judgment. Where a case is brought here upon a writ of error, issued under the twenty-second section of the Judiciary Act, and there is no bill of exceptions, agreed statement, or special verdict in the transcript, the general rule is, that the judgment will be affirmed, as is shown by repeated decisions. *Suydam* v. *Williamson*, 20 How., 441; *Minor* v. *Tillotson*, 2 Id., 392; *Kelsey* v. *Forsyth*, 21 Id., 85; *Guild* v. *Frontin*, 18 Id., 135; *Stevens* v. *Gladding*, 19 Id., 64; *Taylor* v. *Morton*, 2 Black, 484.

In the case last cited, this court said that when a cause is brought into this court upon a writ of error sued out under the twenty-second section of the Judiciary Act, and all the proceedings are regular and correct, it follows, from the express words of the section, that the judgment of the court below must be affirmed, although there is no question presented in the record for revision.

The judgment of the Circuit Court is, therefore,

AFFIRMED WITH COSTS.

SPAIN *v.* HAMILTON'S ADMINISTRATOR.

1. A transfer by a party of his "*right and claim for any commission or compensation* for services rendered, or to be rendered *to any body corporate*," in a class of claims mentioned generally in the transfer, is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees (without notice) of portions of a *fund* designated and appropriated to answer this claim: the case being one where, on the one hand, the older transferee did *not* make inquiries as to *what* body corporate the claim for commissions was against, and did not give notice of the paper executed in his favor, to such body corporate, nor to a third party to whom this body, subsequently to the older transfer, but prior to the junior ones, devoted a fund to answer these commissions; and where, on the other hand, the junior transferees *did* make exact inquiries and obtain precise evidences and accurate information as to the fund from which the commissions were to be derived, and *did* immediately notify to the party then holding the fund, the nature and extent of their claims, and *did* generally take measures to prevent all other persons being misled by the supposition that the fund still remained in the power of the party who had transferred this claim for commissions upon it. Such an assignment

as the one first above mentioned, is a blind assignment, and the party claiming under it cannot come into equity for priority against even junior assignees in a case where the claims of these last are on a fund specifically; and are moreover precise, well understood, and have been vigilantly protected.

2. The general doctrine of equity, that a party complaining of usury can have relief only for the excess above lawful interest, applies to the case of a person standing in the position of a claimant through bill in equity of priority on a *fund*, another claimant upon which, as defendant, is the alleged usurer. The fact that the suit is a mere contest between different parties for a *fund*, and a contest, therefore, in which each claimant may, in some senses, be considered an *actor*, does not force the alleged usurer into the position of a complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover a usurious debt; that is to say, to the loss of the entire claim.

3. Where the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious. Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the legal interest, is "uncertain and so curious," that intentional bad device cannot be affirmed.

MILLER and SWAYNE, JJ., dissented in this case.

THIS was a bill in equity, filed in the Circuit Court for the District of Columbia, by S. Spain, guardian of Mrs. McRae, a lunatic, against the administrator of the late James Hamilton, of South Carolina and Texas, extensively known as "General James Hamilton," and against Corcoran and Riggs, Hill, and others; the said bill claiming priority in the distribution of a fund in the Treasury of the United States, originally belonging to Hamilton, and arising by the assumption of the United States, in September, 1850, of certain debts of the Republic of Texas, which fund, or the source of it rather, Hamilton, having become embarrassed and insolvent, had assigned in divers ways and to various extents to different persons, parties plaintiff and defendant in this suit.

The case in its outlines as proved, or *by agreements made in the case* admitted, was essentially this: the leading facts being derived from the stating part of the opinion of the learned Justice (WAYNE, J.) who delivered the judgment of the court.

The Republic of Texas, prior to its annexation to the United States, had issued a large number of bonds, which

were due, unpaid, and the subject of speculation and purchase in different parts of the Union. Hamilton, who held a considerable amount of the bonds, had become familiar with the affairs of Texas, and especially with all that related to its debts, and was anticipating that if that republic was annexed to the United States, those debts would all be paid. He became, accordingly, an active and energetic advocate of annexation. The trustees of the Bank of the United States also owned a large amount of the bonds. But these had been pledged, in a greatly depreciated state, to a certain Wetmore, one of the defendants, as security for a loan which he had made to the bank. If, however, the bonds should be paid, enough would be obtained to pay the debt due by the bank to Wetmore, and leave a large surplus remaining. And Hamilton, being already the agent of some of the bondholders, and desirous to have the agency for others, applied to the trustees of the bank to represent *them*. On the 16th of October, 1845, the trustees accordingly wrote Hamilton a letter, in which, adverting to his knowledge of the fact that they had "now only a contingent, resulting interest in the bonds, dependent *upon the payment by us of the amount for which they are now held by Mr. Wetmore in pledge*," they say as follows:

"If you will devote your best efforts to securing the recognition and payment of said claims, and your effort shall be successful, then we agree to allow you a commission of 10 per cent. on whatever sum or amount of our claim, through your instrumentality, shall be recognized and paid over to us, over and above the amount for which the said bonds are pledged. The limitation of time during which this agreement on our part can with certainty be continued is only to the 20th of March next ensuing; but we are willing, with the concurrence of Mr. Wetmore, or in case *we* should then or sooner obtain *the entire control of those bonds and securities* now in his hands, to extend the said time to two years from this date."

