cases except railroads and public highways, and, as to them, hold that knowledge on the part of the grantee of the right of way will estop him from asserting its existence.[12] However, as to private easements and rights of way over land, it is well settled that even when the grantee has knowledge of their existence at the time of conveyance, the grantor is not relieved from liability.[13] The instant case follows this accepted doctrine and its decision is in conformity with all jurisdictions.

R.W.C.

CORPORATIONS

Corporations De Facto Under the Ohio Act—Liability of Incorporators

One of the significant changes made in the General Corporation Act by the 1939 legislative session is to be found in section 8623-117 of the Ohio General Code,[1] which made the filing of articles of incorporation with the secretary of state and certification by the latter, conclusive evidence (except as against the state) of incorporation under the Ohio laws. Previous to the amendment, a copy of the articles filed and certified was prima facie evidence of incorporation.[2] Since 1852 Ohio has had a provision declaring that a corporate body comes into existence upon the filing of the articles of incorporation.[3] At first blush, reading these two sections together, it appears that little difficulty would be encountered in protecting incorporators against personal liability from collateral attack where the only step toward incorporation has been the filing of the articles. But at what point in the steps of incorporation the court will recognize de facto existence as a protection for incorporators from personal liability for the transaction of business is as yet a matter for conjecture.

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[11] Jones v. Hodgkis, 233 Ky. 491, 26 S.W. (2d) 19 (1930); Ballard v. Burrows, 51 Iowa 81, 50 N.W. 74 (1879); Long v. Moler, 5 Ohio St. 271 (1855); New York Coal Co. v. Graham, 226 Pa. 348, 75 Atl. 657 (1910).

[12] Patterson v. Jones, 235 Ky. 838, 32 S.W. (2nd) 408 (1930); Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542 (1886); Ireton v. Thomas, 84 Kan. 70, 113 Pac. 306 (1911).

[13] Erickson v. Whitescarver, 57 Col. 409, 142 Pac. 413 (1914); Helton v. Asher, 135 Ky. 751, 123 S.W. 285 (1909); Newsmeyer v. Roush, 21 Idaho 106, 120 Pac. 464 (1912).

[1] 118 Ohio Laws 47, sec. 1.

[2] Ohio Rev. Stat. (1880), sec. 3238; Ohio G.C. sec. 8629; now, Ohio G.C. sec. 8623-117.

[3] S. & C. sec. 273; Ohio Rev. Stat. (1880), sec. 3239; Ohio G.C. sec. 8627; now, Ohio G.C. sec. 8623-7.

A study of the early Ohio cases shows a marked conflict in the attitude of the courts toward the commencement of corporate existence. One line of cases held that the corporate body came into being upon the filing of the articles,[4] with one case recognizing at that point a de facto corporation with the power to convey land without assumption of personal liability.[5] The other line of cases required further steps toward incorporation as a requisite for corporate existence.[6] Because of the conflict in the Ohio decisions, the Circuit Court of Appeals in *Kardo* v. *Adams*[7] attempted to harmonize them by attributing the declaration of law in a case to the facts before the court. The court distinguished the holdings in *State* v. *Insurance Co.* and *Cemetary Association* v. *Traction Co.* as being too broad for the points actually involved and decided.[8] The Federal Court said that under the Ohio statute then operative,[9] the filing of articles of incorporation followed by the transaction of corporate business created a de facto corporation, although the further provisions with respect to the issuance of stock and the election of directors had not been lawfully complied with.[10] Two Ohio cases[11] have since quoted with favor the decision in the *Kardo* case although neither court was presented with a fact situation warranting the adoption of the above statement in its entirety from the *Kardo* case. In the *Garwood* case[11a] there had been, in addition to the filing of the articles, an election of officers and directors and subscription to the stock. The

[4] Ashtabula & New Lisbon R.R. Co. v. Smith, 15 Ohio St. 328 (1864); Society of Perun v. Cleveland, 43 Ohio St. 481, 3 N.E. 357 (1885).

[5] In Society of Perun v. Cleveland, 43 Ohio St. 481, 3 N.E. 357 (1885), cited *supra* note 4, the court recognized a de facto corporation upon the filing of the articles for the purposes of acquiring and conveying property, holding the members immune from personal liability where the attack was collateral.

[6] Powers v. Hazelton & Letonia Ry. Co., 33 Ohio St. 429 (1878); State *ex rel.* v. Insurance Co., 49 Ohio St. 440, 31 N.E. 658, 34 Am. St. Rep. 573, 16 L.R.A. 611 (1892); Queen City Telephone Co. v. City of Cincinnati, 73 Ohio St. 64, 76 N.E. 505, 50 W. L. B. 430, 3 Ohio L. Rep. 465, 5 Ohio C.C. (N.S.) 411, 17 Ohio C.D. 385, 15 Ohio Dec. (N.P.) 43, 2 Ohio N.P. (N.S.) 51, 49 W.L.B. 177 (1905); Parkside Cemetery Assn. v. Cleveland, B. & G-L. Traction Co., 93 Ohio St. 161, 112 N.E. 596, 60 W.L.B. 464 (1915). In syllabus 2 of the latter case the court declared that the statutory requirements dealing with subscriptions of stock, paid in capital, notification of stock subscription, and election of directors were all mandatory and therefore conditions precedent to incorporation.

[7] 231 Fed. 950, 222 Fed. 967 (1916).

[8] The *Insurance* case, cited *supra* note 6, turned upon the question of whether the Insurance Company was "doing business" in Ohio and not upon its corporate existence. The exercising of the right of eminent domain was the question involved in the *Cemetery* case, cited *supra* note 6, and as this right has been consistently denied until further steps toward incorporation have been taken, the case should not stand for lack of corporate existence upon filing of the articles.

