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WHY PENNSYLVANIA RESTRICTS GIFTS FOR MASSES

By

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There are no restrictions at common law on the power of the owner of property to make gifts for Masses. Common law early recognized as a legal right the interest of the individual owner to dispose of his property 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.

Pound says: "An important phase of the social interest in the individual life calls for security to free and spontaneous self-assertion and is connected easily with the juristic thought of the immediate past. But there are many conditions in the life of today in which other phases of this interest must come into account and may call for restrictions upon abstract self-assertion. Thus American legislation restricted the power of Indian allottees to dispose of the tracts allotted to them. British legislation limited the jus disponendi of Irish tenants, suddenly turned into proprietors and without experience of economic freedom. Courts of equity avoided sailors' contracts, contracts with heirs and sales of reversions and expectancies, and agreements with debtors clogging their equity of redeeming mortgaged property where there was an economic pressure and only an abstract theoretical freedom of contract. Back of these doctrines of equity was a dim recognition of a social interest of which we have come to be fully conscious. Today our statute books are full of such restrictions. We do not ask: What will promote the maximum abstract freedom of contract as an item of the general

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1In the United States there have never been any statutory enactments restricting specifically gifts for Masses. "The doctrine of superstitious uses arising from the statute 1 Edw. VI, chap. 14, under which devises for procuring Masses were held to be void is of no force in this State, and has never obtained in the United States." Cartwright, J. in HOEFFER V. CLOGAN, 171 III. 462, (1898).

The English restricting statues were repealed in the last century. See BOURNE V. KEANE, 1919 Appeal Cases 815 (House of Lords).


3Jhering suggested the classification into individual interests, public interests, and social interests. DER ZWECK IM RECHT (1877) 467-83.

4Natural law secures the right of certain relatives under special circumstances 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 view-point 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.

abstract freedom taken to be the end of law? We ask instead: Is it wise social engineering, under the actual social and economic conditions of the time and place, to limit free self-assertion, or what in appearance is free self-assertion, for a time in certain situations?"

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

"b. . . . In some States 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 States 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 States restricting 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 benefit his children and parents. (Compiled Editions of the Civil Codes of 1940, sections 1493, 1494, 1495, 1496, 1497). A surviving spouse is protected by other statutes.

Pennsylvania, like every other State, has no statute specifically restricting gifts for Masses. It does have a statute restricting gifts for charitable uses, generally, and this statute and the judicial decisions thereon will serve to illustrate the scope of statutory restrictions on gifts for Masses.

Pennsylvania's first restricting statute on gifts for charitable uses was the Act of April 26, 1855. The real heart of this statute was expressed in these words:

"no estate . . . shall . . . be bequeathed . . . to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by . . . will . . . at least one calendar month before the decease of the testator. . . ."
By 1855 such legislation was not altogether novel. More than a century before, England sought to cure the same mischief which prompted the legislature of Pennsylvania to enact its own restricting statute. Read, J., in Gable’s Ex’rs v. Daub, states the impelling reason for the restricting legislation of England as follows:

"Devises to charitable uses became so frequent in England, particularly by languishing or dying persons, that the statute of George II, Ch. 36, was passed, enacting, that after the 24th June, 1736, no lands, or money to be laid out in lands, or any interest in lands, shall be given or conveyed for the benefit of any charitable use whatever, unless by deed executed in the manner prescribed twelve calendar months before the death of the donor or grantor, and enrolled in the Court of Chancery within six calendar months from its execution."

The Act of April 26, 1855 was amended by Section 6 of the Wills Act of 1917, which in turn has been amended so that the present restricting statute of Pennsylvania is as follows:

"No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator, which period shall be so computed as to exclude the first and include the last day thereof; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, heirs or next of kin, according to law."

Today in Pennsylvania the requirements for a valid bequest for Masses are exactly the same as the requirements for any valid bequest, with the exception that, like all other gifts for charity, the will must be executed "at least thirty days before the decease of the testator."