The 20th of March, the first limitation, passed without the recognition by Texas of its bonds, and without the payment

of the debt due by the bank to Wetmore. Of course Wetmore's legal right to retain the Texas bonds was continued, and Hamilton was left without any claim upon the bank for commission or compensation under the agreement.

On the 16*th September*, 1850, however, the trustees wrote to *Wetmore* a letter, reciting that Hamilton had rendered his services, as he had agreed, "so far as in his power, without however realizing the money;" and then referring to an act of Congress recently passed for the payment, in part, of the Texas bonds, among which the trustees had been "informed by General Hamilton, are the bonds held by *them*," the letter goes on as follows:

"The trustees, *at the particular request of General Hamilton*, have instructed me to say to you, *if they should not have previously redeemed the bonds*, that upon the final adjustment and payment of the said bonds first above mentioned, either by the Treasury of the United States, in the manner provided for in said act of Congress or otherwise, to the satisfaction of the said trustees, pursuant to their said agreement with General Hamilton, *you will be pleased to hold, subject to the order of General James Hamilton, one-tenth of any sum over and above the amount of your claim against the said bonds.*"

This claim of Wetmore, originally £50,000 sterling, had, at the date of this letter, been reduced by payments from the bank to $55,493.24, with interest from December 9th, 1842.

Upon the bottom of this letter of 16th September, 1850, Wetmore, on presentation of the same to him, wrote as follows:

"In conformity with the above order, I will, when received by me, pay over to James Hamilton, or to his order, the tenth of the money or stock that may be received either at Austin, Texas, or at Washington, D. C., on the above certificates, subject, however, *to the conditions of the above order, and to a lien I hold by assignment for* $2500, *which sum I loaned General Hamilton in August last, with interest.* W. S. WETMORE."

Between the dates of the letters to Hamilton and that to Wetmore—that is to say, on the 12th February, 1850,—

Hamilton, who, as former trustee of Mrs. McRae already mentioned, had become indebted to her estate, and was now under arrest for the debt,—executed a paper to her succeeding trustee or committee, Spain, the complainant, which purported to secure this debt. It "transferred, assigned and made over" to Spain, committee, &c.,

"All my *right and claim for any commission or compensation for services rendered or to be rendered by me to any* and every other person and *body corporate* in the prosecution of any claim or claims for any and every such person and body corporate on the government of Texas, *subject to any previous assignment thereof.*"

As illustrating the special temper and character of Hamilton, referred to by the court and indicated in the record, it may be mentioned that his debt to Mrs. McRae had arisen from a misappropriation of the funds of her estate in his hands as trustee. "Consulting," as his answer said, "the suggestions rather of a sanguine temperament than the admonitions of experience," he had invested about $50,000 of her property "in one of the finest and most promising sugar estates in Texas, supposed to be an investment surpassed by none in the United States;" which, in the end, however, the answer proceeded to state, "*yielded more sap than sugar*," and being sold on first incumbrances, did not bring enough to pay them.

When Hamilton proposed to give the transfer, he made no mention of any Texas bondholders whom he represented, nor did he state that the bonds of the bank were held in pledge by Wetmore; nor did Spain—or rather the person who was acting for him (the arrangement having been made by a third party in his behalf),—*make the least inquiry, so far as appeared, from Hamilton, as to any of these things*, nor was notice ever given to the bank about it. It did not appear that Spain knew anything about it until long after.

This was the claim for which priority on the fund was asserted by the bill filed. The opposing claims were as follows:

1. *A claim of Wetmore, himself*, to the extent of $2500, for

money which, by an agreed statement in the case, it was conceded that he had lent to Hamilton on the 30th August, 1850, being the debt referred to in the paper mentioned *ante*, p. 607, signed by him at the bottom of the letter from the trustees to him of 16th September, 1850, and for which, as he there states, he had taken *an assignment* at the time.

2. *A claim of Corcoran & Riggs, of Washington.* Hamilton needing money in that city had applied to these persons, bankers there, for $25,000. They advanced the sum to him on the 21st September, 1850, taking an order from him on Wetmore for $30,000, "to be paid out of the first moneys received after your claims shall have been satisfied;" which order Corcoran & Riggs *immediately transmitted to Wetmore*, who, on the 24th of the same month, "accepted" it.

3. *A claim by the estate of one Hill*, made partly under an original claim, and partly by subrogation to the rights of James Robb & Co. As far back as 1848, Hamilton, reciting that the trustees of the Bank of the United States had agreed to pay him a commission of 10 per cent. on somewhere about a million of dollars, &c., assigned one-half of "all his interest and property in the commission," in trust for Hill, a creditor and friend. In regard to *this*, it did not appear that notice had been given to any one, and the history of the whole transaction, Hill being dead, was not very clear. The claim, so far as it arose from substitution to a claim of James Robb & Co., was plainer, and thus: Hamilton owing Robb a large sum, made, on the 30th April, 1851, a transfer of the "order" of 16th September, 1850, by the trustees of the bank on Wetmore, and by him accepted; the order being subject, as was stated in the transfer, to the claim of Wetmore, himself, for $2500, and to that of Corcoran & Riggs for $30,000. *Robb wrote immediately to Wetmore*, saying to him:

"We have taken an assignment from General James Hamilton of his residuary interest in an order, &c., of the Bank of the United States, addressed to you, dated September 16th, 1850. *Be pleased to make a note of this assignment*, a notarial copy of which we will send to you, and *hold the claim subject to our order, or that of W. Hoge & Co.*"

This letter and the notarial copy were received by Wetmore, who at once acknowledged their receipt to W. Hoge & Co. The history of the substitution of Hill is told by the following letter, which was duly received and preserved by Wetmore.

