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Tuesday, March 19.

### FIRST DIVISION.

[Lord Stormonth Darling,  
Ordinary.]

#### STEAMSHIP "STATE OF CALIFORNIA" COMPANY, LIMITED v. MOORE.

*Principal and Agent—Agreement to Work Ship—Obligation of Agent to Continue Business during Fixed Period.*

An agreement was entered into between the State Steamship Company, owners of a line of steamers running between Glasgow and New York, and the Steamship "State of California" Company, which had been formed to acquire a new steamship, whereby the State Company undertook to run this steamship as one of their own line in regular turn, giving her "the same attention in all respects, and in the same manner as if she was one" of their own steamers. As remuneration for these services the State Company were to receive a brokerage of  $7\frac{1}{2}$  per cent. on the nett amount received by the steamer for ocean carriage, and a further commission on the nett profits, if they exceeded a specified amount. It was further provided that the contract should subsist for ten years from the date of the launching of the steamer. Before the steamer was ready for sea the State Company went into liquidation, and the "State of California" Company lodged a claim of damages in the liquidation for alleged loss of profits consequent on the State Company's failure to fulfil its agreement.

*Held* that the contract was one of agency, and was contingent upon the State Company continuing to run their line; that they were under no obligation to maintain their line for ten years, and therefore were not liable in damages.

On 11th December 1889 a company was incorporated under the title of the Steamship "State of California" Company, Limited, with the object of acquiring a new steamship of the most modern type, to be run under agreement with the State

Line Company as one of their line of steamers between Glasgow and New York.

On 10th December 1889 a minute of agreement was entered into between the State Line Company and the new company with reference to the new ship which was to be built for the latter. The agreement provided—"Whereas it has been arranged between the parties that the first party (State Line Company) shall work and sail for the second party ("State of California" Company) the said steamship in their Transatlantic service along with their own steamers engaged in the same service. . . . This minute witnesseth . . . "First, the manager for the time being of the first party shall be the manager of the said steamship, and shall be registered as managing owner thereof. *Secondly*, the first party shall give the said steamship her regular turn in their Transatlantic service along with the other steamers belonging to or managed by them, and shall give it the same attention in all respects, and in the same manner as if it was one of the first party's own steamers. *Thirdly*, This contract shall subsist for a period of ten years from and after the date of the launching of the said steamship, . . . unless brought to an end as hereinafter provided. . . . *Sixthly*, the first party shall not have power to withdraw the said steamship from their line, or to employ it in any other trade except with the consent of the second party." The *eighth* clause provided that the first party should pay expenses of management, and certain other expenses. In the *ninth* place it was provided—"The first party shall receive as remuneration for the above services a brokerage at the rate of  $7\frac{1}{2}$  per cent. on the nett amount received for ocean carriage, . . . and a further commission of 5 per cent. on the nett profits . . . where such nett profits exceed 6 per cent. on the whole paid-up capital of the second party." . . .

On the 10th December a further agreement was entered into between the two companies and Messrs Stephen & Sons, who undertook to build the new steamship, to be called the "State of California," at the price of £97,600.

The steamer was launched on 29th January 1891, but before she was ready for sea, on March 4th, the State Company went into liquidation, Alexander Moore, C.A., being appointed liquidator. The State Company being thus unable to perform her part of the above agreement, the "State of California" Company, after endeavouring unsuccessfully to sell the vessel, on 29th July 1891 arranged with Messrs Allan, Glasgow, for her to be run as one of the Allan Line between Glasgow and New York.

Thereafter the "State of California" Company lodged a claim in the liquidation of the State Company for £20,000, as the amount of damage sustained by the claimants through alleged breach of contract on the part of the State Company.

On 13th October 1893 the liquidator rejected this claim—" (3) Because the claim-

ants have sustained no loss for which the State Steamship Company is liable."

The claimants appealed against the delivrance of the liquidator. They lodged condescence, in which, after narrating the facts set forth above, they averred that owing to the steamer having been built for a particular trade they were unable to sell her except at a loss, and that their contract with the Allan Line was less remunerative than the original one. They claimed damages for expenses while the steamer was laid up, and loss of profit, and pleaded—"In respect the appellants have suffered and will suffer loss and damage to the amount claimed, through the fault and breach of contract of the State Company, the delivrance appealed against ought to be recalled, and the respondent ought to be ordained to rank the appellants for the amount claimed." . . .

