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Operation of the Rule Against Perpetuities

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DIVERSITIES

OPERATION OF THE RULE AGAINST PERPETUITIES.—The Rule against Perpetuities permits limitations which postpone the vesting of a gift to the expiration of a period measured by lives in being at the time the gift takes effect, i. e., in case of a will at the death of the testator. The lives determining the period not only need not be lives of beneficiaries, but they also need not be lives of persons specifically enumerated or named. This liberality is only qualified by the requirement that the expiration of the lives must be provable. The language of Lord Eldon in *Thellusson* v. *Woodford*[1] is: "During any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops." Sir A. MacDonald, Chief Baron, in the same case said:[2] "any number of lives, the exhaustion of which could be proved without difficulty."

The qualification impairs the definiteness of the rule. Even though it be said that it is not a question of whether the Rule against Perpetuities has or has not been infringed, but whether the gift is void for uncertainty,[3] it remains true that there are few criteria more uncertain in their application than that of certainty or uncertainty.

In the case Re *Villar*[4] the "period of restriction" set by testator's will was the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of her late Majesty, Queen Victoria, who should be living at the testator's death. Testator died in 1926.

Mr. Butler, former editor of "Burke on Peerage," testified that in 1922 there were one hundred descendants of Queen Victoria living, and that it might be very difficult and very probably impossible (another version makes him say: extremely difficult, if not impossible) in the future to prove who was the last survivor of the lineal descendants of Queen Victoria living September 6, 1926.

Astbury, J., in the Chancery Division of the High Court upheld the will, although with reluctance; he thought that, applying *Thellusson* v. *Woodford,* the limitation would be void if it were substantially impracticable to ascertain the extinction of the lives, but not void if ordinary testimony were available, although difficult and expensive.

The decision is sustained by the Court of Appeal. Lord Hanworth, M. R., says: "The difficulties are not insurmountable and they may arise, but one cannot say they must arise." "I join with Lord Eldon and Astbury, J. in regretting that a will may be validly

1. (1805) 11 Ves. 112, 146.
2. Supra, note 1, at 134.
3. Laurence, J., in 140 L. T. 92.
4. [1929] 1 Ch. 243 [1928] Ch. 471 for report of decision in court below.

made in terms which give rise to great difficulty at the present time, and probably still more so in the future, without any compensating advantage to anyone except to give latitude to the vanity and mere caprice of the testator."

Astbury, J. said the testator had used an old form of precedent. This special form of limitation was first brought to the notice of the writer of this note, when the English papers published the will of Herbert Spencer, in which it is found the great philosopher was not above this particular vanity. It may be surmised that the decision in the *Villar* case is due to the unwillingness of the court to throw doubt on the validity of many wills, and that the expressions used were intended to serve as warnings that the limitation may be declared at some time invalid; for it barely satisfies the test of *Thellusson* v. *Woodford,* if indeed it is within the language of that case.

The right of the testator to select, as measuring the period of restriction, lives that have no connection with the provisions of his will, is peculiar to the common law, and is perhaps in part to be accounted for by the fact that the Rule against Perpetuities is not, as it is in other legal systems, confined to testamentary or family arrangements. It is said that the policy of the Rule is not seriously affected since in any event "all the candles burn at the same time." A note to the *Villar* case in [1928] Ch. 471 shows that in the well known case of *Cadell* v. *Palmer,*[5] where the vesting was postponed to the expiration of twenty years after the extinction of the lives of twenty-eight persons who were beneficiaries under the will, the testator died in April, 1818, and the estate was wound up on May 16, 1918, a few months after the expiration of the period, which turned out to be almost exactly one hundred years. The period of restriction in the *Villar* case can hardly be expected to produce a more prolonged tying up. Still the favorable chances can undoubtedly be increased by the contrivance sanctioned in England. Probably the *Villar* case will put an end to the particular form of limitation which it upheld.

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THE ORIGIN OF THE SPEAKER'S GAVEL.—The gavel of the speaker of the legislative assembly may be taken as the physical symbol of Legislation. But how did the gavel originate? This seems to be so far something of an historical mystery. In the hope of evoking further contributions to clearing up this mystery, three beginnings are here offered; the first from the pen of Professor Robert W. Millar, who prepared a note for the Descriptive Booklet of the Law School Buildings of Northwestern University; the second from Professor J. Nelson Frierson, Dean of the Law School of the University of South Carolina, who, upon reading the first named note, sent the pages of the Legislative Manual of the State of South Carolina, in regard to the parliamentary mace;

5. (1833) 1 Cl. & F. 372.