

VENDOR AND PURCHASER—POSSESSORY TITLE—LAND SUBJECT TO RESTRICTIVE COVENANT—NOTICE—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 Wm. IV. c. 27), s. 34—(R.S.O. c. 133, s. 15).

*In re Nisbett & Pott* (1906) 1 Ch. 386. When this case was before Farwell, J., (1905) 1 Ch. 391, we drew attention to its importance (ante vol. 41, p. 480). Now that his decision has been affirmed by the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.,) its authority and importance is still further enhanced. A too prevalent idea that a possessory title suffices to give an absolutely clear title to land is shewn to be erroneous. In this case the owner of the land in question in 1872. entered into restrictive covenants with his vendor as to building on the land and the user of buildings to be erected thereon. Nisbett, the present owner of the land, who claimed to have acquired title by possession for upwards of 28 years sold the land to Pott subject to a condition that the title should commence with a conveyance dated 11 August, 1890, which recited that one Headde and his father had been then in possession for thirteen years and upwards. After the contract to purchase was entered into, Pott was notified by the covenantees of the existence of the restrictive covenant. The vendor claimed that he was not bound by the covenant because he had purchased without notice, but it appeared that when he bought he accepted less than forty years' title and that if he had insisted on a forty years' title he would then have had notice of the covenant. The vendor also claimed that the effect of the Statute of Limitations being to extinguish the paper title, that it had also the effect of extinguishing all rights derived under that title. The following passage from the judgment of Cozens-Hardy, L.J., shews how the Court dealt with that contention: "The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement, not in any way capable of being affected by the provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter under s. 34 are those of persons who might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach of such a covenant, it is impossible for the person entitled to the benefit of it to bring an action." In Ontario, if a deed containing such a covenant is registered, it is