THE DOCTRINE OF MARKETABLE TITLE IN CANADA†

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PART ONE: INTRODUCTION

Every executory contract for the sale of real property contains, at common law, an implicit[1] covenant that the vendor will tender a marketable title. This rule is subject to any express terms of the agreement and is sometimes qualified by the actual knowledge of the parties.[2] The contract may contain an express term either adding to or derogating from the vendor's common law obligation, but terms of the latter variety are strictly construed against the vendor.[3] Even where the vendor only agrees to tender such title as he has, he must still disclose any unusual defects of which he is aware.[4]

The doctrine of marketable title is far from being an obscure legal construct. The average practitioner encounters that doctrine daily:

1. in deciding whether to object to a "defective" title,
2. in deciding whether the vendor has made a proper tender upon closing a transaction,
3. in certifying for the purchaser or mortgagee that the title is marketable.

It is not within the compass of this paper to examine the various

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† **SOURCES: As a preliminary remark, this writer must point out the extent to which he has drawn upon *Annotation: Marketable Title*, 57 A.L.R. 1253, for some of the material and much of the organization found in this paper.** That work unquestionably constitutes one of the most lucid and comprehensive studies of the law of marketable titles.

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1 Some authority would say "collateral": *Ogilvie v. Foljambe* (1817), 36 E.R. 21, 25.

2 *Ball v. Gutschenritter*, [1925] S.C.R. 68.

3 *Id.*

4 *Re Haedicke*, [1901] 2 Ch. 666.

provincial statutes[5] and commonly used standard form agreements[6] which re-define the obligations of vendors. Rather, this paper is designed to examine the content of the term "marketable" in Canadian common law.

This paper will only touch upon the problem of available remedies insofar as this becomes necessary to elucidate the central issue. Initially, one must be aware that the doctrine of marketable title only applies to executory contracts. In executed contracts one is generally limited to an action for breach of warranty of title.[7] Secondly, it is essential to distinguish between matters of conveyance and defects of title. Encumbrances will not make a vendor's title defective as long as he is in a position to remove them by the date set for closing the transaction. Such encumbrances are termed matters of conveyance. A purchaser need not specifically requisition their removal; such removal is an integral part of the vendor's obligation to tender a proper conveyance. If the vendor fails to convey free from such encumbrances, the purchaser may either repudiate the contract or seek a decree of specific performance.

A defect of title involves some outstanding interest which is not within the vendor's power to remove. This gives the purchaser an immediate right of repudiation, or an alternative right to specific performance with abatement of the purchase price.[8] The right to object to a defect of title may be lost, either through the operation of the doctrine of waiver, or more commonly through the lapse of the agreed period for investigation of title under the contract.[9] In exceptional cases a purchaser may object to title after the expiry of this agreed period, such severe defects are said to go to the root of the title.[10] Having completed an analysis (unfortunately, although necessarily, inadequate) of the available remedies, one must now turn to an analysis of the content of the term "marketable".

The doctrine of marketable title grew up in courts of equity as a defence available to purchasers in actions to have contracts for the sale of land specifically performed. Questions touching the validity

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5 For a detailed discussion of the law in Ontario under the *Investigations of Titles Act* R.S.O. 1950 c. 186, see W.G.C. Howland, *Objections to Title*, Law Society of Upper Canada, Special Lectures, 1960, Sale of Land, p. 221.

6 Many standard form agreements of sale specifically exclude the vendor's obligation with respect to easements, restrictions, covenants, etc. However, the courts have strictly construed such limitations against vendors. See: *Ball v. Gutschenritter*, supra n. 2.

7 Dicastri, Canadian Law of Vendor and Purchaser, Carswell 1968, para. 791 *et seq.*

8 *Ibid.* para. 245, para. 579 *et seq.*

9 *Ibid.* para. 264 *et seq.*

10 W.G.C. Howland, *op cit.*, p. 224.

of title to real estate were within the sole jurisdiction of common law courts. The decree of a court of equity afforded no protection to a purchaser whose title was subsequently challenged at common law:

> I should be in a strange situation in desiring a purchaser to take this title because I think the point a pretty good one, though the Court of Exchequer having determined against it. It is telling him to try my opinion at his expense.[11]

Only where a title was free from any "reasonable doubt" would a court of equity force it upon an unwilling purchaser.[12] The doctrine did not originally extend to actions at Common law. If a purchaser wanted to recover money paid in advance he had to show that the vendor's title was bad, not merely doubtful.[13] Today however the doctrine extends to both legal and equitable remedies.[14]

The doctrine of marketable title represents a jurisprudential compromise between the severity of *caveat emptor* and the impractical alternative of requiring tender of perfect title. This latter course, given the complexity of the law of real property, would render a vendor's right to enforce an executory contract for the sale of land virtually illusory. Equity chose a middle ground decreeing specific performance whenever it found a title free from reasonable doubt. The acid test was whether the purchaser would be exposed to any real hazard of litigation in order to defend the title he was to acquire.

With the merger of common law and equity, if all the necessary parties are before a court, it can resolve objections to title by making a final determination of the validity of the vendor's title; the purchaser will be protected by the doctrine of *res judicata*. Where this is not the case, the court's paramount concern is to protect the purchaser from any real threat of litigation.[15] The court must still examine the vendor's title, but not with a view toward ultimately determining its validity; rather, the court must determine whether there is any reasonable doubt as to the validity of the title.[16] The court may be compelled to find a title unmarketable even if morally convinced of its validity.[17]

Where the relevant facts are not in dispute and the validity of the vendor's title depends on the resolution of a point of law, his title is marketable only when the law is so clearly in his favour that it can be seen to be a matter of settled jurisprudence.[18] Real doubt will

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11 *Rose v. Culland* (1800), 31 E.R. 537, 538 per Loughborough, L.C.

