"Mortmain" in Canada and the United States: A Comparative Study

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At the time when the laws of the provinces of Canada and the early states to the south were being formulated, their common mother country[1] already had a long and turbulent history of "mortmain", *in mortua manu*. The primary concern of these early mortmain laws was the restriction on religious and charitable institutions and uses and the right or power to make dispositions to them, and it is with this phase of the problem only that we are here concerned.

> In the old feudal times in England, many centuries back, the King as the ulterior lord of the fee, had certain rights of escheat, feudal profits, and pecuniary interests on change of tenure, by death of the tenant or otherwise. By the common law a corporation, sole or aggregate, ecclesiastical or lay, could hold lands descendable to successors instead of heirs, but as a corporation never dies, the King by alienation to a corporation would lose his feudal profits and privileges, the lands being in dead hands, in mortmain.
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> To settle the matter, Edward I passed a statute called '*De Religiosis*' forfeiting all gifts or conveyances of lands in mortmain. Then commenced a fight between the ecclesiastics and the Kings, which lasted for centuries. The ecclesiastics, with great ability, evading the statutes by the doctrine of uses and trusts and other ingenious modes.[2]

The Mortmain Act of 9 Geo. II, c. 36 (1736), requiring that all gifts and conveyances for charitable uses must be by deed executed before two witnesses, delivered twelve months before death, and enrolled within six months after its execution, was in force in England during this formative period, and although the

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[1] The French influence, common to Quebec and Louisiana, did not leave unusual mortmain laws.

[2] *In re Pearse Estate* (1903), 10 B.C.R. 280, at p. 282n.

Act was not in effect in the provinces or states,[3] except in Ontario,[4] it seems logical that similar legislative acts would have been widely adopted by them. But this was not done, although vestiges of "mortmain" were and still are to be found in the provinces of Canada and in the states. With the exception of Ontario, then, all restrictions on religious and charitable institutions found their inception in affirmative acts of the legislative branches of the provinces and states and it is with these restrictions that we are here concerned.

The original motivation for mortmain laws came from the fact that in England during the earlier centuries lands were being diverted to the church. Blackstone, in commenting on this, says of Edward I, "He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain . . .".[5] Chancellor Hardwicke in 1748 stated, "the clergy got almost half the real property of the kingdom into their hands, and indeed I wonder they did not get the rest".[6] With this underlying current of thought it is not surprising to find that both in Canada and the United States the most prevalent restriction on religious and charitable institutions was a limitation on the power of the institution to take and hold real property. This appeared in general laws delimiting the area of land permitted to all such institutions and in specific restrictions on the power to take and hold land contained in the special act of incorporation of certain institutions.

Alberta restricts religious societies to three hundred and twenty acres of land,[7] and New Colonies to six thousand four hundred acres, and only with the consent of the Lieutenant

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[3] The Mortmain Act was not in force in New Brunswick, *Doe D. Hazen* v. *St. James Church* (1879), 18 N.B.R. 479; nor in British Columbia, *In re Pearse Estate, supra;* nor in Manitoba, *In re Fenton* (1920), 30 M.R. 246; nor Saskatchewan, *Re Miller* (1918), 11 S.L.R. 76. The Act of 9 Geo. II, c. 36, did not extend to Rhode Island or any of the colonies, *Potter* v. *Thornton* (1862), 7 R.I. 252. It was not adapted to the circumstances of the colonies before or on May 14th, 1776, and did not become part of the law of Georgia, *Beall* v. *Fox* (1848), 4 Ga. 404. The Mortmain Acts of England were local and not applicable to the colonies or Kentucky (1839), 33 Am. Dec. 481. They never extended to or were a part of the law of the colonies, *Deeds* v. *Deeds,*—— Ohio——, (1950), 94 N.E. (2d) 232. The New York court, while not deciding whether or not the Act was in force in that state, said on p. 546 that it "was inapplicable to the situation of the country", *Williams* v. *Williams* (1853), 8 N.Y. 525.

