

PETER ROSS.....APPELLANT; 1881
 AND *Oct. 27, 28.
 1882
 JAMES HUNTER.....RESPONDENT. *March 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trespass—Registration—Notice.—Rev. Stats, N. S., 4 Series, c. 79, secs. 9 & 19.

R. (the appellant) brought an action against *H.* (the respondent) for having erected a brick wall over and upon the upper part of the south wall or cornice of appellant's store, pierced holes, &c. *H.* pleaded, *inter alia*, special leave and license, and that he had done so for a valuable consideration paid by him, and an equitable rejoinder alleging that plaintiff and those through whom he claimed had notice of the defendant's title to this easement at the time they obtained their conveyances. In 1859 one *C.*, who then owned *R.*'s property, granted by deed to *H.* the privilege of piercing the south wall, carrying his stovepipe into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building, which was higher than *R.*'s. *R.* purchased in 1872 the property from the Bank of *Nova Scotia*, who got it from one *F.*, to whom *C.* had conveyed it—all these conveyances being for valuable consideration. The deed from *C.* to *H.* was not recorded until 1871, and *R.*'s solicitor, in searching the title, did not search under *C.*'s name after the registry of the deed by which the title passed out of *C.* in 1862, and did not therefore observe the deed creating the easement in favor of plaintiff. There was evidence, when attention was called to it, that respondent had no separate wall, and the northern wall above appellant's building could be seen.

Held, That the continuance of illegal burdens on *R.*'s property since the fee had been acquired by him, were, in law, fresh and distinct trespasses against him, for which he was entitled to recover damages, unless he was bound by the license or grant of *C.*

* PRESENT.—Sir William J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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2. That the deed creating the easement was an instrument requiring registration under the provisions of the *Nova Scotia Registry Act*, 4 series, Rev. Stats. *N. S.*, ch. 79, secs. 9 & 19, and was defeated by the prior registration of the subsequent purchaser's conveyance for valuable consideration, and therefore from the date of the registration of the conveyance from *N.* to *F.*, that the deed of grant to *H.* became void at law against *F.* and all those claiming title through him.
3. That to defeat a registered deed there must be actual notice or fraud, and there was no actual notice given to *R.* in this case, such as to disentitle him to insist in equity on his legal priority acquired under the statute.

Per *Gwynne*, J., dissenting: That upon the pleadings as they stood on the record, the question of the Registry Act did not arise, and that as the incumbrance complained of had been legally created in 1859, its mere continuance did not constitute a trespass, and that the action as framed should not be sustained.

**APPEAL** from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule to set aside verdict for the appellant, and to enter a verdict and judgment thereon for the respondent. The facts and proceedings are fully stated in the judgments hereinafter given.

Mr. *Thompson*, Q.C., for appellant: The question in this case chiefly turns upon the *Nova Scotia Registry Act*, Rev. Stats. *N.S.* (4th series), ch. 79.

If the agreement from *Caldwell* to defendant is to be considered as a grant, or as a conveyance of the land or of any part of *Caldwell's* estate therein, I contend it comes under the operation of the Registry Act, and the conveyances from *Caldwell* to *Nash*, from *Nash* to *Forman*, and from *Forman* to the bank, took priority of it. In that case, *Caldwell* had no interest in the land at the time of recording the agreement, which could be bound by the agreement. The bank having taken a title free from any such encumbrance, conveyed to the plaintiff a title equally free. *Wash.* on Real Prop. (1); *Wade* on

Notice (1); *James Bates v. Amos Norcross* (2); *John Lomes v. Brewer* (3); *Trull v. Bigelow* (4); *Rawle on Cov. for Title* (5).

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The only other defence left to the respondent is, that appellant had constructive notice, viz. :—that the encroachment was so obvious that the plaintiff was bound to take notice of it. In the first place, I contend that the purchaser was not put on enquiry. The height of the buildings was such that the overlapping of the wall would not attract notice, but would only be observed by a person whose attention was called to it.

There is no evidence in the case that the chimneys of the *Victoria* block or the want of chimneys in the defendant's building was visible. Such may have been only visible from the roofs of the buildings, and in respect of this matter, at least the plaintiff had a right to damages and an injunction. On this point I will cite *Allen v. Seckham* (6). It is only in equity that notice is a defence; and a purchaser without notice is protected in equity. *Sugd. on Vend. & Pur.* (7); *Doe dem. Robinson v. Allsop* (8); *Doe dem. Nunn v. Lufkin* (9).

The facts being found for the plaintiff, the plaintiff was and is entitled to judgment.

The other two points on which I rely, as stated in my factum, are 1st—that the plaintiff had no actual notice of the agreement or of the burden on the property. The registry of the agreement, out of its regular course, and at a period when the title to the property would not be searched for conveyances to or from *Caldwell*, was not actual or constructive notice. It was,

(1) Pp. 60-62, 92.

(2) 14 Pick. 226.

(3) 2 Pick. 184.

(4) 16 Mass. 406.

(5) Pp. 428, 435,

(6) 11 Ch. D. 790.

(7) 707, 723, 8th Ed.

(8) 5 B. & Ald. 142,

(9) 4 East 221.

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in fact, a nullity. *Hine v. Dodd* (1); *Underwood v. Lord Courtown* (2).

2nd. If the agreement is to be considered a license, it is revocable, and was sufficiently revoked. *Gale en Easements*, 20.

Mr. *Rigby*, Q. C., for respondent: My first point is that under the pleadings, the plaintiff cannot take advantage of the Registry Act, as it was not set up in any of the replications. But if this Court holds that the pleadings are sufficient, then I contend that this document does not come within the 19 sect. of Ch. 79, Rev. Stat., N.S., 4 series. No instruments are required to be registered except deeds, mortgages, judgments, attachments, leases and grants. Under 19th section deeds not registered shall be void against a subsequent purchaser, who shall first register his deed. In this case defendant had first registered the agreement; and it was, and for some time had been, on registry, previous to the purchase by plaintiff of his property.

My next point is: plaintiff had notice, both express and constructive, of defendant's easement in his said wall. Express, by the said agreement between plaintiff and defendant registered for nearly two years before his purchase of his said property and also by its being patent to every one who looked at the two properties; constructive, by the fact that the only wall between the two buildings was one of a brick and a-half thick, by which as seen it appeared as a wall common to both parties, and as was also apparent by defendant's shop window. *Wolseley v. Dematros* (3); *Winter v. Brockwell* (4); *McMechan v. Griffin* (5); *Davis v. Sear*

(1) 2 Atk. 276.

(3) 1 Bur. 474.

(2) 2 Sho. & Lefroy 64.

(4) 8 East 308.

(5) 3 Pick. 149.

(1); *Morland v. Cook* (2); *Allen v. Seckham* (3); *Dart V. & P.* (4).

There could be no revocation of a license to do an act executed. *Winter v. Brockwell* (5); *Wallace v. Harrison* (6); *Duke of Devonshire v. Elgin* (7).

This was a license under a sealed instrument. *Croker v. Cooper* (8).

This was a license to an easement on the lands of another: *Washburn on Easements* (9); *Moody v. Steggles* (10).

Easements are not incumbrances. *Dart V. & P.* (11).

Mr. *Thompson*, Q. C., in reply.

RITCHIE, C. J. :—

This was an action wherein the plaintiff claimed that he was lawfully possessed of a certain messuage and building situate on *Hollis* street, in the city of *Halifax*; that defendant wrongfully and injuriously erected and kept erected a building on *Hollis* street contiguous and adjoining to the messuage and building of plaintiff, and used and continues to use the wall of plaintiff's building for defendant's building, and pierced holes, &c., &c., and wrongfully and injuriously built a wall and projection in connection therewith over and upon the building and wall of plaintiff, and the same kept and continued for a long period of time, by reason whereof plaintiff's building was injured, &c.

And he claims two thousand dollars damages.

And the plaintiff also claims a writ of injunction to restrain the defendant from the continuance and repetition of the injuries above complained of in each and

(1) L. R. 7 Eq. 427.

(2) L. R. 6 Eq. 25.

(3) L. R. 11 Ch. 790.

(4) P. 865.

(5) 8 East 308.

(6) 4 M. & W. 538.

(7) 14 Beavan 530.

(8) P. 563.

(9) 1 C. M. & R. 418; 3 B. & C. 238.

(10) L. T. 41 N. S. 6 Sep. 79.

(11) P. 1157.

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every of the said counts respectively, and from the committal of other injuries of a like kind relating to the same rights.

The defendant pleaded several pleas, but the seventh and eighth are the only ones which raise the questions in controversy in this case.

The seventh plea sets out that one *Caldwell*, being owner of the land now owned by plaintiff, by deed granted to defendant, and to his heirs and assigns, the right to make use of the south end wall of the building on said *Caldwell's* land, and granted the defendant the right to raise a new wall on the top of the south end, &c., by virtue of which deed defendant, before plaintiff became owner of said building and while *Caldwell* continued owner, made use of wall and raised said wall; and the said plaintiff became the owner of said building, land, close and messuage, with notice of the said rights and easements of the defendant and subject thereto, and the defendant has ever continued since to enjoy and possess said rights and easements, and to use said *Victoria* block, and said south wall, chimney, roof and cornice in accordance with the terms of said deed and grant, and the alleged trespasses were or are an enjoyment by the defendant of the said rights and easements.

“ 8. And for an eighth plea to said declaration, first suggesting as aforesaid, and for a defence upon equitable grounds, the defendant says that long before the plaintiff became possessed of or entitled to the reversion in the said lands and premises, in the said declaration set forth, one *Samuel Caldwell* was the owner thereof, and of the said building known as the *Victoria* block, then and ever since standing thereon, and the south wall of said building was the northern boundary of a lot of land belonging to the defendant, and of which he then was, and ever since has been, the owner in fee.

That the defendant, being desirous of pulling down the building then upon his said lot, and erecting thereon a new and more valuable building, and also being desirous of using the south end wall of said *Victoria* block as the north end wall of his said new building, as far as the same could be made available for such purposes, entered into an agreement under seal with the said *Samuel Caldwell*, on or about the twenty-second day of August, in the year of our Lord one thousand eight hundred and fifty-nine, which agreement is in the words following; that is to say:—

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“Memorandum of agreement, made the 22nd day of August, in the year of our Lord, one thousand eight hundred and fifty-nine, between *Samuel Caldwell*, of *Halifax*, Esquire, of the one part, and *James Hunter*, of the same place, gasfitter, of the other part. Whereas, the said *James Hunter*, lately purchased the lot of land, dwelling house and premises, situate in *Hollis* street, in the city of *Halifax*, joining the south end of the brick building called *Victoria* block, lately in the occupation and possession of *Henry Pryor*, Esquire, as an office, and by his tenants as a dwelling house, and the said *James Hunter*, being about to pull down the said dwelling house, and to erect on the site thereof a brick building, with an iron front, and four stories high, suitable for his trade and business. And whereas, the said *Samuel Caldwell*, as the owner of the said *Victoria* block, hath consented and agreed with the said *James Hunter*, for the consideration hereinafter mentioned, to permit and allow the said *James Hunter*, his contractors, builders, and workmen, to make use of the south end or wall of the said *Victoria* building, in the erection of the said new store, so as to save to the said *James Hunter* the expense of a new wall or end to his new building about to be erected. Now, this agreement witnesseth that the said *Samuel Caldwell*, for

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himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said *James Hunter*, his executors, administrators, and assigns, in manner following; that is to say, that he, the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency, to him in hand paid by the said *James Hunter*, hereby agrees to permit and allow the said *James Hunter*, his contractors, builders, and workmen, to make use of the south end or wall of the brick building or *Victoria* block in every way that may be requisite and necessary, so as to save the said *James Hunter* the expense of a new north wall to his own building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the said south end or wall of the *Victoria* block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building. And as it is intended that the new building shall be higher than the *Victoria* Block, it is further agreed by and between the said parties that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said *Victoria* Block, and continue the same upwards, to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove pipes, and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary, and to make good the new wall on the top of the present finish or cornice of the *Victoria* block, and round the chimney, to prevent leakage, and further, that in the erection of the said new building, as little damage as possible shall be done to the south wall of the *Victoria* building, and that all holes

or any other damage shall be filled up and made good by the said *James Hunter*. In witness whereof, the said parties have hereunto their hands and seals subscribed and set the day and year first above written."

