has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and if necessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock, under the transfer made by Chapin. This was done, without any legal authority, being several months after Lynn had revoked the power of attorney, under which the transfer was pretended to be made; and with full knowledge that Lynn was not the owner of the stock.

But another and complete answer to the whole of this arrangement between Chapin and Lynn, is, that it was made long after the bill in this case was filed; and it is a well-settled rule, that the court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute. The decree of the court below, must accordingly be affirmed, with costs.

Decree affirmed.

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*Robert Barry, Plaintiff in error, *v.* Thomas Foyles. [*311

Variance.—Declarations of partners.—Pleading.

The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error; Robert Barry appeared, gave special bail, and discharged the attachment; the plaintiff below, then filed a declaration in *indebitatus assumpsit* "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue; the parties went to trial, and a verdict and judgment were rendered for the defendant in error.

The court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved by the entry of bail and the appearance of the defendant; the defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment. p. 315.

Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence to charge the parties, whose agent the person giving the certificates was. p. 316.

The principle is, that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it, at the time of trial. p. 317.

The declaration in an action against one partner only, never gives notice of a claim being on a partnership transaction; the proceeding is always as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. p. 317.

Where the suit was brought upon a partnership transaction, against one of the partners and the declaration stated a contract with the partner who was sued, and gave no notice that it was made by him with another person, evidence of a joint *assumpsit* may be given, to support such a declaration;[1] the want of notice has never been considered as justifying an exception to such evidence at the trial. p. 317.

Error to the Circuit Court of the District of Columbia, for the county of Washington. In the circuit court, the defendant in error issued an

[1] Moore *v.* Bank of the Metropolis, 13 Pet. 311; Gay *v.* Cary, 9 Cow. 44; Collins *v.* Smith, 78 Penn. St. 423.

attachment against Robert Barry, the plaintiff in error; and according to the established practice, the plaintiff in the attachment filed, at the time it was issued, an account or statement of his claim; by which he alleged that
*312] Robert Barry, the defendant below, was indebted to him in the *sum of $3410.25, for debts due from the firm of James D. Barry & Co., assumed by him to pay to the plaintiff in the attachment. This account or statement was accompanied by an affidavit, that "it was just and true, as it stands stated." The plaintiff in error appeared and gave special bail; and a declaration was then filed, in *indebitatus assumpsit*, &c., and the plea of the general issue entered.

On the trial of the cause, the plaintiff offered in evidence, to sustain his case, three paper writings, signed by E. Rice, which are stated, *in extenso*, in the opinion of the court. In order to prove the defendant chargeable with the amount delivered by the plaintiff below, Thomas Rice was produced and sworn as a witness; who testified, as set forth in the opinion of the court. The counsel for the defendant below objected to the evidence, and the objection being overruled, the case was brought by writ of error to this court.

Coxe and *Worthington*, for the plaintiffs in error, contended: 1st. That the evidence is not competent and sufficient to charge the plaintiff in error, upon his alleged *assumpsit*. 2d. That under the declaration in *indebitatus assumpsit*, the evidence is also incompetent and insufficient.

By the statement filed upon oath, the claim of the plaintiff is averred to be a debt due by James D. Barry & Co., which the defendant below assumed to pay. The evidence on the part of the plaintiff below did not show such a firm as James D. Barry & Co.; nor did the same prove an implied, much less an express, *assumpsit* by Robert Barry. The plaintiff below complied with the law of Maryland, by stating his cause of action, when the attachment was issued; and the defendant appeared and entered a plea thereto. Subsequently, he filed a declaration in *indebitatus assumpsit*, which was irregular. This cannot be done, and therefore, the evidence applied only to the first declaration; which stated an assumption of the debt of James D. Barry & Co., and no proof was offered of such assumption. The evidence does not show any connection between Rice and the defendant, nor any authority from Robert Barry, by which his acts or acknowledgments could become binding on him; the plaintiffs did not, therefore, make out the case spread upon the record by the first declaration. The papers signed by Rice were improperly admitted. No. 1 is given in the name of James D. Barry. The other two refer to transactions in which the defendant is not named.

