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principle in, perhaps, every state in the Union, that one administering in one state cannot bring suit in the courts of another state. This necessity of administering, where the debt is to be recovered, effectually places the application of the proceeds under the control of the laws of the state of the administration. And if, in any instance, the rule is deviated from, it forms, *pro hac*, an exception; a voluntary relinquishment of a right, countenanced by universal practice; and is of the *character of the treaty stipulations already remarked upon, by which foreign nations surrender [^{*528} virtually a right, which locality certainly puts in their power.

Whether it would or would not be politic, to establish a different rule by a convention of the states, under constitutional sanction, is not a question for our consideration. But such an arrangement could only be carried into effect, by a reciprocal relinquishment of the right of granting administration to the country of the domicil of the deceased, exclusively, and the mutual concession of the right to the administrator, so constituted, to prosecute suits everywhere, in virtue of the power so locally granted him; both of which concessions would most materially interfere with the exercise of sovereign right, as at present generally asserted and exercised.

There is no error, therefore, in the judgment below, and the same is affirmed, with costs.

BALDWIN, Justice, dissented from the opinion and judgment of the court.¹

*JOHN WINSHIP and others, Plaintiffs in error, v. The BANK OF [^{*529} THE UNITED STATES, Defendant in error.

Partnership.

If the particular terms of articles of partnership are unknown to the public, they have a right to deal with the firm, in respect to its business, upon the general principles and presumptions of limited partnerships of a like nature and any special restrictions in the articles, do not affect them. In such partnerships, it is within the general authority of the partners, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such were the general usage of trade, that authority must be presumed to exist; but not to extend to transactions beyond the scope and objects of the copartnership.²

¹ See the dissenting opinion of Judge BALDWIN, in *Harrison v. Nixon*, 9 Pet. 505, in which he affects to consider this case as overruled; this, however, is not the case; there is a clear distinction between the cases; in the one case, domestic creditors intervened; the other was a mere question of construction, as to the person designated as heir-at-law.

² To constitute one a dormant partner, it is not essential, that he should wholly abstain from any actual participation in the business of the firm, or be universally unknown as having a connection with it, nor that there should be a studied concealment of the fact; it is sufficient, that he is not an ostensible member. *North v. Bliss*, 80 N. Y. 374. When a partnership is formed for the transaction of a special business only, a dormant partner in such firm is not

liable for its contracts, outside such limited transactions. *Bank of Pennsylvania v. Hadfeg*, 3 Yeates 580; *s. p. Ex parte Munn*, 3 Biss. 442. Where, however, a general partnership business is transacted in the name of an active partner, it has been held, that a promissory note given in his name, is *prima facie*, a partnership debt. *Miffin v. Smith*, 17 S. & R. 165. This case has never been overruled, though strong doubts are expressed of its soundness, in *Burrough's Appeal*, 26 Penn. St. 264. But it was there ruled, that it requires but very slight evidence, to impose upon the holder, especially, if a party to the original transaction, the burden of showing that it was intended and understood as a partnership act, and was within the partnership business. See *Jones v. Fegely*, 4 Phila. 1. Where the intention of the contracting parties is, that

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Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public; which subserve the purposes of justice; and which society is concerned in sustaining. One of them is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts; another is, that a partner, certainly, the acting partner, has power to transact the whole business of the firm, whatever that may be; and, consequently, to bind his partners in such transactions, as entirely as himself; this is a general power, essential to the well-conducting of business, which is implied in the existence of a partnership.

When a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way; if that business be to buy and sell, then the individual buys and sells for the company; and every person with whom he trades in the way of his business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm; this is a general authority held out to the world, and to which the world has a right to trust.

The trading world, with whom the company is in perpetual intercourse, cannot individually examine the articles of partnership; but must trust to the general powers contained in all partnerships. The acting partners are identified with the company; and have power to conduct its usual business, in the usual way; this power is conferred by entering into the partnership, and is perhaps never to be found in the articles; if it is to be restrained, fair-dealing requires, that the restriction should be made known; these stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law.

The responsibility of dormant partners depends on the general principle of commercial law, not on the particular stipulations of the articles.

If promissory notes are offered for discount at a bank, in the usual course of the business of a ^{*530]} partnership, by the partner intrusted to conduct the business ^{*of} the firm, and are discounted by the bank, and such discount was within the firm business, a subsequent misapplication of the money (the indorsees not being parties or privy thereto, or of the intention to misapply the money), will not deprive the holders of their right of action against the dormant partners in such a copartnership.

United States Bank *v.* Binney, 5 Mason 176, affirmed.

ERROR to the Circuit Court of Massachusetts. This was an action of *assumpsit*, brought by the defendants in error against John Winship, Amos Binney and John Binney, the present plaintiffs in error, as copartners, under the name of John Winship.

The declaration contained seven counts, six of which set forth six different promissory notes, describing them. The notes were of different dates and amounts, made by Samuel Jacques, jr., and payable to, and indorsed by John Winship, jr.: the declaration alleging the notes to be payable to Amos Binney, John Binney and John Winship, jr., by the name and description of John Winship, and so indorsed to the Bank of the United States. Demand and notice were alleged to have been duly made. The seventh count was for \$14,000, money lent. The defendants pleaded the general issue.

The plaintiffs below offered the testimony of Samuel Jacques, jr., the maker of the notes, which evidence was objected to, on the following facts: On the 28th day of August 1825, Samuel Jacques, jr., having failed in busi-

the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm, in whatever form it may be made. *Ex parte Warren*, 2 Ware 325; *Bigelow v. Elliott*, 1 Cliff. 28. If

a firm carry on business in the name of an active partner, and the latter give a note to the silent partner, for the amount of his capital, this is the separate debt of the former. *Ex parte Waite*, 1 Lowell 207.

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ness, made an assignment of his property to Samuel Etheridge and Henry Jacques, in trust for the payment of his debts, and among them of the claims which John Winship might have upon him on the promissory notes stated in this declaration. These notes are thus described: "And among the creditors in this schedule, are also to be included banks and individuals, who are or may become holders of any of the notes in the following list, which have either been made by Samuel Jacques, jr., as promisor, and John Winship, as indorser, or by said Winship, as promisor, and said Jacques, as indorser; but such banks or holders are to be considered creditors for the purposes of this instrument, only for such part of the contents of such notes as came to such Jacques's use and possession, but for no more; and the assignees are to that extent, to indemnify said Winship for said proportion of said notes *pro rata* with other creditors of this class, *and said Winship may execute this instrument as representing his interest in [**531] said notes, when paid. And accounts between said Samuel Jacques, jr., and said Winship, touching former transactions, are to be adjusted; and the balance, if in favor of said Jacques, is to go towards the indemnity above provided for said Winship, and if in favor of said Winship, is to be a debt in this second class of debts, as above stated." Then followed a schedule of the notes drawn by Samuel Jacques, jr., in favor of John Winship, amounting to \$14,250, and of three notes made by John Winship in favor of Samuel Jacques, jr., amounting to \$4200.

John Winship was, with other creditors of Jacques, a party to this assignment, and released the assignor in these terms: "The creditors of the said Samuel Jacques, jr., do hereby consent to and accept this assignment, and in consideration of the same, and of the covenants of the said Samuel Etheridge and Henry Jacques herein contained, for themselves, respectively, and their respective heirs, executors, administrators and assigns, have hereby demised, released, and for ever quit-claim to the said Samuel Jacques, jr., his executors and administrators, all claims, demands and causes of action which they have, or may hereafter have, for or on account of the several debts and sums of money set opposite to their respective names on schedule, and do hereby acquit and discharge him and them therefrom."

The court overruled the objection to the admission of Jacques; and he testified, "that he knew of the existence of a copartnership between the defendants, by general reputation, but had never seen any articles of agreement between them; he considered that the Binneys were concerned with Winship in the soap and candle business, and he knew that it was generally so understood; that Winship did no other business to his knowledge; that he and Winship both lived in Charlestown, and saw each other every day; that he had dealings with Winship soon after the commencement of the partnership, and supplied him with rosin—perhaps to the amount of \$400 or \$500 per year, sometimes more and sometimes less. And that he sometimes gave a note for the balance, signed John Winship; that witness always took such notes on the credit of the *Binneys, with full confidence that [**532] they were interested and were men of property.

"And at some time in the year 1823, and perhaps a little previously, and until 1825, witness and Winship were in the habit of exchanging notes, which were discounted at the different banks; they began at the Manufacturers' Bank; there were none at the Branch Bank till 1824. They began

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with small notes, and finally exchanged notes for \$2000 and \$2500, sometimes signed by one and indorsed by the other, and *vice versa*. These notes were discounted at the different banks, but that he believed that none were discounted at the United States Bank, until at later periods; and that Winship usually applied for the discounts. That he, Jacques, indorsed these notes, on the credit of the firm. That Winship always represented them to be for the partnership account, and that witness never understood that they were on his private account.

"The notes in suit were generally presented by Winship for discount, but witness might have presented some of them. There were some notes for his private account, but he believed those in suit to have been for the firm. He could not state what portion of the money obtained on these notes he had received; but as he and Winship exchanged notes, he could not say, that he never received any of it. Some of those notes were given for renewals at this bank, and some to take up notes at other banks. It was his impression, that some of the money thus obtained went to pay for rosin; and that one of them for \$1500 was originally made to take up a note which had been previously given at the Manufacturers' & Mechanics' Bank for rosin, being a material used in defendant's factory. He knew no particulars concerning the appropriation of the moneys obtained upon these notes, and knows of no other which Winship has made, but for the use of the firm. The business of the firm required a great capital, and Winship often spoke of buying barilla and tallow for the factory; but witness does not know that he alluded to these particular notes, nor that the proceeds of them were applied to any other business. This business of exchanging notes continued until 1825, *when he and Winship stopped pay-
*533] ment. Winship kept a little note-book, but witness, having great confidence in him, kept no accurate accounts.

"The particular occasion of witness stopping payment was the non-payment of his acceptance on a draft drawn on him by Winship for barilla, an article such as is used in the factory. He told Mr. A. Binney of it, who said, he would do nothing about it. He furnished the factory of defendants with rosin, from 1822 to 1825; he sometimes might have received payment in cash, but it was generally in notes. He has endeavored to trace the origin of the notes in suit, but can trace only two; that of \$800 and one of \$806, originally given for rosin, were eventually included in the notes in suit, for \$1900, by means of successive renewals. Winship sometimes came to witness, and stated, that he wanted his name instead of Amos Binney, because he was absent; and got his name accordingly. He has a memorandum in his note-book, of August 15th, 1825, stating that Winship applied to him to take up a note of Amos Binney, of that date, for \$1500, stating that he was out of town. This note originated 9th of October 1824, and was at first \$2000, and renewed successively, till the 15th of August 1825, when it was reduced to \$1500; the original note was Amos Binney's, not the last one."

