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Taxation--Unearned Fire Insurance Premiums as Deductible Indebtedness

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pointment is provisional and ancillary to the main action. There is some authority, however, that the case of lunatics is an exception to this general rule.[7]

The plaintiff in the principal case would be a proper party in interest, to seek appointment of a guardian for her father, and to request the appointment of a receiver *pendente lite,* as ancillary to the suit for such appointment.[8]

—DONALD F. BLACK.

TAXATION — UNEARNED FIRE INSURANCE PREMIUMS AS DEDUCTIBLE INDEBTEDNESS. — A county assessor refused to deduct $433,721 in unearned premiums in making the return for the assessment of taxes of a domestic fire insurance company. Upon suit by the company to effect such a deduction, the decision of the assessor was upheld by the Board of Equalization and Review, the Circuit Court, and the Supreme Court of Appeals. *Wheeling Fire Insurance Company v. Board of Equalization and Review.*[1]

The point involved is whether the state taxation laws permit a domestic fire insurance company to deduct unearned premiums from its tax return as being within a statute permitting a deduction of any "indebtedness" from the return.[2] On payment to a fire insurance company of unearned premiums, the money becomes the absolute property of that company (on the theory that the entire premium is considered as becoming due and earned when the risk attaches) subject to a double contingency — the option of the policyholder to cancel the contract and call for the unearned premiums at any time, and the possibility of destruction of the insured premises by fire — the occurrence of either at any time creating an obligation to return such premiums.[3]

A state law requiring fire insurance companies to report an-

[7] CLARK ON RECEIVERS (2d ed. 1929) § 51, Price v. Banker's Trust Co., 178 S. W. 745 (Mo. 1915).

[8] State v. Dickman, 175 Mo. App. 543, 157 S. W. 1012 (1913).

[1] 161 S. E. 427 (W. Va. 1931).

[2] W. VA. REV. CODE (1931) c. 11, art. 5, § 6.

[3] 5 COOLEY'S BRIEFS ON INSURANCE (2d ed. 1927) 4630-4639; 2 *id.* 1736 and cases there cited; VANCE ON INSURANCE (2d ed. 1930) 264-265, 318-324. While the right to cancel cannot exist unless the policy so provides, practically all policies contain a clause giving either party the right to cancel the contract upon a stipulated notice; and if the company cancels, notice of cancellation is ineffective unless accompanied by a tender of the unearned premiums. VANCE, *op. cit. supra,* 778, n. 67 and cases there cited.

nually to state insurance commissioners their assets and liabilities provided that unearned premiums should be listed under the head "Liabilities."[4] However, as pointed out by the court, the purpose of that law was to ascertain the solvency of the insurance company and facilitate government control thereof, so it had little bearing on the interpretation of tax laws. Taxation and regulation of fire insurance corporations are entirely independent subjects, so a law concerning one is not necessarily *pari materia* with statutes regarding the other.

The State Constitution requires all property to be taxed to bear the burdens of government.[5] Unless these unearned premiums are taxed while in the hands of the insurance company, they will escape taxation entirely, for the policyholder cannot be assessed on such money.[6] Furthermore, some policyholders are residents of other states so the rule contended for would be extremely impractical of administration, beside providing a covenient means of evading the constitutional provision by permitting much property to go untaxed.

In any event no hardship will be worked by taxing the company for these premiums. A fire insurance company is a public utility and the amount of taxes it pays is taken into consideration as an operating expense in fixing the rate of return allowed.[7] Hence the company will not be financially prejudiced by such taxation, for its rate of return will be proportionately higher and the amount of the taxes recouped by the company, probably in the form of slightly increased premiums.

No prior cases in this state have adjudicated the question, but the weight of authority in other jurisdictions appears to be that unearned premiums constitute a mere *possible* indebtedness and, therefore, are not, within the terms of the tax statute, an indebtedness which may be deducted from the taxable property return.[8]

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[4] W. VA. REV. CODE (1931) c. 33, art. 4, § 4.

[5] W. Va. Const., art. 10, § 1.

[6] Amazon Insurance Co. v. Cappellar, 38 Ohio St. 568 (1883); People's Fire Ins. Co. v. Parker, 34 N. J. L. 479 (1871), aff'd. 35 N. J. L. 575; Tripp v. Fire Ins. Co., 12 R. I. 435 (1879).

[7] 2 WYMAN ON PUBLIC SERVICE CORPORATIONS (1911) § 1154.

[8] Home Fire Ins. Co. v. Lynch, 19 Utah 189, 56 Pac. 681 (1899); Kansas Mutual Life Ins. Co. v. Hill, 51 Kan. 636, 33 Pac. 300 (1893); Kenton Ins. Co. v. Covington, 86 Ky. 213, 5 S. W. 461 (1887); People v. Davenport, 91 N. Y. 574 (1884); People v. Feitner, 31 Misc. Rep. 433, 65 N. Y. Supp. 523 (1900); People ex. rel. Westchester Fire Ins. Co. v. Davenport, 91 N. Y. 574 (1883); People ex. rel. Westchester Fire Ins. Co. v. Davenport, 25 Hun. 630 (1881); Republic Life Ins. Co. v. Pollak, 75 Ill. 292 (1874); Trenton v. Standard Fire Ins. Co., 77 N. J. L. 757, 73 Atl. 606 (1909); 2 COOLEY ON

That a mere *possible* indebtedness cannot be deducted under such a statute is supported by the courts,[9] and seems sound enough, for the makers of the tax statute must certainly have contemplated a fixed and present indebtedness rather than a contingent one which would frequently allow otherwise taxable property to escape taxation completely.

—KINGSLEY R. SMITH.

TAXATION (4th ed. 1924) 1888, § 940, n. 90. *Contra*: Alabama Gold Life Ins. Co. v. Lott, 54 Ala. 499 (1875); Equitable Life Ins. Co. v. Board, 74 Iowa 178, 37 N. W. 141 (1888); Michigan Mutual Life Ins. Co. v. Common Council of Detroit, 133 Mich. 408, 95 N. W. 1131 (1903).

[9] Chicago Life Ins. Co. v. Board of Review, 131 Iowa 254, 108 N. W. 305 (1906) (holding a surplus designated "unassigned funds" which an insurance company collected merely to guard against unexpected losses did not constitute a liability of the company which it was entitled to deduct from its taxable property); City of Waco v. Texas Life Ins. Co., 248 S. W. 315 (Tex. Com. App. 1923) (holding the possession of contract liens by an insurance company is not such ownership of land as permits deduction from the taxable assets); State Tax Commission v. Eureka Life Ins. Co., 150 Md. 380, 133 Atl. 63 (1926) (holding an insurance company cannot deduct investments in realty mortgages from taxable property).