2. Upon a general declaration in *assumpsit*, the issue is not maintained by proof of a partnership debt. The general rule, that the defendant, who
*313] is charged *separately for a joint debt, should plead this in abatement, does not apply, when the plaintiff has, by his pleadings, given no notice of the nature of his demand, until the time of trial. *Jordan* v. *Wilkins*, 3 W. C. C. 112. In the case of *Rice* v. *Shute*, 5 Burr. 2611, Lord Mansfield adverts strongly to the circumstance, that the defendant was the person with whom the business was transacted. Also cited, *Abbott* v. *Smith*, 2 W. Bl. 947.

3. The agency of Rice was a special agency, and his acknowledgments

were not evidence. He might have made entries in the books to charge his principal, but no more. 1 Esp. 375 ; 2 Stark. Ev. 60. Nor does his testimony prove the interest or partnership of Robert Barry, in the dealings to which the papers have reference. 3 Stark. Ev. p. 4, 1067.

Jones, for the defendant.—The objections to the proceedings, as they apply to the first and second declarations, have no force. The account filed, when the writ issued, against Robert Barry alone, states his assumption of the partnership debt ; and if this was objectionable, it should have been pleaded in abatement. It was at one time supposed, that in all cases of attachment, a second declaration should be filed ; but this was afterwards considered as not essential ; but the party has at all times a right to vary his pleadings, and even at "the rules," to file a new declaration. To the pleadings in this case, no exception was taken, nor was any objection made at the trial. The objection to the evidence, as applicable to the account filed, ought not to prevail. If Robert Barry was a partner in the transactions to which the papers refer, the law raises an assumption. The plaintiff is not tied down to prove an *assumpsit*, when proof is given that he was a partner ; and an action will lie against one partner alone, on his express *assumpsit*.

2. The evidence of debts due by J. D. Barry & Co. was properly applied to charge Robert Barry, the plaintiff in error. There must always be a plea in abatement, where the parties are not joined. As to joinder of parties, Mr. *Jones* cited, with other cases, *Minor* v. *Mechanics' Bank of Alexandria* (*ante*, page 46); and also 5 Burr. 2611. If the evidence could in any way charge the defendant below, it was admissible. Partnership may be proved by circumstances ; and the court did not decide upon the effect of the testimony, but only that it should go, generally, to the jury. This is a case in which the principal is charged with the acts of the agent, within the scope of his authority ; the business of the concern being intrusted to the management of Rice by the parties.

*Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States [*313 for the district of Columbia, sitting in the county of Washington. The defendant in error had sued out an attachment against Robert Barry, and had filed an account against James D. Barry & Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration in *indebitatus assumpsit*, for money had and received, and for goods, &c., delivered ; to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the circuit court offered in evidence, three paper writings, signed by Edmond Rice ; and also produced Thomas Rice, a witness, who swore, that at the time the said paper writings bear date, and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tan-yard in Washington ; kept the books, bought and sold leather, and managed the whole concern for the proprietors ; that the said papers are in his handwriting ; that the said Foyles, for about seven years (including the dates of said writings), being a butcher, was in the habit of delivering, from time to time, great numbers of hides, to

the said Rice, at the said yard, and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after a while, it was carried on in the name of Robert Barry. The witness was not present at the settlement, and does not know its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry (who resided in Baltimore) came about twice a year to the yard in Washington; where he spent considerable time in examining and posting the books, with the said E. Rice. Upon one of these occasions, he directed a parcel of leather, which E. Rice had prepared to send on to him to Baltimore, to be kept in the yard, till he should return to Baltimore, or ascertain the price of leather there, and give further directions concerning it. During all the time the business was conducted at Washington, in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant, and there disposed of by him.

The following are the paper writings offered in evidence, to which the testimony of Thomas Rice refers.

*315] *No. 1. Balance due by James D. Barry to Thomas Foyles on settlement, say sixteen hundred and forty dollars, seventy-five cents, up to this date, say April 5th, 1817.

$1640 75. EDMOND RICE.

No. 2. Amount of hides and skins received of Mr. Thomas Foyles, from the first of April 1817, to this date, say December 27th, 1818.

755 hides, at $3.75 per hide, ...	2831 25
10 sheep skins, at 50 cents each, ...	5 00
7 calf skins, do. at $1 each, ...	7 00
	$2843 25

January 13th, 1819. EDMOND RICE.

No. 3. Amount of hides and skins received of Thomas Foyles, from the 2d of February 1819, to 2d of December 1819.

346 hides, at $3.75 each, ... $1297 50

EDMOND RICE.

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion. A verdict was found for the plaintiff below, the judgment on which has been brought into this court by writ of error.

