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HOW NEW YORK RESTRICTS GIFTS FOR MASSES

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NEW YORK imposes statutory restrictions on testamentary gifts for Masses. These restrictions on gifts for Masses are not made in express terms. They flow from a general law which cuts down the right of an owner of property to freely dispose of it by will for charitable uses.

The extent to which the States have gone in restricting the common-law right of owners of property to freely dispose of their property to charitable or religious uses is set forth by the American Law Institute in Section 362 of the Restatement of Trusts (1935):

"b ... In some States¹ there are statutes limiting the proportion of a testator's estate which can be devised or bequeathed for charitable purposes. The permissible maximum varies in different States; in some it is one-half, in some one-third, and in some one-fourth of the testator's estate. Usually the invalidity of the disposition is made dependent on the survival of certain members of his family such as wife or child, descendant of a child or parent. These statutes are ordinarily construed to impose limitations on the power of the testator to dispose of his property in order to protect the designated relatives, and only those relatives can take advantage of the limitation.

"c ... In some States² there are statutes which provide that no devise or bequest for a charitable purpose shall be valid if the will is executed within a certain time prior to the death of the testator. The period varies in different States; in some it is thirty days, in some ninety days, in some one year."

(note to c. "In the United States there are statutes in some States³ restricting

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1. California (one-third if testator leaves legal heirs); Georgia (one-third if testator leaves wife, child or descendants of child); Idaho (one-third if testator leaves lineal descendants); Iowa (one-fourth if testator leaves a spouse, child, child of a deceased child, or parent); Mississippi (one-third if testator leaves spouse, child, or descendant of child); Montana (one-third); New York (one-half if testator leaves spouse, child, or descendant or parent). Scott, Trusts (1938) §§ 362.4, note 2. The New York statute is found in N. Y. Decedent Estate Law § 17.

2. California (thirty days); District of Columbia (one calendar month); Florida (six months); Georgia (ninety days); Idaho (thirty days); Mississippi (ninety days); Montana (thirty days where testator bequeaths more than one-third of the estate for charitable purposes); Ohio (one year); Pennsylvania (thirty days). 3 Scott, Trusts (1938) §§ 362.4, note 1. O'Brien and O'Brien, Why Pennsylvania Restricts Gifts for Masses (1944) 48 Dec. L. Rev. 179.

3. California, Kansas, Massachusetts, Montana, New York, Oklahoma, Oregon, South Dakota and Utah. 3 Scott, Trusts (1938) §§ 362.4, note 3. Bodfish, The Destructive Effect of the 1937 Amendment of Section 42 of the Probate Code of California upon the Limitations
the amount of property, real or personal, which may be held by a charitable corporation. It is a question of interpretation of the statute whether, where property in excess of the amount permitted to be transferred inter vivos or by will to a charitable corporation, the objection can be made only by the State or can be made by the settlor or his heirs or next of kin or residuary devisee.

Louisiana restricts for all purposes gifts inter vivos or mortis causa of a specified share of the donor's property with the view to protect the donor from impoverishing himself during his lifetime and to protect his children and parents. By other statutes a surviving spouse is also protected.

The statutes of New York and the judicial decisions construing the same will serve to illustrate generally the scope of statutory restrictions in the United States on gifts for Masses. New York's basic statute restricting charitable gifts was incorporated in chapter 360 of the Laws of 1860, and provided:

"no person having a husband, wife, child, or parent, shall, by his or her last will . . . devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust, or otherwise, more than one-half part of his or her estate, after the payment of his or her debts."

This basic statute and its subsequent amendments have been construed by New York courts in the cases following.

Ruppel v. Schlegel arose on a petition brought by the sister of the testator for the construction of a will. Adam Schlegel died testate. His will provided:

"Fifth: All the residue . . . I give . . . to the Roman Catholic Church of the Most Holy Trinity . . . Brooklyn . . . but under the following ordination.

"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 Catholic priest(s) or Catholic teacher(s)."


5. Now found in N. Y. Decedent Estate Law § 17.
6. 55 Hun 183, 7 N. Y. Supp. 936 (Gen'l Term, 2d Dep't 1889).
"c. And a part of said estate I ordain shall be used for starting a newspaper for the interest of the Catholic people."

The testator left a widow, to whom he gave by the will a life estate in his realty and personalty, and his sister and other heirs to whom he left nothing. The value of the residue was more than one-half of the estate.

