**Tiernan Vs. Jackson**

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**Court** : US Supreme Court

**Decided On :** 1831

**Appeal No.** : 30 U.S. 580

**Appellant** : Tiernan

**Respondent** : Jackson

**Judgement** :

Tiernan v. Jackson - 30 U.S. 580 (1831)
U.S. Supreme Court Tiernan v. Jackson, 30 U.S. 5 Pet. 580 580 (1831)

**Tiernan v. Jackson**

**30 U.S. (5 Pet.) 580**

*ERROR TO THE CIRCUIT COURT OF THE UNITED*

*STATES FOR THE DISTRICT OF MARYLAND*

## SYLLABUS

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 $2,400 [the amount of the two bills] to I. and 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.

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, 18 U. S. 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 drawer, 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 consents 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 was 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 recognizing the appropriation of it to the particular purposes specified and the persons claiming

Page 30 U. S. 581

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.

James Jackson, the defendant in error, on 30 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 *nonassumpsit,* 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 $4,906.83. Mr. Fletcher was at the same time largely indebted to Luke Tiernan & Co., of which firm Luke Tiernan was the surviving partner, and other merchants in Baltimore, Philadelphia, and elsewhere.

In consequence of the failure of a house in Nashville and of other heavy losses in business, Mr. Fletcher became unable to meet his engagements, and on 10 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

Page 30 U. S. 582

harassed and also put my creditors to much less trouble. In the above proposition, I ask no abatement in amount. 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 endorse 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 3 May following accepted by Messrs. Tiernan & Sons and by Mr. Luke Tiernan for Luke Tiernan & Co., and on 21 May, 1819, Mr. 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 Mr. Foster for the same.

Soon after this adjustment, Mr. 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 Mr. Foster in conformity with directions from his father, Mr. Luke Tiernan, before he left Nashville, he expressed his approbation of it.

In the letter of Mr. Fletcher to his creditors in Baltimore, dated Nashville, April 10, 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 endorsers, as I cannot reconcile it to my feelings to permit a friend to suffer who endorses my paper from motives of friendship. "

Page 30 U. S. 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 $2,000, the other for $2,600. These bills were endorsed by Bernard McKeirnan at the instance of Mr. Thomas H. Fletcher, and fearing that this tobacco would be attached for his debts in Baltimore, Mr. Fletcher, on the same day he procured the endorsement, assigned the shipment on the back of the invoice in favor of Mr. McKeirnan for the proceeds thereof. This assignment was not communicated to Mr. McKeirnan, but was filed away by Mr. Fletcher.

Jouett F. Fletcher, as the agent of Thomas H. Fletcher, drew another bill for $2,000 against the shipment of the tobacco per the *Mary* in favor of Joseph Fowler on Luke Tiernan & Sons. This bill was accepted and paid by the Messrs.

Tiernan & Sons; the two bills endorsed by Mr. McKeirnan 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 endorsed by Mr. McKeirnan, Mr. Fletcher consulted counsel in Baltimore on the effect of the assignment to McKeirnan, and then for the first time made the same public.

After this, Tiernan & Sons wrote to Mr. Foster and to Mr. 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 Mr. 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 19 July, 1819, and under date of 4 September, 1819, they accepted of the new arrangement, and the receipts which Mr. Foster had given to Mr. Fletcher were returned to him and he returned all the notes except one for $2,000 on

Page 30 U. S. 584

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

On 8 May, 1819, Jouett F. Fletcher, as the agent of Thomas H. Fletcher, shipped on board the brig *Struggle* from New Orleans for Baltimore 81 hogsheads of tobacco, amounting, per invoice, to $6,065.67. 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.

Mr. Fletcher stated in his evidence that upon this consignment on 21 May, 1819, he drew two bills upon the consignees, one in favor of James Jackson, the defendant in error, for $2,400, and another bill for $600 in favor of Ingram & Lloyd. On 26 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 Mr. Jackson.