In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his *assumpsit*, for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a transaction with himself. The court attaches no importance to this variance, because when the attachment was discharged, by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in court, as if

the suit had been brought in the usual manner; and no reference can be had to the proceedings on the attachment.

Considering the case as it is made out in the pleadings, the defendant in the circuit court is charged, on his original liability, for a transaction of his own. Edmond Rice, having been manager of the whole concern, for the proprietors of the tan-yard, in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides, received by him in the course of business. The papers, No. 2 and 3, purport, on their face, to be an account of transactions of this description. The only objection made to them, is, that instead of the journal of hides delivered *on each day, the manager has given, at considerable intervals, the total amount of hides received from the last preceding settlement, up to that time. We are not aware of any principle which can make such a general certificate less binding, than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment; and we perceive no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors. [*316

The paper No. 1 is more questionable. It does not purport to be given for hides received at the tan-yard, nor does it express the items which constitute the charge; but it is said to be the balance due from James D. Barry (in whose name the business was conducted), "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tan-yard; and it does not appear that he had authority to give it on any other account. It is an additional circumstance, of no inconsiderable weight, that the account closes on the 5th of April 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances combined, were, we think, sufficient to justify the submission of this paper also to the jury.

The next objection to the admission of these papers, is, that the plaintiff in the circuit court, has failed to prove that Robert Barry was one of the proprietors of the tan-yard, while the business was conducted in the name of James D. Barry. The evidence, on this point, was given by Thomas Rice, and has been already fully stated. We think, the testimony of a partnership was very strong. It could not, with propriety, have been withheld from the jury.

The question on which the plaintiff in error most relies, remains to be considered. This suit is brought on a partnership transaction, against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration? Although it has been held from the 36 Hen. VI. 38, that a suit against one of several joint obligors, might be sustained, unless the matter was pleaded in abatement; yet with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted; upon the ground of a supposed variance between the contract laid, and that which was proved. This distinction was overruled by Lord MANSFIELD, in the case of *Rice* v. *Shute*, 5 Burr. 2611. The same point was *afterwards adjudged, in *Abbott* v. *Smith*, 2 W. Bl. 695; and has been ever since invariably maintained. The prin- [*317

ciple is, that a contract, made by copartners, is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance, in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it, at the trial.

The course of decisions, since the case of *Rice* v. *Shute*, has been so uniform, that the principle would have been considered as too well settled for controversy; had it not lately been questioned by a judge, from whose opinions we ought not lightly to depart. That judge supposed, that if the defendant had no notice, in the previous stage of the proceedings, which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defence at the trial. But the declaration never gives this notice, where the suit is brought against one only of the partners. He is always proceeded against, as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The cases cited by Mr. Serjeant Williams, in note 4, on the case of *Cabell* v. *Vaughan* (1 Saund. 291, n. 4), shows conclusively, that the want of notice has never been considered, since *Rice* v. *Shute*, as justifying this exception to the evidence at the trial. We think, there is no error, and the judgment is affirmed.

Judgment affirmed.

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*318] *Peter Dox, Gerrit La Grange and Isaiah Townsend, impleaded with Gerrit L. Dox, Plaintiffs in error, *v.* The Postmaster-General of the United States, Defendant in error.

Postmasters' bonds.—Laches.

The act of congress for regulating the post-office department, does not, in terms, discharge the obligors in the official bond of a deputy-postmaster, from the direct claim of the United States upon them, on the failure of the postmaster-general to commence a suit against the defaulting postmaster, within the time prescribed by law; their liability, therefore, continues; they remain the debtors of the United States; the responsibility of the postmaster-general is superadded to, not substituted for, that of the obligors. p. 323.

The claim of the United States upon an official bond, and upon all parties thereto, is not released by the *laches* of the officer, to whom the assertion of this claim is intrusted by law; such *laches* have no effect whatsoever on the right of the United States, as well against the sureties, as the principal in the bond. p. 325.

United States *v.* Kirkpatrick, 9 Wheat. 720, re-affirmed.

This case was brought up from the Circuit Court of the United States for the Southern District of New York, in the second circuit, upon a certificate of the judges of that court, that they disagreed on certain points, set forth in the certificate.

The cause was commenced in the district court of the United States for the northern district of New York, and removed by writ of error, to the circuit court. The following were the points of disagreement: 1st. Whether the district court had jurisdiction of the cause? 2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the