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*Feb. 28.

*May 6.

THE NORTH AMERICAN GLASS COMPANY (DEFENDANT)..... } APPELLANT;

AND

MAURICE BARSALOU (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT MONTREAL.

Contract—Construction of—Agreement to discontinue business—Determination of agreement.

B., a manufacturer of glassware, entered into a contract with two companies in the same trade by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace" and the payments to B. should then cease unless he could show "that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day.

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to show that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity whether it was actually produced or not.

APPEAL from a decision of the Court for Lower Canada, sitting in review at Montreal, affirming the judgment in favour of the plaintiff.

The action was brought by Barsalou to recover moneys due under a contract between him and the appellant and the Hamilton Glass Co. The substance of the agreement and nature of the matters in issue be-

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

tween the parties is sufficiently indicated by the above head-note and fully set out in the judgment of this court. The Superior Court held that plaintiff was entitled to recover and its judgment was affirmed on review.

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Martin Q.C. (of the Ontario bar) and *Martin* for the appellant.

Beique Q.C. and *Geoffrion* Q.C. for the respondent.

FOURNIER J.—I am of opinion that this appeal should be dismissed for the reasons given by Mr. Justice Taschereau.

TASCHEREAU J.—The facts which gave rise to this litigation are as follows:—The parties, appellant and respondent, were, previous to the month of May, 1889, engaged in the manufacture and sale of glass and glassware, having their principal places of business in Montreal.

The Hamilton Glass Company was engaged in the said business at Hamilton, in Ontario.

On the seventh of May, 1889, an agreement was entered into between these parties, by which it was stipulated that as the appellant and the Hamilton Glass Company, in view of increasing their works and production thereof, were interested in prevailing upon respondent to discontinue the manufacture of glassware, the respondent covenanted to discontinue such manufacture of glass and glassware for a period of five years from the 15th of May, 1889, in consideration whereof the appellant agreed to pay him quarterly the sum of one thousand two hundred and fifty dollars during said period, and the Hamilton Glass Company agreed to pay him, quarterly, the sum of seven hundred and fifty dollars.

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Provision was also made in the said contract for the purchase by the appellant and the Hamilton Glass Company of the raw materials of the respondent; also for cancelling the same in case any furnace or furnaces should be started for the manufacture of glassware during the said period of five years.

This contract was carried out until the fall of 1891. In November, 1891, the appellant, learning that other firms were manufacturing glassware at or near New Glasgow, N.S., assumed to elect to cancel the contract. Had it the right to do so, is the point in controversy.

The case turns upon the construction and interpretation of that clause of the contract by which the parties could bring the agreement to an end. It reads as follows:

> It is, however, agreed that in case at any time during said period of five years any furnace or furnaces shall be started for the manufacture of glassware, (except black beer bottles and window glass,) by any party or parties other than the said parties of the second and third parts, directly or indirectly, then the said parties of the second and third parts or either of them, if they deem it expedient may, by giving notice in writing to the party of the first part, bring this agreement to an end as on the first day on which glass has been made in said furnace or furnaces, after which notice no further payments shall be made to the party of the first part, except that it can be shown by the party of the first part to the said parties of the second and third parts that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day, calculated on present selling prices, in which case the quarterly payments shall be continued to said party of the first part.

What is the true meaning and construction to be given this clause of the contract?

The respondent contends that it means an actual production and output of manufactured goods exceeding one hundred dollars per day on an average during the whole year.

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Appellant contends that what respondent was required to show is that the furnace or furnaces, which had been started, could not have a production, or in other words a capacity, to produce one hundred dollars per day, that is to say:—What was the capacity of production of the furnaces in question, at the time the notice was given, on the 15th of November, 1891?

The Superior Court held that the parties to the contract had in view a regular, uniform and maintained production of one hundred dollars per day, during the ordinary period of running such furnaces, per year, to wit: during ten months of the year; and that judgment was confirmed in review. Hence the present appeal by the North American Glass Company.

I am of opinion, though not without some hesitation, that the appeal should be dismissed. The case is not free from doubt, but we cannot reverse upon a doubt. Reading the agreement between the parties, in the light of the surrounding circumstances, we cannot say that the courts below were wrong in holding that what the parties intended was not to provide for the case of a possible capacity of producing more than $100 worth per diem, but for an actual production to that amount.

The mere capacity of producing more than $100 per diem could not have been intended, because that alone would not have affected the appellants.

It is the actual production that would have been hurtful to their interests, and the only one which it is reasonable to assume they provided for.

As to the facts of production by the Nova Scotia Company we cannot interfere with the findings of the courts, which are entirely borne out by the evidence. The plea of illegality of the contract was declared before us to have been abandoned, as had been done in the courts below.

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The plea that this contract was in restraint of trade and null on grounds of public policy was abandoned in the courts below, and has not to be determined by us. In fact the defendant also abandoned it expressly at the hearing here.