"JAMES HUNTER, [L.S.]

"SAMUEL CALDWELL, [L.S.]

"Signed, sealed and delivered }  
in the presence of }  
WM. ROBINSON."

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"And thereupon the said *James Hunter*, having paid the sum mentioned in said agreement as the consideration for the rights and easements thereby granted, pulled down the building then standing upon his said lot, and at a very large expense erected a new and valuable building thereon, adjoining said *Victoria* block, and made use of the said south end wall of *Victoria* block, in every way that was requisite and necessary so as to save the defendant the expense of a new north wall to his said building, and did pierce the end of the said wall to allow the ends of the timbers and joists of said new building to be inserted therein, and the same were inserted therein, and defendant used said south wall of *Victoria* block in all respects to the depth and height of his said new building, as if the defendant had built a new north wall for his building, and did raise a new wall on the top of the south cornice of the said *Victoria* block, and continued the same upwards to the full height and depth of defendant's said new building, and did cut holes in the chimney of said *Victoria* block for the stove pipes of and from said building of defendant, and did insert defendant's stove pipes therein, and has ever since used and enjoyed said south wall of said *Victoria* block, and said chimney and said cornice, for the purpose and in the manner aforesaid, and his enjoyment and use thereof has been visible, public and notorious, and he was in the enjoyment thereof when

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the plaintiff became the owner of, or entitled to, the reversion in said land and premises and said *Victoria* block, and the same was known to the plaintiff, and he had notice of the foregoing facts and circumstances when he became the owner thereof, or entitled to said reversion, and he took the same subject to said easements, and said right enjoyed by defendant as aforesaid, and said alleged trespasses were the said use and enjoyment thereof by defendant."

As to the 7th plea, plaintiff replied, no such deed or grant; and that "when he became owner of said building, close and messuage, he had no notice of such rights, easements and privileges, and did not become such owner subject thereto as alleged; as to the 8th plea, plaintiff, by his 9th replication, denies each and every allegation and statement contained in said plea.

"And for an eleventh replication the plaintiff, as to said eighth plea, and for a defence upon equitable grounds, says that the plaintiff, when he became the owner of said land and premises, and said *Victoria* block, or entitled to said reversion as set out in the declaration, had no notice or knowledge of the alleged agreement or the said alleged facts and circumstances set out in said plea, and did not take the said land and premises and said *Victoria* block, or said reversion, or any of them, subject to said alleged easements and rights as alleged in said plea, and purchased and acquired and became owner of the said land free from any of the alleged easements and rights."

It may be as well to mention here, that on the argument before this court, a question was raised by defendant's counsel as to plaintiff's right to refer to or rely on the registry acts of *Nova Scotia*; when both parties desiring to get an adjudication on the respective rights of the parties apart from technical objections, the objection, that the registry acts had not been pleaded,

was withdrawn by Mr. *Rigby*, and it was mutually agreed between the counsel that if it was necessary that plaintiff should have by his pleading relied on the registry acts, they were to be considered as having been duly pleaded, and on this understanding and agreement the argument proceeded. In this connection it may be well to notice the statutory enactments in *Nova Scotia*, which provide by R. S. N. S., cap. 94, sec. 26:—  
 “That the form of the action need not be mentioned in the writ or other proceedings.”

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“By sec. 112—That after writ issued, the parties may, by leave of the Court or a judge, state any question for trial, which they may think fit, without any pleadings, &c.”

“Sec. 114—Questions of law, after writ issued, may be stated for the opinion of the court without pleading.”

“Sec. 116—Every declaration, whether in the body of the writ or annexed, and subsequent pleadings which shall clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply, as the case may be, shall be sufficient; and it shall not be necessary that such matters should be stated in any technical or formal language or manner, or that any technical or formal statements should be used.”

“Sec. 121, on demurrer—The court shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form; and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.”

Secs. 162 and 163—Equitable pleas and replication to plea on equitable grounds allowed.

Sec. 182—Different causes of action of whatever kind, except local causes arising in different counties, may be joined in the same suit.

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Sec. 191—All defects and errors may be amended and all such amendments may be made as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties.

Sec. 53—In all cases of breach of contract or other injury where the party injured is entitled to maintain, and has brought an action, he may claim a writ of injunction, and may also in the same action include a claim for damages with redress.

No question arises as to the title of either plaintiff or defendant in their respective lots. The deed from *Caldwell* to *Hunter*, conveying right to use wall, is dated 22nd August, 1859; that by which *Caldwell* conveyed property to *Nash*, 15th July, 1862, registered 17th July, 1862. *Nash* to *Forman*, 15th July, 1863, registered 1st August, 1863. *Forman* to Bank, 26th July, 1870, registered 27th July, 1870. *Caldwell* to *Hunter*, registered 20th May, 1871. Bank to plaintiff 1st November, 1872.

The leading facts are as follows :—The plaintiff owns the store to the north, measuring 16 feet ten inches on the street under a deed of 1st of November, 1872, from the Bank of *Nova Scotia*, who derived title through intermediate conveyances from *Samuel Caldwell*, whose deed to *John D. Nash* bears date 15th July, 1862, and makes no mention of any incumbrance on the property, nor was such incumbrance known to the Bank nor, as far as appears, to *Forman*, who conveyed to them. *Hunter* became the owner of the site on which his store is erected, measuring 24 feet 4 inches, by deed from *Merkel*, dated 22nd June, 1859, when *Caldwell* was the registered owner of the northern store, and on the 22nd of August, 1859, an agreement under seal was made between the two, whereby *Caldwell*, for the consideration of the sum of £75, granted to *Hunter*, in order to save him the expense of a new north wall to his own

building, the privilege of piercing the end of his, that is, *Caldwell's* wall, allowing the ends of the timbers and joists of the new building to be inserted therein, and using the south wall or end of *Caldwell's* lot in all respects to the depth or height of the new building, as if *Hunter* had built a new north wall to his own building; and *Caldwell* further agreed that *Hunter* might raise a new wall on the top of *Caldwell's* south wall, and might cut holes in the chimney then erected for stovepipes, and use the same at all times thereafter. This agreement, under which the encroachments now complained of were made, was not recorded, either from neglect, or from a notion that it did not come within the Registry Acts, until the 30th May, 1871, which was before the conveyance to the plaintiff; and two questions under these acts have arisen. The plaintiff, before completing his purchase, had the title searched by a solicitor of great experience, who traced it back to the year 1797, and in so tracing it looked for no conveyance or incumbrance from *Caldwell* after the title passed out of him, which was on the 15th July, 1862, by deed recorded two days after, in Book 137, the agreement being entered in Book 171.

As to this Registry the Chief Justice says:—"It was unknown to the plaintiff or to the solicitor he employed."

In the court below the case was decided solely on the ground that there was, when plaintiff purchased, a visible state of things existing "which could not legally exist without being subject to a burthen of the extent and nature of which the law implies plaintiff to have had notice,"; and therefore plaintiff could not disturb defendant in his enjoyment of the easements he had acquired—in other words, that the plaintiff had constructive notice of the defendant's incumbrances or charges, and therefore bought the property subject to

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them. If the case turned on this question, I think the judgment should have been for the plaintiff. The erection or incumbrance was not such an one as could be seen by all passers-by. It could be seen but from one side of the street, and whether readily seen from that would depend much on the relative height of the building and the width of the street, of which no evidence is given; and not one person was called to prove that in passing the street he had noticed the incumbrance. Mr. *Thompson*, plaintiff's solicitor, though a Q.C. practising law in *Halifax*, and who constantly, if not daily, passed through *Hollis* street, one of the leading streets of *Halifax*, clearly had never observed it, nor had the plaintiff, though he bought the property in November, 1872, until he had a conversation with defendant in 1876, when he asked for an extension of a privilege he said he already enjoyed by a paper he had from *Caldwell*. He speaks thus:—"I said this is quite new to me. It was the first time I had heard of the privilege he claimed—of the privilege to insert his joists in my wall. I had never heard of the paper before nor of the privilege;" and plaintiff swears he never knew it was there.

*Austin*, the surveyor, who prepared a plan of the building; says, on cross-examination: "Looking from the west side of *Hollis* street I saw the projection marked on this plan (N). Any one could see it;" but he does not say he saw it till he was called on to make the plan, and his attention called to it. And I think the fair inference from his evidence is, that he saw it after his attention was then called to it for the first time, and when he necessarily critically examined the building. *McKenzie* the builder, who worked at the erection of defendant's building in 1860, on examination, says: "Any one could see the projection from the street." No doubt any one could see it from the

west side of the street, and as the witness assisted in the erection of the encumbrance, he of course well knew it was there. But *Hendry* the surveyor, called by the defendant, and who prepared plan (N), says: "A wall  $1\frac{1}{2}$  brick wide projects over plaintiff's. It is plainly visible to any person looking at it, so also the fact of defendant's having no north wall by examining the windows." But this witness shews the force of the observation I have made in respect to the evidence of *Austin* and *McKenzie*. Cross-examined, he says: "I did not notice this until Mr. *Lynch* (defendant's attorney) spoke to me. Any person would observe all this if his attention were called to it." And on this evidence, and this only, defendant rests his case as establishing constructive notice against the plaintiff. Of the innumerable number of persons in *Halifax* who must have daily passed this building from the 22nd August, 1859, the date of the license, until the 1st November, 1872, when plaintiff bought from bank, not one individual was called who had noticed the incumbrance by defendant's erection on plaintiff's property. Was it then a structure so visible—so apparent to the eyes that it could not have escaped the notice of any reasonable man.

