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

bond set forth in the record? 3d. Whether the said bond, from the facts so found or admitted by the pleadings, or appearing on the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged?

The original suit was commenced in the district court, in August 1823, and the plaintiff declared in debt, on a bond, in the penal sum of $6000, executed on the 1st of January 1816, by Gerrit L. Dox, Peter Dox, Gerrit La Grange and Isaiah Townsend; conditioned for the faithful performance of the duties of postmaster, at Albany, by Gerrit L. Dox.

The declaration alleged two breaches of the condition of the bond: 1. That said Gerrit L. Dox did not, at any time between the *first [*319 day of January 1816, and the 1st day of January 1817 (he being, during the whole of that time, postmaster as aforesaid), render any accounts of his receipts and expenditures, according to the condition of said bond; but utterly neglected so to do. 2. That after the date of said bond, and more than three months previous to the commencement of the suit, there came to the hands of said Gerrit L. Dox, as such postmaster as aforesaid, the sum of $6000, for postages, over and above commissions, &c., which he had not paid over to the postmaster-general; but had refused so to do, although often requested, &c.

Gerrit L. Dox, the principal obligor, pleaded separately three pleas: 1. *Non est factum*, and tendered an issue. 2. To the first breach, that he did render true accounts of his receipts and expenditures as such postmaster, &c., and tendered an issue. 3. To the second breach, that he had paid to the postmaster-general all the moneys he had received, over and above his commissions, &c., and tendered an issue. Issues were joined on these pleas as tendered.

The defendants, Peter Dox, Gerrit La Grange and Isaiah Townsend, the sureties of said Gerrit L. Dox, pleaded six pleas: 1. *Non est factum*, and tendered an issue. 2. To the first breach, that Gerrit L. Dox did render true accounts of his receipts and expenditures, &c., and tendered an issue. 3. To the second breach, that the said Gerrit L. Dox had paid to the postmaster-general all the moneys he had received over and above his commissions, &c., and tendered an issue. 4. To the second breach, that they executed the bond as sureties; that Gerrit L. Dox was removed from office, on the first day of July, A. D. 1816; that the postmaster-general, knowing there were sureties, did not open an account against Gerrit L. Dox, and make any claim and demand on him for the moneys received by him as postmaster, until the first day of July, A. D. 1821; at which time, the postmaster-general did open an account against, and claim and demand of said Gerrit L. Dox, the sum of $3041.35; that Gerrit L. Dox, at the time of his removal from office, was solvent, and able to pay his debts, and continued so for three years, and until the first day of July 1819; and that after the first day of July 1819, and before the first day of July 1821, to wit, on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea concluded with a verification. *5. To the [*320 second breach, that they executed said bond as sureties for said Gerrit L. Dox; that said Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the postmaster-general, well knowing that they were sureties for Gerrit L. Dox, and that Gerrit L. Dox had neglected and

refused to pay over to the postmaster-general, the balance due from him at the end of every quarter, while he was such postmaster, did not commence a suit against said Gerrit L. Dox for his neglect and refusal to pay, until August, in the year 1821, at which time a suit was commenced against him and his sureties, on the bond in question; that Gerrit L. Dox was solvent at the time of his removal from office, viz., on the first day of July 1816, and continued so for three years, and until the first day of July, A. D. 1819; and that, after the first day of July 1819, and before the first day of July 1821, viz., on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea also concluded with a verification.

The plaintiff took issues on the first, second and third pleas of the sureties, as they were tendered; and to the fourth, fifth and sixth pleas, respectively, he replied, that said Gerrit L. Dox was not solvent, at the time of his removal from office, nor did he continue to be solvent for the space of three years thereafter, or any part of said time; nor did he, on the first day of January 1820, nor at any other time after the first day of July 1819, become insolvent; and thereupon issues were joined.