The contesting sister litigated for the excess over the half. She contended that the three clauses in the will, providing respectively (a) for stipends for Masses, (b) for tuition for students for the Catholic priesthood or for Catholics aspiring to be teachers, and (c) for aid towards the establishment of a Catholic newspaper, were subject to the statutory inhibition of chapter 360 of Laws of 1860 restricting charitable gifts to one-half of the estate, because they created charitable trusts. The Surrogate held that the gift for Masses (as well as the other gifts) was not within the statutory inhibition because a trust had not been created. The Surrogate reasoned that the residue had 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. The Surrogate said: "... the testator 'was trusting to the gratitude and generosity of the church to say the masses. ... The testator knew it would not cost the church anything to say the masses and so the church was not directed to use any part of the estate for that purpose.'" The sister appealed to the New York Supreme Court and, at Special Term, judgment against her was affirmed on the ground that no trust had been created and that an absolute gift had been made to the church, though the gift was subject to a condition subsequent. The sister appealed once again, and at the General Term, the judgment was affirmed, the Court saying: "We concur in the reasons assigned by the Surrogate and the Court at Special Term." The Court gave as an alternate ratio decidendi:

"Courts of equity entertain jurisdiction over actions for the construction of doubtful provisions in last wills and testaments in behalf of beneficiaries, executors, and trustees, but the plaintiff occupies no such position or relation."

7. The opinion of the Surrogate will be found in 7 N. Y. Supp. 936 (Surr. Ct. 1886).
8. Id. at 937.
9. The judgment of the Supreme Court at Special Term is reported in 7 N. Y. Supp. at 938 (1889).
10. 55 Hun 183, 7 N. Y. Supp. 936 (Gen'l Term, 2d Dep't 1889).
11. Id. at 185, 7 N. Y. Supp. at 938.
12. Id. at 184, Ibid.
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 on the gift to the church had been created. This equitable charge (apart from any 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 Church in the proper diocesan statutes, for the two Masses would probably amount to $10.00 a year, though they might be more in a few dioceses. The Surrogate was wrong in saying that the church would not be obliged to make the offerings of $10.00, 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 the priests (in their individual capacities) who say 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 the statute. As such gift, it did not have to be in trust in order to be within the restricting statute, which inhibits devises or bequests “to any . . . religious . . . society, in trust, or otherwise. . . .” Assuming that the gift was for charitable uses, the sister should have prevailed in her claim for her part of the estate in excess of one-half thereof, if a surviving sister could take advantage of the statutory limitation.

Vanderveer v. McKane arose on a proceeding brought by the executor for the construction of a will. Aletta M. Vanderveer died testate, within two months after the execution of her will, leaving her father surviving her. By the eleventh article in her will, the testatrix 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 $250 each to the pastors of certain other Roman Catholic churches. The testatrix also gave for charitable uses two other gifts, one of $15,000 and another of $5,000. Including the

13. Bogert says: “An equitable charge for charitable purposes may be created, and it is to be distinguished from a trust.” 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 324. See also § 31. 1 SCOTT, TRUSTS (1939) § 10 et seq.; RESTATEMENT, TRUSTS (1935) § 31; Kenneth R. O’Brien, Foundations for Masses Should Never Create Trusts (1944) 4 THE JURIST 284.


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 $250 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. He contended that all the gifts for charity were within the inhibition of chapter 360 of Laws of 1860. He also contended that the bequests to such of the corporations named as legatees as were incorporated under chapter 319 of the Laws of 1848 were void under the provision of that statute which declared that no devise or bequest to any corporation formed thereunder should be valid in any will which shall not have been made and executed at least two months before the death of the testator. (Under this last contention a gift to the Sisters of Charity of St. Vincent de Paul was declared invalid.) The New York Supreme Court held that the bequests for Masses were not within the statutory inhibition of chapter 360 of Laws of 1860 on the ground that the bequests were not gifts to corporations, but were gifts to individuals.

This decision was right under chapter 360 of Laws of 1860 before the 1923 amendment. The basic restricting statute did not inhibit gifts to individuals. Bequests for Masses are always gifts to individual priests—for their support, gifts on condition precedent that they say and apply the Masses as requested by the donor. In the instant case, the executor was made by the testatrix her donee of powers to distribute Mass stipends to the various priests recommended by her.

*Matter of Zimmerman* was a proceeding upon probate of a will. Sophia Zimmerman died testate. Her 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..."  

She was survived by a husband who was given $300. There were other charitable gifts in the amount of $700. The total amount of the personal estate did not exceed $1,700.

