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information. The question involves a consideration of the Constitution, sec. 77, and the provisions of the *Bankruptcy Act*, secs. 18 and 20, but it is unnecessary, in the view I have taken of the former questions, to decide this third question.

Questions 1 *and* 2 *answered: No. Question* 3 *not answered. No order as to costs.*

Solicitor for the Crown, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

Solicitors for the accused, *Browne, Rymill & Stevens.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

PEARSON . . . . . APPELLANT;
DEFENDANT,

AND

THE ARCADIA STORES, GUYRA, LIMITED RESPONDENT.
PLAINTIFF,

[No. 1.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 29, 30; *June* 13.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Trade and Commerce—Restraint of trade—Sale of business—Covenant by vendor that during a specified period and within a defined area he would not carry on a similar business—Separate agreement between vendor and purchaser—Employment of vendor for specified period at specified salary—Salary not paid in full—Business transferred to another purchaser—Termination of employment—Breach of covenant—Injunction—Defensive equity—Permission—Laches—Acquiescence.

In 1927 the appellant, as vendor, entered into a covenant with a company, the purchaser of his business of produce merchant, that he would not within a period of ten years carry on a similar business within a defined area,

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or allow his name to be used in carrying on such a business. At the same time a separate agreement was entered into between the parties, that for a period of five years the appellant would be employed as manager of the business at a specified salary. The business did not prosper, and for a long time the salary paid to the appellant was less than the amount specified. He protested, but was informed that the arrears would be paid when business improved. In 1933 a receiver and manager was appointed by a debenture-holder, and a winding-up order was made against the company. The appellant continued in the employment until August 1933, when it was terminated. He commenced business in a small way as a produce merchant, in near-by premises. In September 1933, at a time when they had no authority in the matter, two of the three directors of the company then being wound up, said that they would allow the appellant to continue trading as a produce merchant so long as he "kept away from" a named person. In January 1934 the whole of the old company's assets, including the goodwill and the agreement containing the appellant's covenant, was, in pursuance of an agreement made in November 1933 with the two directors, transferred by the liquidator to the respondent company which was incorporated in December 1933, and of which the two directors were the first directors. Until January 1934 the appellant was not very active in carrying on as a produce merchant. He then began to advertise and to use his name openly. Protests were made by the respondent company and its predecessor. These proving ineffectual, proceedings for an injunction were commenced in June 1934.

Held that the respondent had a prima facie right to an injunction, which had not been displaced by any conduct amounting to laches or acquiescence or by reason of the failure to pay salary in full, and that the respondent was entitled to an injunction restraining the appellant from continuing to act in contravention of the agreement.

Decretal order of the Supreme Court of New South Wales (*Nicholas* J.) affirmed.

APPEAL from the Supreme Court of New South Wales.

In a suit instituted in the Supreme Court of New South Wales in its equitable jurisdiction by an originating summons dated 7th June 1934, the plaintiff, Arcadia Stores, Guyra, Ltd., sought to enforce against the defendant, Oscar Randolph Pearson, a covenant contained in an agreement bearing date 18th March 1927, whereby the defendant, his father and his three brothers sold a business carried on by them at Guyra under the style or firm name of "Richard Pearson & Sons," to John Pringle & Co. Ltd., a predecessor in title of the plaintiff. Clause 1 of the agreement provided, *inter alia*, that "the vendors shall sell and the company shall purchase, firstly the goodwill of the said business with the exclusive right to use the name of

'Richard Pearson & Sons' in carrying on such business in continuation of the vendors' firm and in succession thereto and also the right to use if so thought fit by the company the words 'Late Richard Pearson & Sons' or any other words indicating that the business is carried on by the company in continuation of or in succession to the said firm and all trade marks connected therewith." Clause 10 provided that "The vendors hereby jointly and (as separate covenants) each of them doth hereby severally agree with the company that they will not nor will any of them within a period of ten years from the date hereof either solely or jointly with or as managers or manager agents or agent for any other person or persons or company directly or indirectly carry on or be engaged or concerned or interested in the business or businesses of produce merchants, chaff cutters, threshers of produce or bale pressers or permit or suffer their or any of their names or the name of 'Richard Pearson & Sons' to be used or employed in carrying on or in connection with any such business or businesses within a radius of fifty miles of the post office at Guyra save so far as the vendors or any of them shall or may as members or a member of . . John Pringle & Co. Ltd. be interested or as officers of or an officer or servants or servant or agents or agent of the . . . company be employed in or about any business that may be carried on by the . . . company."