Upon cross-examination, he testified, "that he had known John Winship about twenty or twenty-five years; that he was in partnership with Messrs. Hydes, and that their names were in good credit, before his connection with Binney, and not in extensive business. There are accommodation notes of this kind, now outstanding, amounting to about \$21,000. No particular

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agreement ever subsisted between him and Winship, concerning the proceeds of these accommodation notes ; they sometimes divided the money and each took a portion. And sometimes, he lent his name to Winship, and Winship lent his name to him. And at the conclusion of the whole matter, they bundled up all the notes that had been taken up, and agreed to consider them as settled and discharged. *And as to the outstanding \$21,000, [*534 he applied to adjust it with Winship, but he said, that the papers were all in Binney's hands. He never applied to him to adjust them. When he went to Winship, the notes and checks were in a mass, and they agreed to consider them cancelled, to bundle them up and to pass receipts ; and as to the residue, which were outstanding, that they should be adjusted as well as they could. He has checks of Winship's, amounting to about \$1700, or \$2000, and some notes ; and Messrs. Binneys hold notes and checks signed by him, and given to them by Winship.

"He was engaged in an extensive speculation in hops ; was indebted and mortgaged his estates, in 1824, to Messrs. Thompson, for about \$10,000. He never knew any actual use, for the benefit of the firm, for money obtained on the accommodation notes, unless the taking up of the rosin notes, as stated in his testimony, be so considered. He understood, that Winship was engaged in some shipments of the manufactures of the firm, and also of some other articles, but always supposed them to be on account of the firm ; and Winship always told him so. He was called upon to take up one of these accommodation notes signed by him, and borrowed money of Amos Binney upon collateral security, by a mortgage of land for that purpose ; and nothing was said to Binney about his being liable to pay the note, according to his recollection."

The plaintiffs also introduced the testimony of other witnesses, who, among other things, stated, that they learned the existence of a copartnership between Winship and the Binneys, in the soap and candle business, by report, and the declaration of Winship ; but none of them ever learned it from either of the Binneys. One witness stated, that Winship offered to exhibit to him the articles of copartnership ; and Parker stated, that the Binneys were engaged in large business as merchants, and he did not know that any one ever supposed, that they and Winship were connected, except in the soap and candle business.

The defendants gave in evidence the articles of agreement entered into by the defendants, at the formation of the *copartnership. The [*535 agreement was executed on the 25th of September 1817, and was between Amos Binney and John Binney of Boston, and John Winship, of Charlestown, Massachusetts, "for the manufacture of soap and candles." Amos and John Binney agreed to furnish for that purpose a capital stock of \$10,000, at such times as the same should be required, to purchase stock and materials for carrying on the manufacture, and Winship agreed to conduct and superintend the same "under the name and firm of John Winship ;" to keep books open to the inspection of the parties ; exhibit an annual statement of the capital or business, interest to be paid on the capital ; and the profits to be divided, one-half to Winship, and the other half to A. and J. Binney, and losses to be apportioned in the same manner. The agreement was to continue in force for two years, and for a further term if the parties agreed thereto. The capital was afterwards increased to

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\$20,000, Amos Binney and John Binney advancing the same, in equal proportions. This was acknowledged by John Winship on the back of the agreement.

They also gave in evidence a bond given by John Winship to Amos Binney, on the 25th day of September 1817, in the penal sum of \$10,000, with the condition following : "The conditions of this obligation are such, that whereas, the above-bounden John Winship has this day made an agreement with Amos Binney and John Binney, both of Boston aforesaid, for the purpose of carrying on a manufactory of soap and candles in joint account of the parties aforesaid ; and whereas, the said A. Binney hath engaged to indorse the notes given by the said John Winship, for the purchase of stock and raw materials for manufacturing, when necessary to purchase on a credit, and in consideration of which, the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Amos Binney, for the term of two years from the first day of October 1817. Now, therefore, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person, to any amount, *536] other than *the same Amos Binney, for the aforesaid term of two years from the first day of October 1817, then this obligation to be void and of no effect ; otherwise, to remain in full force and virtue."

A witness, the clerk of Amos Binney, testified on the part of the defendants below, that having all the books and papers of Winship in his hands, after the failure of Winship, he examined them, and could find no entry of any of the notes in suit, and none of which are stated to be renewals, except two, one for \$800, the other for \$806 ; which in the note-book are marked paid. That regular business notes appear to have been entered in the books, and the payment of them entered in the cash book ; but no entries of these accommodation notes appear. There are entries of notes signed by Winship and indorsed by the defendant to a large amount. Amos Binney advanced very large sums to pay the debts of the concern, amounting in all to about \$46,828 ; and the whole amount sunk and lost to Amos and John Binney was about \$70,000.

William Permenter said, that he was clerk to Amos and John Binney from 1813 to 1824, and never heard of any of the accommodation notes of Winship. Mr. Gould stated, that he was foreman in the factory, and kept the books of the concern, in a counting-room ; that he never saw John Binney there ; nor Amos Binney, more than once or twice, for the whole time, until about the time of the failure. That he had carried on the business, since Winship's failure, and it had been profitable. And several other witnesses stated, among other things, that Amos and John Binney were severally engaged in other extensive business, and in good credit as merchants ; Amos Binney being esteemed wealthy.

The plaintiffs also introduced William Gordon, who testified, that he had always understood, that there was a copartnership in the manufacture of soap and candles. That Winship bought real estate, and that it was commonly reported, that he bought and shipped other articles than those used in the manufactory. Also, Thomas R. Thompson, Solomon Harvy, Samuel *Raymond and Thomas Pike ; who testified, that it was generally understood, that the defendants were copartners, and that Winship

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shipped articles other than soap and candles, or factory goods. It was not stated, that any of the witnesses ever learned the existence of the partnership from either of the Binneys.

The first exception taken on the trial in the circuit court, as stated in the bill of exceptions, was, that the counsel for the defendants insisted, that the copartnership was, in contemplation of law, a secret copartnership, and did not authorize the giving of credit to any other name than that of the said Winship; but to this the counsel for the plaintiffs did then and there insist before the said court, that this was an open or avowed, and not a secret copartnership. And the presiding justice of the said court did state his opinion to the jury on this point, as follows: "That according to his understanding of the common meaning of 'secret partnership'; those were deemed secret, where the existence of certain persons as partners was not avowed, or made known to the public, by any of the partners. That where the partners were all publicly known, whether this was done by all the parties, or by one only, it was no longer a secret partnership; for secret partnership was generally used in contradistinction to notorious and open partnership; that whether the business was carried on in the name and firm of one partner only, or of him and company, would, in this respect, make no difference; that if it was the intention of the Binneys, that their names should be concealed, and the business of the firm was to be carried on in the name of Winship only, and yet that Winship, against their wishes, in the course of the business of the firm, publicly did avow and make known the partnership, so that it became notorious who were the partners; such partnership could not, in the common sense of the terms, be deemed any longer a secret partnership; that if 'secret' in any sense, it was under such circumstances, using the terms in a peculiar sense. That, however, nothing important in this case turned upon the meaning or definition of the terms 'secret partnership'; since the case must be decided upon the principles of law, applicable to such a partnership, as this was in fact proved to be. That there was no stipulation for secrecy as to the Binneys being partners *on the face of the original articles of copartnership; and when those articles, by their own limitation, expired, the question what the partnership was, and how it was carried on for the future; whether upon the same terms as were contained in the original articles, or otherwise, was matter of fact from the whole evidence; that if the evidence was believed, Winship constantly avowed the partnership, and that the Binneys were his partners in the soap and candle manufactory business, and obtained credit thereby." But he left the jury to judge for themselves as to the evidence.

Second exception. And the counsel of the defendants did then and there further insist, that the jury had a right to infer from the evidence aforesaid, notwithstanding the entries of shipments in the invoice-book kept by Winship, that the said Amos Binney and John Binney had no knowledge thereof; and therefore, could not be presumed to have adopted or ratified the conduct of said Winship, making said shipments. But the presiding judge did then and there instruct the jury as follows: "That whether the said Amos and John Binney, or either of them, knew of the said entries or not, was matter of fact for the consideration of the jury, upon all the circumstances of the case. That, ordinarily, the presumption was, that all the parties had access to the partnership books, and might know the contents

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thereof. But this was a mere presumption from the ordinary course of business, and might be rebutted by any circumstances whatsoever, which, either positively or presumptively, repelled any inference of access; such, for instance, as the distance of place in the course of business of the particular partnership, or any other circumstances raising a presumption of non-access." And he left the jury to draw their own conclusion as to the knowledge of the Binneys of the entries in the partnership books, from the whole evidence in the case.

Third exception. And the counsel of the defendants did then and there further insist, that by the tenor of the said recited articles of agreement and bond, the said Winship had no right or authority to raise money on the credit of the said firm; or to bind the firm by his signature, for the purpose of *borrowing money. But the presiding judge did then and ^{*539]} there instruct the jury as follows: "That if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm, in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature; and that any secret and special restrictions contained in such articles of copartnership, varying the general rights and authorities of partners in such limited partnerships, and of which they are ignorant, did not affect them. That the case of *Livingston v. Roosevelt*, 4 Johns. 251, had been cited by the defendants' counsel, as containing the true principles of law on this subject; and this court agreed to the law, as to limited partnership, as therein held by the court. That it was not denied by the defendants' counsel, and was asserted in that case, that it was within the scope and authority of partners generally, in limited partnerships, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm; and if such was, in fact, the ordinary course and usage of trade, the authority must be presumed to exist. The court knew of no rule established to the contrary. That the authority of one partner in limited partnerships, did not extend to bind the other partners in transactions, or for purposes, beyond the scope and object of such partnerships. That in the present articles of copartnership, Winship was in effect constituted the active partner, and had general authority given him to transact the business of the firm. That he had, so far as respects third persons, dealing with and trusting the said firm, and ignorant of any of the restrictions of such articles, authority to bind the firm, to the same extent, and in the same manner, as partners in limited partnerships of a like nature usually possess, for the objects within the general scope of such a firm. That the articles limited the partnership to a particular period, after which, it expired, unless the parties chose to give it a future existence. That no new written articles were proved in the case: and the terms and circumstances under which it was subsequently carried on, were matters to be decided upon the whole evidence. The fair presumption was, that it was *subsequently carried on on the same terms as before, unless other facts repelled that presumption. That the bond, executed at the time of the execution of the articles, ought to be considered as a part of the same transaction and contract."

And the said counsel of the defendants did, then and there, further request

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the court to instruct the said jury, as follows, to wit: 1. That if, upon the whole evidence, they are satisfied, that the copartnership, proved to have existed between the defendants, under the name of John Winship, was known or understood by the plaintiffs to be limited to the manufacturing of soap and candles, they must find a verdict for the defendants; unless they were also satisfied, that these notes were given in the ordinary course of the copartnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they were satisfied, that any part of these moneys did go to the use of the firm, with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue. And 2. That if they are also satisfied, that the Messrs. Binneys furnished Winship with sufficient capital and credit for carrying on the business of the firm, no such consent can be implied from the mere fact that Winship applied these moneys, or any part of them, to the payment of partnership debts.