The husband contested the bequest for Masses and contended, among other things, that the bequest was in fact to St. Mary’s Church, a re-

religious society, and was, with the other gifts for charity, for more than one-half of the estate, and void as to the excess. The Surrogate held that the bequest for Masses was valid, that it was not within the inhibition of the restricting statute, for the gift was to the priest, in his individual capacity, and not to St. Mary’s Church, a religious society. Under the law before the 1923 amendment this decision was plainly right. In the head-note the reporter states: “... nor is ... a bequest ... to the priest ... for ... masses ... a bequest for a religious purpose. ...” The opinion of Surrogate Marcus does not warrant this conclusion of the reporter.

*Matter of Beck* was a case which arose on a request by executors for the construction of a will in an accounting proceeding. Alphonse Beck died testate. (The exact words of the pertinent provisions of the will were not set forth in the report.) The testator bequeathed $5 to a son and $100 to a nephew, and made gifts of some pieces of jewelry to friends. 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 the decedent’s burial lot. The decedent left a son and a grandson. The jewelry had been itemized as to the pieces thereof, but no value had been set on it.

By the time of this case, 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, literary, scientific, religious or missionary society, association, corporation or purpose, in trust or otherwise, more than one-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*, to the effect that the old law did not restrict a testamentary gift to individuals in trust for a charitable purpose.18

18. 161 N. Y. 122, 55 N. E. 568 (1899).
19. “In New York prior to an amendment of the statute which added ‘purpose’ after ‘society, association, or corporation,’ the statute which in terms applied to gifts to certain types of societies, associations, or corporations, in trust or otherwise, did not include a testamentary gift to individuals in trust for a charitable purpose notwithstanding the will also authorized, but did not compel, the trustees to create a corporation.” 68 C. J. 553. "In
The Surrogate in the *Beck* case declared: "the half given for the purpose of having masses said is a gift for a religious use." He also declared that the other half had been given for "charitable and benevolent uses." He made no determinate finding in the case, however, for, as he said: "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 amount is corrected to show the value of all the assets of the estate." 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 above set forth is not permitted to exceed more than 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."

The Surrogate was unequivocally of the opinion that the bequest for Masses was within the inhibition of the restricting statute as a gift to an individual in trust for a religious use. This decision is right. A Mass stipend is always for the support of the priest who says and applies the Mass as requested by the donor, and thus is for the advancement of religion. The gift, being for a charitable use, did not, however, have to be in trust to be within the inhibition of the restricting statute.

*Matter of Brown* was a proceeding by an executor for the settling of his account. Ella Brown died intestate. According to the report of the case, "Mrs. Brown, 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' ". She gave contingent life estates to her husband and uncle in a trust fund of $12,000 and to her uncle in an additional trust fund of $8,000 and divided the entire residue between St. John's College and St. Joseph's Home. The value of the personal estate, after payment of debts, amounted to $36,574.20, and her real estate to $1,738.34. She left a husband. She was also survived by an uncle and an aunt. The husband died shortly thereafter. Two surviving sisters of the husband were appointed

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administratrices of his estate. They filed objections to the account of the executor of the will of Ella Brown.

The administratrices contended that the bequest for Masses was a charitable bequest within the terms of the inhibition in the Decedent Estate Law and that all the charitable gifts amounted to more than one-half of the estate of Mrs. Brown. The Surrogate ordered the executor of Mrs. Brown's estate to pay the bequest of $500 to the pastor of St. John's Church, declaring that the bequest for Masses was not within the terms of the Decedent Estate Law for the reason that the bequest for Masses was not a charitable bequest. 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 thus 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 become confused. A tendency has developed for some courts to effectuate the intention of testators even though, in order to do so, recourse must be had to false reasoning. 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 teachings and law of the Church and is not justified simply to give full effect to a bequest for Masses. The statement of the Surrogate in the Brown case 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." He cited Matter of Zimmerman and Matter of Rywolt in support thereof. These last two cases do not support the Surrogate's

21. "... 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.


statement. They stand for the proposition that bequests for Masses go to priests in their individual 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 are charitable.

In view of the fact that 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, it may serve a good judicial purpose if this point is carefully reexamined and analyzed.

It is submitted that gifts for Masses are always for a charitable use in New York. They are for a charitable use because they advance a religion tolerated by the State of New York. They advance a religion tolerated by the State because they are used for the support of priests of the Roman Catholic religion, the doctrines of which, under the American principle of freedom of religion, can be lawfully followed.

*What is a charitable use* is a question of law. *Is a specific use charitable* is a question of fact. The constituents of the concept “charitable use” have tended to become more inclusive in the course of time. From the date of his creation, man has been endowed by God with certain charitable directives. He was impelled to give alms or to do acts for the relief of the physically needy. He was impelled to give alms or to do acts for the relief of the spiritually needy. The coercion of the natural law required these things. The commandments of the Church demanded them.