Under the evidence it appears to me the erection was such that might most easily and innocently have escaped the observations of an intending purchaser, who would, most naturally, finding the property clear on the records, and not having his attention called to it, assume it to be unencumbered. I cannot think that a purchaser was bound to go to the opposite side of the street and look up to see if he could discover any encroachments, or that it would enter the mind of any ordinary purchaser to do so. Of the case of *Hervey v. Smith* (1), referred to and relied on by the learned

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Chief Justice in the Court below, a much stronger case than this, Mr. *Sugden*, in his work on Vendors and Purchasers, thus speaks:—"This seems to carry constructive notice beyond its proper limits, and this rule requires a purchaser of a house to look upwards as well as 'about him' before he completes his purchase," and it may be added that Mr. *Dart* in his work in a note puts "*sed q.*" to this case. Had plaintiff's attention been called to it, or had the obstruction been of that character or in that position that it was necessarily visible and could not reasonably have escaped observation, then a visible state of things would exist apart from registry acts which, as Lord Justice *Brett* (2) says, could not legally exist without the property being subject to some burthen, and plaintiff would be taken to have notice of the extent and nature of that burthen. But, as the same learned judge says:—"The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything 'constructive' ought to be narrowly watched, because it depends on a fiction." I think in this case the incumbrance was not so prominent and conspicuous and necessarily visible, as to make the purchaser guilty of negligent ignorance, and as it is clear the plaintiff had no actual notice, and that his attention never was called to this incumbrance, and the evidence, to my mind, shows it was not an obstruction which would be noticed unless attention was called to it, therefore to detect it extraordinary circumspection would be required (2). To extend the law of constructive notice to a case such as this would, I think, be dangerous and unwarranted. And Mr. *Sugden* on Vendors and purchasers goes even further than this, and says:

(1) *Allen v. Seckham* 11 Ch. D. 795.

(2) See observations of Alder-

son, B., in *Whitbread v. Jordan*, 1 Y. & C. 203, and 1 Story Eq. 400. Ed. 1867, 622.

“The question upon constructive notice, is, not whether the purchaser had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.”

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But if there had been constructive notice—notice of that character would not be sufficient as against a registered deed. By the *Nova Scotia* Revised Statutes, Pt. II., Title XVIII., cap. 79, sec. 9:—“All deeds, judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie.”

Sec. 19.—“Deeds or mortgages of lands duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration, who shall first register his deed or mortgage of such lands.”

Now, as to the deed from *Caldwell* to *Hunter*, under which he claims, I quite agree with the learned Chief Justice of *Nova Scotia* that it was a deed such as the statute contemplated should be registered. He says:

Now, first of all, was it necessary to record this agreement? It is a deed by which *Caldwell* for a consideration in money imposed a serious burden upon his title, and to that extent unquestionably it affected his estate in the lot he owned and comes within the 9th section of our Registry Act, Rev. Stat. Chap. 79, directing that all deeds, judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie, and by the 19th section deeds of lands duly executed but not registered, shall be void against any subsequent purchaser for valuable considerations who shall first register his deed of such lands.

The cases clearly establish that to defeat a registered deed there must be actual notice or fraud.

The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice therefore to the principal or his agent, and of fraud, it has been held that a later registered deed will have priority over a prior unregis-

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tered charge notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendors, but were in the hands of certain other persons, but abstained from inquiry.

In *Wyatt v. Barwell* (1) the Master of the Rolls (Sir *Wm. Grant*) says :—

A registered deed stands upon a different footing from an ordinary conveyance. It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, "We cannot permit fraud to prevail;" and it shall only be in cases, where the notice is so clearly proved, as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.

and after stating that—

Even under this limitation, the security, derived from the register, is considerably lessened ; * * * * *

concludes :—

However, it is sufficient for the present purpose to say that it is only by actual notice clearly proved that a registered conveyance can be postponed. Even a *Lis pendens* is not deemed notice for that purpose.

Upon the head of notice Mr. *Sugden* on Vendors and Purchasers says :

It has been decided : That the registry is not notice, and therefore a purchaser without notice obtaining the legal estate will not be prejudiced by a prior equitable incumbrance registered previously to his purchase.

That a purchaser with notice of a prior unregistered instrument is bound by it. But of course notice of a prior unregistered instrument is unimportant at law.

A purchaser, therefore, may in equity be bound by a judgment or a deed, although not registered; but it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situation of the person having the prior deed; and, knowing that, registered, in order to defraud them of that title he knew at the time was in them (2).

(1) 19 Ves. 439.

(2) P. 728.

Apparent fraud, or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an Act of Parliament.

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And again, *Sugden* (1),

Nor is registration of deeds of itself notice to a purchaser who was seized of a legal estate at the time of the purchase. If a man search the register he will be deemed to have notice; but if a search is made for a particular period the purchaser will not by the search be deemed to have notice of any instrument not registered within that period.

In *Chadwick v. Turner* (2) it was held under the East Riding Registration Act, 6 *Anne*, c. 35, that a title which has been registered can only be affected by a clear and distinct notice amounting to fraud.

Sir *J. J. Turner* says :

That the facts which are proved on the part of the defendants raise a strong suspicion of notice cannot be denied, but I think that they fall short of what is required to affect a registered title, for which purpose the notice must be clear and distinct, amounting, in fact, to fraud.

and cites *Wyatt v. Barwell* (3). So in *Rice v. O'Connor* (4).

In this case, where a purchaser under a registered deed had not express notice of an alleged parol contract under which the tenant was in possession, the Master of the Rolls treated it as clear that the purchaser was not liable to it, unless his conveyance bound him, for there was not that "clear and undoubted notice which is necessary to affect a party claiming under a registered deed."

In the *Agra Bank v. Barry* (5) Lord *Selborne* held it was inconsistent with the policy of the Irish registration law to impose on a mortgagee or purchaser the duty of inquiring with a view to the discovery of previous unregistered interests; but quite consistent with it, if he

(1) P. 76.

(3) 19 Ves. 435.

(2) L. R. 1 Ch. App. 310.

(4) 11 Ir. Ch. Rep. 510.

(5) L. R. 7 H. L. 147.

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knows of the existence of those instruments, to estop him from contending that as to him they are void merely because they are unregistered.

In *Lee v. Clutton, Jessel, M. R. (1)*:

I am clearly of opinion that in this suit, as it is framed, I cannot treat the defendant *Clutton* as having had actual notice of the plaintiff's security. But, then, as I understand the law on the subject of postponing a person who has registered under the Registry Acts with notice of a prior unregistered incumbrance, the notice which is to postpone him must be actual notice, in the sense of positive notice given to the person or his agent; or it may possibly be sufficient, instead of alleging actual notice, to charge the person whom you seek to postpone with something actually amounting to fraud. I say that it may possibly be sufficient, because, although the earlier cases apparently indicate that actual notice must be proved, I am aware that there are some observations in the judgment of Lord *Cairns*, in the recent case of the *Agra Bank (limited) v. Barry (2)* to which I shall presently allude, which point to something else as being sufficient.

In regard to the earlier cases, in *Hine v. Dodd (3)*; Lord *Hardwicke*, speaking of the object of the Registration Act (7 Anne, c. 20) as being to prevent parol proof of notice, goes on:—"But notwithstanding, there are cases where this court has broken in upon this, though one incumbrance was registered before another, but it was in cases of fraud. There may possibly have been cases upon notice divested of fraud, but there the proof must be extremely clear. But though, in the present case, there are strong circumstances of notice before the execution of the mortgage, yet upon mere suspicion only, I will not overturn a positive law." That is to say, he considered it necessary to prove either fraud or clear positive notice. Then Sir *William Grant* in *Wyatt v. Barwell (4)* says:—"It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance, but they have said, 'We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.'" It is hardly necessary to go through all the cases, but I must refer to *Chadwick v. Turner (5)*, where Lord Justice *Turner*

(1) 24 Weekly Reporter, p. 107. (3) 2 Atk. 275.

(2) L. R. 7 H. L. 135.

(4) 19 Ves. 439.

(5) L. R. 1 Ch. App. 319.

says :—"That the facts which are proved raise a strong suspicion of notice cannot be denied, but I think they fall short of what is required to affect a registered title, for which purpose the notice must be clear and distinct, and amounting in fact to fraud." Lord *Hatherley's* view in *Rolland v. Hart* (1) is the same:—"It is not perhaps very easy to see the exact shades of distinction between the cases, but this appears to be decided from the time of *Hine v. Dodd* downwards, that a mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second incumbrance to deprive him of priority thereby gained over the first incumbrance."

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In all these cases down to *Wyatt v. Barwell*, the expression is, that there must be actual notice amounting to fraud. It is very well put in *Mr. Dar's* book (2), that it must be actual notice, which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the Registration Act.

The only notice charged by this bill is, that the defendant *Clutton*, when he took his conveyance, knew that the deeds were in the hands of the plaintiff, and made no enquiry; the whole of the case attempted to be made is a neglect or omission to enquire, and it is now admitted at the bar that that cannot be put higher than being constructive notice of the plaintiff's charge. That being so, and constructive notice being insufficient according to the authorities I have referred to, I find further, that no case of fraud is made by the bill, as that *Clutton* actually knew at the time of his purchase of facts which would affect his title, and that he purposely and fraudulently abstained from inquiring into them. Whether or not an allegation of that kind would be sufficient I am not called upon to decide. On the authorities I am inclined to think that actual notice is necessary. The very object of the Registration Acts is to exclude prior charges of which you have no actual notice, and to absolve you from the necessity of inquiring. So far is the register relied upon in practice as entitling the person registering to priority that I have known solicitors in *Yorkshire* actually complete purchases in the registry office to prevent any questions from arising. The judgment of the House of Lords in the case of *The Agra Bank v. Barry*, to which I have referred, entirely supports the view which I have expressed as to the necessity for actual notice. (His lordship

(1) L. R. 6 Ch. 681.

(2) 4th Ed. p. 873.

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read passages on the subject from the speeches of Lords *Cairns*, *Hatherley* and *Selborne* in that case), There are, however, these words used by Lord *Cairns* (1), which give me difficulty :

“ Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy v. Green* (2) commented on in the case of *Jones v. Smith* (3) by Vice-Chancellor *Wigram*, conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that, by reason of a suspicion entertained by the person whose conduct you are examining that there was an unregistered deed before his, he will abstain from enquiring into the fact, because he is so satisfied that the fact exists that he feels persuaded that if he did inquire he must find it out. I do not wish to express any decided opinion at this moment upon a case of that kind. If such a case should arise, I do not desire to say whether, in my opinion, such a case could or could not be deemed sufficient to get rid of the provisions of the Irish Registry Act.”

In the same case on appeal, (4) :—

JAMES, L.J., says :—

It appears to me that the law applicable to this case is very clearly summed up by Lord *Selborne* in the *Agra Bank v. Barry*, and that having regard to the law as there laid down, it is impossible for us to come to any other decision than that arrived at by the Master of the Rolls. Lord *Selborne* there says :—“I entirely agree with the opinion which your lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is ‘the duty’ of a purchaser or a mortgagee, and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man, dealing *bonâ fide* in the proper and usual manner, for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation must always be a question to be decided with reference to the nature and circumstances of each particular case, and among these the existence of a public registry, in a county in which a

(1) L. R. 7 H. L. at p. 149.

(2) 3 My. & K. 699.

(3) 1 Hare 43.

(4) 24 Weekly Reporter, p. 942.

registry is established by statute, must necessarily be very material. It would, I think, be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent." The appeal must be dismissed with costs.

