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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.[8]

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.[9]

—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,[1] 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.[2] 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.[3] The Court answered the contention with

[8] Schadt v. Brill, 173 Mich. 647, 139 N. W. 878 (1913).
[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. 788, 86 S. E. 919 (1915); Withers v. Ward, 86 W. Va. 558, 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, 108 W. Va. 128, 150 S. E. 53 (1929).

[1] § 202 (b), 40 Stat. 1060.
[2] 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."
[3] A stock dividend is not taxable as income. Walsh v. Brewster, 255 U.

the argument that in the case of a stock dividend the enterprise remains the same after its payment, with the same assets and liabilities, whereas the new bank was substantially a different institution and that the added value of the plaintiff's interest was taxable income. *United States v. Siegel.*[4]

Prior cases similar to this have given the Supreme Court of the United States considerable trouble, as evidenced by the ubiquitous dissenting opinions in such cases. Gains resulting from the exchange of shares of stock have been held taxable income, unless the transaction involves a mere reorganization of the company, in which case the new stock represents the same interest the stockholder had before the exchange but in a different form. Justification for taxing such a gain has been put on the ground that by the transaction the accrued surplus profits of the original company, in which the stockholders formerly had only a capital interest, became the separate property of the stockholders by way of distribution in the form of additional shares, which they could dispose of as they chose.[5] The fact that the stockholders acquired no aggregate increase in wealth by virtue of the exchange is not controlling. It is to be noted how similar this method of capitalizing the surplus is to an ordinary stock dividend, which is not taxable. In *Rockefeller v. United States*[6] two oil companies formed a pipe line company to which they conveyed their respective pipe line businesses in exchange for capital stock, which was distributed to the stockholders of the oil companies. This was held to be a dividend out of the accumulated surplus of the oil companies and taxable as income, although the new arrangement did not increase the wealth of the stockholders. In *Cullinan v. Walker*[7] a corporation in the process of dissolution conveyed all its assets to two new corporations equally and the stock received in exchange was transferred to a holding company, and the stock

S. 536, 41 S. Ct. 392 (1921). The interest of the stockholder is not thereby increased, the only change being in the evidence of the interest. Towne v. Eisner, 245 U. S. 418, 38 S. Ct. 158, L. R. A. 1918 D, 254 (1918). A stock dividend consisting of new stock issued to stockholders in proportion to their previous holdings, for profits capitalized, without any distribution of profits, is not "income". Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 9 A. L. R. 1570 (1920). (If a stockholder sells a stock dividend so received, any profit in sale is income).

[4] 52 F. (2d) 63 (C. C. A. 8th 1931).

[5] United States v. Phellis, 257 U. S. 156, 42 S. Ct. 63 (1921). Mr. Justice McReynolds and Mr. Justice Van Devanter dissented on the ground that the facts showed a bona fide reorganization, whereas the majority took the view that a new corporation was formed.

[6] 257 U. S. 176, 42 S. Ct. 68 (1921). Mr. Justice McReynolds and Mr. Justice Van Devanter dissented.

[7] 262 U. S. 134, 43 S. Ct. 495 (1923).

of the holding company was in turn distributed to the stockholders of the old corporation. The Court held this a taxable gain although it was argued that it was a distribution in liquidation, and not a distribution of surplus. However, in *Weiss v. Stearn,*[8] where an exchange of stock was made between two corporations, and the stock received by one corporation was distributed to its stockholders, the Court held the entire arrangement a financial reorganization, which in itself was insufficient to render the new stock taxable as income to the stockholders. Mr. Justice Holmes and Mr. Justice Brandeis dissented on the ground that the Court was taking a stand inconsistent with its former decisions, and it rightly appears so.

In summary it may be said that as a general rule any gain accruing on the exchange of stock in one company for that of another will be taxable unless the arrangement was a mere reorganization of a single going concern.

—AUGUST W. PETROPLUS.

PLEADING — MOTION FOR JUDGMENT — QUASI-CONTRACTS. — In *Lambert v. Morton*[1] the Supreme Court of Appeals of West Virginia recently held that the statute[2] providing for the recovery of money by action on any contract by motion for judgment applies as well to contracts implied in law (quasi-contracts), as to express contracts. The case is one of first impression in West Virginia.

Under equally broad statutory language the Supreme Court of Appeals of Virginia reached the same conclusion in the case of *Long v. Pence's Committee.*[3] Such a construction is desirable in view of the object of the statute, which is to simplify and shorten pleadings and other proceedings, with less chance of a miscarriage of justice. Another advantage of procedure by motion is that a plaintiff may so proceed when it is too late to mature a regular action, or even after the beginning of a term of court, if it shall continue in session long enough for that purpose.[4]

[8] 265 U. S. 242, 44 S. Ct. 490, 33 A. L. R. 520 (1924). *Contra*: Marr v. United States, 268 U. S. 536, 45 S. Ct. 575 (1925). Four judges dissented on the ground that the case fell within the rule of Weiss v. Stearn.

[1] 160 S. E. 223 (1931).
[2] W. VA. REV. CODE (1931) c. 56, art. 2, § 6.
[3] 93 Va. 584, 25 S. E. 593 (1896).
[4] BURKS, PLEADING AND PRACTICE (2d ed. 1920) c. 20, p. 219 *et seq.*