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.

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*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

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[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.

specified, and the persons claiming *had signified their acceptance of it, so as to create a privity between them, the property and its proceeds remained at the risk, and on the account of the remitter or owner.

ERROR to the Circuit Court of Maryland. James Jackson, the defendant in error, on the 30th of April 1824, instituted in the circuit court, an action of *assumpsit*, against the plaintiffs in error, Luke Tiernan & Sons, merchants, of Baltimore. The declaration was for money had and received; the defendants pleaded *non assumpsit*, and issue being joined, the cause was tried in December 1828, and a verdict and judgment rendered for the plaintiff, for the whole amount of his claim, under instructions given to the jury by the court, to which instructions the defendants excepted, and thereupon, prosecuted this writ of error. The circumstances of the case were the following:

Luke Tiernan & Sons were, in 1819, the creditors of Thomas H. Fletcher, a merchant of Nashville, in the state of Tennessee, for a balance of account-current, admitted to amount to $4906.83. Fletcher was at the same time largely indebted to Luke Tiernan & Co., of which firm Luke Tiernan was the surviving partner, and of other merchants in Baltimore, Philadelphia and elsewhere. In consequence of the failure of a house in Nashville, and of other heavy losses in business, Fletcher became unable to meet his engagements; and on the 10th of April 1819, through Messrs. Tiernan & Sons, he made a statement of his affairs to his creditors in Baltimore; and proposed an arrangement for the satisfaction of their claims in these terms:

"I hold a very large amount of good paper, of the most unquestionable kind, the greater part of it now due. The drawers are merchants to whom I have sold goods. It is not payable at bank. I wish to give you paper of this description for your claims against me. This arrangement will at once free me from my present difficulties, and at the same time, enable you to get your money much sooner than I could possibly pay you. This plan will also save me from being *harassed, and also put my creditors to much less trouble. In the above proposition, I ask no abatement in amount; [*582 I offer unquestionable paper for my own. The only injury you sustain by the arrangement is, that you will not get your money quite as soon as was expected originally. I will also indorse the notes I transfer to you, thus making myself still liable. I, therefore, wish you to forward your claims against me to this place, without delay; that I may pay them in the way above pointed out. I wish you all to forward your claims to the same person, as I can settle much easier with one person than with a dozen. I propose, that you all forward your claims, by mail, immediately, to Mr. Ephraim H. Foster, attorney-at-law, of this place. He is a man of integrity and high standing, both as a man and as an attorney, and is withal a gentleman of large fortune, free from all embarrassment, and unconnected with trade, and bound for no person. In his hands, your money will be safe, and your business ably attended to."

These propositions were, on the 3d of May following, accepted by Messrs. Tiernan & Sons, and by Luke Tiernan for Luke Tiernan & Co.; and on the 21st of May 1819, Fletcher paid the whole amount of their claims on him in promissory notes, delivered to Mr. Foster as their agent, and took the receipts of Foster for the same. Soon after this adjustment, Charles

Tiernan, one of the plaintiffs in error, arrived in Nashville ; and on his arrival, was dissatisfied with it. But as it had been made by Foster in conformity with directions from his father, Luke Tiernan, before he left Nashville, he expressed his approbation of it.

In the letter of Fletcher to his creditors in Baltimore, dated Nashville, April 10th, 1819, containing the proposition for the adjustment of their claims, he informed them : "My cotton and tobacco at Orleans have all been sold or shipped, and advances had on it, and I have received the money arising from the sales and shipments ; but that money I am in honor bound to apply to the payment of my notes at bank here, with the view of preventing injury to my indorsers, as I cannot reconcile it to my feelings, to permit a friend to suffer, who indorses my paper from motives of friendship."

*583] *By the evidence of Mr. Fletcher, it appeared, that in April 1819, Jouett F. Fletcher, his agent in New Orleans, shipped *per* the schooner Mary, to Luke Tiernan & Sons, ninety-five hogsheads of tobacco for the account of T. H. Fletcher, and drew on them against this shipment, two bills, one for $2000, the other for $2600. These bills were indorsed by Bernard McKiernan, at the instance of Thomas H. Fletcher ; and fearing that this tobacco would be attached for his debts in Baltimore, Fletcher, on the same day he procured the indorsement, assigned the shipment, on the back of the invoice, in favor of McKiernan for the proceeds thereof. This assignment was not communicated to McKiernan, but was filed away by Fletcher.

Jouett F. Fletcher, as the agent of Thomas H. Fletcher, drew another bill for $2000 against the shipment of the tobacco *per* the Mary, in favor of Joseph Fowler, on Luke Tiernan & Sons. The bill was accepted and paid by the Messrs. Tiernan & Sons ; the two bills indorsed McKiernan were not paid. When the adjustment of the claims of Tiernan & Co., and Tiernan & Sons was made, through Mr. Foster, they were not informed of the particular shipment of tobacco by the Mary, or a shipment made to them by the brig Struggle. On being informed of the dishonor of the bills indorsed by McKiernan, Fletcher consulted counsel in Baltimore, on the effect of the assignment to McKiernan ; and then, for the first time, made the same public. After this, Tiernan & Sons wrote to Foster and to Thomas H. Fletcher, urging that the settlement and payment in notes should be cancelled, with a view to enable them to hold the proceeds of the tobacco ; and a conditional arrangement was entered into, subject to the rejection or acceptance of the defendants ; and the notes which Foster had received were placed in the hands of R. C. Foster, there to remain until they should make known their determination in relation to the arrangements ; this was on the 19th of July 1819 ; and under date of 4th of September 1819, they accepted of the new arrangement, and the receipts which Foster had given to Fletcher were returned to him, and he returned all the notes except one for $2000 on

*584] *Thomas D. Crabb, which he retained on behalf of Tiernan & Sons as was supposed, for their ultimate security.