The respondent pleaded—"(1) The contract alleged was conditional on the State Steamship Company continuing its business. (2) The appellants are not entitled to the ranking claimed in respect no breach of contract has been committed by the State Steamship Company."

On 10th November 1894, after a proof, the Lord Ordinary (STORMONTH DARLING) sustained the first and second pleas in law for the respondent, and in respect thereof dismissed the appeal and sustained the delivrance of the liquidator.

"*Opinion.*—This is an appeal by the 'Steamship State of California Company' against a delivrance of the liquidator of the State Steamship Company rejecting their claim for £20,000 of damages, and the question is whether the company in liquidation have committed a breach of their contract with the appellant company, and if so, what damages are due?"

"The first thing to consider is the contract alleged to have been broken. It was made in December 1889, and it came about in this way. The company in liquidation had been for many years running a line of steamers between Glasgow and New York known as the 'State Line.' They found it necessary to reinforce their fleet with a new steamer of a high class, and instead of having one built on their own orders, they made this contract with a new company, which was really an offshoot from the parent stem, for it consisted largely, if not entirely, of persons who were shareholders in the State Company. The contract proceeded on the narrative that it had been arranged between the parties that the California Company should build a new vessel, and that the State Company should work and sail her 'in their Transatlantic service along with their own steamers engaged in the said service.' Then it went on to provide that the State Company should give the new vessel her regular turn in their Transatlantic service along with the other steamers belonging to or managed by them, and should give her the same attention in all respects and in the same manner as if she were one of their own steamers. The contract was to subsist for ten years from the date of launching (unless

terminated by either party in the event and in the manner provided by articles 4 and 5), and the pecuniary stipulations were that the new vessel was to have full advantage of all contracts for freight, passengers, and stores, and of all rebates, commissions, and so on, just as if she were one of the State Company's own steamers, and that the State Company were to pay all general expenses, in consideration of which they were to receive brokerage at the rate of 7½ per cent. on the net amount received for each voyage, and a further commission of 5 per cent. on the net profits when these exceeded 6 per cent. on the paid-up capital of the California Company.

"Working expenses of the kind usually charged by the State Company against their individual steamers were to be charged against the earnings of the new vessel, and the profits (subject to commission) were to go to the California Company.

"The 'State of California' was built at a cost of over £102,000, and was launched on 29th January 1891. On the 4th March of that year the State Company went into liquidation. The California Company had to lay up the vessel for a time, during which they endeavoured to sell her, but they failed in procuring a sufficiently good offer, and ultimately they made an arrangement with Messrs Allan of Glasgow for having her run as one of the 'Allan Line.' Their claim of damages consists of the expenses of laying her up, and of the loss of profit arising from the contract with the 'Allan Line' being less advantageous in many respects than the contract with the State Company.

"Now, what was the effect of the contract which I have summarised, and did the State Company commit a breach of it when they went into liquidation and ceased to carry on business?"

"In my opinion there was no breach, for the contract is undistinguishable in principle from the contracts in *Rhodes v. Forwood*, 1 App. Cas. 256; and *Patmore & Company*, 19 R. 1004. The true meaning of the contract was, I think, that the California Company were to follow the fortunes of the present company. All that they stipulated for was that their vessel should get her regular turn along with the vessels of the State Company, and should be treated exactly as if she were one of these. But they did not stipulate either expressly or by implication that the State Company should work their Transatlantic service in any particular way, or that they should continue to work it at all. Indeed, the present case is stronger than either of those I have cited, for in *Rhodes* the colliery was voluntarily sold, and in *Patmore* the business was voluntarily given up. Here the California Company seem to have trusted to the State Company continuing their line for their own interest, and no doubt they would have done so if they had not been compelled to go into liquidation.