*Mellish, L.J., and Baggallay, J.A., concurred.*

It has been suggested, that supposing the deed did not give defendant a right to this incumbrance as against plaintiff, still plaintiff could not recover in this action. I cannot appreciate this objection. It does not appear to have been taken on the trial, or suggested by counsel, or noticed by the bench in the court below, nor is to be found in the factum of the defendant; nor, according to my notes, was it urged by defendant's counsel on the argument, nor, had it been presented, do I think it could have been of any avail. If this incumbrance had been legally erected as against *Caldwell*, when *Caldwell* ceased to own, and the title and possession of the property became absolutely vested in the bank without notice, defendant ceased to have the right to continue the incumbrance, and when the title and possession of the property passed to the plaintiff, plaintiff had a right to require its removal, and when he did so, on the 1st September, 1876, the continuance by defendant of the incumbrance or nuisance became a legal wrong for which plaintiff was entitled to seek redress, and the declaration and pleadings in this case, in my opinion, in the words of the statute of *Nova Scotia* "clearly and distinctly state all such matters of fact as are necessary to sustain the action," and as are necessary for the pur-

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pose of determining in this suit the real question in controversy between the parties.

It may be very hard on the defendant, who possibly may have acted, and most probably did act, on the supposition that he had the right to erect and continue for all time the incumbrances, but it would be equally hard on the plaintiff, who *bona fide* purchased his property free of all incumbrances, to have it burthened with incumbrances such as this. But of the two, on whom should the hardship rest? Certainly not on the plaintiff, who bought and paid for his property without any knowledge that anything had been done to encumber it; and equally certainly on the defendant who has brought this difficulty on himself by neglecting to register his deed. The conduct of the plaintiff in this matter is, in my opinion, without reproach; he is only seeking to obtain what he bought and paid for, and which the law gives him, and in reference to which his conduct has been most considerate and perfectly upright, and so far from desiring to use his rights against defendant harshly, he seems to me to have been disposed to act in the most considerate and liberal manner towards defendant when he "offered to allow the encroachments to remain if defendant admitted his right."

STRONG, J. :—

I am of opinion that the evidence supports the second, fourth and fifth counts of the plaintiff's declaration which are in trespass. It makes little difference, since the abolition of forms of action, whether the injuries complained of are to be classified as wrongs which were formerly remediable in actions of trespass, or in some other form of action; so long as the declaration shows a legal injury that is sufficient. The wrongs complained of in the counts I have mentioned

would, however, under the old system of actions, have been the subjects of an action of trespass inasmuch as they amounted to direct injuries to the plaintiff's land. Thus driving nails into another's wall, or even placing objects against it, have been held to be trespasses (1).

The acts of the defendant in inserting his beams in the wall of the house then belonging to *Caldwell*, and now the property of the plaintiff, and in cutting holes in the wall and chimney were therefore illegal acts, that is trespasses, except in so far as they were justified by the grant or license of *Caldwell*. Then the continuance of these illegal burdens on the plaintiff's property since the fee has been acquired by him are also in law fresh and distinct trespasses against the plaintiff, for which he is entitled to recover damages unless he is bound by the license or grant of *Caldwell*. This is shewn very clearly by the case of *Holmes v. Wilson* (2), where the trustees of a turnpike road having built buttresses to support it on the land of A, and A thereupon having sued them and their workmen in trespass for such erection, and having accepted money paid into court in full satisfaction of the trespass, it was held that after notice to the defendant to remove the buttresses and a refusal to do so, A might bring another action of trespass against them for keeping and continuing the buttresses on the land to which the former recovery was no bar. In this case the court considered that the continued use of the buttresses for the support of the road under the circumstances was a fresh trespass. And in *Hudson v. Nicholson* (3), there was a decision to the same effect, and the court likened the case to that of a defendant who persists in holding out a pole over his neighbor's land and who they say would be liable in trespass as long

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(1) *Gregory v. Piper*, 9 B & C. 1 Stark. 22; Cooley Torts 332. 591; *Reynolds v. Clarke*, 1 (2) 10 A. & E. 503. Strange 634; *Lawrence v. Obee*, (3) 5 M. & W. 437.

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as he continued to do so. In *Russell v. Brown* (1) it was held that a mere continuance of a building wrongfully erected on the land of another is a continuing trespass, for which the owner of the land may bring new actions after recovery and satisfaction for the original erection. And it is well settled that where an injury to property is actionable without proof of actual damage, new suits for the damage caused by its continuance may be brought from day to day (2). Therefore as the injuries complained of were not and could not be denied in point of fact, the plaintiff made out a sufficient *prima facie* case so soon as he had proved his title, which he did by putting in and proving the title deeds shewing a clear chain of title from *Caldwell* to himself, through *Nash*, *Forman* and the Bank of *Nova Scotia*; the three latter deeds in this chain of title being conveyances for valuable consideration.

The defendant is consequently compelled to resort to his defence under the pleas of justification. These are two, first, that of leave and license by the plaintiff, and secondly, the grant by deed of an easement by *Caldwell* authorizing the commission of the acts complained of as trespasses. There is no pretence for saying that there was any license by the plaintiff, and even if an irrevocable license given by *Caldwell* or *Nash*, to do the acts complained of, were admissible under the plea of leave and license, it is clear that there was no such license apart from the deed of grant which is the subject of the other pleas of justification. The defence must therefore depend altogether on this deed of grant. The operative part of this deed, which is dated the 22nd day August, 1859, and purports to have been made between

(1) 63 Maine 203.

(2) *Cooley on Torts*, 619; *Thompson v. Gibson*, 7 M. & W. 456; *Esty v. Baker*, 48 Maine 495; *Shadwell v. Hutchinson*, 2 B.

& Ad. 97; *Bowyer v. Cook*, 4 C. B. 236; *Elder v. Bemis*, 2 Met. 599; *Bullen & Leake's Prec.* 416.

Samuel Caldwell (who was then seized of the fee simple in the plaintiff's land) of the first part, and the defendant of the second part, is in form a covenant in the words following :

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Now, this agreement witnesseth that the said *Samuel Caldwell* for himself, his heirs, executors and administrators doth hereby covenant, promise and agree to and with the said *James Hunter*, his executors, administrators and assigns in manner following, that is to say : That he, the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency, to him in hand paid by the said *James Hunter*, hereby agrees to permit and allow the said *James Hunter*, his contractors, builders and workmen to make use of the south end or wall of the brick building or Victoria block, in every way that may be requisite and necessary, so as to save the said *James Hunter* the expense of a new north wall to his own building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the said south end or wall of the Victoria block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building ; and as it is intended that the new building shall be higher than the Victoria block, it is further agreed by and between the said parties that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said Victoria block, and continue the same upwards to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove-pipes, and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary, and to make good the new wall on the top of the present finish or cornice of the Victoria block and round the chimney to prevent leakage ; and, further, that in the erection of the said new building as little damage as possible shall be done to the south wall of the Victoria building, and that all holes or any other damage shall be filled up and made good by the said *James Hunter*.

It is apparent from the mere perusal of this instrument that all the rights conceded by it were properly the subject of easements in the strict definition of the word, being the privilege of imposing certain burdens on the land of the grantor for the benefit of the adjoining land of the grantee. That a mere covenant under seal will

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enure as a grant for the purpose of creating an easement, even though the technical word "grant" is not used as a word of conveyance is well established by authority(1). This covenant or agreement is therefore *prima facie* a complete defence to the action, and in the record as originally framed it was not in any way impeached.

It appears, however, from the note of the learned Chief Justice who tried the case, that at the trial the objection was made that the grant of an easement effected by this instrument was avoided under the Registry Act of *Nova Scotia*, by reason of its non-registration until after the conveyance from *Nash* to *Forman*, which was the first conveyance for valuable consideration of the plaintiff's property subsequent in date to the agreement set up by the defendant, and afterwards in the argument *in banc* the same question of the Registry Act, and the sufficiency of the evidence as shewing that its operation was obviated by notice was the only point argued, and that on which the court below proceeded, it being there held that the Registry Act applied, but that there was such notice of the defendants, rights as in equity to disentitle the plaintiff to insist upon it.

Upon the argument of this appeal, attention having been called by the court to the state of the record, as not containing any replication setting up the registry laws as an answer to the defendant's plea of justification under the agreement, it was agreed by counsel on both sides that the record should be considered as amended in that respect, and the case was argued as though such amendment had been made, and subsequently, at the suggestion of the court, the coun-

(1) *Rowbotham v. Wilson* 8 H. L. 348; *Northam v. Hurley* 1 E. & B. 655; *Holms v. Seller* 3 Lev. 305; *Low v. Innes* 10

Jur. N. S. 1037; *Shove v. Pincke* 5 T. R. 129; *Goddard Easements* 2 Ed., p. 99; *Gale on Easements*, Ed. 5, p. 85.

sel drew and filed with the Registrar two replications and three rejoinders, which it was agreed by them should be considered as being added to the record. The replications which are replied to the 7th and 8th pleas, being those by which the deed of the 22nd August, 1859, is pleaded, are as follows :—

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The plaintiff says that the alleged deed or grant from said *Caldwell* to the defendant was not recorded in the registry of deeds until the year 1871, and that said *Caldwell* had long previously to said recording, to wit, in the year 1862, conveyed the lands and buildings now of the plaintiff, and referred to in the plaintiff's declaration to one *Nash*, who had recorded his deed thereof, and the said *Nash* had sold and conveyed the said lands and buildings to one *Forman*, who was a *bonâ fide* purchaser thereof for value, without notice of said deed or grant, and who also had recorded his deed thereof; and the said *Forman* had sold and conveyed the said lands and buildings to the Bank of *Nova Scotia*, who was a *bonâ fide* purchaser thereof for value, without notice of said deed or grant, and who also had recorded the deed thereof to the said bank, and all the said conveyances and sales mentioned herein had been made, and all the deeds mentioned herein were recorded in the registry of deeds for the county of *Halifax* (in which county the said lands and buildings are situate), prior to the recording of the deed or grant set up in said seventh plea.

By the first of his added rejoinders the defendant takes issues upon the replications. By the second, he alleges, by way of a legal answer, that

Said grantees, before and at the time when they became entitled to said property, were put upon enquiry and had notice of said privileges, easements, and rights acquired by defendant in and under said agreement, deed or grant of said *Caldwell*, in and over and upon said land and property of the plaintiff.

And the third rejoinder is in the same words, but pleaded on equitable grounds.

The question of priority under the registry laws is therefore now formally presented in the record.

The dates of the execution and registration of the several deeds are as follows: The deed granting the

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easement by *Caldwell* to the defendant was executed on the 22nd August, 1859, and not registered until the 20th May, 1871. The deed from *Caldwell* to *Nash* was executed 15th July, 1862, and registered 17th July, 1862. The deed from *Nash* to *Forman* dated 15th July, 1863, and registered 1st August, 1863. The deed *Forman* to the Bank of *Nova Scotia* was dated 26th July, 1870, and registered 27th July, 1870, and the deed Bank of *Nova Scotia* to the plaintiff was dated 1st November, 1872, and registered on the 20th January, 1873.

The first point raised against the application of the Registry Act in the plaintiff's favour is that the deed of 22nd August, 1859, by which the easement in question was originally granted, was not an instrument requiring registration under the provisions of the *Nova Scotia* Registry Act. This question appears to have been raised in the court below, and though no explicit decision is pronounced upon it, it is to be inferred from the judgment that the court considered it an instrument requiring registration. The material clauses of the registry act, Rev. Stats., N. S., 4th series, ch. 79, are the 9th and 19th. By the 9th sec. it is enacted that

All deeds judgments and attachments affecting lands shall be registered in the office of the county or district in which the lands lie.