A gift to be inhibited by the statute must have been made "for religious or charitable uses." Read, J. in McLean v. Wade, stated: "A religious purpose is a charitable purpose, but our act places the question beyond all doubt, for it uses both terms, 'religious or charitable uses'." In cases of bequests for Masses courts need spend no time in determining the constituents of the concepts, "religious purpose" and "charitable purpose." A Mass stipend is always for the support of priests. It is always a gift on condition precedent that the Mass be said and applied as requested by the donor. The Church law so provides. However, as

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841 Pa. 266 (1861).
10Kenneth R. O’Brien, ibid., p. 132.
common law courts do not take judicial notice of canon law, proof of the pertinent provisions of the canon law as facts must be made in the trial courts. As soon as it is duly established by proper evidence that a Mass stipend is always for the support of priests, the conclusion irresistibly follows that the gift is for the advancement of religion, and consequently is for a charitable use. Pember v. Inhabitants of Knighton so decided in 1639 and this case has been followed to the present time.

In Pennsylvania the courts have construed the basic restricting Act of April 1855, and its amendments, in the following cases:

Ann Dougherty's Estate, 12 Phila. 70, (Orphans' Court), (1878);
Rhymer's Appeal, 93 Pa. 142, (1880);
O'Donnell's Estate, 209 Pa. 63, (1904);
Estate of Moran, 24 Lanc. Law Rev. 70, (Orphans' Ct), (1906);
Farrell's Estate, 1 Pa. Dist. & Co. 128, (Orphans' Ct), (1921);
Loughran's Estate, 2 Pa. Dist. & Co. 223, (Orphans' Ct), (1922);

In Ann Dougherty's Estate, 12 Phila. 70, (1878), the facts were as follows:

Ann Dougherty died testate. Her will provided

"And I request my executor to pay over the remaining equal half part of the proceeds of sale, and rents, if any, to the Rev. Hugh McLaughlin, of the said Church of St. Theresa, upon which payment, I earnestly request . . . that he, the Rev. Hugh McLaughlin, will say or procure to be said, three masses a week for the repose of the souls of my brothers and sister Margaret, for one year after such payment shall be made."

A brother and sister survived. The residue amounted to $455.40. The will was executed within one calendar month of the death of the decedent.

The adjudication in the Orphan's Court was that the bequest for Masses was not valid on the ground that it was a gift for a charitable or religious use within the meaning of the Act of 26th April, 1855. Exceptions were taken to the adjudication and the Court sustained the exceptions and directed the executor to pay over the residue to Father McLaughlin for Masses. The Orphans' Court gave as reasons for this decision:

1. The bequest for Masses is not a gift to a charitable or religious use within the meaning of the Act of April 26, 1855, saying: "It was (so) decided by this court in Power's Estate, 35 Legal Intelligencer, 68 . . .".

2. " . . . No trust was created . . . The words of the will are precatory, and clearly imply that the justice and discretion of the donee are alone relied on." It was an absolute gift, according to the court.

