PLEA SIDE.

JOSEPH AGABEG CARRYING ON TRADE AND BUSINESS IN PARTNERSHIP WITH JOHANNES AGABEG & AVETICK GALSTIN UNDER THE NAME AND FIRM OF AGABEG BROTHERS *v.* GEORGE JELLICOE. (1847. *Feb.* 2).

Charter-party Partners—Authority to sign—Right to sue—Penalty—Liquidated damages.

One Partner cannot bind another by deed without the express assent of the latter: such act being beyond the ordinary scope of a partner's authority. J.A. (the plaintiff) entered into a contract under seal, but signed the instrument in the name of his Firm.—*Held* that he was sole covenantee, and therefore, rightly sole Plaintiff on record.

By one of the covenants of the Charter-party it was provided, that if the Charterers (Plaintiff) or their Agents in Rangoon refused to give a full cargo of teak timber to the Vessel, they should pay a damage of Rs. 4,000 to the Defendant, as the probable amount of freight expected to be brought by the Vessel—likewise—If the Defendant or the Commander of the Vessel refused to fulfil the contract in bringing up a cargo of Teak timber for the plaintiff; the Defendant should pay a damage of Rs. 4,000 to the Charterers.—*Held* to be in the nature of penalties and not liquidated damages.

COVENANT on a charter-party in the following terms: "This Indenture, made and agreed to the 10th day of April, 1845, between Captain G. Jellicoe of Calcutta, of the one part; and Messrs. Agabeg Brothers of the other **[52]** part; Witnesseth, that the said Captain Geo. Jellicoe (owner of the ship or vessel called the "Stalkart" of the burthen of tons or thereabouts, whereof A. R. Dixon is the Master, now riding at anchor in the river Hooghly, and bound to Port Louis, Mauritius, with a cargo of sundries,) consents and agrees to let, hire, and charter the said vessel, to the said Messrs. Agabeg Brothers, and the said Messrs. Agabeg Brothers consent and agree to hire, freight, and charter the said vessel from the said Capt. Geo. Jellicoe, for a voyage from Rangoon to Calcutta, upon terms and conditions, and for the considerations as follow: That is to say that said Capt. Geo. Jellicoe shall and will cause the commander of the said vessel, or their agents at the Island of Mauritius, on the arrival of the said vessel at Port Louis, to discharge the whole cargo of the said vessel without the least delay or loss of time, and immediately after such discharge or unloading, to cause to proceed, to send or despatch the said vessel to the Port of Rangoon, and on the said ship's arrival there, a report of her being ready to receive cargo to be made, given, or sent by the Commander or Captain to the Agent of the said Messrs. Agabeg Brothers at Rangoon, (Mr. G. S. Manook,) and, in his absence, to any other person or persons acting for him; and that the said Agent or Agents of the said Messrs. Agabeg Brothers at Rangoon, on receiving such report or notice as aforesaid from the Commander of the said ship, shall and will, on behalf of the said Messrs. Agabeg Brothers, fill and load the said vessel with as much cargo of marketable and sound teak timber, (consisting of masts and keel pieces, duggies, coozars, shinbins, gun-carriage pieces, and sheathing boards) as she can safely take and carry in her hold, and between decks. It is