I would dismiss with costs.

GWYNNE J.—The only question in this case is as to the construction of a clause for defeasance of an agreement bearing date the 7th day of May, 1889, by which agreement, in consideration of the plaintiff, at the request of the defendants, discontinuing his business of manufacture of glass and glassware for the period of five years from the 15th of the said month of May, the defendant promised to pay him quarterly during the said period of five years the sum of $1,250, the first payment to be made on the 15th day of August then next. The clause of defeasance contained in the agreement is to the following effect:

> It is, however, agreed that in case at any time during said period of five years any furnace or furnaces shall be started for the manufacture of glassware, except black beer bottles and window glass, by any party or parties other than the said parties of the second and third parts, directly or indirectly, then the said parties of the second or third part, or either of them, if they deem it expedient may, by giving notice in writing to the party of the first part, bring this agreement to an end as on the first day on which glass has been made in said furnace or furnaces, after which notice no further payments shall be made to the party of the first part, except that it can be shown by the party of the first part to the said parties of the second and third parts that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day, calculated at present selling prices, in which case the quarterly payments shall be continued to the said party of the first part.

The plaintiff is the party of the first part to the agreement, the defendants are the party of the second part, and a glass manufacturing company called the Hamilton Glass Company the parties of the third part

above mentioned. The object which the parties of the second and third part had in view in procuring the plaintiff to give up his business for the period of five years was to endeavour thereby to reserve to themselves as much as possible the benefit to be derived from such his retirement, and the clause of defeasance was inserted to enable them to obviate the effect of their business being interfered with by a new production of glass exceeding in value $100 per day at the then prices. The clause may not be very felicitously expressed, but it is, I think, sufficiently clear that the intention of the parties was that the parties of the second and third parts should assume the risk of all injury which should befall their business from new factories being started whose daily production should not exceed in value $100.

We cannot, I think, hold that the plaintiff was consenting that the defendants should have it in their power to evade the payments they had agreed to make to him for the consideration he had given if, for example, a stranger or strangers should erect a building supplied with a furnace or furnaces having capacity to manufacture glass of greater value than $100 per day, but in which no glass at all should in fact be produced; that very plainly was not the intention of the parties for the clause provides that upon notice of the determination of the contract being given the agreement shall be determined as on the first day on which glass has been made in the furnace. So neither could it have been the intention that the defendants could arbitrarily terminate the agreement if a new factory started having a furnace of capacity sufficient for the manufacture of glass to an amount exceeding in value $200 per day should be shown to have never exceeded in actual production $50 worth per day during the whole glass making season. Such a construction would

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be so utterly illusory and one-sided as plainly to evince that it could not have been the intention of the parties. Injury from a production exceeding in value $100 per day is what the defendants were providing against, not the capacity to produce a non-produced excess of that quantity.

Then the expression "could not have a production of more than $100 per day" plainly shows that what was intended to be guarded against was not the production of more than $100 worth upon one day—or occasionally—or upon a few days, but the interference with defendants' business by a continuous production of glass of greater value than $100 per day, that is daily for some, though undefined, continuous period, and of this opinion the defendants themselves appear to have been, for to this action which is brought to recover the quarterly payments which accrued due from the defendants upon the 15th November, 1891, and the 15th February, 1892, the defendants justify their terminating the agreement under the provisions of the above clause in the agreement by the following plea upon which is raised the only issue between the parties to this action. They say—

that during the summer of eighteen hundred and ninety-one, two other factories were carrying on the manufacture of glass (not black beer bottles or window glass), in the county of Pictou in Nova Scotia, namely, one D. B. Humphrey & Company and another firm of Lamont Brothers, which said factories combined did have a daily production of more than two hundred dollars, and said factories continued in operation during the summer and fall of said year eighteen hundred and ninety-one, and are in operation up to the present time and are still producing more glassware of a value greater than one hundred dollars per day; that when the defendants became aware of the said facts they notified the plaintiff that they cancelled the said contract and would no longer continue the payment of the sums of money therein stipulated.

In thus construing the clause of defeasance as the defendants have here done, as pointing to a daily pro-

duction of glassware exceeding in value one hundred dollars, they have, I think, correctly construed it; and the evidence, in my opinion, justified the finding of the learned trial judge and of the learned judges in the court of review that the factories in question did not have a daily production of glassware exceeding one hundred dollars in value, and that the contingency upon which the defendants have vested their asserted right of determining the contract had not arisen when they gave the notice on the 17th November, upon which they rely. The appeal must therefore be dismissed with costs, and the judgment below affirmed.

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SEDGEWICK and KING JJ.—Concurred.

Appeal dismissed with costs.

Solicitors for the appellant: *Girouard, Foster, Martin & Girouard.*

Solicitors for the respondent: *Beique, Lafontaine, Turgeon & Robertson.*