"It is quite a different case where one party contracts to employ another for a certain period at a fixed salary. That is a positive and absolute undertaking to do a

certain thing, and the party failing to do it must pay damages. The difference is very well illustrated by the case of *ex parte Maclure*, L.R., 5 Ch., App. 737, where an insurance company had appointed an agent for five years at a fixed salary and a commission of 10 per cent. on all business transacted, and the company went into liquidation. The agent was held entitled to rank for his salary, but not for his commission, on the ground that, as regards the latter, he had taken his chance of the company carrying on its business. The concession that there was a breach of contract in *Ross v. Macfarlane*, 21 R. 396, is explainable on the same principle.

“I was referred to the case of *Turner v. Goldsmith*, L.R. 1891, 1 Q.B. 544, as an instance of a party not being held excused from performance of his contract to employ a commission agent even by the destruction of his manufactory. But great stress was laid in that case on the plaintiff’s employment not being confined to articles manufactured by the defendant, and the distinction between such a case and the class to which, in my opinion, this case belongs (though it may be a fine one) is well brought out by the quotation from Lord Blackburn in Lord Justice Lindley’s opinion at pp. 549-50 of the report.

“I shall therefore sustain the first and second pleas for the respondent, but as these pleas were only added at the last moment, he must bear all the expenses of a totally unnecessary proof.”

The appellants reclaimed, and argued—There was an obligation on the State Line Company to carry out the agreement for 10 years; this was expressly stated in the third article of the agreement after the nature of the contract had been described. In the case of *Turner v. Goldsmith*, L.R. 1891, 1 Q.B. 544, an absolute obligation to keep on supplying goods had been read into the contract by the Court, but this was an even stronger case, there being an *ex facie* obligation in the contract. The company by their voluntary Act had ended the possibility of carrying out the obligation, and were therefore liable in damages—*M’Intyre v. Belcher*, June 15, 1863, 14 C.B. (N.S.) p. 654; *Hamlyn & Company v. Wood*, July 30, 1891, 2 Q.B. 488; *re Patent Floor-Cloth Company*, March 7, 1872, 26 L.T. (N.S.) p. 467. This contract was partly one of *locatio*, and partly one of agency. The cases of *Patmore & Company v. Cannon & Company*, July 14, 1882, 19 R. 1004, and *Rhodes v. Forwood*, May 14, 1876, L.R., 1 App. Cas. 256, were clearly distinguishable from this case, for in the former there was no obligation on the defenders to continue supplying goods to the pursuers, while in the latter the obligation was to continue “for 7 years or as long as A should continue to carry on business.” Here there was no such alternative.

Argued for the respondent—This was a contract of agency pure and simple. It rested on the assumption that a certain state of things would continue, *i.e.*, that

the company would keep on running their line, and was contingent upon that. They were nowhere bound to keep it up, and the Court would be slow to read such an obligation into the contract—*M’Intyre v. Belcher*, *supra*. It was in the highest degree improbable that they could ever have intended to bind themselves to keep up their line even at a loss simply for their commission on this one ship. The appellants could not have asked for specific implement of the so-called obligation, and were therefore not entitled to damages—*M’Arthur v. Lawson*, July 19, 1877, 4 R. 1134. The cases of *Rhodes* and *Patmore* were directly applicable in principle.

At advising—

LORD ADAM—This is a claim brought by the State of California Steamship Company against the Liquidator of the State Steamship Company for damages in respect of an alleged breach of an agreement dated 10th and 13th December 1889, entered into between these companies.

It appears that the State Company had for many years carried on a regular series of sailings by their steamers between Glasgow and New York, once every five weeks, and established an extensive and valuable connection in the Atlantic trade.

It further appears that some of the shareholders of that company resolved to form a limited company for the purpose of procuring a new steamship, to be run under agreement with the State Company, in connection with their steamers, and as one of their regular line.

The formation of the State of California Steamship Company was the result. That company in December 1889 entered into a contract for the building of the Steamship “State of California,” and of the same date they entered into the agreement with the State Company which that company is said to have broken.

The general purport of this agreement was that the State Company should work and sail for the California Steamship Company the new steamship in their Transatlantic service, along with their own steamers engaged in the service; and that they should give the steamship her regular turn along with the other steamers belonging to or managed by them.

