ADMINISTRATIVE LAW — DISQUALIFICATION OF TRIAL .. EXAMINER — FAILURE TO RAISE ISSUE TIMELY

In a proceeding to set aside the Interstate Commerce Commission's order and certificate of public convenience and necessity for the extension of an existing motor carrier route, the three-judge United States District Court for the Eastern District of Missouri on the day appointed for hearing allowed an amendment raising for the first time a contention that the Commission's action was invalid for want of jurisdiction because the trial examiner had not been appointed pursuant to § 11 of the Federal Administrative Procedure Act, 5 U.S.C. § 1010. Upon proof that the appointment had not been made in accordance with that Act, the District Court invalidated the order and certificate without considering the merits of the issue tendered in the original complaint. 100 F. Supp 432. Upon appeal to the United States Supreme Court, *held* that such an objection first raised on appeal to the courts is waived by failure to raise the issue during the administrative proceeding unless the facts indicate that the agency concealed the nature of the appointment or that information concerning the nature of the appointment was otherwise unavailable to the complaining party. *United States et al. v Tucker Truck Lines*, 344 U.S. 33 (1952).

In the absence of statutory restriction, the mere fact that a member of an administrative tribunal has had prior contact with a case does not disqualify him from acting in the formal proceedings. See: *Phillips v. Securities and Exchange Commission*, 153 F. 2d 27 (2d Cir. 1946); *National Labor Relations Board v. Botany Worsted Mills*, 133 F. 2d 876 (3d Cir. 1943), *cert. denied* 319 U.S. 751 (1943); *Farmer's Livestock Commission v. United States*, 54 F. 2d 375 (E.D. Ill., 1931). Even if such member took an active part in the investigation leading to the proceedings, there is no denial of due process. *Brinkley v. Hassig*, 83 F. 2d 351 (3d Cir. 1936). However, Section 11 of the Federal Administrative Procedure Act, *supra*, provides that a trial examiner in an administrative proceeding shall not have any inconsistent duties. In two leading cases, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), and *Riss & Co. v. United States*, 341 U.S. 907 (1951), the Supreme Court has sustained attacks on administrative action because of a violation of Section 11, *supra*.

In neither of these cases was the question of the disqualification of the hearing officer raised at the administrative hearing; however, unlike the principal case, in neither was the question of timeliness of the objection raised. The Court now declares that because the question was not raised at the administrative level, the two earlier cases are not binding precedent on this point since

the Court is not bound by a prior exercise of jurisdiction where the issue was passed *sub silentio*. Mr. Justice Frankfurter and Mr. Justice Douglas dissented in the principal case on the grounds that the *Wong* case, *supra*, decided the question raised.

Although this decision may be argued to be inconsistent with the holding in the *Wong* case, *supra*, it cannot be deemed inconsistent with the rule that prevails with respect to the timeliness of an objection to a trial judge on the grounds of bias and prejudice or interest. A statute forbidding a disqualified judge to act may be waived either expressly or impliedly by failure to make timely objection. *Coltrane v. Templeton*, 106 F. 370 (4th Cir. 1901), *Utz & D. Co. v. Regulator Co.*, 213 F. 315 (8th Cir. 1914). State courts have likewise held that disqualification of a judge for interest is waived unless objection is made at the earliest available opportunity. *Tari v. State*, 117 Ohio St. 481, 159 N.E. 594, 57 A.L.R. 284 (1927); *Dotson v. Burchett*, 301 Ky. 28, 190 S.W. 2d 697, 162 A.L.R. 636 (1945); *Washington Fire Ins. Co. v. Hogan*, 139 Ark. 130, 213 S.W. 7, 5 A.L.W. 1585 (1919). And it has been held that even if the disqualification of the judge was unknown, it is waived if not early raised unless it can be shown that the bias and prejudice worked to the prejudice of the complaining party. *State v. Walls*, 27 Ohio L. Abs. 545 (1938). In the principal case, the Court pointed out that there was no indication that the complaining party was in any way prejudiced by the action of the trial examiner: "there is no suggestion that he exhibited bias, favoritism or unfairness." Moreover, in neither the principal case nor the *Wong* and *Riss* cases, *supra*, did the Court refer to the provision of Section 7 of the Administrative Procedure Act, 5 U.S.C. § 1005, that, "... Any such officer may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a *timely* and sufficient affidavit of personal bias or *disqualification* of any such officer, the agency shall determine the matter as a part of the record and decision in the case . . . ." (Emphasis supplied). When read together with Section 11, *supra*, this provision would seem to demand the result that the Court reached in the principal case.

Alba L. Whiteside

DOMESTIC RELATIONS — TORT ACTIONS BETWEEN HUSBAND AND WIFE

The plaintiff alleged that she was negligently injured in a club operated by the defendant, an unincorporated fraternal association. Her husband was a member of the association at the time of the accident and, therefore, one of the defendants. The trial

and appellate courts sustained a demurrer to the plaintiff's petition on the ground that it did not state a cause of action because in Ohio a wife can not sue her husband for tort injuries. On appeal to the Supreme Court, *Held,* reversed and remanded. The common law unity of husband and wife has been abolished in Ohio by OHIO GEN. CODE §§ 7997 - 8002, 11245, 11591 which define the rights of husband and wife; therefore, the plaintiff wife can maintain an action of tort against an association of which her husband had been a member. *Damm v. Elyria Lodge No. 465, Benevolent Protective Order of Elks, et al.,* 158 Ohio St. 107, 107 N. E. 2d 337 (1952).

