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Trial Procedure--Instructions to Jury--Nontaxability of Personal Injury Award

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apparently hoped to find the answer in KRS sec. 58.010, which authorizes "public projects" defined in broad terms of public health and welfare and provides for the pledging of *any funds or tax revenues not required by law to be devoted to some other purpose.*[10] There is language in the *Faulconer* case[11] which indicates that the court might hold the industrial building purchase situation a "public project" as defined by KRS sec. 58.010. Indeed, the court itself only six years later said: "And in Faulconer v. City of Danville . . . we held that the acquisition and ownership by a city of an 'industrial building' was a 'public project' within the purview of KRS Chap. 58, authorizing the issuance of revenue bonds."[12] Unfortunately for the city fathers of Henderson, the court in the principal case refused to adhere to its previous statements and found such ventures are not authorized by KRS sec. 50.010.

In conclusion, it may be well to speculate upon the practical effects of the decision reached in the principal case. As the law of Kentucky now stands, a city may finance such projects either (1) by general obligation bonds secured by the taxing power under KRS secs. 66.050-070, or (2) by revenue bonds payable solely from the project income as authorized by KRS sec. 103.230. Thus, cities oppressed with unemployment and faced with the offer of industrial salvation can purchase industrial property to lease only if they can surmount the two-thirds vote barrier of KRS sec. 66.070, or can persuade the municipal bond buyers that the industry is certain to stay and make rental payments on the lease. Considering the current bond market and the availability of municipal bonds secured by the taxing power, the above procedures hardly seem practical. It would appear one primary qualification of the city councilmen of the future will be the power of salesmanship—either to the voters, or to the municipal bond purchaser.

G. W. Shadoan

TRIAL PROCEDURE—INSTRUCTIONS TO JURY—NONTAXABILITY OF PERSONAL INJURY AWARD.—Plaintiff brought an action to recover damages for personal injuries caused by the alleged negligence of the defendant railroad. The defendant requested that the jury be instructed that any award given plaintiff would not be subject to income taxes, state or federal. From the refusal of the court to give the instruction, the defendant appealed. *Held*: Affirmed. *Louisville & Nashville Railroad*

[10] KRS § 58.130.
[11] Faulconer v. City of Danville, 313 Ky. 468,471, 232 S.W.2d 80,82 (1950).
[12] Dyche v. City of London, 288 S.W.2d 648,651 (Ky. 1956).

Co. v. Mattingly, 318 S.W. 2d (Ky. 1958) (judgment for plaintiff reversed on other grounds).

This was a case of first impression in Kentucky. The court did not disclose the reasoning upon which it based its decision but simply said that it was of the opinion Kentucky should follow "the majority rule which brands such an instruction as misleading in its effects on the minds of the jury."[1] In examining the problem raised in this decision, it may be worthwhile to consider the reasoning applied by other courts in reaching the same result.

There are four points during the course of a trial where the fact that the awards for personal injuries are not taxable[2] could be injected. They are: (1) in the instructions,[3] (2) in closing argument,[4] (3) during the introduction of evidence,[5] and (4) in determination of the proper amount of damages to be awarded.[6] Only the Missouri court has indicated that it would allow the non-taxability of the award to be presented to the jury, solely by means of a cautionary instruction.[7] But even that court held that it was not error to exclude evidence of this fact or to prohibit it from being brought out in closing argument.

Ohio is the only jurisdiction, other than Kentucky and Missouri, which has considered the propriety of such an instruction.[8] The court of that state pointed out that if such an instruction were given it would

[1] 318 S.W.2d at 848.

[2] The Int. Rev. Code of 1954, § 104 (a) (2) provides that gross income does not include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This exclusion would appear to be incorporated into Ky. Rev. Stat. § 141.010 (9) (1959) which defines "net income" by incorporating the definition of "taxable income" contained in the Internal Revenue Code of 1954, § 63 (a) which in turn must obviously not include those items specifically excluded by § 104 (a) (2).

[3] Margevich v. Chicago & No. W. Ry., 1 Ill. App. 2d 162,116 N.E.2d 914 (1953); Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952); Maus v. New York, C. & St. L. R.R., 128 N.E.2d 166 (Ohio App. 1955); Texas & N. O. R.R. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1953) (dictum).

[4] Hall v. Chicago & No. W. Ry., 5 Ill.2d 135, 125 N.E.2d 77 (1955); Pfister v. City of Cleveland, 96 Ohio App. 185, 113 N.E.2d 366 (1953).

[5] Chicago & No. W. Ry. v. Curl, 178 F.2d 497 (8th Cir. 1949); Texas & N. O. R.R. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1953).