12 *Pyrke v. Waddingham* (1852), 68 E.R. 813.

14 *Innes v. Costello*, [1917] 1 W.W.R. 1135, 1139 (Alta. C.A.)

15 *Pyrke v. Waddingham*, *supra* n. 12.

16 *Ibid.* p. 816.

17 *Id.*

18 *Alexander v. Mills* (1870), L.R. 6 Ch. 124, 131.

generally arise where there are decisions,[19] dicta,[20] or expert opinion[21] tending to defeat the title. If a court of first instance has found a title doubtful, an appellate court will only reverse such a finding if it is clearly wrong.[22]

If there is a dispute over the construction of an instrument in the chain of title, the weight of authority must clearly favour the interpretation advanced by the vendor. It is not enough however that a purchaser advance another possible interpretation, that interpretation must be reasonable in light of accepted principles of construction.[23] A title is not marketable if the court itself has doubts about the construction of such an instrument. The same principle applies to the construction of wills,[24] but where all parties having an interest under a will join in a conveyance, doubt as to their respective shares is irrelevant.[25] If there is a real doubt as to the existence[26] or exercise[27] of a power of sale this will render an otherwise valid title unmarketable, but a power of sale is not doubtful merely because it arises by necessary implication.[28] The same principle of reasonable doubt applies to the construction of all statutes upon which the validity of the title rests.[29]

A title is not normally unmarketable simply because it is dependent on the proof of extrinsic facts. Not only must the vendor provide the purchaser with conclusive proof of such facts, but such facts must also be capable of proof at some future date if the purchaser is brought to court.[30] The vendor may rely on any accepted

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19 *Re Thackwray and Young's Contract* (1888), 40 ch. 34, 38. (The American Supreme Court has adopted the rule that a title is deemed to be doubtful where a court of co-ordinate jurisdiction has decided against the principle upon which it rests: *Wesley v. Ells* (1900), 20 S. Ct. 661, 664.).

20 *Id.*

21 *Marlow v. Smith* (1723), 24 E.R. 698.

22 *Collier v. McBean* (1865), L. R. 1 Ch. 81, 85.

23 *Radford v. Willis* (1871), L. R. 7 Ch. 7, 11.

24 *Pyrke v. Waddingham*, supra n. 12.

25 *Re Lane and Beacham* (1912), 7 D.L.R. 311 (Ont. H.C.) (Decided on another point).

26 *Mansfield v. Toronto General Trust Corp.* (1912), 1 D.L.R. 503 (Man. K.B.); *Re Campbell and Harwood* (1902), 1 O.W.R. 139 (Wk. Ct.); *Spellman v. Litovitz* (1918), 44 O.R. 30 (Wk. Ct.).

27 *Alexander v. Mills*, supra n. 18 For a similar point see *Cartlidge v. Bendza* (1956), 6 D.L.R. (2d) 301 (Ont. C.A.).

28 *Hamilton v. Buckmaster* (1866), L.R. 3 Eq. 323.

29 *Annotation: Marketable Title* 57 A.L.R. 1253, 1365 *et. seq.*

30 *Lowes v. Lush* (1808), 33 E.R. 631.

means of proof, including circumstantial evidence and presumptions of fact,[31] but if there are no adequate means for the proof or investigation of necessary facts his title is unmarketable.[32] While he is obliged to prove all facts necessary to support his title, he need not negate the existence of those which might defeat it.[33] As to sufficiency of proof, American courts have adopted the test that the facts proven must be such as would require a directed verdict in a jury trial.[34]

Canadian courts have adopted the doctrine of marketable title but there is evidence of a certain disparity between the theory and its application. One does find examples of an orthodox application of the doctrine. A power of sale which was the subject of conflicting judicial authority rendered a title unmarketable in *Re Thomas MacNabb*.[35] The Ontario Court of Appeal did not decree specific performance in *Logan v. Stein*[36] until it had thoroughly examined a threatened law suit and found it to be completely idle. A title which rested on the unregistered assignment of a vendor's interest in an agreement of sale was found too uncertain to be marketable in *Re Aston and White*.[37]

Yet in *Gunn v. Turner*[38] a recital in a 20-year old deed that the grantor conveyed as administrator of his father's estate prevailed over direct evidence of the previous appointment of another person as administrator *ad litem*. In *Re Tinning and Weber*[39] the vendor had a life estate. This was followed by a fee simple in her son, determinable upon his dying without issue, followed by a springing executory interest in fee simple in the children of X. The vendor's son had issue and conveyed his entire interest to the vendor, as had all of the children of X. The purchaser objected on the ground that X, a 54 year old widow, could have other children. The court found that the vendor had a marketable fee simple. The purchaser was only entitled to a moral rather than a mathematical certainty. In *Re Hewitt and Armstrong*[40] the title rested on a sheriff's deed which purported (in excess of his statutory authority) to subdivide the equity of redemption of the deceased owner. There was some confusing evidence of

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31 *Annotation*, supra n. 29, at p. 1369 n. 13; p. 1370 n. 17.

32 *Pyrke v. Waddingham*, *supra* n. 12, at p. 817.

33 *Annotation*, *supra* n. 29, at p. 1370, n. 15.

34 *Potter v. Ogden* (1905), 59 A. 673, 474 (N.J., Chan.).

35 (1882), 1 O.R. 94.

36 [1958] O.W.N. 343 (C.A.).

37 (1920), 48 O.R. 168 (Wk. Ct.).

38 (1900), 13 O.R. 158 (Div. Ct.).