11Duke 82 (1639).
The Orphans' Court was wrong in ruling that the gift for Masses was not for a charitable use. A gift for Masses is always for a charitable use, being for the support of priests, thus for the advancement of religion and therefore for a charitable use.\(^\text{12}\) The Orphans' Court was right in holding that the bequest for Masses had not created a trust.\(^\text{13}\) The Orphans' Court was wrong in ruling that the bequest was an absolute gift to Father McLaughlin. The primary intention of the testatrix was that three Masses a week for one year be said and applied for the repose of the souls of her brothers and sister. She gave her executor power to make gifts to priests of Mass stipends in the amount of $455.40. These gifts were to be on condition precedent that Masses be said and applied as requested. She recommended that her executor select Father McLaughlin as the priest-donee of the Mass stipends and that her executor deliver to the said priest the entire amount of $455.40 and arrange for the saying and application of a total of 156 Masses at the rate of 3 Masses a week. To make these arrangements in accordance with canon law, the executor would have to go to Father McLaughlin and ask him to say or procure the saying of the 156 Masses and make an offering of the $455.40. Father McLaughlin would thereupon either accept or decline the Mass stipends. In the event that he declined the Mass stipends, the executor would have the power to select another priest in his place. In the event that he accepted them, he would assume the obligation of saying and applying three Masses a week.\(^\text{14}\) Title to $2.93, 1/156 of $455.40, would vest in Father McLaughlin as he said and applied each Mass. Under canon law he would have the power to make offerings of all or a portion of the $455.40 to some other priest or priests who would take title to the stipends on the saying of the Masses as requested.\(^\text{15}\) But Father McLaughlin would have to make an offering of $2.93 for each Mass to such other priest or priests, even though the diocesan statutory amount of the gift for such Mass was but $1.00.\(^\text{16}\) In the event that Father McLaughlin decided that he would accept the obligation to say and apply only a portion of the requested 156 Masses and so notified the executor and stated that he would distribute the balance of the Mass stipends to another priest or other priests in accordance with the power granted to him by canon law and also by the testatrix, he would assume the obligations of a priest-donee of Mass stipends as to the portion which he had accepted as such and the obligations of a donee of a power to distribute Mass stipends for the balance.\(^\text{17}\)

It is submitted that the decision of the Orphan's Court in the case of Ann Dougherty's Estate to the effect that the residue should be given to Father Mc-

\(^{12}\) Consult Scott on Trusts, section 371. Advancement of Religion.


\(^{14}\) Canon 828.

\(^{15}\) Canon 837.

\(^{16}\) Canon 840.

\(^{17}\) Consult: CANON 829 DOES NOT MODIFY THE GIFT ON CONDITION PRECEDENT OF A MASS STIPEND, by O'Brien and O'Brien, IV THE JURIST, (Jan, 1944).
Laughlin for Masses was substantially correct, even though the Court had erred in declaring that the bequest for Masses was not for a charitable use. This bequest for Masses did not come within the inhibition of the restricting statute, because in order to be within the inhibition of the Act of April 26, 1855, the gift, in addition to being for a charitable use, had to be in trust to an individual, and this bequest was not in trust.

Two years after the decision by the Orphans' Court in the case of Ann Dougherty's Estate the Pennsylvania Supreme Court ruled that a bequest for Masses was for a charitable use. This was in the case of Rhymer's Appeal, 93 Pa. St. 142 (1880). It was a proceeding on an account. The facts were: Martin Power died testate. His will, made less than 30 days before death, provided:

"All the residue . . . I give . . . to St. Mary's Catholic Church to be expended in masses for the benefit of my soul."

The executors filed their account. This account was submitted to the court auditor.

The court auditor ruled that the residuary bequest was for a "charitable" and "religious" use, and was void by virtue of the Act of April 26th, 1855, and that the amount should be awarded to the heirs of the testator. Exceptions were filed to the ruling of the auditor on behalf of St. Mary's Church. The Orphans' Court sustained the exceptions. The heirs appealed from the decree of the Orphans' Court to the Pennsylvania Supreme Court. The attorney for St. Mary's Church contended: The bequest for Masses was not for a "charitable" or "religious" use. The testator "by his residuary devise intended to benefit no one but himself. By it he did not intend to benefit his fellow-man or advance the cause of religion. It was a devise purely private and selfish." The Pennsylvania Supreme Court reversed the decree of the Orphans' Court and ordered the residue to go to the heirs. The Supreme Court said: "... the bequest to St. Mary's Catholic Church was . . . for a religious use, and therefore void according to the express terms of the statute."

