should be dismissed, but upon a ground that was not brought to the attention of the learned judge in the court below.

It is not disputed that although the conveyance of Kenney to his wife is expressed to be in consideration of the sum of $4,000, it was in truth a voluntary conveyance, and there was never any intention that any consideration whatever should be either paid or received. The conveyance was made on the 1st of September, 1884, and there was then upon the land the mortgage in question, which was made on the 17th January, 1883. And the intention of Kenney being to make a gift to his wife of this land with a mortgage upon it, the natural form of the transaction would have been to convey it to her subject to the mortgage, that is, to make a gift of it just as it stood; or, in other words, a gift of the equity of redemption. The effect of that would have been that the wife would have taken the estate with the burden of the mortgage upon it, and she could not have compelled her husband to pay it off. As between Kenney and his wife, if either became a surety by such transaction, it was Kenney and not his wife, and the creditors would not have been affected in any way by giving time to Kenney. The gift was not carried out in this way, however. Although the deed is expressed to be subject to the mortgage, the words are added, "Which the said party of the first part (the husband) hereby covenants and agrees to pay off and discharge when due." It appears by the evidence that the first intention of the parties was that the conveyance should be in the ordinary form, and that the wife was to take it subject to the mortgage, and I gather that it was actually drawn and executed in the first instance in that form. Afterwards, however, the solicitor who drew it suggested the alteration, and it was accordingly altered by inserting the covenant, and was re-executed. If the deed had remained in its original form, it is clear that the plaintiff's position as mortgagee would not have been affected in any way, and he could have dealt with Kenney in any way he pleased, for in that case Mrs. Kenney would herself be the person whose duty it was to pay the debt. This appears from the case of *Jenkinson* v. *Harcourt*, Kay 88, where Lord Hatherly uses the following language, speaking of a person who has mortgaged his land: "If he aliens the real estate in his lifetime to a volunteer, and more especially if he does so expressly subject to the mortgage, the natural inference from such a transaction, unless there be something in the instrument to indicate a contrary intention, is that the debtor did not mean to pay the debt out of his personal estate. If the alienation be made subject to the mortgage debt, whether the alienee be a volunteer or purchaser, then, in the absence . . . of a covenant in the settlement to pay the debt, the inference is that though as between his real and personal representatives his real estate was intended to be only a collateral security, yet from the moment of the alienation he has made that estate the principal debtor." Further on, in the same case, he says that instead of being the person as between himself and the voluntary donee to pay the debt, "the rights must be really just the converse, and supposing that the original debtor paid off the debt, being called upon under the covenant in the mortgage deed, he must be entitled to come upon those to whom he has transferred the estate, and insist upon being repaid by them." To the same effect are *Owens* v. *Braddell*, 7 Ir. Eq. 358 (1873), and *Seale* v. *Hayne*, 12 W.R. 239.