The issues were tried at the May session of the court, in the year 1824. All the issues were found for the plaintiff, except those joined on the fourth, fifth and sixth pleas of the sureties, which were found in favor of said sureties; the breaches assigned having been found to be true, as above stated, the damages on them were assessed at $6000. After the verdict, and at the same session of the court, a motion was made on behalf of the said postmaster-general, for judgment in his favor, notwithstanding the verdict against him, on said fourth, fifth and sixth issues with the sureties, and judgment given for the said plaintiff.

The case was argued, on the part of the plaintiffs in error, by *Samuel A. Foot*, of New York; and by *Wirt*, attorney-general of the United States, for the postmaster-general.

Foot.—This suit was instituted to recover a balance due to the United States, by Gerrit L. Dox, as postmaster, at Albany, in New York. Gerrit L. Dox was appointed postmaster, in January 1816, and was removed from office in July 1816. The breaches assigned were: 1. Not rendering accounts
*321] as postmaster. *2. Not paying over the moneys he ought to have paid. The issues upon all the pleas put in by Dox alone, and by him and his sureties together, were found for the plaintiff below; the only questions in the case arise on the fourth, fifth and sixth pleas, put in by the sureties only. The district court held these pleas to be immaterial, and gave judgment for the postmaster-general.

It is admitted, that since this suit was commenced, cases have been decided in this court, which bear upon the question, whether the neglect of the officers of the government to proceed against a debtor to the public, will discharge the sureties. *United States* v. *Kirkpatrick*, 9 Wheat. 720; 11 Ibid. 134; *United States* v. *Vanzandt*, 12 Ibid. 136. But the principles settled in these cases, are not entirely applicable to this. The law of the United States, relative to the post-office establishment, makes it the duty of the postmaster-general to file, every six months, in the treasury department, a transcript of the balances due from the postmasters, and to sue for the

same; and if he omits so to do, the balances are to be charged to the postmaster-general, and to be collected from him. Thus, the postmaster-general becomes himself a debtor to the government, for the amount of the delinquency of every postmaster; unless he has taken measures to collect the same; and he may use the name of the government for the purpose. This suit is, therefore, for the use of the postmaster-general, as he had neglected to proceed against Gerrit L. Dox, for six years; and the sureties are entitled, against him, to the benefit of his *laches*. This case is different from those referred to; and the plaintiff, who had a verdict in his favor on the fourth, fifth and sixth issues, is entitled to the presumption, that the postmaster-general was charged with the balances due by Gerrit L. Dox, and that he has paid the same to the United States. In the case of the *Postmaster-General* v. *Early*, 12 Wheat. 136, the court is understood to have said, that if this suit had been brought for the postmaster-general only, the jurisdiction could not have been sustained; here, the postmaster-general is the only person beneficially interested. If the United States were the parties really interested, a special averment should have been made; and the general formal averment in the declaration, is not sufficient. The postmaster-general is the guarantor of the debt to the United States; he could not be a witness in the case, and the suit should have been stated to be for his use; and then the jurisdiction would have been at an end.

2. Are the issues found for the plaintiff in error, material? If they are, the district judge erred in giving judgment; if they are not, there should be a repleader. When the finding upon the issue does not determine the right, the court ought *to award a repleader; unless it appears from the whole record, that by no manner of pleading, the matter in issue [*322 could have availed. 1 Burr. 381. The fourth, fifth and sixth pleas aver the solvency of the principal of the bond, for a considerable time, during which suit was not brought; and by these *laches* the sureties have become involved. It is not necessary to show, that the sureties applied to know what was the balance due to the United States. At common law, the question is, whether the case is such that the creditor might have been injured or have lost by it. The case of *Law* v. *East India Company*, has some application to the principles claimed in this case. 4 Ves. 824.

The issues in the fourth, fifth and sixth pleas were material, as the solvency of Gerrit L. Dox was of the highest importance to the sureties.

Wirt, Attorney-General, having, upon the authority of a private statement of the facts, made to him by the counsel of the plaintiffs in error, explained why the suit for a delinquency in 1816, was not instituted until 1823; thus vindicating the postmaster-general from the imputation of *laches;* proceeded :—

The case is a plain one, in favor of the postmaster-general. All the material issues are found for him : 1. That it was the bond of the obligors. 2. That the principal in the bond did not render an account. 3. That he did not pay over moneys received by him.