On the 8th of May 1819, Jouett F. Fletcher, as the agent of Thomas H. Fletcher, shipped on board the brig Struggle, from New Orleans for Baltimore, eighty-one hogsheads of tobacco, amounting, *per* invoice, to $6065.67. The invoice stated the same to be "Shipped by McNeil, Fiske & Rutherford, on board the brig Struggle, Nathan Stone, master, bound for Baltimore, by

order of Thomas H. Fletcher, through his agent, Jouett F. Fletcher, consigned to Luke Tiernan & Sons." The bill of lading stated the shipment and consignment to be for the account of Thomas H. Fletcher, Esq., of Nashville.

Fletcher stated in his evidence, that upon this consignment on the 21st of May 1819, he drew two bills upon the consignees, one in favor of James Jackson, the defendant in error, for $2400, and another bill for $600, in favor of Ingram & Lloyd. On the 26th of May 1819, he made the following assignment on the back of a duplicate invoice, and on the same day acknowledged it before a notary, and delivered it to Jackson.

Nashville, May 21st, 1819.

I assign to James Jackson so much of the proceeds of the sale of the tobacco, alluded to in the within invoice, as will amount to $2400 ; to Ingram & Lloyd, as above, $600 ; and the balance, whatever it may be, to G. G. Washington & Co.; and Messrs. L. Tiernan & Sons will hold the net proceeds of the within invoice, subject to the order of the persons above named, as directed above. THOMAS H. FLETCHER.

In reference to his transactions with Jackson, to the bill for $2400 in favor of Jackson, and to this assignment, Fletcher also stated, that in the fall of 1818, he had sold to Jackson a bill of exchange for $5000, drawn by him on his agent in Philadelphia, which was protested for non-payment ; on its return, he liquidated it by his notes, which he paid. Jackson required no security against the bill for $2400, *as he showed him Foster's [*585
receipts that he owed Luke Tiernan & Sons nothing ; and he satisfied him, he had actually made the consignment. When he sold the bill for $2400 to Jackson, he was greatly embarrassed, but did not consider himself insolvent ; because he had made large shipments of tobacco to Europe, and hoped they would turn out well. He did not know what opinion Jackson entertained of his circumstances ; but in the month of May 1819, he voluntarily indorsed his, Fletcher's, note for $10,000, without having any interest in the transaction.

Messrs. Tiernan & Sons refused to accept or pay the bill for $2400, and it was regularly protested. The tobacco *per* brig Struggle arrived in Baltimore, on the 7th of June 1819, and was sold by the consignees ; the net sales amounting to $4335.35, for which sum they were in cash on the 11th of February 1820. Soon after the arrival of the tobacco by the brig Struggle, the plaintiffs in error, and Luke Tiernan, sued out a foreign attachment in the Baltimore county court, against Thomas H. Fletcher, and attached the tobacco in their own hands. In these suits, judgments were obtained, at March term 1821, for the debts due by him to Luke Tiernan & Sons, and to Luke Tiernan & Co.

At the trial in the circuit court, the defendants, by their counsel, prayed the court to instruct the jury—

1. That the assignment made by Thomas H. Fletcher, dated May 21st, 1819, and acknowledged and delivered, on the 26th of May 1819, and indorsed on the copy of the invoice, as stated in the evidence, did not pass such a legal title to any part of the proceeds of the tobacco shipped by the brig Struggle, as will enable the plaintiff to support this action in his own

name. Which instruction the court refused to give, but instructed the jury, that such an assignment, connected with the character of the consignment of the cargo of the Struggle to the defendants, was sufficient to enable the plaintiff to support this action in his own name.

*586] 2. *That the invoice, letter of advice, and bill of lading, taken together, do not constitute such a special appropriation of this cargo of the brig Struggle, or of the proceeds thereof, to the order of Thomas H. Fletcher, as will enable his assignee in this case to maintain this action in his own name, upon the assigment of May 21st, 1819: which instruction the court refused to give.

3. That unless the jury find from the evidence, that Jouett F. Fletcher ordered the said cargo, or the proceeds thereof, to be paid to the order of Thomas H. Fletcher, or in some other manner authorized the defendants to deliver the cargo, or the proceeds thereof to him, the said Thomas H. Fletcher; that then the assignment of the said Thomas H. Fletcher to the plaintiff, dated May 21st, 1819, does not pass such an interest to the plaintiff as will enable him to maintain the present action in his own name. Which instruction the court refused to give; as it appeared on the face of the documents accompanying the consignment, with the bill of lading, invoice, and letter of instructions, that the tobacco was the exclusive property of Thomas H. Fletcher, and that Jouett F. Fletcher was merely the agent of Thomas H. Fletcher.