Simultaneously with that agreement, that is, on 18th March 1927, an agreement was entered into between John Pringle & Co. Ltd. and the defendant whereby the defendant undertook to serve the company as manager for a period of five years from 1st March 1927, but subject to sooner determination at the will of the company, at a salary of £6 per week payable weekly and a commission equal to ten per cent of the nett profits of the business. He was also to receive an allowance of £1 per week towards the cost of the maintenance of a motor car for a period of twelve months, and thereafter at a rate mutually agreed upon by the parties. For some time prior to the end of the five year term, and afterwards, the defendant was paid only £5 10s. per week as salary, and 10s. per week as allowance. On 22nd May 1933 a debenture-holder appointed a receiver and manager of the business of John Pringle & Co. Ltd., and on the same day a winding-up order was made in respect of the

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company. On 19th August 1933 the defendant's appointment was terminated. Upon being approached in September 1933 by the defendant's brothers, two of the three directors of the company said, in effect, in respect of a business then being carried on by the defendant, that they would not stand in his light and would let him go on trading as a produce merchant so long as he " kept away from " a certain named person, the other director. On 20th November 1933, these two directors entered into an agreement with the liquidator of the company for the acquisition by them of its assets. The liquidator agreed to transfer certain assets to them and otherwise vest the whole of the undertaking and assets in a company to be formed under the name of Arcadia Stores, Guyra, Ltd., that is, the plaintiff company, which was incorporated on 22nd December 1933, and of which the two directors above-mentioned were the first directors. An agreement was, on 24th January 1934, made between the old company and its liquidator, and the new company and the two directors for the transfer of the assets to the new company in pursuance of the earlier agreement. The goodwill of the old company and the agreement containing the defendant's covenant were specifically transferred. The receiver, however, did not go out of possession and hand over the business until 13th March 1934. It was not disputed that after he had ceased to be employed as manager of John Pringle & Co. Ltd. the defendant carried on business in a manner forbidden by clause 10 of the agreement for sale and was doing so at the date of the institution of the suit.

The defendant, however, claimed that the plaintiff was not entitled to enforce the agreement for, *inter alia*, the following reasons:— (*a*) Because the predecessor in title of the plaintiff company by a breach of the collateral agreement of service in not paying the full amount of salary and allowance forfeited its right to an injunction; (*b*) because permission to carry on the business of a produce merchant, notwithstanding the provisions of the covenant, was given to the defendant by persons, that is, the two directors, entitled to bind the plaintiff or whose conduct created a defensive equity in favour of the defendant, and that the defendant carried on in reliance on this permission, and (*c*) because the plaintiff had lost its right to restrain

the defendant by the laches and acquiescence of itself or its predecessor in title.

By a decretal order *Nicholas* J. granted an injunction restraining the defendant from acting in a manner contrary to the provisions of the covenant until its expiry by effluxion of time on 18th March 1937.

From that decretal order the defendant now appealed to the High Court.

Further material facts appear in the judgment of *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. hereunder.

