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Damages

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jurisdictions, the position taken by the court of appeals in the principal case has been the practice in Ohio for many years. The plea of former jeopardy is unavailable on the second trial because the accused himself has removed the bar which was effective to prevent his further trial for the offense of first-degree murder.

It is axiomatic that the writ of habeas corpus cannot be used as a substitute for the criminal appeal. Several appellate decisions reinforce that rule of practice. Generally, the writ may not be used as a method of presenting alleged errors in an indictment.[99] The rule is doubly true when the accused has pleaded guilty to the indictment claimed to be defective.[100] By pleading guilty to the indictment, the correctness of the factual charges contained in the indictment are admitted. The writ is equally unavailing where the errors claimed occur in trial proceedings, such as inefficient counsel and defects in the service of papers.[101] When the court has jurisdiction to pronounce sentence, the remedy, if any, is by appeal, not through the writ of habeas corpus.[102]

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DAMAGES

In *Maus v. New York, C. & S. L. R. R. Co.*[1] the Supreme Court considered two problems which are troubling trial counsel in this day of rapidly changing dollar value. First, the court approved an instruction to the jury, in a personal injury suit involving loss of future earnings, that the jury "in considering the loss of future earnings, the earning power of money should be taken into account."[2] Second, the court affirmed a refusal by the trial court to grant an instruction requested by the defendant that "any amount received by the plaintiff as compensation for personal injuries is exempt from personal income taxation and you *must* take this fact in consideration. " (Emphasis added) [3] The court said that "there is no reason why the charge requested by the defendant should have been given, since the effect would be to give the jury license to disregard the charge on the measure of damages already given."[4] On this type of instruction one other state supreme court, Illinois,[5] has held it improper while one Missouri Court[6] has held it proper. Several federal trial and appellate courts have held such instructions improper on the basis that

[99] *In re* Giordano, 164 Ohio St. 509, 132 N.E.2d 211 (1956), *cert. denied*, 351 U.S. 958 (1956).

[100] Frisco v. Alvis, 136 N.E.2d 688 (Ohio App. 1955).

[101] McConnaughy v. Alvis, 165 Ohio St. 102, 133 N.E.2d 133 (1956)

[102] *Ibid.*

they introduced too conjectural an element. It should be noted that in the present decision there are two caveats: First, the court does not pass on the "question as to what a trial judge's response should be if and when the jury asks him whether it should consider the matter of income tax."[7] Second, Judge Bell in a concurring opinion says:

> We believe the requested charge is erroneous in that it requires the jury to take this subject into consideration. An award of damages on account of personal injuries is not to be included in gross income. As long as this remains the law, it would not be improper for a trial court to say so in response to a jury s inquiry or to give a special instruction when properly prepared in conformance with this federal law.[8]

In *Haase v. Ryan*,[9] a suit by a seven year old child to recover for negligently inflicted personal injuries, a court of appeals held that since permanent injury was alleged it was proper to admit the American Experience Tables disclosing the life expectancy of the child. Although the court held that such tables are not conclusive and the jury should have been so instructed, "the failure of the court in the instant case to so instruct the jury was an error of omission and was not prejudicial. Members of a jury are well aware of the vicissitudes and uncertainties of life."[10]

Although it seems to be a well settled principle that the amount of recovery from a person who is responsible for a personal injury is not to be affected by the receipt by the plaintiff from his employer of wages or salary for the period during which the plaintiff has suffered from the injury, there has been doubt as to whether the decided cases placed Ohio in conformity with this general principle. It is suggested, however, that this doubt is not widely shared by lawyers and judges on the battlements of trial work. *Rigney v. Cincinnati Street Ry.*[11] dealt with this matter. In that case the plaintiff was a civil service employee of the United States government and at the time of injury had to her credit a sufficient number of annual leave and sick leave days, so that her employer continued her on full pay during the time of injury. The court held that the wrong-

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[1] 165 Ohio St. 281, 135 N.E.2d 253 (1956).

[2] *Id.* at 285, 135 N.E.2d at 256.

[3] *Id.* at 282, 135 N.E.2d at 254.

[4] *Id.* at 285, 135 N.E.2d at 256.

[5] Hall v. Chicago & Northwestern Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955).

[6] Dempsey v. Thompson, 33 Mo. 339, 251 S.W.2d 42 (1952).

[7] Maus v. New York, C. & S.L. R.R. Co., 165 Ohio St. 281, 285, 135 N.E.2d 253, 256 (1956)

[8] *Ibid.*

[9] 100 Ohio App. 285, 136 N.E.2d 406 (1955).

[10] *Id.* at 291, 136 N.E.2d at 410.

[11] 99 Ohio App. 105, 131 N.E.2d 413 (1954).