(3) that he had not been able to discover that the defendant had any other property except that in question in this suit. *Sterling* v. *Campbell*, 1 Chy. Ch. 147, was cited to show that if A. was admitted he had a right to his priority over the puisne incumbrancer.

Hoyles, contra : (1) Having neglected to come in and prove, A. should not now be admitted to the prejudice of another incumbrancer, *Cameron* v. *Wolfe Island Co.*, 6 Pr. 91 ; (2) the puisne incumbrancer having, by his diligence, secured his rights, ought not to be deprived of them : *Hall* v. *Falconer*, 11 Jur., N. S. 151; *Cattell* v. *Simons*, 8 Beav. 243 ; (3) the delay will not be passed over merely because A. will thereby be unable to realise his debt, *Finnegan* v. *Keenan*, 14 L. J. N. S. 123; (4) the applicant has no equity against the puisne incumbrancer, and has not accounted for his negligence.

Fletcher, for plaintiff, consented to the order being made, but asked for costs.

The Referee granted an order allowing A. to come in and prove his claim on his undertaking to rank after those who had already proved.

McDermid v. McDermid.

Sale under decree—Right of mortgagee to notice of payment in of purchase money—G. O. 389.

Where lands encumbered by a mortgage are sold in a partition suit, a mortgagee of the interest of a tenant in common, though a party to the suit, is entitled to notice of the payment into court of the money out of which his claim is to be satisfied, and where the rate of interest reserved in the mortgage is more than the legal rate, it is incumbent on the mortgagor to see that such notice is given, in order to protect him from liability to such higher rate.

[Referee, Dec. 18, 1878.—Proudfoot, V. C., Jan. 20, 1879.

Here the decree was the usual one in a partition suit. Under it one C., a mortgagee of the undivided shares of the defendants J. and A. in the lands in question was made a party. J. and A. put in a cash tender for the lands which was accepted, and they were declared the purchasers, the purchase money to be paid into court by the 15th of March. The report, dated 1st March, computed interest on C's mortgage (which had three years yet to run) up to the 15th March. The money was not paid into court before 26th Sept. following. Shortly after payment in the purchasers obtained a vesting order on notice to the plaintiff's solicitors, but they served no notice of payment in on C., their mortgagee, and he only learnt by chance of such payment on or about the 15th of Nov., when as soon as possible he made this application.

Seton Gordon, for the mortgagee, moved for payment, out of the shares of the mortgagors of the purchase money in court, of the amount of the applicant's claim with interest at the rate named in the mortgage to date, with six months' subsequent interest at the same rate, and for the costs of the application. A mortgagee always has a right to retain his security until the amount due thereon is duly and properly tendered him. The fact that he has been made a party under a decree does not affect this right. Here the applicant submitted in the Master's office to take the amount due to him on his mortgage up to March 15th, on the understanding that the money was to be paid into court on that day, according to agreement. The money was not so paid, hence, the contract being broken, the mortgagee is released from his engagement, and now claims interest as above, as given by the decree, and as he might have claimed in the Master's office. He had undoubted right to notice of the payment into court. An analogy may be found in G. O. 486, relating to administration suits.

Foster, for plaintiffs, had no objection to order being made so far as J. and A. were concerned, but submitted that no part could be charged against the other parties.

Hoyles, for defendants J. and A., referred to the Vesting Order and paper filed on that application to show notice was given to the mortgagee of payment into court. In a partition suit an incumbrancer can be compelled to accept the money at any time, and is not entitled to six months' interest. *Dalby* v. *Humphrey*, 37 Q. B., 514 ; *Cook* v. *Fowler*, L. R. 7 H. L. 27.

Gordon in reply : This does not apply where the mortgage is not due.