The defendants, by their counsel, prayed the court to instruct the jury:

1. If the jury find from the evidence, that, by the terms of the settlement between Thomas H. Fletcher and Ephraim H. Foster, the agent of the defendants, the said Fletcher was to continue still liable to the defendants for the money due to them from the said Fletcher, that then the assignment of the notes and the receipts mentioned by the said Fletcher in his deposition, did not extinguish the original debt due from him to the defendants, on account of which the said notes were assigned. Which instruction the court accordingly gave.

2. That if the jury find, that at the time the cargo of the brig Struggle came to the possession of the defendants, in the manner stated in the evidence, Thomas H. Fletcher, on whose account the said shipment was made, upon a balance of accounts, was indebted to the defendants in a sum exceeding the value of the whole cargo, for advances made and liabilities incurred *by the defendants, as the factors and agents of the said

*587] Thomas H. Fletcher, that then the said defendants had a lien upon, and were entitled to retain the proceeds of the said cargo, for the balance due them as aforesaid; notwithstanding the assignment made by the said Fletcher to the plaintiff, on the 21st May 1819, as stated in the evidence. Which instruction the court refused to give.

3. That upon the whole evidence offered, the plaintiff is not entitled to recover in this suit. Which instruction the court refused to give.

The case was argued by *Scott* and *Taney*, for the plaintiffs in error; and by *Wirt*, for the defendant.

For the plaintiffs in error, it was contended: 1. That the assignment of Thomas H. Fletcher, dated May 21st, 1819, and indorsed on a copy of the invoice, did not convey to James Jackson the property in the tobacco men-

tioned in the invoice, nor to any part thereof. 2. That the tobacco being the property of the said Thomas H. Fletcher, when it came to the hands of Tiernan & Sons, by virtue of his consignment; they had a lien on it, and a right to retain, for the balance due from Thomas H. Fletcher. 3. But if Tiernan & Sons have not a right to retain for the balance of their account, still James Jackson cannot maintain this action, in his own name, for the portion of the proceeds of the tobacco assigned to him by said Fletcher.

Scott argued, that the principal question in the case arose upon the assignment by Mr. Fletcher on the 21st of May 1819, indorsed on a copy of the invoice of the tobacco shipped to the plaintiffs in error. If that assignment passed the property, the action for money had and received would lie; if it did not, the suit instituted in the circuit court could not be sustained. He contended, that the indorsement was nothing more than a direction as to the disposition of the proceeds of the shipment; the tobacco was then *in transitû*; and it did not take effect, even for that purpose, until the 26th of May 1819, when it was acknowledged by Fletcher, before the notary at Nashville. The bill of leading and the invoice plainly show this construction to be correct. The *shipment was for the account and risk of Thomas H. Fletcher; the property continued in him; no sale was [*588 intended, and no delivery was made. There must be an intention to assign, in order to give the instrument that may be executed the effect of a transfer. 2 Kent's Com. 387; 2 W. C. C. 294, 403; 5 Taunt. 73, 558; 1 Pet. 456–8; 1 Bos. & Pul. 563.

The plaintiffs in error were the factors of Thomas H. Fletcher; the sum due to them arose in the course of their tranactions with him as factors; and they had a right to retain for the balance due to them out of any property coming into their hands in the course of business. Comyn on Cont. 259; 5 Com. Dig. 54; 2 Kent's Com. 501–2; 6 T. R. 259, 262; 2 East 523; 2 Bos. & Pul. 485. The equity was equally in favor of the factors as well as of Mr. Jackson. The proposition of Fletcher was not that he should be released from the debt; his liability continued; and the receipt of the notes by their agent in Nashville was not an extinguishment of the debt. The net proceeds of the tobacco were not sufficient to satisfy the claims of Tiernan & Sons. 1 Wheat. 208, notes; 2 W. C. C. 294.

If there was not an assignment of the property of Fletcher in the tobacco on board the Struggle, so as to vest the same in the defendant in error, absolutely, to the extent of the bill of $2400, he could not maintain this action. 1 Selw. N. P. 6, 33; 1 T. R. 619, 621, 623; 12 Johns. 276, 280. The action could not be sustained in the name of Jackson, even if there had been no debt due to the plaintiffs in error; without some promise or contract on the part of the consignees to pay over the proceeds to him. There is a difference between the assignment of a thing, and an assignment of an interest in it. 1 Har. & Johns. 114; 1 Pet. 446; 11 Mass. 25; 1 Johns. 139; 2 Wheat. 66.

Wirt, for the defendant in error, stated, that this case required a particular reference to the facts on which it depended. Thomas H. Fletcher, a merchant at Nashville, became embarrassed, in the early part of 1819; made a candid disclosure *of his situation, and submitted, through the plain- [*589 tiffs in error, a proposition to his creditors, which was accepted by

Luke Tiernan & Sons; and the whole amount of the debts due to them was paid, according to the proposition, and a receipt given for the same by Foster, their agent. Having thus arranged with the plaintiffs for the satisfaction of their debts (owing them nothing), he made two shipments of tobacco to them, which, by the invoices, were for his account, and which they were to hold subject to his orders. Of part of the proceeds of one of the shipments, he made an assignment to Jackson, to secure the payment of a bill drawn in his favor, on the plaintiffs in error; and this bill was presented on the 9th of June 1819, and on the 15th of June, notice of the assignment to Jackson was given. Thus, the rights of Jackson became fixed; and it was not in the power of the consignees of the tobacco, to change or impair them. Notwithstanding this position of the transaction, the plaintiffs in error refuse to accept the bill, attach the property, and proceed to obtain a dissolution of the settlement under which their demands on Thomas H. Fletcher had been adjusted and satisfied. On the attachments, judgments were afterwards obtained, but these judgments do not establish a debt due by Fletcher. 1 W. C. C. 424; 5 Taunt. 558; Cro. Eliz. 598.