NEW ORLEANS, 28th May, 1853.

MY DEAR SIR: Having confided in Gen'l Hamilton's promises until our patience became exhausted with their continued violation, we commenced suit, and obtained judgment and seizure against sundry securities pledged, including the residuary interest on the Texas claim you hold, after the payment of the advances made by yourself and Mr. Corcoran. Mr. H. R. W. Hill, of this city, who is a large creditor of General Hamilton, in order to secure the margin of securities covered by our judgment and seizure, has arranged to liquidate our claim against Hamilton, and *we shall therefore subrogate him, Mr. Hill, to our interest in the Texas debt represented by you.*

Very respectfully, your ob't serv't,

JAMES ROBB.

W. S. WETMORE.

On the day previous to the date of this letter, Hamilton had executed to Hill, he present and accepting, an assignment of the order previously conveyed to Robb, and now by him surrendered.

So far as respected these three claims, in their common outlines alike, and there being nothing to show that the claimants in any one of them had the least knowledge of the paper executed by Hamilton to Spain, any more than Spain had of what was going on between *them.*

The claim of Corcoran & Riggs was, however, embarrassed by evidence not common to the other two claims, and was the subject in the bill of a charge of *usury.* At the time the money was advanced, a paper, drawn by Hamilton and in his writing, was executed by him and by Corcoran for his firm, as follows:

[Private and confidential.]

The following memorandum agreement witnesseth: That Messrs. Corcoran & Riggs have agreed to loan James Hamilton, on a certain order of the trustees of the Bank of the United

States on William Wetmore, Esq., of New York, $25,000, at an interest of 6 p. c., reimbursable on the payment of its public debt, on his order on William Wetmore for $30,000.

In case J. Hamilton does not procure Messrs. Corcoran & Riggs the agency at Washington for the settlement of said debt, then J. Hamilton is to allow a commission on the loan of $2000, *to be added to the interest of* 6 *p. c.* The balance of the said $30,000 is to be credited to J. Hamilton's account on final settlement.

This contract is not in prejudice of a liberal remuneration which Messrs. Corcoran & Riggs have agreed to allow J. Hamilton in the event of procuring said agency.

J. HAMILTON.
CORCORAN & RIGGS.

WASHINGTON, Sept. 21, 1850.

As to this paper, the answer of Corcoran said that it was executed at "Hamilton's instance and request, and after the whole matter of the said loan had been fully consummated;" that, neither suspecting nor conscious of any illegal motive or stipulation, they readily signed the said memorandum without noticing its terms, or having their attention at all drawn to the artful manner in which it appears to be expressed; that even after the controversies involved in this suit had arisen, they had readily furnished the copy of said memorandum upon which the said charge of usury was based, and that the loan was entered on their books as a loan of $25,000, at 6 p. c. As respected the proposed agency, their answer said as follows:

"The said Hamilton had proposed to procure for defendants the agency at Washington for the settlement of the Texas debt, stipulating at the same time that he should have a 'liberal compensation' from them should he succeed in so doing, as it was supposed that such agency would be profitable to these defendants in their business of bankers. In order to accomplish this object, of which the said Hamilton appeared to be very confident, he represented that it would be necessary for him to go to Texas, provided with the influence of certain persons, who were in friendly relations with these defendants and disposed to oblige them; and to induce them to exert themselves in the premises, and to confide in his assurances that he could and would procure

such agency, he proposed that he would pay to them the sum of $2000 if he failed in his undertaking, which, on the other hand, if he succeeded, he should have from them a 'liberal compensation.' It was *this* matter, and this only, which the said Hamilton represented it expedient to keep '*private and confidential*,' from motives entirely personal to himself. These defendants accordingly did put themselves to considerable inconvenience in providing the said Hamilton with the means of procuring said agency, in the profits of which he was to participate. But they repeat that the said arrangement was altogether distinct from the said loan, and was in its nature wholly contingent, and was no part of the consideration of the said loan, which was at 6 per cent. interest only. And that the said Hamilton himself so considered it, is shown by the manner in which he refers to it in the original letter from him to them, now produced."

This letter expressed a wish to make some arrangement in regard to the security of the loan of $25,000, "preserving our contingent contract inviolate in good faith."

Some reference to dates, in connection with the public history of Texas and of its admission into the Union, was given by the learned judge who delivered the opinion, and this, with a statement of the parties' knowledge and proceedings in connection therewith, will give a perfectly full view of the case.

