the law as found in the *Beck* case, it must eliminate all collateral attacks after the filing of the articles (with the exception of those directed against the directors under 8623-121). This would render obsolete the de facto doctrine as a defense to personal liability. It is not improbable that the cases in the future may follow any one of four different approaches to this problem. (1) The *Beck* case may govern, the court recognizing corporate existence for the purposes of further organization of the company such as accepting subscriptions and electing directors, but requiring compliance with Section 8623-11 and/or Section 8623-13 before granting immunity from personal liability to incorporators. (2) The court may turn to the statement in the *Kardo* case, recognizing a de facto corporation with its corresponding right to transact business in an informal manner upon the filing of the articles of incorporation. (3) The court may treat incorporators as directors by applying, by analogy, the statutory liability found in Section 8623-121. (4) The court may interpret Section 8623-117 as prohibiting collateral attack against incorporators after the filing of the articles, thereby making a de facto defense unnecessary.

D. A. W.

Corporations — Records — Rights of Shareholder to Inspect and to Compel Their Production within the State

I. Domestic Corporations

One Cornell, a stockholder of the Nestle Le Mur Company, an Ohio corporation, wanted to inspect the corporation's books and records. His request to inspect the books was granted by the corporation and he was told he could go to the New York office of the corporation at any reasonable time to do so. But the corporation refused to disrupt its business organization by bringing the books into Ohio as he had requested.

Cornell filed a petition asking for a mandatory injunction requiring the Nestle Le Mur Company to bring all its records to Ohio for his examination. Upon trial the prayer for an injunction was granted. The defendant appealed.[1] The court held that while it possessed the power to compel an Ohio corporation to bring its books of account and records into the state for purposes of examination by a stockholder,[2] the

[1] Cornell v. Nestle Le Mur Co., Ohio App. 1, 29 N.E. (2d) 162 (1940).

[2] *Id.* at 4. The court relied on the case of Frank v. Nat'l Rubber Mach. Co., 22 Ohio L. Abs. 53 (1936), as establishing its power to compel production of the books of account and records. While that case decided only that the corporation had not shown that plaintiff stockholder's request for inspection was unreasonable or for an improper purpose, the assumption of this court that it did have authority to compel production

stockholder had to have an exceptional case before they would exercise that power. The shareholder's privilege of inspecting the books and papers of his corporation should be determined by balancing his individual interest against the interest of the corporation and the interests of other shareholders of the corporation.[3] The balance of convenience, after such a weighing of interests, had to be in his favor before the court would order the corporation to bring its books within the state.

The English common law doctrine was that, in the absence of a statute or other instrument conferring the right, a stockholder had no right to an inspection of the corporate books for the purpose of acquiring a knowledge of facts upon which to create a dispute, but that there had to be a definite and distinct dispute already in existence with reference to which the right of inspection was demanded.[4] This doctrine has not been adopted in the United States,[5] the rule being that a stockholder has a right at common law to inspect and examine the books and records of the corporation at a proper time and place and for a proper purpose whether there is an existing dispute between him and the corporation or not.[6] Today, in the United States, nearly every state has a statute or constitutional provision which embodies or extends this common law right.[7] The common law right of inspection is a qualified

seems to be justified by the weight of authority in the United States. See: *Re* Rehe, 136 Misc. 136, 239 N.Y. Supp. 41 (1930); Note 45 L.R.A. 454; Ruby v. Penn Fibre Board Corp., 326 Pa. 582, 192 Atl. 914 (1937); People v. American Discount Co., 332 Ill. 18, 163 N.E. 479 (1928); Huyler v. Cragin Cattle Co., 40 N.J. Eq. (13 Stew.) 392, 2 Atl. 274 (1885); Bay State Gas Co. v. State, 4 Penn (Del.) 497, 56 Atl. 1120 (1904); See generally: 7 R.C.L. 326; 18 R.C.L. 182; 2 R.C.L. Supp. 356; 5 R.C.L. Supp. 401; Also Annotation, 22 A.L.R. 28; 18 A.L.R. 1399; 22 A.L.R. 31; 43 A.L.R. 784; 59 A.L.R. 1375; 80 A.L.R. 1504; 5 FLETCHER, CYC. CORP. (Perm. Ed.) secs. 2243, 2245; BALLANTINE, PRIVATE CORPORATIONS, sec. 165; STEVENS, CORPORATIONS, sec. 110.

