[HIGH COURT OF AUSTRALIA.]

GERRATY . . . . . APPELLANT;
DEFENDANT,

AND

McGAVIN AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *April* 6, 7, 8.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Landlord and Tenant—Condition of re-entry—Severance of reversionary estate—Apportionment of condition—Option of renewal of lease—Exercise of option after passing of the Conveyancing Act 1904 (*Vict.*)—*Notice to remedy breach of covenant, requisites of—Breach of covenant—Performance impossible by law—Covenant to repair internal parts of premises—Application to dividing fences—Bakehouse—Conveyancing Act* 1904 (*Vict.*) (*No.* 1953), *secs.* 13, 15, 19, 24—*Factories and Shops Act* 1905 (*Vict.*) (*No.* 1975), *secs.* 11, 12, 14, 151, 154.

Sec. 15 of the *Conveyancing Act* 1904 (Vict.) provides that "Notwithstanding the severance by conveyance surrender or otherwise of the reversionary estate in any land comprised in a lease . . . every condition or right of re-entry . . . contained in the lease shall be apportioned and shall remain annexed to the severed parts of the reversionary estate as severed . . . in like manner as if the land comprised in each severed part . . . had alone originally been comprised in the lease."

Held, by *Griffith* C.J. and *Barton* and *Isaacs* JJ., that the section applies where the severance has taken place since the Act came into operation, although the lease was created before that Act.

A lease of land under the *Transfer of Land Act* 1890 (Vict.) which was made before the *Conveyancing Act* 1904 came into operation and which was not registered in accordance with the former Act, contained an option of renewal by the lessee which was exercised after the latter Act came into operation.

Held, that the assignee of the reversion in part of the land was under sec. 15 of the *Conveyancing Act* 1904 entitled to take advantage of the condition of re-entry contained in the lease.

Sec. 19 (1) of the *Conveyancing Act* 1904 provides that "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and if the breach is capable of remedy requiring the lessee to remedy the breach . . . . and the lessee fails within a reasonable time thereafter . . . . to remedy the breach if it is capable of remedy . . . ."

Held, that the notice must in the case of a covenant to keep in repair state the particular condition of the premises which the tenant is required to remedy and not merely that there has been a failure to comply with the covenant.

A lease of land and premises including a bakehouse contained a covenant that the lessee would "cause the baking business now carried on to be still carried on and kept alive." That business having been discontinued, the lessor with knowledge of the discontinuance accepted rent for some time but subsequently gave notice to the lessee requiring him to re-establish the carrying on of the baking business. The construction of the bakehouse was such that under the provisions of the *Factories and Shops Act* 1905 the carrying on of that business there would at the date of the notice have been unlawful unless a practically new bakehouse were erected.

Held, that the lessor could not rely on the failure by the lessee to re-establish the business of baking as a breach of the covenant so as to entitle him to re-enter.

Upon the land leased were a hotel, a bakehouse and other buildings, and saleyards.

Held, that a covenant by the lessee to keep in repair "the internal part of the premises" did not impose upon him a duty to keep in repair the internal dividing fences of the saleyards.

Decision of the Supreme Court of Victoria (*Madden* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Andrew Ingram McGavin and Clara Malinda McGavin against Mary Catherine Gerraty, by which the plaintiffs claimed (*inter alia*) possession of certain land, mesne profits and damages for breach of a certain covenant in a lease.

The material facts are stated in the judgment of *Griffith* C.J. hereunder.

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The action was heard by *Madden* C.J., who gave judgment for the plaintiffs.

From that decision the defendant now appealed to the High Court.

Starke (with him *H. Walker*), for the appellant. The assignee of the reversion in part of the land leased cannot maintain an action in respect of conditions of re-entry unless he comes within sec. 15 of the *Conveyancing Act* 1904. That section, in the absence of plain words, is not retrospective and therefore does not apply to a lease created before the passing of the Act: *Piggott* v. *Middlesex County Council* (1); *Quilter* v. *Mapleson* (2); *Co. Litt.*, 215a; *Muller* v. *Trafford* (3).

