# BEQUESTS FOR MASSES AND THE LAW

A case decided in the High Court in November, 1933, can be reckoned another and final stage in the gradual process of freeing bequests for the saying of masses from legal restrictions imposed on account of their purpose. In spite of the passing of the Catholic Relief Act of 1829, gifts made for a Catholic purpose have been strictly controlled by the law and it is only by several steps culminating in the case of In re Caus (Times Law Reports, 1933; Vol. 50, 80) that they are now almost entirely free of legal fetters. In the following account of the law on this topic an attempt is made to trace the various stages in its somewhat complicated develoment.

The law, thought for so long to have been settled by the ruling case of West *v.* Shuttleworth in 1835 (2 My. and K. 684), was based on the Chantries Act, 1547. Mass, and gifts for the purpose of having it said, were of course recognized by the common law as part of the religion of the country before the Reformation. The Chantries Act, however, contained a severe condemnation of the doctrines of purgatory and the mass, directing that property disposed of within five years before the passing of the Act, for the purpose of enabling mass to be said, should be forfeited to the Crown. But the Act did not prohibit such gifts for the future. The idea, nevertheless, that gifts in support of priests, and for having masses said for the soul of a deceased person, were made illegal by this enactment spread among lawyers. It took definite shape in Duke's textbook on Charitable Uses, published in 1676. No doubt the idea was strengthened by the existence of severe penal legislation against Catholics.

There were many religious purposes before the Reformation for which property could be left on trust, called 'pious uses.' After the Reformation many of these were considered superstitious, and therefore held to be illegal. But it is difficult to discover any precise indication of the principle

upon which, or of the enactments by which, the pious uses of the old common law were converted into superstitious uses. There is no doubt that for a long period the hearing of mass, or the saying of mass, was made illegal by statute and that while this illegality was in force a gift for masses would be void. In 1581 the saying or hearing of the mass was made a criminal offence, so that after that date the question would be not whether a bequest for such a purpose created a superstitious use, but whether the bequest was confiscated to the Crown under the Act of 1547, or had to be used in some other manner. There was also a number of penal statutes passed to enforce conformity with the Established Church and imposing penalties on the exercise of any other form of religion. As Lord Parker observed in the case of Bowman *v.* Secular Society (1917 A.C. **406):** ' As long as these statutes remained in force, no trust for the purpose of any other religion than the Christian religion, or any form of Christianity other than the Anglican, was enforceable, because it was clearly against public policy to promote a religion, or form of religion, the exercise of which was penalized by statute.'

The Catholic Relief Act of 1791 mitigated to some extent the legislation of Queen Elizabeth. Among other provisions the saying of mass was made no longer a criminal offence. In *1832* the Catholic Charities Act provided that Catholics ' in respect of their schools, places for religious worship, education and charitable purposes in Great Britain, and the property held therewith, and the persons employed in or about the same,' were to be ' subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools,' etc.

This was the position when, in 1835, the case of West *v.* Shuttleworth was decided. Lord Cottenham held that certain gifts to priests and chapels for masses were not within the Act of **1832,** and must be treated as being for superstitious uses. Although he admitted that ' there was no statute making superstitious uses void generally,' he went on to say that the Chantries Act, 1547, ' has been considered as establishing the illegality of certain gifts,

and amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in Duke, been decided to be within the superstitious uses intended to be suppressed by that statute.' The legacies to priests and chapels were therefore held void. West *v.* Shuttleworth was subsequently criticized more than once, but also followed more than once and eventually accepted by the Court of Appeal.

These authorities were binding until 1919 when, in the case of Bourne *v.* Keane (1919 A.C. 815), the House of Lords overruled West *v.* Shuttleworth and the Court of Appeal in their interpretation of the Chantries Act. That Act, it was decided, related only to superstitious uses of a particular description *then existing;* there was in fact no statute making superstitious uses void generally. The Catholic Charities Act, 1832, having recognized the Catholic religion as one which could be practised without breach of the law, with a right to hold property for religious worship, it necessarily included a right to celebrate mass according to the tenets and doctrines of the Catholic Church, and the statutory illegality and disability, which up to that time hindered a bequest for masses for the dead, having been removed, the special tenets held by the Catholic Church on masses for the souls of the dead could not be regarded as contrary to the common law so as to render bequests for such purposes in the nature of superstitious uses and on that ground invalid and void.