But the presiding judge refused to give the instruction first prayed for, unless with the following limitations, explanations and qualifications, viz: "That the defendants, as copartners, are not bound to pay the notes sued on, or money borrowed or advanced, unless the indorsements of the same notes, and the borrowing of such money, was in the ordinary course of the business of the firm, for the use and on account of the firm. But if the said Winship offered the notes for discount, as notes of the firm, and for their account, and he was intrusted by the partnership, as the active partner, to conduct the ordinary business of the firm, and the discount of such indorsed notes was within such business; then, if the plaintiffs discounted the notes upon the faith of such notes being so offered by the said Winship, and as binding on the firm, the plaintiffs were entitled to recover; although Winship should have subsequently misapplied the funds *received from the discount of said notes, if the plaintiffs were not parties or privy thereto, or of any such intention. And if Winship borrowed money or procured any advances on the credit and for the use of the firm, and for purposes connected with the business of the firm, in like manner, and under like circumstances, and the money was lent or advanced on the faith and credit of the partnership; the money so borrowed and advanced bound the partnership, and they were liable to pay therefor; although the same had been subsequently misapplied by Winship, the lender not being party or privy thereto, or of any such intention. And with these limitations, explanations and qualifications, he gave the instructions so first prayed for. And the presiding judge gave the instructions secondly prayed for, according to the tenor thereof.

The defendants in the circuit court excepted to these opinions and decisions of the court; and a verdict and judgment having been rendered for the plaintiffs, the defendants prosecuted this writ of error.

The case was argued by *Sprague*, for the plaintiffs in error; and by *Sergeant* and *Webster*, for the defendants.

Sprague contended, that Jacques was interested in the event of the suit, and ought not to have been permitted to testify in the cause. Such was his situation, that if the plaintiffs below did not obtain payment from the defendants, they could call upon him for the whole amount of the debt, he being the maker of the notes in suit. But if the defendants were compelled

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to pay the same, they could have no remedy over against him, having discharged him from all liability by a release, executed after the date and before the maturity of either note. It was competent for the parties to enter into such contract; and to make an effectual release as between themselves; whether Winship was the holder of the notes at the time, or had previously transferred them with his own liability as indorser. Jacques was in failing circumstances; and by a species of conventional bankruptcy, transferred his property to assignees, to be appropriated, *pro rata*, to those debts from

*542] which his *creditors should discharge him by executing the indenture. That indenture expressly names and identifies the notes in suit; and declares, 1. That those who are, or may be, holders thereof may participate in the fund; 2. That the assignees are to indemnify Winship against his liability as indorser; 3. That if on a settlement of accounts, a balance shall be due Winship, he is to hold it towards this indemnity; and it contains a release, duly and legally executed by Winship, of all claims or demands which he had, or in any event might have, on account of these notes. *Gibbs v. Bryant*, 1 Pick. 118; *Le Roy v. Johnson*, 2 Pet. 195; 1 Camp. 408; *Ludlow v. Union Insurance Company*, 2 Serg. & Rawle 119; 2 Condy's Marsh. 202; 2 Ld. Raym. 1007; 1 Holt 390, 392; 16 Johns. 70; *Riddle v. Moss*, 7 Cranch 206; 4 Taunt. 464; 5 Moore 508; 4 Stark. Evid. 751; 4 Day 55; Peake's Cas. 84-5; 4 Mass. 653.

The instructions to the jury, as contained in the first and third exceptions, when brought together and compared, and applied to the same case, will be found to be inconsistent with each other; and one of them, therefore, must be erroneous. In the first instruction, it appears, that it having been contended by the counsel for the defendants, that this was a secret partnership, and did not authorize the giving credit to any other name than that of Winship; the court instructed the jury, "that nothing important in this case turned upon the meaning of the terms secret partnership, since the case must be decided upon the principles of law applicable to such a partnership as this was in fact proved to be," &c. In the third exception, it appears, that the counsel for the defendant having contended, that by the tenor of the articles of agreement and bond, Winship had no right or authority to raise money on the credit of the firm; the judge instructed the jury, "that if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature; and that any secret and special restrictions contained in such articles of copartnership, varying *the general rights and authorities of partners in such limited partnerships, and of which they are ignorant, do not affect them.

In the first place, the jury were informed, that it was of no importance for them to determine, whether this partnership was secret as to the business or not; because their liabilities were to arise from the terms of the partnership, such as they should in fact be proved to be. But in the last, they were instructed that the liabilities of the Binneys are not to be limited or restricted to the terms of the partnership, as proved in this case, but to arise from certain "general principles and presumptions." The latter ruling is correct only in cases of open and avowed partnerships; and it was

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most important, therefore, for the jury to determine, whether this was secret as to the Binneys, so as to limit their liabilities to the special terms of their agreement ; or open, so as to subject them to the operation of the presumptions referred to by the court. And then it becomes of importance to determine, whether another part of the first instructions be correct : that the avowal of the partnership by Winship, when intended to be kept secret, and against the will of the Binneys, could extend their liability.

The legal responsibility of partnership is not to be determined by any classification into limited and unlimited. We must search deeper, and look to the real nature of the subject. In strictness, there are no unlimited partnerships ; all have their boundaries. They vary in extent, from a single joint adventure, to the most enlarged business of general merchants. But each has its sphere more or less comprehensive ; and to that sphere it is confined. The general principles of liability are the same in all ; it may flow from two sources : one, that credit was given on the faith of the name of the partner ; the other, that he participated in the consideration of the contract, by its going to the benefit of the firm. In the first, if he has authorized his name and credit to be pledged, he is bound ; although the goods purchased or the money obtained are squandered by his copartner, and never came to the use of the firm. In the other, if he be a secret ^{*or a} [*544] dormant partner, and has never authorized his name or credit to be pledged ; still, if the goods or money have gone to the partnership funds, they have come to his use ; and he is bound, not on the ground of previous authority given, but subsequent reception and use.

No man's credit can be pledged, except by himself. If it be by the intervention of another, that other must have authority from him. When the ground of liability is, that credit was given to the name, then the liability is co-extensive with the authority which the partner had to pledge the name. This power is usually conferred by the avowal of the copartnership ; and is known, limited and defined, by its nature and extent. But it is not always so ; a person may avow or profess himself a general partner, when he is in fact a special partner, or no partner at all ; or, on the other hand, the authority to use his name may be more restricted than his interest, or withheld altogether. In these cases, the question is, was the credit obtained on his name, authorized by him in any manner ; if so, he is a surety from the beginning ? In this case, was Winship authorized to pledge the credit of the Binneys ? If he was so, the authority must be derived either from the written agreement, or from acts and declarations of the Binneys. It is not derived from the written contract. By that contract, the Binneys furnished the funds, but limited their liability : 1st, by its being secret in the name of Winship alone ; 2d, by binding Winship not to become responsible for any other person ; 3d, by Amos Binney agreeing to indorse Winship's notes for stock and raw materials, when necessary. The court declared, these were restrictions on Winship, binding as to those who knew them.

2. "Acts and declarations." There were none by the Binneys : if they had avowed the partnership, they would have been liable according to the import of the avowal, and could not avail themselves of restrictions which the business did not import. Winship's declarations were no proof : those who trusted him did so on his credit ; and if they required a further responsibility, they should have demanded the articles, or have called upon

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the Binneys. Not only were Winship's declarations no evidence, but he could not prove them his *copartners, by reason of his interest in making such proof. *Brown v. Brown*, 4 *Taunt.* 752; 2 *Moore* 94; 4 *M. & S.* 475, 484; *Field v. Holland*, 6 *Cranch* 8, 24; 16 *Johns.* 89; 2 *Desauss.* 4-5.

This judgment has been rendered against the Binneys, wholly upon the ground, that they were liable, as avowed copartners, for debts contracted upon their credit. It is contended, then, 1st. That it was important to determine, whether they were avowed copartners or not. 2d. That Winship's avowal, when intended by all to be kept secret, cannot extend the liability of the Binneys. 3d. At all events, Winship could avow only such a partnership as actually existed; he could not, by misrepresenting it, extend the liabilities of others beyond what they would be if he had stated only the truth. 4th. Winship's authority was derived wholly from the written instrument, which gave him no power to pledge the credit of the Binneys to any persons; whether such persons knew the articles of the firm or not. 5th. No one has any right or claim against the Binneys, except by virtue of the writings; and, of course, subject to all their restrictions.

The court were requested to instruct the jury, that unless these notes were given in the ordinary course of the partnership business, or the money obtained from them went to the use of the firm, with the consent of Amos and John Binney, they are not responsible for their payment. The consent contemplated might be either direct or indirect, express or implied. The instructions prayed for show that it was not intended to be confined to direct or express assent, but might be implied from the fact of partnership, or the nature of the connection, or any other circumstance from which the law would raise the implication, or the jury deduce it. This instruction, thus prayed for, the court refused to give, except with certain limitations, explanations and qualifications; but the law being absolutely as set forth in the request, it was the right of the defendants below to have it so laid down to the jury, without limitation or qualification.

Sergeant and Webster, for the defendants in error.

I. The first question in this case is, as to the competency of Jacques as a witness. To the objection to his admission, *there are several answers. 1st. The interest of the witness, if any, was created by the act of the defendants, after the plaintiff had become entitled to his testimony. It is not in the power of one party, by any management, to deprive the other party of the benefit of testimony to which he would have been otherwise entitled. If this exception is admitted, it will be the first case in which a witness is declared disqualified by a release given by one party, when he is called by another. Cited, *Barlow v. Vowell*, *Skinner* 586; 2 *Starkie* 750; *Rex v. Forrester*, *Strange* 552; *Bent v. Baker*, 3 *T. R.* 27; *Simons v. Pagne*, 2 *Root* 406; *Jackson v. Ramsey*, 3 *Johns. Cas.* 234; *Baylor v. Smither*, 1 *Litt.* 117; *Tatum v. Lofton*, *Cooke* 115. Also *Long v. Baillie*, 4 *S. & R.* 222; *Forrester v. Pigeou*, 1 *M. & S.* 9. The principles sustained by these cases are very reasonable.

2d. It does not appear that Winship had any interest arising from the release. The bank could only come in as a creditor for so much of the proceeds of the notes as went to Jacques's use. The release was only co-extensive with this: and if this were not so, by the terms of the indenture,

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it would be so from the nature of the case. The notes, therefore, did not constitute a debt by Jacques. It does not appear, that any part of the money raised by these notes went to his use; his being maker makes no difference. It does not, therefore, appear, that there was anything upon which the release operated.

3d. This is not such an interest as to disqualify the witness. The interest must be certain and immediate. The distinctions between competency and credibility are known and settled. The bias of a witness is an exception only to his credit. Winship and Jacques were both answerable to the bank for all the notes. The liability of Jacques remained, whether the bank recovered or not. His interest consisted in this; that if he brought in a better debtor, and the bank could get the debt of that person, the bank might not proceed against him. But this judgment is no bar to a claim upon him, until it shall be satisfied. His interest is, therefore, a mere hope that the bank would satisfy its judgment out of its claims upon the Binneys. This hope was founded upon the situation of the parties, not on their rights.

Reverse the situation of the parties: let Jacques be solvent, *would an objection be sustained to his evidence? It is the right of action [*547 which constitutes the interest. Will Jacques gain or lose by the event of this suit? or can the verdict be given in evidence for or against him? However minute the interest, it is equally fatal; and that is a reason for holding the rule strictly. Where two are bound in a joint obligation, and one is not sued, he may be a witness against the other. 5 Mass. 71; 3 Dow. & Ry. 142; 5 Barn. & Cres. 3, 35. There is no contribution in trespass; and a joint trespasser is a witness. 2 Stark. 749; 1 Pick. 118; 6 Mass. 653; Bailey on Bills 371. Expectation in the highest degree of benefit or loss, without a legal right, does not create incompetency; and where the interest is remote and uncertain, the witness is not excluded. 2 Stark. 301, 744, 749. *Page v. Weeks*, 13 Mass. 199. All the cases cited by the counsel for the plaintiff in error come within these principles. No one of them resembles the present. In all of them, there was an immediate interest.