Mason K.C. (with him *Miller*), for the appellant. The agreement for the sale of the business and the service agreement were collateral agreements. Failure to pay the full salary and allowance under the service agreement is a breach which disentitles the respondent to an injunction in respect of the covenant (*Measures Brothers Ltd.* v. *Measures* (1); *Kaufman* v. *McGillicuddy* (2)). The appellant did not at any time surrender his right to receive the full amount of salary and allowance stated in the agreement. The permission given to the appellant by the two directors was not withdrawn. It remained operative whilst the covenant was vested in those directors. The respondent company took the covenant subject to that position. The respondent cannot be in any better position than its predecessors, the two directors. Although it was aware that the appellant was carrying on a business, the respondent did not take any action until many months had elapsed from the date of its incorporation as a company (*Erlanger* v. *New Sombrero Phosphate Co.* (3); *Turner* v. *General Motors* (*Australia*) *Pty. Ltd.* (4)). On the faith of the permission so given and not withdrawn, the appellant carried on up to the date the statement of claim was filed. Having regard to all the circumstances, the delay, the knowledge of the parties, and the fact that the respondent and its predecessors had stood by and allowed the appellant to build up a business and to incur heavy liabilities in connection therewith, it is inequitable that the respondent

(1) (1910) 2 Ch. 248.
(2) (1914) 19 C.L.R. 1.
(3) (1878) 3 App. Cas. 1218, at p. 1279.
(4) (1929) 42 C.L.R. 352, at p. 369.

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should be permitted to restrain the appellant from further carrying on his business (*Ffooks* v. *South Western Railway Co.* (1); *Maythorne* v. *Palmer* (2); *Sayers* v. *Collyer* (3); see also *Duke of Northumberland* v. *Bowman* (4)). *Turner* v. *General Motors (Australia) Pty. Ltd.* (5) is distinguishable; the person there sought to be restrained was guilty of fraud. The respondent is not entitled to an injunction because of laches and acquiescence on the part of itself and its predecessors. In view of the permission given by persons entitled to the benefit of the covenant, the carrying on of a business by the appellant was not and is not a breach of the covenant. That this is so is supported by the subsequent inaction of the receiver of Pringle & Co., and of the respondent. The condition that the appellant should "keep away from" a certain named person meant no more than that he should not make actual contact with that person. The condition was complied with. A covenant of this nature should be read as if the words "without consent" were actually expressed therein.

Maughan K.C. (with him *Kitto*), for the respondent. The meaning of the contract to which the appellant is a party is not in issue; its validity is not in issue; it is not alleged that it has been discharged in any of the ways recognized by law as effecting a discharge of a contract; and a breach is admitted by the appellant. Assuming, but not admitting, that the payment of a reduced amount of salary and allowance constituted a breach of the service agreement, the appellant by accepting and continuing to accept the reduced amount elected to waive his right, if any, to the larger amount, or to treat the contract, and thereby the covenant, as at an end. The evidence shows that the parties agreed to a variation of the service agreement. At this late stage the appellant is bound by his election. In any event the contract for sale and the service agreement are independent of each other. The continued existence of the contract for sale, and of the covenant therein, does not depend upon the performance of the service agreement. An analogy between *Measures Brothers*

(1) (1853) 1 Sm. & Giff. 142; 65 E.R. 62.
(2) (1865) 11 Jur. 230.
(3) (1884) 28 Ch. D. 103.
(4) (1887) 56 L.T. 773.
(5) (1929) 42 C.L.R. 352.

Ltd. v. *Measures* (1) and this case would arise only if the service agreement continued until the permission was given by the directors.

[DIXON J. referred to *General Billposting Co.* v. *Atkinson* (2).]

Here the service contract was not rescinded. The appellant's conduct does not show that he thought he was absolved from the covenant. In a suit for specific performance of an executed contract it is unnecessary for the plaintiff to aver his readiness and willingness to perform the contract sued upon (*Sydney Consumers' Milk and Ice Co.* v. *Hawkesbury Dairy and Ice Society Ltd.* (3), and see *McDonald* v. *McMullen* (4)).

[McTIERNAN J. referred to *J. C. Williamson Ltd.* v. *Lukey and Mulholland* (5).]

