

1940

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Recommended Citation

Charles F. Mullett, *Catholics and the Courts In England Since the Protestant Revolt*, 9 Fordham L. Rev. 38 (1940).

Available at: <https://ir.lawnet.fordham.edu/flr/vol9/iss1/2>

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Catholics and the Courts In England Since the Protestant Revolt

Cover Page Footnote

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CATHOLICS AND THE COURTS IN ENGLAND SINCE THE PROTESTANT REVOLT

CHARLES F. MULLETT†

I

THE history of Catholic persecution in England under the penal laws¹ has often received attention, but certain gaps remain. Neither the penal laws, seemingly so explicit, nor private papers with their melancholy cry entirely reveal the sufferings for which litigation supplies such excellent evidence. No one can deny the burden of the laws; rather, it is a question whether the student appreciates what burdens such legislation specifically imposed or indirectly permitted. Penal laws had not less significance as enabling acts than as weapons *per se*. To the penalties they inflicted must be added the gnawing extensions of those penalties as well as their more precise definition, especially since the laws were so extreme that they often went unenforced. We may apprehend the formal prohibition of political power; we may not at the same time comprehend what the absence of that power means or how it is brought about. We may see the injustice in labelling a religion as superstition; we do not so quickly grasp that the adherents of this "superstition" often are deprived of citizenship. Indeed, since not all persons seem to qualify for martyrdom, the corrosive insecurity attendant upon unanticipated projections of the penal laws probably accomplished as much as the laws themselves in driving Englishmen to conformity to the Anglican Church.

This generalization applies to all religious nonconformists in England from the sixteenth to the nineteenth centuries. Nevertheless, although at times the weight of governmental penalties, court judgments, and

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1. A brief reference to the penal laws may be of value. In addition to those statutes transferring sovereignty from the pope to the monarch, as well as those dealing with uniformity, elections, and monasteries, the following had especial significance: The Chantry Act, 1547, 1 Edw. VI, c. 14; "An Act to retain the Queen's Majesty's Subjects in their due Obedience," 1581, 23 Eliz. c. 1; "An Act against Jesuits. . .", 1585, 27 Eliz. c. 2; 29 Eliz. c. 6 (1587); 35 Eliz. c. 1 (1593); 35 Eliz. c. 2 (1593); "An Act for the better discovering and repressing Popish Recusants", 1605, 3 Jac. I, c. 4; "An Act to prevent and avoid Dangers which may grow by Popish Recusants," 1605, 3 Jac. I, c. 5 (1605); 7 Jac. I, c. 6 (1609); The Test Acts, 1672, 25 Car. II, c. 2 and 1677, 30 Car. II, c. 2; "An Act to vest in the two Universities the Presentations of Benefices belonging to Papists," 1688, 1 Will. & Mar. sess. 1, c. 26; "An Act for the further preventing the growth of Popery," 1699, 11 & 12 Will. III, c. 4. There were of course numerous other penal laws, but these figured most consistently in the cases which follow. Where no title has been given, the acts amplify some of the preceding statutes.

social disapproval fell heavily upon the Protestant dissenters, Catholics suffered the most protracted and ubiquitous persecution.² At first, the burden was almost entirely legislative; while severe, it could be anticipated. At an early date, however, a refinement of disabilities appeared: the courts began to apply the penal laws to novel ends, ends that might have been deduced but were quite conceivably not anticipated when Parliament enacted the statutes. That these laws prohibited the enjoyment of freedom or the exercise of political power was not enough; henceforth, they covered many non-political functions. Of course, novelty did not characterize every bit of litigation, for in many, many cases the statutes were at once distressingly specific and all-inclusive. Yet the very suits that came into court show that men either did not know a given statute existed—else they would not have put themselves so distinctively within its application—or they did not realize on what occasion the statute might be extended to restrict or punish activities hitherto unsuspected of lying within its scope. The latter seems the more likely. To suffer persecution was bitter; never to know in what unexpected fashion that persecution might strike brought despair—and conformity. To appreciate this situation fully, the cold, impersonal records of the courts, usually devoid of hysteria or patent intolerance, are invaluable.

Although, as already observed, the career of Protestant dissenters had much in common with that of Catholics, unmistakably sharp differences existed. Because of the numerous and varied penalties, Catholics seemed only infrequently willing to risk their causes in court. After 1829 and 1832, remedial legislation improved this situation; given a place to put a lever, they tried to remove the burden of their persecution. In this respect, they followed the tactics of the Protestant dissenters, who also had appealed more and more often to the courts when they saw the possibility of a favorable decision. Until 1689, and often after that date, Protestant dissenters could anticipate no friendly reception at the hands of the law, but the Toleration Act proved an entering wedge. Catholics waited 140 years for similar benefits. On the other hand, at times Catholics, for all their unpopularity with mobs and demagogues, enjoyed less disfavor than Protestant dissenters. The latter were tainted with republicanism, and during both the Restoration and the Revolutionary era of the eighteenth century they occasionally experienced bitter hostility.

Yet of course the pendulum swung back and forth. If Catholics looked less threatening in some periods, the "no-popery" hysteria screamed

2. For some insight into the legal status of Protestant dissenters during these years, see Mullett, *The Legal Position of the English Protestant Dissenters* (1936) 22 VA. L. REV. 495-526, (1937) 23 *id.* 389-418, (1939) 25 *id.* 671-97.

viciously in the days of the Popish Plot, the Glorious Revolution, the Jacobite rebellions, and the Gordon Riots. All things considered, furthermore, the laws against popery so heavily weighted the status of Catholics that they could not even gesture in favor of relief. Protestant dissenters suffered extensively in all faith, but they were seldom so completely demoralized that they could not or dared not raise their voices and organize against persecution. That unfortunately was too often the predicament of the Catholics. Some instances were not especially notable, as they followed directly from the laws; others, however, revealed the fuller meaning of belonging to a persecuted sect. Such items will be the primary concern in the following pages, and for the sake of convenience will be grouped roughly according to subject matter, although some account will be taken of chronology.

II

Of all the ways in which Catholics suffered for their religious faith probably the most persistent hardship resulted from the obstacles placed in the path of certain charitable legacies. Time and again the highest courts of England declared the devise of property for the saying of masses or the benefit of priests a "superstitious use," thus nullifying both a pious intention and a property right. Sporadically, such judgments were handed down from the reign of Elizabeth forward.³ An interesting and clear-cut example of the reasoning and application of this doctrine is *Croft v. Jane Evetts & Auters*⁴ which may be briefly summarized. William, husband of Jane, being a popish recusant⁵ and disliking the next heir because of the latter's Protestantism, intended to disinherit him and confer the profits of his lands upon his own fellow religionists "in trust for the maintenance of superstitious, unlawful and disloyal

3. Anon., Benl. 30, 73 Eng. Reprints 952 (K. B. 1561); The Dean of St. Paul's Case, 3 Dyer 368a, 73 Eng. Reprints 825 (K. B. 1580); Hart v. Brewer and Harrison, Cro. Ellz. 449, 78 Eng. Reprints 688 (K. B. 1595); Adams and Lambert's Case, 4 Co. Rep. 96a, 76 Eng. Reprints 1079 (K. B. 1598), 4 Co. Rep. 104 b, 76 Eng. Reprints 1091 (K. B. 1602), Moo. K. B. 648, 72 Eng. Reprints 815 (1602); Pits v. James, Hob. 121, 80 Eng. Reprints 271 (K. B. 1615); Lancelot v. Allen, Cro. Car. 248, 79 Eng. Reprints 818 (K. B. 1628); Humphrys v. Knight, Cro. Car. 455, 79 Eng. Reprints 994 (K. B. 1632); Waldern v. Ward, 2 Sid. 46, 82 Eng. Reprints 1248 (K. B. 1657).

4. Moo. K. B. 784, 72 Eng. Reprints 904 (1607). In *Lady Egerton's Case* (1605), the relief of poor recusants was held void, and the court decreed the land to the heir at law on the ground that the use could not be charitable within the meaning of 43 Eliz. DUXE, CHARITABLE USES (1676) 133, cited in *Bourne v. Keane*, [1919] A. C. 815, 846. Cf. *Cary v. Abbott*, 7 Ves. Jun. 490, 32 Eng. Reprints 198 (Ch. 1802).