[4] The Statute of 9 Geo. II., c. 36, was in force in Ontario, *Lewis* v. *Doerle* (1898), 25 O.A.R. 206, and in Upper Canada, *Doe Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82.

[5] Blackstone's Commentaries (1759 ed.) Book IV, p. 419, com. 13.

[6] *Attorney General* v. *Day* (1748), 1 Ves. Sen. 218, at p. 223.

[7] R.S.A. (1942), c. 247, s. 2.

Governor.[8] Religious societies in Manitoba are restricted to three hundred and twenty acres.[9] Both charitable and religious societies are prohibited from holding more than ten acres without permission from the Lieutenant Governor in Quebec,[10] and religious societies are restricted to one arpent within the walls of the cities of Quebec and Montreal, eight arpents outside the walls but within the limits and, in any other place, to two hundred English acres.[11] Saskatchewan also adopted the three hundred and twenty acre restriction for religious institutions.[12] In the United States, Iowa formerly restricted religious societies to one acre;[13] Maryland, five acres unless approved by the legislature;[14] Illinois, ten acres;[15] Indiana, one hundred sixty acres;[16] Kentucky now restricts to fifty acres;[17] Nevada, one block in any town or city and ten acres in the country;[18] Ohio, twenty acres;[19] Virginia, four acres in a city and seventy-five acres elsewhere.[20] Washington, D. C.,[21] and West Virginia[22] have similar limitations.

Other jurisdictions restricted the power to hold by valuation limitations. No religious society in Ontario was permitted to take or hold by gift, devise or bequest so that the annual value of its lands exceeded one thousand dollars.[23] Nova Scotia in 1851 restricted religious societies in their holdings of real estate to a yearly value of two thousand pounds,[24] and at present limits them to a yearly value of eight thousand dollars.[25] Saskatchewan denies the right of benevolent societies to hold any lands exceeding in the whole the annual value of five thousand dollars.[26] North Dakota restricts religious and charitable corporations in

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[8] Alta. Stats. (1950), c. 10, s. 1, p. 33.
[9] R.S.M. (1940), c. 180, s. 3.
[10] Mortmain Act, R.S.Q. (1941), c. 283, s. 3.
[11] *Ibid.*, s. 9.
[12] The Religious Societies Land Act, R.S.S. (1940), c. 99, s. 2.
[13] Rev. Stat. of the Territory of Iowa (1843), c. 128, p. 538.
[14] Art. 34 of Dec. of Rights of 1776, Kilty, Maryland Laws (1799).
[15] Illinois Statutes (1858), s. 44, p. 979.
[16] Indiana Rev. Stat. (1843), s. 35, p. 395. Extant, Burns Ind. Stat. Ann. 85-1501.
[17] Ky. Rev. Stat. (1951), 273.090.
[18] Nev. Comp. Laws (Hillyer), 3221.
[19] Page's Ohio Gen. Code Ann. s. 10020.
[20] Code of Va. (1950), 57-12; an earlier law provided 2 acres and 30 acres respectively, Va. Rev. of Civil Code (1846-1849), p. 412, par. 12.
[21] Dis. of Col. Code (1949), 29-501, 516.
[22] W.V. Code (1949), s. 3508.
[23] The Property of Religious Institutions Act, R.S.O. (1897), c. 307, s. 24; since repealed.
[24] Nova Scotia Statutes Revised (1851), c. 51, s. 4.
[25] R.S.N.S. (1923), c. 178, s. 4. The Church of England is excepted by s. 17.
[26] R.S.S. (1940), c. 120, s. 7. In Manitoba, see Man. Stats. (1948), c. 102, ss. 1, 2 and 3.

their right to hold real estate in that state to a value of five hundred thousand dollars.[27] Delaware in 1853 limited religious corporations to, "yearly rents and profits of the whole real estate held or enjoyed by, or for, any such corporation, shall not exceed three hundred dollars"; [28] this was increased to five hundred thousand in 1874.[29] Congress itself restricted religious and charitable associations in its Territories to fifty thousand dollars in value, at a time when most of the west was still in that status.[30]