The agreement of Mr. Tiernan to settle his claims, and the receipt in full which was given to Fletcher, were shown to Jackson, when the property was assigned. This was equivalent to a letter of credit, making the plaintiffs in error the debtors of the holder of the assignment. The bill drawn in favor of the defendant in error, connected with the assignment, is not to be considered as drawn on a general fund, and for a part of it; in which light, the bill would be considered, if it stood alone; but it is a sale and transfer of a portion of a specific property, unmixed, and standing in the hands of the consignees, separate and apart. The transfer was made of a part of this specific fund belonging to Fletcher, in their hands as trustees, and with which the plaintiffs in error had nothing to do, but to pay the amount to his vendees. It is in the nature of a sale of part of the proceeds, in the hands of the consignees, who were mere factors; and on the authority of the case of *Conard* v. **Atlantic Insurance Company*, 1 Pet. 444, it is considered, that the circuit court were right in rejecting the first prayer of the defendants in that court.

*590]

There is another and a distinct ground, on which it is held, that the instructions of the circuit court were right; and on which the action is sustainable. Luke Tiernan & Sons received the consignment, under a letter of instructions, which directed them to hold it subject to the orders of the shipper. In accepting the cargo, under this letter, they assent to the terms, and agree to conform to them. It was a special trust which they were bound to execute. Had they been unwilling to assume this trust, and to perform its conditions, they should have refused it. In taking the fund, therefore, under the condition, they agree, in advance, to pay it over according to the orders of the shipper. The case, thus established, belongs to a class of cases in which it is held that such an agreement beforehand will bind as effectually as a subsequent acceptance. *Neilson* v. *Blight*, 1 Johns. Cas. 205; *Weston* v. *Barker*, 12 Johns. 276.

As to the second bill of exceptions, which presents the right of the plaintiffs in error, as resting on the lien of factors for their balance, it was admitted, that this lien existed, in general, upon the goods of his principal, for a general balance. But even as to the goods of the principal, if the

factor receive them for sale, on a promise to pay the proceeds, when sold, to a particular individual, he has no lien on such goods for the balance of his account. 6 T. R. 262. The tobacco was received under an implied agreement to dispose of it under the orders of Fletcher; and this case is within the principle of that cited. But the conclusive answer to the prayer of the defendants in the circuit court is, that the tobacco, when it came into the hands of Luke Tiernan & Sons, was not the property of Fletcher. It had been previously assigned; and that assignment transferred the title, not only against Fletcher, but against all persons, his agents, factors, and even his creditors. *Conard* v. *Atlantic Insurance Company*, 1 Pet. 386; 5 Taunt. 558.

**Taney*, in reply, contended, that the case did not present an assignment or transfer of the property by Thomas H. Fletcher; it remained in him, until it was sold; and the proceeds only were disposed of by him under the arrangement with the drawer of the bill of exchange. Thus, no right of action in his own name existed in the defendant in error; and the plaintiffs having received the property, had a right to retain it. The equities were equal, and the possession was in the plaintiffs. They have no security for their debt, except the property retained by them; having returned the notes received by Foster, preserving only the responsibility of Fletcher, for their claims. The assignment of May 21st, 1819, did not convey the legal title of the property to the defendant in error, so that he would maintain his action. It remained in Fletcher, until the shipment was received, and then the lien of the plaintiffs in error attached. [*591

But the question is, whether the assignment transferred the legal right, so as to enable the assignee to sue in his own name, and not in that of Fletcher. This is denied. The shipment left this property subject to the control of Fletcher, and directed the proceeds to be subject to his order; when it was sold, it was sold as the property of Fletcher, and the proceeds held as such; a part only was assigned by Fletcher; and if a suit could be maintained, under the assignment, all the persons named in it should have united. The interests cannot be so split up and divided, and thus each become the subject of a separate suit. No notice of the assignment was received by the consignees, until some days after the property came into their hands. The proceeds follow the property; and if the legal title in the property did not pass, neither did the legal title in the proceeds.

The acceptance of property under specific orders, does not waive any lien. 6 T. R. 262. This would enable the principal, in all cases, to deprive the factor of his lien; which would be at war with the general rule of law, and the policy on which it is founded, for the security and indemnity of factors. 2 East 523. The general rule is, that suit must be brought in the name of the assignor, unless there is some promise or assent on the part of the factor to hold the property subject to some declared trust, or defined appropriation. No such exists in this case. 2 Kent's Com. 500. 12 Johns. 279, 281. [*592

Story, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of Maryland, in which the defendant in error was the original plaintiff. The suit was an action for money had and received, brought under the following circumstances: The defend-

ants, Luke Tiernan & Sons, of Baltimore, were factors of Thomas H. Fletcher, of Nashville, in the state of Tennessee. In the course of their business transactions, Fletcher became indebted to them, and to another house, in which Luke Tiernan was surviving partner, in a sum of money exceeding $9000. On the 8th of May 1819, Fletcher, through his agent, Jouett F. Fletcher, shipped, at New Orleans, eighty-one hogsheads of tobacco, on board of the brig Struggle, bound for Baltimore, consigned to Tiernan & Sons. The invoice and bill of lading were inclosed in a letter of advice to Tiernan & Sons, by the Struggle. In the invoice, it was stated, that the shipment was made by order of Thomas H. Fletcher, through his agent, Jouett F. Fletcher; and in the bill of lading, that it was for the account and risk of Thomas H. Fletcher, and consigned to Tiernan & Sons. The letter of advice was as follows:

New Orleans, May 8th, 1819.

