

No. 9.

JAMES M'BRAIRE, Appellant.—*Abercrombie*.
G. and W. HAMILTONS, Respondents.—*Keay*.

Process—Society—Mandate.—Circumstances in which it was held (affirming the judgment of the Judge Admiral and the Court of Session)—1. That a defender, who was sued as the surviving partner of a Company, was not entitled to object that the representatives of a deceased partner were not called, seeing that he declined to state who or where they were.

2. That a Company having employed agents to freight vessels, who accordingly did so in their own name, and the Company having failed to implement the charter-party, was liable to relieve these parties from damages awarded against them for non-implementation; and,
3. That a decree which awarded a sum of sterling money, where the summons concluded for Halifax currency, was, quoad hoc, ultra petita, and a remit made to correct it accordingly.

Mar. 22, 1826.

1st DIVISION.
Bill Chamber.
Lord Eldin.

JAMES M'BRAIRE and Company were engaged in mercantile business, and had a house at St John's, Newfoundland. In September 1809, they wrote to George and William Hamilton of Quebec, (whom they were in the practice of employing as agents,) to freight for them a number of vessels for voyages from Quebec to Newfoundland, and from thence to Britain. In their letter they stated: 'We daily expect the schooner Hope from Scotland. She goes on immediately to Quebec. If you think there is a probability of bread and flour advancing at your market, please purchase on receipt of this 400 barrels of fine flour, (it must be fresh,) and 200 quintals of good biscuit, which will be about her cargo. Unless you are satisfied that the articles will rise, we would prefer your waiting for the vessel's arrival, as an accident may happen, and no vessel to be had to bring it down. It is highly probable that some vessels may come here, to proceed from hence with the cargoes on freight to Europe. We shall thank you to secure as many as you can for us. We shall load them in the usual time for Liverpool, Greenock, Bristol, Cork, Waterford, Portugal or Spain, if a trade with the latter country remains open. Our freights are as follows, when at the highest. To any part in Great Britain or Ireland, £5 per ton, of 256 gallons; for oil, 3s. 9d. to 4s. a quintal; for fish in bulk to Oporto, 4s. 3d. a quintal; for fish, Lisbon, 4s. 6d. do.; Cadiz, 5s. do.; Alicanta, 6s.; to Valencia, 7s. 6d. In either case, the shipper pays two-thirds port charges, and 2½ per cent primage on the freight. We are informed that Mr Colman's schooner, St Anne, is to return and to proceed to the eastward.

' If so, secure her. Colonel Caldwell writes us about a new brig Mar. 22, 1826.
 ' he has on hand ; if he sends her here, and places a price that we
 ' approve of, we will take her ; otherwise give her a good freight.
 ' We beg your attention to this business ; make the charters, and
 ' charge for your trouble. Send us as many vessels as you can ;
 ' we have a large collection of produce, and in the winter we
 ' are generally puzzled for store-room. Last winter we had not
 ' less than 1500 quintals of fish, 65 tons of oil, and 200 tons of
 ' salmon in the country, which is too much, with our remains of
 ' goods, and other property, to lie so many months inactive ; and
 ' although we expect several vessels, we shall be in want of ton-
 ' nage, in consequence of an abundant catch. We are thus far
 ' explicit, to press on you the service it will render if you pro-
 ' cure us a few vessels.' They also gave a discretionary order to
 purchase for them flour and bread. Hamiltons received this let-
 ter on the 24th of October 1809, and on the same day they re-
 turned an answer, stating, that ' We told China to give you the
 ' preference of loading the Mary at St John's, and Colman has
 ' promised us the refusal of the St Anne. People here laugh at
 ' the freights you talk of. Here vessels are in demand at £9 per
 ' registered ton, or 7 guineas, or 5 per cent per ton of 40 cubic
 ' feet, and we suppose seven or eight schooners would get loads
 ' down to you at £4 per ton, so that £4, 10s. for fish to Oporto
 ' sounds curious. We know we shan't be able to charter a ves-
 ' sel for you, but we will engage the preference, as if upon a
 ' speculation of our own, and give them orders to apply to you
 ' as our agents.' In another letter of the 27th of October, they
 wrote, that ' We have chartered the St Anne on the following
 ' terms : £4 per ton to St John's, and £6 from thence to Li-
 ' verpool ;' and after mentioning that they were to send the
 flour and bread by her, and other particulars, they stated, ' We
 ' have exceeded your limits, but are satisfied are correct, and
 ' that you will benefit by our doing so.' No objection was made
 by M'Braire and Company ; and on the 14th of November, a
 charter-party was executed between Hamiltons and the owners
 of the St Anne on the above terms, and by which the latter bound
 themselves to proceed with a cargo to St John's by the first op-
 portunity of wind and weather, and after discharging at that
 port, and receiving a new cargo, to sail to Liverpool as soon as
 wind and weather would permit. The vessel was loaded with
 flour and bread for M'Braire and Company, and sailed on the
 16th ; but in consequence of the winter setting in suddenly, she
 could not get out of the river, and was obliged to put back to
 Quebec, where she was detained until spring. Of this M'Braire
 and Company were made aware by several letters, of which,

Mar. 22, 1826. however, they took no notice. In May she again sailed, and arrived safely at St John's. M'Braire and Company received the cargo, but refused to accept the vessel for her ulterior voyage to Britain, as agreed upon in the charter-party.