Although, as we have seen, the original evil for which mortmain laws were made was the amassing of unconscionable amounts of real estate by religious institutions, yet the legislative tendency in Canada and, especially, the United States was to extend the restriction both to non-religious charities and to holdings of personal property. The extensions indicate a shift from the old English concept of "withdrawing lands from the King" to one of apprehension of vast wealth in perpetuity. The cause may have been a concern lest wealth be unjustifiably withdrawn from taxable sources under the then existing concepts of taxation, but it is more probable that the anlage of this fear was a nebulous distrust of the church itself carried over from earlier years and experiences.

Not only was the power to hold real estate limited in Nova Scotia, but the right of religious societies to hold personal property was restricted to ten thousand pounds in 1851[31] (now forty thousand dollars[32]). New York in its early history carefully circumscribed the power of specific corporations and associations to hold real and personal property. A notable example appears in the act of incorporation of academies, providing "that the annual revenue or income arising from the real and personal estate of any such academy, shall not exceed the value of four thousand bushels of wheat". This in 1787.[33] Connecticut limits any one

[27] N.D. Rev. Code (1943), 10-0807.

[28] Del. Rev. Stat. (1874), s. 11, p. 194.

[29] Acts and Resolves of Delaware (1874), c. 375, s. 7, p. 413.

[30] United States Acts of 1861-63, c. 126, s. 3; Rev. Stat. of United States (1873-74), s. 1890. At the time of this Territorial Act, New Mexico, Utah, Washington, Colorado, Dakotas, Arizona, Idaho, Montana and Wyoming were territories.

[31] N.S. Stat. Rev. (1851), c. 51, s. 4.

[32] R.S.N.S. (1923), c. 178, s. 4. The Church of England is excepted, *ibid.*, s. 17. St. Philip's Church is permitted to hold real and personal property not exceeding in the aggregate fifty thousand dollars, N.S. Stats. (1928), c. 167, ss. 3, 4.

[33] Laws of the State of N.Y. Comprising Acts of the Leg. Since the Revolution, vol. 2, p. 147. See also N.Y.L. of 1848, c. 319, s. 1, p. 447, restricting charitable societies to real estate not exceeding $50,000 and personalty to $75,000, but the "clear annual income . . . shall not exceed the sum of ten thousand dollars". These amounts were changed to $500,000, $150,000 and $50,000 respectively in 1875, N.Y.L. (1875), c. 267, s. 2. Religious societies were restricted to an annual value of $3,000 in real and personal estate,

church to real and personal property the annual income from which does not exceed three thousand dollars.[34] Delaware restricted religious institutions to a yearly interest, or income, from all its property not to exceed six hundred dollars.[35] Although Louisiana has no limitation at present,[36] in 1876 religious and charitable corporations were restricted to real and personal property to the value of three hundred thousand dollars,[37] later, in 1924, changed to one million dollars.[38] Corporations for charitable and religious purposes in Maine are permitted to take and hold real and personal property not exceeding five hundred thousand dollars in value at any one time,[39] but religious societies are restricted to an aggregate the annual income from which does not exceed three thousand dollars.[40] Massachusetts has provisions peculiar to itself which restrict educational, charitable, benevolent or religious corporations in their right to hold real and personal property to an amount not exceeding five million dollars,[41] but the income from property held by any one church is restricted to ten thousand dollars a year[42] and there are special limitations on the Quakers, Methodist and Catholic churches.[43] New Hampshire[44] and Rhode Island[45] currently limit these powers to hold property as does Virginia.[46]

N.Y.R.S. (1875), c. 18, Tit. 6, Art. 1, s. 1. However, the Reformed Protestant Dutch Church was permitted $9,000 annual value; the First Presbyterian Church of the City of New York, $6,000; St. George's Church, $6,000; and the Dutch Church of Albany, $10,000, *ibid.*, par. 12, s. 4. All these restrictions have since been repealed.