hereby agreed and consented to, that the said Capt. Geo. Jellicoe shall and will pay all such Port charges as may be incurred by the **[53]** said vessel at the Port of Rangoon, with the sole exception of landing charges. It is hereby further agreed and consented to, that immediately after the said vessel is so loaded and filled with cargo of timber, the Commander of her shall and will proceed in the same to Calcutta, and the whole cargo of timber that the ship shall have brought, shall be landed, and sold and disposed of by Public Sale at Calcutta, and the net proceeds of such cargo of timber, on a deduction therefrom of all such charges as are common and usual, namely, all loading charges at Rangoon, Auctioneer's Agent's commission, cooly and boat hire, ground rent, and rope for rafters, divided into equal parts, a portion or moiety whereof paid to the said G. Jellicoe as owner of the said vessel for rent hire, or consideration of the said ship, and the other half taken by the said Messrs. Agabeg Brothers for themselves as the value of such timber ; save and except the freight on sheathing boards, which will be calculated at the rate of 25 per cent. as usual. The payment of such freight will be made 33 days after landing the whole cargo of the said vessel at the Port of Calcutta. Freight of any kind or description soever, that the said vessel may bring up in such Ports and places where she cannot possibly carry timber, to be owned and retained wholly by Geo. Jellicoe, the charterers, Messrs. Agabeg Brothers, to have no claim to or share in it. Thirty working days to be allowed for loading the ship with timber, and despatching her, from the day the vessel shall be ready to receive cargo on board. Either party detaining the vessel beyond the 30 working days allowed, shall pay to the other a demurrage of Co.'s Rs. 100 per diem. Lastly, it is hereby expressly agreed by and between both parties, that the said charterers, Messrs. Agabeg Brothers, or their Agents in Rangoon, are to give a full cargo of teak timber to the said vessel, and fulfil their agreement: and in case of their non-performance of this agreement, and **[54]** refusal to give a full cargo of teak timber to the said vessel; they are to pay a damage of, say Co.'s Rs. 4,000, to the said Geo. Jellicoe, as the probable amount of freight expected to be brought by the vessel. Likewise Capt. G. Jellicoe or the commander of the said vessel refusing to fulfil and perform the contract of this agreement, in bringing up a cargo of teak timber for the said Messrs. Agabeg Brothers, shall pay a damage of Rs. 4,000 to the said Messrs. Agabeg Brothers, (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature, or kind soever excepted). In witness whereof the parties subscribing do hereunto affix and set their hands and seals in Calcutta, the day and year first above mentioned.

(Sd.) GEO. JELLICOE. (L.S.).
,, AGABEG BROTHERS. (L.S.).

"Signed, sealed and delivered at Calcutta, in the presence of
(Sd.) P. T. SARKIES."

The plaint, after setting out the terms of the charter-party stated "that the ship or vessel proceeded from the river Hooghly aforesaid to the said Port Louis, and afterwards, to wit on &c., reached the said Port Louis in safety, and there without delay unloaded her cargo, and afterwards, to wit, &c. sailed from Port Louis, and subsequently reached Calcutta, but that the defendant did not nor would cause to proceed, or send or despatch the said ship or vessel to Rangoon aforesaid, and that the said ship did not enter the said Port of Rangoon, but then returned from Port Louis aforesaid to Calcutta without having entered the said Port, and without having received or taken on board at Rangoon aforesaid any cargo of timber. That the plaintiff was ready to perform, fulfil, and keep all things in the said charter-party on his be-**[55]** half contained, and that the Agent of the said Agabeg Brothers, at Rangoon aforesaid, at the time of the sealing of the said covenant, was and from thence hitherto hath been and still is, one Gregory Sarkies Manook, and that the said G. S. Manook, as such Agent, was ready and prepared to load the said ship or vessel with a full and complete cargo of teak timber of the plaintiff, as in the said charter-party mentioned, when and as soon as the said ship should and might enter the said Port of Rangoon, on her said voyage from Port Louis to Calcutta aforesaid. That the said ship or vessel was not hindered or prevented from entering the said Port of Rangoon, or from receiving on board the said last-mentioned cargo by the act of God, or the Queen's enemies, or by fire, or by any danger or accident of any kind whatsoever. Averment, as breach ;—that the defendant neglected and refused, and still doth neglect and refuse, to pay to the plaintiff the said sum of Co.'s Rs. 4,000, and every part thereof, contrary to the tenor of the said covenant of the defendant, in that behalf made as aforesaid. And so the plaintiff in fact saith, that the defendant hath wrongfully broken his said covenant, and to keep the same with the plaintiff hath hitherto neglected, and still doth neglect. By means whereof the said cargo of teak timber could not be, and was not brought to Calcutta, and was of little value to the plaintiff ; and the plaintiff hath lost all the gains and profits which he otherwise might, and would have made, by selling the said timber at Calcutta.

The pleas were : 1. Non est factum. 2. Traverse of readiness and willingness by plaintiff or his agent to load the vessel with a cargo of timber. 3. That the vessel sailed from Port Louis and arrived off the bar of the Rangoon river, but was prevented, by stormy and tempestuous weather, and contrary gales, from entering the Port. or procuring a Pilot, or remaining at anchor outside. That she was driven out again to sea, and unable to re-**[56]** turn, and compelled to proceed to Calcutta ; and that the defendant was thereby prevented from fulfilling his covenant. Issue was joined on the two first pleas, and de injuria replied to the last.