At common law, husband and wife were considered one person and unable to sue each other. *Phillips v. Barnet,* 1 Q.B.D. 436 (1876); 30 C.J. 507. A married woman was not *sui juris* at common law and was incapable of maintaining an action without joinder of her husband. *Barber v. Barber,* 21 How. 582 (U.S. 1858). This doctrine of legal identity prevented the wife from suing her husband in tort for personal injuries. *Schultz v. Schultz,* 89 N.Y. 644 (1882); *Strom v. Strom,* 98 Minn. 427, 107 N.W. 1047 (1906). One of the main arguments for the disability is that if such actions were allowed the peace and tranquility of the family relationship would be disturbed. *David v. David,* 161 Md. 532, 157 Atl. 755, 91 A.L.R. 1100 (1932). See McCurdy, *Torts between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930).

At first equity, then legislation passed in the 19th Century known as the Married Woman's Property Acts, gave the wife a separate legal right to sue or be sued independently in certain actions. Nearly all the states have legislation granting actions of one type or another. VERNIER, AMERICAN FAMILY LAW § 179 (1935). The ability of the wife to sue her husband depends upon the judicial interpretation of these statutes and the degree the courts are willing to erode away the doctrine of legal identity. *Wait v. Pierce,* 191 Wis. 202, 209 N.W. 475, 210 N.W. 823, 48 A.L.R. 276 (1926).

In *Thompson v. Thompson,* 218 U.S. 611 (1910), the majority of the United States Supreme Court construed the Married Woman's Act of the District of Columbia, D. C. CODE § 43 (1929), which gave the wife a right to sue or be sued as a *feme sole,* as not giving her the right to sue her husband in tort. The majority of the states have strictly construed their statutes as having no effect upon the common law disability. *Peters v. Peters,* 156 Calif. 32, 103 Pac. 219 (1909); *Furstenburg v. Furstenburg,* 152 Md. 247, 136 Atl. 534 (1927); *Furey v. Furey,* 193 Va. 727, 71 S.E. 191 (1952); 160 A.L.R. 1406 (1946). Some states will not allow a wife to maintain an action against her husband for an ante-nuptial tort.

Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935). A strong minority of states have construed their statutes and constitutions as allowing the wife an action against her husband for intentional or negligent injuries. *Brown v. Brown,* 88 Conn. 42, 98 Atl. 889 (1914); *Courtney v. Courtney,* 184 Okla. 395, 87 P. 2d 660 (1938); *Brandt v. Keller,* 413 Ill. 503, 109 N.E. 2d 729 (1953); *Wait v. Pierce, supra.* In New York, tort actions between husband and wife are expressly allowed by statute. N.Y. DOM. REL. LAW. § 57 (1939). Though the Married Woman's Statutes grant the wife an action in tort against her husband, it does not necessarily mean that the husband also has an action. *Fehr v. General Accident & Life Insurance Co.,* 246 Wis. 228, 16 N.W. 2d. 787, 160 A.L.R. 1402 (1944), changed by statute. WIS. ST. § 246.075. *Scholtens v. Scholtens,* 230 N.C. 149, 52 S.E. 2d. 350 (1949).

The right to maintain an action between spouses or not is a substantive right and part of the cause of action; therefore, the lex loci governs as to substantive rights unless it contravenes the public policy of the forum. *Coster v. Coster,* 289 N.Y. 438, 46 N.E. 2d. 509, 146 A.L.R. 702 (1943). States which do not allow actions between spouses will not as a rule entertain suits for torts even though permitted in the state where the tort occurred. *Mertz v. Mertz,* 271 N.Y. 466, 3 N.E. 2d. 597, 108 A.L.R. 1120 (1936); *Kyle v. Kyle,* 210 Minn. 204, 297 N.W. 744 (1941).

In *Phillips v. Graves,* 20 Ohio St. 371, 5 Am. Rep. 675 (1870), the Supreme Court of Ohio recognized both the common law doctrine of legal identity and equity's concept of a separate legal estate in the wife. This was modified in 1887 by statute, OHIO GEN. CODE § 8002-1 to 8002-8, which gave the wife the right to maintain certain actions in the protection of her property. In *State v. Phillips,* 85 Ohio St. 317, 97 N.E. 976 (1912), the Supreme Court held that OHIO GEN. CODE § 7995 to 8004 did not remove the common law disability preventing criminal prosecution of the wife for larceny of the husband's goods. This case was cited with approval in *Finn v. Finn,* 19 Ohio App. 302, 23 Ohio L.R. 83 (1924), and in *Leonardi v. Leonardi,* 21 Ohio App. 110, 153 N.E. 93 (1935), where a wife was not allowed to sue her husband for injuries received from the negligent operation of a car by the husband. The plaintiff in the *Finn* case, *supra,* called attention to OHIO GEN. CODE § 11245 which provides that "A married woman shall sue and be sued as if she were unmarried. . . ." The appellate court rejected this argument saying the enabling statutes referred to were not intended by the legislature to confer a civil action in tort between spouses.

The principal case reasons that in Ohio the pertinent statutes, *supra,* and Article I, Section 16 of the Ohio Constitution had so

"modified" the common law rule of identity that a wife could sue her husband in tort. The court rejected the majority opinion of the *Thompson* case, *supra*, and distinguished *State v. Phillips, supra*, by limiting it to its facts which involved a criminal prosecution by a husband against his wife for larceny. Though most courts are emphatically opposed to creation of a crime by implication, the holding in *State v. Phillips, supra*, seems untenable in light of the principal case and the fact that the fiction that the personality of the wife merges into that of the husband has been universally abolished by statute or constitutional amendment. See *State v. Herndon*, 158 Fla. 515, 27 So. 2d. 833 (1946). The court in the principal case called particular attention to the *Courtney* case, *supra*, in which the position taken by most of the states is reviewed. The courts which permit such actions feel that the old actions of divorce and criminal prosecution for assault and battery are inadequate to protect the interest of the wife.