In consequence of this breach of engagement, the owners of the St Anne instituted legal proceedings against Messrs Hamiltons, and recovered a verdict for £1000 Halifax currency of damages, with £30 of interest, besides costs. The institution of this action was announced to M'Braire and Company, who merely denied that they had anything to do with it. Thereafter Hamiltons raised an action before the Judge-Admiral against James M'Braire, as the only surviving partner of the house of James M'Braire and Company, in which, after mentioning the facts, they stated the result of the proceedings to be, that 'the pursuers
' were compelled to make payment to the owners of the St Anne
' of the foresaid sum of £1000 Halifax currency (equal to the
' sum of £900 sterling money of Great Britain),' besides interest and costs. And the summons concluded for 'payment to the
' pursuers of these several sums, viz. of the sum of £1000 Halifax currency, equal to £900 sterling money,' being principal sum, and also for interest and costs.

Against this action, M'Braire stated, as a preliminary defence, that the representatives of a deceased partner were not called; and, on the merits, that Hamiltons had exceeded their mandate as to freights—had been the cause of delaying the departure of the vessel—that they were aware that she was wanted only for the winter voyage, and that they ought, therefore, to have arranged the charter-party accordingly. In answer to these defences, Hamiltons denied that there was another partner, and required M'Braire to condescend on the names of his representatives; and stated that they had been ordered absolutely to secure the St Anne and other vessels; that the rate of freights specified in the letter of M'Braire and Company was not intended to form a limit, but merely to indicate what the rate at St John's was; that they had given due notice of having chartered the St Anne at a higher rate; that not only no objection was made, but M'Braire and Company had availed themselves to a certain extent of the charter-party by receiving the cargo; and that the delay in the sailing of the vessel arose from an accident alone, the consequences of which could attach only to M'Braire and Company, for whom she was engaged. The Judge-Admiral repelled the preliminary defence, 'in respect
' it is stated, on the part of the pursuers, that, prior to raising
' of this action, a letter was written by the pursuers' agent to

' the agent of the defender, calling upon him to point out where Mar. 22, 1826.
 ' the representatives of this deceased partner lived, or what
 ' other party the defender wished should be cited; that no an-
 ' swer was returned to this letter; and that the defender has
 ' not in any of his papers in this cause condescended on the
 ' names or residences of the representatives of the alleged de-
 ' ceased partner.' And on the merits, he found, ' that the let-
 ' ter of M'Braire and Company, of 16th September 1809, to the
 ' pursuers, contained, inter alia, a mandate to the pursuers,
 ' expressed in strong terms, to freight, for behoof of M'-
 ' Braire and Company, sundry vessels for voyages from Quebec
 ' to Newfoundland, and from thence to Britain, and, in parti-
 ' cular, gave instructions for the freighting of the schooner St
 ' Anne: That said letter contained a discretionary order to
 ' purchase a quantity of flour and bread for M'Braire and Com-
 ' pany, which it appears to have been intended should be ship-
 ' ped on board a vessel called the Hope, then expected from
 ' England: That said letter was received by the pursuers on the
 ' 24th of October following: That recently thereafter the pur-
 ' suers freighted the St Anne for behoof of M'Braire and Com-
 ' pany, of which immediate notice was given: That though, in
 ' the letter of M'Braire and Company to the pursuers, the
 ' freights at Newfoundland are specified, yet it does not appear
 ' to have been specially intended to tie the pursuers imperative-
 ' ly down to any specific freight: That though the pursuers
 ' communicated to M'Braire and Company, *quam primum*, the
 ' engagement of the schooner and the rate of freight, and though
 ' it is ascertained that the pursuers' letters were received by
 ' M'Braire and Company, no complaint was made by the latter
 ' of the rate of those freights until the present question arose
 ' between the parties: That in resolving to send the flour and
 ' bread by the schooner St Anne (the Hope never having ar-
 ' rived), the pursuers complied with the spirit of M'Braire and
 ' Company's instructions: That the St Anne proceeded on her
 ' voyage as soon as these goods were put on board, and that no
 ' blame is imputable to the pursuers for the subsequent putting
 ' back and detention of the vessel at Quebec during the winter:
 ' That though some articles belonging to the pursuers were put
 ' on board the vessel, yet no facts and circumstances have been
 ' condescended on by the defender to justify the assertion that
 ' this was the cause of the vessel's detention: That, therefore,
 ' M'Braire and Company having refused to implement the char-
 ' ter-party, the defender is liable to relieve the pursuers of all
 ' the damage which they have sustained thereby: That the
 ' foreign decree founded on by the pursuers comprehends the

