

[STATUTES OF GREAT BRITAIN, 1736] [1]

[9 George II.]

CHAPTER XXXVI.

An Act to restrain the Disposition of Lands, whereby the same become unalienable.

Preamble [1]

WHEREAS Gifts or Alienations of Lands, Tenements or Hereditaments, in Mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome Laws [2], as prejudicial to and against the common Utility;

nevertheless this publick Mischief has of late greatly increased by many large and improvident Alienations or Dispositions made by languishing or dying Persons, or by other Persons, to Uses called Charitable Uses, to take Place after their Deaths, to the Disinheritance of their lawful Heirs;

For Remedy whereof be it enacted by the King’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the twenty-fourth Day of June, which shall be in the Year of our Lord One thousand seven hundred and thirty-six, no Manors, Lands, Tenements, Rents, Advowsons [3] or other Hereditaments, Corporeal or Incorporeal whatsoever, nor any Sum or Sums of Money, Goods, Chattles, Stocks in the publick Funds, Securities for Money, or any other Personal Estate whatsoever, to be laid out or disposed of in the Purchase of any Lands, Tenements or Hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or

settled to or upon any Person or Persons, Bodies Politick or Corporate, or otherwise, for any Estate or Interest whatsoever, or any ways charged or incumbered by any Person or Persons whatsoever, in Trust, or for the Benefit of any charitable Uses whatsoever;

unless such Gift, Conveyance, Appointment or Settlement of any such Lands, Tenements or Hereditaments, Sum or Sums of Money, or Personal Estate (other than Stocks in the publick Funds) be and be made by Deed indented, sealed and delivered in the Presence of two or more credible Witnesses twelve Calendar Months at least before the Death of such Donor or Grantor (including the Days of the Execution and Death) and be enrolled in his Majesty’s High Court of Chancery, within six Calendar Months next after the Execution thereof; and

unless such Stocks be transferred in the publick Books usually kept for the Transfer of Stocks six Calendar Months at least before the Death of such Donor or Grantor (including the Days of the Transfer and Death) and

unless the same be made to take Effect in Possession for the charitable Use intended, immediately from the making thereof, and be without any Power of Revocation, Reservation, Trust, Condition, Limitation, Clause or Agreement whatsoever, for the Benefit of the Donor or Grantor, or of any Person or Persons claiming under him.

unless by Deed indented, and executed before 2 Witnesses 12 Months before the Death of the Donor, and enrolled, &c.

[1] After 24 June 1736, no Manors, Lands, &c. nor Money to be laid out in Lands, to be given for charitable Uses,

[1] [Source: Statutes at Large, Ruffhead (1764), vol 6 pp 246-247. Also: Pickering (1765), vol 17 pp 82-84; Raithby (1811), vol 9 pp 485-486. This Act was passed (received royal assent) on 20 May 1736 and under the legal doctrine of the time it would have been deemed to have come into force retroactively on 15 January 1736, the date of commencement of the session; but s 1 gives its own coming-in-force date of 24 June 1736. For many generations, this act was commonly called the “Statute of Mortmain of 1736”; but in 1896 it was given the short title of The Charitable Uses Act, 1735. See endnotes.]

[2] For former Laws concerning Mortmain, refer to 9 H. 3, ft. 1, c. 36. 7 Ed. 1, stat. 2. 13 Ed. 1, stat. 1, c. 32. 18 Ed. 1, ft. 1, c. 3. 27 Ed. 1, stat. 2. 18 Ed. 3, ft. 3, c. 3. 15 R. 2, c. 5. 23 H. 8, c. 10. 1 & 2 P. & M., c. 8. 39 Eliz., c. 5. 21 Jac. 1, c. 1. 13 & 14 Car. 2, c. 12. 7 & 8 W. 3, c. 37. [from Ruffhead, p 246.]

[3] [See endnote on “Advowson”.]

The said Limitations not to extend to Purchases or Transfers made for valuable Considerations.

II. Provided always, That nothing herein before-mentioned relating to the sealing and delivering of any Deed or Deeds twelve Calendar Months at least before the Death of the Grantor, or to the Transfer of any Stock six Calendar Months before the Death of the Grantor or Person making such Transfer, shall extend, or be construed to extend, to any Purchase of any Estate or Interest in Lands, Tenements or Hereditaments, or any Transfer of any Stock, to be made really and *bona fide* for a full and valuable Consideration actually paid at or before the making such Conveyance or Transfer without Fraud or Collusion.

Gifts, &c. made after 24 June 1736, otherwise than directed by this Act, to be absolutely void.

III. And be it further enacted by the Authority aforesaid, That all Gifts, Grants, Conveyances, Appointments, Assurances, Transfers and Settlements whatsoever, of any Lands, Tenements or other Hereditaments, or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect any Lands, Tenements or Hereditaments, or of any Stock, Money, Goods, Chattles or other Personal Estate, or Securities for Money to be laid out or disposed of in the Purchase of any Lands, Tenements or Hereditaments, or of any Estate or Interest therein, or of any Charge or Incumbrance affecting or to affect the same, to or in Trust for any charitable Uses whatsoever, which shall at any Time from and after the said twenty-fourth Day of *June* one thousand seven hundred and thirty-six, be made in any other Manner or Form than by this Act is directed and appointed, shall be absolutely, and to all Intents and Purposes, null and void.

But not to Prejudice the 2 Universities, or the Colleges of Eton, Winchester, or Westminster.