Because of the peculiar facts of the case, the court possibly could have allowed the action by considering the identity doctrine not applicable to an unincorporated association. Benevolent associations are liable for their actions either in a representative suit or as an entity under the statute. *High v. Supreme Lodge*, 214 Minn. 164, 7 N.W. 2d. 675 (1943); 38 AM. JUR. 582; WRIGHTINGTON, UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 70 (1923). Even though a wife has been denied the right to sue a partnership in which her husband was a partner, *Caplan v. Caplan*, 268 N.Y. 445, 198 N.E. 23, 101 A.L.R. 1223 (1935); *Karalis v. Karalis*, 213 Minn. 31, 4 N.W. 2d. 632 (1942), it is doubtful whether the defendant association is governed by the law of partnership and that the doctrine of the *Caplan* case is applicable. Normally such associations are not organized for profit and are, therefore, governed solely by the law of agency. *Robbins v. Cook*, 42 S.D. 136, 173 N.W. 445 (1919); *cf, Koogler v. Koogler*, 127 Ohio St. 57, 186 N.E. 725 (1933); 1 WILLISTON, CONTRACTS § 308 (1936). It is, therefore, possible that these associations or their members could be liable regardless of the marriage bar.

The court in the principal case did not delve into this problem, but decided to eliminate the identity doctrine altogether in the field of torts, which constitutes a definite departure from the prior Ohio holdings. See Comment, 13 OHIO ST. L. J. 90 (1952). Outside of a few actions for willful torts between estranged spouses, the most prolific action will probably involve automobile negligence with insurance in the background. Recovery will be barred in the great bulk of the cases by the "guest" statutes and statutes like N. Y. INS. LAW § 167 (3) which relieves the insurance companies of liability in such actions unless expressly provided for in the policy.

The principal case reflects the tendency of society to give the wife greater independence from her husband, and it will be interesting to see how far the courts and legislature will allow such actions in the future.

Charles F. Johnston

EVIDENCE—EXPERT WITNESSES—REVERSAL OF TRIAL COURT'S RULING

In a malpractice action for the alleged negligent treatment of a broken leg, plaintiff offered as an expert witness an elderly specialist in gynecology licensed to practice in a neighboring state who, although no longer able to do operative work, had kept abreast of surgical and medical developments through observation and reading. The trial court, declaring him not qualified as an expert, declined to allow him to testify and, as plaintiff offered no other witnesses, the action was dismissed. On appeal, *held* (2-1), reversed, and a new trial ordered. The rejection of the witness was "erroneous and constituted a mistaken use of discretion." *Carbone v. Warburton,* 22 N.J. Super. 5, 91 A. 2d 518 (1952), *aff'd,* 11 N.J. 418, 94 A. 2d 680 (1953).

The decision was not startling; for it is well established that appellate courts will review the use of discretion by trial courts in rulings on the competency of expert witnesses, despite contrary contentions that the appellate function is limited to the review of the legal standards applied. *Sinz v. Owens,* 33 Cal. 2d 749, 205 P. 2d 3 (1949); 32 C.J.S., EVIDENCE § 548; 3 JONES, EVIDENCE § 1318 (2d Ed. 1926); See Note, 166 A.L.R. 1067 and cases cited. Contra: *State v. Bunk,* 4 N.J. 461, 73 A. 2d 249 (1950); *Bratt v. Western Air Lines, Inc.,* 155 F. 2d 850 (10th Cir. 1946). Occasionally there is a misleading tendency to see a problem of reviewability, undoubtedly furthered by Wigmore's insistence on reserving absolute finality of decision to the trial judge, *without review on appeal,* 2 WIGMORE, EVIDENCE § 561 (3d Ed. 1940), but the matter is essentially a question of when and under what circumstances the appellate court will reverse. A common, though not the only, statement of the rule is that, "unless founded on some error of law, or on serious mistake or abuse of discretion, the ruling of the trial court on this preliminary question is not reversible." *Burchett v. State,* 35 Ohio App. 463, 173 N.E. 301 (1930). Actually, such rulings are only infrequently disturbed on any ground, but the distinction between incorrect standards of law and abuse or misuse of discretion is important since reversals on any but the former ground are extremely rare in occurrence.

Much of this restraint can be attributed to the reluctance on the part of appellate courts to interfere with the exercise of the

trial judge's discretion by substituting their judgment for his. Accordingly, they insist on a showing of abuse high enough in degree and of such effect as to constitute error prejudicial to the appellant. That the reviewing tribunal would have reached a different conclusion, or even that actual error has been demonstrated, will not suffice to upset the ruling without the requisite finding of prejudicial error. *Healy v. Billias,* 17 N.J. Super. 119, 85 A. 2d 527 (1951); *Moeller v. St. Paul City Ry. Co.,* 218 Minn. 353, 16 N.W. 2d 289 (1944); *Cincinnati St. Ry. Co. v. Hickey,* 29 Ohio App. 399, 163 N.E. 310 (1928). The degree of abuse necessary has been variously designated as "clear", *Sinz v. Owens, supra,* "palpable", *Robison v. Chicago, Great Western R. Co.* (Mo. App.) 66 S.W. 2d 180 (1933), or "manifest", MODEL CODE OF EVIDENCE, RULE 105, COMMENT.