39 (1904), 8 O.L.R. 703 (Wk. Ct.).

40 (1918), 14 O.W.N. 139 (Middleton, J.).

concurrence in the sale by the deceased owner's executors. The court found that since those executors were alone in a position to question the sale, the title was not doubtful. Such cases seem indicative of a judicial tendency to ease the obligations of vendors.

There is little jurisprudence in this country specifically directed to the definition of the term "marketable". What one does find is a body of case law dealing with various aspects of the law of real property which have led purchasers to question the validity of vendors' titles. Bearing this in mind, this paper will attempt to explore the Canadian case law surrounding some, though by no means all, of the problem areas. Once this has been done one may be able to draw some tentative conclusions about the present state of the doctrine of marketable title in Canada.

PART TWO: SPECIFIC DEFECTS

A. ENCUMBRANCES

"Encumbrance" has no technical meaning and must be construed in any particular instance according to context and usage.[41] The term is commonly used to describe outstanding interests in land which, if not removed, result in the vendor being unable to convey a fee simple absolute. In this sense mortgages, liens, judgments, reservations, restrictions, easements and encroachments all constitute encumbrances on real property. An open contract for the sale of land implies a conveyance free from encumbrances, a contract to purchase the "equity" in property does not.[42]

The distinction between encumbrances which constitute defects in title and those which are merely matters of conveyance is of paramount importance in this area since this defines the rights and obligations of both parties to the contract as outlined above. Generally speaking, if the vendor can compel the encumbrancer to grant a discharge prior to the completion of the contract, the encumbrance is a matter of conveyance.[43] This is so even if the value of the encumbrances exceed the purchase price of the property.[44] Where a vendor sues for damages or specific performance of a contract has been repudiated by a purchaser because of the existence of an encumbrance, to succeed he must show that he had a right to remove that encumbrance (within the period for completion of the contract) at the date of that repudiation.[45] If the purchaser has not elected to

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41 *Re Malott and Mosher* (1964), 44 D.L.R. (2d) 191 (N.S.S.C.) *Clark v. Raynor* (1922), 65 D.L.R. 425 (N.S.C.A.); *Jackson v. Pearldale Ltd.* (1962), 47 M.P.R. (N.S.C.A.).

42 *Bedmarsky v. Weleschuk* (1961), 29 D.L.R. (2d) 270 (Alta. C.A.).

43 *Goodchild v. Bethel* (1919), 19 D.L.R. 161 (Alta. C.A.).

44 *Id.*

45 *Smith v. Crawford* (1918), 40 D.L.R. 224 (Sask. C.A.).

repudiate, it is sufficient that the vendor have a compellable title at the date of the hearing of the action.[46]

Unless time is of the essence of the contract, the vendor is allowed a reasonable time to clear up matters of conveyance.[47] Thus, for example, a vendor who paid in full for a Crown grant but had not received his Patent by the date set for closing the transaction was held not to have been in breach of his contract for sale of that land.[48] If at the date of closing the vendor can neither compel a discharge of all encumbrances nor obtain the encumbrancer's consent to grant such a discharge, his title is unmarketable.[49]

Although in the normal contract for the sale of land by installments the vendor need only make good title at the date of the last installment, the purchaser can require a reference on title before making any payment. At that point the vendor must prove that he will be able to convey free from encumbrances by the date set for that last installment.[50]

B. MORTGAGES

An undischarged mortgage is an encumbrance which the vendor must remove by the closing date.[51] Agreements to purchase subject to an existing mortgage are strictly construed against the vendor. Thus a purchaser who has agreed to buy land subject to one mortgage in a specific amount cannot be forced to accept that property subject to two mortgages, even where they total the same amount.[52] A vendor is allowed a reasonable time to discharge a mortgage, but only where he has made an honest attempt to obtain a discharge prior to the closing date.[53] Thus where the purchaser has specifically requisitioned a discharge well in advance, he can refuse to complete the transaction if the vendor, without explanation, tenders a mortgage statement and a cheque for the balance.[54]

A purchaser can only repudiate a contract on the basis of an undischarged mortgage if the vendor is at that time unable to discharge it prior to closing.[55] However, even a revocable consent to discharge

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46 *Baxter v. Derkas*, [1925] 4 D.L.R. 801 (Sask. C.A.).

47 Di Castri, *op. cit.*, para. 249, n. (p).

48 *Guthrie v. Clark* (1886), 3 Man. L.R. 318 (C.A.).

49 *Brandon Steam Laundry Co. v. Hanna* (1909), 19 Man. L.R. 9 (K.B.); affd. 11 W.L.R. 101 (C.A.).

50 *Cameron et al v. Carter et al* (1885), 4 O. R. 426 (Chan.).

51 *Knight v. Cushing*, (1912), I. D. L. R. 331 (Alta. C. A.).

52 *Smith v. Curtis* (1925), 29 O.W.N. 163 (2nd Div. Ct.).

53 *Ungerman et al v. Maroni*, [1956] O.W.N. 650 (C.A.).

54 *Fong v. Weinpur*, [1973] 2 O.R. 760 (H. Ct.).