[34] Gen. Stat. of Conn. (1949) 5388, excepts church buildings, parsonages, schoolhouses, asylums and cemeteries. For protestant church, see *ibid.*, 5374, 5381.

[35] *Supra* footnote 28.

[36] L.R.S. (1950), 1273.10.

[37] Voorhies, Rev. Stat. and Laws (1876), s. 682.

[38] L. Gen. Stat. (1939), s. 1266.

[39] L. of Maine (1949), c. 25, p. 24; formerly restricted to $100,000, R.S. Maine (1944), c. 50, s. 5, p. 1012.

[40] R. S. Maine, s. 3, p. 1030, and s. 20, p. 1033; see also s. 55, p. 1039.

[41] Ann. Laws of Mass., c. 180, s. 9.

[42] Ann. Laws of Mass., c. 68, s. 9.

[43] *Ibid.*, s. 10, and c. 67, ss. 41, 46. In 1754 the limitation on income value was 300 pounds a year, Acts and Resolves of the Province of Mass. Bay, Vol. III (1742-1756) s. 3, p. 779.

[44] The yearly income of unincorporated religious societies is not to exceed $5,000 a year, R.L. of N.H. (1942), s. 3, p. 1195. "The income of any grant or donation to or for a church shall not exceed seventy-five hundred dollars a year . . .", *ibid.*, s. 10, p. 1196. See also s. 11, p. 1196.

[45] Charitable and religious corporations are limited in both real and personal property to an amount not exceeding $150,000, but the General Assembly may permit a greater holding, Gen. Laws of R.I. (1938), c. 116, s. 75 (f).

[46] Religious societies are not to take and hold personal estate exceeding $100,000, Code of Va. (1950), 57-12. Non-profit corporations are limited in real estate to a yearly income value of $50,000, except for educational institutions, where $100,000 is the limit value, *ibid.*, 13-224(7).

Although there are many statutes extant restricting this right of religious or charitable associations to take and hold property, the great majority of jurisdictions either have no restriction or an innocuous requirement that they may hold property necessary for their purposes only.[47] Upon a casual review of these statutory restrictions, it would appear that religious institutions, in many provinces and states, are severely limited. In practice, however, there has been little objection to the restrictions because of the ease with which their limiting force is circumvented.[48] They may be avoided, for example, by the incorporation of a new association, church, school, charity or other benevolent society to which property may be transferred or later acquisitions directed. It is suggested that the present status of religious and charitable institutions in both Canada and the United States does not call for any restriction on their right or power to hold personal property, but a restriction on the area of land that may be held by religious associations *for their religious purposes* is salutary. No restriction on the right to hold real estate for other charitable, eleemosynary or benevolent purposes seems necessary.

Thus far we have considered only that more obvious aspect of mortmain — the restriction on the right of religious and charitable institutions to *take and hold* property. A more forceful and effective restriction, with its roots in the same period and obliquely contained in 9 Geo. II, c. 36, is to be found in some of the provinces of Canada and many of the states. A method by which vast areas of land were going into the "dead hands" was the *inter vivos* or testamentary gift a short time before death.[49] It is logical then that the early legislation pointed at this period. The Mortmain Act of 9 Geo. II, c. 36, prohibited all testamentary gifts of land for charitable uses but permitted gifts by deed, if executed and

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[47] *E.g.*, British Columbia, R.S.B.C. (1948), c. 288, ss. 2, 7; New Brunswick, R.S.N.B. (1927), c. 88, s. 17; Newfoundland, N.S. (1935), Act no. 20. See also N.S. (1926), c. 3, s. 15 (a), relating to the United Church of Canada; Kentucky, K.R.S. (1946), 273.030; Texas, Vernon's T. S. (1936), 1409. There has been no attempt to give all restrictions on the right of religious or charitable institutions to hold property in the history of the states, but a representative survey. It can be categorically stated after a careful search into all current laws and statutes that there are very few legislative restrictions on this power in the states today.