The 19th sec. is as follows :

Deeds or mortgages of lands duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such land.

It is contended, as I understand the argument, that the deed of 22nd August, 1859, is not a "deed of lands" within this 19th sec., and is consequently not avoided by the prior registration of a subsequent conveyance for valuable consideration. I have no difficulty in decid-

ing against this contention. In the first place, I am of opinion that the two sections—the 9th and 19th—are to be read and construed together, and that sec. 19 is to be taken as attaching the consequences of non-registration to all deeds which the 9th sec. says “shall be registered,” the consequence of which construction must be that the words “deeds of lands” in sec. 19 must be read as convertible with the terms “deeds affecting lands” in sec. 9; and if this is so there can be little doubt that a grant of an easement or servitude is a deed “affecting” the land to be burdened by it. Without the help of the context afforded by the 9th sec., I should, however, have held the words “deeds of lands” in the 19th sec. standing alone sufficient to include an instrument of this kind. The general policy of the registry laws, which has for its object the protection of purchasers against surprise from secret conveyances, and the interpretation placed upon the *Middlesex* and *Yorkshire* Acts in *England*, alike authorize such a construction.

In applying the provisions of both the English and Irish Acts it has been held that any writing, however informal, affecting lands is to be deemed a “conveyance” within the meaning of that expression as used in those acts. And a mere memorandum constituting an equitable charge on lands is held to be subject to avoidance for non registration upon the subsequent registry of another instrument (1). A late writer of high authority (2) thus states the law :

It seems to be now well settled that every instrument which transfers an interest in or creates a charge on lands is a conveyance within the meaning of the Registry Acts.

The whole scheme and policy of the law in requiring the

(1) *Moore v. Culverhouse*, 27 *Potter*, L. R. 10 Ch. App. 8. Beav. 639; *Neve v. Pennell*, 2 (2) *Dart V. & P.* (Ed. 5.) p. H. & M. 170; *Credland v.* 679.

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registration of titles would be frustrated if such were not the law. Therefore I am of opinion that the deed of 22nd August, 1859, was liable to be defeated in favour of a subsequent purchaser for value, holding under a registered chain of title from the same grantee, who first registered his conveyance. *Nash* seems not to have been a grantee for valuable consideration, in fact it appears that he was in truth the vendor of the easement to the defendant, for the deed was made at his request, and the consideration money was paid to him, as is stated by *Caldwell* in his evidence. *Forman* was however a purchaser for value, and as such entitled, upon registering his conveyance, to the protection of the Registry Act. The consequence is that from the date of the registration of the conveyance from *Nash* to *Forman* the deed of grant became, at least at law, void against *Forman* and all those claiming title through him as the plaintiff does.

It is however alleged in the equitable rejoinder which the defendant has filed that the plaintiff and those through whom he claims had notice of the defendant's title to this easement at the time they obtained their conveyances. This is only material as regards *Forman*, the first purchaser for value, for if the deed of 22nd August, 1859, became void as against *Forman* upon the registration of his conveyance, as it did if he had no actual notice of that instrument, it is equally void against all subsequent purchasers claiming under him, even though they may have had notice. Notice to the plaintiff himself is therefore wholly immaterial if *Forman* had no notice.

The court below determined that the state of the premises was itself sufficient notice; and proceeding upon this ground, and upon the supposed authority of cases which seem to me totally inapplicable to the question presented for decision, they held the plaintiff disentitled to the benefit of the registry laws.

It is well settled that nothing short of actual notice, such notice as makes it a fraud on the part of a purchaser to insist on the registry laws, is sufficient to disentitle a party to insist in equity on a legal priority acquired under the statute.

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In *Wyatt v. Barwell* (1), Sir *William Grant* puts this proposition very clearly. He says :

It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance ; but they have said : “ We cannot permit fraud to prevail, and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another that we will suffer the registered deed to be affected.”

Again, in *Agra Bank v. Barry* (2), Lord *Cairns* states the principle and the reasons for it as follows :

Any person reading over that Act of Parliament would, perhaps, in the first instance, conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take precedence of a deed which, although it might be executed before, was not registered till afterwards. But by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this Act of Parliament, still, if a person in Ireland registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed ; and I take the explanation of those decisions to be that which was given by Lord *King* in the case of *Blades v. Blades* (3), upwards of 150 years ago, the case which was mentioned just now at your lordship's bar. I take the explanation to be this : that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished, if the person coming to

(1) 19 Ves. 438.

(2) L. R. 7 E. & I. App. 147.

(3) 1 Eq. C. p. 358.

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register a deed has, *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own. In that case the notoriety which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register, as if he had found upon the register notice of the earlier deed. If that is so, your Lordships will observe that those cases depend and depend entirely upon the question of actual notice, either to the principal or to his agent, whose knowledge is the knowledge of the principal.

Lord *Selborne* in the same case also affirms the same doctrine. He says :

It would be quite inconsistent with the policy of the Registry Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed, I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any enquiries with a view to the discovery of unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

In *Lee v. Clutton*, the Court of Appeal decided the same point, following, of course, the previous decision of the House of Lords in the *Agra Bank v. Barry*, and affirming the judgment of *Jessel, M. R.* (1).

I have dwelt more on this point than I otherwise should, for the reason that in the interval between the judgment of *Sir William Grant* in *Wyatt v. Barwell*, and the decision of the House of Lords in the *Agra Bank v. Barry*, the authority of the previous case had been disregarded by Vice Chancellor *Stuart*, who, in the case of *Wormald v. Maitland* (2), had held constructive notice to be sufficient to postpone a registered deed, and his decision had been followed by the Vice Chancellor of *Ireland*, in *re Allen's Estates* (3). Both these cases were, however, overruled by the later cases in the House of Lords and Court of Appeal already referred to. So far

(1) 24 Weekly R. 106. & 942. (2) 35 L. J. Ch. 69.

(3) 1 Ir. R. Eq. 455.

indeed from the courts having evinced any inclination to carry the principle of notice of an unregistered deed any further, so as to make constructive notice sufficient to take away the priority given by the statute to the grantee in the registered deed, I find in a very late case before the Court of Appeal in England (1) the whole doctrine of Courts of Equity in this matter impugned and severely criticized by a judge of great experience, Lord Justice *Bramwell*, who, although he reluctantly yielded to the force of authority, thus concludes his judgment:

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I doubt very much whether the principle of Courts of Equity ought to be extended to cases where registration is provided for by statute. I do not know whether I have grasped the doctrines of equity correctly in this matter, but if I have they seem to me to be like a good many other doctrines of Courts of Equity, the result of a disregard of general principles and general rules in the endeavour to do justice more or less fanciful in certain particular cases.

Applying the law of Courts of Equity thus settled to the facts of the present case, it is obvious that the defendant does not support his equitable rejoinder unless he proves actual notice of the deed of 22nd August, 1859, to the plaintiff, or to his properly authorized agent. Then, it is not sufficient, to enable us to answer this enquiry favourably to the defendant, to find that from the state of the property purchased by the plaintiff there was ocular proof that the wall of the house had been built upon for the purpose of the defendant's house, and was used by the defendant as a party wall, and that holes had been cut in the chimney; if, indeed, the evidence is sufficient to warrant any such inference, a question, which I do not stop to consider, as it seems to me to be entirely immaterial. What we must find, in order to hold that the defendant is entitled to a verdict, is that he had knowledge of the deed conferring the title to the

(1) *Greaves v. Winfield*, 14 Ch. D. 577,

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easement, not merely that the defendant was in fact in the enjoyment of such an easement ; and of this I need scarcely say there is not a particle of proof. There is consequently nothing to affect the priority gained by the plaintiff, claiming through a registered chain of title under *Forman*, by reason of the registration of the conveyance to the latter anterior to the registration of the deed of grant.

The equitable rejoinder admits the allegation in the replication that *Forman* was a purchaser for value. There is, however, a rejoinder added to the record, in which all the allegations of the replication are traversed, and amongst those so put in issue is the averment that *Forman* was a *bonâ fide* purchaser for value. Strictly speaking, there ought to have been evidence of this fact *aliunde* the conveyance from *Nash* to *Forman*, which, though on its face it purports to be a conveyance for value, is, as regards the defendant, *res inter alios* ; having regard, however, to the admissions made at the bar by which *Forman* was treated as a purchaser for value, and to the desire expressed by counsel for both parties, that the appeal should be decided on its merits, and particularly with reference to the question of registration and notice, I do not feel disposed to raise any difficulty upon the want of evidence in this respect, but, I think, an affidavit should be filed in the court below, showing *Forman's* purchase to have been for value.

The result is, therefore, that we must treat the deed of 22nd August, 1859, as wholly void as against the plaintiff. The defendant, therefore, although not liable to either *Nash* or *Caldwell*, so long as the title to the plaintiff's property remained in them, cannot justify his present continued acts of interference with it as against the plaintiff.

The cases referred to in the judgment of the court

below have no application. They were not cases arising on the registry laws, but cases of what may be called equitable easements. It is well settled, that if on the sale of land the purchaser covenants not to use it in a specified manner, or the vendor covenants not to use adjoining land retained by him in a particular manner, this negative covenant, although amounting to a mere personal covenant at law, not in any way affecting the title, will in equity be held binding on all subsequent assigns of the covenantor, who may have notice of it. This, of course, does not apply in the case of a grant of an easement effectual at law, for in that case a purchaser takes the land subject to the burden, whether he has notice or not, just as he would be held to take it subject to a legal lien or mortgage, of which he had no notice. But as the covenants, in the class of cases I have mentioned, are binding, on the general principles of equity, only on subsequent purchasers from the covenantor *with notice*, courts of equity, when asked to enforce such covenants against assignees for valuable consideration, apply the ordinary equitable doctrine of constructive notice, which raises a very different question from that of actual notice, sufficient to save an unregistered deed from the operation of the statute; the enquiry, in these cases of covenants, being, not whether the purchaser had any actual knowledge of the deed, but whether he had notice of such facts as would, if he had pursued enquiries, which they ought to have induced him to make, have ultimately led him to the discovery of the deed. It is precisely notice of this kind—constructive or imputed notice—that the House of Lords have most emphatically said, in *Barry v. Agra Bank*, is not sufficient in cases under the registry laws.

For these reasons, I am of opinion that we ought to allow this appeal with costs, and that, upon the affidavit I have mentioned being filed in the court below,

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the rule *nisi* for a new trial should be discharged with costs.