As a matter of law the appellant has not proved any series of acts which create a defensive equity in his favour (*Greater Sydney Development Association Ltd.* v. *Rivett* (6) ; *Automobile and General Finance Co.* v. *Hoskins Investments Ltd.* (7)). The mere non-payment of a small portion of the salary payable under the service agreement is not such a breach of the agreement, which otherwise has been wholly performed, as to render the covenant inoperative. At the time the alleged "permission" was given, the two directors had no contractual interest whatever. They had no authority to give permission on behalf of, or power to bind, the old company or its successors. The permission was personal to themselves and did not pass with the property of the company. The Judge of first instance found as a fact that the appellant did not rely upon this permission. The evidence shows that he had commenced business on his own account some time before the permission was given, and that he continued to carry on that business after he had been directed by the respondent not to do so. When so directed he made no protest or representation of any kind. In any event the permission was given subject to a condition with which the appellant failed to comply. The appellant has not shown (*a*) unreasonable delay on the part of the respondent, (*b*) that that delay occurred after the

(1) (1910) 2 Ch. 248.
(2) (1908) 1 Ch. 537 ; (1909) A.C. 118.
(3) (1931) 31 S.R. (N.S.W.) 458 ; 48 W.N. (N.S.W.) 127.
(4) (1908) 25 W.N. (N.S.W.) 142.
(5) (1931) 45 C.L.R. 282.
(6) (1929) 29 S.R. (N.S.W.) 356 ; 46 W.N. (N.S.W.) 99.
(7) (1934) 34 S.R. (N.S.W.) 375 ; 51 W.N. (N.S.W.) 129.

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respondent became aware that the appellant was carrying on a business, and (*c*) that during that period the appellant altered his position in the belief that the respondent had abandoned its rights; therefore he cannot succeed on the ground of laches *per se*. So far as the respondent is concerned, the time did not commence to run until it first became aware that the appellant was carrying on in such a way as to render necessary an application to the Court for the enforcement of the covenant. The respondent and its predecessors in title were entitled to refrain from taking action until the success or otherwise of the appellant's business was established (*Turner* v. *General Motors* (*Australia*) *Pty. Ltd.* (1)). The appellant did not change his position on the assumption that the respondent would not assert its rights under the covenant. If he did so he was not justified in the assumption. Until April 1934 there was no overt sign that the appellant was carrying on a business; any subsequent delay is explained in the evidence and was reasonable in the circumstances.

Mason K.C., in reply. The two contracts are collateral contracts and should be read as if incorporated in one document (*Smith* v. *Chadwick* (2); *Hoyt's Pty. Ltd.* v. *Spencer* (3)). The permission was a continuing permission until its withdrawal. Until the service of the statement of claim there was nothing to indicate to the appellant that the two directors, who became directors of the respondent company, had withdrawn their permission, especially having regard to the fact that injunction proceedings commenced by the receiver prior to the giving of the permission were not proceeded with. The respondent's remedy, if any, is at law, not in equity.

Cur. adv. vult.

June 13. The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. In 1927 the appellant entered into a covenant that he would not within a period of ten years carry on or be engaged or concerned or interested in the business of a produce merchant within a radius of fifty miles of the

(1) (1929) 42 C.L.R., at p. 369. (2) (1882) 20 Ch. D. 27.
(3) (1919) 27 C.L.R. 133.

post office at Guyra, or suffer his name to be used in carrying on such a business. He is now carrying on at Guyra the business of a produce merchant and is using his name for the purpose.

The respondent is the assignee of the covenant. It has obtained an injunction from *Nicholas* J. restraining the appellant from continuing to act in contravention of the covenant, and from the decretal order granting the injunction he brings this appeal. His ground of appeal is that the respondent by reason of its conduct and that of its assignors is disentitled to an injunction compelling him to observe the covenant. The conduct upon which the appellant relies falls under two heads. The respondent and the persons through whom it claims acquiesced, as he alleges, in the appellant's establishing and continuing the business which the respondent now seeks to enjoin. The second matter relied upon is that the covenantee, before assigning the covenant to the respondent, failed to pay the appellant the full rate of wages to which he was entitled under a contract of employment which he claims was a collateral engagement upon which the covenant depended.