55 *Brierly v. Wallace* (1925), 28 O.W.N. 127 (C.A.).

given by the mortgagee is sufficient to deprive the purchaser of this right of repudiation.[56]

Under an installment contract the relevant date is, as a rule, that of the last installment since that is usually the agreed date for passing of the title.[57] This rule is not invariable as the contract may manifest another intention.[58] A provision for prepayment would evidence a contrary intention. Thus a purchaser under such an agreement could repudiate it where the property was subject to a mortgage redeemable within the installment period but without any provision for prepayment.[59]

Generally it is not sufficient that a mortgage is discharged by mere presumption,[60] but the passage of enough time (eg. 80 years)[61] can cure such a defect. The purchaser cannot demand a written discharge where it is impossible to obtain one. In such a case it is sufficient that the vendor give satisfactory proof of that the mortgage has been paid. Similarly a defective written discharge can be cured by extrinsic evidence. Thus a recorded discharge from someone other than the original mortgagee is sufficient if the vendor produces an informal assignment by the mortgagee to that person written on the back of the original mortgage.[62] A purchaser can demand all necessary documentation to complete the discharge; as, for example, registration of letters testamentary where the discharge is given by the mortgagee's executors.[63] The vendor cannot be required to produce a superfluous discharge; as, for example, a discharge of a mortgage given by a life tenant, since deceased.[64]

C. *DOWER*

An outstanding right of dower is defect of title and not a matter of conveyance, even if that right is the inchoate dower of the vendor's wife.[65] A purchaser need not accept such a title and may require the

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56 *Gray v. Chadwick* (1922), 49 N.B.R. 144 (Chan). *Brickles v. Snell* (1916), 30 D.L.R. 31 (P.C.).

57 *Preston v. Adilman* (1915), 21 D.L.R. 869 (Sask. S. Ct.); *Hagen v. Ferris* (1915), 21 D.L.R. 868 (Sask. S. Ct.); *Warren v. Rogers* (1888), 16 O.R. 259; *Bostwick and Curry v. Coy* (1915), 21 B.C.R. 478 (S. Ct.), A purchaser sued for an installment of the purchase price can require that the vendor post security for the discharge of the mortgage.

58 *Brandon Steam Laundry Co. v. Hanna*, *supra* n. 49.

59. *Knight v. Cushing* , *supra* n. 51.

60 *Barnwell v. Harris* (1809), 127 E.R. 901 (in re Ground Rent).

61 *Imperial Bank of Canada v. Metcalf* (1886), 11 O.R. 467 (Chan.).

62 *Re Mara* (1888), 16 O.R. 391 (Chan.).

63 *Re Taylor and Martin* (1907), 14 O.L.R. 132.

64 *Re Ponton* (1889), 16 O.R. 669 (Chan.).

65 *Mason v. Freedman*, [1958] S.C.R. 483.

vendor to use his best efforts to obtain a release of dower. In such a case the purchaser is not entitled to a conveyance with an abatement of the purchase price, although he can require that the vendor make a sufficient payment into court to secure him against any contingent exercise of that dower right.[66] A subsequent abolition of dower by a decree of divorce will not avail a vendor whose title was defective at the date of the issuance of the writ in an action for specific performance.[67]

American authority recognizes a presumption of extinction in the case of long outstanding dower rights.[68] This may be the case in Canada, especially where recitals in the chain of title negate the existence of dower.[69]

D. LEASES

Leases and options to lease which extend beyond the date of completion or the date upon which the purchaser is to go into possession are defects in title.[70] Where, however, that lease[71] or option[72] would be defeated by the registration of the purchaser's deed, there is no breach of the vendor's covenant to give good title. American authority indicates that outstanding options to renew existing leases are defect in title.[73] An outstanding interest in a growing crop is a chattel interest and will not affect the vendor's title.[74]

E. TAXES

Taxes and rates assessed against the property normally constitute encumbrances, although as matters of conveyance and not defects in title.[75] A purchaser is normally entitled to have taxes proportioned *pro rata*[76] even where such taxes are not yet due, eg., only assessed annually.[77] Where there is a dispute over the amount of tax due, the purchaser can demand that the vendor indemnify him against possible loss.[78] Awareness of the existence of outstanding tax

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66 *Re Woods and Arthur*, (1921), 58 D.L.R. 620 (Ont. S. Ct.).

67 *Ungerman v. Maroni*, *supra* n. 53.

68 *Annotation*, *supra* n. 29, p. 1401 n. 19.

69 *Re Lawrason and Sherman* (1930), 27 O.W.N. 474 (Wk. Ct.).

70 *Matejka v. King* (1921), 61 D.L.R. 426 (Alta. S. Ct.).

71 *Crawford and Crawford v. Mago*, [1949] 1 W.W.R. 719 (B.C.S.Ct.).

72 *Bell and Bell v. Fullerton*, [1949] 3 W.W.R. 77 (Sask. S. Ct.).

73 *Annotation*, *supra* n. 29, p. 1402 n. 24; p. 1403, n. 28.

74 *Gardner v. Staples* (1915), 21 D.L.R. 814 (Sask. S. Ct.).

75 *Munroe v. McDonald* (1915), 23 D.L.R. 105 (N.S.C.A.).

76 *Id.*

77 *Id.*

78 *Phillips v. Monteith* (1913), 11 D.L.R. 779 (Ont. S. Ct.).

is not relevant;[79] upon later discovery of such tax, the purchaser may sue for recovery of that amount in an action for breach of warranty of title.[80] If the purchaser has covenanted to pay the taxes on the property pending completion and through his default the property is sold for unpaid taxes, the vendor can maintain an action for the purchse price although he is unable to convey title to the property.[81]

Whether a statute or by-law imposes a charge on the person or against the property is a question of construction. One must also distinguish between charges on the property to be removed by the vendor, eg..