Mar. 22, 1826. ' claim of damages made by the owner of the vessel against
 ' them, in consequence of the breach of the charter-party, which
 ' was occasioned by the refusal of M'Braire and Company to
 ' implement the same, and appears ostensibly to be the measure
 ' of the claim now competent at the instance of the pursuers
 ' against the defender;' but, before answer as to the amount,
 appointed the defender to state any objections he had to the
 decree. The defender having declined to do so, the pursuers
 lodged a condescendence of their claim, which they stated to be
 £1030, consisting of £1000 of principal and £30 of interest,
 besides costs, making in all £1083, 7s. 6d. On advising that con-
 descendence, the Judge-Admiral ' sustained the same, amount-
 ' ing to the sum of £1083, 17s. 6d. with interest,' &c. and de-
 cerned accordingly; and thereafter, on considering a petition
 for the pursuers, he decerned, ' in addition to the sums former-
 ' ly found due against the defender, for interest upon the prin-
 ' cipal sum of £1067, 1s. 6d. sterling, from the 14th day of De-
 ' cember 1819,' the date of the foreign decree.

The defender then presented a bill of suspension, which, to-
 gether with answers, having been reported by the Lordordi-
 nary on the Bills, the Court refused the bill, with expenses;
 and, on advising a petition and answers, on the 19th May 1825,
 adhered.*

Lord President.—The letter of M'Braire and Company was
 not intended to limit Hamiltons as to the rate of freight. It
 merely mentions what was the rate at St John's. Throughout
 the letter they express great anxiety to have vessels secured for
 them, and mention, that, if they cannot agree with Colonel
 Caldwell for the purchase of his vessel, they will ' give her a
 ' good freight.' As to the delay, it certainly appears somewhat
 extraordinary that, at the season of the year when M'Braire
 and Company wrote to Hamiltons, they did not (as is now pre-
 tended) contemplate the possibility of the vessels being detained
 by the frost. I am clear that the bill should be refused.

Lord Gillies.—I am of the same opinion. M'Braire now at-
 tempts to take advantage of the specification of the rate of
 freights in the letter; but it is clear that the Company did not
 intend to limit Hamiltons to that rate; and accordingly no ob-
 jection was made to that at which the vessel was afterwards
 chartered.

Lord Succoth.—I am satisfied that the instructions were not
 positive as to the rate of freights. The specification of them was

* See 4 Shaw and Dunlop, No. 17.

intended as a mere *vidimus*, and not to limit Hamiltons in procuring vessels. The ice appears to have set in earlier than usual, and no fault is ascribable to Hamiltons. I had some difficulty at first as to the allegation that she had been detained in order to put the goods of other people on board; but that is now satisfactorily explained. Mar. 22, 1826.

Lords Hermand and Balgray concurred.

The defender appealed, and, in addition to his former pleas, maintained, that the decree of the Judge-Admiral was *ultra petita*, because it decerned for sterling money, whereas the conclusion of the summons was limited to Halifax currency.

LORD GIFFORD, after observing that he had heard nothing to impeach the judgments on the merits, but as there had been an inaccuracy in relation to the sum decerned for, no costs ought to be allowed to the respondents, moved, and the House of Lords ordered and adjudged, 'that the several interlocutors complained of in the said appeal, except as to the amount of the damages decerned for, be, and the same are hereby affirmed; and the Lords find that the claims of damages by the respondents (the pursuers) were for a sum in Halifax currency, with interest, whereas, by the interlocutors complained of, such damages have been decerned for in sterling money; and therefore, it is ordered that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of in this respect, and to find what sum in sterling money the pursuers ought to receive in respect of the damages decerned for: And it is farther ordered, that the several interlocutors be varied accordingly.'

J. CAMPBELL—SPOTTISWOOD & ROBERTSON, Solicitors.

ELIZABETH W. FRENCH, or HAY, and TRUSTEES; and A. NEISH, No. 10.
Appellants.—*Buchanan—Tindal.*

J. MARSHALL, (Hay's Trustee,) Respondent.—*Keay—Menzies.*

Competition—Right in Security—Poinding—Bankrupt—Held (affirming the judgment of the Court of Session) That the holders of heritable bonds, who had not used poinding of the ground, had no preference over the proceeds of the moveables found on the ground, in a question with personal creditors claiming under a sequestration of the estates of the proprietor.

By an antenuptial contract, between Miss Elizabeth Well-wood French and Mr Hay, her own fortune was secured to her- Mar. 22, 1826.