At the trial a nonsuit was urged. *First*,—On the ground that a variance existed between the charter-party declared on, and the plaint itself ; as the signature "Agabeg Brothers" at the foot of the instrument showed that the contract was entered into between the firm of "Agabeg Brothers," and the defendant

Jellicoe, whereas the plaint alleged the plaintiff to have contracted, as sole covenantee. 2*ndly*,—On the ground of the nonjoinder, as plaintiffs, of the other partners of the firm of Agabeg Brothers, all of whom, according to the tenor of the signature, appeared to be covenantees in this deed. The Court reserved the last point, giving defendant's Counsel leave to move on the ground stated; and as to the 1st point, (upon application by plaintiff's Counsel) gave leave to amend the plaint, by substituting the words "and certain persons therein described as Messrs. A. Brothers, which said A. Brothers were then a firm, carrying on trade in Calcutta, under the style aforesaid, and of which the plaintiff was then a partner," instead of the former words "and the plaintiff (then being one of the partners in and carrying on trade and business under the firm of Agabeg Brothers as aforesaid.)" A verdict was ultimately found for the plaintiff with Co.'s Rs. 4,000 damages, being the sum mentioned in the charter-party; but as the plaintiff had not proved the precise loss sustained, and the Court considered it doubtful whether the Co.'s Rs. 4,000 was intended by the deed to be in the nature of a penalty or as liquidated damages, leave was also given to move to reduce the damages to a nominal sum.

A rule was accordingly obtained, calling on the plaintiff to show cause, why a nonsuit should not be entered on **[57]** the following grounds: 1st,—That no deed had been put in evidence, between the defendant and the plaintiff alone, or with the plaintiff and his partners, they not being a corporate body. 2ndly,—That the three partners, and not the plaintiff solely, were the covenantees, and should therefore have been joined in the action. 3rdly,—Why the damages should not be reduced to a nominal sum.

Mr. *Dickens* and Mr. *Wylie* showed cause. It is admitted that, if the plaintiff's other partners had been covenantees, they ought to have been joined. But that is not the case, one partner cannot bind another by a deed, without authority; *Harrison* v. *Jackson* (a), here there is no evidence of assent or of any authority by his partners to Joseph Agabeg to sign for them, and, in the absence of express evidence, the fact cannot be assumed. Although, therefore, the covenant may be for their benefit, still, they cannot be joined as plaintiffs suing on their record, for they are not parties to the deed, and no other than one who is such party to a deed, can have a right to sue on it. The case of *Metcalfe* and *Rycroft* (b) is expressly in point. That was covenant on a deed of composition with creditors, by one of two partners, who signed in the name of his firm, and set his seal thereto, for nonpayment of an instalment due on a partnership debt; and it was held, that the other partner, not being a party to the deed, could not join in covenant. *Ld. Southampton* v. *Brown* (c), *Stover* v. *Gordon* (d), *Berkley* v. *Hardy* (e) and *Burford* v. *Stuckey* (f) are authorities to the same effect. As to the other point—the charter-party provides for the payment by plaintiff of certain penalties in several events, but there is only one stipu-**[58]**lation for a payment by the defendant, and that is an absolute condition for the payment by him of Co.'s Rs. 4,000, in case of failure

[57] (a) 7 Term Rep. (b) 6 M. & S. 75. (c) 6 B. & Cr. 718.
(d) 3 M. and S. 308. (e) 5 B. & Cr. 355. (f) 1 Bro. &. B. 333.

by him in bringing up a cargo of timber from Rangoon. *Leighton* v. *Wares* (a) is in point, for in that case, as in this, there is nothing to show that the parties contemplated the occurrence of particular damages, and intended to take the penalty so incurred, as a settlement of the whole.

Mr. *Montriou* and Mr. *Ritchie*, in support of the rule; Upon the first point —This is a deed inter partes, but the description of one of the parties viz. " Agabeg Brothers " is not such, as is recognized by law This is not a description, nor intended to be a description of the plaintiff alone, nor of any person whatever, and therefore not excusable as merely inaccurate.

The description of a grantee or covenantee must be of one in rerum natura, and by some name, whereby he may be known, *Com. Dig Grant.* A. 2, *Fait.* C. 2, E. 3. " To the making of every good deed containing any agreement, these things are requisite: 1. Writing. 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names." (b) To hold this to be a description of the persons composing the trading partnership of Joseph Agabeg, Johannes Agabeg, and Avetick Galstin would be conferring upon them an illegal privilege. To act as a corporation is a criminal act, and an usurpation of the Royal Prerogative, *Duvergier* v. *Fellows* (c).