FOURNIER, J.:

La question en cette cause est de savoir si la propriété de l'appelant doit être considérée comme encore grévée de la servitude imposée en faveur de *Hunter*, l'intimé, par *Caldwell*, un des quatre propriétaires qui ont possédé avant *Ross* l'immeuble dont il s'agit. Cette question me paraît devoir être uniquement réglée par la loi d'enregistrement de la *Nouvelle-Ecosse*. D'après la sec. 9 du ch. 79 statut refondu, "All deeds, judgments and attachments affecting lands shall be registered in the office of the County or District in which the lands lie." L'acte du 22 août 1859, intitulé *Memorandum of agreement*, par lequel *Caldwell* a cédé pour £75 à *Hunter* les droits de se servir du mur sud-est de sa maison, avec faculté de l'exhausser de manière à éviter à ce dernier les frais de construction d'un nouveau mur, est revêtu de toutes les formalités pour en faire un acte (*deed*) suivant la loi anglaise. Il est signé par les parties, scellé et délivré en présence de témoins. Il comporte à sa face, qu'il a été fait pour bonne et valable considération. Il est évident que la transaction dont il fait preuve était de nature à affecter l'immeuble de *Caldwell*. Cet acte renferme donc toutes les conditions des actes qui doivent être enregistrés d'après les dispositions de la sec. 9. La section 19 nous dit quelle sera la conséquence du défaut d'enregistrement d'un tel acte. "Deeds or mortgages of lands duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration, who shall first register his deed or mortgage of such lands." Les termes de cette section sont clairs et prononcent en faveur d'un acquéreur, pour valable considération, la déchéance absolue de tous les droits antérieurs, que pou-

vait avoir sur un immeuble ainsi acquis, celui qui n'avait pas fait enregistrer son titre lorsque l'immeuble a changé de mains. L'acte de *Caldwell* à *Hunter* n'a été enregistré que le 20 mai 1871. La propriété avait déjà passé des mains de *Caldwell* à *Nash*, et de *Nash* à *Forman*, et de ce dernier à la banque de la *Nouvelle-Ecosse* par acte du 26 juillet 1870, et enregistré le même jour à *Halifax*, dans le livre B, 167, p. 598. Par cet acte la banque était devenue l'acquéreur de la propriété en question pour la somme de \$27,000. Il n'y avait pas alors d'enregistrement de l'acte de *Caldwell* à *Hunter*; et la propriété se trouvait par conséquent exempte des servitudes imposées par *Caldwell* en faveur d'*Hunter*. L'enregistrement a été fait le 20 mai 1871, lorsque *Caldwell* avait depuis longtemps cessé d'être propriétaire, et lorsque la banque était propriétaire et en possession pour valable considération. Cet enregistrement ne pouvait, d'après la sec. 19 de l'acte d'enregistrement, conférer aucun droit à *Hunter* qui, faute d'enregistrement dans le temps voulu, avait perdu tous ses droits. L'enregistrement qu'il a fait alors n'a pu les faire revivre à l'encontre de l'Appelant. Mais on objecte encore à ce dernier que les marques de cette servitude étant visibles, il doit être considéré comme en ayant eu avis. D'abord ce fait est loin d'être clairement prouvé. Il faut faire une attention toute particulière et regarder bien haut, dans une rue très étroite, pour s'apercevoir qu'*Hunter* a construit sur le mur de la maison de *Ross*. Les autres usages qu'*Hunter* a fait du mur ne paraissent pas à l'extérieur. Je ne considère donc pas ces indices comme suffisants pour faire preuve que *Ross* doit être considéré comme acquéreur avec avis de l'existence des servitudes en question.

Pour empêcher l'effet de la loi d'enregistrement, il ne fallait pas moins qu'un avis spécial (*actual notice*) de l'existence des droits en question. C'est la doctrine

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développé dans la cause de *Lee vs. Clutton*, (1) soutenu par les nombreuses autorités qui y sont citées. Ce jugement consacre la véritable doctrine applicable à cette cause en exigeant en pareil cas avis spécial (*actual notice*).

The very object of the Registration Act is to exclude prior charges of which you have no actual notice, and to absolve you from the necessity of inquiry.....The judgment of the House of Lords in the case of the *Agra Bank vs. Barry*, to which I have referred, entirely supports the view I have expressed as to the necessity for actual notice.

Pour ces motifs je suis d'avis que l'appel devrait être accordé.

HENRY, J. :

I have arrived at the same conclusion. Registry acts, such as have been passed in *Nova Scotia*, are supposed to be known to every person, and there is a duty thrown upon everyone who acquires a title or interest in lands to register his title, and when he does not do so it must be taken that he fail to do so at his peril—that he does so knowing that he is failing in that portion of his duty to himself in securing a proper title to the property which he has purchased. I consider the Registry Act makes the law totally different to what it ever was before in regard to notice, and I agree with the doctrine that actual notice amounting to fraud is necessary to void the operation of the Registry Acts. If the Registry Act, or the provisions and objects of it, can be set aside to enable a party to get the benefit of a conveyance for an easement, he may obtain such a benefit as would destroy the value of the property to the party purchasing it to a large extent. That would, therefore, defeat the object that the legislature had in view. The legislature, in view of passing the Registry Acts, requires everybody to register any conveyance he

(1) Vol. 24 Weekly Reporter, p. 106.

receives with regard to land and makes it void as regards the next subsequent purchaser unless it is registered. That being the case, a party purchasing is presumed to know what the law is, and to act upon it so as to protect his own rights, and when a person searches the registry office and finds no conveyance, he has a right to assume that there is no conveyance which will interfere with the right of the party to convey him the title that he has purchased. I therefore, *in petto*, give my views as to what I think the registry laws are applicable to, at least in *Nova Scotia*, and I agree with my brethren that this appeal should be allowed.

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GWYNNE, J. :

The declaration in this action, which is one of tort alleged to have been committed on lands of the plaintiff in his own possession and in the possession of his tenants, the reversion being in him at the time of the committal of the alleged wrongs, contains five counts ; but as the whole substance of the tort complained of and relied upon is contained in the second count it will be sufficient to set out that count, wherein the plaintiff complains :

That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and still is lawfully possessed of a certain messuage and building situate on *Hollis* street, in the city of *Halifax*, that the defendant wrongfully and injuriously erected and kept erected a building situate on *Hollis* street aforesaid, contiguous and adjoining to the said messuage and building of the plaintiff, and used and continues to use the wall of the plaintiff's said building as and for a wall for the defendant's said building, and pierced holes in said wall, and inserted and kept inserted therein beams and timbers and other materials of defendant's said building, and pierced holes in the chimney of plaintiff's said building and inserted and kept inserted in said chimney divers stove pipes and fire places, and filled up the said chimney with soot from defendant's said building, and removed the cornice from plaintiff's said building, and also wrongfully and injuriously put, placed and built a certain wall and projection in connection therewith over

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and upon the said building and wall of the plaintiff, and the same so put, placed and built as aforesaid, kept and continued for a long space of time, and by reason of the premises the said roof and wall of the plaintiff's building were weakened and injured, and the plaintiff was and is prevented from building upwards and adding to his said wall and building, and by reason of the premises the plaintiff has been greatly annoyed and incommoded in the use, possession and enjoyment of his said messuage and building, and the same have become thereby and are greatly damaged, deteriorated and lessened in value.

To the whole declaration the defendant pleads several pleas. It is only, however, necessary to set out three, namely :—

Secondly. That the plaintiff was not possessed as alleged.

Seventhly. A special plea of a grant under seal of one *Samuel Caldwell*, while he was owner in fee of the said premises now of the plaintiff, and before the plaintiff had any estate therein, to the defendant to do the several acts complained of, and the doing of the several acts under and in virtue of such grant while the said *Samuel Caldwell* continued so seized, and that the alleged trespasses were and are the enjoyment by the defendants of the rights and easements so granted by the said *Samuel Caldwell*. And eighthly :

For an eighth plea to said declaration and for a defence upon equitable grounds, the defendant says that long before the plaintiff became possessed of or entitled to the said lands and premises in said declaration set forth one, *Samuel Caldwell* was the owner thereof and of the said building known as the *Victoria Block*, then and ever since standing thereon, and the south wall of said building was the northern boundary of a lot of land belonging to the defendant, and of which he then was and ever since has been the owner in fee ; that the defendant being desirous of pulling down the building then upon his said lot and erecting thereon a new and more valuable building, and also being desirous of using the south end wall of said *Victoria Block* as the north end wall of his said new building, as far as the same could be made available for such purposes, entered into an agreement under seal with the said *Samuel Caldwell* on or about the 22nd day of August, 1859, which agreement is in the words following, that is to say :

Memorandum of agreement made the 22nd day of August, in the year of our Lord one thousand eight hundred and fifty-nine, between *Samuel Caldwell*, of *Halifax*, Esquire, of the one part, and *James Hunter*, of the same place, gas-fitter, of the other part. Whereas the said *James Hunter* lately purchased the lot of land, dwelling house and premises situate on *Hollis* street, in the city of *Halifax*, adjoining the south end of the brick building called *Victoria* Block, lately in the occupation and possession of *Henry Pryer*, esquire, as an office, and by his tenants as a dwelling house, and the said *James Hunter* being about to pull down the said dwelling house and to erect on the site thereof a brick building with an iron front and four stories high, suitable for his trade and business, and whereas the said *Samuel Caldwell*, as the owner of the said *Victoria* Block, hath consented and agreed with the said *James Hunter*, for the consideration hereinafter mentioned, to permit and allow the said *James Hunter*, his contractors, builders and workmen to make use of the south end or wall of the said *Victoria* building in the erection of the said new store so as to save to the said *James Hunter* the expense of a new wall or end to his new building about to be erected. Now this agreement witnesseth that the said *Samuel Caldwell*, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said *James Hunter*, his executors, administrators and assigns in manner following, that is to say: That he the said *Samuel Caldwell*, for and in consideration of the sum of seventy-five pounds currency to him in hand paid by the said *James Hunter*, he the said *Samuel Caldwell* hereby agrees to permit and allow the said *James Hunter*, his contractors, builders and workmen, to make use of the south end or wall of the brick building or *Victoria* block in every way that may be requisite and necessary to save the said *James Hunter* the expense of a new north wall to his new building, and to pierce the end of the said wall to allow the ends of the timbers and joists of the new building to be inserted therein, and to use the south end wall of the *Victoria* block in all respects to the depth and height of the new building as if the said *James Hunter* had built a new north wall for his own building. And as it is intended that the new building shall be higher than the *Victoria* block, it is further agreed that the said *James Hunter* and his contractors and workmen may raise a new wall on the top of the south end or cornice of the said *Victoria* block and continue the same upwards to the full height and depth of the said new building, and also to cut a hole or holes in the chimney now erected for stove pipes and to have the right and privilege of using the same at all times hereafter for that purpose. The said *James Hunter* hereby agrees to raise the said chimney as high as may be necessary and to make good the new wall on the

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top of the present finish or cornice of the *Victoria* block and round the chimney to prevent leakage, and further that in the erection of the said new building as little damage as possible shall be done to the south wall of the *Victoria* building, and that all holes or any other damage shall be filled up and made good by the said *James Hunter*.

In witness whereof the said parties have hereunto their hands and seals subscribed and set the day and year first above written.

Signed, *JAMES HUNTER.* (L.S.)  
*SAMUEL CALDWELL.* (L.S.)