Messrs. Luke Tiernan & Sons:

Gentlemen:—Herewith we hand you invoice, bill of lading, eighty-one hogsheads of tobacco, for account of Thomas H. Fletcher, by order of Jouett F. Fletcher, which you will please receive and hold subject to the order of the latter. We are yours, &c., McNeill, Fisk & Rutherford,
per Jacob Knapp.

A short time before, there had been a like shipment of tobacco on account of Thomas H. Fletcher, to Tiernan & Sons, by the schooner Mary. The consignment by the Struggle arrived on the 7th of June 1819, sometime after that by the Mary had been received. Previous to the arrival of either
*593] of *these shipments, viz., on the 10th of April 1819, Thomas H. Fletcher, at Nashville, wrote a letter to Tiernan & Sons, inclosing another to his creditors at Baltimore, informing them of his embarrassments, in consequence of the failure of a house at Nashville, and offering a proposition for the liquidation of their debts. The letter, among other things, stated that his cotton and tobacco at New Orleans had all been shipped, and advances had on it, and that he had received the money arising from the sales and shipments; that he held a large amount of good paper, of the most unquestionable kind, the greater part of which was then due; that he offered to give paper of this description for their claims against him. He then proposed, that the creditors should appoint Mr. Ephraim H. Foster, of Nashville, their agent, to negotiate the business; and added, "in all cases such of you as hold my notes must forward them to Mr. Foster, as they must be taken up, when I give him other paper." Tiernan & Sons, on the same day they received the letter, accepted the proposition, and wrote a letter to that effect. In consequence of this arrangement, Thomas H. Fletcher, on the 21st of May 1819, paid to Foster, in promissory notes, the claims of the two houses of the Tiernans, and took receipts in full from Foster, as agent. At the time of this payment and settlement, Tiernan & Sons did not know of the consignment by the Struggle; but Charles Tiernan arrived at Nashville shortly afterwards, and expressed his satisfaction at the mode of payment. At a subsequent period, in July 1819, this payment and settlement were rescinded by the parties, and the receipts given up. But in our view of the case, it is unnecessary to trace these transactions further.

Tiernan v. Jackson.

On the 21st of May 1819, Thomas H. Fletcher, being indebted to James Jackson, of Nashville (the plaintiff), drew a bill of exchange in his favor upon Tiernan and Sons, as follows :

"Nashville, May 21st, 1819.

$2400. Sixty days after sight of this my first of exchange (second unpaid), pay to the order of James Jackson, twenty-four hundred dollars, value received. THOMAS H. FLETCHER.

To Messrs. LUKE TIERNAN & SONS, Baltimore."

This bill was presented, and protested for non-acceptance, on the 9th of June 1819 ; and was, at maturity, protested for non-payment. On the same day the bill *was drawn, Fletcher drew the following assignment on the back of a duplicate invoice of the shipment by the Struggle. [*594

"Nashville, 21st of May 1819.

I assign to James Jackson so much of the proceeds of the sale of the tobacco alluded to in the within invoice, as will amount to $2400 ; to Ingram & Lloyd, as above, $600 ; and the balance, whatever it may be, to G. G. Washington & Co.: and Messrs. Tiernan & Sons will hold the net proceeds of the within invoice subject to the order of the persons above named, as directed above. THOMAS H. FLETCHER."

This assignment was not delivered to Jackson until the 26th of the same month ; and all persons named therein were creditors of Fletcher. There are many other facts spread upon the record, but these appear to us all that are material to dispose of the questions argued at the bar.

The first question is, whether the assignment so made to Jackson, on the 19th of May, passed the legal title in the tobacco, so as to make the same, or the proceeds thereof, presently the property of Jackson and the other persons named. This is a question essentially depending upon the intention of the parties, to be gathered from the terms of the assignment ; for whatever may be the inaccuracy of expression, or the inaptness of the words used, in a legal view, if the intention to pass the legal title can be clearly discerned, the court will give effect to it, and construe the words accordingly. Thus, if a man grant the profits of his land, it is said, that the land itself passes. Co. Litt. 4 ; Com. Dig. Grant, E. 5. At the time when this assignment was made, the tobacco was *in transitû ;* and if there had been an absolute assignment of the proceeds, so that the tobacco was immediately put at the risk of the assignee, and the assignor was to have no further control over the management of it, we do not mean to say, that it would not pass the legal title and property in it to the assignee. But can such an intention be gathered from the words used in this instrument ? We think not. The words are, "I assign, &c., so much of the proceeds of the sale of the tobacco, &c., as will amount to $2400." The parties, then, contemplate a sale, and the assignment is to be, not of the tobacco itself presently, but of a portion of the funds arising from the sale of it, at a future period. Could the assignee or assignees have countermanded the consignment [*595 to Tiernan & Sons ? Or, putting aside the factor's claim of a lien, could they have demanded the property of the factors, before the sale ? We