5. For convenience, a recusant may be defined as a person who wilfully absented himself from the parish church and was therefore penalized under Elizabethan and Jacobean statutes. Catholics were the usual objects of the phrase.

uses." To that end an indenture conveyed the lands in question to some popish recusants and their heirs. It was designed that these persons would, after the decease of William and Jane, "yearly for ever give, bestow, and employ all the issues, revenues and profits of the premises upon poor Scholars in Oxford & Cambridge, or elsewhere, such as study and profess or shall hereafter intend to profess and study Divinity."

The Lord Chancellor, conceiving this devise "pernicious and dangerous to the State, and much to concern the present Government and publick weal of this Land," forbore to make any decree, but ordered that the deeds and evidences should remain in court. Meanwhile, he conferred with the judges. After some deliberation, the justices were of opinion "That all the said Conveyances made upon the hopes, trusts, confidences and meanings aforesaid, were pernicious and dangerous to the State of this Common-Wealth. And that if the profits of the Land should be employed and bestowed according to the hopes, trusts, and meanings afore mentioned, the same would be bestowed upon Traitors, Jesuits, and Seminary Priests and others, being Enemies to the State, Crown and Dignity of this Kingdom."⁶ Too dangerous to be tolerated, repugnant to the law, such trusts were unlawful and void. Therefore the property after Jane's death should go to Croft and his heirs and assigns forever, and those to whom property had illegally been conveyed were to release it. Moreover, Jane was not to waste the property then in her charge.

Throughout the seventeenth century the courts continued to rivet ever more firmly the bonds of "papists." The arguments varied little, case by case, although occasionally sufficient deviation warrants attention, as in a suit of 1693.⁷ Anne Barlow devised to Lady Portington and her heirs "absolutely without any trust" for the good of her soul, the property being God's, not Anne's. Could this devise be averred to be in trust to a superstitious use? The court held that it could not, neither by statute nor by the nature of the thing. Nevertheless, on an information the Exchequer declared that nothing should be done to propagate a false religion through a trust to a superstitious use. The statute of 23 Henry VIII, c. 10 (1531) nullified such uses but did not give them to

6. See *Croft v. Jane Evetts & Auters*, Moo. K. B. 784, 785, 72 Eng. Reprints 904, 905 (1607).

7. *Dominus Rex v. Lady Portington*, 1 Salk. 462, 91 Eng. Reprints 151 (K. B. 1693), 3 Salk. 334, 91 Eng. Reprints 856 (K. B. 1693). Different in character but illustrative of Catholic difficulties was *The Queen v. Ride*, 3 Salk, 133, 91 Eng. Reprints 735 (K. B. 1705), which held that the wife and executrix of a popish recusant convict could not prove his will, being disabled by Eliz. c. 4, par. 22. As usual, Salkeld is very incomplete in his citation, and I am unable to determine the statute.

the king.⁸ Because the use was "merely void" and because, though her purpose was bad, Anne was competent to devise her property away from her kin, the property should not now go to the heir at law. Therefore, the king should apply it to a "proper use."

Meanwhile, an equally oppressive series of judgments had revealed another aspect of legal disability for Catholics. As in the matter of "superstitious uses," the statute specified the crime, but nonetheless the courts were frequently faced with the need for applying it in a harsh fashion. In 1605, Parliament, in order "to prevent and avoid dangers which grow by popish recusants," enacted, among other articles, that no recusant should present to a benefice.⁹ England was divided into two regions, in one of which the chancellor and scholars of Oxford, in the other the chancellor and scholars of Cambridge, should present, so long as the patron remained a recusant. Some ten years later, two suits, one for each region, came into court to clinch this legislation.¹⁰ Why such a lapse of time occurred is impossible to say. Perhaps, the statute was less clear to contemporaries than to later students; perhaps, the desire to take advantage of the act was not very pronounced among the rank and file of Englishmen. In any instance, the delay is not without interest.

In the Oxford case, it appeared that a John Draicot, seised of the manor of Draicot, to which the advowson of the church was appendant in fee, had granted by deed the next avoidance of the church to a George Eyre. After Draicot's death, the manor and advowson descended to another John Draicot, cousin and heir of the former, who was indicted both for not receiving the sacrament and not attending church. The plaintiffs maintained that, because the second Draicot was a popish recusant convict, the grant was void, that the chancellor and scholars of Oxford had the right to present, and that the defendants disturbed them.

8. The statute, 1 Edw. VI, c. 14 (1547), gave such uses to the king but did not extend to future cases.

9. 3 Jac. I, c. 5 (1605). The phrase, "present to a benefice," as well as the words, "advowson" and "avoidance", which will be used below, perhaps call for some definition. A "benefice" was an ecclesiastical living. Technically, it meant one to which a rank or office was attached; practically, the term applied to rectories, vicarages, etc. "To present" was to offer a clerk to the bishop to be instituted in the benefice. "Advowson" was the right of presentation to a benefice; this right belonged to certain manors or parsons, and the individual possessed of the right was a "patron". "Avoidance" was the condition of a benefice when it had no incumbent. So: when an *avoidance* occurred in a *benefice*, the *patron* to whom the *advowson* belonged had the right to *present*.

10. The Case of the Chancellor, Masters, and Scholars of the University of Oxford, 10 Co. Rep. 53b, 77 Eng. Reprints 1006 (K. B. 1613); Chancellor, Masters, and Scholars of Cambridge v. Walgrave, Hob. 126, 80 Eng. Reprints 275 (K. B. 1616). Another instance of loss of advowson through conviction of recusancy came to light in Duncombe v. University of Oxford, Winch 11, 124 Eng. Reprints 10 (C. P. 1620).

The latter replied that the grant preceded any conviction for recusancy. To this the court responded, "after the said John Draicot was a popish recusant convict, during the time that he remains a recusant, he now shall be disabled to grant any next avoidance, by the retrospect of the Act after the beginning of the said session of Parliament, and the makers of the Act intended to inflict greater disability upon them who became popish recusants, after the damnable and damned powder treason, than before."¹¹

The Cambridge case differed sufficiently to warrant a brief resumé of it here. The chancellor, masters, and scholars of Cambridge claimed the presentation of the church of Colny, because Yaxley, patron of the church at the avoidance by the death of the last incumbent, was a popish recusant convict. To this Walgrave replied that although a popish convict, Yaxley was seised of the manor at the time of his conviction, on which occasion the commissioners had taken two parts of the manor for the king who in turn had devised these to Walgrave. In removing the incumbent, the court established the principle—in effect for many generations—that where two patrons, one Protestant, the other Catholic, controlled an advowson, the Protestant should present.

Nearly a century elapsed before this cause again came into court. "No-Popery" had proven a rallying cry throughout the greater part of the seventeenth century, but the Toleration Act of 1689 and the apparent decline in bigotry may have encouraged a test over presentation. The facts differed but little from those already related, and the result varied not at all.¹² In the argument, it was specified that every person convicted of recusancy was disabled from presenting to any benefice. No difference existed whether the person was convicted before or after the avoidance occurred. Three decades later, another suit had some significance in the same issue.¹³ The plaintiff, while a papist, had assigned an advowson to the defendant for ninety-nine years. In bringing suit he contended that he had only assigned it in trust for himself in order to avoid the penalties of 3 Jac. I, c. 5 (1605), and the amplifying statute, 1 Will. & Mar. c. 26 (1689). The alleged trust was not in writing. The plaintiff had now renounced the Catholic faith and had become a "good protestant." The court, awarding judgment to the plaintiff, concluded that the

11. *The Case of the Chancellor, Masters, and Scholars of the University of Oxford*, 10 Co. Rep. 53b, 56a, 77 Eng. Reprints 1006, 1009 (K. B. 1613).

12. *Fitzherbert v. Oxford University*, 1 Com. 181, 92 Eng. Reprints 1024 (K. B. 1709). In *Thurston v. Slatford*, 1 Salk. 284, 91 Eng. Reprints 251 (K. B. 1700), which concerned an action to oust the plaintiff from his office of the clerk of the peace of Oxfordshire because he had not taken his oath of office, the court adverted to the voidance of presentation on the ground of conviction for recusancy.