[48] But see *State ex rel Chamberlain* v. *Hutterische Bruder Gemeinde et al.* (1922), 46 S.D. 189, 191 N.W. 635, annuling the religious charter of a Mennonite corporation which had amassed great areas of land in Dakota and Manitoba.

[49] Chancellor Hardwicke in commenting on the Mortmain Act stated, "The particular views of the legislature were two: first to prevent the locking up land and real property from being aliened; . . . the second, to prevent persons in their last moments from being imposed on to give away their real estates from their families" (1 Ves. Sen. 218, at p. 223).

delivered at least twelve months before death and enrolled within six months.[50] It is this, the death-bed aspect of the original Mortmain Act, which now is most effectively used. The intent of such provisions seems to be to prevent the disherison of the natural objects of the donor's or testator's bounty at a time when he may be overly susceptible to certain influences.[51] In fact, it may be said that "mortmain", in its original dead hands meaning, is lost in provisions of this type, yet the word has generally come to include them.

As Ontario accepted the English Mortmain Act as part of its law,[52] this time restrictive element was directly introduced into Canada. But the rigorous restriction was later relaxed so as to permit testamentary and *inter vivos* gifts to religious societies if executed at least six months before the death of the person making it;[53] and in 1892 a further mitigation entirely removed the restriction on the testamentary gift[54] but continued the six month limitation on the *inter vivos* gift,[55] the tendency being away from the testamentary, while retaining the *inter vivos* restriction, the exact opposite of the trend in the states. Saskatchewan has enacted and retained a restriction on the power to give or devise lands to benevolent societies, requiring gifts or devises to be made at least six months before death,[56] and Manitoba has required deeds of conveyance or transfers of land to religious societies to be registered within twelve months after execution or be void.[57]

In the United States the "time before death" restriction is

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[50] Today there is no restriction on the testamentary gift to religious or charitable purposes, but a twelve month period for the inter vivos gift of land, Halsbury's Laws of England (2nd ed., 1940), Vol. IV, par. 190, p. 145. See also Vol IV, par. 180, p. 138; par. 183, 184, pp. 141, 142; par. 156, p. 118; and Vol. 34, par. 17, p. 21.

[51] See Chancellor Hardwicke's reference to families, footnote 49, *supra*. "It is plain that the purpose of" this type of act "was to safeguard those who might naturally become the objects of a testator's bounty from inadvertence or undue zeal upon his part for a charity", *Estate of Graham* (1923), 63 Cal. App. 41, at p. 48, 218 P. 84, at p. 87 (California); "The design of the statute . . . preventing him from disregarding the just claims of those with natural expectations on his bounty, through pious or philanthropic motives", *Ihm's Estate* (1912), 154 Iowa 20, at p. 24, 134 N.W. 429, at p. 430; "That provision . . . a limitation . . . designed in extenso to prevent 'one who would not be generous at his own expense from being generous at the expense of his heirs' ", *National Bank of Greece* v. *Savarika* (1933), 167 Miss. 571, at p. 596, 148 So. 649, at p. 656 (Mississippi). See also *Hollis* v. *Drew* (1884), 95 N.Y. 166, at p. 173 (New York).

[52] Footnote 4 *supra*.

[53] The Property of Religious Institutions Act, R.S.O. (1897), c. 307, s. 24.

[54] The Mortmain and Charitable Uses Act, R.S.O. (1950), c. 241, s. 10(1); *Re Barrett* (1905), 10 O.L.R. 337.

[55] The Mortmain Act, *supra*, c. 241, s. 6.

[56] R.S.S. (1940), c. 120, s. 8.

