also there is no legal right in another in the artificial character of the
watercourse. In the principal case it was decided that where the cover-
ing of the watercourse has existed less than the statutory period, so that
no prescriptive right arose, there was no incumbrance within the coven-
ant. But in the case of *Stanfield v. Schneidewind*, 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 water-
course, 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 CONVEY-
ANCES — 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 de-
manded 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 incum-
brances, 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 be-
tween clear title and marketable title. The court said that marketable

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¹ *Frank v. Murphy*, 64 Ohio App. 501, 29 N.E. (2d) 41 (1940).
title must be free from all incumbrances which present dubious 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, marketable title, good title, perfect title, and merchantable title are synonymous terms. A vendor’s covenant to furnish an abstract showing clear title requires the vendor to convey a marketable title. This means one free from incumbrance and of a character assuring vendee quiet and peaceable enjoyment of property, 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. 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.

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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10 Sipe v. Greenfield, 116 Okla. 241, 244 Pac. 424 (1926); Weiman v. Steffen, 186 Mo. App. 584, 172 S.W. 472 (1915); Veselka v. Forrest, 283 S.W. 303 (Texas 1926).
6 Hinton v. Martin, 151 Ark. 343, 236 S.W. 267 (1922); Eaton v. Blackburn, 49 Ore. 22, 98 Pac. 303 (1907).
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. Ledy, 37 S.W. (2nd) 308 (Texas 1931).
does not impair his right of recovery for such breach. 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. 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. 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, 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. Since 1852 Ohio has had a provision declaring that a corporate body comes into existence upon the filing of the articles of incorporation. 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.

18 Jones v. Hodgkins, 233 Ky. 491, 26 S.W. (2d) 99 (1930); Ballard v. Burrows, 51 Iowa 81, 40 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).

19 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, 13 Pac. 306 (1886).

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

1 118 Ohio Laws 47, sec. 1.