. He suggested a method which he belived would

8. 61 Mo. 592, 595 (1876).

9. Id. at 601.

10. Id. at 603. Subsequent to the decision of the Missouri Supreme Court in this case, section 13 of Article 1 of the Constitution of Missouri was repealed. Compare this provision of the Constitution of Missouri with the similar provision of the Declaration of Rights prefixed to the Constitution of Maryland and which was a part of the laws of that State on the 27th of February, 1801, when they were adopted and continued in force in the county of Washington, by the Act of Congress of that date (2 Stat. 103), and compare with the case of Newton et al. v. Carberry. Under section 13 of Article 1 of the Constitution of Missouri, before it was repealed, the delivery of Mass stipends to a priest, as a gift to a minister for his support, would be void. After the repeal of this section gifts of Mass stipends became valid. But note dictum in Minturn v. Conception Abbey, 227 Mo. App. 1179, 61 S.W.2d 352 (1933): "Such bequests (for Masses) are universally held, so far as we have been able to find, to be, not individual bequests, but charitable trusts." It is submitted, however, that the Conception Abbey was not a trustee. It was the donee of a power to distribute Mass stipends in the amount of $3,100 to priests who would say the Masses as requested by the testator.

effectuate Mrs. O'Hara's wishes. To carry it out, Mrs. O'Hara by her will gave the residuary estate, the bulk of her property, to her lawyer, her physician, and a priest, as joint tenants. Contemporaneously with the making and execution of her will, there was prepared by the lawyer a writing, which was signed by her, in which she stated: "Having this day made a new will . . . I wish my residuary legatees to consider the instructions heretofore given by me as still in force. February 14, 1876." These instructions were contained in a writing signed by the testatrix on June 8, 1875, on the occasion of her making a previous will. The paper containing these instructions was addressed to the residuary devisees and legatees by name and she said therein, among other things: "I am desirous of accomplishing certain purposes, some of which at least cannot be legally carried out by express provisions in my will, and therefore, in order more certainly to effect my purposes, I have constituted you as such residuary devisees and legatees, relying upon you that you will, immediately upon my decease, take such measures as may be necessary to accomplish my wishes."

The expressed purposes were all charitable, assuming that gifts for Masses were for a charitable use. It was the settled law of New York, at the time of the making and execution of the will, that the doctrines of charitable trusts did not prevail in that State. Consequently, any trust in New York, charitable or private, that violated the Rule Against Perpetuities or had indefinite beneficiaries would be invalid. In this writing Mrs. O'Hara charged the residuary devisees and legatees to impose upon her beneficiaries "as far as you can" the "obligation" of "the offering of the Holy Sacrifice of the Mass" in her own behalf and that of certain named relatives.

In spite of the carefully laid plans of Mrs. O'Hara and her lawyer, the provisions in her will for the bequests for Masses were disputed by her relatives and the contest continued in the lower and intermediate courts until it was adjudicated by the Court of Appeals in 1884[11] by an order for a new trial.

In the last seventy years, 37 cases of bequests for Masses have been finally adjudicated by the secular courts of the State of New York and have been duly reported: 4 by the Court of Appeals, 6 by the Supreme Court, and 27 by the Surrogates' courts.

It is submitted that both in their decisions and in their *rationes decidendi* the New York courts have erred frequently, but most of all in classifying bequests for Masses as *trusts* and often in classifying them as *legacies*. Bequests for Masses rarely create trusts within the meaning of that term in American secular law, and never are real legacies. In only 3 of the said 37 cases had bequests for Masses created trusts.

11. Matter of Will of O'Hara, 95 N.Y. 403 (1884).

New York Cases Before Holland v. Alcock—1883-88

Matter of Hagemeyer[12] is the first case on bequests for Masses found in the New York reports. It was a proceeding for the construction of the will of Maria Hagenmeyer. The will provided, in part: "Third. I further . . . direct my executors . . . to pay . . . one hundred dollars . . . for the purpose that masses shall be read for my . . . soul . . . Sixth. . . . all the rest, residue . . . I give . . . to the Roman Catholic Church of the Most Holy Trinity, . . . Brooklyn . . . for the purpose that some masses shall be read for my poor soul, and for other charity institutions as the pastor of said church sees fit." [13] Heirs at law and next of kin contested these two provisions, contending: ". . . the third clause was void for the reason that there is no donee, or legatee of the gift, and further that it was given for superstitious uses[14] and therefore void. . . . the latter portion [of the sixth clause] . . . makes no definite beneficiaries capable of coming into court and claiming the benefit bestowed." [15] Inasmuch as it may be inferred that the validity of a portion of the residue for "some masses" was conceded, no further consideration will be given herein to the latter portion of the sixth clause.

The Surrogate's Court decided that the bequest of $100 for Masses was valid, reasoning that in the same manner as "she had the legal right to direct the manner of her burial, and the expenses to be incurred in so doing, it cannot be denied that she also had the right to direct that the amount named should be expended for Masses." [16]

This decision is correct. The reasoning is substantially sound, though not completely so. Under the third clause, the executor was made the donee of *a power to make gifts* to priests of his own selection on condition precedent that they say and apply the Masses as requested. This power was analogous to, if not exactly like, a power to appoint. In wills where the testator directs his executor to provide funeral services and purchase a monument, the executor is respectively given *a power to* enter into a *con-*

12. 12 Ab. N.C. 432 (Surr. Ct. 1883).

13. Id. at 433.

14. As to whether or not gifts for Masses were void as being for superstitious uses, the court said: "While I have been unable to find any decision in this State upon the question, I prefer to accept the doctrine laid down in the Irish cases, to that of the English, as more in accord with equal religious toleration as accepted in this country. I am satisfied that the doctrine of superstitious uses is against the spirit of our institutions and should not be adopted by our courts." Id. at 434.

15. Id. at 435.

16. No authorities were cited by the court in support of this proposition. In a note in 46 Harv. L. Rev. 1036 (1933) titled: Rule Against Perpetuities—Animal Lives as "Lives in Being"—Cutting Down Honorary Trust to Legal Period, it is said: ". . . although the courts generally refer to gifts for animals and tombstones as trusts, the nature of the interest created has been analyzed as a power." Also N.Y. Real Prop. Law §§ 130-183-Powers.

tract with a mortician for services and a *power to purchase* from a dealer in tombstones.

The Surrogate had correctly reasoned that the bequest for Masses had not created *a trust*—but had created *a power*.[17]

To get back to the case of Mrs. O'Hara's will, Mrs. O'Hara's grandchildren contested her will, the drawing of which we have described *supra*, on the ground of undue influence, but the will was allowed. This aspect of the will contest is not herein further considered. The grandchildren began an action in equity to set aside and annul the residuary devise and bequest, which, in conjunction with the accompanying writing, provided for Mass stipends. The trial court said: "The conclusion reached is that the secret and unlawful trust, as alleged, is not established, and that the residuary clause of the will is valid as a devise and bequest." [18] There was judgment for the defendants, dismissing the plaintiff's complaint.

The case went to the Supreme Court, General Term, which affirmed the judgment of the Special Term. On appeal, the New York Court of Appeals ruled: ". . . in the equity action we reverse the judgment of the General Term and of the Special Term . . . and order a new trial." The Court said: "While it is true . . . that our statute does not forbid charitable devises and bequests, it does forbid expressly and imperatively a certain manner of making them. Gifts or transfers made in that manner are prohibited and made void. The principal legatee in this case knew it, and it was distinctly planned between him and the testatrix that her understood and declared purpose, *which could not be lawfully carried out by a devise on the face of the will,*[19] should be effected by an absolute devise coupled with his honorable obligation to hold and appropriate the property to forbidden uses. An evasion of the law was the very occasion and object of the absolute devise." [20]

The controversy in *Gilman v. McArdle*[21] arose from an attempt on the part of a Catholic to arrange a legal transaction *in her lifetime* that would ensure after her death the saying of Masses for the repose of her soul and the soul of her deceased husband. Margaret Gilman died on September 1, 1882. Her husband died October 13, 1882. About a week before her death, Mrs. Gilman delivered to one Henry McArdle bank books having a balance of $2,299, and instructed him to draw the money

17. "A power, rather than a trust, is created by provisions authorizing one other than the beneficiaries of a divise or bequest to deal with or dispose of the property, but not giving him title thereto; . . . ." 69 C.J. 824, citing the following cases in note 8: Haug v. Schumacher, 166 N.Y. 506, 60 N.E. 245 (1901); In re Currier's Estate, 138 Misc. 372, 245 N.Y. Supp. 703 (Surr. Ct. 1930); Law Guarantee & Trust Co. v. Jones, 103 Tenn. 245, 58 S.W. 219 (1900).

18. O'Hara v. Dudley, 64 How. Pr. 340, 349 (Sup. Ct. 1882).

19. Emphasis supplied.

20. 95 N.Y. 403, 421 (1884).

21. 99 N.Y. 451 (1885).

out of the banks and apply it to the following purposes: for the support of herself and her husband for life, and after the death of the survivor to use the residue for funeral expenses, including a monument, and to expend the balance for masses to be procured by him for her soul and the soul of her husband. McArdle assented. He withdrew the money from the banks. He used a portion for the support of Mrs. Gilman and her husband. On the death of the wife and husband he paid their funeral expenses and bought a monument as directed. He then had a balance remaining, which balance he was prepared to expend for Masses. Before he had so expended any part of the balance, the administrator of the estate of the husband, James Gilman, claimed it. McArdle refused to turn over the balance to said administrator maintaining that he should be allowed to procure the saying of Masses as requested by Mrs. Gilman. The administrator of the husband's estate brought suit to recover the balance.

The lower courts gave judgment in favor of the administrator of the estate of the husband, reasoning: McArdle held no title to the balance, but held as a mere agent of Margaret Gilman, and the agency ceased on her death, whereupon title vested first in James Gilman, he surviving his wife, and then in his administrator.

On appeal by McArdle to the New York Court of Appeals, the court of last resort reversed the judgment and the complaint of the administrator of the estate of the husband was dismissed. McArdle was permitted to proceed to have the Masses said as requested by Mrs. Gilman. Rapallo, J., speaking for the Court of Appeals, said in part:

"In this case, at the time of the death of Mrs. Gilman, the title to the fund, or so much of it as had not been then applied, was in the defendant, as trustee, upon a valid trust for the support of her husband so long as he should live." [22]

Next the court ruled that as to the surplus, after support, funeral expenses and the monument, a valid *contract* had been entered into by Mrs. Gilman and the defendant for its expenditure for Masses. The court concluded: ". . . we think the plaintiff established no cause of action and his complaint should have been dismissed."

Again it should be noted that this case did not squarely present a controversy over a *bequest* for Masses. The transaction was *inter vivos*.[23]

Holland v. Alcock[24] had more repercussions, probably, than any other case in the New York courts on bequests for Masses. The action was brought by plaintiffs as the next of kin of Thomas Gunning, deceased, against the executors of his will for an accounting, distribution and payment of the residuary estate, as to which plaintiffs claimed the testator

22. Id. at 457.
23. See page 179 infra.
24. 108 N.Y. 312, 16 N.E. 305 (1888).

died intestate because of the asserted invalidity of the provision of the will attempting to dispose of the same for Masses. Gunning's will provided, *inter alia:* "All the . . . residue . . . [$11,500] . . . I give . . . to my . . . executors, to be applied by them for the purpose of having prayers (Masses) offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory."