The district court considered the fourth, fifth and sixth pleas immaterial, and gave judgment for the plaintiffs, *non obstante veredicto*. If these pleas were really immaterial, the judgment so given was correct. 2 Arch. Pract. 229; 1 Chit. Pl. 634. If the postmaster-general did not open an account

with Gerrit L. Dox, the postmaster at Albany, or bring a suit according to law; would the sureties be absolved? This question has been already settled in this court. The provisions of the law are directory to the post-master-general; but they create no contract with the deputy-postmaster, or his sureties, that he shall open an account, or institute a suit, in case of delinquency. The case of the *United States* v. *Vanzandt*, 11 Wheat. 184, was one of great hardship; but the sureties were held answerable, upon the principles stated.

The finding of the jury on the second plea establishes, that no account was rendered by the postmaster; and therefore, the plaintiff below had no materials to make out an account. The provisions relative to opening of accounts, have been held to be for the use of the United States, and for the direction of their officers; and with which others have nothing to do.

*323] *Whether these provisions will be enforced, depends, and properly, on the discretion of the executive.

The question of jurisdiction should have been brought forward in the form of a plea. There is no averment, that the postmaster-general was asserting this claim for himself.

Marshall, Ch. J., delivered the opinion of the court.—This suit was instituted against Gerrit L. Dox, a deputy-postmaster, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the court for the northern district of New York, and was removed, by writ of error, into the circuit court, sitting in the southern district of New York, composed of the associate justice of this court, and the judge of the southern district. On the hearing, the judges were divided in opinion upon three questions; which have been certified to this court. 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 bond so given by them, as set forth in the record? 3d. Whether the said bond, from the facts found, or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged?

1. The question first to be considered, respects the jurisdiction of the court. The difficulties which were believed to attend it, when this cause was adjourned, have been removed by the opinion of this court, in the case of the *Postmaster-General* v. *Early*, 12 Wheat. 136. In that case, the question was fully considered, and deliberately decided. The time which intervened between the default of the officer, and the institution of the suit, exceeded the time prescribed by the act of congress, in that case, as well as this. Consequently, the circumstances of the two cases, are, in this respect, precisely the same. But the counsel for the deputy-postmaster says, that this point was not brought into the view of the court, and has not been considered. The opinion of the court, undoubtedly, did not take a view of the question, whether the postmaster-general possessed such an interest in the cause, that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation. The act of congress for regulating the post-office establishment, does not, in terms, discharge the obligors from the direct claim of the

United States on them, on the failure of the postmaster-general to commence a suit against the *defaulter, within the time it prescribes. [*324
Their liability, therefore, continues; they remain the debtors of the United States. The responsibility of the postmaster-general himself, is superadded to, not substituted for, that of the obligors. The object of the act is, to stimulate the postmaster-general to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the act been to favor the sureties, its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the superadded responsibility of the postmaster-general, cannot affect the reasoning on which the jurisdiction of the court was sustained, in the case of the *Postmaster-General* v. *Early*.

The second question proposed for the consideration of the court, is, whether, on the facts appearing in the record, the sureties are discharged from their obligations? The breaches assigned are: 1st. That Gerrit L. Dox failed to render accounts of his receipts and expenditures, as deputy-postmaster. 2d. That he had failed to pay over the moneys he had received, over and above his commissions, &c.

The defendant pleaded: 1st. *Non est factum:* 2d. That Gerrit L. Dox did render true accounts, &c.: and 3d. That he did pay over the moneys he received. The issues joined on these pleas, were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants; and which state, in substance, that, Gerrit L. Dox was removed from his office, on the 1st day of July 1816; that the postmaster-general did not open an account against him, and make any claim and demand on him for the moneys received by him, as postmaster, until the 1st day of July 1821; that at the time of his removal from office, he was solvent and able to pay his debts, and continued so until the 1st day of July 1819, after which he became insolvent, and continues to be so. These pleas also state, that the postmaster-general, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him, as postmaster, at the end of every quarter, &c., did not commence a suit until August 1821. These facts, placed on the record, without explanation, must be admitted to show a gross neglect of duty on the part of the postmaster-general. Does this neglect discharge the sureties from their obligations? The condition of the bond is broken, and the obligation has became absolute. Is the claim of the United States upon them, released by the **laches* of the officer, to whom the assertion of that claim was intrusted? This question also [*325
has been settled in this court.