The transaction in which the appellant gave the covenant was the sale of a business carried on in Guyra under the style " Richard Pearson & Sons " by a partnership of which he was a member. The partnership consisted of his father, his three brothers and himself. The purchaser, John Pringle & Co. Ltd., under its own name carried on in Guyra a general business, one branch of which was that of a produce merchant. That company acquired the business of Richard Pearson & Sons with the object of continuing both businesses as separate enterprises. Accordingly, besides taking a transfer and assignment of all the assets of the business, the company made with the appellant a contract of employment by which he agreed to serve as manager of the business for five years from 1st March 1927. The remuneration provided by the agreement was £6 a week and ten per cent of the profits. Although the agreement fixed a term of five years, the employment might during that period be determined by the manager if he desired to do so, or by the company if for any reason it should deem it desirable to do so in the interests of the company. Neither of these powers was exercised, and for the full period of five years, which expired on 1st March 1932, the appellant

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served John Pringle & Co. Ltd. as manager of the produce business it had taken over. The business was carried on, notwithstanding that John Pringle & Co. Ltd. owned it, under the style "Pearson & Sons, O. R. Pearson Proprietor." A year or two before the end of the term the weekly payment of wages was reduced to £5 10s. The appellant protested, but he was told that the arrears would be made up when business improved. His weekly allowance of £1 for travelling expenses was also reduced by 10s.; but to this, unlike the weekly salary, he had no definite right under the terms of the agreement which, after the first year, left the amount to the agreement of the parties. When the term of five years ran out, John Pringle & Co. Ltd. continued to employ the appellant as manager of the produce business carried on in the name of Pearson. But John Pringle & Co. Ltd. did not prosper. Its directors were G. A. Butt, H. F. White and L. P. Dutton of whom the first was manager of the company's business. Between him and his co-directors there arose some personal enmity, but whether as a consequence or as a cause of the company's failure does not appear. The company had given a debenture to its bank, and, on 22nd May 1933, a receiver and manager was appointed under this debenture. On the same day a winding-up order was made. The order, which appointed an official liquidator, gave the bank leave to exercise its rights under the debenture. The receiver appointed one Moss to manage the business of the company, and Butt's connection with the company ended. The produce business carried on in the company's own name was put under the control of a manager named C. S. White. The appellant was left in charge of the other produce business until 19th August 1933. That business was carried on in a store or shed near the railway station where it had been conducted before John Pringle & Co. Ltd. bought it. On 19th August Moss terminated the appellant's appointment and requested him to vacate the produce shed. The appellant refused to hand over the keys, and Moss placed a new lock on the premises. But the appellant in his turn removed the new lock. The appellant consulted a solicitor who wrote to the receiver claiming that his client, as the ostensible principal in the business, was responsible to the farmers who had consigned their produce to him, and he must, therefore, have access

to the premises to deal with the goods. This evoked a long letter from the solicitors for the bank and the receiver. They referred to the covenant and demanded that the appellant return the goods taken from the store, that he desist from breaking the covenant and that he restore everything that he had taken from the shed. The letter threatened proceedings in equity in default of immediate compliance. The appellant's solicitors replied to the effect that he was bound to look after the produce entrusted to him as if he were principal, but that he had not carried on business and denied that he had stated it was his intention to do so. The correspondence proceeded, and apparently the appellant was not finally ejected until about 12th January 1934. But in the season from August until January there is little done in the produce business.

In the meantime the appellant's brothers had interviewed H. F. White and L. P. Dutton. His brothers in September told these gentlemen that the appellant's position was worrying his father, and asked if anything could be done to allow him to go on trading as a produce merchant, seeing that he had children to support and no other livelihood. They answered, in effect, that they would not stand in his light and would let him go on trading as a produce merchant so long as he "kept away from" Butt, who had boasted that he would get into the shed controlled by the appellant. This statement was reported to the appellant by his brothers. At the time neither H. F. White nor Dutton had any authority in the matter whatsoever, and immediately after the conversation, namely, on 16th September 1933, the brothers were so informed quite definitely by the solicitor who had acted for the company. The parties met in his office and there raised the question again. But two of the appellant's brothers nevertheless guaranteed his bank account, on the strength, they suggest, of White's and Dutton's assurance. Although at that time they had no authority in the affairs of the company, yet in fact White and Dutton were discussing the formation of a company to acquire the business from the liquidator; indeed this proposal was discussed with the Pearsons at the interview in the solicitor's office. Ultimately it was carried into effect. On 20th November 1933 they entered into an agreement with the company and its liquidator for the acquisition of its assets. Under