The defendant, Alcock, one of the executors, demurred to the complaint. At Special Term of the Supreme Court the demurrer was overruled and the plaintiff had judgment, the court ruling that the residuary gift for Masses was invalid. On appeal to the General Term of the Supreme Court that judgment was reversed and judgment was rendered in favor of the defendant, Alcock, thus affirming validity of the bequest for Masses. The next of kin appealed to the Court of Appeals. They contended (assuming that the bequest for Masses had created a trust) that the English doctrines of charitable trusts, as distinguished from private trusts governed by the general rules of law, did not prevail in New York and, therefore, the trust attempted to be created was void, (a) because of the indefiniteness of the beneficiaries, and (b) because it violated the Rule Against Perpetuities; and that consequently, the testator died intestate as to the residuary estate and that distribution thereof should be made among the next of kin and heirs at law. The executor contended that the beneficiaries were not indefinite and that the Rule Against Perpetuities had not been violated.

The New York Court of Appeals reversed the judgment of the Supreme Court at General Term, affirmed the judgment of the Supreme Court at Special Term, declaring the bequest for Masses invalid. The Court of Appeals declared that the Supreme Court at General Term had erred in declaring that the bequest for Masses was valid. It reasoned that the gift for Masses was for a charitable use and that a trust had been made, consequently a charitable trust, and as there was an absence of a definite beneficiary entitled to enforce the execution of the testamentary trust, the trust was therefore invalid. The doctrines of charitable trusts, as distinguished from private trusts governed by general rules of law, did not prevail at the time in New York. These doctrines were restored by statute in 1893.

It is submitted that the bequest for Masses had not created a *trust* in *Holland v. Alcock.* The executors had been granted a *power,* a power to appoint, viz., to make gifts, offerings, in the total amount of $11,500, to priests of their selection, title to vest in a series of single Mass stipends, as a priest would say and apply a single Mass in accordance with the express wishes of the testator.

The words of the bequest indicated no manifestation on the part of the

testator that he intended a trust to be created, that kind of relationship between the executors and the priests which to secular lawyers is known as a trust. There was no intention, express or implied, that the executors should invest the money and hold the principal for any length of time and to make the offerings of Mass stipends in whole or in part out of income. The policy and law of the Church is that Masses for departed souls must be said and applied promptly. As a believer in the doctrine of Purgatory, the testator would wish the Masses to be said and applied as promptly as possible.

After the New York legislature in 1893 restored the doctrines of charitable trusts, the case of *Holland v. Alcock* lost its value as a precedent in the New York cases of bequests for Masses.

Cases Between 1888-1889—Period of Influence of Holland v. Alcock.

The judicial influence of *Holland v. Alcock* in New York was short-lived. Seven cases were finally adjudicated during the five year period in which *Holland v. Alcock* might have served as a precedent. However, that decision lost its force in even the Supreme and Surrogates' Courts after only one year. As might be expected Catholics vigorously reacted against judicials holdings that bequests for Masses were invalid—invalid on the ground that they created charitable trusts. The following five cases will now be considered; *Schwartz v. Bruder*,[25] *Porter v. Carolin*,[26] *O'Conner v. Gifford*,[27] *Matter of Black*,[28] *Ruppel v. Schlegel* et al.[29]

Schwartz v. Bruder was a proceeding in the Surrogate's Court for the construction of a will, which provided in part: "I hereby direct my executor to have masses read for the repose of my soul for which I direct him to expend the sum of five hundred dolars." The Surrogate held the bequest for Masses invalid, saying: "I am constrained by the decision of the Court of Appeals in the case of Holland v. Alcock (108 N.Y. 312) to determine this disposition to be invalid."[30]

It is submitted that this decision is wrong. The Surrogate assumed that the bequest for Masses had created a charitable trust, which would have been invalid in New York at the time on the ground that the beneficiaries were indefinite. The Surrogate was wrong, because the bequest for Masses had not created *a trust*. The executor had been made *the donee of a power* to make gifts, offerings to priests, title to vest in the priests on the saying and application of the Masses as requested.

25. 6 Dem. 169, 3 N.Y. Supp. 134 (Surr. Ct. 1888).
26. 50 Hun 603, 2 N.Y. Supp. 791 (Sup. Ct. 1888).
27. 117 N.Y. 275, 22 N.E. 1036 (1889).
28. 1 Con. 477, 5 N.Y. Supp. 452 (Surr. Ct. 1889).
29. 55 Hun 183, 7 N.Y. Supp. 936 (Sup. Ct. 1889).
30. 6 Dem. 169, 171, 3 N.Y. Supp. 134 (Surr. Ct. 1888).

In *Porter v. Carolin,* the Supreme Court said: "The residuary clause . . . giving the . . . residue . . . to the executors in trust, to expend the same for masses for the repose of the souls of the testatrix and her husband, is not now presented as a legal direction. Whatever doubt might otherwise exist concerning it has been removed by the case of Holland v. Alcock, 108 N.Y. 312. . . . It is there held that such a direction cannot be carried into effect, and for that reason, it is conceded by the counsel that this clause of the will is not to be maintained. . . ."[31]

In 1888, under the precedent of *Holland v. Alcock,* the New York courts forbade Catholics to make bequests for Masses. It was plain that these devout Catholics would resent this judicial impeding of the exercise of their religion, the curtailing of the support of their priests and the outlawing of the free celebration of Masses, the very center of their religion. The New York contemporaneous juristic philosophers advocated the validity of bequests for Masses. The New York legislature was to enact a law within five years that would legalize such bequests. In the meantime the New York courts kept cutting down the scope of *Holland v. Alcock.* In *O'Conner v. Gifford,* the New York Court of Appeals allowed half of a $500 bequest for Masses, stating that though the bequest for Masses was void on the authority of *Holland v. Alcock,* the contesting creditor was estopped by his laches and the executor was entitled to a credit of $250 expended for Masses.

The Surrogates and the Supreme Court began to distinguish *Holland v. Alcock* from cases which came before them. *Matter of Black* arose on a report of an appraiser for the determination of an inheritance tax on a bequest for Masses. The will provided, in part: "I give . . . to my executors . . . $500 in trust to expend the same for masses for the repose of the soul of my . . . husband and myself, and it is my wish . . . that such masses be celebrated by the Rev. Thomas J. Campbell of the Society of Jesus."[32] The executor contended that such a bequest was not taxable as a legacy—that *it was an expense of the funeral.* The Comptroller contended that the bequest was not a funeral expense—that it was a specific taxable *legacy.* The Surrogate decided that the bequest for Masses was valid and taxable *as a legacy.*[33] He said: "In the case at bar the beneficiary is designated, for undoubtedly a wish on the part of the testatrix to have a partic-

31. 50 Hun 603, 2 N.Y. Supp. 791, 792 (Sup. Ct. 1888).

32. 1 Con. 477, 478, 5 N.Y. Supp. 452, 453 (Surr. Ct. 1889).

33. "A Common Law Power enables the donee to pass the legal estate; but it is the execution, not the creation of the power, which affects the transmutation of estate." Farwell on Powers 2 (3d ed. 1916). In a bequest for Masses, title does not pass on the selection of a priest by the donee of the power, nor even on delivery of the Mass stipends to the priest by the donee of the power, but on performance of the condition that the priest say the Masses as requested.

ular priest celebrate the Mass is equivalent to a direction. I am satisfied that the bequest is a valid one, and as such is subject to the tax imposed by the Collateral Inheritance Tax Act."[34]

The case of *Matter of Black* indicates a departure from the position of the New York Court of Appeals taken in 1888 in the case of *Holland v. Alcock* that all bequests for Masses created charitable trusts and were void on account of indefiniteness of the beneficiaries. This change of judicial policy was to be followed by the legislative act of 1893 which restored the former law of charitable trusts both as to indefiniteness of beneficiaries and as to the Rule Against Perpetuities.

In *Ruppel v. Schlegel* et al., a sister of the testator brought a petition for the construction of a will, which provided, in the fifth residuary clause, *inter alia:*

". . . all the . . . residue . . . I give . . . to the Roman Catholic Church of the Most Holy Trinity . . . Brooklyn . . . but under the following ordinations:

"A. That in each . . . year one High Mass shall be celebrated for my . . . soul; and, also, after the decease of my . . . wife, one High Mass shall be celebrated every year for the soul of my wife.

"B. And a part of the said estate shall be used . . . to pay for poor students intending to become a Catholic priest or Catholic teacher.

"C. And a part of said estate I ordain shall be used for starting a newspaper for the interest of the Catholic people." [35]

The testator left a widow, to whom he gave by the will a life estate in his realty and personalty, and a sister and other heirs to whom he gave nothing. The value of the residue was more than one-half of the estate. The contesting sister litigated for a share of the excess over one-half contending that the three clauses were subject to the statutory inhibition of chapter 360 of Laws of 1860 restricting charitable gifts to one-half of the estate on the ground that they created charitable trusts.

The Surrogate's Court gave judgment against the sister, declaring that the gifts were not inhibited by the restricting statute—the residue having been given absolutely to the Church of the Most Holy Trinity and consequently there were no beneficiaries and hence no one interested in the equitable title, no charitable trust having been created. The Supreme Court, at Special Term and at General Term, affirmed the judgment of the Surrogate's Court.

The New York courts were right in ruling that a trust had not been created. The residue was the subject of a gift to the Church of the Most Holy Trinity. An *equitable charge*[36] on the gift to the church had been

34. 1 Con. 477, 479, 5 N.Y. Supp. 452, 453 (Surr. Ct. 1889).

35. 55 Hun 183, 184, 7 N.Y. Supp. 936 (Sup. Ct. 1889).

36. "Trust and equitable charge. If a testator devises or bequeaths property subject to the payment of certain sums of money to third persons, he thereby creates an equitable charge, not a trust. An equitable charge is like a trust in that in each case the legal title to property

created. This equitable charge (apart from the obligations for the students and the newspaper) required the church to procure the saying and application of an annual high Mass for the soul of the testator and an annual high Mass for the soul of the testator's wife. The offerings, as decreed by the court in the proper diocesan statutes, for the two Masses would probably amount to $10 a year, although they might be more in a few dioceses. The Surrogate was wrong in saying that the church would not be obliged to make offerings of $10, or more annually for the Masses. The church would have to make these offerings annually to one or two priests. Mass stipends are always given to priests, in their individual capacities, who say and apply such Masses, as gifts towards their support. The gift to the Church of the Most Holy Trinity was unquestionably to a "religious society" within the express terms of Chapter 360 of Laws of 1860.

Cases after 1889 to 1954. After 1889 There Has Not Been a Single Final Adjudication Declaring a Bequest For Masses Invalid.

The New York courts rendered no decision after *O'Conner v. Gifford,*[37] decided November 26, 1889, declaring bequests for Masses inherently invalid. *O'Conner v. Gifford,* in fact distinguished from *Holland v. Alcock,* allowed as valid Mass stipends in the amount of $250.00 (on account of a bequest for $500.00), which the executor had expended for Masses and for which the creditor contended that the executor should not be permitted to have credit in his account because of the authority of *Holland v. Alcock,* wherein the Court of Appeals had ruled that all bequests for Masses created charitable trusts and consequently were void under the then New York law. The Court of Appeals did not overrule *Holland v. Alcock,* but, distinguishing it, ruled in the later case that the complaining creditor was barred by his laches.