II. The instructions given in the circuit court are correct; those instructions were not a dissertation or treatise on the law of partnership generally, but are to be considered in reference to the subject before the court and jury. It is contended—

1. That there is no inconsistency between the first and third exceptions. The distinction is obvious between a secret partnership, and a secret stipulation between partners, limiting the authority of each partner. They are essentially different. The substance of the instructions is resolved into this position; that the act of one partner, within the scope of the partnership business, and also within the general scope of the authority of partners, would by law bind the other partners. The law is here laid down carefully and correctly.

2. The whole matter rests upon two or three general well-established principles. That which constitutes a partnership is the agreement to participate in profit and loss. The liability of the partners, is a legal consequence of that agreement; it is a construction of law, not a matter of agreement: and this is equally true of general partnerships and of special ones; of open partners and of secret partners. Such is our law. *To ascertain the liability of partners therefore, we do not look to their agreements or [*548

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their acts between themselves. It is not in their power to limit their liability. The intention to do so is inconsistent with law. The attempt to do so is unavailing. Their agreements are good between themselves ; they are vain as to third persons.

3. The authority of a partner is derived from the law ; is a construction of law. The only limitation is, that it must be within the scope of the partnership ; the name is nothing. If within the scope of a general authority, strangers are not bound to distinguish. They may be affected by actual knowledge. The circuit court went as far in behalf of the defendants as the law would warrant. Taking the whole of the instructions together, there can be no doubt, if the facts were found correctly by the jury, that the defendants below were liable. With the facts, the court here have nothing now to do.

But it was most unequivocally proved : 1. That a partnership was established in 1817, and continued for eight years, under the agreement, and after the agreement expired. It was rather a general than a special partnership ; the business was general and the establishment permanent. 2. It was an open, not a secret partnership ; it was a matter of notoriety. 3. It gave the ordinary authority of a copartnership to give notes, &c. The agreement expressly contemplated this. 4. The credit was given to the firm. This is proved by the evidence of Harris, as well as that of Jacques. 5. Some of these notes are distinctly traced to the business of the partnership. All the notes were understood to be for the partnership concerns. Thus, then, the case is no more than an ordinary one of a partnership, carried on under the name of one partner ; and the use of an individual name ought to operate against all the partners. It enables them to practise unduly upon third persons ; to obtain loans, without the usual pledge of a double responsibility. In this very case, partnership notes were given in the ordinary business of the partnership, drawn by Winship, and indorsed ^{*549]} by Amos Binney, and thus ^{*}the makers and indorser were the same persons. This species of partnership produces a confusion, uncertainty and disputes ; and should receive no favor.

Sprague, in reply :—In answer to the position, that the bank had a right to Jacques's testimony, of which they could not be deprived by the release of Winship, one of the defendants, he argued, 1st. That it does not appear, that any such right existed before the execution of the release by Winship, on the 28th of August 1825. None of the notes were then payable. 2d. Upon a critical examination of all the authorities, it will be found, that the rule contended for extends only to cases where one party created an interest in the witness, for the purpose of depriving his adversary of the testimony ; which, being a fraud, shall not succeed. It does not apply to a *bonâ fide* contract made in the course of business, much less to a case like the present. Mr. Sprague then examined the case of *Barlow v. Dowell*, Skin. 586, and the other cases relied on by the counsel for the defendants in error.

It is said, that the interest was created by the act of the defendants. In the first place, it was by a fair and *bonâ fide* contract in the course of business, and without any design to exclude the witness. This is manifest from the facts stated in the record. In the next place, it was not the act of the defendants who are contesting this demand. The Binneys only have

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interest to resist this action. The interest of Winship is adverse to theirs ; as he seeks to render them equally liable with himself. If he can make them his partners, he thereby transfers one-half of this debt from himself, and throws it upon them. He alone made this release ; the Binneys had no knowledge of it. It was not a partnership act ; and it was an instrument under seal. So strong is Winship's interest against the Binneys, that it would exclude him from testifying against them to prove the partnership. To allow Winship then to create an interest in Jacques, which would induce him to testify that the Binneys were his partners ; is to enable him to bribe the witness to accomplish his purpose.

It was said, that no interest is proved, because it does not *appear that the money obtained on the notes went to Jacques's use. He [*550 was the first witness, and then appeared to the court only as the real maker of the notes. The release created an interest which his testimony could not purge ; and if it could, his testimony would only show that some of the notes were for Winship's use. If Jacques was, as is contended by the counsel for the defendants in error, an accommodation maker, he would have a direct interest in making the Binneys responsible. He would thus obtain their liability for his ultimate indemnity ; but if he failed in proving them to be the partners of Winship, he must rely solely on the insolvent Winship. So that, whether a real or an accommodation maker, Jacques was so interested as to be incompetent.

It has been strongly urged, that as satisfaction is necessary to protect the witness from the plaintiffs below, he has no direct and certain interest in the event of this suit ; and that the judgment would not be evidence for him. This is the first instance in which such a nice and hazardous distinction has been attempted. It is nowhere to be found in the books ; no case has ever recognised it ; but, on the contrary, decisions almost innumerable have been made, that an interest, depending not merely on the rendition of judgment, but on judgment and satisfaction, is such a direct and certain interest as to affect the competency. It is said, the plaintiffs may never enforce the judgment, and therefore, the interest is not certain. This uncertainty is only as to the acts of the party, not as to the operation of law ; and it is always uncertain, whether a party will pursue his case to judgment and execution. But still the witness is excluded ; because, if the plaintiff should follow up his legal rights, an interest would accrue. It is certain, that the law gives the power to the party, and it is to be presumed, that he will exercise it. In nearly all the cases cited in the opening, judgment alone would be ineffectual ; but satisfaction was also necessary, to create the rights or liability of the witness.

It is insisted, that dormant partners are equally liable, when discovered, as if the debts had been originally contracted upon the credit of their names : that is, that there is no substantial *distinction between secret and avowed partnership. This is confounding things, widely different, [*551 and broadly distinguished by the authorities. It is true, as to one class of debts, the liability of dormant partners is equal to that of the avowed partners, where the property actually came to the use of the firm. There, the obligation to pay arises from participation in the consideration ; but if the property never came to the use of the firm, secret partners are not liable,

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although they would have been, if avowed ; because their credit would then have been pledged.

It is said, that the authority of each to bind the others is a conclusion of law. This is true, and so is that of every agent to bind his principal. But it is a conclusion of law from facts, and varies or ceases as they change. The written instruments did not authorize the pledging the credit of the Binneys to those who knew their terms. This is ruled by the court, and not controverted. If, then, Winship had exhibited the articles, he could not have bound his co-defendants to the payment of the notes in suit ; all his authority being derived from the articles. Could he, by suppressing them, enlarge his own powers ? Could he, by a *suppressio veri*, clothe himself with an authority which no one had imparted ? If he could suppress the limitations upon the special partnership, why might he not also the restrictions upon the general ? Why not merely declare himself a partner generally, and bind his associates, upon the principles and presumptions arising from the general partnership thus avowed ? Each member stands in the same relation to the firm as an agent to his principal, and the authority to bind rests upon the same foundation. Can an agent, then, having no other source of authority than a written letter of attorney, enlarge his power, by suppressing the instrument ? Can a principal, who has merely signed a written power, and has neither said nor done anything, nor caused or suffered or acquiesced in any act or declaration by any other person, from which authority could be deduced, be bound beyond the extent of the power which he has subscribed, by the mere suppression of the truth by the agent ? Where a person is responsible, merely and exclusively by *virtue of written articles, can *552] he be rendered liable beyond the extent of those articles ?

MARSHALL, Ch. J., delivered the opinion of the court.—This was an action brought in the court for the first circuit and district for Massachusetts, against John Winship, Amos Binney and John Binney, merchants and partners, trading under the name and firm of John Winship, as indorser of several promissory notes, made by Samuel Jacques, jr. At the trial, the maker was called by the plaintiffs, and sworn. He was objected to by the defendants, as an interested witness, an instrument being produced purporting to be a release in the name of John Winship of all liability of the maker on the said notes. The operation of the said instrument, as a release of the notes in suit, was controverted by the plaintiffs. It is unnecessary to state the instrument, or to discuss the question arising on it, or on the competency of the witness ; because the court is divided on the effect of the instrument and on the competency of the witness.

The witness testified, that he knew from general reputation that the defendant, John Winship, was concerned with the other defendants, Amos and John Binney, in the soap and candle business ; that Winship avowed the partnership ; that he had dealings with Winship, soon after its commencement, and supplied him with rosin, for which he sometimes gave a note, signed John Winship, which the witness always took on the credit of the Binneys. Winship and the witness were in the habit of lending their names to each other, and Winship always represented that the notes made or indorsed by the witness for his accommodation were for the use of the firm. Several other witnesses were examined on the part of the plaintiff to

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prove the partnership, whose testimony was rendered unimportant by the production of the articles themselves. The defendants exhibited them, and they are in the following words :

“ The memorandum of an agreement made this twenty-fifth day of September 1817, between Amos Binney and John Binney, of Boston, county of Suffolk, and John Winship, of *Charlestown, county of Middlesex, [**553 all in the commonwealth of Massachusetts, for the manufacture of soap and candles, witnesseth : That the said Amos and John Binney agree to furnish for the above purpose, the sum or capital stock of \$10,000, at such times as may be wanted, to purchase stock or materials for carrying on the aforesaid manufacture ; and the said John Winship agrees on his part to conduct and superintend the manufactory, and to pay his whole and undivided attention to the business ; to manufacture, or cause to be manufactured, every article, in the best possible manner, and to use his utmost skill and exertions to promote the interest of the establishment, under the name and firm of John Winship, and without any charge for his personal labors ; and to keep a fair and regular set of books and accounts, open and subject at all times to the inspection of the parties interested in the concern, and annually, on the first day of October of each year, to make and exhibit a statement of the state of the business, the amount of purchases and sales, and the profits, if any, of the business, that have been made ; the expenses of conducting the business, and the profits, to be divided in the following manner : to say, from the profits is to be paid interest for the capital stock of \$10,000, at the rate of six per centum per annum, all expenses of rent, labor, transportation, fuel and utensils, that it may be necessary to purchase or have, and the remainder of the profits, if any, to be equally divided between the said Winship and Binneys, one-half thereof to the said John Winship, and the other half to A. and J. Binney ; and in case no profit should be made, but a loss, then the loss is to be borne and sustained, one-half by the said A. and J. Binney, and the other half by the said John Winship. The agreement to continue in force for two years from the first day of October next ensuing, and then for a further term, provided all parties agree thereto. And to the true and faithful performance of the foregoing conditions, each party bind themselves to the other in the penal sum of \$10,000.”