The case of the *United States* v. *Kirkpatrick and others*, 9 Wheat. 720, was a suit instituted on a bond, given by a collector of direct taxes and internal duties, under the act of 22d July 1813, ch. 16. The act required each collector to transmit his accounts to the treasury, monthly; to pay over the moneys collected, quarterly; and to complete his collection, pay over the moneys collected to the treasury, and render his final account, within six months from the day on which he shall have received the collection-list from the principal assessor. In case of failure, the act authorizes and requires the comptroller of the treasury, immediately, to issue his war-

rant of distress against such delinquent collector, and his sureties. The comptroller did not issue his warrant of distress, according to the mandate of the law; and this suit was instituted, four years after such warrant ought to have been issued. The court left it to the jury to decide, whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants; the judgment on which was brought before this court by writ of error. The counsel for the defendant urged that *laches* might be imputed to the government, through the negligence of its officers; but this court reversed the judgment, declaring that the opinion that the charge of the court below, which supposes that *laches* will discharge the bond, cannot be maintained in law. "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. It would in effect, work a repeal of all its securities." It was further said, that the provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection; and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle, "that the mere *laches* of the public officers, constituted no grounds of discharge in the present case."

The same question came on to be again considered, in the case of the *United States* v. *Vanzandt*, 11 Wheat. 184. This was an action of debt, brought upon a paymaster's official bond, against one of the sureties. The act of organizing the general staff, and making further provision for the army of the United States, "makes it the duty of the paymaster to render his vouchers to the paymaster-general, for the settlement of his accounts;" and if he fail to do so, for more than six *months after he shall have *326] received funds, the act imperatively enjoins "that he shall be recalled, and another appointed in his place." The paymaster had failed to comply with the requisites of the law; after which the paymaster-general, instead of obeying its mandate, by removing him, placed further funds in his hands. The circuit court instructed the jury, that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds, so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict, was also brought before the court by a writ of error, and was reversed. The counsel for the defendant contended, that this case differed from the *United States* v. *Kirkpatrick and others;* but the court said, "the provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster, was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle, that the *laches* of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates, as firmly as the decisions of this court can fix it. We think, they decide the question now under consideration.

The third question is, whether the bond can, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January 1816, the postmaster was removed from office, on the 1st day of July, in the same year; and this suit was instituted in August 1821. But little more than five years intervened, between the time when the sum due from the principal in the bond was ascertained, and the institution of the suit. The presumption of payment has never been supposed to arise from length of time, in such a case, even between individuals; much less, in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time, is evidence to be laid before the jury, on the plea of payment. The pleas on which this presumption is supposed to arise, not only do not allege payment, but pre-suppose that payment has not been made, which failure they ascribe *to the *laches* [*327 of the postmaster-general. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the court to decide, whether the bond has been "otherwise discharged;" is understood to be a repetition of the second question, and to be answered in the answer given to that question.

This court is of opinion, that it be certified to the circuit court of the United States for the southern district of New York—1. That the district court had jurisdiction of this cause. 2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record. 3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

This cause came on, &c.: On consideration whereof, this court is of opinion: 1. That the district court of the northern district of New York had jurisdiction of the said cause: 2. That the sureties to the bond on which the said suit was instituted, are not exonerated or discharged from their liability on the said bond, by the facts apppearing on the record, and admitted by the pleadings, or found by the jury: 3. That the said bond cannot, from the facts found or admitted by the pleadings, or appearing by the record, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. All which is directed to be certified to the circuit court of the United States for the southern district of New York, in the second circuit.