[3] *Acc.* in principle; G. W. Jones Lumber Co. v. Wisarkana Lumber Co., 125 Ark. 65, 187 S.W. 1068 (1916); Charles Hegewald Co. v. State, 196 Ind. 600, 149 N.E. 170, 43 A.L.R. 775 (1925); Ruby v. Penn Fibre Board Corp, 326 Pa. 582, 192 Atl. 914 (1937); Annotation, 22 A.L.R. 28; 18 R.C.L. 182; Weihenmayer v. Biotner, 88 Md. 325, 42 Atl. 245, 45 L.R.A. 446 and note, 107 A.S.R. 681 (1898); 10 Ann. Cas. 990; 20 Ann. Cas. 612; Ann. Cas. 1913E, 173; 5 FLETCHER, CYC. CORP. (Perm. Ed.) secs. 2220, 2245, 2249; 2254; A. M. Kales, *The Stockholder's Right to Inspect Books of the Corporation* (1912), 7 ILL. L. REV. 155.

[4] *In re* Burton, etc., Co. 31 L.J.Q.B. 62 (1861); Bank of Bombay v. Suleman Somji, 99 L.T. Rep. N.S. 62 (1908).

[5] Varney v. Baker, 194 Mass. 239, 80 N.E. 524, 10 Ann. Cas. 989 (1907); and see Foster v. White, 86 Ala. 467, 470, 6 So. 88 (1889).

[6] As to common law right: Guthrie v. Harkness, 199 U.S. 148, 26 Sup. Ct. 4, 50 L.Ed. 130 (1905); Stone v. Kellogg, 165 Ill. 192, 46 N.E. 222 (1896); *In Re* Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899); Rex v. Fraternity of Hostman, 2 Strange 1223n (1746); that no dispute need be in existence, Huylar v. Cragin Cattle Co., 40 N.J. Eq. 392, 2 Atl. 274 (1885); Hodder v. George Hogg Co., 223 Pa. 196, 72 Atl. 553 (1909); Schade v. Windber Tel. Co., 22 Pa. Dist. 468 (1912).

[7] OHIO G.C. sec. 8623-63 (1929); Cal. DEERING'S CIVIL CODE 1931, sec. 352 et seq.; Idaho, CODE 1932, sec. 29 et seq.; Ill., SMITH-HURD REV. STAT. 1933, c. 32, sec. 157.45; Ind., BURN'S STAT. 1933, sec. 25-210; Ky., CARROLL'S STAT. 1936, sec. 546; Mass., GEN. LAWS 1932, c. 155, sec. 22; Mich., COMP. LAWS 1929, sec. 9987; N.Y., CAHILL'S CONSOL. LAWS, c. 60, sec. 10; Penna, PURDON'S STAT. 1936, title 15, sec. 2852-308; Tenn., WILLIAMS' ANN. CODE, sec. 3762; W.Va., CODE 1931; c. 31, art. 1, sec. 74; La. and Pa. have constitutional provisions.

and not an absolute one.[8] It is qualified by conditions that the examination must be asked for in good faith,[9] for a specific purpose,[10] and, further, such examination must be for an honest purpose.[11] Courts disagree as to the effect of statutes on this common law right. Some courts say that the statutes make the right absolute,[12] while others recognize certain conditions and circumstances as justifying a refusal to permit an inspection.[13] Ohio falls into this latter classification.[14]

The Ohio courts have held that the inspection can be had only at a reasonable time,[15] for a proper purpose,[16] and now the *Cornell* case[17] which holds that the inspection must be at a reasonable place. In reaching this conclusion the Ohio court is in accord with the trend of modern decisions which tend to restrict the stockholder's right of inspection.[18]

II. Foreign Corporations

The power to compel inspection of corporate books exercised over domestic corporations has, in a number of states, been extended, either by statute[19] or by judicial decision, [20] to include foreign corporations with books within the state.

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[8] Whitney v. American Shipbuilding Co. 14 Ohio N.P.N.S. 12 (1912); 18 C.J.S. p. 1177, note 34.

[9] Winter v. Southern Securities Co. 118 S.E. 214, 155 Ga. 590 (1923); Wilson v. Mackinaw State Bank, 217 Ill. App. 494 (1920).

[10] Baydrop v. Second Nat. Bank, 180 Atl. 469, 472, 120 Conn. 322 (1935); Winter v. Southern Securities Co. 118 S.E. 214, 155 Ga. 590 (1923).

[11] Schade v. Windber Tel. Co. 22 Pa. Dist. 468 (1912); Baydrop v. Second Nat. Bank. 180 Atl. 469, 472, 120 Conn. 322 (1935).

[12] Shea v. Parker, 126 N.E. 47, 234 Mass. 592 (1920); Wire v. Fisher, 185 Pac. 469, 66 Colo. 545 (1919); State v. Goodsell, 270 Pac. 297, 149 Wash. 143 (1928).

[13] Same rights as accorded under common law, O'Hara v. National Biscuit Co., 54 Atl. 241, 69 N.J. Law 198 (1903); As to place, State v. Middlesex Banking Co., 88 Atl. 861, 87 Conn. 483 (1913); Must be a lawful purpose, Burns v. Drennen, 125 So. 667, 220 Ala. 404 (1930).