On the back of which were receipts signed by said Winship, acknowledging that he had received of Amos Binney \$1000, on the 6th of September 1817, and *\$4000, on the 9th of October 1817 ; and on the 27th of December 1827, he had in his hands \$10,000, as said Amos’s proportion of the capital ; and that he had received of John Binney \$2500, on the 1st of October 1817, and \$500, on the 3d of November 1817, and \$500, on the 17th of November 1817, and \$1500, on the 13th of June 1820, and on the 2d of June 1821, he had in his hands \$10,000, as said John’s proportion of the capital stock.

They also gave in evidence a bond given by said Winship to said Amos, on the 25th of September 1817, in the penal sum of \$10,000, with the condition following : “ The conditions of this obligation are such, that whereas, the above-bounden John Winship has this day made an agreement with Amos Binney and John Binney, both of Boston aforesaid, for the purpose of carrying on a manufactory of soap and candles on joint

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account of the parties aforesaid ; and whereas, the said A. Binney hath engaged to indorse the notes given by the said John Winship, for the purchase of stock and raw materials for manufacturing, when necessary to purchase on a credit, and in consideration of which the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons other than the said Amos Binney, for the term of two years from the first day of October 1817. Now, therefore, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person to any amount other than the same Amos Binney for the aforesaid term of two years from the first day of October 1817, then this obligation to be void and of no effect ; otherwise, to remain in full force and virtue."

The defendants also produced witnesses whose testimony furnished some foundation for the presumption, that the money arising from the notes, on which the suits were brought, was not applied by Winship to the purposes of the firm. Other testimony led to the belief, that a part, if not the whole of the money was so applied. All the notes in suit were discounted by and applied to the credit of John Winship.

*The testimony being closed, the counsel for the defendant insist-
*555] ed, 1st. "That the said copartnership between them was, in contemplation of law, a secret copartnership, and did not authorize the giving of credit to any other name than that of the said Winship ;" but to this the counsel for the plaintiffs did then and there insist before the said court, that this was an open or avowed, and not a secret copartnership. And the presiding justice of the said court did state his opinion to the jury on this point, as follows : "That according to his understanding of the common meaning of 'secret partnership,' those were deemed secret, where the existence of certain persons as partners was not avowed or made known to the public, by any of the partners. That where the partners were all publicly known, whether this was done by all the partners, or by one only, it was no longer a secret partnership ; for secret partnership was generally used in contradistinction to notorious and open partnership ; that whether the business was carried on in the name and firm of one partner only, or of him and company, would, in this respect, make no difference ; that if it was the intention of the Binneys that their names should be concealed, and the business of the firm was to be carried on in the name of Winship only ; and yet that Winship, against their wishes, in the course of the business of the firm, publicly did avow and make known the partnership, so that it became notorious who were the partners ; such partnership could not, in the common sense of the terms, be deemed any longer a secret partnership ; that if 'secret,' in any sense, it was under such circumstances, using the terms in a peculiar sense. That, however, nothing important in this case turned upon the meaning or definition of the terms 'secret partnership,' since the case must be decided upon the principles of law, applicable to such a partnership, as this was in fact proved to be. That there was no stipulation for secrecy as to the Binneys being partners, on the face of the original articles of copartnership ; and when those articles, by their own limitation, expired, the question what the partnership was, and how it was carried on for the future ; whether upon the same terms as were contained in the original

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articles or otherwise ; was matter of fact from the whole evidence ; that if the evidence was believed, Winship constantly avowed the partnership, and that the Binneys were "his partners in the soap and candle manu-
factory business, and obtained credit thereby." But he left the jury [*556
to judge for themselves as to the evidence.

Second exception. And the said counsel of the defendants did then and there further insist, that the said jury had a right to infer from the evidence aforesaid, notwithstanding the entries of the shipments in the invoice-book kept by said Winship, that the said Amos Binney and John Binney had no knowledge thereof ; and therefore, could not be presumed to have adopted or ratified the conduct of said Winship making said shipments. But the presiding judge did then and there instruct the jury as follows : "That whether the said Amos and John Binney, or either of them, knew of the said entries or not, was matter of fact for the consideration of the jury, upon all the circumstances of the case. That, ordinarily, the presumption was, that all the parties had access to the partnership books, and might know the contents thereof. But this was a mere presumption from the ordinary course of business, and might be rebutted by any circumstances whatsoever, which either positively or presumptively repelled any inference of access ; such, for instance, as the distance of place in the course of business of the particular partnership, or any other circumstances raising a presumption of non-access." And he left the jury to draw their own conclusion as to the knowledge of the Binneys, of the entries in the partnership books, from the whole evidence in the case.

Third exception. And the said counsel of the defendants did then and there further insist, that by the tenor of the said recited articles of agreement and bond, the said Winship had no right or authority to raise money on the credit of the said firm, or to bind the firm by his signature, for the purpose of borrowing money. But the presiding judge did then and there instruct the jury as follows : "That if the particular terms of the articles of copartnership were not known to the public, or to persons dealing with the firm, in the course of the business thereof, they had a right to deal with the firm in respect to the business thereof, upon the general principles and presumptions of limited partnership of a like *nature ; and that any [*557
secret and special restrictions contained in such articles of copartner-
ship, varying the general rights and authorities of partners in such limited
partnerships, and of which they are ignorant, did not affect them. That the
case of *Livingston v. Roosevelt*, 4 Johns. 251, had been cited by the defend-
ants' counsel, as containing the true principles of law on this subject ; and
this court agreed to the law, as to limited partnership, as therein held by
the court. That it was not denied by the defendants' counsel, and was
asserted in that case, that it was within the scope and authority of partners,
generally, in limited partnership, to make and indorse notes, and to obtain
advances and credits for the business and benefit of the firm ; and if such
was, in fact, the ordinary course and usage of trade, the authority must
be presumed to exist. The court knew of no rule established to the contrary.
That the authority of one partner in limited partnerships did not extend to
bind the other partners in transactions, or for purposes, beyond the scope
and object of such partnerships. That in the present articles of copartner-
ship, Winship was in effect constituted the active partner, and had general

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authority given him to transact the business of the firm. That he had, so far as respects third persons, dealing with and trusting the firm, and ignorant of any of the restrictions in such articles, authority to bind the firm, to the same extent and in the same manner as partners in limited partnerships of a like nature usually possess, in the business, or for the objects within the general scope of such a firm. That the articles limited the partnership to a particular period; after which it expired, unless the parties chose to give it a future existence. That no new written articles were proved in the case, and the terms and circumstances under which it was subsequently carried on, were matters to be decided upon the whole evidence. The fair presumption was, that it was subsequently carried on, on the same terms as before, unless other facts repelled that presumption. That the bond executed at the time of the execution of the articles ought to be considered as a part of the same transaction and contract."

And the said counsel of the defendants did then and there further request the said court to instruct the said jury as follows, to wit :

*1. That if, upon the whole evidence, they are satisfied, that the ^{*558]} copartnership proved to have existed between the defendants, under the name of John Winship, was known or understood by the plaintiffs, to be limited to the manufacturing of soap and candles, they must find a verdict for the defendants, unless they are also satisfied, that these notes were given in the ordinary course of the copartnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they are satisfied, that any part of these moneys did go to the use of the firm, with such consent, that then they must find a verdict for the plaintiffs for such part only, and not for the residue. And—

2. That if they are also satisfied, that the Messrs. Binneys furnished Winship with sufficient capital and credit for carrying on the business of the firm, no such consent can be implied, from the mere fact that Winship applied these moneys, or any part of them, to the payment of partnership debts.

But the presiding judge refused to give the instructions first prayed for, unless with the following limitations, explanations and qualifications, viz: That the defendants, as copartners, are not bound to pay the notes sued on, or money borrowed or advanced, unless the indorsements of the same notes and the borrowing of such money, was in the ordinary course of the business of the firm, for the use and on account of the firm. But if the said Winship offered the notes for discount, as notes of the firm, and for their account, and he was intrusted by the partnership, as the active partner, to conduct the ordinary business of the firm, and the discount of such indorsed notes was within such business; then, if the plaintiffs discounted the notes, upon the faith of such notes being so offered by the said Winship, and as binding on the firm, the plaintiffs were entitled to recover; although Winship should have subsequently misapplied the funds received from the discount of said notes; if the plaintiffs were not parties or privies thereto, or of any such intention. And if Winship borrowed money, or procured any advances, on the credit and for the use of the firm, and for purposes connected with the business of the firm, in like manner, and under like circumstances, and money ^{*559]} was lent or advanced on the faith and credit of the partnership, the money so *borrowed and advanced bound the partnership; and they

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were liable to pay therefor, although the same had been subsequently misapplied by Winship ; the lender not being party or privy thereto, or of any such intention. And with these limitations, explanations and qualifications, he gave the instructions so first prayed for. And the presiding judge gave the instruction secondly prayed for, according to the tenor thereof.

To these opinions and decisions of the court, the defendants excepted. A verdict was found for the plaintiffs, and judgment entered thereon ; which is brought before this court by writ of error.

The exceptions will now be considered. All must admit, that the opinion asked in the first instance by the counsel for the defendant in the circuit court, ought not to have been given. That court was required to decide on the fact as well as law of the case, and to say, on the whole testimony, that it did not warrant giving credit to any other name than that of John Winship. But, though this prayer is clearly not sustainable, the counsel for the plaintiff in error contends, that the instructions actually given were erroneous.

The first part of the charge turns chiefly upon the definition of a secret partnership, which is believed to be correct ; but the judge proceeds to say, that if incorrect, it would have no influence on the cause ; and adds, "that the case must be decided on the principles of law applicable to such a partnership as this was in fact proved to be ;" "that when the original articles expired by their own limitation, the question what the partnership was, and how it was carried on, for the future, whether upon the same terms as were contained in the original article, or otherwise, was matter of fact from the whole evidence." The error supposed to be committed in this opinion is in the declaration, that nothing important in this case turned on the meaning or definition of the terms "secret partnership." This is not laid down as an abstract proposition, universally true, but as being true in this particular case. The articles were produced, and the judge declared that the case must depend on the principles of law applicable to such a partnership as this was in fact. This instruction could not, we think, *injure the plaintiff in error. Its impropriety is supposed to be made apparent by [*560 considering it in connection with the third exception.

The second instruction appears to be unexceptionable, and the counsel for the plaintiff in error is understood not to object to it.

The third instruction asked in the circuit court, goes to the construction of the articles of copartnership. The plaintiff in error contends, that those articles gave Winship no authority to raise money on the credit of the firm, or to bind it by his signature, for the purpose of borrowing money. The instruction given was, that if the particular terms of the articles were unknown to the public, they had a right to deal with the firm, in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature ; and that any special restrictions did not affect them ; that in such partnerships, it was within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm ; and if such was the general usage of trade, the authority must be presumed to exist ; but that it did not extend to transactions beyond the scope and object of the copartnership. That in the present articles, Winship was in effect constituted the active partner, and has general authority to transact the business of the firm, and

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a right to bind the firm in transacting its ordinary business, with persons ignorant of any private restriction, to the same extent that partners in such limited partnerships usually possess. The amount of the charge is, that if Winship and the two Binneys composed a joint company for carrying on the soap and candle business, of which Winship was the acting partner, he might borrow money for the business, on the credit of the company, in the manner usually practised in such partnerships; notwithstanding any secret restriction on his powers, in any agreement between the parties; provided such restriction was unknown to the lender.