[ISAACS J. referred to *Hyde* v. *Skinner* (4); *Nicholson* v. *Smith* (5).]

The exercise of the option of renewal of the lease in 1910 does not come within the definition of a "lease" in sec. 24. The dividing fences of the saleyards are not internal parts of the premises. That term is limited to parts which are indoors as contradistinguished from those parts out of doors. The notice to remedy the breaches of covenant is bad. It does not call attention to the particular condition of the premises which is said to constitute a state of disrepair: *Jolly* v. *Brown* (6); *Horsey Estate Ltd.* v. *Steiger* (7); *In re Serle*; *Gregory* v. *Serle* (8); *Piggott* v. *Middlesex County Council* (1); *Foa on Landlord and Tenant*, 5th ed., p. 642; *Halsbury's Laws of England*, vol. XVIII., p. 540. The notice also requires something to be done which no covenant requires to be done, namely, to repair the internal fences of the saleyards, and it also requires too much to be done. If the notice is bad in part, the whole of it is bad: *Guillemard* v. *Silverthorne* (9); *Horsey Estate Ltd.* v. *Steiger* (10); *Lock* v. *Pearce* (11); *Pannell* v. *City of London Brewery Co.* (12). As to the covenant to keep alive the baking business, the respondents continued to receive rent after they knew that the business had

(1) (1909) 1 Ch., 134.
(2) 9 Q.B.D., 672.
(3) (1901) 1 Ch., 54, at p. 61.
(4) 2 P. Wms., 196.
(5) 22 Ch. D., 640.
(6) 109 L.T., 210; 532.
(7) (1899) 2 Q.B., 79, at p. 91.
(8) (1898) 1 Ch., 652.
(9) 99 L.T., 584.
(10) (1899) 2 Q.B., 79, at p. 92.
(11) (1893) 2 Ch., 271.
(12) (1900) 1 Ch., 496.

been stopped, and they have therefore waived that breach. The failure to re-establish the business cannot be regarded as making the breach a continuing one: *Walrond* v. *Hawkins* (1); *Griffin* v. *Tomkins* (2). Under the *Factories and Shops Act* 1905 the business of baking could not have been re-established in the bakehouse unless a certificate were obtained, and under the Regulations then in force a certificate could not have been obtained unless practically a new building were erected: See secs. 11, 14, 151. That the appellant was not bound to do. The performance of the covenant was therefore rendered impossible by law. The putting the bakehouse into such a state as would be necessary under that Act is not a repair: *Lurcott* v. *Wakely & Wheeler* (3); *Foa on Landlord and Tenant*, 5th ed., pp. 221, 224.

Hayes, for the respondents. The particular thing dealt with by sec. 15 of the *Conveyancing Act* is severance, and it applies to severances of existing as well as future leases. As the severance in this case was in 1910 the section applies. The effect of the exercise of the option of renewal was to create a new lease; so that, even if sec. 15 only applies to leases created after the passing of the Act, it applies in this case. In the circumstances that existed the saleyards were made an adjunct of the premises, and the internal parts of them are internal parts of the premises. See *Green* v. *Eales* (4) as to the meaning of internal parts of premises.

[ISAACS J. referred to *Perry* v. *Davis* (5).]

The fact that part of the notice to repair is bad does not vitiate the whole. The notice so far as it deals with repair is sufficient. It tells the lessee the particular part of the premises that is in disrepair, and she must find out the details for herself. It is not necessary to instruct the lessee as to the law, which she is supposed to know. [He referred to *Jolly* v. *Brown* (6); *Piggott* v. *Middlesex County Council* (7).] The notice is clearly good as to the failure to keep alive the baking business. That breach of covenant has not been waived as it is a continu-

(1) L.R. 10 C.P., 342.
(2) 42 L.T., 359.
(3) (1911) 1 K.B., 905.
(4) 2 Q.B., 225, at p. 237.
(5) 3 C.B.N.S., 769, at p. 777.
(6) 109 L.T., 210; 532.
(7) (1909) 1 Ch., 134, at p. 146.

