The Ohio Mortmain Statute--A Need for Reform

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$15,000. It also requires a sale of the property by the vendor upon the vendee's default and a return to the vendee of the sale proceeds which exceed the unpaid balance of the purchase price. Furthermore, after the vendee has paid forty per cent of the purchase price he is given a statutory right to receive a purchase money mortgage for the balance of the purchase price from the vendor. These statutory remedies are but illustrative of the variety of methods which can be adopted to accomplish the reform.

CONCLUSION

Unfortunately, the divergence in treatment accorded the land contract and the mortgage is firmly established in Ohio. However, no logical reason can be offered for the perpetuation of this dichotomy. Because of historical technicalities and respect for precedents that seem to overshadow the courts it is unlikely that they will adequately solve the problem. Legislative recognition of an equity of redemption and the right to foreclosure proceedings in the land contract vendee is sound in principle.

The mechanical distinction between the vendee and mortgagor, both of whom are in default, should no longer be legally countenanced. This is especially true in light of the great abuses being performed with the land contract instrument in certain real estate transactions. It should be clear that if the equity courts of the sixteenth century were capable of piercing the formality of the common-law mortgage to protect the mortgagor, surely the enlightened courts of the twentieth century should unhesitatingly do likewise for the vendee under the land contract.

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Eleven states have statutes which either limit the amount that can be devised or bequeathed to charities, or which render such dispositions invalid if drawn into the testator's will within a prescribed period of time before his death, or which impose both of these restrictions. The Ohio statute, which is of the second variety, has probably evoked the greatest criticism and controversy due to the harshness of its provisions and disagreement among the Ohio courts as to its construction and purpose.

The aim of this article, which is a study in comparison of the Ohio statute with those of the ten other states having such laws, is to expose

the inequities and inconsistencies of the Ohio statute and to demonstrate the need for legislative revision.

AMERICAN AND ENGLISH CONCEPTS

Statutes restricting testamentary gifts, while customarily termed mortmain acts in America, have no significant identification with the English statutes of mortmain. The earliest mention of mortmain was in the forty-third clause of Henry III's Second Charter (1217), which sought to prevent gifts to religious corporations on the grounds that they were fraudulent and intended to deny the lord his feudal obligations. In addition, conveyances of property to charitable and religious corporations endowed with perpetuity interfered with free alienation of land and prevented escheats to the crown.

Although the Wills Act of 1837 repealed the existing prohibition against corporations taking by devise, its effectiveness was diluted by the statute of George II, c. 36 (1736), entitled the Statute of Mortmain and Charitable Uses. This latter statute prohibited the gift or conveyance of real or personal property "to or upon any person or body corporate or politic, in trust for the benefit of any charitable uses whatever, except by deed properly executed within twelve months before the death of the donor."

Although the influence of the English laws aimed at free alienation may have given rise to similar legislation in the colonies, the English statutes themselves were never in force on this side of the Atlantic. The former laws of Mississippi came, perhaps, the closest to those of England. If these laws were ever considered to exist in Ohio before 1806, it could only have been by resolution of the territorial governors and judges.

The reason for restricting gifts by will for charitable purposes in the United States was in part motivated by fear that free alienation of lands would be curtailed, but was mainly to protect certain classes of the testator's relatives from being excluded from his will by improvident gifts made to

1. Iowa, New York.
3. California, Georgia, Idaho, Mississippi, Montana.
8. Prior to 1940, the Mississippi Constitution, art. 14, §§ 269 and 270, prohibited unequivocally all devises and bequests for charitable purposes.
charitable institutions while under the apprehension of impending death. Whether the purpose of the Ohio statute is solely to protect certain classes of the testator's relatives has been the subject of conflict among the courts of Ohio. A full analysis of the Ohio law to date, however, leaves little doubt that the effect of the statute is not primarily to protect the heirs of the testator, but to declare gifts within the purview of the act as void as against public policy. The result is one of discrimination against charitable institutions in that they do not have the same standing to take under a will as do private persons and private corporations.

THE OHIO MORTMAIN ACT

The Ohio mortmain statute originated in an 1874 amendment to the wills act passed on May 3, 1852. This amendment of 1874 has survived without substantial change to the present time and is presently found in Ohio Revised Code section 2107.06, as follows:

If a testator dies leaving issue, or an adopted child, or the lineal descendants of either, and the will of such testator gives, devises, or bequeaths such testator's estate, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to any state or country, or to a county, municipal corporation, or other corporation, or to an association in any state or country, or to persons, municipal corporations, or associations in trust for such purpose, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not, such will as to such gift, devise, or bequest, shall be invalid unless it was executed at least one year prior to the death of the testator.