1. *Tile Drainage Act* R.S.O. 1914, c. 44,[82]

2. Local Improvement Rates in Ontario;[83] and taxes to be apportioned between the parties, eg.,

3. Local Improvement Rates in Alberta.[84]

F. JUDGEMENTS AND OTHER CHARGES ON LAND

Judgments against the vendor filed in the county where the land to be sold is located are encumbrances, even though they have been filed subsequent to the execution of the agreement of sale. The court will not expose a purchaser to possible litigation to prove the priority of his agreement.[85] Similarly undischarged *lis pendens*,[86] *caveats*,[87] powers of attorney,[88] previously registered agreements for sale,[89] specific legacies and maintenance agreements touching the land[90] all form encumbrances. Where doubtful questions arise because of the

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79 *Freeman v. Calverly* (1916), 27 D.L.R. 394 (Man. C.A.).

80 *Id.*

81 *Label v. Dobbie*, [1919] 2 W.W.R. 483.

82 *Re Rowell and Forbes* (1920), 19 O.W.N. 104.

83 *Re Taylor and Martyn*, *supra* n. 63.

84 *Neitsch v. Mulek* (1969), 70 W.W.R. 630 (Alta. D. Ct.).

85 *Spohn v. Ryckman* (1859), 7 Gr. 389; An execution against a *cestui que trust* whose beneficial interest in the property is extinguished does not affect the title: *Re Toronto General Trust Corpn. v. Christie* (1927), 33 O.W.N. 168 (Wk. Ct.). But where the vendor himself holds an unsatisfied judgment against a purchaser under a former agreement of sale, the title is defective: *Harvey v. Malanchuk* (1931), 40 Man. L. R. 78 (C.A.).

86 *Re Bobier* (1888), 16 O.R. 259 (Q.B.).

87 *Warren v. Rogers* (1914), 6 W.W.R. 1062 (Man. K.B.).

88 *Re Bobier*, *supra* n. 86.

89 *Paulter Holdings Ltd. v. Karrys Invest Ltd.* (1961), 28 D.L.R. (2d) 642 (Ont. H.Ct.).

90 It is a question of construction whether such agreements impose a charge on the land: *Baker v. The Trusts and Guarantee Co. et al* (1898), 29 O.R. 456 (S. Ct.); or merely a personal obligation: *Re Eagan and Dawson* (1909), 18 O.L.R. 638.

bankruptcy of the vendor,[91] the possibility of fraudulent conveyances in the chain of title,[92] or where the debts of the deceased owner exceed the value of his personal estate,[93] the land is not marketable. It is not however a defect in title that an estate has not been administered if the decedent left no debts and had no creditors.[94] Where the Federal Government claims part of the land to be sold as a "Public Harbour" by virtue of s. 108 of the *British North America Act*, the title is defective.[95] Where a purchaser negotiates with the vendor for the removal of such encumbrances he will not be taken to have waived his right to enforce that removal in court.[96]

G. RESERVATIONS AND EXCEPTIONS

A purchaser is *prima facie* entitled to a conveyance free from any reservations or exceptions[97] not contained in the Crown grant.[98] He need not prove that the vendor's inability to convey, for example, mineral rights adversely affects the value of the property. Discovery of that inability gives the purchaser an immediate right to repudiate the agreement.[99] In the normal agreement for sale the term "land" includes mineral rights,[100] even if those rights are acquired by the vendor after execution of the agreement but before closing.[101] Agreements lessening the vendor's obligations are very strictly construed against them. Thus an agreement to purchase subject to "reservations" does not preclude repudiation based on the existence of and "exception" in the chain of title.[102] An agreement of sale based on the mistaken assumption of both parties that the Crown grant did not include mineral rights may be rectified so as to allow conveyance of the entire fee to the purchaser.[103]

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91 *Sloper v. Fish* (1813), 35 E.R. 274.

92 *Annotation, supra* n. 29, 1408 n. 64.

93 *Ibid.*, p. 1490 *et seq.*

94 *Id.*

95 *Rodd v. Cronin*, [1936] 2 D.L.R. 377 (S.C.C.).

96 *Ballantyne v. Hettinger* (1914), 7 W.W.R. 526 (Alta. S. Ct.).

97 *Burke v. Popoy*, [1923] 2 W.W.R. 648 (Sask. K.B.); *Crump v. McNeil*, [1919] 1 W.W.R. 52 (Alta. C.A.); *Bellamy v. Debenham*, [1891] 1 Ch. 413 (C.A.); *Universal Land Sec. Co. v. Jackson* (1917), 33 D.L.R. 764, (Alta. C.A.); *Armstrong v. Spraling et al*, [1925] 1 D.L.R. 914 (Sask. C.A.).

98 *Ball v. Gutschenritter, supra* n. 2.

99 *Innes v. Costello, supra* n. 14.

100 *Hobbs v. E & N Ry. Co.* (1898), 29 S.C.R. 450.

101 *Ferguson v. Saunders* (1958), 12 D.L.R. (2d) 688 (Alta. C.A.).

102 *Rayfuse v. Mugleston*, (1954) 3 D.L.R. 360 (B.C.C.A.).

103 *Schorb v. Public Trustee* (1953), 8 W.W.R. 677, affd. 11 W.W.R. 132 (Alta. C.A.).

Colony Oil & Gas Co. v. Showers, [1938] 3 W.W.R. 739 (Sask. K.B.).

H. BUILDING RESTRICTIONS

Enforceable private building restrictions are encumbrances[104] regardless of whether or not they actually affect the value of the land; or, it would seem, whether or not the purchaser's objection is *bona fide*.[105] If a vendor is to defeat such a general objection he must, after adducing all necessary evidence pertaining to the enforceability of the restriction,[106] either show that it is unenforceable[107] (eg., because of the changed character of the neighbourhood)[108] or produce a clearly effective release.[109] If the purchaser has objected that the restriction prohibits some proposed or existing use of the property, the court will only address itself to that specific point, eg., duplexes,[110] apartment buildings,[111] verandahs,[112] garages.[113] There is very little case law involving other types of private restrictions.[114] Where there is reasonable doubt as to the enforceability of a restriction,[115] or as to the validity of some specific use proposed by the purchaser,[116] the vendor's title is not marketable.