Six months previous to the decision in *O'Conner v. Gifford,* a Surrogate's Court, *Matter of Black,*[38] in proceedings to impose an inheritance tax on a bequest for Masses had decided the bequest for Masses was taxable as *a legacy*—no charitable trust having been created.

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is vested in one person and an equitable interest in the property is given to another. The interest which the equitable encumbrancer has, however, is different from the interest of a beneficiary of a trust. The equitable encumbrancer has only a security interest in the property; the beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property. . . ." "I Scott on Trusts § 10 (1939). See 1 Bogert, Trusts and Trustees § 31: ". . . It is not uncommon to find courts and writers stating that such a charge is a trust, and occasional holdings to that effect are found. . . ." Section 324: "An equitable charge for charitable purposes may be created, and is to be distinguished from a trust." See Restatement, Law of Trusts § 10 (1935): "Trust and Equitable Charge. An equitable charge is not a trust." See N.Y. Real Prop. Law § 131 as to "a charge thereon."

37. 117 N.Y. 275, 22 N.E. 1036 (1889).

38. 1 Con. 477, 5 N.Y. Supp. 452 (Surr. Ct. 1889).

Within a month after *O'Conner v. Gifford*, the Supreme Court in *Ruppel v. Schlegel* et al.,[39] involving a restrictive statute on charitable bequests, ruled that the bequest for Masses therein constituted an absolute gift to a corporate body and had not created a charitable trust.

The Two Other Cases Before 1893 Which Holland v. Alcock Might Have Been Assumed to Influence.

Vanderveer v. McKane,[40] was a proceeding for the construction of a will, brought by the executor. The testatrix, within two months after the execution of her will, died leaving her father surviving her. By the eleventh article in her will she bequeathed to her executors $5,500 to be paid over by them as therein directed: $500 each to the pastors of certain Roman Catholic churches in Brooklyn therein named, and $25 each to the pastors of certain other Roman Catholic churches. The testatrix also gave for charitable uses two other gifts, one of $13,000 and another of $5,000. Including the gifts for Masses as gifts for charitable uses, the total of such gifts exceeded one-half of the estate. Excluding the gifts for Masses, the total of the gifts for charitable uses was less than one-half of the estate. The testatrix directed that the gifts of $500 and the gifts of $25 to the various priests be made for Masses to be said in each of the named churches for the repose of her own soul and the souls of her mother, brother, and aunt. The gifts for Masses and the other charitable gifts were attacked by the father of the testatrix. He claimed the part of all these gifts which was in excess of one-half of the estate.

The New York Supreme Court, Special Term, held that the bequests for Masses were not within the statutory inhibition—on the ground that the bequests for Masses were not gifts to *corporations*—they were gifts to *individuals* and, therefore, were without the scope of the inhibiting statute. This decision was right under chapter 360 of Laws of 1860—before the 1923 amendment. The then basic restricting statute did not inhibit gifts to *individuals*.[41] The bequests for Masses did not create charitable trusts.

Estate of Julia Howard[42] was an accounting under a will. Julia Howard's will had provided, *inter alia:* "I direct my . . . executor to pay . . . unto Rev. Father McLoughlin of New Rochelle . . . three hundred

39. 55 Hun 183, 7 N.Y. Supp. 936 (Sup. Ct. 1889).

40. 25 Ab. N.C. 105, 11 N.Y. Supp. 808 (Sup. Ct. 1890).

41. In 1927 a Surrogate, In re Beck's Estate, 130 Misc. 765, 225 N.Y. Supp. 187, ruled that a bequest for Masses, as a gift to an individual in trust for a charitable use, was inhibited by chapter 301 of Laws of 1923. Apart from possible constitutional objections, this decision appears to be correct. In 1929 a Surrogate, In re Brown's Estate, 135 Misc. 611, 238 N.Y. Supp. 143, ruled that a bequest for Masses, as a gift to an individual, was not for a charitable use, and therefore was not inhibited by chapter 301 of Laws of 1923. The ruling that a gift for Masses is not for a charitable use is fundamentally wrong.

42. 5 Misc. 295, 25 N.Y. Supp. 1111 (Surr. Ct. 1893).

dollars for the purpose of masses. . . . I direct my executor to pay . . . unto Rev. James T. Coles of Mount Vernon . . . $300 for the purpose of masses. . . ." Both Father McLoughlin and Father Coles survived the testatrix, though Father Coles died shortly thereafter and before the offerings of the Mass stipends had been made to him by the executor. No offerings of Mass stipends had been made to Father McLoughlin. The residuary legatee contested the bequests for Masses. The Surrogate decided that Father McLoughlin would be entitled to the bequest of $300 on showing that he said the Masses as requested; and that the administrators of the estate of Father Coles were not entitled to the bequest of $300 and that that sum would go to the residuary legatee. The Surrogate reasoned that the gifts to the two priests were made on the condition precedent that they say the Masses as requested. and that, therefore, Father McLoughlin would be entitled to the first bequest of $300 on showing a performance of the condition. But as to Father Coles, he being dead and therefore not being able to perform the condition, title to the second bequest of $300 at least,—but the courts varied in their rulings as to the nature of bequests could never vest in him, and consequently the bequest would fall into the residue.[43]

43. In 1943 in an article titled Bequests For Masses Rarely Create Charitable Trusts, by Rev. Kenneth R. O'Brien, published in III The Jurist 416-440, it was stated: "Cases like that of Estate of Julia Howard . . . are unsound . . . the court ruled that the two bequests constituted legacies to the priests but that they were conditioned on the saying of the Masses requested, and that, therefore, the legacy to Father Cole had lapsed and that the Masses so desired by the testator could not be said by another priest.

"The court said: 'I think the Reverend Mr. McLoughlin may still be entitled to his legacy on showing a future performance of the condition, but, as that is impossible in so far as the Reverend Mr. Cole is concerned, the legacy to him is held to be void, and it will therefore fall into the residuum, and belong to the legatee thereof.'

"As to Father McLoughlin's case, the court demonstrated its lack of knowledge as to *how a Mass Intention is made.* In the case of Father Cole the decision deprived the testatrix of having carried out her primary intention of having Masses said for the repose of her soul. In the Howard Case application of the theory that the executor is a donee with power to make a gift would have guided the court to a correct solution in each of the two divisions of the case.

"The advantages of the application of the theory that the Executor is a donee with power to make a gift rather than the legacy theory is apparent in that the former insures the fulfillment of the primary purpose of the testator, viz., to have Masses said for the repose of his soul without imperilling this purpose by the possible intervention of the common law doctrine of lapsed legacies in the event that the priest recommended for the saying of the Masses, should predecease the testator. In addition it makes uniform the common law and the canon law in that title to the money does not vest in the priest until the Masses are said."

Scott, in Fifty Years of Trusts, 50 Harv. L. Rev. 60, 72 (1936), says: "In the field of charitable trusts there have been changes during the last half century. Fifty years ago charitable trusts were held to be invalid in New York, Michigan, Minnesota, Maryland, Virginia, and West Virginia. When the great Tilden Trust for the maintenance of a free library and other educational and scientific objects failed in New York, Professor Ames wrote that anyone who

Period from Chapter 701 of the Laws of 1893 to Morris v. Edwards, October 14, 1919.

It might have been expected that after Chapter 701 of the Laws of 1893 had become effective and the doctrines of charitable trusts had been reestablished in New York the New York courts would have a tendency to declare all bequests for Masses valid *as charitable trusts.* But such a judicial policy was not to come into being. Nine cases were finally adjudicated in the period beginning January 1, 1894 and ended October 13, 1919. In all of these cases the bequests for Masses were declared valid, in part, for Masses.

In two cases the courts reasoned that the bequests were not in the nature of charitable trusts but were rather in the nature of a power given by the testator to the executor, quite like a direction for a monument, and ordered the amount of the bequest for Masses in each case to be cut down to a sum "in accordance with the station in life of the testator."

In *Matter of Baches,*[44] Katherine Baches had died testate. Her will directed her executors: "To cause masses to be read in a German Catholic church in the city of Buffalo, for herself and her deceased husband, for any balance of cash money which might be left after the payment of her just debts, doctor bills and funeral expenses." This cash balance amounted to $900. Children objected to the probate of the will. Among the questions raised were the following: (1) Was the bequest for Masses valid? (2) If so, how much was to be expended for Masses? The Surrogate ruled that the bequest for Masses was valid. However, he decided that only $250 would be allowed for the *three* items, debts, funeral expenses and Masses, and that the total of the debts and funeral expenses should be subtracted from $250 and that balance should be allowed for Masses. The residue, the difference between $900 and $250, or $650 should be distributed *as though she had died intestate.* In support of his decision that the bequest for Masses was valid the court cited *Gilman v. McArdle,*[45] *Holland v. Alcock,*[46] and *Kehoe v. Kehoe.*[47] The Surrogate further reasoned that the amount for Masses should be in accordance with the station in life of the testatrix.

follows the reported cases 'will be startled at the number of testators whose reasonable wishes have been needlessly disappointed, and at the amount of property which has been diverted from the community at large for the benefit of unscrupulous relatives.' (Ames, *The Failure of the "Tilden Trust"* (1892) 5 Harv. L. Rev. 389, 391). The public dissatisfaction which resulted from the failure of the Tilden Trust led the legislature of New York to enact a statute permitting charitable trusts, and one by one the other states which formerly held these trusts invalid have adopted legislation permitting them."

44. 9 Misc. 504, 30 N.Y. Supp. 394 (Surr. Ct. 1894).

45. See note 21 supra.

46. See note 24 supra.

47. 12 Ab. N.C. 427 (1883).

It is submitted that the Surrogate was right as to the validity of the bequests for Masses, though his reasoning was not accurate, but was wrong as to the amount which he authorized to be expended for Masses.

Matter of Welch,[48] was a proceeding upon the probate of a will. Margaret F. Lasher died testate. Her will provided: "Balance for burial and expenses, and masses."[49] A previous paragraph had bequeathed $100 for Masses for the repose of her soul. The Surrogate was called upon to decide how much should be allowed for expenditures for Masses. He decided that the portion of the residue as shall accord with the circumstances of the testatrix should be allowed for burial expenses and for Masses and that the balance belonged to the next of kin *as intestate property*. The court said: "This provision . . . must be construed to intend the expenditure for such purposes of such sums as shall be suitable to the condition in life of the testatrix. . . ." As *dictum*, the court added: "The gift in paragraph 10 of the will for Masses [$100] constitutes a good trust for a religious use."[50] The court reasoned that in view of the express provision of the will for the expenditure of $100 for Masses, the repetition of such purpose in the later paragraph indicated an intention that a sum in addition to that specifically provided shall be expended. This sum could not be ascertained with certainty in advance of administration, but the appropriation of $100 for Masses would probably be sufficient in view of the circumstances disclosed in the stipulation as to the condition in life of the testatrix.

It is submitted that this decision is wrong. The Surrogate has imposed as the will of the testatrix his own judgment as to how much should be expended for Masses. It is submitted, also, that the Surrogate's *dictum:* "The gift in paragraph 10 of the will for Masses [$100] constitutes a good trust for a religious use," is also wrong. The gift was for a charitable use, but no charitable trust had been created. The testatrix had given the executor power to make a gift to a priest or priests.

Before the close of the following year, the New York Court of Appeals by the case of *Morris v. Edwards*,[51] was to declare the decisions in such cases as *Matter of Baches* and *Matter of Welch* wrong.