This bequest for Masses was for a charitable use. It was a gift to priests, for their support, thus for the advancement of religion, and therefore for a charitable use. But the bequest for Masses had not created a trust. Bequests for Masses rarely create trusts. This bequest for Masses did not come within the inhibition of the Act of April 26, 1855, because to do so, the gift, in addition to being for a charitable use, had to be in trust to an individual, and this bequest was not in trust. In Rhymer's Case the restriction on the gift for Masses was the result of an erroneous decision by the Pennsylvania Supreme Court. The Supreme Court erred through ignorance of the nature of the Mass stipend. Priests, and only priests in their individual capacity, are the donees of Mass stipends. St.
Mary's Catholic Church was not a legatee of the bequest for Masses, nor could it be the beneficiary of the bequest for Masses. St. Mary's Catholic Church had been made the donee of a power to distribute the Mass stipends to priests.

In 1904 the Pennsylvania Supreme Court decided the case of O'Donnell's Estate, 209 Pa. 63. This arose on a petition in the Orphans' Court to order a trustee to file an account and to pay over to the petitioner his share of the estate absolutely, free of trust. The facts were:

Terence O'Donnell died testate, within 30 days from the making of his will. He left the income of two-thirds of his estate to his wife, and the income of the remaining one-third to his son. The will then provided:

"And after the death of my . . . wife and son I give . . . all of my estate to Rev. Richard Kennahan, or his successors of the St. Matthew's Church, of Conshohocken, Pennsylvania, for the purpose of saying masses for myself, my now wife Ellen, and my deceased wife Mary."

The Orphans' Court gave a decree in favor of petitioner awarding citation that trustee file account and pay over to petitioner his share of the estate absolutely, free of trust. Father Kennahan appealed to the Supreme Court of Pennsylvania. The attorney for Father Kennahan contended that the bequest was a personal one to him as compensation for services to be rendered, and therefore not within the Act of 1855. The son contended that the bequest was for a religious use, and, that the will having been made within 30 days of death, was void under the Act of 1855.

The Supreme Court of Pennsylvania affirmed the decree of the Orphans' Court, and said:

"The contention of the appellant (Father Kennahan) that the bequest was a personal one to him as compensation for services to be rendered, and therefore not within the Act of 1855, cannot be sustained. The bequest it is true is to him by name, but it is plainly to him not as an individual, but by virtue of his office, for the words are 'to Rev. Richard Kennahan, or his successor, of St. Matthew's Church,' and 'for the purposes of saying masses' for testator and his wife. It thus appears that the bequest is to the appellant not only as priest of the church named, but also for a specific use and is thus charged with a trust. While therefore under the rules of the church as set forth in appellant's answer to the petition the money when earned might become the absolute property of appellant to be spent as he pleased, yet it can only be earned by the execution of the trust, to wit: the performance of the duties imposed by the testator's will. . . . These duties are clearly a religious use within the act of 1855. . . ."

\[18\] See note 13 supra.
The attorney for Father Kennahan, realizing that—if the bequest for Masses were construed to be a gift for a religious use—the bequest might be void under the Act of 1855, took the very questionable position that Mass stipends are not gifts, but instead are earned income for services to be rendered. But the Pennsylvania Supreme Court gave scant consideration to this unorthodox argument. In the very first sentence of a "Per Curiam" opinion, the Court said:

"The contention of the appellant (Father Kennahan) that the bequest was a personal one to him as compensation for services to be rendered, and therefore not within the Act of 1855, cannot be sustained."

No canonist has ever taken the position that a Mass stipend is the sales-price of a Mass nor the consideration of a common law contract for services for the saying of a Mass. Either would constitute, unquestionably, the grave crime of simony in canon law.19

The case of O'Donnell's Estate presents another example of judicial restriction in Pennsylvania on gifts for Masses. The Pennsylvania Supreme Court erred in this decision. It made its mistake in ruling that the bequest for Masses had created a trust. A trust had been created in the case, but the trust was confined to the life estates of the widow and son of the testator. The remainder was not the subject of a trust, and it was the remainder that was given for Masses. The Pennsylvania Supreme Court was led into its error through lack of knowledge of the nature of the Mass stipend. The bequest for Masses was not within the inhibition of the Act of April 26, 1855, because in order to be within the inhibition of that restricting statute, the gift, in addition to being for a charitable use, had to be in trust to an individual, and this bequest was not in trust.