[14] American Mortg. Co., v. Rosenbaum, 114 O.S. 231, 59 A.L.R. 1368, 151 N.E. 122 (1926); William Coale Development Co. v. Kennedy, 121 O.S. 582, 170 N.E. 434 (1930); Ratcliff v. Auto Remedy Co., 20 Ohio N.P. N. S. 39 (1917); Ohio G.C. 8623-63.

[15] Ratcliff v. Auto Remedy Co., 20 Ohio N.P., N.S. 39 (1917); Ohio G.C. 8623-63.

[16] The American Mortg. Co. v. Rosenbaum, 114 O.S. 231, 69 A.L.R. 1368, 151 N.E. 122 (1926); That there is a presumption of good faith and honesty of purpose on part of stockholder until the contrary is shown, see William Coale Development Co. case, *supra*, note 14.

[17] *Supra*, note 1.

[18] Ruby v. Penn Fibre Board Corp., 326 Pa. 582, 192 Atl. 914 (1937); Ballantine, Private Corporations, sec. 165; Stevens, Corporations, sec. 110; Fletcher, Cyc. Corp. (Perm. Ed.) sec. 1220, 2245, 2249, 2254.

[19] Cal. Civ. Code (1933) sec. 17-614; La. Laws, Third Extra Session, 1934, Act. No. 12, sec. 1; Miss. Code Ann. (1930) sec. 3452.

[20] Rogers v. American Tobacco Co., 143 Misc. 306, 257 N.Y. Supp. 321 (1931), Aff'g., 233 App. Div. 708, 249 N.Y. Supp. 993 (1931); See note, 31 Ill. L.Rev. 677, *Right of Stockholder in a Foreign Corporation to Inspect Books;* 18 A.L.R. 1399; Klotz v. Pan-American Match Co., 108 N.E. 764, 221 Mass. 38 (1915).

In the case of *The American Shipbuilding Co.* v. *Frank P. Whitney*,[21] the court held that Ohio G.C. sec. 8673[22] applied to foreign corporations with as much force as it did to domestic corporations, and that it would compel a foreign corporation doing business in Ohio to open its books which were within the state for the inspection of a stockholder. However, that decision was based on Ohio G.C. sec. 5508, as amended in 102 Ohio Laws,[23] which was repealed in 1931.[24] Since that date there have been no reported decisions dealing with this problem. What will the Ohio court do when this problem arises again? Will they reach the same result by reading into the Foreign Corporation Act[25] what was formerly explicitly provided for?[26] Ohio G.C. 8623-63 is seemingly broad enough to apply to foreign as well as to domestic corporations.[27]

Ohio courts have the power to compel a domestic corporation to produce its books which are either within or without the state,[28] and they have the power to compel a foreign corporation with books within the state to permit a stockholder to inspect them.[29] Have they the power to compel a foreign corporation, doing business within the state, to produce its books which are without the state?

The courts of Illinois[30] and Vermont[31] have compelled foreign corporations to bring back into the state, books which they had removed, where their presence was necesssary in judicial proceedings.[32] Other courts have refused to order that books be brought into the state when they had never been kept there, either on the ground that they will not decree what they cannot compel performance of,[33] or that such a decree is beyond the power or jurisdiction of a court, as it would require

[21] 19 O.C.C. N.S. 584, 36 O.C.C. 668 (1912).

[22] Now Ohio G.C. sec. 8623-63.

[23] At page 251, sec. 119, which said, "All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers."

[24] 114 v. 564, sec. 34 (eff. 8-7-31).

[25] Ohio G.C. sec. 8625-1, et seq.

[26] Ohio G.C. sec. 5508, as amended in 102 O.L. at page 251, sec. 119.

[27] Ohio G.C. sec. 8623-63, "The books of accounts . . . of every corporation shall be open to the inspection of every shareholder at all reasonable times save and except for unreasonable or improper purposes."

[28] *Supra*, note 1.

[29] *Supra*, note 21.

[30] People v. American Discount Co., 332 Ill. 18, 163 N.E. 479 (1928).

[31] *In re* Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790, 11 Anno. Cas. 1069; *Judgment affirmed*, Consolidated Rendering Co. v. State of Vermont, 207 U.S. 541, 28 S. Ct. 178, 52 L.Ed. 327 (1908).

[32] This possibly may be explained by the fact that the corporation removed the books from the state to evade laws of the state. Cf. *In Re* Sykes (D.C.S.D.N.Y.), 23 Fed. Cas. 579, 7 Amer. Law Rec. 370, which questions, but did not find it necessary to pass on the power of the court to order production from without the state.