Three factors set forth by the act must be present before the Ohio mortmain statute can operate: (1) the decendent must die testate, (2) within a year of making his will, (3) survived by issue, adopted child, or by the lineal descendants of either. Where all of these conditions exist, devises or bequests to charities, either outright, or in trust for charitable uses, are "invalid." The gift, if a specific or general devise or bequest,

10. In re Lennon's Estate, 152 Cal. 327, 92 Pac. 870 (1907); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944); Application of Franklin Nat'l Bank, 4 Misc. 2d 410, 147 N.Y.S.2d 572 (1955); Ruple v. Hiram College, 53 Ohio App. 8 171 N.E. 417 (1928).
11. Thomas v. Trustees of Ohio State University, 70 Ohio St., 92, 70 N.E. 896 (1904), and Deeds v. Deeds, 94 N.E.2d 232 (Ohio P. Ct. 1950), state that the only purpose of the statute was to protect the heirs of the testator; while Patton v. Patton, 39 Ohio St. 590 (1883), Davis v. Hutchins, 15 Ohio C.C.R. 174 (1897), rev'd., Davis v. Davis, 62 Ohio St. 411, 57 N.E. 317 (1900), Campbell v. Musart Society, 131 N.E.2d 279 (Ohio P. Ct. 1956), and Roenick v. Dollar Savings and Trust Company, 179 N.E.2d 379 (Ohio Ct. App. 1960), recognize that the Ohio statute not only benefits the heirs of the testator, but that it, in effect, discriminates against charity and protects others besides testator's issue and lineal descendants.
13. 72 Ohio Laws 3 (1875).
14. OHIO REV. CODE § 2107.06.
lapses and passes into the residuary clause of the testator's will. Where there is no residuary clause, or the gift itself consists of the entire residuary clause of the will, the gift passes as intestate property to the heirs at law of the testator pursuant to Ohio Revised Code section 2105.06. Where the gift represents merely a portion of the residue the same is divided up among the remaining residuary beneficiaries.

**Operation of Ohio Mortmain Act — Comparison with Other States**

The “conditions precedent” to and the resulting effects of the operation of the mortmain acts vary from jurisdiction to jurisdiction. In the main the differences between the statutes of the eleven states relate to the following specifics: (1) institutions prohibited from receiving testamentary gifts; (2) requirements as to time; (3) requirements as to amount; (4) persons ostensibly protected by the statutes; (5) whether the gifts are void or voidable; (6) parties who may invoke or waive the benefits of the statutes; and (7) provisions which benefit the charitable institutions.

**Institutions Prohibited from Receiving Testamentary Gifts**

The Ohio act includes the most numerous group of institutions within the purview of its prohibitory provisions — benevolent, religious, educational, and charitable institutions; county and municipal corporations; and, any state or country. Florida includes all of the above categories except institutions of higher learning which are specifically excluded. Georgia and Mississippi include charitable, religious, educational or civil institutions, while the remainder of the jurisdictions, in varying degrees, confine the operation of their mortmain acts to charitable or religious persons or institutions.

16. Davis v. Davis, 62 Ohio St. 411, 57 N.E. 317 (1900), held that where the residuary clause was limited to the “balance” of the testator’s estate, that it was limited in nature, and gifts which were invalid by operation of the mortmain act, passed as intestate property to the heirs of the testator.
19. OHIO REV. CODE § 2107.06.
22. See CAL. PROB. CODE § 41. Section 42 of the California Code specifically exempts from the operation of its provisions: “Bequests and devises to or for the use or benefit of the State, or any municipality, county or political subdivision within the State, or any institution be-
Requirements as to Time

The Ohio statute provides that charitable gifts shall be "invalid" if the testator dies within a year of making his will, and is survived by one of the parties enumerated in the statute. This one-year requirement is considerably longer than the time limitations set up by the eight other jurisdictions which impose this type of restriction. In these eight jurisdictions the time varies from six months (Florida) to ninety days (Georgia and Mississippi) to thirty days (California, District of Columbia, Idaho, Montana, and Pennsylvania). Two states, Iowa and New York, have no time requirements. Contrasted with parallel provisions in the statutes of other states, the one-year requirement of the Ohio statute is probably its most offensive and highly criticized provision.

Requirements as to Amount

Ohio, like the District of Columbia, Florida, and Pennsylvania, while invalidating gifts within a certain time period, places no restriction on the amount which may be given to the institutions enumerated in the statute in a will executed prior to the time limitation period. Iowa and New York, which have no time limitations, restrict charitable gifts to one-fourth and one-half of the estate, respectively. California, Georgia, Idaho, and Mississippi, which invalidate gifts made within periods ranging from thirty to ninety days, also restrict charitable gifts made before such periods to one-third of the estate. Montana, with the most liberal statute for charities, restricts gifts to one-third of the estate within its thirty-day prohibitory period, while all gifts made more than thirty days prior to the death of the testator are valid.
Persons Ostensibly Protected by the Statutes

The persons ostensibly protected by the statutes are those individuals specifically enumerated within the statutes as surviving the testator. Whether such enumerated persons are the only ones who are protected and have standing to object depends upon statutory construction and judicial decision. In other words, the extent of the class protected depends upon whether the gifts within the statutes are void or voidable.

The Ohio statute, with its provision that the testator must be survived by "issue, adopted child, or the lineal descendants of either," confines its coverage to the most limited class of persons. In the remaining states which have such provisions, the protected class of persons is broader. Depending upon the state, the statute may include the surviving spouse, parent, brother, sister, or nephew or niece of the testator. The statutes of the District of Columbia, Idaho, Montana, and Pennsylvania impose no conditions of survivorship which affect the validity of the charitable gift. From the foregoing it might be concluded that the purpose of those statutes which enumerate persons who must survive the testator is to protect those specifically named persons, while the purpose of those statutes which name no individuals is to invalidate certain gifts to charity as against public policy. Except for Ohio, as will be seen, this conclusion is true.