13. *Cottington v. Fletcher*, 2 Atk. 155, 26 Eng. Reprints 498 (Ch. 1740).

acts of "papists" were purged upon their conformity to the Protestant religion. Such conformists were freed and discharged from any penalties and losses which they might otherwise sustain in respect of their recusancy.

During the remaining years of the century Catholic suits arose but seldom, a sharp contrast to the history of Protestant nonconformity. Protestant dissenters constantly appealed to litigation, probably because they found the courts generous—more generous, indeed, than Parliament. Catholics found the courts firmly intent on not only retaining but even increasing the bonds; rather oddly, they received more concessions from Parliament than did their Protestant brethren.¹⁴ Moreover, regardless of the bitter feeling during the Gordon Riots, Catholics soon aroused less fear than the Protestant dissenters.¹⁵ When the Catholic Church was suffering confiscation and humiliation at the hands of the French Jacobins, it enjoyed greater prestige and favor in the eyes of many Englishmen who feared lest English Jacobins follow French precedent in attacking the Established Church.¹⁶ Prestige and favor, however, were but relative, and the law granted no equality to Catholics. From the standpoint of their devotions they had materially improved their status; as members of a state they were still a persecuted minority. They might *worship* in their own way without immediate hindrance; nevertheless, so ran much contemporary reasoning, if they were sufficiently perverse to want to worship that way, they must be prepared to accept the consequences, namely, a large measure of outlawry.

This point of view was consistently exemplified by the courts. In 1793, a woman by a codicil to her will gave legacies to several Catholic institutions in England and elsewhere.¹⁷ These were considered void:

14. "An Act for relieving his Majesty's Subjects professing the Popish Religion from certain penalties and disabilities. . .", 1777, 18 Geo. III, c. 60; "An Act to relieve, upon conditions, and under restrictions, the persons therein described, from certain penalties and disabilities to which Papists, or persons professing the popish religion, are by law subject", 1790, 31 Geo. III, c. 32. Chiefly, these acts improved the property rights of Catholics, removed restrictions on personal liberty, and conceded a substantial amount of freedom of worship.

15. In 1780, the Bishop of Derry favored a "seasonable indulgence" to both "Papists" and Presbyterians, of whom the latter were more dangerous to society as being "more truly republican". I Stopford-Sackville MSS. 250 [Hist. Mss. Comm. Rep. (1904)]. In 1791, Pitt regretted that the Catholics had applied for relief because their application would be "improperly confounded with the question of the Dissenters. This, however, is no good reason against the Catholics. . ." II Fortescue MSS. 13 [XIV Hist. Mss. Comm. Rep., pt. v. (1894)].

16. See 28 PARLIAMENTARY HISTORY 1262-69, 1364-76; 29 *id.* 113-19, 664-83; II Fortescue MSS. 89, 237.

17. *De Garcin v. Lawson*, 4 Ves. 433n (Ch. 1789).

those to foreign countries as contrary to English policy, those to English beneficiaries as illegal. A little later, the court of chancery held void the disposal of property at the discretion of a religious superior.¹⁸

In 1802, the same court disallowed a residuary bequest for bringing up poor children in the Catholic faith.¹⁹ The other beneficiaries filed a bill to set aside this bequest and to have the testator declared intestate as to the residue which would then pass to them. It was replied that the common assumption concerning the forfeiture of property devised to a superstitious use could not be maintained upon the statute.²⁰ When the devise was to a superstitious use and voided by statute, or to a charity and voided by the Statute of Mortmain,²¹ it should go to the heir at law. On the other hand, when the devise was to a charity but the mode promoted a religion contrary to the established one, the crown might by sign manual give orders in what charitable way the devise should be disposed. The plaintiffs, however, argued that such a disposition completely departed from the testator's intention, and that by the Statute of Mortmain his disposition of the property was absolutely void. Therefore, the court could not give it effect. In his decision, the Master of the Rolls carefully weighed the arguments. Although, he said, Catholics had no lawful right to devise property for educating children in their faith, "authorities without number" had concluded that, when a testator was disposed to be charitable upon his own principles, the courts should not disappoint even while disapproving his intention. The court would not overturn the settled law and practice according to which charitable bequests void as to one object might be appropriated to another. No statute made superstitious uses void generally; the pertinent statutes had a particular or temporary application. The use being superstitious was void, but not so far void that it should go to the heir. Bequests charitable in their nature should be applied to charities. Although the present residuary bequest was void, it should go to such charitable use as the king directed.

This case has considerable interest, for it became a signpost in many later decisions. Although in a narrow sense it bears out Dicey's contention that even prior to 1778 judges and juries "threw every difficulty in the way of informers who proceeded against Roman Catholics for penalties",²² it had the vicious effect of amplifying earlier steps in the

18. *Smart v. Prujean*, 6 Ves. 560, 31 Eng. Reprints 1195 (Ch. 1801).

19. *Cary v. Abbot*, 7 Ves. 490, 32 Eng. Reprints 193 (Ch. 1802).

20. 1 Edw. VI, c. 14 (1547).

21. 9 Geo. II, c. 36 (1735).

22. DICEY, *LECTURES ON RELATION BETWEEN LAW AND PUBLIC OPINION DURING THE NINETEENTH CENTURY* (1905) 80n.

direction of the doctrine of *cy pres*. This doctrine, which had in essence characterized the decision, already noted, in *Dominus Rex v. Lady Portington*, and had also appeared in the case, *Da Costa v. De Pas*,²³ proved to have most absurd, not to say unjust, consequences, since it permitted the king to disregard the wishes of the testator by making the latter support a charity completely repugnant to him.

Not long after *Cary v. Abbot* the Irish Chancery likewise considered the issue in a case worth recounting.²⁴ A Mrs. Power, by will dated May 25, 1804, bequeathed £9332 to two Catholic bishops and to their successors forever, in trust (amongst others) to apply the interest of £2000 in clothing such poor children educated in the school of the nunnery at Waterford, to lay out the sum of £1000 for the purchase or building of a house in Waterford for twelve "reduced gentlewomen," and to use the interest of £1000 for the support and the education of poor boys, to be nominated and appointed by the said trustees and their successors forever. In May, 1807, an information charged the trustees with legal incapacity, denied the legality of some of the trusts, and prayed for the appointment of new trustees and the devotion of the funds to legitimate charitable purposes. The relators maintained that no such corporate characters as a Catholic bishop and his successors were known to Irish law. A bequest to them was void. Likewise a bequest to endow a Catholic school was void by statute;²⁵ moreover, as a superstitious use it was void by *Cary v. Abbot*. The same objection applied to the £1000 for the education of poor boys. Against this it

23. In *Da Costa v. De Pas*, Amb. 228, 27 Eng. Reprints 150 (Ch. 1754), the court, arguing that where a devise promoted a religion contrary to the Establishment, the crown shall give it to a proper charity, applied a legacy for instructing Jews to a Christian Foundling Hospital. The bequest was good, the use was bad.

The doctrine of *cy pres* has recently been analysed by SCOTT, *THE LAW OF TRUSTS* (1939) 2098-2103. He emphasizes its prerogative as well as its judicial character, especially in connection with those cases "where property was given for a purpose which was illegal but which except for such illegality would be charitable." The prerogative doctrine gave the crown the right to apply the property to any charity it might select, on the theory that the purpose of the testator being charitable, he would have applied his bequest to the second end, had he known that the first was impossible. Applying a Jewish bequest to Christian beneficiaries shows the perverted nature of such reasoning, and Catholic cases greatly enlarged the moral. Significantly but not influentially, Wilmot pointed out the vicious consequences of *Da Costa v. De Pas* in *Attorney-General v. Downing*, Amb. 550, 27 Eng. Reprints 353 (Ch. 1766), Wilm. 1, 97 Eng. Reprints 1 (K. B. 1767), where he said that had he not been bound by authority, he would, in a case of this sort, have been inclined to hold for the next of kin; no testator should be made to support a charity repugnant to him. However, he felt the doctrine too firmly settled to go counter to it.

24. *Attorney-General v. Power*, 1 Ball & B. 145 (Ir. Ch. 1809).

25. 21 & 22 Geo. III, c. 62 (1781).

was argued that if the defendants could not take in a corporate capacity, they still might take as individuals, and that since the relaxing laws, the establishment of schools was not to be deemed a superstitious use, and the bequest contravened no law.