On the 1st March, 1845, Congress passed an act for the admission of Texas into the Union, and an ordinance having been passed July 4th of that year, accepting the conditions proposed by Congress; a joint resolution was passed the same year, declaring Texas admitted. On the 20th March, 1848, the State of Texas itself passed an "act for ascertaining the debts of the late republic," and with a view, as was generally understood, of their being ultimately assumed by the Federal Government. *This act required creditors to file their bonds with the auditor and controller of the State.* Two years afterwards, that is to say, September 9, 1850, Congress passed an act, declaring that it would issue for Texas $10,000,000 in stock bonds; *provided, however*, that no more

than a portion of the fund should be issued until the creditors of Texas holding its bonds and certificates should file in the Treasury releases of all claims against the United States on their account. It was prescribed that the secretary should give notice, by advertisement for ninety days, of the time for payment of the Texas bonds on which releases had been made, and that no payment would be made on those which had not been presented thirty days before the time appointed for payment. All the legislation and government's action upon it to consummate its intention was known, of course, by persons interested in the payment of Texas bonds, and as appeared by the complainant's bill, were known to the appellant, Spain.

Spain did not take steps to secure his bonds until the 18th June, 1851. Being then in Galveston, he at that time, and as his bill stated, "with a view to make his assignment effectual, and to fasten notice thereof upon the government of Texas," caused a certified copy of the assignment to him, addressed to the Treasurer of Texas at Austin, its capital, to be deposited in the post-office. Mr. May, also, a connection and friend of Mrs. McRae, acting for Spain, prior to the 9th September, 1851, and in accordance with public notice given 22d March of that year to the creditors of Texas, "notified to the Secretary of the Treasury of the United States the transfer to Spain," with a view to prevent the payment of the claim so transferred to anybody other than the said Spain. Both these notices were received at the departments to which they were sent.

Under the act of the Texas legislature Wetmore filed his bonds, on the 9th of November, 1849, and getting certificates of debt, which he lodged at the earliest day with the Treasurer of the United States. The original Texas bonds had been delivered to him by the bank when he made his loan, and had always remained in his possession and control. And a portion of his debt being still unpaid, the certificates issued by the United States in lieu of the Texas bonds, were made out to him and in his name; he having stated, however, in an affidavit filed at the Treasury in Wash-

ington, on which they were issued, that as to one-tenth he had no claim except for $2500, and stated also the exact history of the orders of Corcoran & Riggs, and of Robb, with the substitution of Hill, upon him. On the 11th April, 1854 (subsequently to the certificates being thus made out), the bank paid the balance of its debt; and Wetmore immediately transferred to them nine-tenths of the new or substituted certificates. The remaining one-tenth, amounting to $72,505.12, was still in the Treasury of the United States, and it was this which was the subject of dispute for priority; the sum being large enough to pay Wetmore, Corcoran & Riggs, and Hill as substituted to Robb, but not large enough to pay them *and* Spain also.

It was agreed by counsel "that for the purpose of ascertaining the several parties to this controversy, and the origin and character of the fund claimed by them, that the fund now in the Treasury of the United States, amounting to $72,505.12, became due and payable to Hamilton under an agreement entered into by the Bank of the United States, which is evidenced by the two letters of the trustees of the 16th October, 1845, to Hamilton, and 16th September, 1850, to Wetmore." Several other agreements were made, the substance of which is presented in the case as already stated. Good faith and conformity to the instructions of the letter to Wetmore were considered by the court, in stating the facts of the case, to be conceded to him in accepting Hamilton's order in favor of Corcoran & Riggs; and there was no evidence—but on the other hand the contrary of it—that either Wetmore, Corcoran & Riggs, Robb or Hill had knowledge of the paper executed 12th February, 1850, to Spain, till 10th May, 1856 (about the time the bill was filed), when Wetmore heard of it.

The court below held that the letter of the trustees to *Hamilton* (the letter of 16th October, 1845), gave him no *lien* on the Texas bonds for his commissions, but "only a personal claim against the bank for his ten per cent.;" that, accordingly, "the notice of the complainant to Texas was void;" that the legal title of the one-tenth under mort-

gage, and the letter of the trustees to Wetmore of the 9th of September, 1850, with the assent, and at the request of Hamilton, was in *Wetmore*, and was not intended to be reconveyed; that the condition in the letter to Wetmore, by which any reverter on payment of the mortgage debt could be claimed, was for the benefit of the bank only; and that by accepting the deed of 11th April, 1854, for the nine-tenths, they renounced any such benefit as to the remaining one-tenth; that from the 16th September, 1860, Wetmore was trustee to pay Hamilton's debts. The court decreed that they should be paid in this order:

1. Wetmore's own $2500 with interest from date of loan.
2. Corcoran & Riggs's $30,000,—this sum being less than the $25,000 lent with interest on it.
3. Hill, assignee of Robb, his debt with interest.

Any balance was ordered to be reported into court.

It was from this decree that the appeal came to the Supreme Court.

Messrs. Brent and Bradley, for Spain, the appellant: By the terms of the bank's letter to Wetmore, the direction to "hold subject to the order of General James Hamilton," &c., was made expressly subject to the proviso, "if the trustees have not *previously* (*i. e.* previously to the 'final adjustment *and payment*') *redeemed* the bonds," and Wetmore's acceptance was subject to the *conditions* of the order. Now the trustee did previously redeem the bonds, and thus carried away the entire basis on which Wetmore's "acceptance" of the order of Corcoran & Riggs, and of the notification by Robb, was based. The payment of the debt determined the special title of the pawnee.* The bonds became the property of the bank. All that Wetmore did to keep the one-tenth in his own hands he did of his own head and to protect his $2500, which he could not otherwise secure. Of what use, then, were notices to Wetmore? If notices to any one were obligatory it was to the bank. It is not pretended that any one of the appellees gave notice to *it* or to its trustee.