The counsel for the plaintiff in error has objected to this instruction with great force of reasoning. He contends very truly, that in fact scarcely any ^{*561]} unlimited partnerships ^{exist.} They are more or less extensive; they may extend to many or to few objects; but all are in some degree limited. That the liability of a partner arises from pledging his name, if his name is introduced into the firm, or from receiving profits, if he is a secret partner. No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and if he transcends that authority, the act cannot affect his principal; he acts no longer as an agent. The same principle applies to partners. One binds the others, so far only as he is the agent of the others.

If the truth of these propositions be admitted, yet their influence on the case may be questioned. Partnerships for commercial purposes; for trading with the world; for buying and selling from and to a great number of individuals; are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is, that a man who shares in the profit, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently, to bind his partners in such transactions, as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership. When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company, to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and if it be so, the partner who purchases on credit, in the name of the firm, must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are perhaps never published. They are rarely, if ^{*562]} ever, seen, except by the partners themselves. The ^{stipulations} they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business, in the usual way. This power is conferred by entering into the part-

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nership, and is perhaps never to be found in the articles. If it is to be restrained, fair-dealing requires that the restriction should be made known. These stipulations may bind the partners; but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. 2 H. Bl. 235; 17 Ves. 412; Gow on Part. 17.

The counsel for the plaintiff in error supposes, that though these principles may be applicable to an open avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner, and one whose name was to the articles. But their responsibility, in all partnership transactions, is admitted to be the same. Those who trade with a firm, on the credit of individuals whom they believe to be members of it, take upon themselves the hazard that their belief is well founded. If they are mistaken, they must submit to the consequences of their mistake; if their belief be verified by the fact, their claims on the partners, who were not ostensible, are as valid as on those whose names are in the firm. This distinction seems to be founded on the idea, that, if partners are not openly named, the resort to them must be connected with some knowledge of the secret stipulations between the partners, which may be inserted in the articles. But this certainly is not correct. The responsibility of unavowed partners depends on the general principles of commercial law, not on the particular stipulation of the articles.

It has been supposed, that the principles laid down in the third instruction, respecting these secret restrictions, are inconsistent with the opinion declared in the first; that in this case, where the articles were before the court, the question whether this was in its origin a secret or an avowed *partnership, had become unimportant. If this inconsistency really existed, it would not affect the law of the case; unless the judge had [^{*563} laid down principles in the one or the other instruction which might affect the party injuriously.] But it does not exist. The two instructions were given on different views of the subject, and apply to different objects. The first respected the parties to the firm, and their liability, whether they were or were not known as members of it; the last applies to secret restrictions on the partners, which change the power held out to the world, by the law of partnership. The meaning of the terms "secret partnership," or the question whether this did or did not come within the definition of a secret partnership, might be unimportant; and yet the question whether a private agreement between the partners, limiting their responsibility, was known to a person trusting the firm, might be very important.

The proposition of the defendants in the circuit court was, that Winship had no right or authority to raise money on the credit of the firm, or to bind the firm by his signature, for the purpose of borrowing money. This can scarcely be considered as a general question. In the actual state of the commercial world, it is perhaps impossible to conduct the business of any company, without credit. Large purchases are occasionally made on credit; and it is a question of convenience, to be adjusted by the parties, whether the credit shall be given by the vendor, or obtained at the bank. If the vendor receives a note, he may discount it at the bank. If, for example, the notes given by Winship to Jacques, for rosin, to carry on his manufacture, which have been mentioned by the witness, had been

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discounted in bank, it would not have been distinguishable from money borrowed in any other form. The judge said, that if it was within the scope and authority of partners generally, in limited partnerships, to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm, and if such was in fact the ordinary course and usage of trade, the authority must be presumed to exist. Whether this was the fact or not was left to the jury.

Does anything in the articles of agreement restrain this general authority? *The articles state the object of the company to be, the ^{*564]} manufacture of soap and candles; the capital stock to be \$10,000, which sum is to be paid in by Amos and John Binney; John Winship to conduct and superintend the manufactory; the name of the firm to be John Winship; the profit and loss to be divided. They are silent on the subject of borrowing money. If the fact that the Binneys advanced \$10,000 for the stock in trade, implied a restriction on the power of the manager to carry on the business on credit, it would be implied in almost every case.

But the bond given by Winship to Amos Binney, which is admitted by the judge to constitute a part of the partnership agreement, is supposed to contain this restriction. The condition of the bond recites, that "whereas Amos Binney had engaged to indorse the notes given by the said John Winship for the purchase of stock and raw materials for manufacturing, when necessary to purchase on credit, in consideration of which, the said John Winship hath engaged not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Amos Binney." "Now, if the said John Winship shall faithfully observe the conditions, and wholly abstain from becoming the surety or indorser of any person, to any amount, other than the said Amos Binney, then," &c.

The agreement recited, but not inserted in this condition, that Amos Binney would indorse the notes of Winship, when it should be necessary to purchase on credit; while it implies that the power was incident to the act of partnership; was not in itself a positive restriction on that power. The affirmative engagement on the part of Amos Binney, that he will indorse, is not a prohibition on Winship to obtain any other indorser. The exigencies of trade might require the negotiation of a note, in the absence of Mr. Binney, and this may have been a motive for leaving this subject to the discretion of the acting partner. If he has abused this confidence, the loss must fall where it always falls, when a partner, acting within his authority, injures his copartners. If, then, the agreement between Amos Binney and John Winship contains nothing more than is recited in the condition, it contains no inhibition on Winship to negotiate notes in the ordinary course of ^{*565]} *business. The restriction on Winship is not in this recital, but in his engagement expressed in the condition of the bond.

He engages not to indorse the notes, paper, or become in any manner responsible or security for any person or persons, other than the said Binney. The obvious import of this engagement is, that Winship will not make himself responsible for another. Had he made an accommodation note for Jacques, it would have been as much a violation of this agreement as if he had indorsed it. The undertaking is not to indorse notes for another. But this note is indorsed for himself. It is negotiated in bank, in the name of the firm, and the money is carried to the credit of the firm. Had not

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Winship misapplied this money, no question would have arisen concerning the liability of his partners on this note. The stipulation in the bond, not to indorse or become security for another, would not have barred the action. But be this as it may, this stipulation between the parties is a secret restriction on a power given by commercial law and usage, generally known and understood; which is obligatory on the parties, but ought not to affect those from whom it is concealed.

The counsel for the defendants in the circuit court then prayed an instruction to the jury, that if they were satisfied, that the partnership was known to the plaintiffs to be limited to the soap and candle business, they must find for the defendants; unless they were also satisfied, that these notes were given in the ordinary course of the partnership business, or that the moneys obtained upon them went directly to the use of the firm, with the consent of Amos Binney and John Binney; and that if they are satisfied, that any part of these moneys did go to the use of the firm with such consent, that then they must find a verdict for such part only; and not for the residue. This instruction was not given as asked; but was given with "limitations, explanations and qualifications." The judge instructed the jury, in substance, that the defendants were not bound to pay the notes sued on, unless the indorsements thereon were in the ordinary course of the business of the firm, for the use and on account of the firm; but if they were satisfied, that the notes were so offered and discounted, and that the said Winship was intrusted by the partnership, as the active partner, to conduct the ordinary business of *the firm, and the discount of such indorsed notes was within such business, then the plaintiffs were [*566 entitled to recover, although Winship should have subsequently misapplied the funds, received from the discount of said notes; if the plaintiffs were not parties or privies thereto, or of any such intention.

The plaintiffs in error contend, that the instruction ought to have been given, as prayed, without any qualification whatever. The instruction required is, that although the jury should be satisfied, that the money went to the use of the firm, they should find for the defendants; unless they should be also satisfied, that the consent of Amos and John Binney was given to its being so applied. That is, that a note discounted by the acting and ostensible partner of a firm, for the use of a firm, the money arising from which was applied to that use, could not be recovered from the firm, by the holder, unless the application was made with the consent of all the partners. The counsel for the plaintiffs in error is too intelligent to maintain this as a general proposition. He must confine it to this particular case. He is understood as contending, that under the secret restrictions contained in the bond given by Winship to Amos Binney, Winship was restrained from discounting these notes, even for the use of the firm; and that no application of the money to the purposes of the copartnership could cure this original want of authority, and create a liability which the note itself did not create; unless such application was made with the consent of all the partners. So understood, it is a repetition of the matter for which the third exception was taken, and is disposed of with that exception. The instruction, therefore, ought not to have been given as prayed. Still, if the court has erred in the instruction actually given, that error ought to be corrected. That instruction is, that if the notes were offered in the usual

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course of business for the firm, by the partner intrusted to conduct its business, and were so discounted, and if such discount was within such business, then the subsequent misapplication of the money, the holders not being parties or privies thereto, or of such intention, would not deprive them of their right of action against the copartnership. We think this opinion entirely correct. It only affirms the common principle, that the misapplication of funds raised by ^{*567]} authority, cannot affect the person from whom those funds are obtained.

We think there is no error in the opinions given by the judge to the jury. The court being divided, on the competency of Samuel Jacques as a witness, the judgment is affirmed, with costs and damages at the rate of six per centum per annum, by a divided court.

BALDWIN, Justice. (*Dissenting.*)—The plaintiffs sue in this case as the indorsees of six promissory notes drawn by James Jacques, and indorsed by John Winship, which came to their hands, as the discounters thereof, being offered by John Winship, and the proceeds thereof placed to his credit in the bank. They were not notes indorsed to the plaintiffs in payment, or as collateral security for the payment of an antecedent debt, or the performance of any pre-existing contract. The bank are prohibited in their charter from dealing in goods, unless for the sale of such as are pledged for the payment of debts. (4 Laws U. S. 43; Ninth fundamental article of the charter of the bank.)

This was not then the case of goods sold by plaintiffs to defendants, as partners, on the faith of the partnership, in the course of their business. Neither is it a case of money previously lent, and a note or bill indorsed over in payment or security. The case finds, and the circuit court considered it, a case of discount, which is a purchase of the note on stipulated and well-known terms. The purchase or discount of a note is contract wholly unconnected with the objects, uses or application of the money paid. A party who sells a bill or note, incurs no liability to the discounter, by the mere contract of discount, where he does not indorse it; nor does the discounter who pays for the discounted bill or note in other bills and notes, without indorsement, guaranty their payment. The contract is one of sale; and in the absence of fraud or misrepresentation, the rights of the parties are tested exclusively by the only contract which the nature of the case imports; of sale and purchase as of any other article in market.

Where a purchase is made or money borrowed on partnership account, an immediate debt is created; a note or bill given or indorsed, is for payment of the existing debt; and if not ^{*568]} paid, the debt remains, unless the bill or note has been accepted as payment. So, if the bill or note is given as collateral security. And the law is the same, whether one or all the partners do the act; there is an antecedent debt binding on all, or an indemnity to be provided; the obligation is not impaired by giving or transferring an effectual security. But the present case is wholly different. The defendants owed no antecedent debt to the bank, for which these notes were transferred to them. They were neither offered nor accepted as payment or indemnity; but sold by Winship, and purchased by the bank, at their value. That value is, in my opinion, to be ascertained with reference to the names on the bill, who are the parties to the contract; and in my view

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of the law, the only parties. The bank bought from John Winship, the promise of James Jacques, guaranteed by Winship, on known conditions. This distinction between passing or pledging a note in payment, and discounting it, has been wholly overlooked in the opinion of the circuit court ; and the case seems to have been considered throughout, as governed by the same rules which apply to purchases, loans, and other partnership engagements. The case before them was a pure case of discount, which is governed by its own principles ; which, in my opinion, would have produced a different result in the cause, had they been laid down to the jury.