Whether the Gifts are Void or Voidable

In determining whether a testamentary gift is void or voidable under a particular mortmain act, one writer has concluded that under those statutes which enumerate parties who must survive the testator, the gifts are voidable, while under those that do not, the gifts are void. While such a conclusion seems logical and practical, a reading of the statute in Pennsylvania, which does not enumerate parties who must survive the testator, and a study of the case law in Ohio where the statute does enumerate parties, leads one to the conclusion that such a categorical generalization is fallacious.

33. Ohio Rev. Code § 2107.06. Thus designated heirs are not within this specified group. Theobald v. Fugman, 64 Ohio St. 473, 60 N.E. 606 (1901).
38. Note, 50 Colum. L. Rev. 94 (1950).
If the testamentary gift to charity is void, then it must fail as a result of the death of the testator. If the gift is merely voidable, then it fails only if one of the parties protected under the statute objects; if no such objection is made the statute is deemed waived, and the charitable bequest is valid.

Of the eleven jurisdictions which have mortmain statutes, Ohio appears to be the only one in which both the "void" and "voidable" positions have found acceptance. This confusing situation has resulted from the lower courts' propensity to hold gifts voidable in contravention to the Ohio Supreme Court's rulings that such gifts are void. All of the other jurisdictions have apparently resolved their problems either by statutory amendment or unequivocal judicial interpretation.

While the Georgia, Idaho, Mississippi, and Montana statutes specifically state that gifts made in contravention of their provisions are "void," Georgia and Mississippi courts have held that such gifts are merely voidable, and thus, in effect, have interpreted "void" to mean "voidable."

The District of Columbia statute, which provides that the gifts are "invalid," falls into the "void" category because it contains (just as the Idaho and Montana statutes) neither a provision as to persons who must survive the testator, nor a provision permitting waiver of the gifts.

California, Florida, Iowa, and New York by statutory implication or court decision have held the gifts to be voidable by the protected or benefited parties under their statutes.

Pennsylvania, as a result of statutory amendment in 1947, stands in


41. Commissioner v. First Nat'l Bank, 102 F.2d 129 (5th Cir. 1939) (construing the Georgia statute); Monahan v. O'Byrne, 147 Ga. 633, 95 S.E. 210 (1918); Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941). This writer, however, would concur with the reasoning of dissenting Judge Gilbert in the case of Monahan v. O'Byrne, 147 Ga. 633, 634-35, 95 S.E. 210, 211 (1918): "The devise being void ab initio, its invalidity could not be waived, nor could any act of the beneficiaries after the death of the testator give it validity."


43. In re Estate of Adams, 164 Cal. App. 2d 698, 331 P.2d 149 (1958), construed the present California code section, CAL. PROB. CODE § 41. The former California statute was almost identical to the one presently in existence in Idaho and provided that a gift to charity was void. See also In re Garthwaite's Estate, 131 Cal. App. 321, 21 P.2d 465 (1933); Davidson's Estate, 69 Cal. App. 2d 263, 215 P.2d 504 (1950); In re Bunn's Estate, 33 Cal. 2d 897, 206 P.2d 635 (1949); In re Randall's Estate, 86 Cal. App. 2d 422, 194 P.2d 709 (1948).


a class somewhat by itself. While a gift made within thirty days of the
testator's death is "void," the statute permits "... all who would benefit
by its invalidity [to] agree that it shall be valid."48

"Void" or "Voidable" Confusion under the
Ohio Mortmain Act

Early History of the Act — The Omitted Words

The Ohio mortmain act passed in 1874 as an amendment to the
wills act of 1852 specifically provided that charitable gifts made within
the prohibited time period were "invalid and void."49 When this act
was printed in 1874 as section 5915, Revised Statutes, it was entitled,
"Any bequest or devise to charitable purpose, if any issue of testator liv-
ing, void, unless made one year before his death." But the words "and void"
for some reason disappeared from the body of the statute so that
it provided only that charitable gifts within one year of the testator's
death were "invalid." It cannot be discovered where or why those words
were omitted; it is mere conjecture that they were so omitted either be-
cause of redundancy, or because of the desire to change the meaning of
the section. Semantically, there is no difference between the word "in-
valid" and the word "void." Subsequent sections of the Ohio General
Code50 and the present section 2107.06 of the Revised Code, entitled "Be-
quests to Charitable Purpose," state only that the gifts are "invalid."

Supreme Court Cases Construing Gifts Under the Act as Void

Certainly it is questionable that the omission of the word "void"
from the statute has caused the apparent disagreement among the Ohio
courts as to the gift being void or voidable. In Patton v. Patton51 in
1883, the earliest of seven cases in which the Supreme Court of Ohio
construed the Ohio mortmain act, the court held that the charitable
bequests made within a year of the death of the testator "became abso-
lutely void immediately at and after the death of the testator." Some
difficulty was subsequently caused by the decisions of the supreme court in
the cases of The Trustees of Ohio State University v. Folsom52 in 1897
and Thomas v. The Trustees of Ohio State University53 in 1904. Both of

47. In re Estate of Rhodes, 399 Pa. 476, 160 A.2d 532 (1960); McGuigen's Estate, 388
49. 72 Ohio Laws 3 (1875).
50. OHIO GEN. CODE §§ 10504, 10504-5.
51. 39 Ohio St. 590 (1883).
52. 56 Ohio St. 701, 47 N.E. 581 (1897).
53. 70 Ohio St. 92, 70 N.E. 896 (1904).
these cases dealt with the construction of a will left by the same testator who died within a year of executing his will and codicil. In his will the testator made a devise to Ohio State University, but provided that if for any reason the gift should fail, it should then pass to the children of his brothers. In his subsequent codicil, the testator gave his daughter the power to appoint the devise to the University, if it became void, and thereby cut off the gift to the children of his brothers. At the death of the testator within a year of making his will and codicil, his daughter exercised her power of appointment. The supreme court held that the power to appoint did not fall within the purview of the statute, and the devise went to the University. Some discussion by the court of the power to waive the statute caused confusion in later cases.

