description of the indebtedness, and it is there found distinctly stated. There could, therefore, have been no concealment, and there is no pretence whatever of any false statement. If Sawyer had exercised ordinary prudence he need not have been mistaken, and the testimony of the witness who drafted the conveyances, if it is to be relied upon, shows most conclusively that he was not.

The decree is affirmed.

Mr. T. T. Crittenden and *Mr. George W. Paschal* for appellant.

No appearance for appellee.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY *v.* BURNSTINE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 240. October Term, 1877. — Decided March 25, 1878.

A mortgagee who has notice through his agent in the negotiation of the loan, that the discharge of a prior mortgage on the property was fraudulently obtained, cannot acquire the property discharged of the prior incumbrance, by purchase at a sale under decree of foreclosure of his own mortgage.

The question is one of fact; and this court cannot see that the evidence is so clearly against the decision of the court below, that it would be justified in reversing it.

The case is stated in the opinion.

Mr. Justice Hunt delivered the opinion of the court March 25, 1878.

The contention in this case arises upon the priority of the security and the trust deeds held by the respective parties.

The first deed was made by John N. Hubbard to Wm. H. Ward to secure the payment of a note of $3000, payable thirty days after its date, made by Hubbard, payable to and held by James M. Ormes. The papers bear date of January 31, 1872, and within three days after that date the note and the trust deed were transferred and delivered to the plaintiff, Burnstine.

The trust deed under which the insurance company makes claim bears date of November 11, 1872, made by the same Hubbard to trustees, to secure a loan of $12,000 made by the insurance company to Hubbard. The insurance company admits in its answer that at the time of making this loan and receiving its security therefor, the deed to Ward was on record and known to it, and was a

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prior encumbrance. It insists, however, that by an agreement with Hubbard it retained and withheld from him a sum sufficient to pay and satisfy the debt of $3000 secured by the said deed, until there was delivered to it as ready for record a release of the debt and security referred to, and the company was notified that the prior lien had been paid off and discharged, and that thereupon, without knowledge or suspicion that the release had not been duly executed, it paid to Hubbard the amount which had been withheld as security in respect to the said prior encumbrance.

This release and discharge of the trust deed was made by Ward, the trustee, and Ormes the original payee of the $3000 note, but it was in disregard and in fraud of the rights of Burnstine, to whom the note had been transferred before maturity, with the accompanying security of the trust deed, and who was the actual holder thereof.

The company claims that under these circumstances it became the first encumbrancer, and having subsequently purchased the property at the sale under the trust in good faith and without notice, it acquired the legal title and holds the same discharged of Burnstine's claim.

Without seriously contesting the soundness of the general principle of law set forth, the counsel of Burnstine contends that John G. Bigelow was the agent of the company in making its loan to Hubbard, and in making the subsequent payment to him, and in receiving the release. That Bigelow knew that Burnstine was the holder and owner of the note secured by the trust deed to Ormes, and knew that the execution of the release by Ward and Ormes was a fraud upon Burnstine.

It is insisted that notice to the agent is notice to the principal, and that a mortgagee with notice of the fraudulent discharge of a prior mortgage is not a *bona fide* purchaser. 2 Leading Cases Equity, 1st ed. 1877, pp. 134, 144, 154, 157, 160, 178; *Williamson* v. *Brown*, 15 N. Y. 354, 359; *Champlin* v. *Layton*, 6 Paige, 189, 203; *Morgan* v. *Chamberlain*, 26 Barb. 163; *Jackson* v. *Post*, 15 Wend. 588, 594. There is but little difficulty as to the principles of law which should control the case.

The question is one of fact: was Bigelow the agent of the company in receiving the release, and had he knowledge of the fraud?

The fraudulent release was executed on the 4th day of February, 1873, and on or about that day was delivered to Mr. Bigelow. It was retained by him without being placed on record until November.

1873, when he delivered it to Mr. Parsons, the president of the insurance company. Mr. Parsons retained it until the 7th day of February following, (for the reasons given by him,) when he placed it on record.

We think that upon the evidence it is too plain for discussion that in February, 1873, and afterwards, Bigelow was the agent of the insurance company in disbursing its moneys to Hubbard and others, and in perfecting its title to the lots covered by the larger trust deed, and in paying out the money reserved for the indemnity of the Ormes or Burnstine security; and that he received the release in question for and on behalf of the company, held it in that capacity, and at a convenient time delivered it to its president as a muniment of title.

Whether Mr. Bigelow had knowledge that Burnstine was the owner of the $3000 note when this release was executed, and that Ward and Ormes had no authority to execute the release they delivered to him, is not free from doubt. Mr. Bigelow testifies positively that he had no such knowledge. Mr. Burnstine testifies positively that he had such knowledge, and that in the presence of his brother (now deceased) and himself, Mr. Bigelow saw him take the note and trust deed from his safe as his property, that they were examined, a calculation made by him of the amount due on the note, and the securities again placed in Burnstine's safe.

Mr. Ormes testifies that he informed Mr. Bigelow that Burnstine was the owner of the note or had an interest in it, and that he went with him to Burnstine's office, leaving him at the door, which Bigelow entered, while he passed on.

Mr. Bigelow admits that he was informed by Mr. Ormes that Burnstine held the note as collateral security, and testifies that he called upon Burnstine for the purpose of paying his claim, but that both Burnstine and his brother denied the ownership or possession of the note, or any knowledge whatsoever of the note or the security.

The court below gave its decision in favor of Burnstine, and we do not see that the evidence is so clearly against that decision that we should be justified in reversing it.

Adding to this the fact that a man who was honest and but reasonably prudent should not have been satisfied with a release without the production of the note secured, when he had information that there was question about its ownership, we feel constrained to affirm the decree. *Affirmed.*

Mr. S. R. Bond for appellant. *Mr. Enoch Totten* for appellee.