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ing breach: *Penton* v. *Barnett* (1). It was possible to continue the baking business in the bakehouse notwithstanding the *Factories and Shops Act*, for sec. 14 only applies to a place which became a factory after the Act was passed.

Starke, in reply, referred to *Fletcher* v. *Nokes* (2).

Cur. adv. vult.

April 8.

GRIFFITH C.J. This is an action by the assignees of a reversion against the lessee for recovery of possession of land on the ground of breaches of covenant, and for mesne profits and damages. The document called a lease, which is dated 13th May 1899, comprises two distinct parcels of land, one of about half an acre in a town having on it an hotel, a bakehouse and other buildings, and saleyards, the other a parcel of country land of about 40 acres in the neighbourhood. The term was to be eleven years renewable at the option of the lessee for a similar period. That option was exercised in 1910. In 1911 the plaintiffs became assignees of the reversion in the town block but not in the other land. The land was under the provisions of the *Transfer of Land Act*. The document called a lease was not registered, and does not therefore operate to confer any legal title upon the lessee, but is in law only an agreement enforceable by suit in the Supreme Court. The covenants relied upon by the plaintiffs are, first, a covenant by the lessee that "she will keep the internal part of the said premises in good and tenantable repair . . . . and so yield them up, reasonable wear and tear only excepted;" secondly, a covenant that she "will cause the baking business now carried on to be still carried on and kept alive and will allow James Gerraty to use the said bakehouse during the said term so long as he lives." The breaches alleged are, first, that the defendant did not keep the internal parts of the demised premises in good and tenantable repair, and, secondly, that she did not cause the baking business to be carried on and kept alive. The notice purporting to be given in pursuance of the *Conveyancing Act* 1904, and given on 31st July 1913, complained of these breaches.

(1) (1898) 1 Q.B., 276.

(2) (1897) 1 Ch., 271, at pp. 275-279.

The defendant objected, in the first place, that an assignee of the reversion in part of land which is leased is not entitled to take advantage of the covenants in the lease. That argument was founded upon sec. 15 of the *Conveyancing Act* 1904. Under the old common law, as stated in *Co. Litt.* 215a, that would have been the position in general. The words of sec. 15 are: "Notwithstanding the severance by conveyance surrender or otherwise of the reversionary estate in any land comprised in a lease . . . every condition or right of re-entry . . . shall be apportioned and shall remained annexed to the severed parts of the reversionary estate as severed . . ." It is contended that that section does not apply to leases granted before the passing of the *Conveyancing Act* 1904. The section does not say expressly, as the corresponding section of the English Act does, that it shall only apply to leases made after the passing of the Act. But in this case it seems to me that, whatever view may be taken as to the application of the section to existing leases in other respects, the terms of it as regards severance are future, and that it should be held to apply where the severance takes place after the passing of the Act.

There is a further ground upon which that objection fails. The position of the lessee, as I have already pointed out, was that of a person having an equitable estate only. In order to get the legal estate it would be necessary to apply to the Court for specific performance of the agreement by granting a lease of the part of the land severed, and such a lease if granted would be granted as from the end of the existing term, that is, from a date after the passing of the Act. Even if that were not so, and if the contract to be specifically performed were to be deemed to be a contract to grant a lease as from the time when the contract was originally made, that is, before the passing of the Act, I do not think that a Court of equity would grant specific performance to the lessee unless she was willing that such a covenant should be inserted in the new lease.