The cases of *Davis v. Davis* in 1900 and *Theobald v. Fugman* in 1901 both held that gifts made within the statutory period were void. The case of *Barrett v. Delmore* in 1944 did not consider the "void versus voidable" question but dealt solely with the issue of whether a designated heir was within the classes specified by the statute as surviving the testator.

If there was any doubt created as to whether charitable gifts were void or voidable under the Ohio statutes, the most recent case decided by the supreme court in 1951, *Kirkbridge v. Hickok*, seems to have answered it. The testator in this case died within a year of making his will. The will placed substantially his entire estate in trust for twenty years, with provision for the payment of income during such period to his children and certain other persons. At the end of twenty years the trust was to terminate and be divided among some twenty charities. An *in terrorem* clause in the will provided that the children would forfeit all their interests if they contested the provisions of the will. This put the controversy of "void versus voidable" squarely in issue. If the gift were *voidable*, then action by the children would invoke the *in terrorem* clause, while inaction would constitute a waiver of the statute's provisions. On the other hand, if the gift were *void*, then action by the children would not invoke the *in terrorem* clause, because the gift

54. 62 Ohio St. 411, 57 N.E. 317 (1900).
55. 64 Ohio St. 473, 60 N.E. 606 (1901).
56. 143 Ohio St. 203, 54 N.E.2d 789 (1944).
57. 155 Ohio St. 293, 98 N.E.2d 815 (1951).
58. For criticism of this case as going beyond the statutory purpose, see 65 HARV. L. REV. 1074 (1951).
59. The result here would be that the other beneficiaries would receive the entire income for twenty years and the children would have a vested remainder.
60. The result here would be the same as the provision of the will, that is, the children and other beneficiaries would receive the income for twenty years, and the charities receive a vested remainder in the principal.
would fail automatically at the death of the testator.\textsuperscript{61} The court in holding that the gifts were void, stated:

The language of this section is clear and unambiguous. Invalid means void, or without validity, and it seems obvious that if children of the blood take under the will just as it provides, and have done nothing themselves to bring about the invalidity of the bequests to the charities, they can not be said to have waived the provisions of the statute . . . .

The court went on to distinguish \textit{Thomas v. The Trustees of Ohio State University} and \textit{The Trustees of Ohio State University v. Folsom} on the ground that the naked power to appoint is not covered by the statute.\textsuperscript{62}

\textbf{Lower Court Cases Construing Gifts Under the Act as Voidable}

The conflict in the Ohio position as to the "void versus voidable" question arises from two probate court decisions (and, perhaps, also from two tax court decisions\textsuperscript{63}). The first of these two probate court decisions, \textit{Deeds v. Deeds},\textsuperscript{64} decided in Montgomery County in 1950, involved a devise by codicil to Denison University which failed because the codicil was executed within a year of the date of testatrix's death. Testatrix's husband was the residuary beneficiary under her will, and her son was substitute residuary beneficiary if her husband failed to survive the testatrix. After testatrix's death, her son signed a waiver relinquishing and disclaiming his rights under the statute to the property devised to the charity. In a will construction action filed by the husband as executor, the court held that the gift was voidable rather than void. Accordingly, said the court, the son, who was a protected party under the statute, had by his waiver effectuated the gift to the University. This case was never appealed.

The second case, \textit{Ireland v. Cleveland Trust Company},\textsuperscript{65} decided in 1958 by Judge Walter Kinder of the Probate Court of Cuyahoga County, involved a devise of over a million and one-half dollars to charity. Testatrix was survived by her son, the sole heir at law and residuary legatee under her will, who was willing to waive the benefits of the statute

\textsuperscript{61} The result here as determined by the court in the \textit{Kirkbridge} case was that the children and other beneficiaries received the income for twenty years, and the children had a vested remainder.

\textsuperscript{62} Subsequent to the \textit{Kirkbridge} case, the Court of Appeals of Mahoning County, Ohio, decided the case of Roenick v. Dollar Savings and Trust Company, 179 N.E.2d 379 (Ohio Ct. App. 1960). In that case the testator, within the year of his death, drafted a will leaving the residue to his grandson on the condition that he pay certain sums of money to certain charities. The court upheld the gift of the residue to the grandson, but without citation of authority, held that the condition was invalid as coming within "the plain, and unambiguous, terms" of the mortmain act.

\textsuperscript{63} Estate of Dudley S. Blossom, 45 B.T.A. 691 (1941); Estate of William A. Carey, 9 T.C. 1047 (1947).

\textsuperscript{64} 94 N.E.2d 232 (Ohio P. Ct. 1950).

