It was also objected that this court had not the power to compel the bank to allow the transfer to be made; the proper proceeding being by mandamus.

ESTEN, V. C.—The facts of this case are, that a mercantile firm of Gillyatt, Robinson and Hall, being indebted to the plaintiffs on a promissory note for $1500, deposited with them scrip for twenty shares of the capital stock of the Bank of Toronto, belonging to them, as collateral security for that note, and any other note or debt which they might owe to the plaintiff Drake, or to Henry Bull, or "enry Bull and Company, and delivered to the plaintiff a power of attorney to one Forbes, signed with the partnership name, authorising him to transfer the stock in the books of the bank into the name of the plaintiff so soon as default should be made in payment of any of the debts for which it was to be held as security. Henry Bull afterwards became possessed of a note for $800, on which Gillyatt, Robinson & Hall were liable, and default being made in payment of this note, and afterwards of the note for $1500, the defendants, the Bank of Toronto, which is a corporate body, established for the purpose of conducting the business of bankers, were required to permit a transfer to be made of the stock in question in their books into the name of the plaintiff, which they refused, on the ground, first, that the power of attorney was null and void, being signed only with the partnership name; and second, that Gillyatt, Robinson and Hall were indebted to them on several promissory notes of third parties, endorsed by the firm, and discounted for them by the defendants, and that the defendants had a lien on the stock in question for this indebtedness by virtue of the 21st clause of the act by which the bank was established. Meanwhile Gillyatt, Robinson and Hall had made an assignment of all their property to the defendant H. A. Joseph, upon the several trusts, for the benefit of their creditors; after which, however, the creditors accepted a composition, and released their debts, the composition being secured or guaranteed by Mr. Joseph, who thereupon became entitled to the estate for his own benefit, and Gillyatt, Robinson, and Hall have no longer any interest in it. Pending these proceedings Mr. Joseph applied to the bank to renew in part a note of one Vandell, being one of the notes upon which Gillyatt, Robinson and Hall were endorsers, as before mentioned, telling them that if that course was not adopted Vandell would fail, and his note would become a loss, and offering, if the bank would comply with his proposal, to guarantee the payment of the rest of the paper, held by the bank, of Gillyatt, Robinson and Hall; which offer the bank declined, declaring that they relied on their lien on the stock, and were indifferent as to the payment of the notes. The plaintiffs, upon learning the claim advanced by the bank, applied through their attorney, Mr. Boyd, to pay to the bank what was due upon the notes, upon having the notes delivered to him, and the stock transferred into their name, but the bank refused to accept this offer; and thereupon the present suit was instituted, in which, in addition to the facts before stated, the plaintiff insists that the notes held by the bank, and for which they claim a lien on the stock, were discounted by them upon an usurious contract; that consequently no indebtedness existed to them on the part of Gillyatt, Robinson and Hall, and they had no lien on the stock in question, which it was their duty to allow to be transferred as requested, and praying that he might be declared entitled to the stock in preference to the bank, and that the bank might be ordered to permit a transfer of it to be made into the name of the plaintiff; or that a sale might be made of it, and the plaintiffs paid their debt in preference to the bank; or in case of any loss, that the bank should make it good; or that the plaintiffs might be allowed to redeem the stock and the notes, or that they should be marshalled; or that, if any loss should have happened on the notes, by reason of the refusal of the bank to deliver them to the plaintiffs, that the bank should make it good.

It should be mentioned, that the bill contains a sort of minor case against another defendant of the name of Phipps, who had obtained judgment against Gillyatt, Robinson and Hall, and had threatened to proceed to a sale of the stock under execution, and the bill prays that he may be restrained from so acting. The defendants, the Bank of Toronto, answered the bill, denying the alleged usury, but insisting that the plaintiffs must, at all events, pay what was really advanced, with legal interest, and relying upon their lien on the sto . The bill was taken *pro confesso* against Phipps.

The sheriff of York and Peel is also a party to the bill, and H. A. Joseph, the assignee of Gillyatt, Robinson and Hall, as interested in the equity of redemption of the stock and notes. Evidence was entered into on both sides, and the case was argued fully with much ability. The first point discussed was whether, supposing the transaction to be usurious, the plaintiffs were bound, as a condition of obtaining relief from this court, to tender the principal sum advanced and legal interest. It was contended that the bank had no lien on shares of stock for any debt due to it from the holder of them, under any circumstances: that when the debt or liability claimed by it against such holder was tainted with usury and void, the bank could not prevent a transfer of the shares; that the equitable doctrine respecting the payment of the sum really advanced, and legal interest, did not extend to a subsequent incumbrancer or purchaser from the mortgagor; and that the bill did not, in the first place, pray redemption, but sought to compel the performance of a duty incumbent on the bank. The 21st clause of the act was certainly intended to give to the bank a sort of security on the shares of its stock held by its debtors for the amount of their debts. No transfer can be made until all debts are paid. This must be intended as a security. The mere retention of the stock until payment operated as security; and I apprehend that the dividends accruing in the meantime can be applied by way of set-off in satisfaction of the debt. On the final arrangement of the affairs of the bank all debts would be deducted from the stock before its avails would be paid to the holder. If, in addition to these rights, the stock is to be considered as the property of the debtor, so that the bank could proceed to a sale under execution upon a judgment obtained against him, in preference to all intermediate sales and dispositions either by the owner or under legal process, the security is greatly augmented. But, under any circumstances, it is a security of considerable importance, and whether it is created by the act of the party or the operation of law can be of no importance to the application of the equitable doctrine which has been mentioned. It is said, however, that where there is no legal debt there is no security. But the same remark is applicable to an usurious mortgage. If the mortgage were tainted with usury it was a nullity. No estate passed to the mortgagee: the mortgage-deed was a mere piece of paper—no debt existed. The court, however, would not lend its aid to destroy it but upon terms which it considered equitable. So, in the present case, to compel a transfer of the stock would be to annihilate the security, and if the aid of the court be wanted for that purpose, it must, as appears to me, be on the same terms. Such would be my judgment if the relief were sought by Gillyatt, Robinson and Hall; but it can make no difference that the party seeking relief is not the mortgagor, but an incumbrancer claiming under him. How can he stand in a better position than the person under whom he claims—at all events, as a plaintiff seeking relief?

I have examined all the cases cited by Mr. Crooks, and they all appear to me to recognise the doctrine in question, and no distinction is made between the mortgagor and a purchaser or incumbrancer claiming under him Even the case of *Belcher* v. *Vardon* recognises the doctrine; if it had not, relief would have been given without even proving the debt under the fiat. The case in 10 Paige (*Cole* v. *Savage*) recognises the doctrine expressly, and the case in 1 Johnston (*Rogers* v. *Rathbun*, 1 J. C. C. 367) in effect; the case of Lord *Mansfield* v. *Ogle* is distinguishable, and so are the cases in bankruptcy. My opinion, therefore, is, that if the aid of this court is required to destroy this security, whatever it may be, and however imperfect it may be, it must be upon the terms of paying to the bank what they would have been entitled to receive upon a legitimate discount of the notes in question, supposing the actual transaction which occurred to have deviated from that standard.

This consideration introduces the second question, whether the transaction in question was not in fact usurious; which, however, in consequence of my determination on the first point, becomes of little practical importance. My sole concern is with the four transactions which form the subject of this suit; and which occurred respectively on the 26th of September, the 17th of Octo-