Signed, Sealed and Delivered  
 in the presence of

*WM. ROBINSON.*

And thereupon the said *James Hunter*, having paid the sum mentioned in the said agreement as the consideration for the rights and easements thereby granted, pulled down the building then standing upon his said lot, and at a very large expense erected a new and valuable building thereon adjoining said *Victoria* block, and made use of the said south end wall of *Victoria* block in every way that was requisite and necessary so as to save the defendant the expense of a new north wall to his said building, and did pierce the end of the said wall to allow the ends of the timbers and joists of said new building to be inserted therein, and the same were inserted therein, and the defendant used the said south wall of *Victoria* block in all respects to the depth and height of said new building as if the defendant had built a new north wall for his building, and did raise a new wall on the top of the south cornice of the said *Victoria* block and continued the same upwards to the full height and depth of defendant's said new building, and did cut holes in the chimney of said *Victoria* block for the stove pipes of and from said building of defendant, and did insert defendant's stove pipes therein and has ever since used and enjoyed said south wall of said *Victoria* block and said chimney and said cornice, for the purpose and in the manner aforesaid, and his enjoyment and use thereof has been visible, public and notorious, and he was in the enjoyment thereof when the plaintiff became the owner of or entitled to the reversion in the said land and premises and said *Victoria* block, and the same was known to the plaintiff, and he had notice of the foregoing facts and circumstances when he became the owner thereof; and he took the same subject to said easements and said right enjoyed by defendant as aforesaid; and said alleged trespasses were the said use and enjoyment thereof by defendant.

To these pleas the defendant replies:—

1st. By joining issue upon all of them—and further, 4th, as to the 7th plea, that the deed therein alleged was not the deed of the said *Samuel Caldwell*.

5th. As to the said 7th plea, that there was and is no such deed and grant as is set up in said plea, and the alleged rights, easements and privileges were not, nor was any of them granted to the said defendant as alleged, and the plaintiff, when he became owner of the said building, close and messuage, had no notice of such rights, easements and privileges, and did not become such owner subject thereto as alleged.

6th. As to said 7th plea, that the alleged deed was a license and not otherwise, and the same was revoked before the plaintiff became such owner of said building, land, messuage and close—before the alleged grievances and trespasses, as the defendant well knew.

8th. As to the said 8th plea—that the agreement set out in said plea is not the agreement of the said *Samuel Caldwell*, and he did not agree as alleged.

9th. As to 8th plea—that he denies each and every allegation and statement contained in said plea.

10th. And for tenth replication—as to the said 8th plea, and for a defence upon equitable grounds, the plaintiff says that the sum mentioned in the said agreement was not nor was any part thereof paid as alleged, and the said agreement and license thereby given were rescinded, cancelled and revoked before the grievance and trespasses set out in the plaintiff's declaration, as the defendant well knew.

11th. And for an eleventh replication the plaintiff as to the said 8th plea, and for a defence upon equitable grounds, says that the plaintiff when he became the owner of the said land and premises, and the said *Victoria* block, or entitled to said reversion as set out in said declaration, had no notice or knowledge of the alleged agreement, or said alleged facts and circum-

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stances set out in said plea, and did not take the said lands and premises and said *Victoria* block subject to said alleged easements and rights as alleged in said plea, and purchased and acquired, and became owner of the said land free from any of the said alleged easements and rights.

The plaintiff also replied, by way of new assignment, but it is unnecessary to refer to this, because it was not suggested at the trial that the plaintiff was proceeding for, or that the defendant had done anything not mentioned in the deeds pleaded in the 7th and 8th pleas.

The plaintiff thus joined issue on the pleas of not guilty and not possessed, and also upon all the material matters alleged in the 7th and 8th pleas.

The 4th replication, which is to the 7th plea, and which denies that the deed therein pleaded as the deed of *Samuel Cadwell* is his deed, is but a repetition of the denial of one of the material matters alleged in the 7th plea and necessary to be proved in order to sustain that plea, and was therefore a matter already put in issue by the joinder in issue.

The 5th replication as to that part of it which denies that there was, or is such a deed as that set out in the 7th plea, is but another mode of repeating the 4th replication, and as to the residue is either a denial of facts not material to the establishment of the substance of the plea, or which if material had already been put in issue by the joinder in issue, or it is matter relied upon as a conclusion of law, namely, that the plaintiff did not become owner of the premises in question, subject, as had been alleged in the plea to the terms of that deed, because he had not, as he alleges he had not, notice of the easements and rights mentioned in the plea having been granted as is therein alleged when he became owner of the premises consisting of the *Victoria* building.

The 8th replication is open to the same observations as to the 8th plea as is the 4th replication as to the 7th plea.

The ninth replication is a precise repetition in a different form, of the joinder in issue. The tenth replication is an attempt to set up as a matter of fact the non-payment of the sum of money which is in the deed set out in the eighth plea, admitted under the hand and seal of *Samuel Caldwell* to have been paid in hand; and to offer as a point of law that thereby, that is by such alleged non-payment, the deed set out in the plea became rescinded, cancelled and revoked before ever the defendant did the acts complained of.

The eleventh replication, while admitting the execution of the deed set out in the eighth plea, sets up the claim that in point of law or equity the plaintiff, when he acquired and became owner of the *Victoria* building, did so free from the easements and rights mentioned in the deed set out in the plea, for the reason that, as he alleges, he had no notice or knowledge of the agreement so set out in the eighth plea when he purchased.

The appeal case brought before us does not show what course the defendant adopted in relation to the above fifth, tenth and eleventh replications. The case was argued as if he had joined issue thereon, and in so far as the merits of the case can be affected we may assume this to have been done.

The case was brought down for trial before a judge without a jury, and, briefly, it may be said that the acts complained of appeared to have been all committed in the years 1859 and 1860, and in the manner and under the authority of the deed set out in the eighth plea. It was also proved that the £75 in the deed mentioned was paid to one *Nash*, at whose request *Caldwell*, as he himself testified, executed the deed of the 22nd August, 1859. That *Nash* was the person at that time bene-

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 appear from the fact that by deed dated the 15th July,  
 1862, *Caldwell*, for the expressed consideration of five  
 shillings, conveyed the premises under the description  
 of "The *Victoria Buildings*" to *Nash* in fee. It was  
 further proved that by deed dated the 15th July, 1863,  
 registered the 1st August, 1863, *Nash* conveyed the  
 premises by the same description to one *Forman* and  
 that *Forman*, by deed dated the 26th of July and  
 registered the 27th July, 1870, conveyed the same  
 premises with another lot of land to the president, di-  
 rectors and company of the Bank of *Nova Scotia* in trust  
 to sell the same, and to apply the proceeds in liquida-  
 tion of a debt due by *Forman* to the bank. It was  
 further proved that the deed of the 22nd August, 1859,  
 was registered on the 20th May, 1871, and that by deed  
 dated the 1st November, 1872, and registered the 20th  
 January, 1873, the Bank of *Nova Scotia* conveyed the  
 premises in question to the plaintiff in fee under a  
 special description concluding as follows: "The prop-  
 erty now in description being known as *Victoria*  
*Buildings*."

The learned Chief Justice of the Supreme Court of  
*Nova Scotia*, before whom the case was tried, rendered  
 a verdict for the plaintiff, subject to the opinion of the  
 court upon the facts and law, which verdict the court  
 in term, by a judgment delivered by the learned Chief  
 Justice himself, set aside and entered for the defendant,  
 and issued a rule for judgment for the defendant thereon.  
 It is from this judgment and rule that the plaintiff  
 has appealed.

Now, from the above statement of the pleadings, it is  
 obvious that, inasmuch as it appeared that all the acts  
 complained of were committed in 1859 and 1860, when  
*Caldwell* was seized in fee in possession of the premises  
 now owned by the plaintiff, and twelve years before

the plaintiff had any estate or interest therein, the continuing existence of a house so erected while *Caldwell* was seized in fee could not give to the plaintiff any cause of action of the nature of the present one which is in trespass. The issue joined upon the plea of not possessed raised directly the question whether the plaintiff was possessed of the Victoria building at the time the defendant did the acts complained of, and this issue, upon the evidence, could be found only in favor of the defendant, and is conclusive against the plaintiff's right to recover upon this record. It was suggested that under the doctrine of relation, the plaintiff, although he became entitled only in November, 1872, twelve years after the complete erection of the defendant's house, which the plaintiff desires now to have pulled down, can recover in this action as for a trespass committed before he became entitled, being continued after, but that doctrine of relation applies only where the original act was a trespass, the continuance of which is said to constitute a continuing trespass; it has never, that I am aware of, been applied so as to make an act, perfectly legal when completely executed, acquire by mere continuance the character of a trespass committed against a person, who, at the time of the completion of the act, had no estate or interest whatever in the land upon which the act was done, but who subsequently acquires the land while the thing so done remains upon it.

It was suggested that the defendant not having withdrawn his house from the support of the south wall of the *Victoria* building, upon plaintiff's notice to him to do so after the plaintiff's purchase, constituted an act of trespass sufficient to support this action, but the answer to that is obvious, namely, that nonfeasance never can in itself constitute an act of trespass (1). Then as to the 7th and 8th pleas—these

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(1) Bullen & Leake, 416.

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pleas respectively set up a good and sufficient grant at common law executed by the owner in fee of the *Victoria* building, under his hand and seal, granting to the defendant the easement, right and privilege to do the several acts now complained of; and the pleas allege the complete performance of those acts by the erection of the defendant's house under and in pursuance of the provisions of the deed granting the easement. These pleas, if true, show a complete defence in law to the plaintiff's action, and the facts pleaded in them have neither been disputed on the record nor disproved; in fact, on the contrary, they have been admitted upon the record and proved also to be true in fact in every particular. They have been admitted upon the record by the replications thereto, which allege by way of answer to the facts pleaded in the defendant's plea, that the plaintiff, when he purchased and became owner of the premises in question called the *Victoria* building, had no notice of the facts relied upon in the pleas. Now, as to the mere matter of fact involved in the issue joined upon this replication, it sufficiently appears that the plaintiff had full opportunity of observing the position and precise condition of that particular thing which he was purchasing under the designation of "the *Victoria* buildings," and I must say that in my judgment it would be competent and proper for a jury, or a judge acting as a jury, to apply to the determination of that issue the rule laid down in *Allen v. Seckham* (1), namely, that where one purchases property where a visible state of things exists, which could not legally exist without the property being subject to some burden, he should be taken to have notice of the extent and nature of that burden.

Common sense does not, in my judgment, permit a doubt to exist, that the erection of the south wall of the

1) 11 Chy. D. 796.

Victoria building (which building as it then stood appears to me to have been what the plaintiff was purchasing,) above the roof of that building to the height of another story in defendant's house by which the defendant's house exceeded the *Victoria* building in height, and which south wall so raised supported the roof of the defendants house, constituted such a visible state of things that no intending purchaser seeing the building at all, could fail to see; and such a state of things should have conveyed, and should have been held to have conveyed, to the mind of the intending purchaser, when purchasing, full and actual notice and knowledge, that the defendant was in the actual visible enjoyment of an easement in the south wall of the house the plaintiff was about purchasing for the support of the roof of the defendants house; and that he had such notice and knowledge is in substance and effect the finding of the judges of the court below acting as jurors upon this question; and they would, in my judgment, have been justified in finding, and should have found, as a mixed proposition of law and fact, that what the plaintiff contracted to purchase under the designation of the "*Victoria* buildings," and what was in fact conveyed to him by the terms of his deed, namely, "the property now in description being known as *Victoria* buildings" was that building, just as it then stood, with its south wall constituting the support of the adjoining house in the row just as if the description had been the building known as No. 2 in a named row of buildings erected upon the east side of *Hollis* street; but, wholly apart from these considerations, upon what principle could the plaintiff's ignorance of acts done by the defendant twelve years previously under a legal common law grant, executed by the owner in fee of the premises upon which the acts were done, have the effect of attaching to the continuance of the house so erected the

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character of a trespass on the plaintiff's possession upon his acquiring title by purchase of the premises upon which the acts so authorized were done? Such a replication plainly admits the grant as pleaded, and that the acts were done, and in pursuance thereof, and offers no answer in law to the defendant's pleas. If such ignorance as is pleaded would give to the plaintiff any *locus standi* in equity entitling him to consider the defendant's house, so erected 12 years previously to the plaintiff's purchase, a nuisance which, upon purchasing without notice of defendant's right to do the acts complained of at the time they were done, the plaintiff could cause to be abated or enjoined against, then the replication is bad as a departure from the legal cause of action stated in the declaration, and can entitle the plaintiff to no relief upon this record. Such an equity, if such exist, must be stated on the record with a full statement of the facts which give rise to the equity expanded upon a bill in equity (1).