* Ratcliff *v.* Davis, Noy, 137.

The assignment of 1848 to Hill was never notified even to Wetmore, and if it had been the notice would have been valueless, since the assignment was itself merged by Hill's acceptance of the subsequent assignment to Robb. Each one of the assignments set up is, therefore, subsequent to the meritorious and interesting one in favor of Mrs. McRae. It is no answer to our claim to say that by the terms of our assignment we took subject to "any previous assignment," for there was no previous "assignment." Equitable assignees take in order of time, unless where by superior diligence a junior assignee has secured an advantage.* When Hamilton made the assignment to Spain, he had assigned to nobody but Hill, which assignment is not now in our way, having been merged, if, indeed, it existed. We neither asked about other assignments, nor did he speak of them, for none others then existed. There is no evidence that any were contemplated, and if they were it was unimportant, since they would be subsequent ones, and subject to ours, as ours had been to "any previous."

The debtor was, first, the State of Texas, and subsequently the United States. To both notice was given. Here were no laches, but on the contrary, in both cases, diligence. Even admitting Wetmore to hold a legal title, we deny that the subsequent assignees have a prior equity, unless Spain was guilty of laches in giving notice to Wetmore, after the former had knowledge where this legal title was; and this is not shown. A prior assignee is not postponed by a failure to give notice, unless guilty of fraud or of gross neglect. The subsequent assignee takes subject to the prior equities.

As to Wetmore's claim for $2500, he notified it to no one. The order of the bank to him was to accept in one way: he accepted in another, for his own benefit; and he gives no notice to the bank of his departure from the terms on which they had asked him to accept. He has notice, at any rate,

* 2 Leading Cases in Equity, by Hare & Wallace, part 2d, p. 218, ed. of 1852, note to Row *v.* Dawson, &c.; Berry *v.* Mutual Insurance Co., 2 Johnson's Chancery 609.

of our older claim, prior to his getting the money from the United States, and is bound to postpone himself.

As to Corcoran & Riggs, their claim is usurious on its face; and even supposing Spain to be postponed by their prior notice to Wetmore, he may drive them out entirely by the illegality of their loan. The right to object is not personal to the borrower.* Suppose Corcoran & Riggs had filed a cross-bill here. Could we not object? Can they, then, vary our rights by assuming the position of a defendant, and asking only to be let alone? In *Scott* v. *Nesbitt*,† which may be thought to oppose our view, the party sought to vacate a *judgment* on the usurious debt. We do not desire to destroy any legal advantage obtained by these persons. It is they who seek to postpone *our* prior equity.

So far, therefore, as Wetmore, or, indeed, anybody else, sets up other assignments as entitled to priority over ours, they become actors, and the court must decide on priorities to the fund. We cannot assent to the proposition, that because Wetmore intends to pay a usurious claim to one who declines to file a cross-bill for fear of the plea of usury, and through Wetmore and the grounds taken in his answer becomes an actor and claimant of the fund, therefore the holder of that claim is not an actor, as he clearly would be if Wetmore refused to pay over to him and he sought relief. On a bill to settle priorities the decree is a judgment in favor of each incumbrancer.

Mr. Carlisle, contra: On the 12th February, 1850, the day when all the rights of the complainant accrued, whatever they were, Hamilton himself had only a personal contract upon which he might sue, if within the time limited thereby he should become entitled to claim compensation of the trustees of the bank. Of consequence, this contract was all that it was legally possible to assign; so that the assignee would have the right to sue in the name of Hamilton, for his (the assignee's) use, on that contract, when, by its terms,

* Lloyd *v.* Scott, 4 Peters, 225.

† 2 Brown's Chancery, 649.

Hamilton himself might sue. The subsequent paper, of 16th September, 1850, under which these appellees claim, recapitulating the terms of the agreement of 1845, without any variation from them, referred to it as a personal contract and not as a lien specifically on the fund. In this fund, *created in September*, 1850, the complainant could have had no interest on the 12th of February previous, the date of the assignment to him, for the fund did not then exist. Indeed the paper does not purport to assign any interest in any specific fund, but only the claim, as general creditor, which he might have against the trustees of the bank for services rendered. It is not possible to convert a personal contract into the pledge of a particular fund.*

2. But if the complainant has a specific assignment of the fund, and may sue upon it here, he is postponed to the appellees, Wetmore, Corcoran & Riggs, and Hill.