The relief of the spiritually needy in England in the twelfth, thirteenth, fourteenth and fifteenth centuries was administered by the Church, the Roman Catholic Church. There was no other. This was, in a way, organized charity. The individual did not effect relief to the spiritually needy by giving alms directly, but he did give the alms to the Church, as a moral entity, for the promotion of religion, or to the priests of the Church for their support in order that they might be enabled to perform their religious duties, so that in both cases spiritual comfort would be given generally to the people and specifically to the individual. There was no difficulty then, in finding as fact, that the giving of alms in these ways was always charitable.

The determination of these cases in England began to become uncertain towards the end of the reign of Henry VIII during the years he contested with the Pope for the supremacy of the church in England. However, it is submitted that even up to the time of the death of Henry VIII the giving of alms for the support of the Church in England
and for the support of Roman Catholic priests was charitable, as matter of fact.

During the reign of Edward VI, the successor of Henry VIII, for the first time in England there came into existence a religion other than the Roman Catholic religion. By enactment of Parliament, approved by Edward VI, the Mass, without which the Roman Catholic religion admittedly would be "a mere husk," was ordered not to be included in the new religion and the communion service was substituted therefor. Immediately thereafter there were two different religions in England, one the Roman Catholic religion, the other the Anglican, the now State religion. The Anglican became the established religion, the Roman Catholic religion was simply tolerated. Gifts by the adherents of the Anglican religion to their Church and to their ministers for their support were undoubtedly charitable. So also were the gifts by Roman Catholics to their Church and for the support of their priests. No questions were raised in English courts during this period as to the validity of either of these propositions.

On the death of Edward VI the Roman Catholic religion temporarily displaced the Anglican in royal favor. But shortly afterwards, when Elizabeth came to the throne, the Anglican Church was reinstated as the established church. By the Acts of Uniformity, in 1549 and 1559, the celebration of the Mass was no longer tolerated. It became illegal and, later, in 1581, it was a penal offence for a priest to say Mass and a penal offence for a layman to attend Mass and these two acts continued to be crimes until 1791, and it was not until the Catholic Relief Act, in 1829, that the Roman Catholic Church was again given the status of being tolerated in England.

In 1601, shortly before Queen Elizabeth died, Parliament enacted what is now well known as the Statute of Charitable Uses.26 This statute authorized the Anglican bishops of every diocese and certain others to investigate cases where property had been given for charitable purposes, and to make such orders, judgments and decrees as should be necessary to carry out the purposes for which the donors had given the property, which orders, judgments and decrees were to be valid until altered by the chancellor. In short the statute provided machinery for the enforcement of charitable trusts. The statute, however, soon fell into disuse. But its preamble, containing an enumeration of charitable purposes, was to exert judicial influence for centuries.

26. 1 Stat. 43 Eliz. c. 4 (1601).
In this enumeration of charitable purposes, advancement of religion was not included. The draftsman of the Act, Sir Francis Moore explained this omission as follows:

"... the gifts intended to be employed upon purposes grounded upon charity, might, in change of times (contrary to the minds of the givers) be confiscated into the king's treasury. For religion being variable, according to the pleasure of succeeding princes, that which at one time is held to be orthodox, may at another be accounted superstitious, and then such lands are confiscated."

The Statute, *inter alia*, classified, as charitable, gifts for the "repair of ... churches ..." This was its only enumeration of what gifts for the advancement of religion were charitable. The Statute declares that among the charitable purposes are:

"... some for relief of aged, impotent and poor people; some for maintenance of sick and maimed soldiers and marines; schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways; some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction; some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes."

It was plain that the Statute of Charitable Uses, though by its express terms it delimited as charitable, gifts for the relief of the spiritually needy, to the "repair of churches," did extend the fact-field of charitable gifts beyond those found by the ordinary processes of the mind. For example, where reason formerly would not classify a contribution for the repair of a port as charitable, now the fact-finder by law would be required to declare such a contribution charitable.

In a short time after its enactment the judiciary began to supply the omissions of the legislature in the matter of gifts for the advancement of religion. In 1639 it was held in the case of *Pember v. Inhabitants of Knighton*, that a gift to support a preaching minister of the established church was charitable.

The English courts, of course, did not declare gifts for the support of priests of the Roman Catholic faith or of rabbis of the Jewish faith, religions not tolerated by the law, as charitable.