What constitutes abuse, however, has not been completely agreed upon. Nor can it be, since, after all, the matter by definition is one of judicial discretion. The few attempts to establish a rule have been in the area of the minimum amount of evidence necessary to demonstrate a witness' qualifications. *Robison v. Chicago, Great Western R. Co., supra,* states that palpable abuse would occur in allowing a witness to testify where no evidence of his qualification had been presented; but a showing of 18 years experience as a railroad engineer sufficed where the question was one of stopping capacity of certain railroad air brakes. Earlier, in *Katz v. Delohery Hat Co.,* 97 Conn. 665, 118 Atl. 88 (1922), a witness with 30 years experience in the hat manufacturing business was considered qualified to testify as to the condition of the fur market after the 1918 Armistice where qualification based on incompetent or insufficient evidence would have constituted abuse of discretion. More recently, 27 years service with a municipal fire department was deemed sufficient for a fire chief to give an opinion that a petroleum-base paint thinner could be ignited from sparks of an emery wheel where substantial evidence was needed to support the trial court's ruling. *Humiston v. Hook,* 86 Cal. App. 2d 101, 194 P. 2d 122 (1948). The qualification must affirmatively appear. *Byrd v. Virginian Ry. Co.,* 123 W. Va. 47, 13 S.E. 2d 273 (1941).

The principal case comes as one of the rare instances of reversal for misuse of discretion with the dissenting opinion expressing quite strongly the conflict of opinion on the point. Unlike the great majority of cases, the witness here was rejected. Usually, on the basis of some quantum of evidence, the expert is permitted to testify, with the degree of his knowledge or skill going more to the weight of his opinion than to its admissibility. Reliance is placed on cross-examination for the exposition of any weaknesses and on the jury for evaluation. Also, here, the trial judge's ruling

was the sole issue brought for review, leaving no opportunity for its relegation to a position subordinate to the more important allegations of error usually present. After rejecting the theory that the holder of a license to practice is qualified to give an opinion merely by virtue of his holding the license, the court elaborated on the difficulties attending the presentation of expert testimony. Pointing out the extreme reluctance of many professional people, particularly physicians, to appear and give opinion testimony, the court indicated that the trial judge should have regard for the difficulties of proof thus encountered, with a "reasonable" amount of evidence sufficing to qualify the expert.

The dissent, beyond disagreeing with the majority's evaluation of the facts, argued quite comprehensively the theory that appellate review of the trial judge's rulings should be limited strictly to a search for error of law. An indication of the unsettled state of opinion in this area, however, is the citation of several New Jersey cases in support of this view which, though not the identical cases cited by the majority, are contemporaneous with them. The dissent concluded with a statement of Wigmore's position that determinations of the trial judge in such instances ought not to be reviewed on appeal; this point was expressly disapproved in the affirming opinion, *supra*. The case for review of discretion is also well presented in the concurring opinion in *Hager v. Weber*, 7 N. J. 201, 214, 81 A. 2d 155, 161 (1951).

There is a dearth of Ohio law on this point, but the susceptibility to the split of opinion appearing in the principal case seems considerably less. Although the most recent decision, *Beam v. B. & O. Ry.*, 77 Ohio App. 419, 68 N.E. 2d 159 (1945), would seem to leave the matter in the air by the statement that the decision "will not be disturbed unless clearly shown to be erroneous," especially when this is recognized as a quotation from *Bradford Glycerine Co. v. Kizer*, 113 F. 894 (6th Cir. 1902), but omitting the final phrase "as a matter of law", there is respectable authority for a review of discretion in *Burchett v. State, supra*. See also: 2 O. JUR., PART 2, OPINION AND EXPERT EVIDENCE § 676. *Cincinnati St. Ry. Co. v. Hickey, supra*, and *L.S. & M.S. Ry. Co. v. Terry*, 14 O.C.C. 536, 7 O.C.D. 599 (1897). Both speak of the "reasonable" amount of discretion allowed the trial judge in the admission of expert and opinion evidence but do this more in terms of whether the issue is one in which such evidence is necessary or would be of assistance to the trier of fact. That a strong showing of abuse is needed in order to secure a reversal is made plain for all these Ohio decisions clearly require a demonstration of prejudicial error to justify such a ruling.

James E. Chapman

INCOME TAXATION — GROSS INCOME — SICK BENEFITS RECEIVED FROM EMPLOYER

The plaintiff received from his employer sick benefits of $300 per month for six months while he was on a sick leave. He was taxed on this amount as gross income. In this action for a refund the federal district court rendered a judgment in favor of the defendant. On appeal to the United States Court of Appeals for the Seventh Circuit, *held*, reversed. Sick benefits are to be excluded from gross income by Section 22 (b) (5) of the Internal Revenue Code. *In re Epmeier v. United States*, 199 F. 2d 508 (7th Cir. 1952).

When an employee is disabled and unable to work and thus receives accident or health insurance payments, these payments are to be excluded from gross income in a personal income tax return. INT. REV. CODE § 22 (b) (5). The issue now is whether benefits received by the employee while on sick leave but which are paid directly by the employer and not by the insurance company should also be excluded under the meaning of this statute.

The constitutionality of taxing such proceeds has never been raised before a federal court. It might be argued that the payments are intended as a substitute for the employee's earnings and should be regarded as income. MAGILL, TAXABLE INCOME 383 (1945). A Scottish court held, however, that such payments do not constitute taxable income. In that case the United States made payments to a former private soldier whose war injuries caused his confinement as a lunatic in Scotland. *Laird v Com'rs.*, 14 Tax Cas. 395 (Ct. of Sess., 1929).

