

pose a larger liability upon them now than they thought they were incurring. Had the plaintiff objected to the deposit, they would have had an opportunity of considering whether the chance of getting more than enough to liquidate prior incumbrances was probable enough to justify the hazard of a larger sum, and no objection having been made, they had reason to assume that no greater risk than the \$80 was incurred.

*Appeal dismissed with costs.**

LONDON AND CAN. L. AND A. CO. V.
MORRISON.

*Costs—Deposit on sale by subsequent incumbrancer
—G. O. 429, 456.*

Under similar circumstances as those in the last case, an application was made for an increased deposit immediately after the settlement of the advertisement; *held*: application made too late. *Semble*, incumbrancer might be compelled to increase deposit, or have no sale, if called on promptly to do so.

[Mr. Stephens, Dec. 17, 1878.—Blake, V. C., Jan. 13, 1879.]

This case, following close upon the case of the same Company v. Pulford, confirmed the decision therein, and carried still further the principle on which that decision proceeded.

The dates of the proceedings in this case, from the decree onwards, were:—

Decree for foreclosure, Jan., 1878.

Deposit and order for sale, May 3, 1878.

Master's report, May 13, 1878.

Final order for sale, Nov. 12, 1878.

Letter from plaintiffs' solicitor, asking for increase of deposit, Dec. 12, 1878.

Refusal of subsequent incumbrancer to increase the same, Dec. 13, 1878.

Advertisement of sale settled a few days prior to the notice of this motion, which was served Dec. 14, 1878.

Arnoldi now moved for an order for payment into Court by the subsequent incumbrancer of a larger sum than the \$80 already deposited. He used similar arguments and referred to the same authorities as in the last case against Pulford, and dwelt upon the judgment of the Vice-Chancellor therein. He proved that the costs of the sale would

be more than \$120. The plaintiff could not prove to the Court what the expenses of the sale would be until the directions for advertising were given. It could not be said that the plaintiff should have given the conduct of the sale to the defendant: *Taylor v. Walter*, 8 Gr. 506. The amount of \$80 was settled long ago, under the old tariff, when the amount was probably sufficient. He was not asking to vary the order, but only to increase the security. He asked that, in default of payment of the increased deposit, the order for sale should be vacated and the property foreclosed.

Kingston, contra, read G. O. 429 and 456. Until G. O. 456 and F. O. S. were set aside the application could not be granted. The proper time for taking the objection was when the order for sale was granted, and before the defendant had been put to expense under it; as it was, the plaintiff had acted on the order, and had taken out F. O. S. and settled advertisement. The plaintiffs might have given the conduct of the sale to the defendants.

The REFEREE held that if such an order could be made at all, it ought to be made earlier—that is, as soon as the order for sale had been obtained, and before the incumbrancer had incurred expense. He, however, referred the point to the Judge, as it was averred to have been already decided the contrary way by Vice-Chancellor Proudfoot in the case against Pulford.

On reference to him, BLAKE, V.C., dwelt on the injustice of calling on the subsequent incumbrancer to pay in a larger deposit, after he had incurred expense and was helpless. He continued: "I will follow *London and Can. L. and A. Co. v. Pulford*, decided by V. C. Proudfoot, in holding that the deposit is the price paid by the subsequent incumbrancer for a sale. The plaintiffs cannot, after so long a time, and after taking the proceedings for sale taken in this place, apply for an increase in the deposit. They cannot approbate and reprobate the order for sale. They should have said promptly to the incumbrancer, 'You may withdraw the deposit and have no sale,

* This case stands for appeal.—Rep.