In 1754 in the case of Da Costa v. De Pas, a Jew left by will a certain sum to be applied toward establishing a Jesuba or assembly for reading the Jewish law and instructing the people in the Jewish religion. The court ruled that the gift was not charitable, deciding that an illegal trust had been created, and decreed that the king might apply the fund under the doctrine of cy pres to other charitable purposes. Accordingly, practically the whole fund was applied to the support of a minister of the established religion. This was an outrageous decision.

In 1935 an English court in the case of West v. Shuttleworth, decided that a bequest for Masses was illegal as a superstitious use and of course not charitable.

In 1862 in the case of Thornton v. Howe, still another English court held that a gift of property to be applied to the "propagation of the sacred writings of the late Joanna Southcote," a person who had declared that she was with child by the Holy Ghost and that she was to give birth to a second Messiah, but who had died without issue, was charitable.

In 1919, although the House of Lords, in Bourne v. Keane, overruling West v. Shuttleworth, decided that gifts for Masses were not void as being superstitious, failed to decide whether or not such gifts were charitable.

In 1934, however, it was held in England in In re Caus, that a gift for Masses was for a charitable use. The case was tried on the theory that the testator, Father Caus, had created a trust which would be void as in violation of the rule against perpetuities unless the gift were saved as being for a charitable purpose. The statement of Dr. Delaney, filed as a supplementary answer in the case of Attorney-General v. Delaney, was admitted by agreement as evidence in the trial of the case, first as to the nature of the Mass, and secondly as to the nature of the money received by the priest who says the Mass. The attorney for the heirs contended that there was no authority in favor of the proposition that the bequest was charitable and argued that West v. Shuttleworth, to the effect that a gift for Masses was not charitable, applied. The Attorney-General, for the will, argued that the gift was charitable on the ground that it was for the advancement of religion, and that it was for the ad-

33. (Lindeboom v. Camille) [1934] Ch. 162.
34. I. R. 10 C. L. 174 (1877).
vancement of religion in two ways: first, it enabled Masses, ritual acts of religion, to be performed, which benefited the whole body of faithful Catholics; second, it provided for the support of the priests who would say the Masses. He then cited the Irish case of *O’Hanlon v. Logue*\(^5\) to sustain his arguments.

The Court held that the gifts were charitable and that as the trust was therefore a charitable trust it was not void as being contrary to the rule against perpetuities. Luxmore, J. said:

“In my judgment, once the true nature of the Mass is explained, and the destination and object of the payment for it is made clear, there can be no room for any other opinion but that the gift for Masses is charitable, and that the contrary view expressed in *West v. Shuttleworth* . . . is based upon insufficient and incorrect information with regard to the character of the rite, and the nature and purpose of the payment. 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 . . .

“I have no hesitation in holding that a gift for the saying of Masses constitutes a valid charitable gift, on the grounds, 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 . . .”\(^36\)

The decision in the *Caus* case that gifts for Masses are charitable because they advance religion is correct. It is submitted, however, that the second ground given by the court for the decision is a sufficient one. The first ground really expresses the motive of the gift. The second ground expresses the use to which the gift is to be put. Religion is advanced because the gift is to be used for the support of priests.

The court did not distinguish between the motive of the gift and the use to which the gift was to be put. Father Caus’s motive in making the gift was to obtain the celebration and application of Masses for the repose of his soul in the hope that thereby he might obtain from God through the intercession of Christ, the principal minister of the Mass, and through the sacrifice of the priest, the amelioration of any punishment due to his sins. The Catholic belief in the propitiatory effect of the Mass, coupled with his belief in the doctrine of Purgatory and the communion of saints, would give him confidence that the sacrifice would not

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36. [1934] Ch. 162, 169.
be offered for his intention in vain. Father Caus's gift was to be used to provide support for priests who would celebrate Mass for the faithful and perform other obligations of their sacred office.

The difference between the motive and the purpose of an act is illustrated as to justice and charity respectively by two parables from the Bible.

[Justice] "And he spoke also a parable to them, that we ought always to pray, and not to faint, saying: there was a judge in a certain city, who feared not God, nor regarded man. And there was a certain widow in that city, that she came to him, saying: Avenge me of my adversary. And he would not for a long time. But afterwards he said within himself: Although I fear not God, nor regard man, yet because this widow is troublesome to me, I will avenge her, lest continually coming she weary me."37

The purpose of the judge's act in this parable was to do justice. But his motive was to obtain personal relief from being nagged by the widow.

