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 Since the statute involved in the *Shipbuilding Co.*[42] case has been repealed, it would seem that the courts of Ohio have a choice as to which of the rules they will apply in the future.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.

not prejudiced thereby.[1] Appeal to the Supreme Court of Ohio was dismissed on the ground that no debatable constitutional question was involved.[2]

At the time of this decision no court had determined the number of peremptory challenges permitted to the state in a joint trial of a capital offense under Ohio G. C. sec. 13443-4. Consequently, as peremptory challenges can be exercised only to the extent authorized by statute, for it is alone by such authority that they exist,[3] the court could only depend upon its own interpretation of the statute for its decision. It would seem that the claim of the state to a jury which will fairly try the case is as strong as the like claim of the defendant, for the rights of the former are not inferior to those of the latter in this respect; both should have an equal opportunity to obtain a satisfactory jury. The court's decision in this case would not give such an equal opportunity, for it gives the prosecution but half the total number of peremptory challenges allowed to the two defendants. Historically, the trend in Ohio has been towards equalizing the number of peremptory challenges allowed to the prosecution and to the defendant by increasing those of the former, while decreasing those of the latter.[4] This trend culminated in Ohio G.C. sec. 13443-4 and sec. 13443-6 which became effective in 1929 and which gave both parties an equal number of challenges. It doesn't seem likely that the Legislature intended to nullify this accomplishment by allowing the state only six challenges under Ohio G.C. sec. 13443-3 which became effective in 1935 and which permitted joint trials in capital cases. Both Ohio G.C. sec. 13443-4 and sec. 13443-6 were passed by the Legislature at the same time and, it would seem, should be read together as successive parts of the same thought as follows: the state and the defendant may each peremptorily challenge six jurors in capital cases and four jurors in all other criminal cases, 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. This would effectuate the desired result.

---

[1] State v. Bohannon, 64 Ohio App. 431, 28 N.E. (2d) 1010 (1940).

[2] State v. Bohannon, 137 Ohio St. 152, 28 N.E. (2d.) 201 (1940).

[3] Stevenson v. State, 70 Ohio St. 11, 70 N.E. 510 (1904).

[4] In 1847, under prior statutes, the defendant charged with murder in the first degree had twenty-three peremptory challenges. Martin v. State, 16 Ohio 364 (1847). In 1857 it was established by authority of sec. 15 of the statute relating to juries passed by the legislature Feb. 9, 1831, that the state had a right to exercise two peremptory challenges in capital cases. Fouts v. State, 8 Ohio St. 98 (1857). By OHIO G.C. sec 13649, effective May 19, 1908, and now superseded, the state was entitled to peremptorily challenge four of the panel. By OHIO G.C. sec. 13647, of the same date, and which also has been superseded, the defendant in a capital case could peremptorily challenge sixteen of the panel.

Although the majority of the other states have similar statutes, a California decision[5] was the only case found interpreting such a statute. This decision held that the state's number of peremptory challenges in a joint trial of a capital offense was equal to the sum of the challenges allotted to each defendant and that this number was independent of the number exercised by the defendants. However, the California statute[6] makes the legislative intent clear, thus leaving the court little necessity of choosing between two interpretations, and thus not aiding us much here. Several decisions exist which are no longer the law because of a subsequent change in the statute. These may serve as examples of the various possible attitudes. One view is that the state is to have a number of challenges equal to the total of the number allocated to each defendant.[7] The opposite view is shown by several cases which allowed the state the same number of challenges regardless of the number allowed to the defendants.[8] In agreement with the latter group is an Ohio case.[9]

When we come to the consequences of allowing the state excessive challenges, and thereby excluding a competent juror, we again have no precedent in Ohio to rely upon. However, we are guided generally by the attitude expressed in Ohio G.C. sec. 13449-5 and by the court's interpretation of this section.[10] Here, however, other states have passed upon the question. Although there are a few decisions to the contrary,[11] the majority of the cases hold that although the court wrongfully excluded a competent juror, such error will not be cause for reversal unless the defendant has been prejudiced thereby.[12] The right of the defendant is to a trial by an impartial jury; it is not the right that any particular set of men shall be his triers, but that those selected for the office shall be such as possess the requisite qualifications of impartiality.[13] The defendant's right is not of selection of the jury, but of rejection of

[5] People v. Pillbro, 260 Pac. 303 (Cal. App., 1927).