The State Company undertook to render various services set forth in the agreement, and as remuneration for their services they were to receive brokerage at the rate of 7½ per cent. on the net amount received for ocean carriage, to be charged against each voyage, and a further commission of 5 per cent. on the net profits, when such profits exceeded 6 per cent. on the paid-up capital of the California Steamship Company.

The agreement was to subsist for ten years from the date of the launching of the steamship.

The steamship “State of California” was built and duly launched on 29th January, 1891. On the 4th March 1891, however, before she was completely finished and ready for sea, the State Company went into liquidation. Their fleet of steamers has

since been sold, and they are no longer carrying on the Transatlantic service previously carried on by them.

They have never worked or sailed the steamship "State of California," and are not in a position to do so.

The question is whether, in so failing to work and sail the steamship, the State Company have committed a breach of their contract with the Californian Steamship Company, and that leads us to consider more particularly the terms of that contract.

The preamble recites that it had been arranged that the State Company should work and sail the steamship in their Transatlantic service along with their own steamers engaged in the service, and the second, and as it appears to me, the leading article of the agreement on which the other provisions depend, provides that the State Company shall give the steamship *her regular turn* in their Transatlantic service along with the other steamers belonging to or managed by them.

This is the obligation which the State Company undertake as to sailing and working the steamship, and it appears to me that the breach of that obligation would have consisted in not giving the steamship *her regular turn* along with the other steamers belonging to or managed by them.

But that is not the nature of the alleged breach, which is that the State Company have failed to sail or work the steamship at all, and that raises the question whether in the circumstances which have emerged there was any obligation on the State Company to do so.

It appears to me that the true meaning of the contract is that the State Company were only bound to give the steamship *her "regular turn"* when and so long as they were carrying on their Transatlantic service.

It will be observed that the agreement postulates the existence of a Transatlantic service, for the "regular turn" is to be given in their Transatlantic service. Neither is there any stipulation in the contract as to how often *her "regular turn"* was to come round. It was left entirely in the option of the State Company, and dependent on the state of their business, how often it should come round, whether every month, or every two months, or every six months, yet it is obvious that upon this the profits which would be earned by the steamship depended.

This seems to me to point strongly in the direction that it was equally in the discretion of the State Company whether they should keep up any Transatlantic service at all.

It appears to me, therefore, that the Californian Ship Company cannot succeed in this claim unless they can show that there is an obligation, express or implied, on the State Company to keep up their Transatlantic service during the whole ten years of the agreement.

There is no express obligation to that

effect, and I think the implication is the other way.

I concur with the Lord Ordinary that the meaning of the contract was that the California Steamship Company was to follow the fortunes of the State Company, and that their vessel should get a regular turn along with the vessels of the State Company, but that they did not stipulate that the State Company should work their Transatlantic service in any particular way or at all.

I also concur with him that the case falls within the principle of the cases *Rhodes v. Forwood and Patmore & Company*.

I therefore think we should adhere.

LORD M'LAREN—If this had been a contract of location there would be no question but that the hirer would be bound to pay damages in lieu of the sum due for the uncompleted portion of the term of years.

But it is clear from the terms of the contract of agreement that no money was to be earned by the State Steamship Company except in the way of commission, and the whole profits made by the ship were to be paid over to her owners. In claims arising from an unfulfilled contract of agency, the Court will be very ready to imply a condition from the description expressed in the terms of the contract. This principle is often applicable to cases of contracts of agency for sale of goods, as, for example, where a manufacturer binds himself to send all his goods manufactured to an agent who undertakes to sell them. In such cases it has been held that the manufacturer is not bound to carry on his business at a loss for the whole period of the agency, but the condition is that so long as he continues to manufacture the goods he shall send them to the agent. Of course, as the principal is only conditionally bound, the agent is equally so, the contract being a mutual one with identical stipulations as to time and subject. This case appears to me eminently one for the application of this principle as expounded by Lord Adam. It is admitted, and indeed is self evident, that the ship would be of no value to her owners if run alone and independently of the State Line. The impossibility that the company could have intended to bind themselves to run their line for a period of ten years, even at a loss, furnishes the strongest reason for qualifying the agreement by adding the condition that it should continue only as long as they were working their line. Therefore, as this contract has failed, not by any wilful breach, but by the condition no longer existing under which it was to continue, I agree that no damages are due.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

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