At the date of the complainant's assignment Hamilton's only claim to the fund rested on the letter to *him*, of October 16, 1845. The existence of these bonds, and that they were held by Wetmore, and that the interest of the bank was only "*contingent and resulting, dependent upon the payment of the amount for which they are now held by Mr. Wetmore*," was expressly notified to him in that paper, and his previous knowledge is there imputed to him. The complainant claims to stand in his place, and before us, upon that paper. Therefore, it was plainly his duty to give notice to Wetmore. If he had done so, we should have been safe from any fraud. The obligation of the equitable assignee in cases like the present is set forth in *The Leading Cases in Equity*,† where it is said that "in order that third parties may be bound, it is necessary with regard to a chose in action to do all that can be done to perfect the assignment;" and again, that "if the assignee of a chose in action, or of a trust estate in personalty does not perfect his title by giving notice of the

* 2 Leading Cases in Equity, by Hare and Wallace, part 2d, p. 233, ed. of 1852; note to Row *v.* Dawson, &c.

† By Hare and Wallace, vol. 2, part 2d, pp. 212, 213, ed of 1852; note to Row *v.* Dawson.

assignment to the debtor or trustees, a subsequent purchaser or incumbrancer giving notice of *his* assignment will thereby acquire priority."

No such notice from Spain or from any one is pretended, either before or after our assignments, except the notice of this bill, filed in 1856, nearly six years after our rights accrued. Spain's laches every way were great. We need not recapitulate the evidence, as the court, we are sure, will perceive and enforce our view of the case, on the facts as stated in the case. *Judson* v. *Corcoran*, in this court, is in point.*

3. The question of usury as regards Corcoran and Riggs, is a question of fact, of intent. If neither party intend it, but act *bonâ fide* and innocently, the law will not infer a corrupt agreement.†

The complainant, unable to deny the well-known rule, that a third person complaining in equity of usury can only have relief for the excess of the real debt, seeks to avoid it by a supposed distinction in cases of several claimants upon a fund, the question being as to priority of equities. But there is no foundation for the distinction. It is believed that in all cases *in equity* the rule is unyielding. *Scott* v. *Nesbit* is to the point.‡ Even in an action of trover,§ Lord Mansfield refused to allow the plaintiff to recover his goods, which had been pledged on a usurious agreement, because he had not offered to pay the real debt and legal interest.

It is settled, moreover, that, notwithstanding the statute declares all usurious securities absolutely void, this is by way of defence to a suit founded on such security. To this extent the rule applies to the holder of a negotiable promissory note (the most favored in this respect), when he sues on the infected instrument; because the defence is provided absolutely by the statute. The policy of the statute was to protect the necessitous borrower; but, by legal reasoning, it

* 17 Howard, 612.

† Bank of the United States *v.* Waggener et al., 9 Peters, 378.

‡ 2 Brown's Chancery, 649; see Mason *v.* Gardiner, 4 Id., 438.

§ Fitzroy *v.* Gwillian, 1 Term, 153.

has been extended to his legal representatives; yet only as defence. If the assignee of the borrower sue in ejectment, and the purchaser under the usurious mortgage is defendant (at least not being *particeps criminis*), the instrument under which the defendant claims is not *void;* for the fact of usury is not used in such case as a defence, but as a weapon of attack, which was not the intent of the statute, and would be against conscience.* So that, even at law, the imperative terms of the statute only make the usurious securities void, *sub modo;* the equitable rule being applied even by courts of law, whenever, consistently with technical reasons, it can be done.†

Mr. Justice WAYNE delivered the opinion of the court.

He stated facts at length; and after quoting the letters of the bank to Hamilton of 16th October, 1845, and to Wetmore of 16th September, 1850, and Wetmore's indorsement on it,—which latter, of the 16th September, his honor observed, "is a substantial repetition of the conditions upon the performance of which the bank would give to Hamilton 10 *per centum*, with a full acknowledgment that he had rendered such services as entitled him to have it,"—proceeded as follows:

Viewing *the case as the parties have chosen to make it by agreement*, we must consider it differently from what we would otherwise have done, and will consider, as the purpose of the suit is declared to be to settle priorities between the parties to it, what are the rights of the complainant in that particular, and how the priority which he claims has been affected by his own remissness and negligence.

It must be remembered that he rests his claim upon a paper executed by Hamilton of all his "right and claim for any commission or compensation for services rendered or to be rendered by him to any person and body corporate, in the prosecution of any claim or claims for any and every person and persons and body corporate, on the said government of

* Jackson *v.* Henry, 10 Johnson, 195. † Jackson *v.* Dominick, 14 Id., 435.

Texas, subject to any previous assignment thereof, which Hamilton might have made before."

Mr. Spain, the complainant, is in a court of equity asking a priority of payment over other creditors, out of a fund held in trust by Mr. Wetmore for the benefit of Hamilton, who became assignee of Hamilton on his acceptance in the discharge of his duties of the relation to them as the trustee of the fund. No inquiry was made by the complainant, as he had a right to make, when he accepted the paper from Hamilton, as to who were the persons or body corporate from whom he anticipated commissions or compensation for the successful prosecution of their claims upon Texas. He certainly had the right to make such an inquiry from Hamilton, and in the situation in which Hamilton and himself were at the moment, could either have coerced at least such a reply as would have enabled him to protect himself by notices of his interest in the matter, knowing as he then did that Hamilton was an insolvent man, and being admonished by the paper itself that the rights which Hamilton was professing to give him were but secondary to the right of other assigness of Hamilton, as the paper declares they were. Instead of any such care and caution, he accepted the paper, or assignment as it is called, not in any way guarding himself from the power which Hamilton might exercise to sell and borrow money upon the same fund from innocent parties, without any possibility of the buyer or lender having any knowledge of the claim which Mr. Spain now makes upon the fund in controversy. Mr. Spain neither asked for information to secure his own rights, or to protect the rights of others from such a result. And it was not made until some time after Mr. Wetmore had accepted Hamilton's draft in favor of Corcoran & Riggs, that Mr. Spain thought of giving a notice of any kind of his claim upon the fund. He then says in his bill, that to make his assignment effectual, and to fasten notice of it upon the government of Texas, that he had sent through the post-office at Galveston to the treasurer of Texas a copy of Hamilton's assignment to him, which appears to have been received. It was dated the 8th