There is, perhaps, a third answer that may be made to this objection, namely, that the common law doctrine does not apply at all when the same instrument of lease contains two entirely distinct and non-contiguous parcels of land, of one of which only

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the reversion is assigned. It is arguable that in such a case the covenants should be held to apply separately to the several parcels. That point, however, was not argued, and I do not express any definite opinion upon it. I should add that I have some doubt whether sec. 15 has any application to this case, and whether sec. 13 is not the relevant section.

I pass to the other defences. The notice given by the plaintiffs on 31st July 1913 purported to complain of the following breaches:—

"1. That you have failed and neglected to cause to be carried on and kept alive the baking business referred to in the said lease.

"2. That you have failed and neglected to keep in good and tenantable repair the internal part of the bakehouse on the said land.

"3. That you have failed and neglected to keep in good and tenantable repair the internal part of the saleyards erected on the said premises."

The notice then proceeded to require the lessee to remedy the breaches by re-establishing the carrying on of the baking business and by putting the internal parts of the bakehouse and the internal fences of the saleyards into repair within one month.

I will deal with the breaches in inverse order.

First, as to the failure to keep in good and tenantable repair the internal part of the saleyards. I have already said that the saleyards are on the land. The words of the covenant are: "That she will keep the internal part of the said premises in good and tenantable repair." There was a corresponding covenant by the lessor, namely, that he "will keep all external parts of the said premises in good and substantial repair." The plaintiffs contend that those two covenants apply to the saleyards, and it is admitted that the internal dividing fences of the saleyards had been allowed to fall into disrepair. The question is whether those dividing fences are covered by the words "the internal part of the said premises." *Primâ facie* they are not. The term "premises" is used in various parts of the lease. Immediately following the covenant by the lessee to keep the internal part of the premises in good and tenantable repair is a

covenant by her to insure and keep insured "the said hotel and premises," and then a covenant to keep "the said hotel and premises" open as an hotel, and later there is a reference to "the licence of the said premises." On the other hand there is a provision that "the lessee paying the rent and performing the covenants shall quietly enjoy the said premises during the said term without disturbance by the lessor." In the last instance the word "premises" of course includes the whole of the demised premises. But in the other cases it is clear that the word "premises" refers to the buildings, and that "the internal part of the premises" means the internal part of the buildings. The covenant does not, in my opinion, apply to the case, and no right of entry can be founded upon it.

I pass to the next alleged breach—that the defendant had failed to keep in good and tenantable repair the internal part of the bakehouse. The objection taken to that is that the notice is insufficient—that it does not give such information as is required to be given by sec. 19 of the *Conveyancing Act* 1904, which provides that "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and if the breach is capable of remedy requiring the lessee to remedy the breach" within a reasonable time. That section has been expounded in England in several cases. I only refer to one, *Penton* v. *Barnett* (1), in which *Collins* L.J. expressed his opinion as to its meaning. He said (2):—"I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do." That passage has been frequently quoted in subsequent cases as expressing the

(1) (1898) 1 Q.B., 276. (2) (1898) 1 Q.B., 276, at p. 281.

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proper interpretation of the section. The notice in the present case did exactly what the learned Lord Justice said was insufficient. It merely quoted the covenant. I think, therefore, that the notice, so far as regards the failure to keep in repair the bakehouse, is bad, and that no right of re-entry can be founded upon it.

I turn now to the other alleged breach, the failure to cause the baking business to be carried on and kept alive. At the time the lease was made there was a small building on the premises, with walls six feet high, and in an almost ruinous condition. But still it was used as a bakehouse. Up to April 1913 the business of baking was carried on there, but on 16th April the then tenant, one Onley, discontinued it. He found that it was impracticable to carry it on, and it is doubtful whether under the then existing law he would have been allowed to do so. At any rate, he ceased to carry on the business. The lessors were informed of the cessation of the baking business, but notwithstanding this information they continued to demand and receive rent, which was a weekly rent payable monthly. On 4th August they received and accepted the rent due up to 2nd August. That acceptance of rent was clearly a waiver of the right to take advantage of that temporary discontinuance of the business of baking. It was contended by Mr. *Starke* that the covenant to carry on the business was not a continuing covenant, and that when once broken there was an end of it. I can see no reason why a temporary discontinuance should not be permitted or waived by the lessor without depriving him of the right to insist on the renewal of the business. The notice in this case went on to require the defendant to remedy the breach by resumption of the business. In point of form I think that notice was sufficient.