[6] Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951). *cert. denied*, 341 U.S. 904 (1951); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944) (trial by court without a jury); O'Donnell v. Great No. Ry., 109 F. Supp. 590 (N.D. Cal. 1951); Smith v. Pennsylvania R.R., 47 Ohio Op. 49, 59 Ohio L. Abs. 282, 99 N.E.2d 501 (Ct. App. 1950); Billingham v. Hughes. [1949] 1 K.B. 643 (trial by court without a jury).

[7] Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952). But see also Texas & N. O. R.R. v. Pool, 263 S.W.2d 582,592 (Tex. Civ. App. 1953) in which the court, though sustaining exclusion of evidence of deductions for income tax, stated it was in accord with Dempsey v. Thompson, *supra*, as to jury instructions.

[8] Maus v. New York C. & St. L. R.R., 128 N.E.2d 166 (Ohio Ct. App. 1955); *Cf.* Margevich v. Chicago & N. W. Ry., 1 Ill. App. 2d 162, 116 N.E.2d 914 (1953), which held the tendered instruction on tax exemption bad, distinguishing it from the one in Dempsey v. Thompson.

require segregation of the award for loss of earnings from awards for pain, suffering, and mental anguish, since only the former would be compensation for income which would have been taxable if received in the normal manner. The court went on to say:

> The result of several such inquiries would so complicate the trial of a personal injury action into an intricate discussion of tax and non-tax liabilities, and so confuse the ordinary jury with technical tax questions as to defeat the purpose of a trial.[9]

The court also reasoned that, although it was a correct statement of the law, the requested instruction was not pertinent to any issue in the case.

In *Hall v. Chicago & Northwestern Railroad Co.*,[10] the Illinois court upheld the granting of a new trial where counsel for the defendant told the jury during the closing argument that the verdict would be tax exempt. The court gave as its reasons for so holding the following: (1) Such an argument infers that the jury will not follow the instructions as to what factors may properly be considered in fixing damages but that they will add to the amount justified by the evidence an additional amount to offset a supposed tax liability of the plaintiff. Such misconduct by the jury should not be assumed. (2) If the defendant may point out the nontaxability of the verdict, there is no reason why the plaintiff should not be permitted to point out that damages do not include an award to cover the costs of trial, medical witnesses, taking depositions, court reporting, and attorneys' fees; that defendant may deduct any award from excess profits taxes and include it as an expense in fixing railroad fares; and so on *ad infinitum*. (3) Where the defendant gets the money to pay the award and what plaintiff does with it is no concern of the court or jury. (4) Any matter of taxes concerns only the plaintiff and the tax commissioner. (5) Mitigation of damages by the jury on account of taxes would defeat the purpose of Congress in giving this tax advantage to plaintiffs.

Other courts have held that any attempt to fix an amount by which the judgment should be reduced to account for taxes would necessarily have to be based upon pure conjecture and speculation as to many factors.[11] Such factors include, *inter alia*: the number of exemptions plaintiff has; the extent to which such exemptions will be increased or

[9] Maus v. New York, C. & St. L. R.R., 128 N.E.2d 166, 167 (Ohio Ct. App. 1955).

[10] 5 Ill.2d 135, 125 N. E.2d 77 (1955).

[11] Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951), *cert. denied*, 341 U.S. 904 (1951); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944); O'Donnell v. Great No. Ry., 109 F. Supp. 590 (N.D. Cal. 1951); Pfister v. City of Cleveland, 96 Ohio App. 185, 113 N.E.2d 366 (1953); Smith v. Pennsylvania R.R., 47 Ohio Op. 49, 59 Ohio L. Abs. 282, 99 N.E.2d 501 (Ct. App. 1950); Texas & N. O. R.R. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1953).

diminished by him or a dependant of his going blind, reaching 65 years of age, dying, etc.; what tax bracket he is in or may later be put into by outside earnings; changes in the tax rates; the amount of deductions plaintiff may be entitled to; and many other variables.

The Missouri court in *Dempsey v. Thompson*[12] indicated that a cautionary instruction would prevent the jury from being misled by their natural assumption that the amount awarded for lost earnings would be subject to income taxes. The court there disclaimed any belief that the jury would not follow the general instructions on computation of damages. The weight of logic and reasoning, however, strongly supports the result reached by the Kentucky court in the principle case. Having reached this result, the court is also likely to deny admission of evidence of the nontaxability of the verdict and prohibit this fact from being brought out in closing argument or considered in computing damages. Logical consistancy and the persuasive case authority from other jurisdictions would seem to dictate such a conclusion.

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[12] 363 Mo. 336, 251 S.W.2d 42 (1952).