[33] State *ex rel.* Minn. Mut. Life Ins. Co. v. Denton, 229 Mo. 187, 129 S.W. 709 (1910).

the control, direction, and revision of the internal affairs of the corporation.[54] However, there is one recent case [55] which holds that jurisdiction of a state court to compel production of records of a foreign corporation is not confined to such as might be found within the state, but extends beyond the borders of the state to compel production of records from without the state. There are no reported cases in Ohio on this problem. At the present time, in other states, more cases have denied the court's authority to compel such production than have upheld it.[56]

The decisions are in an apparently sharp conflict on the problem of whether to apply the law of the forum[57] or the law of the state of incorporation[58] when a stockholder seeks the court's aid in compelling a foreign corporation to permit an inspection of its books. However, a close analysis of the cases shows that while many courts purport to apply the rule of the state of incorporation, in reality they usually say the law of the forum and that of the state of incorporation are the same and they then apply the law of the forum.[59] The stockholder makes his contract with the corporation with reference to and under the laws of the state of domicile of the corporation. If under the law of the domiciliary state the stockholder has an absolute right to inspect the books of the corporation, it would seem that he should have the same right in all states. His contract with the corporation does not change when the corporation enters business in another state, and unless the statutes of the state of the forum require that the corporation submit to its law as regards the right of inspection by stockholders as a condition precedent to its doing business within the state, it is submitted that it is unjust to compel the stockholder to accept the law of the forum as the criterion of his right. Especially is this true when the law of the forum does not give him the same right of inspection as does the law of the domiciliary state. It would be equally unjust to the corporation where the law of the state of domicile gave the stockholder only a discretionary right of

[54] Clark v. Mutual Reserve Life Assn., 14 App. D. C. 154, 43 L.R.A. 390 (1899); Cf. FLETCHER, CYC. CORP. (Perm. Ed.) sec. 2229 (notes 72 and 73).

[55] Gilmer Oil Co. v. Ross, 62 P. (2d) 76 (Okla. 1936).

[56] See *supra*, cases cited in notes 31, 32, 33, and 34.

[57] This rule is based on the theory that the state statute imposes the rule of inspection of the state of the forum as a condition precedent to doing business within the state. See, People v. American Discount Co., 332 Ill. 18, 163 N.E. 479 (1928); Gertridge v. State Capital Co., 18 P. (2d) 375, 129 Cal. App. 86 (1933); State *ex rel.* Quinn v. Thompson's Malted Food Co., 160 Wis. 671, 152 N.W. 458 (1915).

[58] See, State *ex rel.* Herman v. Goodsell, 149 Wash. 143, 270 Pac. 297 (1928); Elliot & Co. v. Lake Torpedo Boat Co. 90 Conn. 638, 98 Atl. 580 (1916); Cf. RESTATEMENT, CONFLICT OF LAWS (1932) sec. 200, comment a.

[59] See note, 31 ILL. L. REV. 677, *Right of Stockholder in a Foreign Corporation to Inspect Books*, and cases there cited.

inspection and the law of the forum gave him an absolute right, if the law of the forum were applied.

Ohio, on the basis of the *American Shipbuilding Co.*[40] case, appears to follow the "Law of the forum" rule. However, in the case of *State* ex rel. *Templin* v. *Farmer*,[41] the court applied the law of the state of incorporation to compel a foreign corporation to permit an inspection of its books. Since the statute involved in the *Shipbuilding Co.*[42] case has been repealed, it would seem that the courts of Ohio have a choice as to which of the rules they will apply in the future. Under Ohio G.C. 8623-63 the court could as easily say it did not apply to foreign corporations as they could say that it did. The *State* ex rel. *Templin* case[43] might have enough weight to swing the court to that view.

CRIMINAL LAW

The Number of Peremptory Challenges Allowed to the State in a Joint Trial of a Capital Offense; the Effect of Allowing the State Too Many Peremptory Challenges Upon the Rights of the Defendant

In a joint trial of a capital offense the trial court allowed the state seven peremptory challenges. The defendant did not exhaust his allotment of peremptory challenges. The Court of Appeals held unanimously that allowing seven peremptory challenges was a violation of Ohio G.C. sec. 13443-4 by which "in capital cases . . . the state and the defendant may each peremptorily challenge six of the jurors . . ." and that this section was not qualified by Ohio G.C. sec. 13443-6 which stipulates the number of challenges allowed in criminal cases other than those specifically provided for and then continues ". . . but if two or more persons are jointly tried, the prosecuting attorney shall be entitled to challenge peremptorily a number equal to the total challenges said defendants so jointly tried are entitled to." The court further held that, applying Ohio G.C. sec. 13449-5 which permits reversal of a judgment of conviction only where "it shall affirmatively appear from the record that the accused was prejudiced thereby or was prevented from having a fair trial," this was not reversible error where defendant was

[40] 19 O.C.C. N.S. 584, 36 O.C.C. 668 (1912).
[41] 4 O.C.D. 614 (1892).
[42] *Supra*, note 40.
[43] *Supra*, note 41.