Before 1919, In Three Proceedings To Impose Inheritance Taxes On Bequests For Masses, New York Courts Ruled That Bequests For Masses Were Within The Express Terms Of The Inheritance Tax Law and Were Taxable as Legacies or Gifts in the Nature of Legacies.

Naturally the tax officials in these cases argued that the bequests for Masses were valid and then claimed that they constituted transfers in the

48. 105 Misc. 27, 172 N.Y. Supp. 349 (Surr. Ct. 1918).
49. Id. at 28, 172 N.Y. Supp. at 350 (Surr. Ct. 1918).
50. Ibid.
51. 227 N.Y. 141, 124 N.E. 724 (1919).

nature of legacies within the express term of the inheritance tax law.

In *Matter of Mary J. McAvoy,*[52] Mary J. McAvoy died testate. Her will provided: "I give . . . unto Rev. Father Guhl, of St. Alphonsus Church . . . Brooklyn . . . or in the event of his death, to his successors as pastor of said Church . . . eight hundred (800) Dollars, to be used in saying eight hundred (800) low masses, as follows: two hundred . . . for Henry J. Riley; two hundred . . . for Mary J. McAvoy; two hundred for James A. McAvoy, and two hundred . . . for Jane Riley." The Appellate Division of the Supreme Court ruled that the bequest for Masses was taxable and said: "I think that the conclusion reached by the learned surrogate in *Matter of Black (supra)* was correct."[53]

In re Didion's Estate,[54] Mary Didion died testate. Her will provided, *inter alia:* "I give, bequeath, and devise and direct that $200.00 be given to the Assumption Church of Lancaster, N.Y. (so-called St. Mary's Church) for masses to be read for the repose of my soul, and . . . $100.00 . . . be given to the St. Mary's Church of Buffalo, N.Y., for the repose of my soul." The Surrogate decided that the bequests for Masses were not subject to the inheritance tax law, being exempt under section 221 of the transfer tax law as legacies to religious or charitable bodies. The Surrogate said: "The legacies are bequeathed directly to religious bodies, the provision for masses being merely collateral and incidental."

It is submitted that the Surrogate had erred. Mass stipends are primarily gifts to priests. Only priests are empowered to accept and satisfy Mass stipends.

In *Matter of Eppig,*[55] Margaret Eppig's will provided: "Second. I direct my executors to pay and expend . . . $2,000 . . . the same to be applied by them from time to time in their discretion to the payment of the expense of Roman Catholic Masses to be procured by them to be said for the repose of my soul. Third. I direct my executors to pay and expend . . . $500 . . . the same to be applied by them from time to time in their discretion to the payment of the expense of Roman Catholic masses to be procured by them to be said for the repose of the souls of my deceased parents. . . ." The Surrogate decided that the bequests for Masses were subject to the transfer tax at the rate of five per cent. He gave as his reasons: The bequests had created (1) gifts for a religious use, and (2) trusts, the rates of which are five per cent. He said that trusts had been created because "the duties are active and render the possession of the estate convenient and reasonably necessary."

It is submitted that the Surrogate was wrong in declaring that charitable

52. 112 App. Div. 377, 98 N.Y. Supp. 437 (2d Dep't 1906).
53. Id. at 378, 98 N.Y. Supp. at 438 (2d Dep't 1906).
54. 54 Misc. 201, 105 N.Y. Supp. 924 (Surr. Ct. 1907).
55. 63 Misc. 613, 118 N.Y. Supp. 683 (Surr. Ct. 1909).

trusts had been created. Margaret Eppig had made her executors donees of powers to make gifts to priests on condition precedent that they say and apply Masses as requested by her in her will.

Commencing September 1, 1930 the New York statutes imposed a tax on estates, which superseded any other article of the Tax Law which imposed a transfer, inheritance or estate tax. Since September 1, 1930 cases like *Matter of Black, Matter of Mary J. McAvoy, In re Didion's Estate,* and *Matter of Eppig,* have ceased to be of importance.

In re O'Regan's Will,[56] arose on proceedings for the construction of the will of Patrick B. O'Regan, particularly as to the following clause: "XI. I give . . . the . . . residue . . . unto my . . . executors for their use and benefit. With a request to them, that a portion of said residue be used for Masses for the repose of my soul, and the balance given to some deserving charity." The executors were two nephews. The Surrogate decided that the nephews were given the residue absolutely, with no binding legal obligation to make any offerings for Masses for the repose of the soul of Patrick B. O'Reagan, or to make any gifts therefrom for any other charitable uses, saying that the request made by the testator in these respects was but precatory and binding only upon the conscience of the nephews. The Surrogate gave as his reason for his decision: "That the gift was to them personally appears in its limitation 'to their use and benefit.'" This decision is possibly wrong as to the Masses.

In *Matter of Rywolt,*[57] Agnes Rywolt's will provided, in part: "I give . . . to the pastors of the following churches the amounts of money set after their names for the purpose of saying masses for the souls of my husband . . . and myself: (a) St. Valentine's Polish Church, . . . Williamsbridge $250; . . ." At the time of the death of the decedent, Rev. Antoni Jakuboski was the pastor of St. Valentine's Polish Church. Later he was transferred to another parish and Rev. Charles Czarbowski succeeded him. The executor asked the Surrogate to rule as to which priest was entitled to the bequest. The Surrogate decided that Rev. Antoni Jakuboski was entitled to the bequest. The court cited in support of his opinion *Matter of Zimmerman.*[58]

It is submitted that the decision of the Surrogate effectuated the intention of the testatrix. She desired Masses to be said and applied for the souls of her husband and herself. The identity of the priests who would say the Masses was of minor importance to her. She had made her executor the donee of powers to select the priests to say and apply the Masses as she had requested. She also recorded for his guidance her recommendations. The pastors of the designated churches were not legatees in the

56. 62 Misc. 592, 117 N.Y. Supp. 96 (Surr. Ct. 1909).
57. 81 Misc. 103, 142 N.Y. Supp. 1066 (Surr. Ct. 1913).
58. 22 Misc. 411, 50 N.Y. Supp. 395 (Surr. Ct. 1898).

true meaning of that term. The testatrix, however, might have intended the pastors to be the donees of the powers.

In *Matter of Zimmerman,* Sophie Zimmerman's will provided: ". . . to the priest of St. Mary's Church, Lancaster, New York . . . $600, for which Masses shall be said for the repose of my soul. . . ." There were other charitable gifts in the amount of $700. The total amount of the personal estate did not exceed $1,700. Her husband contested this bequest for Masses. He contended: (1.) This bequest for Masses is void for uncertainty as to the trustee and beneficiary. (2.) If valid, it is a bequest in fact to St. Mary's Church, and in that event the will gives the corporation more than one-half of her estate, and as to the excess the same is void, and the husband takes. (3.) In the first event, the husband takes instead of the residuary legatee—the St. Mary's Church, named in the sixth clause of the will—since the same is in contravention of chapter 360 of the Laws of 1860. The Surrogate decided that the bequest for Masses was not void for uncertainty as to beneficiaries or trustee, and that the bequest was not within the inhibition of the restricting statute. The Surrogate reasoned: (1.) The first objection that the bequest is void for uncertainty as to trustee and beneficiary is without force by reason of chapter 701 of the Laws of 1893. (2.) The second objection that the bequest for Masses was within the inhibition of the restricting statute, chapter 360 of Laws of 1860, is without force by reason of the fact that the bequest for Masses was a charitable gift to an *individual* and thus not within the express terms of that statute. The Surrogate said that the bequest, by the universal practice of the Church, belonged to the priest individually and not to St. Mary's Church. "I am satisfied that no trust is created in this will, but a conditional legacy . . . title to vest in the priest . . . on showing a future performance of the condition to say masses as mentioned."[59]

It should be noted that at the time of this decision bequests for Masses definitely were not within the inhibition of the restricting statute for the reason that gifts to *individuals* were not so inhibited. In the head-note of the instant case, the reporter states: ". . . nor is . . . a bequest . . . to the priest . . . for masses . . . a bequest for a religious purpose. . . ." The opinion of the Surrogate does not warrant this conclusion of the reporter. A gift to a priest for Masses is always for the support of the priest, thus advances religion, and therefore is for a charitable use.

Summing up for this period, we find that in not a single one of the eight cases which the New York courts decided during this period of 26 years did the courts declare a bequest for Masses to be a charitable trust. Then the decision in *Morris v. Edwards* was to be made.

59. Id. at 414, 50 N.Y. Supp. at 397 (Surr. Ct. 1898).

Period From Morris v. Edwards (1919) to Chapter 301 of Laws of 1923.

During this period, certainly, one might expect that the New York courts would declare bequests for Masses charitable trusts. But once again the New York courts did no such thing and thus added three more years to the period of 26 years during which—with the exception of *Morris v. Edwards*—no New York final adjudication declared a bequest for Masses to be a charitable trust.

Morris v. Edwards,[60] was a petition for the allowance of an account. Catherine Gorey died testate. Paragraph Eight of her will provided: "I bequeath all . . . the residue ($6,000) . . . to my executor . . . to pay funeral expenses, say masses, and put a modest tombstone over my remains." The executor filed a final account and petitioned to have it allowed. He set forth that he had expended $187.50 for funeral expenses and $350 for a monument, and $5 as the offering for the *funeral Mass*. There was a balance of approximately $5,500. The executor made no offerings of Mass stipends out of the balance of $5,500. He petitioned to distribute the entire balance *as intestate property* to the next of kin. The Surrogate's Court allowed the executor's account, including $5 for Masses. An appeal was taken from the Surrogate's decree to the Appellate Division of the Supreme Court which affirmed the decree of the Surrogate. An appeal was taken from the order of the Appellate Division to the Court of Appeals. The next of kin contended that the testatrix intended to have only so much of the residue expended for funeral services, Masses, and a monument as would be suitable to her station in life—and $5 for one Mass was so suitable.

The New York Court of Appeals, opinion by Pound, J., modified the order of the Appellate Division by directing the payment of *the entire residuary estate* to the executors *in trust* for funeral services, Masses and a monument, saying: "The testatrix was free to judge for herself what was reasonable. . . . Masses are . . . public charities. She could give her entire estate outright to any charity. . . . The construction which upholds the main purpose of the testatrix is that the executors shall take title to the residuary estate in trust and that they shall, after paying funeral expenses, dispose of the estate by having Masses said in a Roman Catholic church. . . ."[61] The decision was correct but the New York Court of Appeals erred in ruling that the bequest for Masses had created *a trust*.

The executors had been made donees of a power to contract and pay for the undertaking services; donees of a power to purchase and pay for a monument; and donees of a power to make gifts on condition precedent to priests selected by them to say and apply the Masses as requested. In

60. 227 N.Y. 141, 124 N.E. 724 (1919).
61. Id. at 144, 124 N.E. at 725 (1919).

accordance with the policy of present Church law, all the Masses could be said in the course of a year, the usual time for winding up an estate in the Probate Courts. The executor could select about twenty-five priests to say the Masses. If the residue were for funeral services, no trust would have been created. If the residue were for a monument, no trust would have been created. No trust, in the sense that secular lawyers use that term, was created by the additional provision for Masses in Catherine Gorey's Will.