But in the meantime other things had happened. In September 1912 the *Factories and Shops Acts* had been applied to this district. A bakehouse is a factory within the meaning of those Acts. The Act then in force was Act No. 1975. Sec. 11 of that Act (*cf.* sec. 14 of the Act of 1912, No. 2386) provides, amongst other things, that "(1) Every person . . . . in occupation of any building or place which becomes for the first time or after a period of disuse again becomes a factory . . . . shall within

fourteen days of such building or place becoming or again becoming a factory . . . . serve on the Chief Inspector . . . . a written notice in " a certain form. There may be a question as to the meaning of the words " becomes for the first time a factory," but there is none as to the alternative " after a period of disuse again becomes a factory." There is no doubt, therefore, that if the defendant had attempted to resume the business of baking in that building the case would have been one in which the building after a period of disuse had again become a factory, and it would have been necessary for the defendant to apply for registration of the factory. Then sec. 11 (4) goes on to provide that if it is shown that all the requirements of the Act have been fulfilled the Chief Inspector shall issue a certificate of registration on payment of the prescribed fee. Sec. 12 (*cf.* sec. 15 of the Act of 1912) provided that a building shall not be registered as a factory until the municipal council for the district or the Chief Inspector has certified that the requirements prescribed by any regulations made by the Board of Public Health and which the Board is thereby authorized to make have been complied with. Sec. 14 of that Act (*cf.* sec. 17 of the Act of 1912) provided that " (3) Any occupier of a factory . . . . which is not registered as in this Act provided shall be liable on conviction to a penalty not exceeding ten pounds," and sec. 154 (*cf.* sec. 233 of the Act of 1912) provided that " if a factory . . . . or bakehouse . . . . is not kept in conformity with this Act . . . . the occupier thereof shall . . . . be liable to a penalty not exceeding ten pounds, and to a further penalty of one pound for every day during which such breach continues." Sec. 151 (*cf.* sec. 244 of the Act of 1912) provided that regulations made or purporting to have been made under the Act are to have the same effect as if enacted in the Act. A regulation which had been made by the Board of Public Health under sec. 12 of the Act, and which came into operation when the Act was applied to this bakehouse, required, as to buildings to be used as bakehouses, that the walls should be not less than twelve feet in height, that the roofs should be lined if no ceiling was provided, and that the bakehouses should be provided with floors or be imperviously paved. The building

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in which the baking business had been carried on had walls six feet in height, there was no floor and the building was not imperviously paved, the roof was not lined, and there was no ceiling. It was therefore impossible for the defendant to resume the business of baking in that building as it stood, and in order to resume that business it would have been necessary to put up what would be practically a new structure. The covenant which I have already read, is to "cause the baking business now carried on to be still carried on and kept alive during the said term." The covenant therefore was, as the learned Chief Justice thought, to carry on the business in that building. It was impossible for the defendant to do so in accordance with the law. Performance of the covenant had become impossible by law. The covenant cannot be construed as one that the defendant in the event of a change of the law would put up an entirely new structure. On that ground the plaintiffs cannot take advantage of the failure of the defendant to resume the business of baking as a breach of the covenant.

All the breaches, therefore, for one reason or another fail to give a right of re-entry.