In his judgment the Lord Chancellor displayed a larger and more generous spirit than that exemplified in many earlier cases. He declared that the trustees might act in a qualified manner, but upon their death (or of either of them) the trust would devolve upon the chancery which did not recognize them in a corporate capacity. The bequest to the school would be void in England by the statute, 1 Edw. VI, c. 14 (1547) which did not extend to Ireland, or as against public policy. The statute, 7 Will. III, c. 4, sec. 9 (1695), while not creating the offense, penalized Catholics for keeping schools. Other laws strongly declared the assumption that Catholic schools were illegal, as in England. The trust for the education of the poor boys would cause no difficulty if the trustees made no distinction between Catholic and Protestant boys. Otherwise, the trust would be looked into. The English Mortmain Act, 1735, 9 Geo. II, c. 36, would render void the bequest for reduced gentlewomen, if Ireland were under that law. Since this act did not apply, the bequest was not declared void, though its legality was by no means absolutely settled. Although the decision here gave Catholics no immediate hope, the temper of the case, like that of *Cary v. Abbot*, showed no tendency to push the letter of the law to the farthest extreme. Nevertheless, the predicament of Catholics in such matters as that under dispute revealed a large measure of persecution which only legislation could abolish. In that sense litigation had unmistakable value.

In England, litigious activity after *Cary v. Abbot* lapsed for over a quarter of a century, but in 1828 a court declared against the legality of Catholic charities whose particular purpose was to promote the circulation of a treatise upholding the supremacy of the pope, and which therefore reverted to the donor.²⁶ The following year, however, legislation achieved the prior place of interest. The Emancipation Act²⁷ removed many oppressive political burdens and relieved Catholics in some measure of their outlawry. Yet, the act was by no means comprehensive, and three years later additional legislation attempted to settle some problems created by the Emancipation Act, particularly in the matter of charities.²⁸ This latter statute in turn stimulated extensive litigation.

26. *De Themmines v. De Bonneval*, 5 Russ. 288, 38 Eng. Reprints 1035 (Ch. 1823).

27. 10 Geo. IV, c. 7 (1829).

28. "An Act for the better securing the charitable Donations and Bequests of his Majesty's Subjects in Great Britain professing the Roman Catholic Religion," 1831, 2 & 3 Will. IV, c. 115.

III

The first case following the legislation was *Bradshaw v. Tasker*.²⁹ Bradshaw, who died in 1823, had in his will, dated 1820, bequeathed £500 to two Catholic schools. A bill, filed on behalf of the infant heir of Bradshaw, prayed that the legacies might be declared void and the sums added to the residuary personal estate. To complicate the situation, section three of the act, 2 & 3 Will. IV, c. 115 (1832), "for the better securing the charitable donations and bequests of his Majesty's Roman Catholic subjects in Great Britain," provided that nothing in the act should affect any suit actually commenced or pending, or any property in litigation. The plaintiff argued that before the act a bequest for the benefit of a Catholic school was unlawful. Were the legacies absolutely void, thus falling into the residue, or did the act recently passed operate retrospectively? Supposing the latter to be true, were not these legacies governed by the section against affecting a suit pending or property in litigation? Lord Chancellor Brougham "was of opinion that the act was retrospective; and that, as the trustees of the school [Tasker was a trustee] were not litigant parties in the suit, which was a mere suit for the administration of the testator's estate, the case did not fall within the exception in the third section of the act." The legacies should go to the trustees of the schools.

Fundamentally similar in many ways was *West v. Shuttleworth*.³⁰ A testatrix directed payment of several sums to certain Catholic beneficiaries as soon as possible after her decease so that she might have the benefit of their prayers and masses. She also gave the residue of her estate to trustees to pay specified sums for prayers for the repose of her soul and that of her deceased husband, and to promote the Catholic religion among certain poor and ignorant people. Anne West, the residuary legatee, filed the bill against the surviving executor. The court held that the gifts to priests and chapels were void and should go to the next of kin, but that the gift of the residue was valid within the recent Charities Act. Because this case dictated the trend of decisions for nearly a century, additional attention to its pleas and arguments seems warranted.

The plaintiff argued that if the legacies were void and no charitable purpose was indicated, the next of kin would be entitled to the benefit of the failure. The gifts to priests and chapels were to a superstitious use and consequently void, either by 1 Edw. VI, c. 14 (1547), or as against the policy of the law. Moreover, these indicated no charitable

29. 2 My. & K. 221, 39 Eng. Reprints 928 (Ch. 1834).

30. 2 My. & K. 684, 39 Eng. Reprints 1106 (Ch. 1835).

purpose. The gift for the promotion of knowledge of the Catholic religion, for propagating a religion other than that of the state, was equally void as contrary to the policy of the law. The defendant maintained that the gifts to the priests and chapels were in the nature of rewards for services to be performed and that no ground existed for supposing the prayers and masses were to be said in perpetuity. These gifts were void neither by the statute of Edward nor by virtue of running contrary to the general policy of the law. *Cary v. Abbot* held that no statute made superstitious uses void generally; the act of Edward applied only to superstitious uses of a particular kind then in existence. Moreover, the contest now made was for the testatrix's personal estate, whereas the statute specified real property. Although the residuary bequest might once have been held void, it was now, under the relief act of 1791 and the Charities Act, which Lord Brougham had held retrospective, perfectly valid.

Supposing that the present bequest, if made in behalf of Protestant dissenters, could be proved valid, it must be valid as regards Catholics. In *Attorney-General v. Pearson*,³¹ Lord Eldon had no doubt that the court should carry into execution a fund, real or personal, to maintain a society of Protestant dissenters, promoting no illegal doctrines although at variance with Anglican tenets. The doctrines of Catholics no more contravened the law than those of any class of Protestant dissenters; if a bequest for the latter was good, so was one for the Catholics. In qualification of this stand, however, one attorney insisted that, in removing doubts concerning the right of Catholics to acquire and hold property necessary for religious worship, education, and charitable purposes, the legislature had not intended that the Charities Act should change the whole policy of the law as it applied to doctrines other than those of the established church and sanction the unlimited propagation of the Catholic religion.

The plaintiff rejoined that the gifts for the purpose of obtaining prayers and masses could not be considered as gifts for a temporary service: the testatrix intended these to continue as long as her soul might remain in purgatory; her bequest was "a gift for a purpose in its nature superstitious, and void, therefore, as contrary to the policy of the law," irrespective of Edward's act. Furthermore, the residuary legacy sought to promote the Catholic faith at the expense of others. This bequest would be unlawful, whether the beneficiaries were Jews, Presbyterians, Catholics, or any other dissentients from the established religion. Since it indicated no charitable purpose but one contrary to the policy of the

31. 3 Mer. 353, 36 Eng. Reprints 135 (Ch. 1817).

law, the bequest failed altogether, and the next of kin should receive the residuary estate.

The Master of the Rolls, after reviewing the arguments, considered first the gift of the residue. Since the property was not in litigation upon the point contended for, in 1832, no consideration of the law concerning the disposition of property in favor of Catholics prior to that time, was necessary. What is the law in favor of Protestant dissenters, and thus of Catholics, now? *Bradshaw v. Tasker*³² did not help because a gift to certain Catholic schools differed in principle from promoting the Catholic religion among the poor and ignorant. On the other hand, *Attorney-General v. Pearson* sustained funds to promote doctrines not illegal; and since the court had favored legacies to dissenters the gift of the residue was valid here. The legacies to the priests and chapels were not affected by the Charities Act, because the testatrix intended them not for the priests personally but for the benefit of her soul and that of her late husband. Could such legacies be supported? Even if they were not within the terms of Edward's statute, many cases showed such legacies to be among the superstitious uses which that act intended to suppress. What should be done with them? Since they were void not by statute but on account of the general illegality of their object, the property did not go to the king. Had these bequests been charitable, the doctrine of *cy pres* would hold. The gifts were void because illegal; since neither the Chantry Act nor *cy pres* gave the crown a claim, the property went to the next of kin.