Estate of Moran, 24 Lancaster Law Review 70, (1906), Orphans' Court, arose in a proceeding on an accounting. The facts were:

Fardy Moran died testate. His will made within a calendar month of his death, provided:

"4. I also give . . . $25.00 for Masses for myself . . . ."

An account was filed. Among the credits in the account was an item:

"Paid for masses, as per direction in will, $25.00."

The question which the Orphans' Court was called upon to decide was: Should the payment of $25.00 for Masses stand approved? The decision of the Orphans Court was that the payment of $25.00 for Masses should stand approved. The court reasoned: "We assume that this payment for Masses was made with the approval and consent of the legatees, and therefore, it will not be disturbed." The court then proceeded to say: "This payment is wrong for three reasons: first, it was an attempt at a distribution, and; therefore improperly in the account; second, it is a bequest subject to collateral inheritance tax from which the tax

19St. Thomas, SUMMA THEOLOGICA - IIa - IIae, p. 100, a. 2, ad. 2.
had not been deducted; third, it is a void bequest, having been given for a religious use within a calendar month of the death of the testator, contrary to the provision of the 11th section of the Act of April 26, 1855, P. L. 332. Rhymer's Appeal, 93 Pa. 142; O'Donnell's Estate, 209 Pa. 63. . . . The collateral inheritance tax will be deducted from the balance."

Fardy Moran's bequest was not within the statutory inhibition. A gift for Masses, plainly not being within the first category of the inhibitory statute, viz. "to any body politic", to be inhibited would have to be "to any person in trust". Fardy Moran's bequest for Masses did not create a trust and so was not within the statutory restriction.

Farrell's Estate, 1 Penna. Dist. & Co. Rep. 138, (1921), arose out of an adjudication in the Orphans' Court. The facts were:

The testatrix provided in her will, after two bequests expressly "for masses for me" that the residue go to her nephew Father J. A. Genshimer "in remembrance of my soul". The instrument was in the handwriting of the testatrix and not witnessed. (At the time charitable wills had to be attested by two credible and disinterested witnesses. Subsequent amendatory legislation eliminated this requirement). The nephew had predeceased distribution.

The personal representatives of the nephew-priest claimed the residue as an absolute legacy to him. The auditing judge ruled that this bequest, being one to a priest absolutely as a legacy and not to him for a charitable use, was not invalid under the Act of Assembly because it was not witnessed. Exceptions were taken to this ruling. The Orphans' Court dismissed the exceptions and the adjudication was confirmed absolutely. The Orphans' Court said: "The bequest was not invalid under the Act of the Assembly. . . . The conclusion is irresistible that whatever the testatrix may have meant by the curious phrase 'in remembrance of my soul', she did not mean that the residue was given for masses. . . ."

The Orphans' Court made a mistake of fact in this respect. The Court should have concluded: "The conclusion is irresistible that . . . the testatrix . . . by the . . . phrase 'in remembrance of my soul' . . . did . . . mean that the residue was given for Masses." The phrase "in remembrance of my soul" was not a "curious" one, in the sense that it was "strange", as intimated by the Court. It was a "studiously carefully" chosen phrase to mean just one thing, "Masses for the repose of my soul". There was no intention to make an absolute legacy to the nephew. The testatrix did know that if the nephew-priest said the Masses as requested he would take the title to the Mass stipends; and that if he did not say the Masses as requested he would not take title. The principal purpose of the bequest was to obtain the saying of the Masses for the repose of her soul. Where a specific priest is nominated by a testator to say and apply Masses, as was done in the case of Farrell's Estate, the naming of the priest constitutes a recommenda-
tion by the testator to the executor that, in the exercise of his power, he select the priest so named to say some or all the Masses. The Church, itself, has carefully legislated that the priest named in a bequest for Masses takes not as a legatee, but as a donee of a gift on condition precedent, and that the priest does not take title to the Mass stipend before the saying and application of the Mass, and consequently if he dies before he does say the Mass the stipend does not pass by his will as his personal property, nor to his personal representatives, heirs or next of kin, if he dies intestate. The Church treats the named priest as a potential donee of a gift on condition precedent, viz. the saying and application of the Masses as requested. The Church protects the request of the testator for Masses and the property rights in the Mass stipend against the devisee, legatee, or personal representatives of the priest and against the heirs, next of kin, and residuary legatee or devisee of the testator.