The only question remaining is one of damages. The learned Chief Justice thought, and I quite agree with him, that the defendant had failed to some extent to keep the premises in tenantable repair. But the damages to which the plaintiffs as assignees of the reversion are entitled are damages for the injury to the reversion. No evidence was given as to what that would be, and I do not think it would be illiberal to estimate them at one shilling. So that the plaintiffs are technically entitled to one shilling damages.

The result, therefore, is that the appeal should be allowed.

My brother *Barton* authorizes me to say that he concurs in what I have said.

My brother *Gavan Duffy* also authorizes me to say that he concurs, with the exception of what I have said on the point of the application of sec. 15 of the *Conveyancing Act* to future severances, as to which he expresses no opinion.

ISAACS J. read the following judgment:—Several points of importance have been raised, to which I shall refer in order.

1.—The first point taken by Mr. *Starke* was that as there had been a severance of the reversion by a division of the land, the condition for re-entry is not apportionable.

To sustain this, he relied on the contention that the renewal of the lease of 1899 was a mere continuance of the original demise; and further, said learned counsel, as sec. 15 of the *Conveyancing Act* 1904 applies only to leases made subsequent to the Act, no apportionment of the condition could be made. No formal renewed lease has been executed, and the matter rests on agreement. But sec. 24 of the Act puts an agreement for a lease on the same footing as a lease—provided that "the lessee has become entitled to have his lease granted," that is, if the agreement be one of which the tenant is in a position to claim specific performance. If the lessee be not so entitled, he is not entitled to notice under the Act; but he cannot be in a better position otherwise in defending the action for possession by his landlord, who has the title both documentary and by estoppel, than if the lease itself were executed.

Now, what is the position of a lease obtained by the exercise of an option to renew? Clearly it is a new lease, a new demise. An option given for valuable consideration is merely an irrevocable offer, but beyond that there is no contract for a further term, unless and until the offer is duly accepted, by exercising the option. The matter is plain on principle; but there is authority, and I shall refer only to two cases. One is *Hand* v. *Hall* (1), decided by Lord *Cairns* L.C., *Cockburn* L.C.J., and *Brett* L.J. There it was held that a lease for twelve months containing a right of renewal for three and a half years more need not be under seal. The Court so held because, said Lord *Cairns*, until the option is exercised no interest passed to the tenant. He added (2):—"It is a stipulation that at his option, on a notice given to the plaintiff, he shall not be disturbed for three years and a half. Whereas there is not anything to be done by the tenant in the first part of the agreement to create a demise, in the second part something has to be done by him before that part takes effect, and until that is done it is impossible to tell whether a tenancy shall come into force or not. I think, therefore, that it

(1) 2 Ex. D., 355.

(2) 2 Ex. D., 355, at pp. 357-358.

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is absolutely necessary to divide the contract into two parts. I think the agreement is an actual demise, with a stipulation superadded, that if at his option the tenant gives the landlord a notice of his intention to remain, he shall have a renewal of his tenancy for three years and a half." The other case is *Woodall* v. *Clifton* (1), and I refer to the observations of *Stirling* L.J. (2) and *Romer* L.J. (3). I refer also to my judgment in *Goldsbrough, Mort & Co.* v. *Quinn* (4) as to the effect of an option.

The renewal must therefore be regarded as a new lease, and in any case falls within sec. 15 of the Act.

But if it were not a new lease, the severance took place since the Act came into operation, and that is enough. The section is designed to alter the law as to "severance," as it existed at common law where the land is divided, and it applies to any future severance.