[57] Man. Stats. (1941-42), c. 48.

notably present. Nine of the forty-eight states now have legislation providing for it.[58] Five others are known to have enacted time restrictive legislation at an early period but have since abandoned it.[59] The restricted period before death varies from thirty days to one year,[60] but the greater number of states have accepted the shorter period.[61] It must be noted, however, that the restriction in the states applies only to the testamentary gift.[62] The concern of the legislator was to prevent the testamentary gift to charities a short period before death, since the volume of charitable dispositions is and was by will executed too frequently at a time when the mind is not clear or unduly susceptible to certain influences.[63] Yet, because there is no *inter vivos* restriction, the natural result has been the execution of a present gift where the testamentary time restriction is operative.[64] It is suggested that statutes limiting the time before death within which testamentary

[58] California, 30 days, Cal. Prob. Code, s. 41 (1949); Florida, 6 months, Fla. Stat., s. 731.19 (1949); Georgia, 90 days, Ga. Code Anno., s. 113-107 (1949); Idaho, 30 days, I. Code Anno., s. 14-326 (1948); Mississippi, 90 days, Miss. Code Anno., s. 671 (1946); Montana, 30 days, Rev. Code of Mont. Anno., s. 91-142 (1947); Ohio, 1 year, Page's Code Anno., s. 10504-5; Pennsylvania, 30 days, Purdon's Pa. Stat. Anno., Tit. 10, s. 17; District of Columbia, one calendar month, D.C. Code, s. 19-202 (1949).

[59] Michigan in 1855 provided that every devise of real estate shall be void, so far as made to any church, congregation or religious order, unless it shall have been executed at least two months prior to the death of the testator, without alteration or codicil, and filed with the probate judge. Inter vivos gifts of real estate were required to be executed and recorded at least two months before death, and testamentary gifts to the amount of $100 or over were void if executed during the last sickness, and further procedures followed otherwise. L. of Michigan 1853-5, Act No. 145, ss. 24 and 25, p. 319, also contained in, Comp. Laws of Mich., Vol. I, (1857), ss. 2032, 2033; repealed, Laws of Mich., Vol. I, 1867, Act. No. 33, p. 41. Delaware in 1787 required gifts of land to religious societies to be made by deed executed twelve calendar months before death and recorded within one year, Del. Laws, Vol. 2, 1700-97, s. 3, p. 880. Wisconsin for a two year period restricted gifts or devises of real estate to religious and charitable societies unless executed at least three months before death, Wis. Laws 1891, c. 359, p. 464; repealed, Wis. Laws 1893, c. 102, p. 111. New York required wills to be executed at least two months before death, Laws of N.Y. 1848, c. 319, par. 6. Massachusetts required deeds to be recorded three months before death and bequests and devises to be executed three months before death and before the last sickness, Provincial Laws (1754), Acts and Resolves of the Province of Massachusetts Bay, Vol. III, 1742-1756, s. 3, p. 779; repealed in 1785, *Bartlet* v. *King* (1815), 12 Mass. 69.

[60] Footnote 58 *supra*.

[61] Foontote 58 *supra*.

[62] Pennsylvania is the exception, see footnote 58 *supra*.

[63] Footnote 51 *supra*.

[64] *E.g.*, *President of Bowdoin College* v. *Merritt* (1896), 75 Fed. 480 (N.D. California), app. dismissed, 167 U.S. 745, in which it was held that a deed for the purpose of effecting a gift, which would be void if testamentary because of the statute, was not a fraud on the statute although the testimony showed, "I tried to explain to her . . . the advantages of making it by deed instead of by will . . . that she could dispose of her entire property for charitable purposes by deed, and could only dispose of one-third of it to charitable purposes by will" (p. 501).

gifts may be effectively executed are at present virtually impotent because of this method of circumvention. It might have been prevented by an extension of the restrictive period to both the *inter vivos* and the testamentary gift, but no attempt has been made to do so. Has the *inter vivos* restriction in Ontario created a similar trend to the testamentary gift?