[6] CAL. PEN. CODE, sec. 1070 and sec. 1098.

[7] Spies v. People, 122 Ill. 1, 12 N.E. 865 (1887).

[8] Shoeffler v. State, 3 Wis. 823 (1854); State v. Caron, 42 So. 960 (La. 1898).

[9] Mahan v. State, 10 Ohio 232 (1840).

[10] Moon v. State, 124 Ohio St. 465, 179 N.E. 350 (1931).

[11] State v. Bertrand, 167 La. 373, 119 So. 261 (1928); State v. Hammond, 14 S.D. 545, 86 N.W. 627 (1901); Foutch v. State, 100 Tenn. 334, 45 S.W. 678 (1899); Montague v. Commonwealth, 51 Va. 767, 10 Grat. 76 (1853).

[12] People v. Durrant, 116 Cal. 179, 48 Pac. 75 (1897); John D.C. v. State, 16 Fla. 554 (1878); Watson v. State, 63 Ind. 548 (1878); Snow v. Weeks, 75 Me. 105 (1883); O'Brien v. Iron-Works, 7 Mo. App. 257 (1879); Dodge v. People, 4 Neb. 220 (1876); Fishburne v. Commonwealth, 103 Va. 1023, 50 S.E. 443 (1905); Clores Case, 8 Grat. 606 (1851); Thompson v. Douglas, 35 W.Va. 337, 13 S.E. 1075 (1891); Sutton v. Fox, 55 Wis. 531, 13 N.W. 477 (1882); 1 THOMPSON, TRIALS (1st ed. 1889) sec. 120.

[13] Bixbee v. State, 6 Ohio 86 (1833).

an objectionable juror.[14] As long as the defendant has been tried by an impartial jury he has had all he is entitled to and a re-trial would give him no more. One single man is not better to try the defendant's case than the rest of the state.[15] However, if the defendant had exhausted his preremptory challenges and the prosecution, by use of excessive peremptory challenges, had forced upon the defendant a juror who was partial to the prosecution, then such error would be cause for reversal. Even though the defendant had exhausted his peremptory challenges, such would not necessarily mean there was prejudicial error. Ohio G.C. sec. 13449-5 would seem to include in reversible errors only those which are prejudicial. Only in several of the many cases cited in the opinion of the court was the fact mentioned that the defendant had not exhausted his peremptory challenges. The principal case certainly stands with the majority rule when defendant has not exhausted his peremptory challenges. It would seem probable that its position would be unchanged even though the defendant had exhausted his peremptory challenges.

R. D. S.

DOMESTIC RELATIONS

Is Alimony Mandatory When Divorce Is at Aggression of the Husband?

Because of the aggression of her husband, Margaret Hardy was granted a divorce on her cross-petition for divorce, alimony and custody of the children. In awarding the custody of the children to their mother the trial court ordered that "said defendant shall have for their maintenance the sum of seventeen dollars per week." On appeal the Court of Appeals unanimously held that this order does not meet the mandatory provisions of Ohio G.C. sec. 11990, that the court shall allow "alimony" out of the husband's property.[1]

The origin of the doctrine of alimony is based upon the common law obligation of the husband to support his wife.[2] Founded upon considerations of equity and public policy, the natural and legal duty of the husband to support his wife does not cease when there is a legal separation or divorce because of his misconduct.[3] Where this obligation of mainte-

[14] O'Brien v. Iron-Works, 7 Mo. App. 257 (1879).

[15] Thompson v. Douglas, 13 S.E. 1015 (W.Va. 1891).

[1] Hardy v. Hardy, 64 Ohio App. 25, 17 Ohio Op. 316, 27 N.E. (2d) 497 (1940).

[2] Albert v. Albert, 7 Ohio App. 156, at 159, 28 Ohio C.A. 225, 29 Ohio C.C. 271 (1916).

[3] Fickel v. Granger, 83 Ohio St. 101, 93 N.E. 527, 32 L.R.A. (N.S.) 270, 21 Ann. Cas. 1347 (1910).