

thrown into cold water, and was obliged to remain for some hours in his wet clothes. He says he has suffered from the shock and from rheumatism. I do not think we can interfere as to the amount of damages (\$200).

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

APRIL 18TH, 1903.

DIVISIONAL COURT.

BERRY v. DAYS.

Covenant—Restraint of Trade—Breach—Injunction—Damages—Waiver—Assignment of Covenant.

Appeal by defendant from judgment of MACMAHON, J. (1 O.W.R. 909), in favor of plaintiffs in action to recover damages for breach of a covenant by defendant not to enter into business as a druggist, and not to open a third or further drug-store in the village of Lucknow, and for an injunction. The trial Judge granted an injunction and directed a reference to assess damages. Defendant was selling out to plaintiff Berry one of the only two drug-stores in Lucknow; it was considered necessary that he should not for five years either open a new drug-store, or go into business with the other existing one. After five years he might go into business with the other existing one, or buy it out, but he must not for a further period of five years open a new one, so as to increase the competition in Lucknow. There were, therefore, for the first five years two concurrent covenants, one of which continued beyond the five years for a further period of five years.

J. A. Paterson, K.C., for defendant.

W. Proudfoot, K.C., for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) held that the assent of plaintiff Berry to defendant's carrying on the original business with Berry's son during the first five years did not affect the covenant not to open a third business in Lucknow. The covenant is separable into two parts, and one part may survive the other. A covenant such as this is assignable, and the right to enforce it does not terminate by reason of plaintiff having gone out of business himself: *Hitchcock v. Coker*, 6 C.B. 438; *Elves v. Crofts*, 10 C.B. 241; *Jacoby v. Whitmore*, 49 L. T. 335. Judgment to stand, and defendant to be restrained from opening, carrying on, or having part in a further business in Lucknow during the period of ten years from 21st September, 1900. No reference as to damages. Defendant to pay costs of action and appeal.