\textsuperscript{65} 157 N.E.2d 396 (Ohio P. Ct. 1958).
if a waiver was legally possible. The court, "distinguishing" the Kirkbridge case without elaboration, held that the law of Ohio permitted and authorized a waiver, and therefore the gift to charity was valid. This case, as the Deeds case, was never appealed, and thus both appear to have been friendly lawsuits, aimed perhaps at saving taxes.66

Both of these cases are contrary to the law as interpreted by the supreme court, for the Ohio statute and the weight of case law interpreting it are clear in holding that testamentary gifts made in prohibition of the statute are void as against public policy.67

Parties Who Can Invoke or Waive the Benefits of the Statute

Who can invoke the operation of a particular statute where the statute does not set forth particular persons who must survive the testator? Where the statute does enumerate persons who must survive the testator for the statute to operate, can only those persons question the validity of the charitable bequest, or can any person who might benefit from the invalidity of the gift contest it?

In all of the states in which no class of persons are specified by the statute,68 testamentary gifts to charity have been held to be void. Upon the death of the testator, such gifts pass to either successor legatees and devisees, residuary beneficiaries, or the heirs at law of the testator depending upon the particular provision of the will which is void. Therefore, any interested person can contest the validity of the gift. Only Pennsylvania, by a 1947 amendment to its statute, permits the gift to be validated by all the persons who would be benefited by its invalidity.69

66. See Estate of Dudley S. Blossom, 45 B.T.A. 691 (1941); Estate of William A. Carey, 9 T.C. 1047 (1947); Milliard v. Humprey, 8 F. Supp. 784 (W.D. Wash. 1934), aff’d, 79 F.2d 107 (2d Cir. 1935). Internal Revenue Code of 1954 section 2055(a) provides: "In General — For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the return) ... (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes ...." Thus, if a waiver of a charitable bequest is valid, there is a substantial saving in estate tax, for the amount of the charitable bequest can be deducted from the estate before computing the estate tax.

67. The theory that such testamentary gifts are void as against public policy is succinctly set forth in Kirkbridge v. Hickok, 155 Ohio St. 293, 300, 98 N.E.2d 815, 819, as follows: "In none of these cases has the statute been treated otherwise than as a limitation on the power of the testator to make charitable bequests, where the testator dies within a year after making his will, and all hold that property so devised or bequeathed does not under such circumstances pass to charitable institutions."


In the rest of the states, except Ohio, where the statutes enumerate certain classes of persons who must survive the testator for the charitable gifts to be invalid, it has been held that only those persons can exercise the right to invoke the statute, and that if they fail to contest the gifts, then the provisions of the statute are waived. Thus, in Georgia and Mississippi, where the statutes provide that gifts within the statutory provisions are "void," the courts have held that "void" means "voidable" and only persons named in the statute can invoke its provisions. California, Florida, and New York specifically state that gifts made in contravention of their statutes can only be contested by those parties enumerated therein. The gifts are valid and the statutes are waived if there is no contest.

The same result has been reached by court decision in Iowa.

While the Ohio statute is similar to those of the latter group, the same Ohio courts which have disagreed as to whether gifts made in contravention of the statute are void or voidable, have also, as to be expected, disagreed over which parties have the standing to attack the validity of such gifts. The supreme court in Patton v. Patton, which involved a partition action brought by the brother of the decedent, held that since the gift was void any one interested in the descent and distribution could assert the invalidity of the bequest. Thus, the brother, who was not within any class enumerated within the statute, had the right to attack the charitable gift. In a later case decided by the Ohio Circuit Court of Cuyahoga County, it was held that any party interested in the estate could object.

In contrast, the cases of Deeds v. Deeds and Ireland v. Cleveland Trust Company, which stated that the gifts under the statute were voidable, held that only persons named in the statute could invoke its protection, and that there could be no attack on the gift unless the declared purpose of the statute would be served. As stated previously, the waivers in these cases in favor of the charities were held to be valid, but neither case was appealed.

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70. GA. CODE ANN. § 113-107 (1959); MISS. CODE ANN. § 671 (1942).
71. Monahan v. O'Byrne, 147 Ga. 633, 95 S.E. 210 (1918); Bell v. Mississippi Orphans Home, 192 Miss. 205, 5 So. 2d 214 (1941).
74. 39 Ohio St. 590 (1883).
75. Davis v. Hutchins, 15 Ohio C.C.R. 174 (1897), rev'd on other grounds, Davis v. Davis, 62 Ohio St. 411, 57 N.E. 317 (1900). The grounds for reversal were that the residuary clause of the will was limited in nature, and therefore the void bequests to charity went by the law of intestate succession.
76. 94 N.E.2d 232 (Ohio P. Ct. 1950).
77. 157 N.E.2d 396 (Ohio P. Ct. 1950).
Thus, while the position of the Supreme Court of Ohio is clear — testamentary gifts, coming within the provisions of the statute, are void at the death of the testator and can be attacked by any interested or benefited party — this position is illogical and completely out of step with similar legislation in other states. Why would the Ohio legislature have enumerated certain classes of persons who must survive the testator for the statute to operate, if it did not intend to protect only these classes?