In the only other case during this period the court held the bequest for Masses to be an expense—not a charitable trust. *Matter of Dwyer*[62] was on an account under the will of Catherine Hutchins. In her will (which was not set forth in the report)[63] she directed $500 to be expended for Masses. The Surrogate ruled that the item of $500 for Masses was to be treated as a legacy. An appeal was taken from the decree of the Surrogate to the Appellate Division of the Supreme Court. The Appellate Division modified the decree of the Surrogate, declaring the bequest for Masses not a legacy but *an expense* and deductible in determining the net estate, thus reducing the share of the residuary legatee and increasing the share going to the next of kin, giving no *ratio decidendi* for holding the bequest for Masses to be *an expense.*

It is submitted that the Appellate Division of the New York Supreme Court was wrong in saying that the bequest for Masses was an expense. It is not *a legacy* in the exact meaning of that word. Here the testatrix made her executor *the donee of a power* to make gifts to priests of Mass stipends in the total amount of $500. The New York courts showed no knowledge whatever of the nature of Mass stipends.

Period From Chapter 301 of Laws of 1923 To December 31, 1953

During this period the New York courts finally adjudicated sixteen cases. Four of these cases involved the New York restrictive statute.[64]

62. 192 App. Div. 72, 182 N.Y. Supp. 64 (4th Dep't 1920).

63. It is submitted that it would better enable the Bar to understand the exact nature of decisions dealing with the problem if the reports set forth the exact words of the bequest for Masses. It is only from the words of the testator that his intentions can be discerned—as to whether or not he simply wants some person to be the donee of a power to make offerings of Mass stipends, or whether or not he desires to have a trust fund set up for Mass stipends, or whether or not he wants an equitable charge for Mass stipends to be attached to the gift. In every case, trust, equitable charge, or otherwise, there will be a donee of a power to make offerings of Mass stipends to a priest or priests.

64. New York's basic restricting statute, chapter 360 of Laws of 1860, had been amended by chapter 301 of Laws of 1923, now Decedent Estate Law, section 17, by the addition of the words, "or purpose," after "society, association, or corporation," so as to read: "No person having a husband, wife, child, or descendant or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, library, scientific, religious or missionary society, association, corporation or purpose, in trust, or otherwise, more than one

Matter of Beck[65] arose on a request for the construction of a will in an accounting proceeding. Alphonse Beck died testate. The exact words of his will were not set forth in the report.[66] By the sixth paragraph all the residue was given to a trustee, one half for the purpose of having Masses said, and the other half for the perpetual care of decedent's burial lot. $5 had been bequeathed to a son and $100 to a nephew. Some pieces of jewelry had been willed to friends. The jewelry had been itemized as to the pieces thereof, but no cash value had been set upon it. The decedent left a son and a grandson. The question which the Surrogate was called upon to answer was whether or not there was a violation of Section 17 of the Decedent Estate Law, as amended by Laws of 1923, chapter 301.[67] The Surrogate declared: "No finding as to whether or not there has been a violation of Section 17 and no decree of construction and distribution can be made until the account is corrected to show the value of all assets of this estate."[68] The fact of the value of the jewelry once determined, the Surrogate was very positive as to the law to be applied to the facts. He said:

"The value of the balance on hand should then be divided in half, and the amount bequeathed for the purposes set forth is not permitted to exceed more than the one-half so ascertained. . . . So much as then remains of the personalty and the realty is distributable and descends to the same persons who would have received it if the decedent had died intestate." [69]

The Surrogate's reasons were as follows: "The half given for the purpose of having masses said is a gift for a religious use. Matter of Welch, 105 Misc. Rep. 72, 172 N.Y.S. 349; Matter of Morris, 237 N.Y. 141, 124 N.E. 724." The other half had been given for "charitable and benevolent uses." The bequest for Masses was within the inhibition of the restricting statute as a gift to an individual in trust for a religious use, according to the Surrogate.

This decision is right.[70] The bequest for Masses was within the express inhibitory terms of the restricting statute as a gift to an individual for a charitable use. The gift, being for a charitable use did not, however, have to be in trust to be within the inhibition of the restricting statute.

half part of his or her estate, after the payment of his or her debts. . . ." This amendment was enacted to overcome the rule of law laid down in Allen v. Stevens, 161 N.Y. 122, 55 N.E. 568 (1899), to the effect that the old law did not restrict a testamentary gift to individuals in trust for a charitable purpose.

65. 130 Misc. 765, 225 N.Y. Supp. 187 (Surr. Ct. 1927).

66. See note 63 supra.

67. See note 64 supra.

68. 130 Misc. 765, 766, 225 N.Y. Supp. 187, 189 (Surr. Ct. 1927).

69. Id. at 766, 225 N.Y. Supp. at 189 (Surr. Ct. 1927).

70. Subject, however, to possible objections on the ground that the statute, as applied to gifts for Masses, would be in contravention of the provisions of the First and Fourteenth Amendments of the Federal Constitution in respect to the free exercise of religion.

Matter of Brown[71] was a proceeding by an executor for the settling of his account. Ella Brown died testate. According to the report of the case: "Mrs. Brown's will, so far as here material, gave a legacy of $500 to the pastor of St. John's Church . . . Brooklyn, 'to be used for the saying of masses for the repose of the souls of myself and of my husband. . . .' "[72] She was survived by her husband. Two surviving sisters of the husband were appointed administratrices of his estate. They filed objections to the account of the executor of the will of Mrs. Brown. The administratrices contended that the bequest for Masses was a charitable bequest, and as such was within the inhibition of section 17 of the Decedent Estate Law, as all the charitable gifts amounted to more than one-half of the estate of Mrs. Brown. The Surrogate decided that the bequest for Masses was not within the inhibition of section 17 of Decedent Estate Law, giving as his reason: The bequest for Masses was not a charitable bequest within the terms of the statute, citing *Matter of Zimmerman* and *Matter of Rywolt.*

It is submitted that this decision is wrong. The *ratio decidendi* of the Surrogate was erroneous. A Mass stipend is always for a charitable use. It is always for the support of a priest. It is for the advancement of religion. The advancement of religion is a charitable purpose.

In New York, *prior* to the amendment of the statute, which added the words "or purpose" after "society, association, or corporation," the courts had no difficulty in holding that the ordinary bequest for Masses was not within the inhibition of the restricting statute. Subsequent to said amendment, however, the New York courts have had a tendency to effectuate the intentions of testators, even though, in order to do so, recourse must be had to false reasoning.[73] An example of this unhealthy judicial policy is seen in *Matter of Brown,* where the Surrogate, assuming that the restricting statute would cut down a bequest for Masses, if ruled charitable, resorted to the device of declaring that a bequest for Masses is not for a charitable use. This stand is directly opposed to the doctrines and laws of the Church, and is not justified simply to give full effect to a particular bequest for Masses. The statement of the Surrogate in *Matter of Brown* that a bequest for Masses is not for a charitable use has little support at the present time in common law. He said: "The contention that the bequest (for Masses) to the pastor of St. John's Church is a charitable bequest within the terms of the statute cannot be sustained." The Surrogate cited *Matter of Zimmerman* and *Matter of Rywolt* in support thereof. These two cases do not support the Surrogate's statement. They stand for the proposition that bequests for Masses go to priests in their individual

71. 135 Misc. 611, 238 N.Y. Supp. 160 (Surr. Ct. 1929).

72. Id. at 612, 238 N.Y. Supp. at 161 (Surr. Ct. 929).

73. ". . . subsequent to the above amendment, the cases are apparently not in accord as to the application of the statute to gifts for Masses." 68 C.J. 554, note 11.

capacities. The Surrogate did not understand that Mass stipends, though they go to priests, are always for the support of priests, thus advance religion, and therefore are charitable.

The *Beck* case and the *Brown* case are in sharp disagreement on the point as to whether or not bequests for Masses are for religious or charitable uses.

Matter of McArdle[74] was a proceeding for the construction of the will of Mary McArdle, which provided: "I . . . want . . . $100 sent to the same Priest [parish of Cullyhanna . . . Ireland] for Masses for My Mother and Myself . . ." A codicil provided: "I want all funeral expenses paid before the two Perpetual funds are created . . ." The values of the testamentary provisions for charitable purposes aggregated more than half of the net estate at the time of her death. Decedent's distributees contested the excess of the charitable gifts over the half and also some of the interpretations placed on the will by the executor.

The Surrogate was called upon to decide *inter alia* these questions: (1.) Is the bequest of $100 a charitable bequest? (2.) Does the bequest of $100 for Masses constitute a trust or legacy? (3.) Does the bequest of $100 for Masses abate? The Surrogate decided the first two questions in the affirmative and the third question in the negative. The reasons of the Surrogate were as follows: 1. Masses are for religious and charitable uses. *(Morris v. Edwards; Matter of Beck).* 2. "Her purpose was not to make a personal gift to any person. . . . The primary and imperative object of this testamentary provision was . . . to have Masses said for her mother and herself. . . . These legacies are trusts in the petitioner for charitable uses."[75] 3. The item for Masses is "not strictly funeral expenses . . . but I find that the testatrix intended [it] to be included among "all funeral expenses," the payment of which is preferred by her direction in the codicil . . . [It] will be paid without abatement . . ."[76]

The Surrogate was right in declaring that the bequest of $100 for Masses was for a charitable use. It was for the support of priests, thus for the advancement of religion, and therefore for a charitable use. The Surrogate was wrong in ruling that the bequest of $100 for Masses constituted a trust. The premise for this conclusion was not true, viz.: "Her purpose was not to make a personal gift to any person." Her intention was that a gift of $100 be made to a priest, preferably the parish priest of Cullyhanna. To effectuate this intention she had made her executor the donee of a power to make a gift to the priest. The Surrogate was also wrong in finding that the testatrix intended that the bequest of $100 for Masses be included among "all funeral expenses." Bequests for Masses

74. 147 Misc. 876, 264 N.Y. Supp. 764 (Surr. Ct. 1933).
75. Id. at 883, 264 N.Y. Supp. at 772 (Surr. Ct. 1933).
76. Id. at 81, 264 N.Y. Supp. at 770 (Surr. Ct. 1933).

are always gifts. They are never for services rendered, as secular lawyers understand these words. But she might have intended preference for the bequest for Masses on a parity with the funeral expenses. This, of course, is a question of fact.

In one case a New York court ruled that a bequest for Masses constituted a legacy to a non-existent society and held that it had lapsed. In *Matter of Korzeniewska,*[77] the will provided, in part: "$500 to St. Mary's Society of Holy Trinity Church for Masses." There never was such a society. The court held that this legacy lapsed for want of a beneficiary.

It is submitted that the ruling of the Surrogate that the bequest of $500 for Masses, specifying St. Mary's Society of Holy Trinity Church, constituted a legacy to St. Mary's Society and lapsed for want of a beneficiary because St. Mary's Society was non-existent, was erroneous. The executor was the donee of a power, and under a duty, to make offerings of $500 to a priest or priests for Masses to be said and applied for the repose of the soul of the testatrix. Only a priest can take title to a Mass stipend. St. Mary's Society could not have taken title to the Mass stipends, *even if it had been existent.*

The decisions in two quite recent cases definitely departed from the legacy theory and veered toward the power theory. In *Matter of Neary,*[78] Mary L. Neary died testate. Her will provided *inter alia:* "Fifteenth. I give . . . [1/20] of my estate to Reverend Charles A. Roth of the Society of Jesus and request that he say Masses for the repose of the souls of members of my family." *Father Roth predeceased the testator.* (If this bequest constituted a *legacy* to Father Roth, it would have lapsed and the 1/20th share of the estate would not have been ordered distributed for Masses.)