[Charity] "And he said to them: Which of you shall have a friend, and shall go to him at midnight, and shall say to him: Friend, lend me three loaves, because a friend of mine is come off his journey to me, and I have not what to set before him. And he from within should answer, and say: Trouble me not, the door is now shut, and my children are with me in bed; I cannot rise and give thee. Yet if he shall continue knocking, I say to you, although he will not rise and give him, because he is his friend; yet, because of his importunity, he will rise, and give him as many as he needeth."38

The motive of the householder in getting up in the middle of the night and giving the bread to the one who requested it was to be relieved from the persistent solicitations, though the purpose of the gift was charitable in that it helped the needy.

Examples of gifts in which the motive is one thing and the purpose another are very common in the every day affairs of life and are especially numerous in matters of taxation. A donor may make contributions for charitable purposes with the motive that by obtaining thereby deductions from his gross income, the tax on his net income will be lessened. A donor may even make contributions for charitable purposes with the motive of advancing his political fortunes.

Just as motive is immaterial in the law of gifts, so also is motive immaterial in the law of sales and in the law of contracts. Williston39 distinguishes consideration from motive in contracts as follows:

39. WILLISTON, CONTRACTS (Rev. Ed. 1936) § 111.
"Though desire to obtain a consideration for a promise may be and ordinarily is, the motive inducing the promisor to enter into a contract, yet this is not essential nor, on the other hand, can any motive serve in itself as consideration. [citing cases] Thus, A may be moved by friendship to agree to sell his horse to B for one hundred dollars. If there is an actual agreement to make the exchange of the horse for money, there will be a contract though A's motive for entering into the transaction was friendship. . . . On the other hand, if there be no legal consideration, no motive, such as love and respect, or friendship for another, or a desire to do justice, or fear of trouble, or a desire to equalize the shares in an estate, or to provide for a child, or regret for having advised an unfortunate investment, will support a promise. There is a distinction between the consideration of the Common Law and the causa of the Roman Law. Consideration is a present exchange bargained for in return for a promise. Causa is some adequate reason for making a promise, and may be either a present exchange or an existing state of facts. As the Civil Law is in force in Louisiana, the requirement of consideration does not there obtain."

The Mass case differs from the ordinary gift case where the motive of the donor is immaterial. In the Mass case the motive becomes all important, not as motive, but as condition precedent,40 for these two always coalesce. Just as in the ordinary contract, the desire to obtain the consideration for a promise is the motive inducing the promisor to enter into the contract and just as in the ordinary sale desire to obtain the property for the purchase price is the motive inducing the buyer to purchase, so the desire to obtain the performance of the condition precedent, viz., the saying of the Masses, is always—and in the Mass case there is no exception—the motive inducing the offerer to make the gift to the priest.

In the Mass case the motive, immaterial in the ordinary Common Law gift, always rises to and equals a condition precedent to the vesting of the title to the Mass-money, a phase that must always be reckoned with in Common Law, Civil Law, and Canon Law. The nagging widow parable was not a case of the transfer of property by gift or otherwise and the motive therein did not rise to the status of condition precedent. The midnight-knocker parable was a case of a transfer of title to prop-

40. O'Brien and O'Brien, Canon 829 Does Not Modify the Gift on Condition Precedent of a Mass Stipend (1944) 4 THE JURIST 133. "The nature and effect of a gift, not its motive, determines its legal character. . . . The . . . donor's . . . motive . . . may be the hope through masses to obtain some benefits for his soul. . . . Courts cannot look to such motive, but must confine their attention to the nature of the gift and the objects to be obtained by it. [citing cases]." ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) 131. See RESTATEMENT, TRUSTS (1935) § 368(d): "Motive of Settlor Immaterial."
The intention of the householder was that title to the loaves should pass on delivery and he obtained his mental relief at the time of the delivery. Therefore in the Caus case the motive of obtaining the Masses was immaterial in the Common Law, while the obtaining of the Masses as a condition precedent had binding force both at Common Law and Canon Law insofar as the vesting of the title to the Mass-money was concerned. The motive was collateral and the nature of the Mass was irrelevant in the determination of the fact as to whether or not the use to which the gift to the priest was to be made was charitable. In the trial of cases involving gifts for Masses, where the charitable use of the gift is the issue, so long as the Roman Catholic religion is at least "tolerated" by the law, the nature of the stipend to the priest only, and not the nature of the Mass, is relevant.

The Caus case definitely settled the law in England that gifts for Masses are always for a charitable use.

The great weight of authority in the United States is that gifts for Masses are always for a charitable purpose. All those States which declare that bequests for Masses are valid as charitable trusts necessarily hold that gifts for Masses are for a charitable use.