Although the time before death restriction is the most prevalent, another type has been adopted by several states, which has no counterpart in Canada, that is, the percentage of estate limitation.[65] This prevents a testator from devising or bequeathing more than a designated portion of his net estate to any charitable or religious use. New York restricts such testamentary gifts to one-half the net value of the estate,[66] and Iowa restricts them to one-fourth the net estate.[67] The intent of such legislation again emphasizes the change of attitude from a restriction directed against the religious or charitable object to one designed for the protection of heirs or next of kin of the testator. The value limitation has been combined in many states with the time restriction so that testamentary gifts may be effective if executed a designated time before death and then only to a delimited portion of the testator's estate,[68] the most widely designated portion being one-third of the net estate.

Although these restrictions on the power or right to give one's property to religious or charitable objects may seem harsh, the effect is softened and made more equitable in a majority of the states with such a limitation by the further provision that the restriction does not become effective unless the testator leaves certain surviving heirs or next of kin.[69] The class designated is quite broad, perhaps too broad, and usually includes spouse, child, parent, and child of deceased child.[70] Since the basic intent of the legislation in the states is to protect the natural objects of the testator's bounty, it follows that, if none of these exist at the death of the testator, there should be no impediment in the way of the religious or charitable object. If the object were primarily to prevent accumulations in dead hands, there would still be an impediment. In Ontario the restriction is absolute, irrespective of

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[65] California, Georgia, Idaho, Iowa, Mississippi, Montana and New York have this type of restriction. See footnote 58 *supra*, and 66 and 67 *infra*.

[66] N.Y. Dec. Est. Law, s. 17 (1949).

[67] Code of I., s. 11848 (1950).

[68] Footnote 65 *supra*. The value limitation of one-third is most prevalent, having been adopted in California, Georgia, Idaho, Mississippi and Montana.

[69] California, Florida, Georgia, Idaho, Iowa, Mississippi, New York and Ohio. See footnote 65 *supra* for Code citations.

[70] Footnote 69 *supra*.

survivorship, as it is also in Montana, Pennsylvania and the District of Columbia.[71]

A further mitigation of the severity of these restrictions on the donative process and the capacity to take and hold property has been effected by special legislation exempting certain favoured institutions from their operation: for example, the University of Saskatchewan,[72] the Church of England in Quebec,[73] the United Church of Canada,[74] the Mennonite Brethren Church,[75] the University of Alberta Foundation,[76] universities, colleges or schools in Ontario,[77] and the University of California.[78]

SUMMARY

The background for the independent policy of the provinces and states on mortmain was substantially the same, and its history in both has been similar. The earlier tendency was to limit the power and right of the institution to take and hold property and this is still part of the living law of several of the provinces and states, but with a decided trend in the states to remove the restriction. The restriction on the power or right to give either by the *inter vivos* or testamentary process is extant also in Canada and the United States, but is much more prevalent in the states, at least on the testamentary gift, the noticeable tendency in the states being to prevent disherison of near relatives by such gifts and not to prevent accumulation in "dead hands".

[71] The Mortmain and Charitable Uses Act, R.S.O. (1950), c. 241, s. 6; Rev. Code of Mont. Anno., s. 91-142; Purdon's Pa. Stat. Anno., Tit. 10, s. 17; D.C. Code, s. 19-202.

[72] R.S.S. (1940), c. 163, s. 5(a).

[73] Religious Congregations Property Act, R.S.Q. (1941), c. 312, s. 10.

[74] N.S. Stats. (1924), c. 122, ss. 15, 21; Newfoundland Stat. (1926), c. 3, s. 15(a).

[75] Man. Stats. (1940), c. 90, ss. 3 and 8.

[76] Alta. Stats. (1947), c. 21, ss. 2, 3, 6.

[77] The Mortmain and Charitable Uses Act, R.S.O. (1950), c. 241, s. 9(a); and see also s. 13(1).

[78] Cal. Prob. Code, s. 42.