The result, therefore, of the decision in Bourne *a.* Keane is to establish the validity of bequests for masses for the repose of the souls of the departed, but, it is important to observe, does not lay down that such a bequest can be a ' charitable trust.' A charitable trust is one which the law will enforce on certain grounds of general social benefit, one of which is that the trust be for the advancement of religion. The decision did not lay down that money left on trust for masses was for ' the advancement of religion ' in a way which could be legally recognized. This is a vital point, for if such a bequest be not charitable, a bequest of personal property *upon trust* to apply the annual income

for masses for the dead would still be void, not as being for a superstitious purpose, but void as tending to create a perpetuity, *i.e.*, a restriction on land or capital lasting longer than the period allowed by law. This question did not directly arise in Bourne *v.* Keane as there the property was bequeathed out and out and not only the income was to be devoted by trustees for the saying of masses.

But this question did arise in 1933 in In *re* Caus. It was there, by Mr. Justice Luxmoore, explicitly laid down for the first time that a gift in a will for masses constitutes a valid charitable gift. In the course of his judgment he said: 'In my view, the decision in West *v.* Shuttleworth that a gift for the saying of masses is not a charitable gift is not correct, and is contrary to the whole current of authority with regard to gifts for the advancement of religion. The decision in West *v.* Shuttleworth that such a gift was void as constituting a superstitious use was overruled by the House of Lords in Bourne *v.* Keane and with it the decisions which followed it. Although there was no decision in Bourne *v.* Keane on the question whether a gift for saying masses was charitable or not, there are many passages in the speeches of Lord Birkenhead, Lord Atkinson and Lord Parmoor that recognize and support the view that such a gift is charitable.' In summing up his reasons for holding the gift to be enforceable, the learned judge went on to say: 'I have no hesitation in holding that a gift for the saying of masses constitutes a valid charitable gift on the ground, first, that it enables a ritual act to be performed which is recognized by a large proportion of Christian people to be the central act of their religion, and, secondly, because it assists in the endowment of priests whose duty it is to perform that ritual act. On each of these grounds religion is advanced, and it is no objection in law that the particular religion advanced is a particular form of Christian religion.'

Up till the passing of the Catholic Relief Act of 1929 there were many restrictions on religious orders which might have nullified any trusts for the saying of masses where regular priests or monks were to be the trustees.

Although the penalties were never enforced all male religious orders were technically illegal bodies so that any gift for the specific benefit of a religious order was void. The courts were, however, always ready to construe a document, if they possibly could, in such a way as to nullify the object of this admittedly harsh law. This they were able to do by holding a given gift to be not for the benefit of the religious order as such but for the benefit of particular members of it. Thus, in the case of Bourne *v.* Keane, when dealing with a bequest to 'the Jesuit Fathers of Farm Street for masses,' Lord Buckmaster followed the usual judicial practice when he said: 'The Jesuit Fathers at Farm Street are not a corporation, and the gift to them cannot be regarded as a gift to a corporate body. It is in fact a gift to a group of men, members of a particular community resident at a named place, but the gift is to them individually. If there were imposed upon them by the terms of the will the obligation of holding the gift so made for the purpose of a monastic order, the gift would be bad, but no such trust exists. The trust that is imposed upon them is a trust for a purpose which I regard as lawful, which is certainly not the peculiar and exclusive duty of any monastic order, but a trust which they can perform not as members of any body, but by virtue of their ecclesiastical office in the Roman Catholic community.'

However, this distinction is now no longer of any importance, for the Catholic Relief Act of 1929, by abolishing the provisions in the Act of a hundred years earlier making religious orders illegal, has placed regular priests on the same footing as secular. Either class may now with security act as trustees of property left for the purpose of having masses said. They will be trustees executing a valid and enforceable trust.

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