If the purchaser has agreed to buy subject to all restrictions[117] or covenants running with the land[118] he loses his right to object to most

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104 *Flight v. Booth* (1834), 131 E.R. 1160.

105 *Foley v. Lipson* (1918), 14 O.W.N. 269 (H. Ct.).

106 *Re Beatty and Brown* (1915), 7 O.W.N. 846 (H. Ct.).

107 *Re Addison and Bradbury* (1921), 19 O.W.N. 472 (Wk. Ct.).

108 *Re Montgomery and Miller* (1918), 13 O.W.N. 399 (H. Ct.); *Re Ryding and Clover* (1920), 19 O.W.N. 235 (Wk. Ct.); *Re Wheeler and Rayfield* (1925), 29 O.W.N. 277 (Wk. Ct.).

109 *Re Scaman and Ward* (1919), 17 O.W.N. 8 (Wk. Ct.).
Re Rooke and Smith (1914), 6 O.W.N. 382, 503 (H. Ct.).

110 *Re Hoidge and Davidson* (1923), 25 O.W.N. 430 (Wk. Ct.);
Re James and Cutts (1922), 52 O.R. 453 (Wk. Ct.);
Re Toronto Gen. Tr. Corpn. and Crowley (1928), 34 O.W.N. 148 (Wk. Ct.).

111 *Re Robertson and Depoe* (1911), 3 O.W.N. 431 (H. Ct.).

112 *Fisher v. Goldoff*, [1942] O.W.N. 490 (H. Ct.).

113 *Re Dunlop and Elliott* (1920), 18 O.W.N. 182 (Wk. Ct.).

114 *Re Godson and Casselman* (1915), 18 O.W.N. 480 (Wk. Ct.): Restraint on Alienation.
Re North Grover Pub. S. Bd. and Todd, [1968] 1 O.R. 63 (C.A.): Fee Simple Subject to Condition Subsequent.

115 *Re Royal Trust Co. and Fisher and Lawson* (1922), 22 O.W.N. 169 (Wk. Ct.).

116 *Re Heynes and Pulver* (1923), 25 O.W.N. 269 (Wk. Ct.);
Re Rapp and Davidson (1930, 38 O.W.N. 270 (Wk. Ct.).

117 *Miller v. Young (1918), 14 O.W.N. 130 (1st Div. Ct.).*

118 Scholoff v. Reeder (1915), 22 D.L.R. 770 (Ont. S. Ct.).

restrictions. An agreement to accept the vendor's title does not preclude objections based on restrictions of which the purchaser has no notice,[119] or more extensive than those which he had agreed to accept.[120] In all three cases a purchaser can object to an existing breach of a restriction of which he had no notice and which materially affects the subject matter of the sale.[121]

The effect of zoning restrictions on executory contracts for the sale of land is quite unclear.[122] There is some authority which treats restrictions in the same manner as private building restrictions,[123] but other authority treats them as having no effect whatsoever.[124] There is support for the proposition that a zoning change intervening between the execution and completion of an agreement of sale is a defect going to the root of title.[125] If the agreement of sale specifically provides that the land is not subject to any zoning restriction, the existence of such restriction will give the purchaser an immediate right of repudiation without having to prove that any prejudice would be done to him by such a restriction.[126] Actual knowledge of an existing breach of a zoning by-law has been held to preclude a purchaser from objecting to title,[127] and there is some authority for the proposition that purchasers are deemed to have constructive knowledge of all zoning provisions.[128] While it is clear that contracts knowingly made in contravention of zoning restrictions are contrary to public policy,[129] it is possible that any agreement violating such a provision is tainted with illegality.[130]

I. EASEMENTS

The common law held that an easement which was a visible, or "patent" defect such as would put a prudent purchaser on inquiry could not be raised as an objection to the vendor's title.[131] "Patent" in this context has come to mean "either visible to the eye or arising

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119 *Western Can. Inv. Co. v. McDiarmid* (1922), 66 D.L.R. 457 (Sask. C.A.).

120 *Flight v. Booth*, *supra*, n. 104; *Coaffee v. Thompson* (1912), 5 D.L.R. 9 (Man. K.B.).

121 *McAleer v. Desjardine*, (1948) 4 D. L. R. 40 (Ont. C. A.).

122 *Danforth Heights Ltd. v. McDermid Bros.* (1922), 52 O.R. 412 (C.A.).

123 *Bard v. Duggan*, [1955] O.W.N. 246 (H. Ct.); *Re Pentacost* (1927), 33 O.W.N. 233 (H. Ct.).

124 *Re Pongrate and Zubyr*, [1954] O.W.N. 597 (H. Ct.).

125 *Innes et al v. Van de Weerdhof* (1970), 10 D.L.R. (3d) 722.

126 *Taback v. Rosenberg*, 56 Man. L.R. 121 (K.B.).

127 *Valentine v. Chutorian* (1950), 1 D.L.R. 292 (Man. C.A.).

128 *Winth v. Kutarna* (1955), 5 D.L.R. 785 (Sask. C.A.).

129 *Glenn v. Harix Const. Co.*, [1938] O.W.N. 405 (C.A.).

130 *Winth v. Kutarna*, *supra* n. 128.

