the social policy of not enforcing illegal contracts in order to prevent their formation, against the equities of the parties in the particular case, and found the latter more persuasive. Since the parties are in *pari delicto*, this position is not untenable,[13] but not many courts will permit recovery, even in quasi-contracts.[14].

J. B. S.

CONVEYANCES

Covenant Against Incumbrances

The plaintiff purchased a lot from the defendant by warranty deed with covenant against incumbrances. A natural watercourse on the premises had been covered with concrete and sod in such a manner that it was not visible, and neither party knew of its existence. This covering collapsed causing damage to the building on the property. In a suit against the grantor, the court held that the concealed watercourse, which had existed less than twenty-one years, was not such an incumbrance as to constitute a breach of the covenant against incumbrances.[1]

When a purchaser is injured by defective title in the realty purchased, he usually must seek his recourse through an action for breach of an express covenant. In real property there are few implied warranties, in the absence of statutes creating them, and, except in the case of leases, none are implied from the mere conveyance of land.[2] Where the defect in title is not inconsistent with the passing of the estate, as in the principal case, the covenant against incumbrances seems the plausible one on which to seek recovery. It is sometimes said that the covenant against incumbrances warrants against any right or interest of another to the diminution of the value or use of the land, but not inconsistent with the passing of the estate.[3] This covenant extends to easements,[4]

[13] The Courts dislike having one wrongdoer subjected to a severe forfeiture and the other unjustly enriched. When the infraction of law is minor, they try to prevent this. Note (1913) 26 Harv. L.R. 739.

[14] Cashin v. Pliter, Randall v. Tuell, both *supra*, note 4; Peck v. Sands, 198 N.Y. Supp. 313, 119 Misc. 804 (1922); Peacock, Woodside & Co. v. Grannan, 2 Ohio Dec. Rep. 465, 3 W.L.M.155(1861).

[1] Zoyteck v. Peoples Savings Bank Co., 65 Ohio App. 118 (1940).

[2] Peoples Savings Bank Co. v. Parsiette *et al.*, 68 Ohio St. 450, 67 N.E. 896 (1913); Nelson v. Hamilton County, 102 Iowa 229, 71 N.W. 206 (1897); Thorp v. Keokuk Coal Co., 48 N.Y. 253 (1872); Van Doren v. Fenton, 125 Wis. 147, 103 N.W. 228 (1905); Wheeler v. Wayne Co., 132 Ill. 599, 24 N.E. 625 (1890).

[3] Stanbaugh v. Smith, 23 Ohio St. 584 (1873); Peoples Savings Bank Co. v. Parsiette *et al.*, 68 Ohio St. 450, 67 N.E. 896 (1903); 61 A.L.R. 72; Rawle, Covenants, Sec. 85.

[4] Fassnacht v. Bessinger, 35 Ohio App. 509, 172 N.E. 636, (1930); Kunkle v. Beck 1 Ohio App. 70 (1913).

rights of dower,[5] and to adverse claims such as outstanding mortgages,[6] liens,[7] and unpaid taxes.[8] Easements of private ways,[9] rights to enter land for specific purposes,[10] rights to take water or divert it, and to flood lands are also incumbrances within the purview of the grantor's covenant.[11] Some jurisdictions hold that a public highway on the premises is within the covenant against incumbrances,[12] but the majority of courts contend that there is an implied exception of a highway from the covenant. The majority bases this exception on the grounds that the highway is apparent, and the condition irremediable, and the parties know of such conditions.[13] Courts are more reluctant to give effect to the knowledge of the easement when a railroad right of way is involved, holding the covenant breached by the existence of a valid right of way whether known or not.[14] Where public sewers and drains, buried under the ground and unknown to the parties, or where other easements of a public character, such as irrigation and drainage ditches are involved, many courts do not consider them within the covenant because of their beneficial effect on the premises.[15]

The right to the natural flow and fall of water on land is not considered an easement but a right connected with the interest in land, and so natural watercourses have not been held to be within the covenant against incumbrances.[16] Although the principal case is concerned with a natural stream, the damage resulted from the artificial character of the covered watercourse. An artificial structure does not in itself constitute an incumbrance.[17] There must be some legally enforceable right in some third person in the artificial character before it is an incumbrance.[18] In the case of a license there is no right which another can enforce to the diminution of the estate of the covenantee.[19] Here

[5] Peoples Savings Bank Co. v. Parsiette *et al.*, 68 Ohio St. 450, 67 N.E. 896 (1903); Deibel v. Kinncar, 17 Ohio L. Abs. 684 (1934).

[6] Reid v. Sycks, 27 Ohio St. 285 (1875); Smith v. Dixon, 27 Ohio St. 471 (1875).

[7] Gerlach v. Redinger, 40 Ohio St. 388 (1833).

[8] Long v. Noler, 5 Ohio St. 272 (1855); Craig v. Heis, 30 Ohio St. 550 (1873).

[9] Fassnacht v. Bessinger, 35 Ohio App. 509, 172 N.E. 636 (1930).

[10] Stanbaugh v. Smith, 23 Ohio St. 584 (1873).

[11] 61 A.L.R. 72; 64 A.L.R. 1479.

[12] Kellogg v. Ingersoll, 2 Mass. 97 (1806); Alling v. Burlock, 46 Conn. 504 (1878).

[13] Paterson v. Arthur, 9 Watts (Pa.) 152 (1839); Desverger v. Willis 56 Ga. 515, 21 Am. Rep. 289 (1875). See 61 A.L.R. 72; 64 A.L.R. 1479.

[14] 61 A.L.R. 72; 64 A.L.R. 1479.

[15] Newcomb v. Fiedler, 24 Ohio St. 463 (1873); Suhr v. Butterfield, 151 Iowa 736 (1911); First Unitarian Society v. Citizens Savings and Trust Co., 162 Iowa 389, 51 L.R.A. (N.S.) 428, 142 N.W. 87 (1913).

[16] Stanfield v. Schneidewind, 96 N.J.L. 428, 115 Atl. 339 (1921).

[17] Rawle, Covenants, Sec. 85.

[18] Reibel v. Downs, 23 Ohio App. 352, 155 N.E. 403 (1926); Price v. Foster, 36 Ohio App. 526, 173 N.E. 618 (1927).

[19] Wilkins v. Irvine, 33 Ohio St. 138 (1877); Jerald v. Elly, 51 Iowa 321, 1 N.W. 639 (1879); Dinsmore v. Savage, 68 Me. 191 (1878).

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 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).