One month after the decision by the circuit court in the instant case, the internal revenue commissioner issued a release in which he stated that such payments would constitute income. He did not mention the *Epmeier* case, *supra*, although his statements concerned the issues of this decision. He said that self-insured plans established by employers which provide for the payment of sickness or accident benefits to employees do not become plans of insurance just because they comply with state disability benefits statutes. If payments do not fall under a plan of insurance they are not exclusions and are subject to income tax. I.T. 4107, 1952-23-13961, 525 C.C.H. 6335.

Again, on March 26, 1953, the Commissioner of Internal Revenue issued a special release, in which he specifically mentioned the *Epmeier* case, *supra*. The release states that the Internal Revenue Department will not follow this decision, as it was decided on a narrow ground and to follow this decision in future cases would not be within the intention of Congress as to the meaning of this statute. The federal act was originally passed at a time when individuals took out individual policies of insurance with insurance

companies for compensation for personal injuries or sickness. The premiums on these policies were paid out of taxable income. But today, it has become common practice for employers to give this type of compensation during periods of sick leave by making direct payments to the employees. The commissioner thus contends that it was the intention of Congress to exclude from gross income only payments which are truly insurance payments. C.C.H. (March 26, 1953) 6136.

The court in the instant case, however, did not adopt these arguments when it decided that insurance is a contract under which one party for consideration promises to indemnify in case of certain specified losses. It is a transfer of a risk from the insured to the insurer. In this case there was no formal insurance policy issued to the worker, but the company's intention to make such payments was included in their documents. However, there is no statutory requirement that a formal insurance policy must exist. Although the employee paid no premiums, there was consideration in the contract of employment. This protection was part of the compensation running to the employee. This court stated that the purpose of the statute, Section 22 (b) (5) of the Internal Revenue Code, was to relieve the employee of the burden of paying income tax on benefits he receives while sick for the purpose of combating that illness.

There is thus a problem confronting the Bureau. They must make a decision on how far they can go in exempting compensation merely because the payments are received during a period of illness. If the employee is simply getting paid whether he is sick or well, can we call this health insurance?

Even if the commissioner's contention is correct that it was not the original intention of Congress to exclude this type of payment from the gross income, it is evident that the customs have changed since that statute was enacted and this type of arrangement is common practice today. From the reports of the commissioner it is apparent that the Bureau does not intend to follow this case. Therefore, payments made directly to an employee while on sick leave by his employer are to be subject to income tax. However, if a similar case were presented and appealed to a federal court, the court would probably follow the decision of the *Epmeier* case, *supra,* and again overrule the commissioner.

Carl E. Juergens

NEGLIGENCE — LIABILITY OF RURAL ABUTTING LANDOWNERS FOR TREES FALLING INTO THE HIGHWAY

While plaintiff's decedent was operating his truck along a rural state highway, limbs from a decayed tree overhanging the highway

fell on the truck causing decedent to lose control. The truck struck a tree, with decedent's death resulting from the injuries he sustained. In his action for the wrongful death, plaintiff alleged that defendant had knowledge of the tree's dangerous condition. Defendent's demurrer was sustained on the ground that the petition did not state a cause of action. *Held,* reversed. Although a rural landowner has no duty to inspect, an owner having knowledge, actual or constructive, of a patently defective condition of a tree must use reasonable care to prevent harm to a person lawfully using the highway. *Hay v. Norwalk Lodge No. 730, B.P.O.E., et al.,* 92 Ohio App. 14, 109 N.E. 2d 481 (1952).

Historically, an abutting landowner owed no duty to travelers on the highway for the natural condition of his premises. *Miller v. City of Detroit,* 156 Mich. 630, 121 N.W. 490 (1909); PROSSER ON TORTS § 76 (1941). In England and the urban areas of this country an exception to the rule was made for patently defective trees that fell into the highway if the owner knew, or should have known of their dangerous condition. *Caminer et al. v. Northern & London Investment Trust, Ltd.,* 2 K.B. 64, 11 A.L.R. 2d 617 (1949); *Brown v. Milwaukee Terminal Ry. Co.,* 199 Wis. 575, 227 N.W. 385 (1929); *Smith et al. v. Bonner,* 63 Mont. 571, 208 Pac. 603 (1922); *Weller v. McCormick,* 52 N.J.L. 470, 19 Atl. 1101 (1890). Many statutes have imposed a duty on municipalities and other governmental bodies to protect travelers from dangerous trees. See notes, 14 A.L.R. 2d 186; 60 C.J.S. 527; 40 C.J.S. 301.

In rural areas, however, the rule of non-liability is still applied to dangerous trees abutting the highway. *Chambers v. Whelen,* 44 F. 2d 340, 72 A.L.R. 611 (4th Cir. 1930); *Zacharias v. Nesbitt,* 150 Minn. 369, 185 N.W. 295, 19 A.L.R. 1016 (1921); see notes, 49 A.L.R. 840; 11 A.L.R. 2d 626. There are two basic arguments for retaining rural non-liability. The first is the great burden imposed on the rural owner if he must inspect all his trees. The second, that many states have statutes imposing a duty on the governmental agency in charge of maintenance of the highways to care for defective trees.