Secondly,—If this be a sufficient description, all the partners are covenantees, and all must sue, because all *may* sue, *Petrie* v. *Bury* (d), and their interest is joint. The cases cited of *Metcalfe* v. *Rycroft* and *Berkley* v. **[59]** *Hardy* are clearly distinguishable. In the first, the plaintiff's partner did not come within the description of the parties to the deed; he could not therefore be a party to the covenant. Here, the description is general, and not confined to the partner, who, in fact, sealed the deed. *Berkley* v. *Hardy* was covenant upon an indenture of lease, not executed by the lessor, the plaintiff in the action. There was therefore no lease.

Thirdly,—If this action be maintainable, specific damage must be proved: and the Rs. 4,000 cannot be taken as liquidated damages. Jellicoe is to pay all port charges, except loading charges: the net proceeds are to be equally divided, save and except the freight on sheathing boards, which are to be calculated at the rate of 25 per cent. as usual, the payment of such freight is to be made three days after landing the whole cargo of the vessel at the port of Calcutta, freight of any description and kind soever that the vessel may bring up in such ports and places where she cannot possibly carry timber, to be owned and retained wholly by Jellicoe, the charterer, Agabeg Brothers to have no claim or share in it. Demurrage of Rs. 100 to be mutually paid: and in case of the non-performance by the charterers of this agreement, and refusal to give a *full* cargo of teak timber to the said vessel, they are to pay a damage of say Co.'s Rs. 4,000 to the owner, as the probable amount of freight expected

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[58] (a) 3 Mees. & W. 545. (b) Shep. Touch, cap. 4.

(c) 5 Bing. 248, ubi vide judgment of Best, C.J. in fine. See also *Reg.* v. *West*, 1 G. & D. 481 *Cooch* v. *Goodman*, 2 G. & D. 159.

(d) 3 B. and C. 353.

to be brought by the vessel. Likewise, the owner or commander refusing to fulfil and perform the contract of this agreement, in bringing up a cargo of teak timber for Agabeg Brothers, to pay them *a damage* of Rs. 4 000. Here are a number of stipulations, the breach of which is of very unequal importance. The most trifling deficiency in the supply of cargo, as well as total refusal must be estimated alike; many contingencies may arise of breach of these covenants, in which an absurd and disproportionate advantage would be given to one [60] party, if this sum is to be treated otherwise than as a penalty. It comes within the class of cases where an estimated sum is construed, from the nature and context, of the agreement, to be a penalty, and not a fixed amount of damages, *Boys* v. *Ancell*(a), *Exparte Maclean*(b), *Harrison* v. *Wright* (c).

Cur. ad. vult.

SIR L. PEEL, C.J. This is a deed inter partes. There seems no doubt that the transaction in question was a partnership one, and intended by the plaintiff to be for the benefit of his partners, as well as himself; but there is no proof of assent by the former, and without their assent and authority the plaintiff cannot bind his partners by a charter-party under seal. It was rightly argued that the real question was, whether Joseph Agabeg was not the sole covenantee; for if the covenant was joint, all the co-covenantees should have joined in the action. The case of *Petrie* v. *Bury* cited for the defendant, was that of a *Trust*; and *C. J. Abbott* in his judgment says "Trustees often assent to a trust without executing the deed which creates it, and they may assent to it at any time, and without an express allegation of dissent, which will not appear. Assent is therefore to be *presumed*." Here the transaction in question is a commercial one, between partners, and some evidence of assent must be given: if actual presence at the time of execution of the deed be sufficient—that even has not been shown. There is no case which decides what amounts to sufficient evidence of assent by partners to a deed executed on their behalf: but no presumption can be made in favor of the fact of one party having assented to acts done by another, beyond the scope of his ordinary authority. The action therefore has been rightly brought in the sole name of Joseph Agabeg. On the other point there is much diffi- [61] culty; but we cannot decide that there is a provision for a penalty on the one hand, and for liquidated damages on the other. We, therefore, must consider the Rs. 4,000 to be in the nature of a penalty, and not liquidated damages. The verdict must be reduced to a nominal sum, but there may be a new trial on payment of costs.

Rule accordingly.

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[60] (a) 5 Bing. 390. (b) 2 M. D. & D. 564. (c) 13 E. 343.