In 1788 the legislature of New York formally declared that the English statute 43 Elizabeth was without force in that State. The purpose of the legislature was to abrogate the prevailing system of charitable trusts with their indefinite beneficiaries. New York, in 1784, had laid the foundation of a policy not to introduce any system of public charities except through the medium of corporate bodies, and in that year enacted its basic law for the incorporation of religious and charitable societies. "Charity as a great interest of civilization and Christianity...suffered no loss or diminution in the change...made." The legislature eliminated the legal instrument of the charitable trust as a valid conduit for the dispensing of charities to indefinite beneficiaries, but it had no intention of cutting down the scope of the fact-field of charitable uses or purposes, and gifts for the advancement of religion in the State of New York have always been liberally construed to be for charitable purposes. The Court of Appeals of New York, as early as 1888, in the case of Holland v. Alcock, ruled that a gift for Masses

41. N. Y. Laws 1788, c. 46, § 37.
43. 108 N. Y. 312, 16 N. E. 305 (1888).
is for a charitable use, as one for the advancement of religion, though it held the gift to be invalid as one in trust for indefinite beneficiaries. Later, in 1919, the Court of Appeals in *Matter of Morris* declared that gifts for "Masses are . . . public charities." In 1893 the legislature of New York had enacted laws practically restoring the common-law doctrines of charitable trusts by providing that indefiniteness of beneficiaries did not invalidate charitable devise and bequests in general.

Bequests for Masses, as gifts for a charitable purpose, are squarely within Section 17 of the Decedent Estate Law as amended in 1923:

". . . 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 . . . charitable . . . purpose, in trust or otherwise, more than one-half of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more. . . ."

It is quite certain that the New York Legislature, when it amended section 17 of the Decedent Estate Law by chapter 301, Laws of 1923, by adding after the word "corporation" the words "or purpose" did not do so for the purpose of cutting down the scope of gifts for Masses, which theretofore had not been within the terms of the restricting statute. In the Mass bequest cases which had come before the courts of the State of New York, the amounts of the bequests were not of sufficient

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44. 227 N. Y. 141, 144, 124 N. E. 724, 725 (1919). As late as 1941, in *Matter of Breckwoldt*, 176 Misc. 549, 27 N. Y. S. (2d) 938 (1941), Wingate, S. said: "The suggestion that a gift of this variety partakes of the nature of a 'public charity' naturally precipitates the question whether it is to be included in the aggregate of charitable gifts under a will for the purpose of determining whether its composite provisions offend against the inhibition contained in section 17 of the Decedent Estate Law, which provides that testators who are survived by certain specified close relatives may not give more than one-half of their net estates to charity if such relatives object to such a course. In every instance in which this issue has been raised, the determination has been in the negative. (Matter of Zimmerman, 22 Misc. 411, 413, 414, 50 N. Y. Supp. 395, 396, 397 (Surr. Ct. 1898). Matter of Rywoldt, 81 Misc. 103, 104, 142 N. Y. Supp. 1066, 1067 (Surr. Ct. 1929). Matter of Brown, 135 Misc. 611, 612, 238 N. Y. Supp. 160 (Surr. Ct. 1929). This result appears sound. Whereas such a gift may be made to a religious society it is not for a general religious purpose since its object is not to promote religion as a whole, but according to the tenets of the Roman Catholic and Jewish faiths, to secure for the testator a particular individual benefit, by promoting the eternal welfare of his soul." The Surrogate went out of his way to drop this confused and erroneous dictum. The Surrogate did not know the pertinent tenets of the Roman Catholic relation nor the nature of the Mass stipend. He was unable to distinguish between the motive of the offering and the purpose of the gift.

size to warrant any feeling that social interests or individual interests were being impaired by permitting testators to continue the exercise of freedom to dispose as they wished of their property to charity. Common law early recognized as a legal right the interest of the individual owner to dispose of his property by will for charitable purposes, generally as he wished. It did not recognize as a right the claim of any relative to an interest in the property either during the lifetime of the owner or upon his death.

Two Surrogates had declared that, prior to the amendment of the statute, gifts to priests for Masses were not restrictable by the statute. The fact that the New York legislature did not intend to restrict gifts for Masses by the amendment of 1923 is of no avail.

"In construing statutes, we resort to the natural significance of their words and if they bear a definite meaning, and the language is precise, we give effect to the law as expressed. We should not indulge in conjecture as to intention, if an intention is clearly expressed in the language; for the language of a statute is presumed to declare the intention."47

Nor, on the other hand, is the fact that the New York legislature did not expressly intend to reduce the number of law suits contesting the validity of bequests for Masses when it amended Section 17 of the Decedent Estate Law48 by Chapter 229 of the Laws of 1929, Section 3, effective September 1, 1930, of any avail to disgruntled heirs. 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."