The executrix requested construction of paragraph fifteen. The question which the Surrogate was called upon to decide was the disposition to be

77. 163 Misc. 323, 297 N.Y. Supp. 997 (Surr. Ct. 1937). In this case the Surrogate said: "Under section 17 of the Decedent Estate Law, as now amended, none of the claimants [who were nieces and nephews] are proper parties to oppose the religious bequests, assuming they would exceed one-half of the net estate of decedent at death. . . ." See chapter 229 of the Laws of 1929, section 3, effective September 1, 1930. This amendment provided: "The validity of a devise or bequest for more than one-half may be contested only by a surviving husband, wife, child, descendant or parent." The report in Korzeniewska did not set out the provisions of the will for Masses. The report did state, however: "The decedent intrusted to her executor . . . $2,000 to be used by him for Masses, and gave to other relatives $800 in trust for the same purpose. . . ." The court held that the bequest for Masses did not exceed the statutory percentage and that, therefore, the trust for Masses was valid. It is submitted that without the words of the will it is impossible to tell whether or not a trust had been created. Without additional evidence it is fair to assume that the testatrix had made her executor the donee of a power to make offerings of $2,000 to various priests as Mass stipends, and had made designated relatives donees of powers to make offerings of Mass stipends in the amount of $800.

78. 194 Misc. 200, 86 N.Y.S. 2d 312 (Surr. Ct. 1949).

made of the bequest for Masses. The Surrogate answered: "the bequest . . . should be paid to the New York Province of the Society of Jesus for the celebration of masses for the souls of decedent's family. In this manner the expressed desires of the testatrix will be upheld. (*Matter of Morris*, 227 N.Y. 141, 144)."[79]

Similarly in *In re Liebeck's Will*,[80] the executor requested construction of the second paragraph of the testatrix's will, which provided: "I . . . give . . . to the said Rev. Sebastian B. Englerth [Rector of St. John's Evangelist Church, Greece, New York] . . . $200.00 to be used for saying of masses for the repose of my soul." *Father Englerth predeceased the testatrix.* The Surrogate said: "As to the gift for Masses, the Court designates the pastor of St. John's Evangelist Church of Greece, New York, to receive the bequest for such purposes, conditioned upon his filing before presentation of the decree hereon his duly acknowledged consent to receive the legacy and perform the masses in accordance with testatrix express wishes."[81]

Neither Father Roth nor Father Englerth were legatees. Each was the testator's recommended appointee of a power of appointment given his executor by the testator. This power was the power to make gifts to priests on condition precedent that they say and apply the Masses as requested. On the death of the recommended appointee, the executor might select another priest.

During this period there were five cases in which the question arose as to whether or not bequests for Masses should be given preference over general legacies, all on the ground that such bequests constituted funeral expenses. The cases unanimously held that the amounts of the bequests for Masses were not to be considered part of the funeral services and were not to be deemed preferred to general legacies.[82] These cases appear to be soundly reasoned in the main, but the bequests for Masses should not be deemed to be general legacies.

Also during this period there were three cases wherein bequests for Masses had created trusts as that term is understood by American secular lawyers.

Matter of Semenza[83] is one of the very few cases, relatively speaking, wherein a bequest for Masses had created a charitable trust. The case

79. Id. at 201, 86 N.Y.S. 2d at 313 (Surr. Ct. 1949).

80. 109 N.Y.S. 2d 147 (Surr. Ct. 1951).

81. 109 N.Y.S. 2d at 149 (Surr. Ct. 1951).

82. In re Nolan's Will, 99 N.Y.S. 2d 622 (Surr. Ct. 1950); Matter of De Molina's Estate, 35 N.Y.S. 2d 24 (Surr. Ct. 1942); Matter of McArdle, 147 Misc. 876, 264 N.Y. Supp. 764 (Surr. Ct. 1933); Matter of Cunningham, 140 Misc. 91, 249 N.Y. Supp. 439 (Surr. Ct. 1931); Matter of Werrick, 135 Misc. 876, 239 N.Y. Supp. 740 (Surr. Ct. 1930).

83. 159 Misc. 487, 288 N.Y. Supp. 556 (Surr. Ct. 1936).

involved a proceeding for the construction of a will. Alfonso Semenza died testate. The clause for construction (translated from the original Italian) was: "7. The testator gives faculty and authorizes the Executors and Trustees, hereinafter named, to put aside a certain sum of money in order that every year there may be celebrated two high masses for the suffrage of his soul, exactly one on March 29th, of each year [his birthday], and the other on the anniversary of his death." The Surrogate was called upon to decide these questions: (1.) Was the bequest for Masses valid? (2.) If valid, what amount will be set aside for such Masses? (3.) What will be the manner of administration of the bequest? The Surrogate decided: (1.) The bequest for Masses was valid. As to (2.) and (3.) "The amount to be set aside for such purposes and the manner of its administration will be determined upon the settlement of the executor's account, and the interested parties may then be heard with respect thereto." The Surrogate reasoned: (1.) "The direction for the celebration of Masses is a valid trust for religious uses."

The decision in this case is right. $2,500 would probably be a reasonable amount to be set aside for the two high Masses annually, depending on the statutes of the particular diocese. Many dioceses decree that the stipend for a Missa Cantata shall be $25 annually at an interest rate of 2%. If the trustee were to be compensated for services in the administration of the trust, the trust res would have to be increased accordingly.

Matter of Breckwoldt,[84] is the second case in New York, wherein a bequest for Masses had created a charitable trust as that term is used by secular lawyers. It was a proceeding for the construction of the will of Anna M. Breckwoldt. The will provided, in part: "Sixth. I give . . . to the Church of Our Lady of Perpetual Help . . . Brooklyn . . . owned and controlled by the Missionary Society of the Most Holy Redeemer . . . $1,000, IN TRUST . . . the principal . . . to be retained by said corporation in perpetuity, and the income only . . . to be used perpetually for the celebration of masses to be said in honor of the Sacred Heart." The Redemptorist Fathers renounced the bequest. The Surrogate was called upon to decide the following questions: (1.) Was the bequest for Masses a valid bequest? (2.) In view of the fact that the Redemptorist Fathers had renounced the bequest, is it the duty of the executor and the court, under the *cy pres* doctrine, to apply said gift to an object which, so nearly as conditions will permit, will effectuate the intentions of the testatrix? The Surrogate decided: (1.) The bequest for Masses was a valid bequest. (2.) It is the duty of the executor and the Court, under the *cy pres* doctrine, to apply said gift to an object which will effectuate the instructions of the testatrix.

84. 176 Misc. 549, 27 N.Y.S. 2d 938 (Surr. Ct. 1941).

Subsequent records in this case disclose the information that the Bishop of Brooklyn requested "an ecclesiastical moral person" to fill the vacancy caused by the declination of the designated church, and that said "ecclesiastical moral person" accepted and was duly appointed by the Surrogate. A trust had been created. The gift was for a charitable use. It was for the support of priests, thus for the advancement of religion, and therefore for a charitable use. Consequently the trust was a charitable trust. A beneficial gift had not been made to the Church of Our Lady of Perpetual Help. The testatrix had named this church as trustee. She gave the church as trustee power to select the priests to say the Masses and to make gifts to those priests of the Mass stipends provided for by Canon Law. On the declination of this church to act as trustee, the Court should appoint another trustee to carry out the terms of this charitable trust. The case does not present a cause for the application of the *cy pres* doctrine.

Matter of Lawless,[85] is the third, and the only other case in New York, wherein a bequest for Masses had created a charitable trust as that term is used by secular lawyers. It was a proceeding in the matter of the petition of George D. Mulligan, as executor of the will of Charles M. Lawless, deceased, for a construction of the will. One of the paragraphs in the will for which construction was requested was the "Fifth." This was a bequest for Masses, but the exact words of the bequest were not set out in the report of the case.[86] It appears from the opinion that certain *bonds* were to be held by a trustee—the income of the bonds to be used for Mass stipends until the bonds matured and were paid. The principal sum of the bonds was then to be expended for Mass stipends until the principal was exhausted. The report did not show the name of the bonds, their maturity, the number of Masses requested, and other pertinent details. The Surrogate in his opinion, said: "The bequest in Paragraph 'Fifth' for the celebration of masses is of a charitable nature and constitutes a gift in trust for a charitable use (*Matter of Morris*, 227 N.Y. 141; *Matter of Idem*, 256 *App. Div.* 124, 126, affd. 280 N.Y. 756; *Matter of Breckwoldt*, 176 Misc. 549, 551–552; . . .). That the intended recipient of the gift in trust and his successor are directed to use the income thereof until maturity of the bonds does not destroy or lessen the gift as one of income and principal, the intent being, in the language of the provision that 'the principal be used as far as it will go for the same purpose until the principal fund is exhausted.' The written offer by the pastor substantially complies with the terms of the will and constitutes a valid acceptance of the bequest. Accordingly, the decree to be entered herein may provide for the delivery over of the property in question."[87]

85. 194 Misc. 844, 87 N.Y.S. 2d 386 (Surr. Ct. 1949).

86. See note 63 supra.

87. 194 Misc. 844, 846, 87 N.Y.S. 2d 386 (Surr. Ct. 1949).

In two cases wherein Mass stipends were to be given to priests abroad, New York Courts held the bequests valid. In *Matter of McArdle,*[88] the court said: "The parish priest in Ireland cannot act as trustee unless he is an American citizen. The general purposes . . . will be most effectually and lawfully accomplished by a construction that results in the petitioner (the executor) becoming trustee. . . ."[89] But no trust had been created. *Matter of Abraham Stephen,*[90] was a proceeding for the construction of the will of Abraham Stephen, which provided: "Fourth. All that remains of my estate . . . may be distributed amongst the priests [of] my mother Mount Lebanon, Syria, for the purpose of offering masses for my soul and all my intentions and my will is that this money be distributed amongst the priests of Mount Lebanon in accordance to what The Reverend Francis Shomalic sees proper in compliance with what is known and defined by the heads of the Church as the stipend for masses in Lebanon."[91] The will was in Arabic and the above translation of the pertinent paragraphs was received in evidence in the Surrogate's Court.

The next of kin contended that this clause was void for indefiniteness which renders an inability on the part of the executors to carry out the terms of this clause and effect an equal division; that furthermore, the clause was void because the funds were to be expended in a foreign country. The Surrogate decided that the bequest for Masses was valid. He gave as his reasons: (1.) It is valid as a charitable trust. *(Matter of Morris).* (2.) "I am satisfied that it can be carried out to the extent that it is beyond the realm of indefiniteness." (3.) "Nor does it matter that the funds are to be expended in a foreign country. (*Mount v. Tuttle,* 183 N.Y. 358)."[92]

It is submitted that a trust had not been created. Father Shomalic had been made the donee of a power to make gifts to Catholic priests of Mount Lebanon.

