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Injunctions–Equitable Servitudes–Boarding House as "Residence Purpose"

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trustworthy to warrant its being admitted. The case illustrates the modern trend. There is a feeling that all men hold death in awe and experience a physical revulsion towards its unknown and unascertainable consequences. This the courts apparently are willing to recognize, and rightly so, as sufficient assurance of trustworthiness, without any requirement of a belief in God or a hereafter.

There is some authority that the credibility of the dying declarant may be impeached by a showing of atheism. There would not seem to be any more valid reason for permitting a showing of atheism to destroy credibility than to permit it to make the declaration inadmissible. Why admit a declaration only to leave it discredited by a clever lawyer playing upon the religious prejudices of the jury?

—Donald F. Black.

INJUNCTIONS — EQUITABLE SERVITUDES — BOARDING HOUSE AS "RESIDENCE PURPOSE". — In a suit to enjoin the operation of a boarding house on property subject to a covenant limiting the use to residential purposes only, the court, on appeal, dissolved the injunction holding the operation of a boarding house not violative of the covenant providing that "said land shall not be used otherwise than for residence purposes, and shall not be used for a sanatorium, hospital or infirmary, and no apartment-house shall be erected thereon". Beek, P. J., dissented vigorously on the ground that both the spirit and the letter of the covenant were violated. John Hancock Life Insurance Co. v. Davis.

It is an elementary rule of law that covenants restricting land should be strictly construed in favor of the free and untrammeled use of property. The majority of the court, pur-
porting to follow this rule, probably elicited from the words of
the covenant a meaning which they did not naturally and nor-

mally import. This application of the rule, however, is no more
excessive than that found in other cases.\(^a\)

West Virginia has gone equally as far and probably over-
reached itself in construing a restrictive covenant too strictly.
In the case of Deutsch & Cohen v. Mortgage Securities Co.\(^b\) the
court held that the erection of two one-family dwelling houses
on a lot was not in violation of a covenant "that no dwelling shall
be built upon the said lot except a one-family house". The same
principle was adhered to in a somewhat startling decision where
the court held the construction of a spur railroad track not viola-
tive of a covenant not to build any buildings "for other than
dwelling or residence purposes" upon the premises.\(^c\)

The word "residence" used in such restrictive covenants,
ecluding other uses, refers to the settled abode of persons.\(^d\) The
common meaning of the word hardly includes such commercial
uses as "boarding", or the next step, operating a restaurant.
This is the view taken by the dissent. It is supported by a Massa-
chusetts case\(^e\) where the court held that the keeping of boarders
and roomers to the number of twelve at one time was violative of
a restriction in a deed limiting the building upon the premises
to a "dwelling house to be used exclusively as a residence for a
private family". A similar position was taken by the Michigan

\(^a\) Hunter Tract Improvement Co. v. Corporation of Catholic Bishop, 98
Wash. 112, 167 Pac. 100 (1917) (occupation of a residence by twelve or
fifteen members of a religious organization for worship, initiation and
instruction of children held not violative of a covenant to use the premises
"for residence purposes only").

\(^b\) Hunt v. Held, 90 Ohio St. 280, 107 N. E. 765 (1914) (holding that the building of a double house on one lot was not in violation of a covenant to use the premises "for residence purposes only").

\(^c\) 96 W. Va. 676, 123 S. E. 793 (1925).

\(^d\) Neekamp v. Huntington Chamber of Commerce, 99 W. Va. 388, 129 S.
court took a practical view of a covenant that "no building or structure for
any business purpose whatsoever shall be erected on said premises" and
held the construction of a railway across the lots a violation of the terms
of the covenant.)

In the recent case of Kaminsky v. Barr, 106 W. Va. 201, 145 S. E. 287
(1928) the court seemed to adopt a liberal view in spirit, if not in words,
when it granted relief to the plaintiff who had violated the covenant him-
self saying that the establishment of several stores did not so change the
character of the neighborhood from a residence section, under the terms of
the covenant, into a business district as to preclude relief, and compelled
the defendant to observe a set-back line to the same extent which the plaintiff
had conformed thereto.

\(^e\) Moore v. Stevens, 90 Fla. 879, 106 So. 901, 48 A. L. R. 1127 (1925).

\(^f\) Sayles v. Hall, 210 Mass. 281, 96 N. E. 712 (1911).
court when it held that a "condition that no store, factory or building, other than a dwelling house" should be erected, "and that the said premises shall be used for residence purposes only" prohibited the construction of a double house though under the same roof and with but a single front entrance."

If restrictive covenants are to be recognized as available juristic devices it hardly seems warranted to defeat them by such indirections as strained constructions of common words."

—FREDERICK H. BARNETT.

INTERNAL REVENUE — GAIN ACCRUING ON EXCHANGE OF SHARES OF STOCK AS TAXABLE INCOME. — Plaintiff, owner of 255 shares in Bank A which consolidated with two other institutions to form Bank X, exchanged his shares of stock for those of the new bank and received 340 shares of the new stock which had a higher aggregate market value than the stock surrendered. The Circuit Court of Appeals of the Circuit held the difference to be taxable income under the Revenue Act of 1918, which provided that when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock owned by him new stock of a greater aggregate par or face value, the excess in par or face value shall be treated as a taxable gain to the extent that the fair market value of the new stock is greater than the cost of the stock exchanged. The plaintiff contended his interest was precisely the same before and after consolidation, and that the excess aggregate par value of the stock received was in the nature of a stock dividend, which has been held not taxable under the Federal law. The Court answered the contention with

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§ 202 (b), 40 Stat. 1060.

The Act also provides: "... but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange."  

A stock dividend is not taxable as income. Walsh v. Browster, 255 U.

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9 The West Virginia decisions on equitable servitudes are limited and do not present a very consistent or detailed picture of the device. For additional cases see Robinson v. Edgell, 57 W. Va. 157, 49 S. E. 1027 (1905); Hennen v. Deveny, 71 W. Va. 629, 77 S. E. 142 (1913); Harper v. The Virginian Railway Co., 76 W. Va. 738, 86 S. E. 919 (1915); Withers v. Ward, 86 W. Va. 355, 104 S. E. 96 (1920); Cole v. Seamonds, 87 W. Va. 19, 104 S. E. 747 (1920); United Fuel Gas Co. v. Morley Oil & Gas Co., 102 W. Va. 374, 135 S. E. 399 (1926); White v. White, 103 W. Va. 128, 150 S. E. 53 (1927).