These principles are fully illustrated and established in their various bearings on cases which have been adjudicated, and laid down in terms too clear not to be understood. 15 East 10, 11 ; 2 Doug. 654, note ; 3 Ves. jr. 368 ; 10 Ibid. 204 ; 3 T. R. 757 ; 1 Ld. Raym. 442 ; 1 Cranch 192 ; 6 Ibid. 264 ; 1 W. C. C. 156, 321, 328, 399 ; 3 Ibid. 266 ; 9 Johns. 310 ; Burke's Cases in Bankruptcy 114, 170 ; 3 Madd. 120 ; 1 Esp. N. P. 448. I do not refer to the latter case, because it ought to be any authority in this court ; but because it shows that Lord KENYON, who dissented from the court of king's bench in 1790, in the case quoted from 3 T. R. 757, came to the same opinion in 1796. Neither do I rely on elementary writers who lay down the same positions ; but on the adjudged cases, which seem to me to be the safest guides to the law. "*Satius est petere fontes, quam sectari rivulos.*" 10 Co. 118.

*Resting on these authorities, I shall consider the case on the evidence, as one of discount, not of loan, purchase or any other pre-existing liability. As the evidence of Jacques proves that these notes were accommodation, and not notes of business ; as Mr. Harris, the discount clerk, testifies, that all the notes were discounted at Winship's request, and the proceeds passed to his credit ; that it is easy to distinguish accommodation notes from others ; and that he considered these in suit to be of that description ; and that the bank had frequently discounted notes drawn by Winship, and indorsed by Amos Binney ; and Mr. Parker, one of the directors of the bank, testified, that when the bank discounted these notes, it was understood that Amos and John Binney were bound by them. Witness understood, that they were bound as partners in the soap and candle business, not general partners. Did not know, as to John Binney, whether plaintiff considered him answerable, but that they did so consider Amos Binney ; that a number of notes of this kind were discounted, while other notes indorsed by Amos Binney were in bank ; that Amos and John Binney were engaged in large business as merchants, and witness does not know that any one ever supposed defendants to be partners, except in the manufacture of soap and candles.

I cannot do injustice to the plaintiffs, by founding my opinion on this testimony. Mr. Parker was present at the making of the contract of discount of these notes ; he was one of the agents of the bank in making it, and a party to it, as a member of the corporation, directly interested. His evidence is the solemn admission, on oath, of a party to the contract, and ought to be taken as true. The defendants have a right to its full benefit, as explanatory of the nature, terms and circumstances under which it was made. Mr. Harris, the discount clerk, was the appropriate agent of the bank in consummating the contract of discount, by paying to Winship the

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proceeds of the discounted notes ; and I cannot err in saying, from the record, that these were the only witnesses examined at the trial touching the discount of these notes ; the only contract, in my opinion, which the law raises between the plaintiffs and defendants. What, then, was the obligation which this contract of discount, as proved by Harris and Parker, imposed on Amos and John Binney, by the bank's purchasing these notes *570] *at the request of John Winship, and paying or passing the proceeds *570] to his credit ?

The notes were accommodation, so understood by the plaintiffs, and discounted as such. The bank, then, knew that they were not what they purported to be ; they are set forth in the record, are all drawn for value received, and thus bear a falsehood on their face, known to the bank. Such notes, Mr. Harris says, are easily distinguishable from notes of business ; and the bank did not discount them as representing a purchase, a loan, or any pre-existing obligation by Jacques to pay the amount to Winship, but as the lending of his name by Jacques to Winship, to enable him to raise money by the sale of the notes. There was in this respect no fraud on the bank. They knew they were not purchasing notes given and indorsed in the usual course of business. They did not come to their hands as innocent indorsers, taking them to be what they imported to be, for value received. The bank are purchasers, it is true, for a valuable consideration ; but not innocent, or without notice. They took the notes, with a known taint on their very face, which can only be effaced by some subsequent indorsee or holder, who takes them in the course of business, without notice, and takes them as between the payer and payee, as having been given for value received. But the plaintiffs have become the indorsees by discount, knowing that by the acknowledged principles of commercial law, as between the original parties in all their relations, Winship was the maker and Jacques the indorser. As between them and the bank, their relations were the same, whether the notes were of business or accommodation ; they were liable in the capacities they respectively assumed on the face of the notes. When the discount, or the indorsee, of an accommodation note, known by him to be such, seeks to recover the amount from a person whose name does not appear on the note, he must prove that the person charged had made himself a party to the note ; had authorized its negotiation or transfer, previously, or afterwards assented to, ratified or adopted the indorsement as his own. Had there been no previous connection between the Binneys and Winship, and the Binneys had procured the discount from the bank, without their indorsement, they would be no more answerable to the bank, than by *571] receiving payment of a check. *On the face of these notes, the Binneys are strangers to the bank. The contract of discount which they made with Winship, does not, *per se*, create one with the Binneys. Being accommodation notes, they were discounted as such ; that is, as the notes of Winship, indorsed by Jacques ; for such is the acknowledged character of such notes in the commercial world. The line separating business from accommodation paper, is clearly defined by law and usage. There is the same difference between the indorser of a note known not to be what it purports to be, and one which represents a real debt from the maker to the payee, as between the purchasers of real estate with or without notice of an incumbrance, or the defect of title ; so far as respects their standing in

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courts of justice, in relation to third persons, not parties to the contract. Those who purchase in good faith, without notice of fraud, and pay their money, confiding in the face of the transaction, ignorant of anything which can affect its legal or equitable character, are entitled to the protection of all courts as their most favored parties.

A peculiar sanctity is thrown round the obligation of negotiable paper, actually negotiated in the usual course of business, and in the hands of an innocent holder, for a valuable consideration, without notice. Every presumption which the law can raise, is in favor of such a holder, whether he receives the note in payment, or by discount. It becomes divested of this peculiar obligation, when the paper, in its original concoction or negotiation, becomes divested of these attributes, and remains in the hands of a holder who has a knowledge of all the circumstances attending both. I know of no decision of any court, no principle of law, nor usage of merchants, which confounds the distinction between these two kinds of paper in the hands of indorsees, with or without notice ; it is too well established to require support from argument or authority. The same distinction exists in paper negotiated after it is due, or partnership notes given for the private debt of a partner. Notice is the distinguishing criterion in all these cases, and settles the question as to the burden of proof. So I find the law laid down by the supreme court of Massachusetts, in the case of the *Manufacturers' & Mechanics' Bank v. John Winship*, 5 Pick. 11. The suit was brought on an *accommodation note drawn by John Winship, to Jacques or order, indorsed by him and discounted by the plaintiffs in the usual course of banking business. The chief justice charged the jury, that the burden of proof was on the plaintiffs ; and that if no proof was given by them that the money was raised for the business of the firm, at the manufactory, the jury should find the fact for the defendants. In giving judgment for the defendants, the court affirmed the charge of the chief justice as to the burden of proving the note to have been given on partnership account being on the bank ; that no recovery could be had against the partners, so long as it remained doubtful whether they have or have not made the contract declared upon ; that from the fact of the note being found to be an accommodation one between Winship and Jacques, it would seem more likely that it related to the private concerns of Winship than to those of the partners ; at any rate, the uncertainty resting on the face of the note would still continue. The plaintiffs knew, or might have known, that Winship was openly engaged in commercial speculations, which were wholly unconnected with the business of the manufactory ; and that his signature might relate to one concern as well as another. If, therefore, they meant that the note should be enforced against the partnership, they should have ascertained that the signature of Winship was intended for the signature of the firm. But they made no such inquiry, and it does not appear that Winship or Jacques ever made any representation to that effect. And although it appears, that the plaintiffs supposed the Binneys would be answerable, because they were partners with Winship in the manufactory, yet they gave no intimation whatever to the parties to the note to be discounted, that such was their understanding of the contract.

There are few courts whose opinions may be more safely confided in, as to the rules of the common law ; there is none whose authority I feel more

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bound to respect, as to the common law of Massachusetts, than its highest judicial tribunal. The law of the state where a contract is made and carried into effect, seems to me to be the law which must control its obligation; and until evidence of the common law of that state more imposing than the ^{*573]} solemn decision of its supreme court ^{*is} furnished me, I feel it my duty to respect and adopt it: believing that in doing so, I violate no principle which has ever been sanctioned by this court. In some particulars, the evidence in the cause referred to was more favorable to the bank than in this. The note was discounted at the bank, on the belief that the Binneys were liable as partners of the manufactory at Charlestown only. This was found by the jury; but it was not found, and there appears to have been no evidence, that the bank or its officers knew the note to be an accommodation one. The judgment of the court was on the fact being so found, not on its being known to the plaintiffs.

In this case, the notice is brought home to the plaintiffs, by the evidence of their discount clerk. Mr. Parker, the director, does not say the note was discounted, on the belief that the Binneys were liable as partners; all he says on that subject is, when the bank discounted these notes, it was understood, the Binneys were bound by them. He immediately corrects this, and says, he does not know, as to John Binney, whether plaintiffs considered him answerable; but they so considered Amos Binney. This is certainly very lame evidence of the notes being discounted on the credit of both Amos and John Binney; and much weaker than the fact found by the jury in the other case. The bank had notice of the course of business between Winship and Amos Binney, by his indorsing Winship's notes, and the bank discounting them. The Binneys were in good credit; and being reputed wealthy, it was not to be presumed, they would borrow credit from Jacques. These circumstances ought to have put the bank on inquiry, as Binney was a customer residing in the place. The court placed no reliance on these circumstances, or on the fact of the notes being discounted with the knowledge that they were notes of accommodation.

Nor did the court, in my opinion, correctly define the difference between a dormant and an open partnership. It seems to me to be this: where the names of the partners do or do not appear in their accounts, their advertisements or their paper; where the business is carried on in the name of all, it is open; but if any are kept back, it is dormant; that the knowledge which the public may have is not the test, when it is acquired from the acts or ^{*574]} declarations of the acting ^{*avowed} partners: it may enable them to reach the dormant one, if the transaction is one in which he had an interest, but does not alter its nature. The partnership remains dormant as to all, whose names do not appear on its transactions. The dormant, the sleeping, inactive partner may be known by reputation, or the declaration of his copartner, but these do not make him an avowed or active one, without the avowal and pledge of his name or paper. If credit is given to the other names, on the faith of such reputation or representation, the persons so trusting must do it at the risk of suffering, if their information is not true. The declarations of one of a firm are not evidence of another person's being a partner, in any particular transaction, unless a previous connection is established, which gives him authority to bind by his acknowledgment, or proof given of subsequent assent: reputation is not, *per se*, evidence,

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unless brought home to the party charged ; then his silence may be deemed acquiescence or assent. 11 Serg. & Rawle 362 ; 2 W. C. C. 388, 390 ; 14 Johns. 215 ; 3 Caines 92 ; 10 East 264 ; 5 Pick. 415, 417 ; 1 Gallis. 635, 638, 640.