think such was not the intention of the parties. The claim of Jackson was not to an undivided portion of the property, but to a specific amount of the proceeds arising from a sale. Suppose, before sale, the tobacco had been lost or destroyed, would the loss have been his or Fletcher's? We think, it would have been Fletcher's. The assignees were all creditors; and there is no evidence, that they took the assignment in satisfaction of their debts, or otherwise than as security therefor. And the fact, that, contemporaneously, Jackson took a bill of exchange on Tiernan & Sons for the same amount, demonstrates, that he did not understand the assignment as extinguishing his debt, or as operating more than as collateral security. Upon the dishonor of that bill, he had a right of recourse against the drawer. In this view of the transaction, Fletcher had an immediate interest in the sale. The larger the amount of the proceeds, the further they would go to extinguish his antecedent debts. It is perfectly consistent with the terms of the instrument, that he should retain the legal title in the tobacco, and that his factors would have a right to make sale thereof, in the best manner they could, for his benefit, giving the assignees an equitable title in the proceeds of the sale. Our opinion is, that upon the terms of the assignment, it was not intended by the parties to pass the legal title in the tobacco, or its proceeds; but to create an equitable title or interest only in the proceeds, after sale, for the benefit of the assignees.

Assuming, then, that an equitable title only to the proceeds of the sale, amounting to $2400, vested by the assignment in Jackson, still, if there has been any agreement on the part of Tiernan & Sons to hold so much of the proceeds, for the benefit of Jackson, he may maintain the present action; for under such circumstances, upon the receipt of the proceeds after the sale, so much thereof would be money had and received to the use of Jackson; and it will make no difference, under such circumstances, whether Tiernan & Sons have a lien for any balance of accounts or not; for such *an *596] agreement will bind them, and amount to a waiver of their lien *pro tanto* in favor of Jackson.

The question, then, is, whether there are any ingredients in this case furnishing sufficient proofs of such an agreement? Such an agreement may be express, or it may be implied, if the circumstances of the case, coupled with the acts of the parties, necessarily lead to such a conclusion. That there has been an express agreement on the part of Tiernan & Sons is not pretended. On the contrary, having received the shipment on the 7th of June 1819, they attached the property by a writ of garnishment, on the 8th of the same month, on their own account, as the property of Fletcher; and they dishonored the bill drawn in favor of Jackson, on the succeeding day; nor did they, after the notice of the assignment, on the 15th of the same month, ever give any express assent to hold the proceeds according to the terms of it.

But it has been argued, that the receipt of the consignment, with the bill of lading, invoice, and letter of advice, amounted to an implied engagement to conform to the terms of the latter, and "to receive and hold the tobacco subject to the order of" Jouett F. Fletcher, the agent of Thomas H. Fletcher; and that it being the case of a mere agency, it is, in contemplation of law, subject to the direct order of the latter, without the intervention of his agent. Now, assuming that a factor, upon receiving a consignment,

is bound, as between himself and his principal, to conform to the orders of the latter, which cannot well be denied in point of law, the question still recurs, whether that implied obligation can inure to the benefit of a third person, so as to entitle the latter, upon obtaining an order at a future period, to maintain an action against the factor, as upon an agreement in his favor? And, *à fortiori*, whether, in case of a dissent or refusal, contemporaneous with the receipt of the consignment, such an implied obligation can supersede the legal effect of such dissent or refusal? If an assent is to be implied from the duty of the factor, in ordinary cases, may not his dissent be shown by acts rebutting the presumption? In the present case, the letter of advice contains no authority to sell, but only to receive and hold the tobacco subject to the order of the party. If a power to sell be implied, it must be *implied from the antecedent course of business and relation of the parties, as principal and factors. The implied obligation, then, from [*597 the receipt of the consignment, is no more than the terms of it express, viz., to receive and hold the tobacco subject to order; not to pay over the proceeds to order. But waiving this consideration, how stands the general proposition in point of principle and authority?

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 for the amount, against the debtor, as money received to his use. Independently of such promise, there is no pretence, that an action can be sustained. Have Tierman & Sons, since notice of the present assignment, made any such promise to Jackson? No express promise is shown; and the acts antecedently done by Tierman & Sons repudiate the notion of any intentional implied promise; for those acts appropriate the property to their own claims, and to meet their own lien.

But it is said, that if a party agrees to hold money or goods, subject to the order of the owner, it raises an implied promise to the holder of the order, upon which he may maintain an action at law. The case of *Weston* v. *Barker*, 12 Johns. 276, has been relied on for this purpose. But in that case, the party receiving the money under the assignment, made an express promise to hold the same, subject, in the first place, to the demands of certain specified creditors, and next, the balance, subject to the order of the assignor. The court held, that in such case, the holder of the order subsequently drawn had a right to the money, as money had and received to his use; notwithstanding, there was a counter-claim, or set-off, of the assignee, accruing before the assignment. The case of *Walker* v. *Birch*, 6 T. R. 258, is somewhat complicated in its circumstances, but it turned upon similar principles. There, the agreement was express, to hold the property for a particular purpose; and that, in the opinion of the court, excluded the right of the factor to assert a lien upon it, for any demand due to him, which was inconsistent with that purpose. Lord Kenyon there said, the parties may, if they please, introduce into their contract an article to prevent the application of a *general rule of law to it. In the note [*598 given by the factors in that case, they acknowledged, that they had received the goods for sale, and promised to pay the proceeds of them, when sold, to J. F. or his order. J. F. was the agent of the owners; and they having become bankrupt, their assignees brought an action, not for the proceeds (for the goods were not sold), but for the goods, and they

recovered, upon the footing of the original special contract. That case also differs from the present in one important fact, and that is, that the suit was brought by the assignees of the bankrupt owners, and not by a holder of the order. In the case of *Mandeville* v. *Welch*, 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 the 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, in 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