The rule of rural non-liability has not been universally accepted, for in Delaware an abutting owner of a suburban forest was held liable for injuries to a traveler on the highway resulting from the fall of limbs from a decayed tree. *Brandywine Hundred Realty Co. v. Cotillo,* 55 F. 2d 231 (3rd Cir. 1931). A trial court in Pennsylvania in a case that is quite similar factually to the principal case held that even if there is a statutory duty on the state highway department to supervise trees, it does not excuse the landowner, and he will be liable if he had constructive notice of the dangerous condition of the tree. *Falco v. Bryn Mawr Trust Co.,*

Adm'r, 43 Montg. Co. L.R. 41, 10 Pa. D. & C. 115 (1927). A few courts have even said that a defective tree should be treated like an artificial structure, in which case the liability is absolute. *Medeiros v. Honomu Sugar Co.*, 21 Hawaii 155 (1912); *Patterson v. Canadian Robert Dollar Co.* (dissent), 41 B.C. 123 (1929). If the defect is caused by the active negligence of the owner, or someone with the owner's consent, the owner will be liable to the user of the highway. *Nagle v. Brown*, 37 Ohio St. 7 (1881); *Miller v. Jacobs*, 249 N.Y. 577, 164 N.E. 590 (1928); *Ver-Vac Bottling Co. v. Henson*, 147 Md. 267, 128 Atl. 48 (1925).

The court in the principal case first ruled that the plaintiff could not sue the unincorporated organization as an entity, or the trustees thereof as individuals, before reaching the instant problem — the liability of an abutting landowner for trees which cause injuries to a traveler on the highway. The case is one of first impression in Ohio, although an earlier case discussed the problem while deciding on another point. *Gschwind v. Viers*, 21 Ohio App. 124, 152 N.E. 911 (1925). The opinion points out that it makes no difference whether the tree was in the right of way or not, since there is no duty on the state highway department to care for trees, (although the director of highways has the right to trim and maintain trees in the highway. OHIO REV. CODE § 5501.15 (1178-6).). This leaves inapplicable in Ohio the argument against imposing a duty on rural landowners that there is a statutory duty on highway officials to maintain trees. The case seems rather like a nuisance case, not nuisance per se, but knowingly allowing a dangerous condition to remain on one's premises. Even in England there is no liability for latent defects in trees, and there is much support for the court's holding that a tree is not an extra-hazardous possession. *Noble v. Harrison*, 2 K.B. 332, 49 A.L.R. 833 (1926); *Miller v. City of Detroit, supra; Caminer et al. v. Northern & London Investment Trust, Ltd., supra.*

The court also takes a negligence approach by declaring: "An owner of property abutting the highway has the obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway," and, "the owner is responsible because in the management of his property he has not acted as a reasonably prudent landowner would act." The problem then becomes: what is reasonable? It is expressly stated that there is no duty to inspect, and the tree in question must be patently defective. But, the court in the syllabus uses the phrase "constructive knowledge", and in the opinion says: "If the danger is apparent, which a person can see with his own eyes, and he fails to do so with the result that injury results to a traveler on the way, the owner is responsible. . . ." The phrase "constructive knowledge"

has never been defined in Ohio before this decision. Other courts have defined it as: "Knowledge which could be acquired by the exercise of ordinary care," *Luck v. Buffalo Lakes*, 144 S.W. 2d 672 (1940), or, "Where general observation by inspection or otherwise should have revealed such defects." *Brown v. Green*, (Del.) 1 Pennewell 532, 42 Atl. 991 (1898). Constructive knowledge and the lack of a duty to inspect seem to be conflicting principles. Constructive knowledge, as defined by the court, would indicate that if the owner should have seen the defect and failed to do so, he would be liable. On the other hand, a lack of duty to inspect tends to indicate that actual knowledge is necessary to impose responsibility. This presents the problem of what would be the decision in a fact situation similar to this case except that the owner did not know, but should have known, of the dangerous condition of the tree.

Although the case says there is no duty to inspect, this case can be fairly interpreted as holding that if a rural owner knows, or should know, of a patently defective condition of a tree, he will be responsible. This adopts the English and the urban rule for the rural areas of Ohio.

David Carroll

PLEADING — SHAM — METHOD OF PROOF

Plaintiff, a lawyer, sued his client in quantum meruit and on a written contract for services rendered. Defendant answered by setting up an oral release and by a general denial. Plantiff moved that these defenses be stricken as sham and that judgment be rendered on the pleadings. *Held,* judgment granted. In determining what a sham pleading is the court may consider pleadings, affidavits, exhibits, depositions and evidence on motion to strike. *Metzenbaum v. Lyman,* 49 Ohio Op. 167, 108 N.E. 2d 869 (1952).

A sham pleading has been defined as a pleading good in form, but false in fact and not pleaded in good faith. *White v. Calhoun,* 83 Ohio St. 401, 94 N.E. 743 (1911), 31 O. JUR. 892. At common law, a sham pleading was subject to a motion to strike. 72 Am. Dec. 521. Some states have taken statutory cognizance of sham pleading. CLARK, LAW OF CODE PLEADING § 87 (1947). Other jurisdictions have adopted summary judgment statutes. RULE 56 (C) FED. RULES CIV. PROC., CLARK, LAW OF CODE PLEADING § 88 (1947). While the Ohio General Code makes no express statutory reference to sham pleadings, it specifically allows a motion to strike a pleading. OHIO GEN. CODE § 11375. In the absence of a statute, it is often held that the court has an inherent power, existing at common law, to strike sham pleadings. *Butterick Publishing Co. v. Smith,* 112 Ohio St.

73, 146 N.E. 898 (1925); *White v. Calhoun, supra* (the leading Ohio case on sham). A contra view has been taken. *Broocks v. Muirhead,* 221 N.C. 466, 20 S.E. 2d 273 (1942); *Schottenfels v. Marsman,* 16 Ohio App. 78 (1922) (apparently ignoring *White v. Calhoun, supra*).