[9] Ohio G.C. sec. 8627.

[10] Kardo v. Adams, 231 Fed. 950, at page 963.

[11] Garwood *et al.* v. The Great Western Oil Co., 11 Ohio App. 96 (1919); Hennegan v. Nunner *et al.*, 25 Ohio N.P. (N.S.) 225 (1924).

[11a] *Supra* note 11.

court held that the failure to certify in writing to the secretary of state when ten per cent of the capital stock was paid as required by Ohio G.C. sec. 8633, then operative, did not make the members of the corporation liable as individuals or partners, but that a de facto corporation existed. In the *Hennegan* case[11b] a de facto corporation was declared to exist even though the only steps taken by the incorporators were the filing of the articles, their subscription to the stock, and investment of their property. This decision is in line with many cases in other states holding the incorporators and subscribers to the stock immune from personal liability after the filing of the articles and subscription to the stock.[12] Thus by 1927, when the former corporation act was superseded by the General Corporation Act of 1927,[13] the Ohio decisions offered a fair degree of certainty. It could then be said that a corporation came into existence for the purposes of further organization of the corporation upon the filing of the articles,[14] but not for the purpose of exercising the right of eminent domain.[15] And at least one court had recognized a de facto corporation upon the filing of the articles and subscription to the capital stock.[16]

It was not until 1931, in the case of *Beck* v. *Stimmel*,[17] that an Ohio court had an opportunity to apply the de facto doctrine where the only step toward incorporation was the filing of the articles of incorporation. Although it recognized corporate existence upon the filing of articles, the court held the incorporators liable as joint enterprisers or partners for negligence in the maintenance of an unlighted and unguarded elevator shaft. In saying that "the incorporators have no authority to carry on business in the corporate name until the corporation is legally completed,"[18] the court has in effect outlawed the de facto defense by making sections 8623-11 and 8623-13 of the Ohio General Code, which relate to the election of directors and payment of capital,[19] mandatory conditions precedent to the right to transact business. It would appear that Section

[11b] *Supra* note 11.

[12] See 50 A.L.R. 1030. The *Garwood* case, cited *supra* 11, contains a good statement of the de facto doctrine in the syllabus: "A de facto corporation exists where there has been an attempt to incorporate a corporation which the law authorizes to be formed, the associates are acting in good faith, and there has been a user of powers which such a corporation would possess.

[13] 112 Ohio Laws 9.

[14] The Glass Coating Co. v. Clark, 118 Ohio St. 10, 160 N.E. 460 (1928).

[15] Powers v. Hazelton & Letonia Ry. Co., cited *supra*, note 6; Queen City Telephone Co. v. City of Cincinnati, cited *supra*, note 6; Parkside Cemetery Assn. v. Cleveland, B. & G-L. Traction Co., cited *supra*, note 6.

[16] Hennegan v. Nunner, cited *supra*, note 11.

[17] Beck v. Stimmel, 39 Ohio App. 510, 177 N.E. 920, 35 Ohio L. Rep. 188, 10 Ohio L. Abs. 729, 27 Ohio N.P. (N.S.) 454 (1931).

[18] *Id.* at 513.

[19] Ohio G.C. sec. 8623-11 provides: "When subscriptions have been received in an amount at least equal to the capital stated in the articles as that with which the corpora-

8623-7 was interpreted by the court to mean that filing brought in corporate existence for the purpose of further organization of the corporation but not for the transaction of business. But unless Sections 8623-11 and 8623-13 are considered mandatory, corporate existence for the transaction of business is recognized upon compliance with Section 8623-7; and the statements in the *Kardo*, *Hennegan*, and *Garwood* cases were to the effect that compliance with all of these sections was not a condition precedent to the transaction of business. Although Section 8623-13 states that a corporation shall not commence business until payment of the stated capital, this section is less of a mandatory nature when read with Section 8623-121, which imposes statutory liability on the directors for business transacted before stated capital is paid in.[20] The latter section is clear in insuring the validity of transactions during this period. It is suggested that the court might, by analogy, have imposed the statutory liability under Section 8623-121 upon the incorporators instead of holding them liable as partners. The failure of the court to mention Section 8623-121 in its decision may indicate that it believed this section limited in its application to directors. Assuming this to be true, it is suggested that Sections 8623-13 and 8623-121, by imposing statutory liability upon the directors, do not deny the defense of de facto existence to incorporators and subscribers to the stock in a proper case. There is frequently informal corporate action by the incorporators before a board is chosen. The holding in the *Beck* case is made the more confused by the court's failure to make reference to a single case.

It is doubtful that the amendment to Section 8623-117, making the filing conclusive evidence of incorporation when attacked collaterally, will have any effect on the holding of the *Beck* case. That court would probably have made the same decision under the amended statute, inasmuch as corporate existence was recognized for some purposes in its decision. If we assume that the effect of the amendment is to change

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tion will begin business, the incorporators or a majority of them shall give ten days notice by mail to shareholders unless such notice be waived by the shareholders, to meet at such time and place as the notice designates for the purpose of adopting regulations, electing a board of directors and transacting any other business. The shareholders shall meet at the time and place designated, and adopt a code of regulations and elect a board of directors."

OHIO G.C. sec. 8623-13 reads: "No corporation shall commence business until the amount of capital with which it will commence business has been paid in."

[20] OHIO G.C. sec. 8623-121 reads: "If any corporation shall commence business before there has been paid in the amount of capital specified in its articles as the amount of capital with which it will begin business, no corporate transaction shall be invalidated thereby, but the directors participating therein shall be jointly and severally liable for the debts of the corporation up to an amount not exceeding in the aggregate the amount of capital so specified in the articles until the amount of capital so specified has been paid in."

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