The importance of this decision is comprehended only when it is remembered that until 1919 it governed all such bequests. In that year, *Bourne v. Keane*³³ overturned *West v. Shuttleworth*³⁴ and sustained such legacies as these referred to. Even then, however, one member of the court thought it undesirable to run counter to *West v. Shuttleworth* and the opinions based on it. During the eighty-five years intervening between these two cases, as we shall see, several important decisions extended the judgment of *West v. Shuttleworth* which became a bulwark for those who would penalize Catholics. The case revealed also what is easily overlooked, namely, that of itself relief legislation was often woefully inadequate and so porous as to leave many loopholes for men to snipe at the adherents of a nonconforming faith. The Emancipation Act of 1829 has—and justly—received great attention and praise; to appreciate the full story, however, students must look into such neglected pages as those of *West v. Shuttleworth*.

32. 2 My. & K. 221, 39 Eng. Reprints 928 (Ch. 1834).

33. [1919] A. C. 815.

34. 2 My. & K. 684, 39 Eng. Reprints 1106 (Ch. 1835).

Two years later, the court of chancery nullified another will.³⁵ In 1680, a testatrix requested that a farm be let to some deserving Catholic who would minister to poor Catholics. The court now held these instructions illegal and void, partly on the convenient ground that at the beginning of this suit the Charities Act of 1832 had not been passed. Notwithstanding this ruling, the priest was awarded an annual grant of £20; it not being clear, however, whether this concession was regarded as legally due or as an indirect protest against the law as it then stood.

In 1839, an historically interesting case began its two year career in the courts, not the least of its engaging facets being the interpretation of a will dated 1513.³⁶ In that year, Sir Thomas Kneseworth devised lands to the Fishmongers' Company to secure prayers for the good of his soul. The Chantry Act provided that all such lands should be enjoyed by the king, but questions later arose as to whether the act vested the land itself or only the annual payments as rent charges in the crown. Accordingly in 1550, by Letters Patent between the crown and the Fishmongers' Company and other companies similarly situated, the companies purchased the rent charges to which the crown had or was supposed to have become entitled. Some indecision still remaining, a private statute, 4 Jac. I, c. 10 (1606), confirmed the hereditaments to the said companies forever without rent. In 1833, the Attorney-General sought to have Kneseworth's trusts declared charitable and to be carried into effect by the court.

The defendants, maintaining that virtually all the payments were directed to superstitious uses, claimed to have performed the only charitable purpose by applying considerable parts of the income to ends more or less specified in the will. This they did from pious regard, not from obligation. The plaintiff replied that the *obits* alone came within Edward's act; the other bequests were valid, to be carried into effect *cy pres* by the court. The defendants by their conduct had admitted the estate to be subject to charitable trusts. Edward's statute sought not to overthrow works of charity, but to remove the abuse; the statute of James supported this view. In return, the defendants emphasized the company's title to the rents and grants which had been confirmed by James. The testator had intended the company to take some part by making it liable to a penalty for default in the performance of the trust. Because the gifts were superstitious the statute deemed the king in

35. *The Attorney-General v. Todd*, 1 Keen 803, 48 Eng. Reprints 516 (Rolls 1836-37).

36. *The Attorney-General v. The Fishmongers' Company (Kneseworth's Charity)*, 2 Beav. 151, 48 Eng. Reprints 1137 (Rolls 1839). A case somewhat similar to this was *The Attorney-General v. The Cordwainers' Company*, 3 My. & K. 534, 40 Eng. Reprints 203 (Ch. 1833).

actual possession; therefore, the doctrine of *cy pres* had no validity. Even if the company had devoted part of the income to charity, it had assumed complete freedom of disposal.

The Master of the Rolls agreed that James's statute had vested in the Fishmongers' Company such lands or interests as the crown was entitled to by Edward's statute. Were any of Kneseworth's trusts good charitable trusts which had been violated by the defendants? Foundations securing prayers for the souls of the dead were superstitious within the statute of Edward VI; the directions of the will were such that payments made in respect thereof became the property of the crown. Prayers for the souls of the dead had never been deemed superstitious, but to endow a foundation in perpetuity for securing such prayers might be deemed superstitious. All the estates became the property of the company.

In a parallel suit, differing slightly in detail, the relators sought to impeach the company's title to absolute ownership and to make the company only a trustee. The defendant again received judgment. In 1840-41, both cases were carried on appeal to the Lord Chancellor who held that the Letters Patent of Edward and the statute of James gave the company all the interests in the property to which the crown became, or might have become, entitled to by Edward's act, subject to no trust whatever; in any case he could not establish charities made illegal by that statute.³⁷ In the second suit, the relators had to pay the cost of the appeal, and the Lord Chancellor sharply condemned their lamentable carelessness in not investigating the facts before making an impossible appeal.

In 1839, Catholics had their first advowson test in a century.³⁸ The plaintiff and Knight, a Catholic, were seised of an advowson in equal moieties. When the living fell vacant, the plaintiff presented a fit person whom the defendants refused to accept because Knight had not joined in the presentation and because they had no notice of his faith. The court decided that where a Protestant and a Catholic were co-patrons, the right of presentation lay in the Protestant alone. The statutes only intended to keep the Catholic from presenting, and any other interpretation would penalize the Protestant co-patron. To transfer to the universities the power to present, when not all the co-patrons were disabled, would be a *casus omissus* in the statute. In this respect, the status of Catholics had not improved since 1615, regardless of the relief acts,

37. *The Attorney-General v. The Fishmongers' Company (Preston's Will)*, 2 Beav. 588, 48 Eng. Reprints (Rolls 1839), 5 My. & Cr. 11, 41 Eng. Reprints 276 (Ch. 1841).

38. *Edwards v. The Bishop of Exeter*, 5 Bing. N. C. 652, 132 Eng. Reprints 1251 (C. P. 1839), 6 Bing. N. C. 146, 133 Eng. Reprints 57 (C. P. 1839).

and after such assurance as given here they did not raise the issue again for over half a century.

The year 1842 brought a contest over legacies of £15,000 to the use of Catholic priests in and near London, of £2,000 for a Catholic chapel, and others similar in nature.³⁹ At the instance of several priests an information prayed that the £15,000 might be invested and secured, its charitable use established, and its regulation and disposal settled, since the testator intended the legacy, a charitable one, as a permanent endowment for the support of Catholic clergy in and near London. The defendant, one of the trustees, argued that the testator wished to benefit specific Catholic priests and not their successors. The Vice-Chancellor agreed with the relators. The phrase, "for the use thereof," must "be construed as importing perpetuity;" the gift to the chapel sustained this view. Where the testator meant a precise person, he so stated. The legacy of £15,000 was a charitable use.

Twelve years later, a similar issue occupied the courts.⁴⁰ A testator bequeathed annuities to churches in Italy and England for masses and requiems. Since such bequests contravened the *spirit* of English law, the testator transferred the stock in his own lifetime to trustees to carry out his intentions. Although it was argued that gifts for such prayers were not illegal, the residuary legatees insisted that the Charities Act of William IV⁴¹ had only put Catholics on the same footing as Protestant dissenters. It did not make a use which was superstitious cease to be so. Gifts for masses and requiems were void. In his decision, the Vice-Chancellor primarily considered whether the uses and purposes of the donor were void as superstitious. Before William's act, such were superstitious and void, and the property went to the crown. What did the statute accomplish? If it meant to alter the law it was singularly inapt. Actually it put the Catholics on a footing with the Protestant dissenters. Property given for a place of worship but not for superstitious uses was lawful. Since the present uses were superstitious the only question concerned the recipient. No charity being involved, the residuary legatees and not the crown were the beneficiaries.

In 1861, the same hardy perennial required settlement.⁴² Blundell in

39. *The Attorney-General v. Gladstone*, 13 Sim. 7, 60 Eng. Reprints 3 (V. C. 1842). Two years later, 1844, an act, 7 & 8 Vict. c. 102, repealed certain penal enactments ranging from the reigns of Edward VI to William and Mary.

40. *Heath v. Chapman*, 2 Drew. 417, 61 Eng. Reprints 731 (V. C. 1854). By *Brecks v. Woolfrey*, 1 Curt. 880, 163 Eng. Reprints 304 (Ecc. 1838), such gifts for prayers were held not contrary to Church of England doctrine.

41. 2 & 3 Will. IV, c. 115 (1832).