131 *Bowler v. Round* (1800), 31 E.R. 707.

by necessary implication from something visible to the eye."[132] Thus a right of way which a purchaser could reasonably have interpreted to be a private path was found to be a "latent" defect.[133] Professor Bora Laskin, as he then was, has criticized this doctrine. He suggests that it would not, in any event, qualify an express covenant to give good title.[134] There seems to be only one Canadian case where the court has found such a defect to be patent.[135] While there is American authority that easements for the public good (eg., power lines, sewers) cannot be the subject of objections to title,[136] the English and Canadian case law stands opposed to this contention.[137]

Subject to the above qualifications, easements will generally constitute encumbrances. Thus an 8 foot wide[138] and a 10 foot wide[139] right of way, as well as a joint right of way over a common staircase[140] have all been held to be defects in title. If the purchaser has expressly contracted for a right of way, he may repudiate his contract if that right of way is doubtful,[141] or if less extensive than that for which he contracted.[142] In one reported case, the rights of way over a property were so extensive (covering a full third of the premises) that a Manitoba court allowed rescission of an executed contract.[143]

A party wall which depreciates the value of the property is normally a defect in title,[144] but it is unclear if the same is true where there is no evidence of such depreciation.[145] Where a purchaser has agreed to purchase subject to a party wall it is not a defect in title that the mid-point of that wall extends beyond the borders of his

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132 *Yandle v. Sutton*, [1922] 2 Ch. 199 (Sargeant, J.).

133 *Id.*

134 *Law Society of Upper Canada, Special Lectures, 1960, Sale of Land, 389, 391 et seq.*

135 *Lubienski v. Silverman*, [1932] 3 D.L.R. 320 (Ont. C.A. Chan.).

136 *Annotation, supra* n. 29, p. 1428.

137 *Re Brewer* (1899), 80 L.T. (N.S.) 127; *Re Packett*, [1902] 2 Ch. 258; *Pemsel v. Tucker*, [1907] 2 Ch. 191; *Rowland v. Ransford* (1919), 2 W.W.R. 486 (Alta. C.A.); *Joydan Dev. Ltd. v. HiLite H. Ltd.*, [1927] 1 O.R. 482 (H. Ct.): property subject to "easement" actually vested in fee simple in power company.

138 *Fesserton v. Wilkinson* (1914), 6 O.W.N. 347 (H. Ct.).

139 *Re Fielding* (1929), 36 O.W.N. 26 (Wk. Ct.).

140 *Dineen v. Young* (1909), 13 O.W.R. 722.

141 *Anoni v. Wilson* (1915), 9 O.W.N. 295 (Wk. Ct.).

142 *Re Capital Trust Corp et al* (1931), 40 O.W.N. 463 (Wk. Ct.).

143 *Tomoch v. N.B. Can.Trust Co. Ltd.* (1936), 44 Man. L.R. 1 (K.B.).

144 *Lavine v. Independent Builders Ltd.* (1932), 4 D.L.R. 569 (Ont. C.A.).

145 *Imperial Bank of Canada v. Metcalf, supra* n. 61; but cf. *Lavine v. Independent Builders Ltd., supra n. 144.*

property. He is not entitled to an exact half of the wall.[146]

Easements will not support an objection to title if they are unenforceable, eg., improperly created,[147] barred by statute,[148] or arise out of a frustrated contract.[149] A purchaser cannot object to an easement if he was himself responsible for its creation.[150]

J. ENCROACHMENTS

If property being purchased encroaches upon neighbouring land or a street this is normally a defect in title:

(i) a 2¼" encroachment of a house on neighbouring land,[151]

(ii) a stable encroaching on a highway,[152]

(iii) an eave encroaching on adjoining air space,[153]

(iv) a stoop encroaching on a street,[154]

(v) a 6" encroachment of a porch,[155]

(vi) a 4" encroachment of a wall.[156]

In the last case, the defect was found to go to the root of title. Encroachments give the purchaser a right to abatement of the purchase price[157] or an action for breach of warranty,[158] but not to rescission of an executed contract.[159]

There is some support for the application of the *de minimus* principle to extremely small encroachments. Thus a 1¾" encroachment of an eave upon a street gave rise to a small abatement of price, but was not sufficient to allow the purchaser to repudiate.[160] In another case, a small encroachment by a verandah was held to have no legal consequences.[161] That decision was distinguished in a later

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146 *Woodrow v. Connor*, (1922), 52 O.L.R. 631 (C.A.).

147 *Sumner v. McIntosh* (1917), 35 D.L.R. 336 (Sask. S. Ct.).

148 *Jackmar Dev. Ltd. v. Smith* (1973), 1 O.R. (2d) 87 (H. Ct.).

149 *Pigott v. Bell* (1913), 25 O.W.R. 266 (H. Ct.); but cf. *Re Pigott and Bell* (1913), 24 O.W.R. 863 (Wk. Ct.).

150 *Re Boulton and Garfunkel* (1912), 4 O.W.N. 263 (H. Ct.).

152 *Re Davis and Moss* (1918), 15 O.W.N. 111 (H. Ct.).

153 *Id.*

154 *Heifitz v. Garal*, [1950] O.W.N. 854 (H. Ct.).

155 *Re Fowler and Cawfield* (1926), 29 O.W.N. 245 (H. Ct.).

156 *Brown v. Laffradi*, [1961] O.W.N. 263 (H. Ct.).

157 *Re Maclarne and Connor* (1925), 28 O.W.N. 14 (Wk. Ct.).

158 *Hickman v. Warman* (1918), 15 O.W.N. 201 (2ns Div. Ct.): 4" encroachment.

159 *Quick v. Wilkinson* (1930), 39 O.W.N. 42, affd. 39 O.W.N. 276 (C.A.): 3' - 4' encroachment.

160 *Martin v. Kellogg*, [1932] 2 D.L.R. 496 (Ont. S. Ct.).