In the argument before us the contention of the learned counsel for the plaintiff was that by reason of the *Nova Scotia* Registry Act, section 19 of chapter 79 of the revised statutes, fourth series, the deed of the 22nd August, 1859, although registered on the 20th May, 1871, eighteen months before the plaintiff acquired any interest in the premises in question, was void as against him, and that for this reason this action could be maintained. The learned counsel for the defendant objected that the record opened no such point, and upon the following day expressed his willingness to withdraw that objection, and that the case should be considered as if that point had been raised by the pleadings.

For my own part I must say that in my opinion no

(1) *Thames Iron Works Co. v. R. Mail S. Packet Co.*, 13 C. B. N. S. 358.

court should in any case accede to any such suggestion, although consented to by counsel, unless the amendment be, in fact, made at the time, so that the argument may be proceeded with in view of the new pleadings, and the court be placed in the position of calling for an argument in support of the sufficiency of the pleadings in point of law, if such should appear doubtful, and be also in the position of being able to see before the close of the argument whether any new issue in fact raised by the added pleadings requires further investigation before a jury; for in my opinion this court should not, if it has the power, allow any new pleading to be put upon the record which is not framed in such a manner as to accord with, and be supported by, the evidence already given, and to be a good and sufficient answer in law to the pleas pleaded by the defendant in bar of the plaintiff's action; for so long as the defendant's seventh and eighth pleas remain unanswered the defendant must recover upon this record, as indeed he must with the plea of not possessed proved and established beyond dispute in his favor.

Now this was not done in this case, but the argument was proceeded with and was closed upon the record as it came up to us from the court below; but ten days after the close of that argument the plaintiff appears to have filed with the registrar of this court a replication, as follows:—

“And for a further replication to the defendant's seventh plea the plaintiff says that the alleged deed or grant from said *Caldwell* to the defendant was not recorded in the registry of deeds until the year 1871, and that said *Caldwell* had long previously to said recording, to wit, in the year 1862, conveyed the lands and building now of the plaintiff and referred to in the plaintiff's declaration to one *Nash*, who had recorded his deed thereof, and the said *Nash* had sold and conveyed the

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said land and building to one *Forman*, who was a *bonâ fide* purchaser thereof, for value, without notice of the said deed or grant, and the said *Forman* had sold and conveyed the said land and building to the said Bank of *Nova Scotia*, who was a *bonâ fide* purchaser thereof, for value, without notice of said deed or grant, and who also had recorded the deed thereof to the said bank, and all the said conveyances and sales mentioned herein had been made, and all the deeds mentioned herein were recorded in the registry for the county of *Halifax*, in which county the said lands and building are situate, prior to the recording of the deed or grant set up in said seventh plea."

At the foot of this replication is added a note to the effect following :—

"The same matter is to be considered as replied to "the eighth plea in addition to the replications already "pleaded and as a part of such replications."

I stop not now to enquire whether the brevity which is so conspicuous in this mode of replying to the eighth plea has so much merit in it as to justify us in adopting this novel and unprecedented form upon a document which is intended to be preserved as a record of the issues joined between the parties upon which the court pronounces judgment in favor of one or other of the parties, and which, being so preserved, might be regarded as establishing a precedent for this concise method of pleading to be followed in other cases. There appear to me to be matters of still graver importance to be considered arising out of the replication which is set out at large to the seventh plea and the rejoinder thereto, and which should lead us to the conclusion not to allow these pleadings to be now added to the record.

And firstly, as to the substance of the replication, it is to be observed that it admits everything averred in the

seventh plea, namely, that all the acts complained of by the plaintiff in his declaration as wrongs and trespasses committed upon his property and his possession, were done and legally completed by the defendant before the plaintiff had any estate whatever in the premises, and were so legally done under in pursuance of the provisions of a good and sufficient grant executed under the hand and seal of the then owner in fee of the premises in question, and while he continued to be such owner, and that the alleged acts which the plaintiff complains of as trespasses consist merely in the continuance of the enjoyment by the defendant of the easement so granted. To avoid this confession the replication sets up the registry of a deed for value executed to one *Forman* by one *Nash*, who may be said to have claimed title to the premises in question by deed, not for value, from the defendant's grantor, and who was a party privy to the deed executed to the defendant, and who received the consideration therefor, and the registry also of a deed for value executed by *Forman* to the Bank of *Nova Scotia* before the registry by the defendant of the deed relied upon by him in his seventh plea, which deed, however, is admitted to have been registered long before the plaintiff purchased, and the replication adds that neither *Forman* nor the bank at the time of their respective purchases had any notice of the deed or grant relied on by the defendant. And if we are to consider the replication to be upon the record as pleaded to the eighth plea (notwithstanding the peculiarity in the form of pleading it), then it admits, in addition to the above, that the plaintiff when he purchased had notice of the grant to the defendant, and of his having done all the acts (complained of as trespasses) under and in pursuance of the terms of such grant. Now, it being admitted that the acts complained of, when done, were legally done in virtue of a good and sufficient deed authorizing them

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to be done, assuming for the present the contention of the plaintiff to be well founded, that the registry of the deeds to *Forman* and the bank of *Nova Scotia* before the registry of the deed of grant to the defendant deprived the latter of all right to continue any longer to avail himself of the easement granted to him by his prior legal grant completely executed though it was, still the plaintiff's right to recover in this action would not be advanced, nor would the defendant's right to have judgment in his favor upon the seventh and eighth pleas, as also upon his plea of not possessed, be at all prejudiced, for the reasons I have already before stated, namely, that the mere continuance of an act perfectly legal when completely executed cannot become an act of trespass committed against a person, a perfect stranger to the possession, and the title, at the time the acts were completely executed, upon his acquiring title to the premises with the thing so done remaining upon them; and that the nonfeasance of the defendant in not acceding to the plaintiff's demand to remove his the defendant's, house from continuing to rest upon the south wall of the *Victoria* building, after the plaintiff's purchase of that building, cannot constitute an act of trespass.

The plaintiff, in virtue of the prior registry of the deeds to *Forman* and the bank, in priority of title with whom the plaintiff claims, may perhaps, I do not say it does, but it may perhaps give to the plaintiff a right to file a bill in equity to attain the object sought to be attained by this action of trespass, but in face of the matters abundantly proved, and indeed admitted on the record, the plaintiff cannot sustain the present action. When such a bill shall be filed, it will, in my opinion, be time enough to consider what effect (if any) the registry laws of *Nova Scotia* have upon the facts appearing in the present case.

In the view which I take it is quite beside any question which is or can be raised in the present action to inquire whether a deed of the nature of that of the 22nd August, 1859, granting only an easement of the character therein described, and which does not profess to be, and never was intended to be, a deed of land, is of such a nature as to be avoided by non-registry within the provisions of sec. 19 of ch. 70 of the Revised Statutes of *Nova Scotia*, 4th series, which enacts that—

Deeds or mortgages of lands, duly executed but not registered, shall be void against any subsequent purchaser or mortgagee for valuable consideration who shall first register his deed or mortgage of such lands.

Besides joining issue on the plaintiff's replication above added, the defendant for a further rejoinder to said added replication says, that when said lot of land and premises of plaintiff were conveyed to the several grantees in said replication mentioned, the defendant had done and performed the several acts set out in the eighth plea under and by virtue of said deed, grant or agreement from said *Samuel Caldwell* in said plea referred to and set forth, and which are the alleged grievances, and the same were visible and apparent to the plaintiff and said grantees before and at the time when they became entitled to said property, and they were put upon inquiry and had notice of said privileges, easements and rights acquired by defendant in and under said agreement, deed or grant of said *Caldwell* in over and upon said land and property of the plaintiff.

Now, if this rejoinder had stopped with the averment that the acts complained of were all completely done and performed before any of the grantees mentioned in the replication had purchased, it would, in my opinion, have afforded a complete answer to the replication as relying upon the position asserted in the plea, that acts so perfected could not be treated by the

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plaintiff as trespasses committed to his possession after his purchase; but the defendant proceeds to aver, not only that the same were visible and apparent to the several grantees before they respectively purchased, but that they had notice of the privileges, easements and rights required by the defendant in and under said agreement, deed or grant of said *Caldwell* in, over and upon said land and property of the plaintiff.

The plaintiff does not appear to have joined issue upon this rejoinder, so that either the added pleadings have resulted in no issue, and for that reason should not be allowed to be put upon the record, or we must add the joinder for the plaintiff, and in the latter case we have an issue joined upon a material fact as to which no evidence whatever has yet been given. Now, what right has the court to pass judgment in respect of a matter of fact when no issue joined between the parties in respect of such matter has been found in favor of either party by the constituted tribunal for that purpose? What right has this court to constitute itself a jury for the purpose of finding the fact? or if it has such right, by what law is it enabled to determine the fact so in issue, without any evidence being offered or any opportunity being given to the parties to offer evidence upon the subject? For, whether *Forman* or the bank had or had not notice of the grant of the easement to the defendant, which is affirmed upon one side and denied upon the other, there is not a particle of evidence as yet given. I confess I am unable to see upon what principle we can countenance a proceeding so utterly novel and unprecedented.

For these reasons, I am of opinion, that we are not justified in permitting the record sent to us to be altered in the manner which is proposed, and that our judgment should be upon the record as sent to us. At the same time, I must say, that even as altered, I cannot see any

issue joined between the parties upon which it would be possible for us to order a verdict and judgment in favor of the plaintiff to be entered, which would be supported by the evidence which has been given. The same remarks apply to the other rejoinders which, in their form, adopt the looseness of the plaintiff in his manner of replying to the eighth plea. Upon the whole, I can see nothing whatever to justify a verdict in favor of the plaintiff either upon the record as sent up to us, or upon it if altered in the manner proposed.

This action, as framed, cannot, in my opinion, be sustained, for the reasons given, and I cannot see anything of a meritorious character in the plaintiff's case which would justify us in allowing any alteration in the record to be made, if any could be made, which would entitle the plaintiff to succeed in compelling the defendant to pull down his house, and in so perpetrating what, as it appears to me, would be a great injustice and wrong to the defendant, and thereby deprive the defendant of the full defence of title by prescription which he would have to any future attempt by the plaintiff to perpetrate so great a wrong.

I am of opinion, therefore, that the only judgment we should give upon this record is that the rule granted by the court below to set aside the verdict for the plaintiff and to enter a verdict and judgment thereon for the defendant should be sustained, and that the appeal should be dismissed with costs.

*Appeal allowed with costs.*

Solicitor for appellant: *Wallace Graham.*

Solicitor for respondent: *Peter Lynch.*

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