42. *In re Blundell's Trusts*, 30 Beav. 360, 54 Eng. Reprints 928 (Rolls 1861). The

1807 had transferred £1000 into the names of three specified trustees (whose successors were provided for) to distribute the income to priests of specific chapels on condition of celebrating masses for the repose of Blundell's soul. If these priests failed, the trustees should pay the appropriate funds to priests willing to comply. The dividends were paid for many years but in 1861 the trustee, being advised that doubts existed as to the validity of the trusts, paid the fund into court. Priests of four chapels declared their willingness to comply with the terms and requested payment. The Master of the Rolls, stating his obligation to follow *West v. Shuttleworth*, held the trust void and ordered the fund paid to the representative of the founder: the House of Lords alone could alter the law.

*In re Metcalfe's Trusts*⁴³ was another variation on this theme. A Miss Thompson became a Catholic and a nun in 1858; in 1862 she conveyed and assigned all her property to X and Y upon trust for the benefit of an Oratory at Brompton; all future acquisitions would be conveyed to the same men for the same purpose. After this, Metcalfe left her some property. She petitioned that this be given to X and Y, but her action was opposed on the ground that a nun being civilly dead was incapable of taking property, and many cases were cited to support this contention. Nevertheless, the court, after considering whether or not a nun was capable of inheriting and assigning property, declared Miss Thompson to possess legal capacity of owning and transferring land. The hostile precedents—with the irrelevant exception, *Rex v. Lady Portington*⁴⁴—occurred before the Reformation; no cases afterward denied a nun's right to inherit and convey property.

In *Cocks v. Manners*,⁴⁵ a testatrix bequeathed the residue of her property, consisting of pure and impure personalty, to four Catholic institutions. The Vice-Chancellor held the bequest to a community of sisters, a voluntary, charitable institution, good as to the pure personalty, and the bequest to a Dominican convent good as to both pure and impure personalty. "Religious purposes are charitable," he decided, "only when religious services tend directly or indirectly towards the instruction or edification of the public."

Although these two cases seemed to indicate a trend in favor of Catholic property rights, evidence was not long in coming to show that

preceding year had seen the passage of another Charities Act, 1860, 23 & 24 Vict. c. 134, but it was not sufficiently powerful to change the ruling of *West v. Shuttleworth*.

43. 2 De G. J. & S. 122, 46 Eng. Reprints 321 (Ch. 1864).

44. 1 Salk. 162, 91 Eng. Reprints 151 (K. B. 1693), 3 Salk. 334, 91 Eng. Reprints 856 (K. B. 1693).

45. L. R. 12 Eq. 574 (1871).

certain bequests were still void as illegal. *In re Flectwood*⁴⁶ declared a gift for masses void. A decade later, the court annulled a legacy to a superstitious use, given by a testator domiciled in England, even though the legatee resided abroad where such a legacy was good.⁴⁷ The testator, a domiciled Englishman, bequeathed to the Society of Jesus at R., Victoria, Australia, £1000 to be spent in masses. The court held that the legacy, being void in England, did not become legal through the legatees' domicile in Victoria, where it would be valid. On another occasion, a residuary bequest, given in trust for the Catholic Archbishop of Westminster for the time being to be distributed between various charitable, religious, and other societies, institutions, or persons of the Catholic faith in England as he saw fit, was held void.⁴⁸ Uncertainty, however, rather than religion seemed to determine the judgment inasmuch as the executors expressly sought to discover whether this was a good charitable bequest.

In 1914, the issue again called for settlement.⁴⁹ Erasmus Smith devised his property, less certain expenses, to trustees to hold the residue in trust for "the Franciscan Friars of Clevedon." The plaintiffs, who were the executor, executrix, and trustees, questioned the validity of the trust as contrary to the Relief Act of 1829, of which the pertinent section recited the expediency of suppressing "Jesuits, and members of other Religious orders, Communities, or Societies of the Church of Rome, bound by monastic or religious vows, resident within the United Kingdom." The law further provided that natural born Jesuits might return to the kingdom and be registered. The court held the will valid: the sections relied on "have never been enforced. They are, as they have been from the first, and no doubt remain, a dead letter." Taken in their widest possible sense, they did not place the defender, "even if and when convicted, in the position of an outlaw; or disqualify him from taking, by conveyance or assignment *inter vivos* or by will, or from holding any property, even real estate, in this country." By the law a person becoming a Jesuit was guilty at the most of a misdemeanor. A felon was no longer disqualified as to holding property; how then could one guilty of a misdemeanor be disqualified? While some Irish cases had held that an unincorporated society could not take property, Irish cases upon the whole were far from satisfactory and need not be followed. The bequest in question was "a gift to the several members of the community of Franciscan Friars at Clevedon upon a simple imme-

46. 15 Ch. D. 594 (1880).

47. *In re Elliott*, 39 W. R. 297 (1891).

48. *In re Davidson*, [1909] 1 Ch. 567.

49. *In re Smith*, [1914] 1 Ch. 937.

diate absolute bequest of individuals ascertained at the death of the testator."

In 1917, the Chancery settled a dispute over a bequest by a testatrix to the trustees of her will, to pay the income for life to her nephew when he should have attained the age of 24 years, provided that he should not be a Catholic at her death or being a Catholic at her death should cease to be so before the expiration of a year.⁵⁰ The nephew was only 9 years old when the testatrix died. He had been baptized in a Roman Catholic Church and brought up by his father in that faith. The court held that the nephew had not forfeited the legacy as the testatrix intended him to make a choice which he could not do until he reached years of discretion. In the eye of the court an infant was incapable of being a Catholic or not a Catholic.

In 1919, *Bourne v. Keane*⁵¹ strikingly reversed the law of bequests for masses by deciding that such a bequest of personal estate was not void as a gift to superstitious uses. Before discussing that revolution, it may be well to bring together the scattered suits of other application during the later nineteenth and early twentieth centuries. This litigation, lacking uniformity and defying classification, revealed nonetheless the manifold ways in which Catholics might have their religion flaunted, their social status circumscribed, and their individual rights invaded. If the issues were on the whole less significant than those touching bequests, the implicit persecution appeared very clearly.

IV

The *Earl of Shrewsbury v. Scott*⁵² recalled a more intolerant age. In 1700, the then Earl of Shrewsbury made a settlement of his lands, etc. At that period, persons professing the Catholic religion, unless they took certain oaths and subscribed a specific declaration within six months of attaining the age of eighteen years, were incapable of inheriting, and the property would go to the Protestant next of kin. Under the will of a former owner the plaintiff was now entitled to the land in question until something disentitled him. The court held, however, that the plaintiff, a Catholic, having done nothing to remove the penalties of the act, could not take the land. The Relief Act of 1829 did not remove this disability.

Four years later a pleasant, albeit a minor contrast to hostile deci-

50. *In re May*, [1917] 2 Ch. 126.

51. [1919] A. C. 815.

52. 6 C. B. N. S. 221, 141 Eng. Reprints 437 (1860). In 1867, this situation was improved by an act abolishing the declaration against transubstantiation and other devotional ceremonies. 30 & 31 Vict. c. 62.

sions occurred. To sustain her plea of coverture, the defendant swore marriage by a priest in 1844 in a Catholic chapel to a Catholic.⁵³ The plaintiff sought to prove the marriage not solemnized in a registered place of worship as required by a recent act, 6 and 7 William IV, c. 85 (1836), but the court declared the legality of the marriage.

Quite different in character from these disputes was *The Queen v. Haslehurst*.⁵⁴ The Poor Law empowered overseers and guardians to employ requisite paid workers to superintend the administration of the relief and employment of the poor, but no workers should be compelled to attend any services contrary to the religious beliefs. In this instance a Catholic clergyman was appointed for those of that belief, yet payments to him were disallowed by the auditor. The court held that since the guardian could lawfully provide religious services for the different workers, he could appoint and pay persons to hold such services. The phrase, "officers to superintend", included ministers of different religious beliefs. It was competent, therefore, of the guardians to appoint and pay a Roman Catholic clergyman to minister to the religious wants of the Roman Catholic inmates of the workhouse.