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the agreement, which was made subject to the Court's approval, White and Dutton deposited £1,500 for the payment of a number of creditors whose debts, according to the recitals, they had verbally guaranteed. Claims made by the liquidator against them were to be released and they agreed to pay a sum of £2,500 to the liquidator upon the Court's sanctioning the agreement. The liquidator agreed to transfer certain of the company's assets to them and otherwise to vest the whole of the undertaking and assets (words wide enough to include the appellant's covenant) in a company to be formed under the name of Arcadia Stores, Guyra, Ltd., in other words in the respondent company. That company was incorporated on 22nd December 1933. White and Dutton were, by its articles, constituted its first directors. Moss became its secretary. On the day of its incorporation and, no doubt immediately prior to the actual registration of the company, the agreement of 20th November 1933 received the sanction of the Supreme Court. On 24th January 1934 an agreement was made between the old company and its liquidator, the new company and White and Dutton for the transfer of the assets to the new company in pursuance of the earlier agreement. The goodwill of the old company and the agreement containing the appellant's covenant were specifically transferred. The receiver, however, did not go out of possession and hand over the business until 13th March 1934, and until that date the capacity in which Moss conducted the undertaking was as manager for the receiver. Until January 1934 the appellant does not appear to have been very active in carrying on as a produce merchant. He says that after he was finally ejected from the produce shed, he conducted his business for about six weeks at his home and then took a small office in the town, which he occupied for another six weeks without putting up a sign. C. S. White saw him occasionally in the railway yards looking after produce. On 4th January 1934, however, he advertised in the Guyra *Argus* newspaper that he was carrying on business as a produce merchant. Moss wrote a letter to him on 12th January 1934 demanding the keys of the produce shed, warning him against trespassing there, offering to deliver the personal belongings he had left in the shed, and stating that Moss had had his attention directed to the fact that he was carrying on

the business of a produce merchant, and notifying him that, unless he discontinued doing so, "suitable action will be taken immediately and without further notice." Notwithstanding this letter, in April he took new premises upon which he exhibited signs "O. R. Pearson Produce Merchant."

Butt had become a partner in a firm of produce merchants carrying on business on the Queensland border and the appellant undertook the agency of this firm. On 24th May 1934 he published in the Guyra *Argus* newspaper an advertisement of his business stating that he was local agent of the firm of which Butt was a member.

On 7th June 1934, without any further communication with the appellant, the respondent company commenced this suit.

Moss gave as a reason for not proceeding earlier that in March and April the appellant's father was known to be dying. He died on 26th May 1934. It may be inferred that the appellant's father was much concerned about his son's position and that it was for this reason that White and Dutton had said, in September 1933, they would not stand in his light and that during the father's last illness proceedings were withheld.

Upon these facts the respondent company has established a clear prima facie right to an injunction restraining the appellant from continuing to act in opposition to the terms of his covenant. The covenant is valid. It was annexed to the goodwill of the covenantee's business. That goodwill, together with the benefit of the covenant, has been duly acquired by the respondent company. The appellant is persisting in a course of conduct completely at variance with the terms of the covenant. The position is exactly that which obtained formerly when a covenant and a continuing breach had been established at law and the covenantee prayed an injunction. Unless the covenantor established affirmatively some definite ground upon which it would be inequitable to grant the relief, the covenantee was unconditionally entitled to an injunction. If the covenantor sets up grounds which do not give him an equity to restrain the covenantee from enforcing the covenant at law, in considering their sufficiency to induce the Court to withhold specific relief the fact cannot be left out of account that a continuance of the covenantor's conduct exposes him day by day to repeated actions for damages, and that

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a refusal of the injunction turns the covenantee to that remedy. When the covenantor relies upon the conduct of the party entitled to the benefit of the covenant as implying consent or acquiescence, an essential matter is the covenantor's own belief that the covenant was not insisted upon, or that his failure to observe it would be permitted, and his acting upon the faith of that belief.

