

PATRICK GIBSON
 vs.
 JOS. W. FINLEY AND OTHERS. } DECEMBER TERM, 1853.

[EQUITABLE ASSIGNMENT.]

A DEBTOR residing in San Francisco sent, by letter, to his agent in Baltimore, two drafts on New York and one on Baltimore, with request to collect them, and pay the proceeds to certain creditors specified in the letter, with the respective sums due each, and also gave those creditors orders on his agent for the sums due them. One of these orders was payable out of the proceeds of the New York drafts, the others out of both the New York and Baltimore drafts, but none of them were accepted by the agent. The Baltimore draft being dishonored, the holder of the order on the New York drafts claimed the payment of it in full out of the proceeds thereof to the exclusion of the others. HELD—That the proceeds of the New York drafts should be paid, *pro rata*, among all the creditors mentioned in the letters.

It is the invariable effort of a court of equity to do equal justice to all by a ratable distribution of the fund under its control, when not prevented from so doing by the plain and explicit terms of the instrument with which it has to deal.

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 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 assent 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.

If a creditor is pursuing two remedies when only one is open to him, chancery may, upon application, compel him *to elect*, but until this is done, his pursuit of both will not deprive him of either.

[Jos. W. Finley, formerly of the city of Baltimore, but at the time of the filing of this bill, a resident of San Francisco, California, being indebted to various persons in the former city, transmitted in a letter, dated 31st of March, 1850, to Patrick Gibson, of Baltimore, three several drafts, two of which amounting to \$7000 were drawn upon bankers in the city of New York, and the other for \$5000 upon A. J. Bowie, of Baltimore. This letter, after specifying the drafts, requests Gibson to collect them and distribute the proceeds among certain creditors, a list