DOCTRINES PERMITTING AVOIDANCE OF HARSH EFFECTS OF MORTMAIN ACTS

A number of doctrines which reduce the hardship of the mortmain statutes have been incorporated into statutes or adopted by judicial decision. One of these is the doctrine of dependent relative revocation. Another is the doctrine of independent legal significance.78

Doctrine of Dependent Relative Revocation

The doctrine of dependent relative revocation operates where the testator has executed a will prior to the statutory time limitation set forth in a particular mortmain act leaving gifts to charity, and later, during the statutory prohibited time period, executes a new will or codicil which either expressly or impliedly revokes or modifies the prior will, and which names the same or similar charity and gives the same or different amounts of money to those charities. As previously discussed, the gifts made to charities within the prohibited time periods are void or voidable if left to charity, and the requisites of the particular statutes have been met. However, the doctrine of dependent relative revocation operates to validate the charitable gifts in the prior will, on the ground that it was the testator's intention that the revocation of the gift in the prior will was conditioned upon the validity of the subsequent will or gifts.79 Further, if the gifts are invalid under the second will, the condition has not been met, and thus the gifts under the prior will are still in effect. Thus as succinctly stated by the court In re Kaufman's Estate:80

Under the doctrine of dependent relative revocation, an earlier will, revoked only to give effect to a later one on the supposition that the later one will become effective, remains in effect to the extent that the later proves ineffective. ... The doctrine is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative.

78. Further statutory aids to charities are provided in the Florida and Georgia statutes. The Florida statute, FLA. STAT. ANN. § 731.19 (Supp. 1961), requires that those persons named within it must file notice within eight months after the death of the testator in order to invoke its protection. The Georgia statute, GA. CODE ANN. § 113-107 (1959), provides that when the estate exceeds $200,000 the restrictions shall not apply to the excess.
80. 25 Cal. 2d 854, 859, 155 P.2d 831, 834 (1945).
The various courts which apply the doctrine of dependent relative revocation to such situations have adopted different standards. Thus, some courts\textsuperscript{81} refuse to apply the doctrine where there is an express clause of revocation, stating that such a clause is controlling. Others\textsuperscript{82} will apply the doctrine even when the revocation clause has been inserted, stating that the intention of the testator is paramount to the words used in his will. Further, where the second will contains no express clause of revocation, but the clauses of the second will are inconsistent with those of the first, the courts are split in decision.

Some of the courts have held that the second will does not revoke the first, since it is truly the inconsistency between the gifts in the two instruments which affords any grounds for claiming revocation, and since the gifts in the second will are not operative, the first instrument is not affected by the second. Other courts hold that the testator intends to revoke the first instrument, as is indicated by the inconsistent gifts in the second instrument; and effect must be given to this intention even though the gifts which are made by the second instrument cannot take effect.\textsuperscript{83}

The application of the doctrine can best be illustrated by several cases. In \textit{In re Kaufman's Estate}\textsuperscript{84} the testator, upon moving from New York to California, drafted a new will revoking all his former wills. This new will named the same charitable beneficiaries as his former will and provided for identical cash bequests. The only substantial change was the naming of a new executor. The testator died within thirty days of the execution of this new will. Under California law testamentary gifts to charity are invalid if the will providing for them was executed within thirty days of the testator's death. The California court, applying the doctrine of dependent relative revocation, sustained the gifts to charity under the prior will stating:

When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new.\textsuperscript{85}

In the case of \textit{Linkins v. Protestant Episcopal Cathedral Foundation},\textsuperscript{86} the testator executed a second will revoking his first will, but provided in the residuary clause of the second for distribution to the same charities as in the residuary clause of the first. The testator died within one month

\textsuperscript{81} Ely v. Megie, 219 N.Y. 112, 113 N.E. 800 (1916).
\textsuperscript{83} Id. at 860, 155 P.2d at 834.
\textsuperscript{84} \textit{In re Blankenship's Estate}, 22 So. 2d 466 (Fla. 1960); Wilbourn v. Shell, 59 Miss. 205 (1881).
\textsuperscript{86} 25 Cal. 2d 854, 155 P.2d 831 (1945).
of executing his second will, making such charitable bequests void under the District of Columbia Code. The court of appeals, citing the *Kaufman* case with approval, applied the doctrine of dependent relative revocation to uphold the gifts and stated:

The doctrine of dependent relative revocation is basically an application of the rule that a testator's intention governs; it is not a doctrine defeating that intent.\(^8^7\)

The same result was reached by an Iowa court in *Blackford v. Anderson*,\(^8^8\) holding that the doctrine of dependent relative revocation was applicable so as to give effect to the thrice declared intent of the testator.

Several states have, by statute, incorporated into their mortmain acts the doctrine of dependent relative revocation in order to avoid the effects of the mortmain provisions. Thus, in 1957, as a result of *In re Pratt's Estate*,\(^8^9\) in which a Florida court refused to apply the doctrine in a case similar to the *Kaufman* and *Linkin* decisions where a subsequent will revoked all prior wills of the testator, the Florida Legislature amended section 731.19 of its statutes to provide that charitable gifts are not voidable if

... testator, by his will duly executed immediately next prior to such last will and more than six months before his death, made a valid charitable bequest or devise in substantially the same amount for the same purpose or to the same beneficiary, or to a person in trust for the same person or beneficiary as was made in such last will.

Another comprehensive incorporation of the doctrine into a mortmain statute was accomplished by Pennsylvania in section 180.7 of its statutes. This section in part provides:

Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if such instrument shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.

Following the amendment of the Pennsylvania statute, *McGuigan's Estate*\(^9^0\) was decided. In that case the testator died five days after executing a new will which specifically revoked all prior wills. This new will left all the residue absolutely to a charity, while a former will executed more

\(^{87}\) *Id.* at 360.