In 1891, *Petre v. Ferrers*⁵⁵ brought a different instance into court. The Petres, an old Catholic family, years before had a bishop consecrate an altar in their mansion where it was used only for worship. The lessee of the mansion, now the defendant, gave the altar to a bishop. Previously, the house had ceased to be used as a place of worship. The defendant claimed that his action accorded with church law and that when the status of the house changed, the title to the altar passed to the bishop. In rejecting this plea, the court held church law no part of the common law and ordered the return of the altar.

The year 1892 saw the reappearance of the advowson issue.⁵⁶ Boyer, nominated by Sir Alexander Dixie to a vacant rectory, was in all respects qualified for the position. Because Sir Alexander was a Catholic, the Bishop of Norwich refused to accept the nomination under the statute which read, "Every Papist is hereby incapable to present to any benefice." Although Sir Alexander was the heir to one who had formerly had the right to present, and although he had the necessary education and other requirements, the statute made him ineligible. It was not only the bishop's privilege to refuse, but his duty. The nomination was entirely void.

Some ten years later a dispute of broader and quite novel character

53. *Sichel v. Lambert*, 15 C. B. N. S. 781, 143 Eng. Reprints 992 (1864).

54. 13 Q. B. D. 253 (1884).

55. 65 L. T. 568 (1891).

56. *Boyer v. Bishop of Norwich*, [1892] A. C. 417.

over a mandamus commanding a magistrate to hear and determine the application for summonses against three men charged with having become Jesuits, attracted attention.⁵⁷ The Relief Act of 1829, cited against the three men, provided "in case any person shall after the commencement of this Act within any part of this United Kingdom be admitted or become a Jesuit, . . . such person shall be deemed and taken to be guilty of a misdemeanor, . . . and shall be banished from the United Kingdom for the term of his natural life." The magistrate, Kennedy, refused to hear the application on the grounds that the statute was obsolete, and that the proceeding could only be taken by information by the Attorney-General. Asked if he would allow the action were the charge altered, the magistrate refused. Whereupon an attempt was made to compel him to do so. The court, though discharging the case, held the law not to be obsolete, for in 1898 parliament had refused to repeal this section of the Roman Catholic Relief Act. This statute, however, had been intended to get the Jesuits out of the country rather than to punish them. In any case, the law had not been constantly enforced. Because the magistrate had discretionary powers, the court would not invalidate the conclusion of his discretion except where he clearly exceeded the proper limits. He was not bound to issue a summons at the instance of an ordinary reformer. Considering these circumstances, the court refused to grant the writ of mandamus.

In 1913, the distant past awoke when *The Times* Publishing Company published a papal bull and supposedly contravened the statute of 1571.⁵⁸ The court declared that translation and publication of a papal bull simply for the information of readers in no way violated the Elizabethan law. The words of that statute, "publish or put in use," meant publishing so as to make the bull operative in England. Clearly *The Times* had no such intention.

V

Until 1919, despite several rather significant exceptions, the condition of English Catholics showed many fundamental weaknesses. On almost any given issue they were more likely to suffer a defeat than to gain a victory, and, so far as bequests for masses were concerned, *West v. Shuttleworth* still held. Ninety years had passed since "Catholic Emancipation"; yet, not only by virtue of exceptions in "relief" legislation but also on account of hostile court decisions, Catholics were still extensively unemancipated. "No-Popery", while no longer sufficiently potent to break heads and windows, permitted the application of many

57. *Rex v. Kennedy*, 86 L. T. 753 (1902).

58. *Mathew v. Times Publishing Co. Ltd.*, 29 T. L. R. 471 (1913).

restrictions not to say oppressions. A large measure of relief, however, did materialize through the judgment of *Bourne v. Keane*.⁵⁹

Inasmuch as this decision overruled *West v. Shuttleworth*⁶⁰ and the cases based thereon, namely, *Heath v. Chapman*,⁶¹ *In re Blundell's Trusts*,⁶² *In re Fleetwood*,⁶³ and *In re Elliott*,⁶⁴ a summary of the facts and arguments seems warranted. Lords Birkenhead, Buckmaster, Parmoor, and Atkinson concurred in the decision, but Lord Wrenbury, reviewing the authorities on the non-disturbance of long-standing decisions, dissented on the ground that *West v. Shuttleworth*, having been so long recognized as an authority, ought not to be disturbed. A Catholic testator bequeathed £200 to Westminster Cathedral for masses, and £200 and his residuary personal estate to "the Jesuit Fathers, Farm Street," for masses. Following *West v. Shuttleworth*, the Court of Appeal voided the gifts as gifts to superstitious uses. At the Bar of the Lords the next of kin contended that the bequests to the Jesuit Fathers were void under the act of 1829. The Lords held (1) that the bequests were not void as gifts to superstitious uses; (2) that the contention of the next of kin as to the bequests to the Jesuit Fathers failed—by Birkenhead and Atkinson for insufficient evidence concerning the community, by Birkenhead on the ground that the next of kin had not raised this point in their case, and by Buckmaster and Parmoor (following *In re Smith*⁶⁵) because these bequests were for individual members of a particular order resident at a named place and impressed with no trust for the benefit of the order.

The appellants argued that the will of Henry VIII contained directions for masses, and that the First Book of Common Prayer, composed after Edward's Chantry Act, included prayers for the dead, although the Second Book did not. An analysis of the Chantry Act revealed its limited application as to time and to character of property. Although the saying of masses became illegal in 1581, the statute of 1791 had mitigated this situation. In reviewing penal legislation and litigation, the appellants dilated upon the paradox of legalizing Catholic worship and attaching an illegality to ceremonies: if a gift to build a Catholic cathedral was valid, why not a gift for masses. *West v. Shuttleworth* and the cases following it rested on one of two erroneous views, namely,

59. [1919] A. C. 815.

60. 2 My. & K. 684, 39 Eng. Reprints 1106 (Ch. 1835).

61. 2 Drew 417, 61 Eng. Reprints 781 (V. C. 1854).

62. 30 Beav. 360, 54 Eng. Reprints 928 (Rolls 1861).

63. 15 Ch. D. 594 (1880).

64. 39 W. R. 297 (1891).

65. [1914] 1 Ch. 937.

that the Chantry Act by implication made gifts for masses illegal, or that such gifts were illegal at the date of the statute. According to *Bowman v. Secular Society*,⁶⁶ the Catholic religion only contravened statutes; remove these and gifts were legal. *West v. Shuttleworth* had turned a relieving act into a penal statute. Gifts for masses were good in the British dominions, Ireland, and the United States. The implication toward illegality in Edward's act had been removed by the equally strong implication toward legality in the Charities Act of William IV. Moreover, to give effect to the Charities Act of 1860, the mass must be legalized. In rebuttal, the respondents insisted that gifts for masses were always illegal, that right or wrong, *West v. Shuttleworth* ought not to be disturbed, and that *In re Smith* was a bad decision based on a misconstruction of a will. Even more interesting than these arguments, however, were the judges' opinions.

Birkenhead informed the Lords that they could not escape the duty of overruling decisions treated as binding for generations. Bequests for masses were legal. If his view prevailed, their Lordships would not within a short time have pronounced valid legacies for the purpose of denying fundamental doctrines of the Christian religion, and have nullified a bequest for the purpose of celebrating the central rite in a creed accepted by many millions of their Christian fellow-countrymen, and the importance of which in the varied history and ceremonies of the Catholic Church was incalculable. Moreover, England would be brought into line with Ireland, the dominions, and the United States. Such considerations might temper the admitted impolicy of disturbing old conclusions. The common law recognized the validity of gifts for masses: how strange for that law to discourage gifts recommended by its own doctrine of frankalmoigne! Celebration of the mass survived Edward's statute; although ousted from the Second Book of Common Prayer and the Elizabethan Book of Common Prayer, it did not become criminal until 1581.

Inasmuch as the Edwardian statute was the only basis for the case against masses, Birkenhead analyzed its historical influence. Duke on *Charitable Uses* had been mainly responsible for the idea that the statute nullified gifts for masses, but Boyle on *Charities* had defined a superstitious use as "one which has for its object the propagation or the rites of a religion not tolerated by law." The Relief Act of 1829 undid previous unfavorable decisions; *West v. Shuttleworth* was not well founded; the reasoning in *Heath v. Chapman* was not to be supported. Finally, masses were not illegal at common law; no act made them illegal before

66. [1917] A. C. 406.