The case of *Farmer* v. *Russell*, 1 Bos. & Pul. 295, so far as the point before us is concerned, asserts the principle, that if A. receives money from B., to pay to C., it is money had and received for the use of the latter. In such a case, it is immaterial, whether the promise to pay over be express or implied; for by the very act of receipt, the party holds it, not for A., but in trust for C. (See also *Schermerhorn* v. *Vanderheyden*, 1 Johns. 139; *Onion* v. *Paul*, 1 Har. & Johns. 114; *Pigott* v. *Thompson*, 3 Bos. & Pul 146, 149, note.) The case of *Neilson* v. *Blight*, 1 Johns. Cas. 295, resolved itself substantially into this: that the defendant, who was a sub-agent, had received the goods in question, upon condition of paying to the plaintiff out of the first proceeds, a certain sum due to him, according to a written contract with *the agent, of which he had notice, and to which, in a letter addressed to the plaintiff, he admitted his obligation to comply; and the court held the plaintiff entitled to recover the amount, in an action for money had and received. This was, a case then, either of an express promise, by the sub agent, or at least of an implied promise, irresistibly established, and creating a privity between the parties, in a manner clear and unequivocal.

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All these cases are distinguishable from the present. They are either cases, where there was an express promise to hold the money subject to the order of the principal; or there was an implied promise to pay it over, as it was received, to the use of a particular person. The express promise to pay to order bound the party, and excluded any claim for a lien, and any defence on account of want of privity between him and the holder of the order. The receipt of the money for the use of a particular person necessarily imported a promise or obligation to hold it in privity for such person. In the case at bar, no such irresistible presumptions exist. There was, as we have seen, no express promise to hold the proceeds of the sale subject to order; and no implied promise, positively and necessarily, flowed from the circumstances. On the contrary, the acts of Tiernan & Sons, contemporaneous with the receipt of the consignment, negatived it; and the actual assignment was subsequent to those acts.

The question is certainly a nice one; and confessedly new in the circumstances of its actual presentation. On this account, we were desirous of

making some further researches into the authorities; and we have found two cases not cited at the bar, which seem to us fully in point. The first is *Williams* v. *Everett*, 14 East 582. There, K., abroad, remitted certain bills to his bankers, in London, directing them to pay certain sums out of the proceeds, when paid, to certain specified creditors. The bankers received the bills, and before they were paid, the plaintiff (one of the specified creditors) called on the bankers, and stated, that he had received a letter from K., directing 300*l.* to be paid to him, out of the bills sent, and proposing to the bankers to indemnify them, if they would deliver to him one of the bills to the amount; but the bankers refused so to do, or to act upon the letter; *although they admitted the receipt of it, and that the plaintiff was the person to whom the sum of 300*l.* was directed to be appropriated. [*600 The bankers afterwards received the money on the bills, and the plaintiff brought an action for money had and received, to recover the amount of the money so appropriated to him. The court held, that the action was not maintainable. Lord Ellenborough, in delivering the opinion of the court, said: "The question which has been argued before us is, whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by K., and bind themselves so to apply it; and whether, therefore, the amount of such bill, paid to them, when due, did not instantly become, by operation of law, money had and received to the use of the several persons mentioned in K.'s letter, as the creditors in satisfaction of whose bills it was to be applied; and of course, as to 300*l.* of it, money had and received to the use of the plaintiff. It will be observed, that there is no assent on the part of the defendants, to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal of the creditor so to do. If, in order to constitute a privity between the plaintiffs and defendants, as to the subject of this demand, an assent, express or implied, be necessary, the assent can, in this case, be only an implied one, and that too, implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it, until paid; and its contents, when paid, to the use of the remitter. It is competent to the remitter to give, and countermand, his own directions respecting the bill, as often as he pleases; and the persons to whom the bill is remitted may still hold the bill, till received, and its amount, when received, for the use of the remitter himself; until by some engagement entered into between themselves with the person, who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given; but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff, under the orders, which accompanied the remittance, it occurs, as fit to be asked, when *did it become so? It could not be so, before the money was received on the bill becoming due. And at that instant, suppose, the defendants had been robbed of the cash or notes, in which the bill in question had been paid, or they had been burnt or lost by accident; who would have borne the loss thus occasioned? Surely, the remitter, K., and not the plaintiff and his other creditors, in whose favor he had directed the application of the money, according to their several proportions, to be made. This appears to us to decide the question." [*601

This language has been quoted at large, from its direct application to all the circumstances of the case at bar. Here, Tiernan & Sons, before the sale and receipt of the proceeds of the tobacco, refused to hold the same for the use of Jackson; and how then could the money, when afterwards received, be money had and received to his use. If this case be law, it is in all its governing principles like the present. The case of *Grant* v. *Austin*, 3 Price 58, is still later, and recognises in the fullest manner the decision in 14 East 582. That was the case of a remittance to bankers, with a request, that they would pay certain amounts to persons specified in the letter. No dissent on the part of the bankers was shown. But the court held, that in order to constitute an appropriation of the money, or any portion of it, in favor of the persons specified, some assent on the part of the bankers must be shown: and that the circumstances of the case did not establish it. The remitter was, at the time, largely indebted to the bankers; and the account between the parties was soon after broken up. It seems to us, that these authorities are founded in good sense and convenience. Until the parties receiving the consignment or remittance, had done some act recognising the appropriation of it to the particular purposes specified, and the persons claiming had signified their acceptance of it, so as to create a priority between them, the property and proceeds remained at the risk and on the account of the remitter or owner.