\(^{88}\) 226 Iowa 1138, 286 N.W. 735 (1939).

\(^{89}\) 88 So. 2d 499 (Fla. 1956).

than thirty days prior to decedent's death had left all the residue in trust for the same charity. The court in upholding the charitable gift stated:

Prior to the Act of 1947 the law of Pennsylvania was clearly settled that the residuary gift contained in testatrix's last will of 1955 was void [because of testatrix's death within 30 days]. . . . The reason for the law prior to 1947 was clear. The basic purpose of the 30 day requirement was and is to prevent a testator during his last illness from being importuned or otherwise influenced, by hope of reward or fear of punishment in the hereafter, to leave his estate in whole or in part to charity or to church. Since it would often be difficult to prove whether a man was in his last illness, or whether he had been importuned, or was unduly influenced by charity or church, or was influenced while in extremis by sudden hope of Heaven or fear of Hades, the Legislature wisely established a clear, realistic and inflexible time period — 30 days. However, society came to realize that gifts to charity or church which were made within the last 30 days of a man's life were not always unduly influenced by charity or church and that the law was unfair to testators, charity and church alike for the above mentioned reason, as well as because of the fact that while in good health a testator might die in a motor, railroad or plane accident within 30 days after making his will. The legislature therefore decided that the prior statutory law in re charitable gifts should be modified and liberalized and that gifts to charities which were made within 30 days of death should, at least to a limited extent, be protected and validated where the testator had made a substantially identical charitable gift in a prior extant will.91

Thus, the Pennsylvania Legislature came to recognize some of the inherent problems which resulted from a harsh and antiquated law and corrected them by adopting a modern and liberal approach.

But, while California, District of Columbia, Iowa, Florida, Mississippi, and Pennsylvania, by decision or statute, have adopted to a greater or lesser degree the doctrine of dependent relative revocation to ease the burden of of their mortmain acts, the Ohio Supreme Court in the recent case of Jewish Welfare Federation of Cleveland v. The Cleveland Trust Company,92 refused to apply the doctrine. Such a refusal is certainly not inconsistent with the harsh position taken by the Ohio courts in rebuffing any attempt to modify the effects of its mortmain statute.

**Doctrine of Independent Legal Significance**

While all apparent attempts to modify the effect of the Ohio mortmain act on testamentary dispositions93 have been thwarted by the Ohio

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91. Id. at 477-79, 131 A.2d at 126, 127.
92. Cuyahoga County P. Ct No. 554490 (Ohio 1960), aff'd., Cuyahoga County Ct. App. No. 25339 (Ohio 1961), motion to certify overruled, Sup. Ct. No. 37084 (Ohio 1961). This case was unreported and therefore can be cited only by its docket numbers.
courts and legislature, the Ohio courts have held that inter vivos trusts with charitable beneficiaries are not void if created within a year of a testator's death. Because of this approach the implications of a recently passed statute, Ohio Revised Code section 2107.63, may cause some surprising results.

Formerly, where a testator provided in his will that the residue of his estate "pour over" into a pre-existing inter vivos trust, for such a gift to be valid, the trust had to be incorporated by reference, pursuant to Ohio Revised Code section 2107.05, into the testator's will. Any subsequent amendments to the trust also had to be incorporated into the testator's will by codicil for the property passing from the estate into the trust to go according to the terms of the trust as amended. Thus, in Cleveland Trust v. White, decided prior to Ohio Revised Code section 2107.63, and pursuant to Ohio Revised Code section 2107.05, where the testator created an inter vivos trust within a year of the date of his death with charitable beneficiaries and incorporated the same by reference into his will executed thereafter, the court held that while the property transferred during life to the trust passed to charity, property which passed into the trust from testator's will did not pass to charity because the same was a testamentary disposition within the prohibition of the mortmain act.

However, with the passage of section 2107.63, the Ohio Legislature recognized the doctrine of "independent legal significance," which provides in substance that an intervivos trust stands independently of a will of a testator, and that once the trust has been referred to in the will, subsequent amendments to the trust do not have to be referred to in the will. The result of this doctrine is that, without testamentary disposition, the residue of the testator's estate "pours over" into his inter vivos trust as amended.

The doctrine of independent legal significance coupled with the approach of the Ohio courts in upholding inter vivos trusts for the benefit of charities produces an interesting result which can be illustrated as follows: X draws a will in July of 1961 and provides therein that the residue of his estate shall "pour over" into P inter vivos trust created in June of 1961; X amends his trust in January of 1962 by changing the beneficiaries to charitable institutions without changing his will; if X dies in March of 1962, the gifts to the charities are valid, even if X is survived by issue, adopted children, or lineal descendants thereof, be-

cause the amendment of his trust is not a testamentary disposition so as to come within the purview of Ohio Revised Code section 2107.06, the Ohio mortmain act. In reality what the testator is doing is devising or bequeathing property to charity and accomplishing such during the year of his death.

Whether the Ohio Legislature was aware of this interesting result when it passed section 2107.63 is a matter of conjecture.

**A Need for Change in Ohio**

Since 1874, when the mortmain statute was first passed in Ohio, until the present time, there have been no more than two dozen reported cases dealing with the act; of these cases, only seven have reached the supreme court. While the supreme court cases are consistent in holding that the gifts coming within the statute are void, and that any interested person can raise the issue, some lower courts have felt free to alter the meaning of the act when the equities of the situation favor upholding the gift and the issue, lineal descendents, or adopted children raise no objection.