However, there is a split of authority over the means available to a court in determining whether the pleading is sham. At common law, extrinsic evidence, such as affidavits, was admissible. 72 Am. Dec. 521. Some jurisdictions today require that proof of a sham be determined solely from the pleading itself or from facts within the judicial knowledge of the court. *McDonald v. Pincus,* 13 Mont. 83, 32 P. 283 (1893); *Reed v. Neu-Pro Construction Corp.,* 226 App. Dec. 70, 234, N.Y.S. 400 (1929), abrogated by statute, N.Y. C.P.R. 103 (1944). Under this view, extrinsic evidence is excluded in proving a sham because "such a practice seems to lead toward a dangerous and unwarranted encroachment upon the right of trial..." *McDonald v. Pincus, supra.*

Other jurisdictions, taking a contra view, admit extrinsic evidence such as affidavits, *Sheets v. Ramer,* 125 Minn. 98, 145 N.W. 787 (1914), *Goldberg v. Fisher,* 11 N.J. Misc. 657, 168 Atl. 232 (1933); allegations of the movant, *Cook v. Ramsey,* 322 Ill. App. 671, 54 N.E. 2d 624 (1944); depositions, *Felder v. Pugh,* 53 Ohio L. Abs. 90, 81 N.E. 2d 639 (1949); or evidence in such manner as the court may direct, *Burkhalter v. Townsend,* 139 S.C. 324, 138 S.E. 34 (1927). This is also the English rule. *Remmington v. Scoles,* 2 Ch. 1 (1897). In jurisdictions which have adopted summary judgment legislation the statutes usually specifically provide for use of affidavits, pleadings, depositions, and admissions on file. RULE 56 (C) FED. RULES CIV. PROC., CLARK, LAW OF CODE PLEADING § 88 (1947).

Courts which allow extrinsic evidence do so on the basis that the right to a trial by jury is contingent on the presentation of a justicable issue, *Barker v. Foster,* 29 Minn. 166, 12 N.W. 460 (1882), and the court has the right to determine its existence in such manner as it may direct. 72 Am. Dec. 521.

However, courts which allow extrinsic evidence are careful to provide a full and fair hearing, 48 COL. L. REV. 780 (1948), by requiring that if affidavits are used there must be an opportunity for confrontation and cross-examination, *Zinsmaster Baking v. Commander Milling Co.,* 200 Minn. 128, 273 N.W. 673 (1937), *Parish Asschu Properties Inc.,* 247 Wis. 166, 19 N.W. 2d 276 (1945); by refusing to allow controversial issues of fact to be determined by affidavits, *Kirk v. Welch,* 212 Minn. 300, 3 N.W. 2d 426 (1942), *Golden v. Universal Indemnity Ins. Co.,* 117 N.J. Law 192, 187 Atl. 163 (1942); and by requiring that the party alleging the sham carry the

burden of proof, *Scottish Rite Co. v. Salkowitz*, 119 N.J. Law 558, 197 Atl. 43 (1938).

By dictum, the leading case on sham in Ohio indicated that depositions were admissible, *White v. Calhoun, supra.* More recent decisions have permitted depositions, *Felder v. Pugh, supra,* affidavits, exhibits and sworn evidence. *Butterick Publishing Co. v. Smith, supra.*

Until a decision is obtained from a higher tribunal, the principal case indicates that Ohio trial courts, in considering the question of sham, may rather liberally allow extrinsic evidence to be introduced to determine if an answer, good on its face, does present a justicable issue.

However, notwithstanding specific judicial decisions granting authority to determine sham pleadings, *White v. Calhoun, supra,* Ohio trial courts generally refuse even to consider the question of sham but instead allow the defendant to file an answer, thereby needlessly extending the litigation. The best solution to this problem would seem to be the enactment of a summary judgment statute, specifically granting the authority and stating the means by which the courts could determine sham pleading.

Earl E. Mayer, Jr.

STATE TAXATION — REAL PROPERTY — CONSTITUTIONALITY OF TURNPIKE EXEMPTION STATUTE

OHIO REV. CODE § 5537.20 (1212), Turnpike Projects, states: "The exercise of the powers granted by this act will in all respects be for the benefit of the people of the state ... and as [such], the commission shall not be required to pay any taxes ... upon ... any property acquired ... under the provisions of this act ...." The Attorney General has declared, following this statute, that real property so acquired is exempt from taxation and that "it would be difficult to perceive how any argument could be successfully advanced as to the unconstitutionality" of this section under the Ohio Constitution. 1953 Ohio Ops. Att'y Gen., #2840. OHIO CONST. ART. XII, § 2, states, "... general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and *public property used exclusively for any public purpose ....*" (Emphasis supplied.)

It is evident, upon examination of the last phrase, that there is no question but that turnpike property is public property, since OHIO REV. CODE § 5537.07 (1207) states: "... title [of property] shall be in the state." Nor is there a question of public purpose, since the court, influenced by § 5537.20, *supra,* has declared the

Ohio Turnpike Commission to be a public organization created for a public purpose. *State, ex rel Kauer v. Defenbacher*, 153 Ohio St. 268, 91 N.E. 2d 512 (1950). However, a question does arise as to whether all the land acquired by the Turnpike Commission is used *exclusively* for a public purpose. The adverb "exclusively," which appears three times in ART. XII, § 2, *supra*, preceding the phrases, "public worship charitable purposes," and "public purpose," has received considerable construction by the courts.