IV. Provided always, That this Act shall not extend, or be construed to extend, to make void the Dispositions of any Lands, Tenements or Hereditaments, or of any Personal Estate to be laid out in the Purchase of any Lands, Tenements or Hereditaments, which shall be made in any other Manner or Form than by this Act is directed, to or in Trust for either of the two Universities within that Part of *Great Britain* called *England*, or any of the Colleges or Houses of Learning within either of the said Universities, or to or in Trust for the Colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better Support and Maintenance of the Scholars only upon the Foundations of the said Colleges of *Eton*, *Winchester*, and *Westminster*.

V. Provided nevertheless, and be it enacted by the Authority aforesaid, That no such College or House of Learning, which doth or shall hold or enjoy so many Advowsons of Ecclesiastical Benefices as are or shall be equal in Number

to one Moiety of the Fellows or Persons usually styled or reputed as Fellows, or,

where there are or shall be no Fellows or Persons usually styled or reputed as Fellows, to one Moiety of the Students upon the Foundation,

whereof any such College or House of Learning doth or may by the present Constitution of such College or House of Learning consist, shall from and after the twenty-fourth Day of *June* one thousand seven hundred and thirty-six, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other Advowsons of Ecclesiastical Benefices by any Means whatsoever; the Advowsons of such Ecclesiastical Benefices as are annexed to, or given for the Benefit or better Support of the Headships of any of the said Colleges or Houses of Learning, not being computed in the Number of Advowsons hereby limited. [4]

VI. Provided always, That nothing in this Act contained shall extend or be construed to extend to the Disposition, Grant or Settlement of any Estate real or personal, lying or being within that Part of *Great Britain* called *Scotland*.

[Notes: 1. For many generations, this UK act was commonly called the “Statute of Mortmain of 1736”. This was somewhat misleading. The word “mortmain” referred to lands owned by a group or entity that never died, such as the church or some other municipal or civil corporation, and on which, therefore, the main feudal taxes would never come due. The original mortmain laws were passed to stop or limit such tax avoidance. This act of 1736 had a different aim: to prevent or limit any lands, or rents from lands, from being given to or acquired by any charity—whether corporate or not, and whether taxes were being avoided or not. The idea was apparently that when lands were owned by charities, the rents were being excluded from the economy. Preventing or limiting this was not the original mortmain idea. Rather, it was enlarging mortmain to achieve an anti-charity agenda.

2. According to the Raithby edition in 1811 at p 486, s 5 was superseded “As to Grants to Governors of Queen Ann’s Bounty, under 2 & 3 Ann. c. 11. See 43 G. 3. c. 107.”

3. Two years later, s 5 was repealed entirely by UK 45 G. 3 c 101, thereby allowing university colleges to acquire or inherit advowsons for their members without restriction.

4. More exemptions superseding the strictures of this act were granted to many charities by subsequent acts.

No College to hold more Advowsons than shall be equal to 1 Moiety of their Fellows, &c.

This Act not to extend to Estates in Scotland.

[4] [Section 5] Repealed, 45 G. 3, c. 101 [from Raithby, p 486.] [See also end-notes 2, 3 and 4.]

5. British case law (the leading case being *Whicker v Hume* (1858), 7 HLC 124, 11 ER 50) held this act was inapplicable in the colonies—but the courts of what is now Ontario had earlier decided that this act had been inherited (“received”) by Ontario law and was in force there.

6. This act, except the already repealed s 5, was repealed in the UK by the *Mortmain and Charitable Uses Act, 1888*, UK 51 & 52 Vict c 42 s 13(1) Sch 8th item. Such repeal, not having been made applicable to Canada by express words or necessary intendment, did not extend to Canada; see the *Colonial Laws Validity Act, 1865*, UK 28 & 29 Vict c 63 s 1 5th para. Therefore, the status, if any, in Canada of this 1736 U.K. act was unaffected by the 1888 UK repeal.

7. Despite being repealed in the UK in 1888, this Act was given the short title *The Charitable Uses Act, 1735* by the *Short Titles Act, 1896*, 59 & 60 Vict c 14 s 1 First Sch at p 23. (The year 1735 in this short title appears to be a mistake, perhaps based on the fact that King George 2’s ninth regnal year, in which this parliamentary session occurred, began in 1735; but in fact this parliamentary session occurred entirely in 1736.)

8. Some years later in Ontario, this 1736 UK act was repealed and replaced by *The Mortmain and Charitable Uses Act, 1902*, SO 1902 c 2 s 14 Sch 8th item.

9. “**ADVOWSON.** The right of appointing a clergyman to a parish or other ecclesiastical benefice. Advowsons are of two kinds:

(1) ‘Collative’, when they are held by the Ordinary under whose jurisdiction the benefice is, normally the bishop of the diocese; and

(2) ‘Presentative’, when they are held by some other person (‘patron’), who presents the nominee for institution.

In the latter case the patron, who may be clerical or lay, an individual or a corporation, does not possess the right of putting his candidate in spiritual or even legal possession of the office. He presents him to the bishop or other ecclesiastical superior for institution and induction, and the latter may for due cause reject the nominee. The right of Advowson is historically the survival of an originally much more extensive control exercised by the feudal lord over churches on his estates . . . In the Church of England, where it still exists, its exercise is governed by English civil law, which since the time of the *Constitutions of Clarendon* (1164) has succeeded in maintaining control of this valuable right . . . In the Church of England the right of Advowson may be held by anyone who is not a Roman Catholic or an alien. An Advowson is treated by English law as a right of property which can be transferred by gift or (until 1924) by sale. . . .”—*Oxford Dictionary of the Christian Church*, revised (1983), p. 20.]