1547; the act of Edward (1547) did not make them illegal. Although they became illegal in 1581, they ceased to be penal offenses in 1791. Therefore the appeal must be allowed with costs.

The judgments of the other lords, though less comprehensive, possessed considerable interest. Buckmaster and Parmoor, more prosaic, adverted to Lord Mansfield's opinions on toleration in *Harrison v. Evans*.⁶⁷ The first stressed the diverse consequences of the Toleration Act (1689), saw in the Charities Act of 1860 an enabling statute, and agreed that *West v. Shuttleworth* being wrongly decided ought not to be perpetuated. Parmoor recalled Mansfield's opinion, the common law "knows of no prosecutions for mere opinion." Atkinson sharply criticized those responsible for sustaining penal burdens. No preamble to an act, such as Edward's statute, could be regarded as a coercive provision; any decision based upon such an assumption must be erroneous. The Catholic religion was not at Henry's death regarded as false. Although the law of 1832 undid all that had gone before, Cottenham in *West v. Shuttleworth* had decided that the legacies were not within the law; yet he considered that statute to establish the illegality of certain gifts—"a most unsatisfactory statement of the law." Of the judgment in *Heath v. Chapman*, Atkinson observed: "With all respect I think it would be difficult to compress into such a limited space more historical and legal inaccuracies. . . . It is too late in the day to hold in this country that a religious ceremony . . . is merely a superstitious rite."⁶⁸ Consequently, he was even prepared to hold that *Adams and Lambert's Case*⁶⁹ and others following it were wrongly decided.

Equally interesting was Wrenbury's dissenting opinion. Perhaps from some points of view, he disregarded vital human factors; nevertheless when one takes into consideration the confusion that was implicit in reversing *West v. Shuttleworth* and therewith its pendant cases, it may be suggested that his conservatism covered more than the narrow legalist. Characterizing the mass as a solemn service, he stressed its purpose to relieve souls in purgatory; a devise for procuring masses affirmed the doctrine of purgatory. Although neither statute nor common law forbade the saying or hearing of mass, a devise to procure masses was not necessarily legal. The dicta of *Adams and Lambert's Case*, a case on the statute itself, were not to be disregarded, and the dicta opposed gifts for superstitious uses. As Wrenbury saw the situation, "There is a statute passed in 1547—an opinion was expressed upon its true construction in 1602—the construction accepted in 1602 was acted upon

67. 3 Bro. P. C. 465, 1 Eng. Reprints 1437 (H. L. 1767).

68. See *Bourne v. Keane*, [1919] A. C. 815, 892, 895.

69. 4 Co. Rep. 104b, 76 Eng. Reprints 1091 (K. B. 1602).

judicially in 1835—that judicial decision has been accepted ever since.”⁷⁰ What has been law for over 300 years ought to be retained! Was it expedient to overturn judgments in this manner? Should a court, competent to overrule a decision of long standing, overrule it if titles taken on the footing of the decision were affected? Length of time was a material consideration. The appeal ought therefore to be dismissed.

Regardless of the logic and sound law in this reasoning, Wrenbury's opinion has now only an academic interest. The opinions of Birkenhead and Atkinson were on the other hand especially notable in their deliberate overturning of a century of unjust and—what was worse from their viewpoint—unfounded decisions. Undoubtedly *Bourne v. Keane* has every claim to be considered a landmark in the history of toleration in England. Lacking perhaps some of the fiery zeal of the pamphlet, this judgment like that of *Harrison v. Evans*, has a value all its own. It expressed the opinion, the considered opinion, of the highest court in the land. It expressed that opinion in weighty arguments and dignified style with a rich substratum of history and law. It stood as a precedent for subsequent decisions. That for the immediate future at least, the litigious career of Catholics was to be marked by victories became clear in the cases following *Bourne v. Keane*. Though the particular issues vary, the fundamental principle clearly relates to what had gone before.

*In re Barclay*⁷¹ revived the question of trusts. A testatrix in 1903 willed the residue of her property, after the death of G. who had a life interest, to “the Superior of the Jesuit Church of the Immaculate Conception . . . to the Superior of that Church at the moment of the legacy falling due, and failing him to any other representative Father of the Order of the Society of Jesus. . . .” The testatrix died in 1910, G. in 1928; the Superior in 1928 was not the one of 1910. A lower court held the gift to the Superior at the moment of G.'s death valid. On appeal, it was decided “that the gift was to this Superior upon trust for the benefit of the church . . . as he might in his discretion think fit; and that this was a valid gift.” Some interesting questions marked the case, of which the relation of the Catholic relief act of 1926 to what had gone before had the greatest relevance.⁷² This act was held not retrospective, so that certain dispositions before that act might be invalid as infringing the statute of 1829.

The final cases that need be mentioned here largely maintained the precedent set by *Bourne v. Keane*. In 1930, concerning a residuary

70. See *Bourne v. Keane*, [1919] A. C. 815, 922.

71. [1929] 2 Ch. 173.

72. 16 & 17 Geo. V, c. 55 (1926). This statute repealed certain sections of earlier acts.

bequest for the benefit of the Catholic Church, the plaintiffs held that since nothing restricted the bequest to charitable uses it should be voided, the more especially because the Catholic Church also had civil functions; the defendants thought the bequest intended for the particular church attended by the testatrix.⁷³ The court considered three answers as to who got the gift: a particular church, "the quasi-corporate institution consisting of those persons who carry on the Roman Catholic religion," or individual members of the Church. The last would fail for uncertainty; no evidence supported the first; the second was intended and was a good gift. In 1932, the Court of Chancery held a devise to the sisters of a community and to the clergy valid as a good charitable trust given to good objects of charity.⁷⁴ Two years later, the same court declared a gift for saying masses to be a good charitable gift because it assisted the performance of a ritual, the central act of the religion of a large number of Christians, by endowing the performers of that act.⁷⁵

VI

To summarize and interpret the foregoing material in any extensive fashion is unnecessary, for in most instances the reports of the cases present the facts and arguments in an adequate degree. Attention has of course been directed not toward any technical items of law, either as to substance or procedure, but toward the attitude of English courts and law on various matters of high concern to millions of people. In estimating the significance of these cases, one should remember their indicative as well as their imperative role. Not only did they penalize or benefit specific members of a religious minority, they also pointed the way for the whole group. Likewise, the particular cases here gathered together indicate what might prove a fruitful source of investigation, namely, the records of lesser courts. The atmosphere of feverish controversy created by demagogues has perhaps too long been accepted by historians as the complete story. "No-Popery" was undoubtedly a powerful party cry, but, inasmuch as in other times and countries the planks of a political platform have not always expressed the daily social philosophy of the rank and file, it is difficult to believe that the citizenry of England was constantly at white heat over religious issues. The records of lower and local courts might well reveal to what extent Catholics were *not* persecuted.

Here, however, the concern has to a large extent been directed to the opposite aim. As suggested at the outset, the cases which fiber this

73. *In re Schoales*, [1930] 2 Ch. 75.

74. *In re James*, [1932] 2 Ch. 25.

75. *In re Caus*, [1934] Ch. 162.

account drive home in a clearcut fashion what the penal laws meant and how they might be painfully and perhaps indirectly applied years after the event for which the laws were made, when, all passion spent, the ancient catchwords and long dead controversies experienced a mechanical resurrection. Additional value derives from perusing these disputes through the opportunity to observe the character of the arguments and opinions. The reasoning and prejudices of the advocates and the judges have a place in the history of thought not less than the systems of philosophers and the fiery zeal of pamphleteers. Furthermore, the direct relation of these arguments and opinions to coercive activity gave them a relevance not always apparent in the expression of sentiments, no matter how noble or convincing. While undoubtedly some cases discussed here arose as test cases to reform the law by revealing its shortcomings, an atmosphere ranging from oppressive bigotry to callous selfishness permeates a great many.

Although the legal status of English Catholics has unmistakably improved since 1829, the very appearance in courts of law of such issues as those summarized above evidences a precarious situation in the recent past. With the tide of decisions turning steadily in Catholic favor or at least against those who would badger and persecute the sect, however, the litigious experiences of Catholics are likely to decrease. Be that as it may, the full story of their persecution cannot be appreciated without attention to those experiences during the last four centuries.