The language of some of the cases is, that it is rather on the ground of agency, than partnership resulting from the community of interest in the subject-matter of the contract. The principle which makes a dormant partner liable is this : having an interest in the profits which are a part of the fund to which a creditor looks for payment, he shall be bound. 2 W. Bl. 1000 ; 2 H. Bl. 247 ; 4 East 144 ; 16 Johns. 40 ; 2 Nott & McCord 427, 429 ; 1 H. Bl. 45, &c. As his name is not pledged, his liability arises only from his interest (16 East 174-5) ; and the burden of proving such interest is on the party suing. The language of the court, in 2 Nott & McCord 429, is very emphatic : "To charge defendant as partner, one of two things is necessary ; either he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community ; or he must have participated in the profits." As the Binneys never pledged their names on these notes, they were not discounted on their faith. There is then wanting in this case that fact on which the power of one partner to bind the firm by negotiable paper is created, the use of the names. *The plaintiff who seeks to make those parties to a note, whose names do not give it currency or credit, must make them parties, by affirmative proof of an interest in profits, previous authority, or subsequent recognition. It is true, that when a dormant partner is discovered, he is liable ; but then he must be shown to be one, by an interest in the subject-matter of the note. Till this is brought home to him, he is no party to it. I know of no authority for saying, that the mere existence of a partnership, composed of names not avowed or pledged to the public, makes them, when discovered, liable for any other than contracts in which they have an interest ; one who suffers his name to be used on paper, is liable as a partner, though there is in fact no existing partnership ; but the man who does not suffer his name to be used or pledged, is bound only by virtue of his interest.

This furnishes, I apprehend, the true distinction between dormant and open partnerships, and that it does not depend on the knowledge which the public may have, or the representation made by the contracting partner, when he is giving or negotiating a note. The reason which makes a note drawn or indorsed by one partner, in the joint name, though for his own use, binding on the firm, in the hands of an innocent holder, is, because it has been taken on the faith of his name. 3 Kent's Com. 18. The case of *Van Reimsdyk v. Kane*, shows the importance attached to the names of the partners appearing on a bill. One partner was authorized by the others to take up money on the credit of the partnership concern, and draw bills therefor, on a house at A. He took up money, drew a bill directing it to be charged on the account of all the partners ; but it was signed by himself alone : the court held, that the representative of a deceased partner was liable in equity to a payee, who trusted his money on the faith of the joint credit ; but expressed themselves with great doubt and caution, as to the liability of the partners at law. 2 Gallis. 30.

It seems to me, that the circumstance which would excite a doubt in

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that case would remove it in this. But when all the names are not used, the reason and the law cease together. Where the liability attaches to the name, proof of the signature is enough; where it depends on the mere participation of the *profits, that must be proved by the holder: as he ^{*576]} claims to hold persons bound whose names were not held out on the paper as inducements to take it, he must show that the law has placed their names upon it. In proving a partnership assignment, it must appear, that the party making it had a right to sign the name of the firm, and that his act is the act of all the partners. 5 Cranch 300. A party claiming the money due on a note, indorsed to him in the name of the firm, must show the indorsement to be made in the name of the firm, by a person duly authorized. 7 Wheat. 669. The case of *Leroy v. Johnson*, in this court, 2 Pet. 186, was this: Hoffman and Johnson were partners, under the firm of Hoffman & Johnson; so advertised in the papers, so publicly known, and so carried on, under articles of partnership. Hoffman drew a bill on London, in Alexandria, in his own name, which the plaintiff, residing in New York, purchased from Hoffman; the bill was drawn to raise money to pay a note of the firm, and sent to New York, by Johnson, for the purpose of selling it. Not succeeding, Hoffman went on, and, assisted by letters of recommendation from merchants of Baltimore, negotiated the bill, and with the proceeds paid a partnership note. The circuit court of the district were asked to instruct the jury: 1. That on the evidence of partnership and the application of the proceeds of the bill to partnership purposes; 2. That if the bill was drawn with reference to the business of the concern; 3. That if the name of Jacob Hoffman was sometimes used in relation to the business of the firm, that the bill was drawn in his name, and so negotiated for the firm, and to pay their debts: that the plaintiff was entitled to recover. These instructions were refused, and judgment rendered for the defendant, which was affirmed; this court holding it indispensable for the plaintiff to prove, that the name of Hoffman was used in the transaction, as the name of the firm, and that the parties so traded and carried on their business; that the jury would be well warranted from the facts of the case in believing, that Hoffman dealt in his individual name, and on his sole responsibility, without even an allusion to the partnership; though the bill was drawn for partnership purposes, with the knowledge of Johnson, and ^{*577]} by him sent to New York for sale, *and the proceeds applied in good faith. The attention of the court was not drawn to the distinction between notes discounted, and those received in payment; nor was the bill in question an accommodation one. There was no fraud in the transaction, as between the partners. It was drawn, negotiated, and the proceeds applied, with the consent of both, and the aid of letters of recommendation. It came to the hands of the holder, by fair purchase in market, in the usual and regular way of business; yet Johnson was not bound: his name was not on the bill; the plaintiff did not prove it to be the name of the firm, in the particular transaction, though Hoffman's name was sometimes used alone in partnership transactions.

If, in addition to these defects in the plaintiff's case, it had appeared, that the bill drawn in the name of Hoffman had been one of accommodation, known to Leroy to be so, and purchased as such, without the knowledge of Johnson of its having been drawn or negotiated, or the application of its proceeds to

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partnership purposes, and with a knowledge by Mr. Leroy, derived from his having been in the frequent habit of discounting bills drawn by one and discounted by the other, understanding there was a special partnership between them; it is not presuming too much, to think, that this court would have deemed these circumstances strong presumptive proof and reasonable notice of their accustomed mode of raising money for partnership purposes, by discount; and that a known accommodation note, made by a stranger, and indorsed by Hoffman alone, was not a partnership note, when offered by him for discount, without the name of Johnson. It would seem to me, to furnish the very case which this court, in delivering their opinion in *Leroy v. Johnson*, make a proviso of the liability of the members of a firm, whose names appear on a bill negotiated, and in the hands of an indorsee. The court say, a bill drawn or accepted by a firm, by their usual name and style, is presumed to be on their joint account and authority, and that third persons are not bound to inquire whether it was so done or not, "unless the contrary be shown, and that the persons with whom the partner deals had notice, or reason to believe, that the former was acting on his separate account." This restriction to the liability of partners, whose names appear on a joint note, in the hands of an indorsee, to whom the faith of a partnership is publicly pledged, seems to me conclusive in a case circumstanced like this; where the agents, who effect the discount of the note in question for the bank, prove distinctly their own knowledge of the nature, extent and objects of the partnership, the mode adopted to raise funds for the firm in the same bank, and of these notes being for the accommodation of Winship, and his receiving the proceeds.

Under the circumstances of this case, I cannot consider the plaintiffs as innocent indorsees of the negotiable paper of a firm, actually negotiated by them on its pledged credit, without notice or reason to believe that Winship was acting on his separate account. The testimony of Harris is conclusive on my mind, to prove, that the officers of the bank perfectly understood the nature of the transaction; that the notes were not discounted on any representation made by Winship, or on the belief that they were the notes of the firm. The bank may have thought the Binneys, or one of them, liable; but according to the testimony of Parker, could not have believed the indorsement to represent a regular and authorized partnership transaction. The statement of Mr. Parker was, at first, that they understood the Binneys were liable; but he afterwards corrected himself, and said, he did not know, as to John Binney, whether the plaintiffs considered him so answerable, but that they so considered Amos Binney. They evidently thought Amos liable, because he had been in the habit of indorsing Winship's notes, but could by no possibility have believed Amos and John liable as partners, under the signature of Winship, when one of the directors who made the discount could not say that the bank ever considered John Binney to be liable.

Finding, on a careful examination of the charge of the circuit court, that none of the restrictions and qualifications of the liability of a dormant partner, whose name does not appear in an indorsement of an accommodation note, discounted under known circumstances of suspicion, have been laid down or explained to the jury; I am constrained to say, that it is erroneous, and that the judgment ought to be reversed. I cannot, on a subject so important as this, silently dissent from the opinion of the court, when my

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judgment has been made up on *what seems to me the best established principles of commercial law; nor can I consent to overrule a decision of the supreme court of the state where this contract was made, executed and enforced, without the highest possible evidence of their having been mistaken in their judicial exposition of the common law.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel: On consideration whereof, it is considered, ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs and damages, at the rate of six per centum per annum.

*580] *LUKE TIERNAN, DAVID WILLIAMSON, Jr., and CHARLES TIERNAN, Plaintiffs in error, v. JAMES JACKSON, Defendant in error.

Construction of contract.—Equitable assignment.

Whatever may be the inaccuracy of expression, or the inaptness of the words, used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the court will give effect to it, and construe the words accordingly.

A shipment of tobacco was made at New Orleans, by the agent of the owner, consigned to a house in Baltimore, the shipment being for the account and risk of the owner, he being at the time indebted to the consignees for a balance of account; the owner of the shipment drew two bills on the consignees, and on the same day, made an assignment on the back of a duplicate invoice of the tobacco, in the following words: "I assign to James Jackson (the drawee of the bills) so much of the proceeds of the tobacco alluded to in the within invoice, as will amount to \$2400 (the amount of the two bills), to I. & L. \$600, &c., and Messrs. Tiernan & Sons (the consignees), will hold the net proceeds of the within invoice subject to the order of the persons above named as directed above;" the bills were dishonored. This assignment, by its terms, was not intended to pass the legal title in the tobacco, or its proceeds, to the parties; but to create an equitable title or interest only in the proceeds of the sale, for the benefit of the assignees; and they cannot maintain an action against the consignees, in their own name, for the same; the receipt of the consignment, by the consignees, did not create a contract, express or implied, on the part of the consignees, with the assignees, to hold the proceeds for their use, so as to authorize them to sue for the same.¹

The general principle of law is, that *choses in action* are not at law assignable; but if assigned, and the debtor promise to pay the debt to the assignee, the latter may maintain an action against the debtor, as money received to his use.

In *Mandeville v. Welsh*, 5 Wheat. 277, 286, it was said by this court, that in cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund; and after notice to the drawee, it binds that fund in his hands; but where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee; unless he consent to the appropriation, by an acceptance of the draft, or an obligation to accept may be fairly implied, from the custom of trade, or the course of business between the parties, as a part of their contract. The court were there speaking in a case where the suit was not brought by the assignee, but in the name of the original assignor, for his use, against the debtor; and it was, therefore, unnecessary to consider, whether the remedy, if any, for the assignee, was at law or in equity.

Until the parties receiving a consignment or a remittance, under such circumstances as those in this case, had done some act recognising the appropriation of it to the particular purposes

¹ An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment, so long as the owner of the fund retains a control over it. Christmas

v. Russell, 14 Wall. 69; *s. p. McLoon v. Linquist*, 2 Ben. 9; *Randolph v. Canby*, 11 Bank. Reg. 296.