In the case of Farrell's Estate the bequest for Masses was, of course, for a charitable use. But the bequest did not create a trust. Consequently the bequest for Masses was not within the inhibition of the restricting statute. The decision was wrong, and the ratio decidendi wrong.

Loughron's Estate, 2 Pa. Dist. & Co. Rep. 223, (1922) was a case which arose under a final account in the Orphans' Court filed by an administrator with the will annexed. The facts were:

Bridget Loughran died testate, within 30 days from the making of her will. It contained the following clause: "I give . . . to the Rev. P. J. Flaherty . . . $50 for masses to be offered for the repose of my soul,"

The attorney for Father Flaherty contended that the bequest was not a gift for charitable uses within the restricting statute of 1855, because it was a gift specifying an individual priest. The auditing judge ruled: "The gift for masses was void under the Act of 1855, P. L. 328, 332, by reason of testator's death within 30 days, as there was no alternative gift in case of her death within the statutory period." Father Flaherty excepted to this ruling. The Orphans' Court dismissed the exceptions and the adjudication was confirmed absolutely. The Court said: "The bequest . . . was . . . a charitable gift, and void because the will had been executed within thirty days of testatrix's death."

This decision of the Orphans' Court was wrong. The bequest for Masses had not created a trust. To be within the inhibition of the restricting statute a bequest for Masses would have to be in trust, as well as for a charitable use. This is another case of judicial restriction of gifts for Masses.

The case of Jennings' Estate, 20 Pa.. Dist. & Co. Rep. 506, (1934) arose on a petition for allowance of an account and for distribution. The facts were:

Catherine Jennings died testate. Her will had been executed 2 days before her death. It provided in part:
"My executor . . . shall expend . . . $2,750 for Masses for the repose of the souls of the following named (11 persons); and I do further direct that this sum shall be expended by the payment of $250 on behalf of each of the above named and . . . direct that the money shall be paid for low Masses only and that the following priests of the Catholic Church shall say them and share equally in the distribution of said money for Masses, Fr. James Craven, Fr. Michael Mun- ley, Fr. Thomas Fitzgerald, the Rev. Dr. Joseph McDermott, the Rev. Dr. Patrick Reilly of California, Father Boyle of Tuscarora, Penna., Rev. Dr. Frank Brennan and Father Durkin."

The next of kin contended that the bequest of $2,750 for Masses was a bequest for religious or charitable purposes and therefore void under the Wills Act of June 7, 1917, P. L. 403, 406. Counsel for the estate contended that the bequest for Masses was not for a religious or charitable use. The Orphans' Court decided that the bequest for Masses was void, saying: "We are satisfied that this bequest is for religious purposes and therefore void."

This bequest for Masses was for a charitable use but as no trust had been created the gift was not within the statutory inhibition and the case is wrong. It is just another case of judicial restriction by Pennsylvania courts of gifts for Masses.

It is submitted that the Pennsylvania courts in construing the restricting statutes have invariably posed an incomplete question in an attempt to discover whether or not the charitable gifts in question were within the statutory inhibition. This incomplete question was: Is the bequest for Masses for a charitable use? The correct question should have been: Does this bequest for Masses create a trust in an individual for religious or charitable uses?

The comparable restricting statutes of California and Pennsylvania are practically identical. Pennsylvania's statute says: "no estate . . . shall . . . be bequeathed . . . to any person in trust for religious or charitable uses, except the same be done by . . . will . . . at least thirty days before the decease of the testator . . ." California's statute says: "no estate . . . shall . . . be bequeathed . . . to any person . . . in trust for charitable uses . . . unless the will was . . , executed at least thirty days before the death of the testator. . . ."