If the surviving husband, wife, child, descendant or parent elect not to contest, bequests for Masses, as well as all other charitable gifts are not restricted by Section 17 of the Decedent Estate Law. If a spouse, parent or descendant should successfully contest excess charitable gifts, other heirs, who had no right to contest, might share as in intestate property."49

It is submitted that the New York restricting statute as amended, more nearly approaches the natural law than restricting laws of other States. Natural law secures the right of certain relatives under special cir-

46. See infra, Appendix.
48. Section 18 of the Decedent Estate Law gives a surviving spouse a right of election to take against the will his or her share of the estate as in intestacy.
cumstances to be free from want and restricts generally the power of a head of a family to make gifts outside his immediate family—and this restriction does not except gifts for Masses. From the viewpoint of the present Church law this is not a matter of positive (man-made) law, at least de iure condito, whatever it might be de iure condendo. But natural laws are immutable; they cannot be changed or abrogated by the Church.

Appendix

New York Cases of Bequests for Masses:

<table>
<thead>
<tr>
<th>Bequests</th>
<th>Amounts of Bequests</th>
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<tbody>
<tr>
<td>Matter of Hagenmeyer, 12 Ab. N. C. 432 (1883)</td>
<td>$100 and uncertain residue</td>
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<tr>
<td>Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305 (1888)</td>
<td>$11,500</td>
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<td>Schwartz v. Bruder, 6 Dem. 169, 3 N. Y. Supp. 134 (1888)</td>
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<td>O'Connor v. Gifford, 117 N. Y. 275, 22 N. E. 1036 (1889)</td>
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<td>Matter of Black, 1 Con. 477, 5 N. Y. Supp. 452 (1889)</td>
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</tr>
<tr>
<td>Ruppel v. Schlegel, 55 Hun 183, 7 N. Y. Supp. 936 (1889)</td>
<td>unknown</td>
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<tr>
<td>Vanderveer v. McKane, 25 Ab. N. C. 105, 11 N. Y. Supp. 808 (1890)</td>
<td>5,500</td>
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<tr>
<td>Estate of Julia Howard, 5 Misc. 295, 25 N. Y. Supp. 111 (1893)</td>
<td>600</td>
</tr>
<tr>
<td>Matter of Backes, 9 Misc. 504, 30 N. Y. Supp. 394 (1894)</td>
<td>650</td>
</tr>
<tr>
<td>Matter of Zimmerman, 22 Misc. 411, 50 N. Y. Supp. 395 (1898)</td>
<td>600</td>
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<tr>
<td>Morris v. Hughes, 45 Misc. 278, 92 N. Y. Supp. 288 (1904)</td>
<td>1,000</td>
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<td>Matter of Eppig, 63 Misc. 613, 118 N. Y. Supp. 683 (1909)</td>
<td>2,500</td>
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<td>Matter of Rywolt, 81 Misc. 103, 142 N. Y. Supp. 1066 (1913)</td>
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<td>Matter of Catherine Welch, 105 Misc. 27, 172 N. Y. Supp. 349 (1918)</td>
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<tr>
<td>Morris v. Edwards, 227 N. Y. 141, 124 N. E. 724 (1919)</td>
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(total for funeral expenses, masses and tombstone)

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<tr>
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<tr>
<td>Matter of Dwyer, 192 App. Div. 72, 182 N. Y. Supp. 64 (1920)</td>
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<td>Matter of Werrick, 135 Misc. 876, 239 N. Y. Supp. 740 (1930)</td>
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<td>Matter of Cunningham, 140 Misc. 91, 249 N. Y. Supp. 439 (1931)</td>
<td>unknown</td>
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<tr>
<td>Matter of McArdle, 147 Misc. 876, 264 N. Y. Supp. 764 (1933)</td>
<td>100</td>
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<tr>
<td>Matter of Semenza, 159 Misc. 487, 288 N. Y. Supp. 556 (1936)</td>
<td>500</td>
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<td>Matter of Breckwoldt, 176 Misc. 549, 27 N. Y. S. (2d) 938 (1941)</td>
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<td>Matter of Demolina, — Misc. — 35 N. Y. S. (2d) 24 (1942)</td>
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<td>Matter of Hofmeister, 48 N. Y. S. (2d) 351 (1944)</td>
<td>app. 125</td>
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