"Nashville, May 21, 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 $2,400; to Ingram & Lloyd, as above, $600; and the balance, whatever it may be, to G. G. Washington and 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 Mr. Jackson, to the bill for $2,400 in favor of Mr. Jackson, and to this assignment, Mr. Fletcher also stated that in the fall of 1818, he had sold to Mr. Jackson a bill of exchange for $5,000, drawn by him on his agent in Philadelphia, which was protested for nonpayment; on its return he liquidated it by his notes, which he paid. Mr. Jackson required no security against the bill for $2,400,



as he showed him Mr. Foster's receipts that he owed Luke Tiernan & Sons nothing, and he satisfied him he had actually made the consignment. When he sold the bill for $2,400 to Mr. 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 Mr. Jackson entertained of his circumstances, but in the month of May, 1819, he voluntarily endorsed his, Mr. Fletcher's, note for $10,000 without having any interest in the transaction.

Messrs. Tiernan & Sons refused to accept or pay the bill for $2,400, and it was regularly protested.

The tobacco per brig *Struggle* arrived in Baltimore on 7 June, 1819, and was sold by the consignees, the net sales amounting to $4,335.35, for which sum they were in cash on 11 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 21, 1819, and acknowledged and delivered on 26 May, 1819, and endorsed 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.

Page 30 U. S. 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 assignment of May 21, 1819, which instruction the court refused to give."

"3. That unless the jury finds 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 21, 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 finds 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

Page 30 U. S. 587

by the defendants, as the factors and agents of the said 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 21 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.

Page 30 U. S. 592

MR. JUSTICE STORY delivered the opinion of the Court:

This is a writ of error from 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 defendants, 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 $9,000. On 8 May, 1819, Fletcher, through his agent, Jouett F. Fletcher, shipped at New Orleans 81 hogsheads of tobacco on board of the brig *Struggle,* bound for Baltimore, consigned to Tiernan & Sons. The invoice and bill of lading were enclosed 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 8, 1829"

"Messrs. Luke Tiernan & Sons"

"Gentlemen -- Herewith we hand you invoice, bill of lading, 81 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, and 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 7 June, 1819, sometime after that by the *Mary* had been received. Previous to the arrival of either of

Page 30 U. S. 593

these shipments, *viz.,* on 10 April, 1819, Thomas H. Fletcher, at Nashville, wrote a letter to Tiernan & Sons enclosing 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 21 May, 1819, paid to Mr. Foster in promissory notes the claims of the two houses of the Tiernans, and took receipts in full from Mr. Foster as agent. At the time of this payment and settlement, Tiernan & Sons did not know of the consignment by the *Struggle,* but Mr. 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.

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

"$2 400 Nashville, May 21, 1819"

"Sixty days after sight of this my first of exchange, second unpaid, pay to the order of James Jackson, $2.400, value received. Thomas H. Fletcher. To Messrs. Luke Tiernan & Sons, Baltimore."

This bill was presented and protested for nonacceptance on 9 June, 1819, and was at maturity protested for nonpayment. On the same day the bill

Page 30 U. S. 594

was drawn, Fletcher drew the following assignment on the back of a duplicate invoice of the shipment by the *Struggle.*

"Nashville, 21 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 $2,400; 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 Mr. 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 19 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 transitu,* 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 $2,400." 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.

Page 30 U. S. 595

Could the assignee or assignees have countermanded the consignment 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 account 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 $2,400, 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

Page 30 U. S. 596

an 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 7 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 enure 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 *a 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

Page 30 U. S. 597

implied from the antecedent course of business and relation of the parties as principal and factors. The implied obligation, then, from 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 pretense that an action can be sustained. Have Tiernan & Sons, since notice of the present assignment, made any such promise to Jackson? No express promise is shown, and the acts

antecedently done by Tiernan & 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 counterclaim, or set off of the assignee accruing before the assignment. The case of *Walker v. Birch,* 6 Term 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

Page 30 U. S. 598

general rule of law to it. In the note 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, 18 U. S. 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 was 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. & Pull. 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 Harris & Johns. 114; *Pigott v. Thompson,* 3 Bos. & Pull. 146, 149, note.

The case of *Neilson v. Blight,* 1 Johns. 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

Page 30 U. S. 599

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 the 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.

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 defense 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 three hundred pounds 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,

Page 30 U. S. 600

although they admitted the receipt of it and that the plaintiff was the person to whom the sum of 300 was directed to be appropriated. 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 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 entire 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."

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 recognizes 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 recognizing 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 disability on their part to assert it.

Page 30 U. S. 602

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 21 May, 1819, and acknowledged and delivered on 26 May, 1819, and endorsed 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, 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 lading, 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 of May 21, 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.*