watercourse. In the principal case it was decided that where the covering of the watercourse has existed less than the statutory period, so that no prescriptive right arose, there was no incumbrance within the covenant. But in the case of *Stanfield* v. *Schneidewind*,[20] similar in facts to the principal case, the New Jersey court held that no prescriptive right arises from such artificial character even though it has existed more than the statutory period, for the legal character of the watercourse has not changed, and no right in another has attached. No one has an interest in the covering except the owner of the land; he can remove it, replace or repair it at will, and can if he so desires return it to its original state as an open brook.

In the principal case the purchaser suffered considerable damage to a building on the premises by the collapse of the covering of the watercourse, but he has no recourse against his grantor under the usual covenants of a warranty deed. This is a risk he assumes, unconsciously perhaps, when he purchases realty. He might be able to protect himself by a special covenant of freedom from hidden watercourses and similar defects, but perhaps his best protection is a more careful examination of the premises which may follow an awareness of the risk involved.

F. F. V.

## THE EFFECT OF EASEMENTS AND RESTRICTIONS ON CONVEYANCES — CLEAR TITLE — MARKETABLE TITLE

Plaintiff contracted to purchase a certain property and defendant agreed to convey a clear title to the land. An abstract of title was demanded by plaintiff. He was apprised of certain restrictions limiting the use to which the property could be adapted and of the existence of a record easement for driveway purposes across the rear of the premises. There was also a driveway across the premises at a place other than that specified in the record title. Defendant contended that such title was a clear title and that plaintiff, who had knowledge of the incumbrances, was estopped from objecting to their existence. The court held that the title to be conveyed did not constitute a clear title and was a breach of warranty irrespective of the grantee's knowledge of such incumbrances.[1]

The court in the principal case attempted to draw a distinction between clear title and marketable title. The court said that marketable

[20] Stanfield v. Schneidewind, 96 N.J.L. 428, 115 Atl. 339 (1921).
[1] Frank v. Murphy, 64 Ohio App. 501, 29 N.E. (2d) 41 (1940).

title must be free from all incumbrances which present *doubtful* questions of law or fact, while clear title imports something more than marketable title, in that it must also be free from incumbrances which present any *reasonable* questions of law or fact. It appears that no such distinction has been drawn in any other jurisdiction. It is commonly held that clear title,[2] marketable title,[3] good title,[4] perfect title,[5] and merchantable title[6] are synonymous terms. A vendor's covenant to furnish an abstract showing clear title requires the vendor to convey a marketable title.[7] This means one free from incumbrance and of a character assuring vendee quiet and peaceable enjoyment of property,[8] free from reasonable doubt both as to matters of law or fact. A title which a reasonable purchaser, well informed as to the facts and their legal bearing, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.[9] It is submitted that since the distinction drawn is *obiter dictum*, less confusion would result if Ohio courts follow the accepted view. Other jurisdictions do not follow the Ohio court in the concept of clear title and marketable title, but all jurisdictions would concur in the soundness of the result reached in the principal case, in that title will not be considered marketable where there are easements and restrictions, which raise such a reasonable doubt of law or fact as would affect the market value of the property.[10]

The contention is also made in the principal case, that where there is a breach of covenant affecting title knowledge of the grantee will estop him from asserting the existence of the incumbrance or restriction in an action on the deed. Most jurisdictions hold that knowledge on the part of the grantee, at the time of conveyance, that the breach exists,

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[2] Ogg v. Herman, 71 Mont. 10, 227 Pac. 476 (1924); First Nat. Bank v. Russell, 181 Ark. 654, 27 S.W. (2d) 90 (1930).

[3] Silfvast v. Asplund, 93 Mont. 584, 20 P. (2d) 631 (1933); Weaver v. Richards, 144 Mich. 395, 108 N.W. 382 (1906).

[4] Sipe v. Greenfield, 116 Okla. 241, 244 Pac. 424 (1926); Weiman v. Steffen, 186 Mo. App. 584, 172 S.W. 472 (1915); Veselka v. Forres, 283 S.W. 303 (Texas 1926).

[5] Ross v. Smiley, 18 Col. App. 204, 70 Pac. 766 (1902); McCleary v. Chipman, 32 Ind. App. 489, 68 N.E. 320 (1903).

[6] Hinton v. Martin, 151 Ark. 343, 236 S.W. 267 (1922); Eaton v. Blackburn, 49 Ore. 22, 88 Pac. 303 (1907).

[7] Gantt v. Harper, 82 Mont. 393, 267 Pac. 296 (1928); Kincaid v. Dobrinsky, 225 Ill. App. 85 (1922).

[8] Dougles v. Ransom, 205 Wisc. 439, 237 N.W. 260 (1931); Delnay v. Woodruff, 244 Mich. 456, 221 N.W. 614 (1928).

[9] Todd v. Union Dime Savings Institution, 128 N.Y. 636, 28 N.E. 504 (1891); Staton v. Buster, 79 Cal. App. 428, 249 Pac. 878 (1926); Robinson v. Bressler, 122 Neb. 461, 240 N.W. 564 (1932).

[10] Griffith v. Maxfield, 63 Ark. 548, 39 S.W. 852 (1897); Rife v. Lybarger, 49 Ohio St. 422, 31 N.E. 768 (1892); Myrick v. Leddy, 37 S.W. (2nd) 308 (Texas 1931).

does not impair his right of recovery for such breach.[11] A minority of 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.

[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.