Future Interests--A Fee Limited Upon a Fee by the Deed--Heir Construed as Heir of the Body

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with clean hands. In announcing that the legislature had violated the public policy of the State, it seems that the Court has not discriminated between the functions of the legislative and judicial departments.

—Mose Edwin Boiarsky.

**Future Interests—A Fee Limited Upon a Fee by Deed**

—Heir Construed as Heir of the Body.—The grantors by deed granted land to their daughter Laura, with a limitation that should Laura die without an heir, the land to be equally divided between James and William, sons of the grantors. After conveying to her sister, Laura died. The heirs of James and William brought ejectment against the sister. Held, the limitation over to James and William was valid. Laura took a qualified fee determinable upon her death without heirs of the body then living. *Kidwell v. Rogers*, 137 S. E. 5 (W. Va. 1927).

At early common-law a fee could not be limited upon a fee. The only kinds of future interests that could be created were in the form of remainders, and any limitation operating to shift the seisin otherwise than as a remainder expectant upon the determination of the preceding estate was void. This rule, the common-law doctrine of repugnancy between two estates, was founded upon the assumption that the conveyance of the fee was the conveyance of the whole, and after the whole was given there was nothing beyond that left to give. However, with the passage of the statute of uses and the statute of wills, the possibilities of the creation of future estates were greatly enlarged. Limitations after a fee by way of springing and shifting uses came to be recognized. Ulterior estates were permitted to be created to arise upon the defeasance of prior estates in the same property, contrary to the strict rules of the early common-law. *Pells v. Brown*, 3 Cro. Jac. 590, introduced into the law the novel idea of indestructible contingent future interests. This nondestructibility of such contingent future estates, created under the statute of uses, led to the growth of a new doctrine in the law of property, the so-called rule against perpetuities. The English and nearly all of the American authorities sustain the view of *Pells v. Brown*, and also hold that a gift over upon a definite
failure of issue is valid whether the gift is by will or deed. Van Horn v. Campbell, 100 N. Y. 287, 3 N. E. 316; Harder v. Matthews, 309 Ill. 548, 141 N. E. 422; 11 R. C. L. pp. 470-471; 21 C. J. 1022-1025. The principal case is in accord with the weight of authority and prior West Virginia decisions. Ocheltree v. McClung, 7 W. Va. 232; Tomlinson v. Nickell, 24 W. Va. 148; McKown v. McKown, 93 W. Va. 689, 117 S. E. 557. The courts of this state are bound to uphold such limiting clauses not only by virtue of precedent, but also by statutory directions. CODE, ch. 71, §§5 and 10. The court in construing the word "heir" departed from the strict common-law meaning. The rule is that "heir" will be taken in its technical sense, as a word of limitation, and the grantor will be presumed to have so intended. Reid v. Stuart, 13 W. Va. 346. If, in the principal case, the court had construed "heir" in its technical sense, the grantors would have said, "and should Laura die without an heir at law, the land should be divided between John and William, two of her heirs at law." In order to avoid that absurdity and give effect to the intention of the grantors as evidenced by the circumstances surrounding the transaction, the court properly construed "heir" to mean "heir of the body". Chipps v. Hall, 23 W. Va. 512; Tomlinson v. Nickell, 24 W. Va. 148. This construction brings the case within the operation of §10 of ch. 71, CODE, which renders valid the limitation which would be otherwise invalid as violative of the rule against perpetuities.

—Howard Caplan.

LIBEL — PRIVILEGED COMMUNICATIONS — COMMUNICATIONS SENT TO COMPENSATION COMMISSIONER AFTER AWARD.
—The plaintiff was receiving compensation from the West Virginia State Compensation Commissioner for an injury received in the defendant's mine. The defendant wrote a letter to the State Compensation Commissioner which caused this compensation to be cut off. The plaintiff brought an action for libel alleging that because of false statements in the letter the award had been set aside and not reinstated until nine months later, thereby damaging plaintiff's good name and reputation. Held, demurrer to the declaration sustained. In view of CODE, c. 15P, §40, giving