One reason, perhaps, for the sparsity of cases, is the fact that testator's attorney has several tools at his disposal which he can use to thwart the statute. The best tool available, and probably the most frequently used, is the inter vivos trust properly drawn so as not to be testamentary in character. If such a trust is not construed as a testamentary disposition of property, it does not come within the purview of the mortmain statute.99 This device can now be coupled with a "pour-over" trust provision in a will under Ohio Revised Code section 2107.63. A second available tool is the bequest to a compliant relative or friend of a power to appoint certain property of the decedent to a named charity in the event that a direct bequest to that charity is held invalid under the mortmain act. A further possibility is the use of a joint bank account with right of survivorship in the name of the donor and the charity he wishes to benefit.100

Thus, the Ohio statute, as it stands today, has only limited application. Yet, in those cases in which it does operate there are bound to be harsh

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100. For two early cases holding that a bequest of a power to appoint to charity does not fall within the mortmain act, see Thomas v. The Trustees of Ohio State University, 70 Ohio St. 92, 70 N.E. 896 (1904), and The Trustees of Ohio State University v. Folsom, 56 Ohio St. 701 (1897).

101. A second reason for the lack of cases may be due to the testator's fear of the provisions of the statute itself, which have caused him to reconsider his plan of testamentary disposition.
and inequitable results. The statute as construed establishes a conclusive presumption of "undue influence"\textsuperscript{102} even in a situation where such presumption could be effectively rebutted.\textsuperscript{103} Further, the statute as construed is not only inconsistent with similar legislation in other states but also appears not in harmony with its purpose. While enumerating certain classes of persons who are ostensibly to be protected from improvident gifts of the testator, the courts interpret the act for the benefit of other classes and hold that gifts to charity are void as against public policy. All that can be said for the majority of Ohio courts that so hold is that they have been, if not logical, at least consistent among themselves.

The need for statutory aid to certain classes of the testator's heirs, however, is not recognized by the great majority of states. Of the eleven states which place some limitation on charitable bequests and devises, the Ohio statute is the most severe because under it all testamentary gifts to charities made within one year of the testator's death are void. It is for these reasons that the writer agrees with those who find the statute not only harsh, but obsolete and who advocate its repeal.

**RECENT LEGISLATIVE AND JUDICIAL PROPOSALS**

From 1953 to 1957, the Probate and Trust Committee of the Ohio State Bar Association considered legislative changes in Ohio's mortmain statute. During this time a subcommittee was appointed to study the problem. A majority of this committee was of the opinion that the statute no longer served any useful purpose and that it should be abolished. They felt that it impaired proper estate planning especially as related to those problems created by rapid changes in tax laws and estate conditions.

Since there was apparent opposition by the Council of Delegates of the Ohio Bar Association to total abolition of the statute, however, the committee proposed as a compromise measure, that the time period be reduced from one year to thirty days. Other suggested changes which were considered were a limit as to the amount which could be devised or bequeathed to charities, and an amendment making gifts under the statute voidable only at the instance of parties enumerated within the statute. The committee in making this proposal expressed its belief that gifts under the present statute were void and not voidable. When the proposed change to a thirty-day time limitation was presented, it also met with strong opposition from the Council of Delegates of the Ohio State Bar. Much of this resistance came from representatives from rural counties.


\textsuperscript{103} Sudden fatalities arising from automobile accidents or airplane crashes provide one example where there can be no suggestion of undue influence.
Due to this opposition, consideration of the amendment was dropped by the Ohio State Bar Committee.\textsuperscript{104}

In the past several years both the Cleveland and the Cuyahoga County Bar Associations, as well as others, have considered changes in the statute. These suggested changes follow closely the proposals made by the Probate and Trust Committee of the Ohio State Bar Association—changes as to the time limitation, as to limitations on the amount which the charities could take, and a change making the gifts voidable rather than void.\textsuperscript{105}

At the present time there is little, if any, action for legislative amendment or abolition of the mortmain statute. However, a harsh result in the recent case of The Jewish Welfare Federation of Cleveland v. Cleveland Trust Company\textsuperscript{106} again illustrates the need for changing the statute.\textsuperscript{107}

\textbf{RICHARD W. SCHWARTZ}

\textsuperscript{104} This information was secured through the courtesy of Richard F. Sater, Chairman of the Probate and Trust Committee of the Ohio State Bar Association.

\textsuperscript{105} This information was provided by R. T. Sawyer, Jr., former Chairman of the Probate and Trust Committee of the Cleveland Bar Association, and Ellis V. Rippner, Chairman of the Probate and Trust Committee of the Cuyahoga Bar Association.

\textsuperscript{106} Cuyahoga County P. Ct. No. 554490 (Ohio 1960); aff'd., Cuyahoga County Ct. App. No. 25339 (Ohio 1961), motion to certify overruled, Sup. Ct. No. 37084 (Ohio 1961).

\textsuperscript{107} The status of the present Ohio mortmain act can be summarized by the words of Judge Frank J. Merrick, Probate Court of Cuyahoga County, in his unreported opinion in the case of Jewish Welfare Federation of Cleveland v. Cleveland Trust Company, Ibid.: "The writer of this opinion has advocated the repeal of this so-called mortmain statute and is of the belief that the same is unrealistic and penalizes worthy religious organizations in undue fashion."