In this view of the case, it is wholly immaterial to decide, whether Tiernan & Sons had a lien on the proceeds, or not, for the balance due them; or whether the negotiations, stated in the record, created a dis-
*602] ability on their part to assert it. *For, even supposing that they have no available lien, that is a matter which cannot be litigated in a suit at law, where the only question is, whether the plaintiff has a good right to maintain his action; whatever might be the case, in a suit in equity, brought by the plaintiff to enforce his equitable claims under his assignment.

The instructions given by the court decided, that the assignment made to the plaintiff did, in effect, pass the legal property in the proceeds to the plaintiff, so as to entitle him to maintain the present action; or, that at all events, it constituted such a special appropriation of them, as would enable the plaintiff, as assignee, to maintain it. We are of opinion, that the court erred upon both grounds; and that, therefore, the judgment ought to be reversed, and the cause be remanded to the circuit court, with directions to award a *venire facias de novo*. In the mandate, the errors in the bill of exceptions will be specially pointed out; but as the principles involved in them are resolved into the points before stated, they need not here be particularly commented on.

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 Maryland, and was argued by counsel: On consideration whereof, it is considered by the court here, that there was error in the circuit court in refusing to instruct the jury upon the prayer of the defendant's counsel, that the assignment made by Thomas H. Fletcher, dated the 21st May 1819, and acknowledged and delivered on the 26th May 1819, and indorsed on the copy of the invoice, as stated in the evidence, did not pass such a legal title to any part of the pro-

ceeds of the tobacco shipped by the brig Struggle, as will enable the plaintiff to support this action in his own name; and in instructing the jury that such an assignment, connected with the character of the consignment of the cargo of the Struggle to the defendants, was sufficient to enable the plaintiff to support this action in his own name. And there was error also in the circuit court, in refusing to instruct the jury, that the invoice, letter of advice, and bill of leading, taken together, do *not constitute such a special appropriation of the cargo of the brig Struggle, or of the proceeds thereof, to the order of Thomas H. Fletcher, as will enable his assignee in this case to maintain this action in his own name upon the assignment on May 21st, 1819. It is, therefore, considered by the court here, that for the errors aforesaid, the judgment of the circuit court be and the same is hereby reversed; and that the cause be and the same is hereby remanded to the circuit court, with directions to award a *venire facias de novo*. [*603

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*Patapsco Insurance Company, Plaintiffs in error, *v.* John Southgate and Wright Southgate, Defendants in error. [*604

Depositions de bene esse.—Subpœna.—Marine insurance.—Total loss. Sale by master.—Abandonment.

In the caption of a deposition, taken before the mayor of Norfolk, to be used in a cause depending, and afterwards tried, in the circuit court of the United States, held in Baltimore, the mayor stated the witness "to be a resident in Norfolk;" and in his certificate, he stated, that the reason for taking the deposition was, "that the witness lives at a greater distance than one hundred miles from the place of trial, to wit, in the borough of Norfolk." It was sufficiently shown by the certificate, at least, *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial.[1]

The provisions of the 13th section of the act of congress, entitled, "an act to establish the judicial courts of the United States," which relate to the taking of depositions of witnesses, whose testimony shall be necessary in any civil cause depending in any district in the courts of the United States, who reside at a greater distance than one hundred miles from the place of trial, are not confined to depositions taken within the district where the court is held.

In all cases where, under the authority of the act of congress, a deposition of a witness is taken *de bene esse*, except where the witness lives at a greater distance from the place of trial than one hundred miles, it is incumbent on the party for whom the deposition is taken, to show that the disability of the witness to attend continues; the disability being supposed temporary, and the only impediment to a compulsory attendance. The act declares expressly, that unless this disability shall be made to appear on the trial, such deposition shall not be admitted, or used on the trial; this inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles; he being considered beyond a compulsory attendance.

The deposition of a witness living beyond one hundred miles from the place of trial, may not always be absolute; for the party against whom it is to be used, may prove the witness has removed within the reach of a *subpœna*, after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus probandi* thus would rest upon the party opposing the admission of the deposition in evidence; for a witness whose deposition is taken under such circumstances, it is not necessary to issue a *subpœna;* it would be a useless act; the witness could not be compelled to attend personally.[2]

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[1] Rules for taking a deposition *de bene esse*, and when it may be read in evidence. Harris *v.* Wall, 7 How. 693. The magistrate must state in his certificate the reason for taking the deposition; that the witness is about to "depart the state," is not sufficient. Id.

[2] This overrules Brown *v.* Galloway, Pet. C. C. 291; Penn *v.* Ingraham, 2 W. C. C. 487; Banert *v.* Day, 3 Id. 243; Pettibone *v.* Derringer, 4 Id. 215.