June, 1851. If Mr. Spain had been vigilant in his inquiries as to what had been done by Texas for the payment of its debts, he would have learned by inquiries, while he was at Galveston, that Wetmore, as the assignee of the bank's Texas bonds, had, two years before the date of his notice, filed those bonds, as the act of Texas directed it to be done, with the treasurer and comptroller of Texas. But if that had not been done by Mr. Wetmore, and the notice of the complainant had come to his knowledge, it could not in any way invalidate the loan of Corcoran & Riggs, or his acceptance of Hamilton's order in their favor, which had been made prior to the date of the letter from the complainant, transmitting to the treasurer of Texas a copy of the paper under which he claimed to be the assignee of Hamilton.

The same may be said of the paper given by Mr. May, on the 9th September, 1851, to Mr. Corwin, the Secretary of the Treasury, which was intended to prevent the payment of the fund to any other person than Mr. Spain. No one will doubt that such a paper for that purpose was written and placed by him in the Treasury Department; but it cannot in any regard affect the claim of Corcoran & Riggs upon the fund, as their dealings with Hamilton, and Wetmore's acceptance of Hamilton's order in their favor, took place twelve months before, on the 21st and 24th September, 1850. The paper left by Mr. May with the secretary cannot be presumed to have been made known to Wetmore to affect his rights, as the legal holder and trustee of Hamilton, to the fund, or those of Robb & Co., or those of Hill, as it has not been presented and proved in the manner that the law requires all papers or documents to be, from either of the departments of the Government, before they can be received as testimony in courts of justice. In fact the complainant, Mr. Spain, neither made inquiries to protect himself or to secure others from being imposed upon by Hamilton. He knew, as his bill shows, all the proceedings of this Government for the payment of the Texas debt, and where to go for information, and was advised of the notice given by the Secretary of the Treasury to the holders of Texas bonds as early as March,

1851. Instead of acting promptly and with vigilance, he delays all notice to Wetmore for more than six years; until he brought his bill. The complainant says, in excuse for not having given earlier notice to Wetmore, that he was ignorant of the existence or terms of the papers connecting Hamilton and Wetmore with the fund in controversy. The answer to that is, that he should have made inquiries, and should not have left himself ignorant, as he did, when he took the paper from Hamilton upon which he asks for a priority of payment. On the contrary, Wetmore and Corcoran & Riggs used every precaution to protect themselves before the latter lent to Hamilton $25,000, and also to warn others who might come afterwards as dealers in the fund with Hamilton.

No creditor has a right to take a blind assignment from his debtor upon the latter's anticipation of becoming interested in a particular fund to be realized thereafter, without making such inquiries as the occasion may require, and then to ask in equity for a priority in the payment of his debt merely from the precedency in date of his assignment over those who became subsequently assignees for part of the same fund for actual value given to the *cestui que trust* of the fund. It is our opinion that Wetmore, Corcoran & Riggs, and Hill are meritorious creditors of Hamilton, and that their claims upon the fund were acquired without notice or the possibility of their having had it, when they became the assignees of Hamilton, and that the complainant in this case has no priority of payment out of the fund in consequence of remissness in not having given notice of his claim as the assignee of Hamilton.*

This case has been examined by us very fully and with every regard for the arguments of the able counsel representing the complainant. We think it to be clearly within the principles decided by this court in *Judson* v. *Corcoran*.†

* Foster *v.* Blackstone, 1 Mylne & Keen, 297; Tirson *v.* Ramsbotham, 2 Keen, 25; Meaux *v.* Bell, 1 Hare, 73; Loomis *v.* Loomis, 26 Vermont, 198; Ward *v.* Morrison, 25 Ibid., 593.

† 17 Howard, 612.

It is clearly within the cases which have been so fully and ably reported, of *Dearee* v. *Hall*, and *Leveridge* v. *Cooper*, in 3 Russell.* The interests of Wetmore, Corcoran & Riggs, and Hill in the fund, are valid and operative as assignments. To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. A draft drawn by A. or B. in favor of C. for a valuable consideration, amounts to a valid assignment to C. of so much of the funds of A. in the hands of B. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.† No cases can be cited, or were in conflict with those upon which we rely for the judgment which we are about to give in this case.

In respect to the question of usury alleged by the complainant against Corcoran & Riggs, to affect their right to recover their loan to Hamilton, we do not deem it necessary to follow the arguments of counsel. The complainant, as a suitor in equity, could only have relief for the excess over the real debt, as he admits it to have been a loan by Corcoran & Riggs to Hamilton of $25,000, in the way and at the date mentioned in their answer to his bill.‡ The application of the rule in this case cannot be denied, because the complainant alleges his bill to be for claims upon a fund

* Pages 1–64.

