

trustee for D. McCall & Co., dated 17th January, 1883, to secure payment of certain cash advances and of all indebtedness then due or thereafter to become due from Kenney to them on account of purchases or cash advances made by or to him from or by the firm.

Margaret Kenney, wife of the mortgagor, was made a defendant as being the owner of the equity of redemption, under a conveyance from her husband, dated 1st September, 1884, which was expressed to be made subject to the plaintiff's mortgage, which mortgage the grantor Kenney expressly covenanted "to pay off and discharge when due." The defendant Ferguson was made a party as being the assignee for the benefit of creditors of defendant J. H. Kenney, under an assignment dated 26th April, 1887, and as claiming to be entitled to the equity of redemption on the ground that the deed to the assignor's wife was fraudulent and void as against him.

The defendants the Kennys insisted upon the validity of the deed to Mrs. Kenney, and that it had been made with the knowledge and consent of the plaintiff and the firm of D. McCall & Co. They also attacked the plaintiff's mortgage on several grounds, but nothing turns on this. The defendant Ferguson pleaded the assignment to him for the benefit of Kenney's creditors, and "that, acting upon the instructions of the inspectors of the estate, he had taken proceedings on behalf of the creditors to set aside the deed from Kenney to his wife as being void as against such creditors." He sought, however, no relief in the present action. On the 18th October, 1887, an order was made in Chambers, referring it to an official referee, to inquire and report "whether there is any, and if any, what sum of money due to the plaintiff in respect of the mortgage security in question in the cause."

By his first report, 30th June, 1888, the referee found (1) that the amount due upon the mortgage to that date was \$4033.52; (2) specially, at the request of the plaintiff, that defendant Ferguson was entitled to the equity of redemption; (3) specially, at the request of the defendant Mrs. Kenney, that in the action of *Ferguson v. Kenney* (the action mentioned in Ferguson's statement of defence) he had found that the deed from Kenney to his wife was wholly voluntary, and when given was fraudulent and void against Ferguson as trustee, and in consequence he had not considered what was due to the plaintiff, under his mortgage, from defendant Margaret Kenney. On appeal to this court, it was held that the first and second findings were wrong; that the defendant Mrs. Kenney was the owner of the equity of redemption under the deed to her of the 1st September, 1884; that the plaintiff, the mortgagee, having advised and assented to the making of the deed, was not in a position to impeach it as fraudulent against himself and other creditors of the husband; and on the authority of *Hopkinson v. Rolt*, 9 H.L.C. 514; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29, and cases of that class, that he could not charge the property in respect of any advances made under his mortgage after date of the conveyance to the wife.

The case was therefore sent back to the referee to proceed in accordance with these directions. When the case again came before the referee, the defendant's counsel for the first time took the point that inasmuch that Kenney has covenanted with his wife "to pay off and discharge the plaintiff's mortgage