In one case it was held that an unincorporated association validly can take a bequest for Masses. *Matter of Idem,*[93] involved proceedings in the matter of the construction of the will of Frank Idem. The will provided: "Fourth. I give . . . to the Franciscan Missionary Union #1615 Vine St., Cincinnati, Ohio, Two Thousand ($2,000.00) Dollars for Masses to be read for the repose of the Soul of My departed Wife, Barbara Idem and Myself." The Franciscan Missionary Union was an unincorporated asso-

88. 147 Misc. 876, 264 N.Y. Supp. 764 (Surr. Ct. 1933).
89. Id. at 883, 264 N.Y. Supp. at 772 (Surr. Ct. 1933).
90. 150 Misc. 27, 269 N.Y. Supp. 614 (Surr. Ct. 1934).
91. Id. at 27, 269 N.Y. Supp. at 615 (Surr. Ct. 1934).
92. Id. at 28, 269 N.Y. Supp. at 616 (Surr. Ct. 1934).
93. 256 App. Div. 124, 8 N.Y.S. 2d 970 (4th Dep't), aff'd, 280 N.Y. 756, 21 N.E. 2d 522 (1939).

ciation situated in the Roman Catholic Archdiocese in Cincinnati, Ohio, and an agency of the Friars Minor (Franciscan Friars), also an unincorporated association of the Province of St. John the Baptist of Cincinnati, Ohio, created to promote and support the missionary and charitable work of the province. Certain heirs and distributees contended *inter alia* that the bequest to the Franciscan Missionary Union contained in item four was invalid under the general rule that an unincorporated association cannot take a bequest or devise. The Surrogate decided that the bequest for Masses was invalid and an intestacy resulted therefrom.

The Franciscan Missionary Union appealed from the Surrogate's decision. The Appellate Division reversed, declaring the bequest for Masses valid, reasoning: 1. Under the laws of Ohio an unincorporated association may take a bequest of personal property. Under a principle of conflict of laws—by the application of the Ohio doctrine—the Franciscan Missionary Union, although an unincorporated association, could take the bequest for Masses. 2. The bequest for Masses created a trust. *(Morris v. Edwards).* "If the trustee of such a trust . . . is incapable of taking, there is deemed to be an omission to name a trustee and the administration of the trust vests in the Supreme Court. (Pers. Prop. Law, section 12. . . ." [94] (citing cases). In any event the provision of item four of the will is valid.

The decision is correct. The *rationes decidendi* were wrong. The Franciscan Missionary Union was not the beneficiary of the gift for Masses. A gift for Masses is always for the support of a priest or priests. The Franciscan Missionary Union was the donee of a power to make gifts to priests on condition precedent that they say and apply the Masses as requested by the testator. Title to each Mass stipend would vest in a priest as he said and applied a Mass as requested. *A charitable trust had not been created.*

In one case a Surrogate held that the terms of a bequest for masses were so indefinite that it was void. In re *Hofmeister's Estate,*[95] was an application for the construction of the will of Henry Hofmeister. The will provided: "Second. There are to be two (2) High Masses read each year on the 11th day of May, for the repose of the soul of my departed wife,—Anna Hofmeister. One (1) at St. Mary of Sorrows Church . . . Buffalo, N.Y., and the other at Blessed Trinity Church . . . Buffalo, N.Y. Also two (2) High Masses each year to be read on the date of my death for the repose of my soul at the same Churches. Third. . . . Also there is to be a High Mass read for my wife and myself on the 17th of October of each year. The above is to be enforced until my son [who was twelve years old at date of testator's death] reaches his twenty-first (21st) birthday."

94. Id. at 126, 8 N.Y.S. 2d at 973 (4th Dep't 1939).
95. 48 N.Y.S. 2d 351 (Surr. Ct. 1944).

Two questions were raised for the Surrogate to answer: (1.) Was the direction for the four High Masses provided for in the Second Paragraph void for indefiniteness? (2.) How much should be set aside for the High Masses provided for in the Third Paragraph? The Surrogate decided: (1.) The Second direction is void for want of definiteness because no specific money had been directed to be set aside and no time limit expressed; but the executors are authorized to cause two High Masses to be read on May 11, 1944, and a High Mass to be read on July 11, 1944, the anniversary of the death of the deceased. (2.) As to the Third Paragraph Surrogate directed that $90 should be set aside for Masses, the Surrogate giving no reason for his direction. The criticism of the bequest for Masses in the Second Paragraph appears to be partly justifiable.[96] Assuming the diocesan stipend for a High Mass to have been $10, the offering of $90 for a High Mass for each of nine years would have been proper.

SUMMARY

I. All bequests for Masses are now valid in New York. From November 26, 1889, when *O'Conner v. Gifford* was decided by the Court of Appeals, to December 31, 1953, there have been 31 final adjudications on bequests for Masses by the New York courts. *During this period no final adjudication had declared a bequest for Masses inherently invalid.*

II. 13 of these 31 cases have been held, expressly or impliedly, to be charitable trusts—and therefore not invalid in face of contentions that they are void—because of indefiniteness of the beneficiaries of the charitable trusts.[97] It is submitted that in only three[98] of these thirteen cases did the bequests for Masses create charitable trusts. In the other ten cases the bequests for Masses had not created charitable trusts.

III. In 11 of these 31 cases the courts treated the bequests for Masses—definite priests having been recommended to be given the Mass stipends—as legacies:—not charitable trusts.[99] It is submitted that bequests for

96. See Matter of Semenza, note 83 supra. This possibly is a fourth charitable trust case.

97. In re Zimmerman's Will, 22 Misc. 411, 50 N.Y. Supp. 395 (Surr. Ct. 1898); Matter of Eppig, 63 Misc. 613, 118 N.Y. Supp. 683 (Surr. Ct. 1909); Morris v. Edwards, 227 N.Y. 141, 124 N.E. 724 (1919); Matter of Beck, 130 Misc. 765, 225 N.Y. Supp. 187 (Surr. Ct. 1927); Matter of McArdle, 147 Misc. 876, 264 N.Y. Supp. 764 (Surr. Ct. 1933); Matter of Abraham Stephen, 150 Misc. 27, 269 N.Y. Supp. 614 (Surr. Ct. 1934); Matter of Semenza, 159 Misc. 487, 288 N.Y. Supp. 556 (Surr. Ct. 1936); Matter of Korzeniewska, 163 Misc. 323, 297 N.Y.S. 997 (Surr. Ct. 1937); Matter of Idem, 256 App. Div. 124, 8 N.Y.S. 2d 970 (4th Dep't 1939); Matter of Breckwoldt, 176 Misc. 549, 27 N.Y.S. 2d 938 (Surr. Ct. 1941); Matter of Neary, 194 Misc. 200, 86 N.Y.S. 2d 312 (Surr. Ct. 1949); Matter of Lawless, 194 Misc. 844, 87 N.Y.S. 2d 386 (Surr. Ct. 1949); In re Liebeck's Will, 109 N.Y.S. 2d 147 (Surr. Ct. 1951).

98. Matter of Semenza, Estate of Breckwoldt, Matter of Lawless, supra note 97.

99. Vanderveer v. McKane, 25 Ab. N.C. 105, 11 N.Y. Supp. 808 (Sup. Ct. 1890); Estate of Julia Howard, 5 Misc. 295, 25 N.Y. Supp. 1111 (Surr. Ct. 1893); Matter of Zimmerman, 22 Misc. 411, 50 N.Y. Supp. 395 (Surr. Ct. 1898); Matter of Mary J. McAvoy, 112 App. Div.

Masses do not create legacies, whether or not a particular priest is specified therein,—but, by bequests for Masses the executor, usually, but not always, is made the donee of a power to make gifts to a priest or priests on condition precedent that the priest or priests say the Masses as requested.

IV. In 4 of these cases—without questioning the validity of the bequests for Masses—the courts held that the bequests for Masses, as general legacies, were not preferred over other general legacies.[100]

V. In two of these cases Surrogates held that bequests for Masses—wherein Churches were specified in the bequests—constituted legacies to the Churches. In re *Didion's Estate,*[101] the bequest was held exempt under the then inheritance tax law as a legacy to a religious body. This reasoning was incorrect. At most the religious body was the donee of a power to make offerings of Mass stipends to priest or priests. In *Matter of Korzeniewska,*[102] the Surrogate held that, inasmuch as the society specified in the bequest was non-existent, the legacy lapsed. This phase of the case is wrong. The executor was the donee of a power to make offerings of the Mass stipends to a priest or priests.

VI. In one of these cases where an unincorporated society was specified in the bequest the Supreme Court held that the society took as a legatee.[103] The *ratio decidendi* is wrong. The unincorporated society is at most a donee of a power to make offerings of Mass stipends to a priest or priests.

VII. In one of these cases the Supreme Court held that the bequest for Masses was "an expense" deductible in determining the net estate.[104] This case is wrongly decided.

VIII. In one of these cases the Supreme Court treated a bequest for Masses—not as a trust, but as an absolute gift to a Church "although the gift was subject to a condition subsequent."[105] There was *an equitable charge* against the property given to the Church—the charge being that the Church had to make offerings to priests for the Masses as requested.

IX. In one of these cases the Surrogate held that a bequest for Masses

377, 98 N.Y. Supp. 437 (2d Dep't 1906); Matter of Eppig, 63 Misc. 613, 118 N.Y. Supp. 683 (Surr. Ct. 1909); Estate of Rywolt, 81 Misc. 103, 142 N.Y. Supp. 1066 (Surr. Ct. 1913); Matter of Brown, 135 Misc. 611, 238 N.Y. Supp. 160 (Surr. Ct. 1929); Matter of Werrick, 135 Misc. 876, 239 N.Y. Supp. 740 (Surr. Ct. 1930); Matter of Cunningham, 140 Misc. 91, 249 N.Y. Supp. 439 (Surr. Ct. 1931); In re De Molina's Estate, 35 N.Y.S. 2d 24 (Surr. Ct. 1942); In re Nolan's Will, 99 N.Y.S. 2d 622 (Surr. Ct. 1950).

100. Matter of Werrick, Matter of Cunningham, In re De Molina's Estate, In re Nolan's Will, supra note 99.

101. 54 Misc. 201, 105 N.Y. Supp. 924 (Surr. Ct. 1907).

102. 163 Misc. 323, 297 N.Y. Supp. 997 (Surr. Ct. 1937).

103. Matter of Idem, 256 App. Div. 124, 8 N.Y.S. 2d 970 (4th Dep't), aff'd, 280 N.Y. 756, 21 N.E. 2d 522 (1939).

104. Matter of Dwyer, 192 App. Div. 72, 182 N.Y. Supp. 64 (4th Dep't 1920).

105. Ruppel v. Schlegel et al., 55 Hun 183, 7 N.Y. Supp. 936 (Sup. Ct. 1889).

did not create a charitable trust—was not for a charitable use—and was a gift to a specified priest.[106] The *ratio decidendi* in this decision was wrong.

X. In one of these cases the Surrogate held that the request that Masses be said constituted but a precatory trust.[107] The construction raised a question of fact—but the decision was possibly wrong.

XI. In one of these cases the Surrogate held that the terms of the bequest for Masses were too indefinite for validity.[108] The conclusion was possibly warranted.

XII. In two of these cases the courts treated the bequests for Masses—not as charitable trusts or legacies—but as analogous to the powers given executors to provide for funeral services and monuments.[109] However, in so far as the Surrogates cut down the bequests for Masses to an amount, which in their personal opinions, was suitable to the condition in life of the testator, the decisions are wrong.

CONCLUSION

Bequests for Masses Create a Power, in a Donee, to make Offerings of Mass Stipends to Priests.

A testator, *in his lifetime,* has the right to make offerings of Mass stipends. This is the way the testator in his lifetime would make his offerings. He would go to the priest who he wishes to say the Mass. He would say to him: "Father, please say a Mass for the soul of my mother," and he would hand to the priest a sum of money, as provided for in the statutes of the particular diocese (usually $1 or $2). The priest would probably say: "Very well." The priest would then enter in his Mass Intention Book the name of the deceased person, the amount of the offering, the name of the person who made the request. Later, on saying the Mass, the priest would complete the transaction and make an entry to this effect in his Mass Intention Book.