† 2 Story's Equity Jurisprudence, 376, § 1047, and the cases cited.

‡ Stanley *v.* Gadsby et al., 10 Peters, 521.

by several parties contesting their equities to a priority of payment.

The charge of usury against Corcoran & Riggs depends altogether upon a paper marked "private and confidential," bearing date the 21st of September, 1850, the day that Hamilton drew his order upon Wetmore in favor of that firm. The paper is admitted to be in the handwriting of Hamilton, and is signed by himself and by Mr. Corcoran for his firm. Though drawn and signed on the day that the loan was made, the reading of it shows that it had no connection with the arrangement between Hamilton and Corcoran & Riggs for lending the money. The paper is begun by a recital of the loan at an interest of six per cent., and it proceeds to say, without any mention of the subject, that he, Hamilton, in case of his not procuring for Corcoran & Riggs the agency at Washington for the settlement of the Texas debt, will allow a commission on the loan of two thousand dollars, to be added to the interest of six per cent. Not that he would pay, but that he would allow, and that the balance of the $30,000 was to be credited to his account on a final settlement of the same, concluding the paper with a provision characteristic of Hamilton, as this record shows, that the "contract was not to be in prejudice of a liberal remuneration which Corcoran & Riggs have agreed to allow him in the event of his procuring for them the agency for the settlement of the Texas debt." It must be observed that Hamilton in this paper promises nothing absolutely, though he secures or stipulates for a payment to himself by Corcoran & Riggs of a liberal remuneration in the event of his getting for them the agency. It cannot fail to be remarked, in reading the paper, that Hamilton is left by it either to get the agency for Corcoran & Riggs or not to do so, as it may be his interest to do, and that he is not obliged by words of any force amounting to a contract to pay the two thousand dollars which he says shall be added to the interest of six per cent. upon the loan. It would be difficult, indeed, to find anything like a paper of this kind in any attempt by parties to a usurious loan. From the whole of

it, it is certain that no part of it contains a promise to pay anything absolutely in addition to the loan, and the six per cent. interest for which it stipulates. The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious. No part of the paper, taken in connection with all the circumstances of the case, could be used as a predicate from which it could be affirmed that the commission to be allowed by Hamilton was an intentional device between himself and Mr. Corcoran to make the loan to the former usurious. The paper is uncertain and so curious that if any conjecture can be allowed as to the temper and character of Hamilton, as they are shown by the record, it may be supposed to have been intended by him to allure Mr. Corcoran into the belief that Hamilton's influences in Texas were so prominent that he was willing on his part to promise to forfeit the sum of $2000, if Corcoran & Riggs would make him other advances to aid him in procuring for them the agency. Whatever may have been the motives of Hamilton for drawing such a paper, we cannot infer from the paper itself and all the circumstances attending it, that it was designed by those who signed it as a device to make the contract for a loan usurious. Mr. Corcoran, however, by having incautiously signed it, has subjected himself, in the pleadings and argument of the cause, without there having been any foundation for such a charge, to a professional imputation of having intended to make a usurious loan.

We have discussed this case in all the relations which its circumstances, proofs and admissions place the parties with each other. Mr. Spain, as the representative of Mrs. McRae, claims a priority of payment out of the fund on the ground that it had been assigned to him for that purpose. If the paper, as executed by Hamilton and received by Mr. Spain, could by the force of its provisions have the efficacy of an assignment, there would be some coloring for the claim of a priority of payment. But it has not, for it is expressly declared that it was made subject to other assignments which

had been previously made. To whom or for what amounts is not said. Hamilton then executed the paper subject to them, and Mr. Spain so received it, without knowing that he could have any interest in the fund. Had they been otherwise, Mr. Spain's claim of priority would have been lost by his omission to make those inquiries suited to the occasion, and he leaving it in the power of Hamilton to make assignments to others of parts of the same fund. There is no doubt that he did so to Corcoran & Riggs, to Robb & Co., and to Hill, without either of them having had notice of any dealing between Hamilton and Spain. They have the right to a priority of payment out of the fund, and we affirm the decree of the Circuit Court with costs.

CASE REMANDED.

Messrs. Justices MILLER and SWAYNE dissented.

GRAY *v.* BRIGNARDELLO.
BRIGNARDELLO *v.* GRAY.

1. The ancient doctrine that all rights acquired under a judicial sale made while a decree is in force and unreversed will be protected, is a doctrine of extensive application. It prevails in California as elsewhere; and neither there nor elsewhere is it open to a distinction between a reversal on appeal, where the suit in the higher court may be said to be a continuation of the original suit, and a reversal on a bill of review, where, in some senses, it may be contended to be a different one. But purchasers at such sale are protected by this doctrine only when the power to make the sale is clearly given. It does not apply to a sale made under an interlocutory decree only; or under a conditional order, the condition not yet having been fulfilled.
2. A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form, cannot be entered in that shape *nunc pro tunc* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory.

IN July, 1853, Franklin C. Gray, of California, died in the State of New York, leaving there a widow, Matilda, and an infant daughter, Franklina, and property held in *his* name,