The California courts have approached this problem in a different manner from the Pennsylvania courts. The case of Estate of Margaret Ward, 125 Cal. App. 718, (1932) arose on a petition for distribution. The facts were as follows:

20 "In law as elsewhere the right answer usually depends on putting the right question." Mr. Justice Frankfurter in Estate of Rogers v. Helvering, United States Supreme Court; 88 Law Ed. Advance Opinions, page 150.
Margaret Ward died testate. Her will provided:

"I give . . . unto the person who at my death shall be the pastor in charge of St. Patrick's Roman Catholic Church at San Jose, California, . . . one-half of the . . . residue (said one-half amounting to $5,000) . . . to be used by such person to procure masses to be said for the repose of my soul."

The will had been executed within 30 days of death.

The petition, which was for final distribution in accordance with the above provision, was objected to in the trial court by an heir at law on the ground that the will had been executed within 30 days of the death of the testatrix and was therefore invalid under section 1313 of the Civil Code (later, section 41 of the Probate Code). The trial court decided that distribution should be made in accordance with the provisions of the will. The heir at law appealed to the Court of Appeals, and contended that the bequest was in trust and also for a charitable use, and therefore within the inhibition of section 1313. The executor contended that no trust had been created, or at any rate no charitable trust had been created. The California Court of Appeals affirmed the decree of the trial court, giving as its reason that the bequest did not create a trust, because the obligation did not "go to the use and disposition of the money"; and ruled that a bequest to an individual does not come within the inhibition of section 1313 of the Civil Code unless it is a bequest both "in trust" and "for charitable uses."

This decision of the California Court of Appeals is correct. The bequest for Masses was not inhibited by section 1313 of the Civil Code (now section 41 of the Probate Code). A trust had not been created. The bequest for Masses was a gift for a charitable use. It was destined for the support of clergymen. Gifts for the support of clergymen are for the advancement of religion. Gifts for the advancement of religion are for a charitable use. But to come within the inhibition of the restricting statute, the gift, in addition to being for a charitable use, had to be in trust to an individual. The gift, not being to an individual in trust, was valid. The pastor of St. Patrick's Roman Catholic Church was the donee of a power to make gifts to priests in the form of Mass stipends for their support on condition that they say and apply the Masses as requested, the title to the said offerings to vest in the priests on the saying and applying of the masses. The pastor would distribute the bequest of $5,000 among the 25 priests, each of whom might receive approximately $200.00.

The legislature of Pennsylvania made the scope of the statutory restrictions on gifts for Masses less extensive than did the legislature of California. To the extent that the statute of Pennsylvania makes bequests for masses void if the will is executed within 30 days prior to the death of the testator, the statute of California is practically the same. But the legislature of California went further and extended these restrictions on gifts for Masses, not specifically but as charitable gifts generally, so as to limit under certain circumstances gifts for Masses to one-
third of the testator's estate if the will were executed more than a month before the testator's death. However, the California legislature, by an amendment enacted in 1943, has cut down the scope of its restricting laws as to charitable gifts with the result that many gifts for Masses which might formerly have been declared void or might have been cut down in amount now are valid and unrestricted in California.

The Pennsylvania judiciary, by a series of erroneous decisions based on ignorance of the nature of the Mass stipend, has practically rendered ineffective all bequests for Masses made in wills executed within 30 days of the death of the testator. Lack of knowledge on the part of the courts of Pennsylvania as to the nature of the Mass stipend has prevented the judiciary from discovering that gifts for Masses rarely create trusts. In not a single one of the reported cases in Pennsylvania dealing with restrictions on bequests for Masses had a trust been created. Once the fact that the gifts for Masses were not in trust had been established, the Courts would be bound to rule that the gifts for Masses were not within the inhibition of the restricting statute enacted by the legislature. At the earliest possible moment the above series of erroneous decisions by the Pennsylvania judiciary should be reexamined and overruled.