In the present case the appellant was repeatedly warned both by Moss when manager for the receiver and by the receiver's solicitors that he was required to desist from breaking the covenant. He knew that the greatest objection to his carrying on existed on the part of those entitled to speak for the liquidating company. During the period when he commenced his business and when his brothers guaranteed his bank account, he knew that he was acting without the consent, indeed, in face of the objection of the covenantor, the liquidating company. In his evidence he did not say that he acted in the belief that the covenant would not be enforced against him. What he does say is that, without the assent of White and Dutton, he could not have continued to establish his business, because without their expressions of acquiescence his brothers would not have guaranteed his bank account. It can scarcely be doubted that he knew they then had no authority to waive the covenant. When, on 13th March 1934, the respondent company took over the business, did he believe that White's and Dutton's consent continued, and, because they were its directors, became, so to speak, the consent of the respondent company? Nowhere in his evidence does he say so. He had received a most emphatic protest from Moss on 12th January 1934, who, although he may have written as manager for the receiver, was the secretary of the new company. Moss continued to manage the business when the new company took it over. The appellant did not consult or communicate with either White or Dutton, nor did his brothers.

So far from acting in accordance with the views they had expressed to his brothers in September 1933 about Butt, he undertook the agency in Butt's new firm. Vaguely as the condition about "keeping away from Butt" was expressed, to become his firm's agent and to advertise the agency can scarcely be consistent with it.

The appellant's evidence reads as if he knew full well in March, April and May 1934 that his carrying on business was objected to by the respondent company.

Nicholas J. has found that the appellant did not carry on business in reliance on the assurance or assurances given. His evidence and his conduct convinced His Honor that for some reason he did not take the permission seriously into account when deciding his course of action.

The appellant has failed to establish that at any time he acted upon the faith of a belief that the covenant was not insisted upon induced by the respondent company or its predecessor in title. He cannot succeed upon the ground of laches or acquiescence.

The other ground relied upon by the appellant is that, during the latter part of the period of the appellant's service under the agreement made between him and John Pringle & Co. Ltd., the latter failed to pay him the full amount of weekly wage stipulated for. It is said that his agreement of service was intimately bound up with the giving of the covenant, and afforded to him a material inducement to enter into the covenant. To defer payment of a portion of his wages was to deprive him of some of the advantages he looked for in giving the covenant, and the covenantee having committed a breach of contract of this character could not obtain an injunction. The covenantee's assignee could be in no better position.

This argument cannot be sustained. It is not every failure by the covenantee to observe stipulations entered into as part of transactions in which the covenant was given that disentitles the covenantee to an injunction. If, by reason of the covenantee's own failure to perform interdependent covenants made by him, the covenant has ceased to bind the covenantor at law, there is no obligation to enforce by injunction. It is, of course, plain that in the present case the contract of service could not operate to create a collateral condition upon which the covenant depended. But there may be cases, both in covenant and in simple contract, where, although the obligation for the enforcement of which an injunction is sought continues to subsist at law, either because there has been an election to affirm, or because a right to treat the obligation as discharged did not arise, yet in equity an injunction would be refused

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because it would be inequitable to require the obligation to be carried out specifically by a person who has through the default of the other contracting party failed to obtain a material part of the consideration which induced him to enter into the obligation. But the present case is not of that description. The service agreement was terminable at the option of either party and gave the appellant no security of tenure. The only departure from its strict terms was to hold over payment of a small part of his salary thereunder. Had the appellant persisted in his objection to this course, it would have been open to John Pringle & Co. Ltd. to terminate the service agreement. He did not do so and went on under the agreement until it expired.

For these reasons the appeal should be dismissed with costs.

STARKE J. The case cannot be made any plainer than the judgment of *Nicholas* J. has made it. In my opinion, that judgment should be affirmed and this appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *E. W. Doust*, Guyra, by *C. A. Morgan & Stevens*.

Solicitors for the respondent, *Mackenzie & Biddulph*, Guyra, by *Biddulph & Salenger*.

J. B.