161 *Re Marchment*, [1947] O.W.N. 363 (H. Ct.).

case on the basis that the encroachment of the verandah would not affect the purchaser's proposed use of the property. In that later case it was held that a stoop located entirely on the street materially affected the proposed use of the land.[162] The Ontario Court of Appeal[163] recently rejected an attempt to apply the "patent" defect theory to a case involving a large encroachment of a loading platform upon neighbouring land. While there seems to be no Canadian case law on the effect of neighbouring structures encroaching upon the premises to be sold, it is suggested that such cases would be treated in a manner analogous to easements.[164]

If the vendor can prove that he has acquired title to the land being encroached upon, the purchaser is obliged to accept a conveyance of the original property along with the property so acquired.[165] If that claim is doubtful (as where, for example, it depends upon the resolution of the question of whether a lane being encroached upon is public or private, itself being an uncertainty) the purchaser will not be forced to accept his title.[166]

PART THREE: CONCLUSION

As must now be manifest to the reader, a study of the doctrine of marketable title necessitates a somewhat tedious compilation of particulars. It would be extremely artificial to attempt to extract any broad synthesis from these materials, most of which represent isolated, self-sufficient points of law. Since it is possible, however, that this compendium of facts will prove to be the most valuable element of this paper, this may excuse the pedantic manner of their expression.

The Canadian practitioner must contend with an absence of precedent in many important areas. One may attribute this lack of reported decisions variously to the tendency to settle such disputes, standard-form contracts allowing vendors to rescind rather than meet objections, or the professional stance of those who have certified questionable titles. This has, in any event, the practical consequence of augmenting the theoretical difficulty of dealing with the subject matter of marketable titles. Inevitably, one must rely heavily on the use of analogy. Fortunately, it is submitted, there are no practical or theoretical barriers to the use of American case law for the purposes of supplementing deficiencies in our own.

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162 *Heifitz v. Gural*, *supra* n. 154.

163 *Re Mountroy Ltd. et al*, [1955] O.R. 352 (H. Ct.), affd. [1955] 3 D.L.R. 840 (C.A.).

164 *Annotation*, *supra* n. 29, p. 1444 *et seq.*

165 *Re Butler and Henderson* (1912), 23 O.W.R. 576 (H. Ct.).

166 *Re Goldenberg and Glass* (1925), 56 O.R. 414 (C.A.): 8" encroachment.

Many reported decisions are concerned with whether some particular feature of the title can properly be termed an encumbrance, eg., an option to renew a lease. This area of the law is largely resolved and presents few problems. The major source of difficulty is in the area where one must determine whether a recognized encumbrance actually renders a title questionable, eg., an 80 year old undischarged mortgage. It is at this point that one must invoke the "reasonable doubt" analysis of the marketable title doctrine. The English law in this area is quite clear. The question then becomes whether the Canadian case law has somehow inferentially altered the meaning of the term "marketable".

Initially one must note the evolution of a juris prudential presumption of the extinction of long outstanding interests,[167] and also of one in favour of the evidentiary validity of recitals.[168] If used in moderation, these devices are not essentially contradictory to the "reasonable doubt" analysis, and can greatly facilitate real estate transactions. There is, however, some very questionable precedent where such a presumption has prevailed over direct evidence to the contrary.[169] There are other examples of decisions which ignore significant elements of doubt:

(1) leases defeated by the vendor's deed,[170]

(2) a fee simple arising out of a void condition subsequent,[171]

(3) easements destroyed by the operation of the doctrine of frustration.[172]

It is submitted that all of these cases presented a real threat of litigation to the prospective purchaser. This must be contrasted with the clear appreciation of the importance of the "reasonable doubt" concept illustrated in cases involving disputed tax liability[173] and outstanding executions.[174]

As has been pointed out, there is considerable doubt as to the application of the "patent" concept to the Canadian law of easements. Our courts have remained mute in the face of the important policy considerations behind this problem. The issue of zoning provisions and their effect on executory contracts for the sale of land is far from resolved. Certainly this is of some importance in the average

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167 *Imperial Bank of Canada v. Metcalf*, *supra* n. 61.

168 *Re Lawrason and Sherman*, *supra* n. 69.

169 *Gunn c. Turner*, *supra* n. 38.

170 *Crawford and Crawford v. Mago*, *supra* n. 71.

171 *Re North Grover Pub. S. Bd. v. Todd*, *supra*, n. 114.

172 *Pigott v. Bell*, *supra* n. 149

173 *Phillips v. Monteith*, *supra* n. 78.

174 *Spohn v. Ryckman*, *supra* n. 85.

real estate transaction. While this writer would suggest that to treat such provisions in the same manner as private restrictions is more consonant with prevailing authority, at this point in time the matter must remain purely speculative. The nature, extent and operation of the *de minimus* rule as it applies to encroachments is completely unclear. Finally, none of the Canadian case law dealing with encroachments seems to have dealt with the problem of encroachment by neighbouring premises on the land to be purchased.

These factors combine to point to a general lack of coherence in the treatment of title problems. One might attempt to rationalize these discrepancies on the basis of judicial evolution of a "new" theory of marketable title. It is submitted that this approach is untenable. The more natural conclusion is that Canadian courts tend to confuse titles of doubtful validity with invalid titles. The practitioner is left in the unenviable position of having to educate the court as to the content of the term "marketable", and at the same time cope with a considerable bias in the case law in favour of vendors. One can only hope that the future will see a greater appreciation of the importance of the doctrine of marketable title. The Canadian law of vendor and purchaser would be significantly clarified by a greater degree of uniformity in the application of that doctrine.