Early public worship cases received a rather strict interpretation of "exclusively," although recently the court has said it should receive a "reasonable", not literal construction. *In re The Bond Hill-Roselawn Hebrew School*, 151 Ohio St. 70, 84 N.E. 2d 270 (1949); *Mussio v. Glander*, 149 Ohio St. 423, 79 N.E. 2d 233 (1948). In charity cases involving income producing activities, such as hospitals, YMCA's, etc., again the court has not required a literally *exclusive* use for charity, if the profit is not for the pecuniary advantage of those involved, and if the main objective is for the purpose allowed by the Constitution. *Golman v. The Friars Club, et al*, 158 Ohio St. 185, 107 N.E. 2d 518 (1952); *Battelle Memorial Institute v. Dunn*, 148 Ohio St. 53, 73 N.E. 2d 88 (1947); *O'Brien, Treasurer v. The Physicians Hospital Association*, 96 Ohio St. 1, 116 N.E. 975 (1917); *Cleveland Osteopathic Hospital v. Zangerle*, 153 Ohio St. 222, 91 N.E. 2d 261 (1950); *Goldman v. Robert E. Bentley, Post No. 50, American Legion*, 158 Ohio St. 205, 107 N.E. 2d 528 (1952); *The Welfare Federation of Cleveland v. Glander*, 146 Ohio St. 408, 64 N.E. 2d 813 (1945); *American Committee of Rabbinical College of Telshe, Inc. v. Board of Tax Appeals*, 156 Ohio St. 376, 102 N.E. 2d 589 (1951); *The College Preparatory School For Girls v. Evatt*, 144 Ohio St. 408, 59 N.E. 2d 142 (1945).

Public property cases seem to dwell upon whether or not there is a private use of the property, and hold the use to be not exclusive if it is for private use or gain. The main category dealing with denial of exemptions has been municipalities operating in a proprietary capacity. *City of Cleveland v. Board of Tax Appeals*, 153 Ohio St. 97, 91 N.E. 2d 480 (1950); *Zangerle v. City of Cleveland, Division of Municipal Transportation*, 145 Ohio St. 347, 61 N.E. 2d 720 (1945); *Dayton Metropolitan Housing Authority v. Evatt*, 143 Ohio St. 10, 53 N.E. 2d 896 (1944). The balance of the cases have involved public owners renting real estate to private persons. *Pfeiffer, Trustee of Akron Public Library v. Jenkins*, 141 Ohio St. 66, 46 N.E. 2d 767 (1943); *Division of Conservation and Natural Resources of Ohio v. Board of Tax Appeals*, 149 Ohio St. 33, 77 N.E. 2d 242 (1948). The trend in public property cases seems to be that there must be an *exclusive* public *use* whose main objective is a public purpose, and not merely public benefit, conven-

ience, or welfare. *Pfeiffer, Trustee of Akron Public Library v. Jenkins, supra; City of Toledo v. Jenkins,* 143 Ohio St. 141, 54 N.E. 656 (1944).

Along the 241 mile length of the turnpike, the commission will lease land to profit-making service station and restaurant owners, who will be the users of the property. This is not unlike the case of *City of Dayton v. Haines, Aud.,* 156 Ohio St. 366, 102 N.E. 2d 290 (1951); Noted, 13 OHIO ST. L. J. 540. Directly, and by analogy, the foregoing cases suggest several possible holdings in regard to this fact. First, these concessions could indicate a non-exclusive use of the property, and as such contaminate the whole turnpike project, thus denying any exemption. *Mussio v. Glander, supra; Pfeiffer, Trustee of Akron Public Library v. Jenkins, supra; City of Cleveland v. Board of Tax Appeals, supra.* Secondly, service station and restaurant property could be classifed as entities separate from the roadbed, berms and ditches, therefore, an exemption allowance could be made for all property except the actual plots leased to the service stations and restaurants. *Trustees of the Church of God of Cleveland v. Board of Tax Appeals,* 159 Ohio St. 517, 112 N.E. 2d 633 (1953); OHIO REV. CODE § 5713.04 (5560); see also *City of Toledo v. Jenkins, supra.* Thirdly, service stations could be considered necessities, and thus exempt, *In re The Bond Hill-Roselawn Hebrew School, supra, Goldman v. The Friars Club, supra;* while restaurants might be held taxable, either because they are not necessities, or because they house strictly profit-making souvenir shops, *City of Cleveland v. Board of Tax Appeals, supra.* Fourthly, these concessions could be considered incidental and necessary to the operation of the turnpike and therefore carry the exemption along with it. *Goldman v. The Friars Club, supra; In re the Bond Hill-Roselawn Hebrew School, supra; City of Toledo v. Jenkins, supra.*

Other questions can be answered in a more definite manner. For example, the fact that the public has to pay for the use of the turnpike, and that the bondholders receive interest, does not threaten exemption. *City of Toledo v. Jenkins, supra; Goldman v. The Friars Club, supra.* Also the argument that the property should not be exempt until actually used for the public purpose, *i.e.,* until the turnpike is built, was squarely met in *Board of Education of City School District of Cincinnati v. Board of Tax Appeals,* 149 Ohio St. 564, 80 N.E. 2d 156 (1948), where the court held such property exempt, saying, "... a distinction must be made in the exemption of private property ultimately used for charitable purposes and property purchased by public authorities for a public purpose and *being prepared to serve the public use.*" (Emphasis supplied.)

The attorney general's opinion concludes with the statement that because most of the denials of exemptions for public property are for municipalities operating in a proprietary capacity, and since the proprietary-governmental distinction is not made at the state level, or even if it were the court has declared the Turnpike Commission to be performing a governmental function, "no successful challenge of the constitutionality of (5537.20) could be made." It is submitted that the problem of turnpike property exemption goes beyond the proprietary-governmental problem and involves a decision on the scope of the word "exclusively."

John A. Jenkins