2.—The next point was that the notice of breach of covenant did not satisfy sec. 19. That section requires the notice to specify "the particular breach complained of and if the breach is capable of remedy requiring the lessee to remedy the breach and in any case requiring the lessee to make compensation in money for the breach." The "breach" does not mean the "covenant" or "promise" which was broken, but what it is that is alleged to be the "breach" of that covenant or promise. The object of the section is pointed out in various cases cited, as *Fletcher* v. *Nokes* (5), approved in *Jolly* v. *Brown* (6). In order to avoid the expense of an action for forfeiture in which the Court would permit the tenant an opportunity to remedy his default so as to save the forfeiture, the legislature has required the landlord to give that opportunity first. But he must then do what he would have to do if he had brought an action, namely, specify what he says is "the particular breach," and not merely state that there has been "a breach." If he does that, he is not bound to go further and instruct the tenant how to repair it. That would not only be an undue burden on the landlord, but, if effectual at all, would tie the tenant down to one particular

(1) (1905) 2 Ch., 257.
(2) (1905) 2 Ch., 257, at p. 271.
(3) (1905) 2 Ch., 257, at p. 274.
(4) 10 C.L.R., 674, at pp. 690 *et seqq.*
(5) (1897) 1 Ch., 271, at p. 274.
(6) 109 L.T., 532.

mode of repairing his fault. *Piggott's Case* (1) goes no further than that. On this basis the notice is ineffectual as to the covenant to repair.

But I do not think it nullified the part of the notice referring to the bakery. Notwithstanding anything said in *Guillemard's Case* (2), mere insufficiency of specification as to one covenant cannot infect with invalidity a perfect specification as to another. The only effect of the insufficiency is to prevent any reliance at the trial on the defective part. I agree with what *Buckley* J. said in *Pannell's Case* (3). If the notice is framed so as to mix up the alleged breaches or complaints inexplicably and inseparably, it may affect it all; but not where, as here, the sufficient and the insufficient parts are distinct and unmistakable.

3.—The next point was waiver. This depends on facts as well as law. As to the facts it is clear the acceptance of rent covered all breaches up to about the 31st July, when the notice was served. The effect of this with reference to sec. 15 is a difficult question to answer in view of *Penton* v. *Barnett* (4), and I prefer to leave that for further consideration, should it ever become necessary. It is not necessary here, because the notice is insufficient as to all but the bakery covenant, and as to that the Factories Act clearly, on the uncontroverted facts, rendered the further carrying on of that business unlawful in the building where both parties contemplated it was to be carried on, unless the bakery premises were structurally altered. It would have been futile to apply for registration, and the tenant is therefore under no liability for not so applying. The landlord would not effect the necessary alterations, and the tenant was not bound to effect them (*Baily* v. *De Crespigny* (5)), whatever her liability to pay rent still is (see *Grimsdick* v. *Sweetman* (6)).

4.—The last point was as to whether there had in fact been a breach of the covenant to keep in repair. This raised the question whether the saleyard fences fall within the phrase "the internal part of the said premises" in clause 4 of the indenture. Clause 9 relates by way of contrast to the external part of the

(1) (1900) 1 Ch., 134.
(2) 99 L.T., 584.
(3) (1900) 1 Ch. 496, at p. 503.
(4) (1898) 1 Q.B., 276.
(5) L.R. 4 Q.B., 180.
(6) (1909) 2 K.B., 740.

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premises. In my opinion the phrase referred to does not include such structures as saleyards, but to buildings where there is both an external and an internal part in the ordinary sense. There was in fact a breach of the covenant to repair but no actual damage is proved, and only nominal damages can be awarded.

I agree with the judgment proposed by the learned Chief Justice.

RICH J. I concur in the judgment of the Court.

Appeal allowed. Judgment appealed from discharged except the direction to amend the statement of claim and the dismissal of the counterclaim with costs. Judgment for plaintiffs for one shilling damages for breach of the covenant to keep the bakehouse in repair, with costs. Judgment for defendant as to the residue of the action with costs of action including costs of interrogatories and discovery, except so much as is exclusively attributable to the issue of that breach of covenant. Set off as to costs. Respondents to pay costs of appeal.

Solicitors, for the appellant, *Henderson & Ball* for *Michael P. Ryan*, Beechworth.

Solicitors, for the respondents, *Plante & Henty* for *Notcutt & Purbrick*, Wangaratta.

B. L.