New York courts have decided four cases involving *inter-vivos* offerings of Mass stipends.[110] In *Gilman v. McArdle* the Court of Appeals differentiated between a power, a trust, and a contract. It impliedly, if not expressly, ruled that the testatrix in her lifetime could validly make offerings of Mass stipends to a priest.

Neither in the four *inter-vivos* Mass stipend cases nor in the thirty-seven

106. Matter of Brown, supra note 99.

107. In re O'Regan's Will, 62 Misc. 592, 117 N.Y. Supp. 96 (Surr. Ct. 1909).

108. In re Hofmeister's Estate, 48 N.Y.S. 2d 351 (Surr. Ct. 1944).

109. Matter of Baches, 9 Misc. 504, 30 N.Y. Supp. 394 (Surr. Ct. 1894); Matter of Welch, 105 Misc. 27, 172 N.Y. Supp. 349 (Surr. Ct. 1918).

110. Gilman v. McArdle, 99 N.Y. 451 (1885); Morris v. Hughes, 45 Misc. 278, 92 N.Y. Supp. 288 (Sup. Ct. 1904); Hoffman v. Union Dime Bank, 109 App. Div. 24, 95 N.Y.S. 1045 (1st Dep't 1905); Morris v. Wucher, 188 N.Y. 568, 80 N.E. 1114 (1907).

cases of bequests for Masses did the New York courts base their decisions on New York's statutory provisions on powers. This legislation is comprehensively set forth in article 5 of Real Property Law, sections 130 to 183, inclusive. The New York courts now uniformly hold that said article 5, relating to the creation, construction and execution of certain powers, is applicable equally to personal property.[111]

Testamentary Powers in Bequests for Masses—Extent of Power to Offer Mass Stipends.

In every bequest for Masses there is a testamentary power given by the testator to a donee of the power to make offerings of Mass stipends—gifts on condition precedent—to a priest or priests. Real Property Law, section 131 defines a power as an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform.[112]

A power of appointment is an authority to do an act which the owner granting the power might himself lawfully perform, and, when exercised it is to be construed as done by the donor of the power.[113] Real Property Law, section 133 divides powers into either general or special, and either beneficial or in trust. A power of appointment limited to a class is a special power.[114] A power to make offerings of Mass stipends is always limited to a class, priests of the Catholic Church.

Real Property Law, section 135 provides that a power is special where: 1. The person or class of persons to whom the disposition of the property under the power is to be made are designated. Real Property Law, section 138 provides that a special power is in trust, where, either: 1. the disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or 2. a person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power. Powers in trust are distinguishable from trusts, in that in the latter the trustee takes legal title to the property which does not pass to a trustee of the power.[115]

111. In re Peabody, 277 App. Div. 905, 98 N.Y.S. 2d 614, aff'g, 96 N.Y.S. 2d 556 (2d Dep't 1950).

112. This section is applicable to personal property. In re Thompson, 274 App. Div. 49, 80 N.Y.S. 2d 1 (1st Dep't 1948).

113. In re Merseles, 161 Misc. 454, 292 N.Y. Supp. 276 (Surr. Ct. 1936).

114. In re Davis, 186 Misc. 397, 59 N.Y.S. 2d 607 (Sup. Ct. 1946).

115. 72 C.J.S. 405, note 51, citing Train v. Davis, 49 Misc. 162, 98 N.Y. Supp. 816 (Sup. Ct. 1906); In re Suffolk County Trust Co., 65 N.Y.S. 2d 243 (Sup. Ct. 1946); In Matter of Currier, 138 Misc. 372, 377, 245 N.Y. Supp. 703, 709 (Surr. Ct. 1930) Surrogate O'Brien said: ". . . (3) I further hold that no trust was intended by testatrix nor was one created, but a power in trust was given by testatrix to her executor. . . ."

Donee of Special Power in Trust to Make Offerings of Mass Stipends.

In approximately 70% of the thirty-seven New York cases the testator had made the executor of his will the donee of a special power in trust to make offerings of Mass stipends to a priest or priests. In about 8% of the cases, where the bequest for Masses had created *a charitable trust,* the testator had made the trustee the donee of the power to make offerings of Mass stipends to a priest or priests. Also in about 14% of the cases the testator had made the pastors of specified churches the donees of the powers to make the offerings of the Mass stipends.

In two cases church societies were made the donees. In one case an archbishop, in one a Missionary Union, in one the holder of property subject to an equitable charge, in one a doctor, lawyer, and priest, as joint tenants, and in one a religious congregation or order, were respectively made the donees of the powers. In two cases where the terms of the bequest were not set forth in the report, the identity of the donee could not clearly be determined.

What Property May Be Subject to Special Power in Trust to Make Offerings of Mass Stipends?

By virtue of the statutes of the Archdiocese of New York, as well as by the statutes of all other dioceses in the United States, only money is the subject of the special power in trust to make offerings of Mass stipends. Food, clothing, etc., are not subjects of this power.

Execution of The Special Power in Trust to Make Offerings of Mass Stipends.

The power can be executed in only one way. The donee of the power must get in touch with the priest—exactly as the testator in his lifetime was obliged to do. This procedure may be illustrated by the first New York case, *Matter of Hagenmeyer.*[116] The will, in this case provided: "Third. I further direct my executors . . . to pay . . . one hundred dollars, . . . for the purpose that masses shall be read for my . . . soul." In such a case the executor would select a priest who he desired to say these Masses. Then he would have to communicate with this priest. He would say to the priest: "Father, Maria Hagenmeyer, who is now dead, by her will directed me to make offerings of Mass stipends in the amount of $100 for the repose of her soul. Can you say these Masses?" Assuming that the priest answers affirmatively, the executor must hand the priest the sum of $100. The executor by delivery of the Mass stipends has now executed the power.

Real Property Law, section 157 provides that a trust power, unless its

116. 12 Ab. N.C. 432 (1883).

execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

Transmutation of Title to Mass Stipends.

Delivery of the Mass stipends will not give the priest immediate title. The gift would be on condition precedent that the Masses be said as requested.[117] As soon as the priest says a Mass as requested, title to that particular Mass stipend vests in the priest.

APPENDIX*

	Donees of powers
Matter of Hagenmeyer, 12 Ab. N.C. 432 (1883).	*Executor and pastor*
Matter of O'Hara, 95 N.Y. 403 (1884).	*Lawyer, Physician, Priest*
Holland v. Alcock, 108 N.Y. 312, 16 N.E. 305 (1888).	*Executor*
Schwartz v. Bruder, 6 Dem. 169, 3 N.Y. Supp. 134 (Surr. Ct. 1888).	*Executor*
Porter v. Carolin, 50 Hun 603, 2 N.Y. Supp. 91 (Sup. Ct. 1888).	*Executor*
O'Conner v. Gifford, 117 N.Y. 275, 22 N.E. 1036 (1889).	*Executor*
Matter of Black, 1 Con. 477, 5 N.Y. Supp. 452 (Surr. Ct. 1889).	*Executor*
Ruppel v. Schlegel et al., 55 Hun 183, 7 N. Y. Supp. 936 (Sup. Ct. 1889).	*Equitable Chargee*
Vanderveer v. McKane, 25 Ab. N.C. 105 11 N.Y. Supp. 808 (Sup. Ct. 1890).	*Executor*
Estate of Julia Howard, 5 Misc. 295, 25 N.Y. Supp. 1111 (Surr. Ct. 1893).	*Executor*
Matter of Baches, 9 Misc. 504, 30 N.Y. Supp. 394 (Surr. Ct. 1894).	*Executor*
Matter of Zimmerman, 22 Misc. 411, 50 N.Y. Supp. 395 (Surr. Ct. 1898).	*Executor*
Matter of Mary J. McAvoy, 112 App. Div. 377, 98 N.Y. Supp. 437 (2d Dep't 1906).	*Pastor*
Johnson v. Hughes et al., 187 N.Y. 466, 80 N.E. 373 (1907).	*Hospital*
In re Didion's Estate, 54 Misc. 201, 105 N.Y. Supp. 294 (Surr. Ct. 1907).	*Executor or pastors*
In re O'Regan's Will, 62 Misc. 592, 117 N.Y. Supp. 96 (Surr. Ct. 1909).	*Executor*
Matter of Eppig, 63 Misc. 613, 118 N.Y. Supp. 683 (Surr. Ct. 1909).	*Executor*
Matter of Rywolt, 81 Misc. 103, 142 N.Y. Supp. 1066 (Surr. Ct. 1913).	*Executor or pastors*

117. See: Canon 829 does not modify the gift on condition precedent of a Mass stipend, IV The Jurist 133-141 (January 1944).

* For list of all reported cases in American Courts of Record involving Mass stipends, see: The Nature of Support of Diocesan Priests in the United States of America, The Catholic University of America Canon Law Studies, No. 286, pp. 129-134 by Reverend Kenneth R. O'Brien, J.C.D.

Matter of Welch, 105 Misc. 27,
172 N.Y. Supp. 349 (Surr. Ct. 1918). *Executor*
Morris v. Edwards, 227 N.Y. 141, 124 N.E. 724 (1919). *Executor*
Matter of Dwyer, 192 App. Div. 72,
182 N.Y. Supp. 64 (4th Dep't 1920). *Executor*
Matter of Beck, 130 Misc. 765,
225 N.Y. Supp. 187 (Surr. Ct. 1927). *Trustee*
Matter of Brown, 135 Misc. 611,
238 N.Y. Supp. 160 (Surr. Ct. 1929). *Pastor*
Matter of Werrick, 135 Misc. 876,
239 N.Y. Supp. 740 (Surr. Ct. 1930). *Executor*
Matter of Cunningham, 140 Misc. 91,
249 N.Y. Supp. 740 (Surr. Ct. 1931). *Executor*
Matter of McArdle, 147 Misc. 876,
264 N.Y. Supp. 764 (Surr. Ct. 1933). *Executor*
Matter of Abraham Stephen, 150 Misc. 27,
269 N.Y. Supp. 614 (Surr. Ct. 1934). *Priest*
Matter of Semenza, 159 Misc. 487,
288 N.Y. Supp. 556 (Surr. Ct. 1936). *Trustee*
Matter of Korzeniewska, 163 Misc. 323,
297 N.Y. Supp. 997 (Surr. Ct. 1937). *Executor, Relatives, Church society*
Matter of Idem, 256 App. Div. 124, 8 N.Y.S. 2d 970
(4th Dep't), aff'd, 280 N.Y. 756, 21 N.E. 2d 522 (1939). *Church society*
Matter of Breckwoldt, 176 Misc. 549,
27 N.Y.S. 2d 938 (Surr. Ct. 1941). *Trustee*
In re De Molina's Estate, 35 N.Y.S. 2d 24 (Surr. Ct. 1942). *Archbishop*
In re Hofmeister's Estate, 48 N.Y.S. 2d 351 (Surr. Ct. 1944). *Executor or trustee*
Matter of Neary, 194 Misc. 200, 86 N.Y.S. 2d 312 (Surr. Ct. 1949). *Executor*
Matter of Lawless, 194 Misc. 844, 87 N.Y.S. 2d 386 (Surr. Ct. 1949). *Trustee*
In re Nolan's Will, 99 N.Y.S. 2d 622 (Surr. Ct. 1950).
Executor, Religious Congregation
In re Liebeck's Will, 109 N.Y.S. 2d 147 (Surr. Ct. 1951). *Executor or pastor*

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