

Case No. 4,839. FITZGERALD V. THE H. A. RICHMOND.  
[10 Chi. Leg. News, 216.]

District Court, E. D. Michigan.

March 11, 1878.

LIBEL FOR MATERIALS—RIGHTS OF MORTGAGEE—BONA FIDE  
PURCHASER—LIENS—STALE CLAIM.

1. It is too well settled to need the citation of authorities that the lien of a material man is not waived by taking the negotiable paper of the owner or master of the vessel.

[Cited in The Illinois, Case No. 7,005.]

2. The court considers how far a mortgagee is to be regarded as a bona fide purchaser without notice.

3. That it is well settled, a mortgagee for a present valuable consideration, is a bona fide purchaser to the extent of his mortgage interest, but even if no money be advanced at the time the mortgage is made, if upon the faith of the security the mortgagee afterwards advances money, or becomes liable as indorser to that extent, he becomes a bona fide purchaser.

4. Under the circumstances in this case, the claimant should be regarded as a bona fide purchaser, the libel not having been filed until two years after his claim accrued, and one year after the mortgage was given and the advances made.

In admiralty. On the 19th day of August, 1875, libellant [Edmond Fitzgerald], who is the proprietor of a shipyard at Port Huron, furnished a mast to the schooner "H. A. Richmond," for which Scott & Brown, her owners, agreed to pay \$225, in two installments of \$112.50 each, evidenced by two drafts, one on the captain of the vessel, which was paid, and one upon themselves, which was accepted but not paid. This draft matured September 21st. Subsequently during the same season, the schooner took on two cargoes at Port Huron, and continued passing and re-passing the rivers until the close of navigation. In May, 1876, she was again put upon the lake and river trade, chiefly between points on Lake Huron and Lake Erie. She passed Port Huron and Detroit several times, and continued to make frequent trips, within the jurisdiction of this court, during that season, and in November, 1876, was actually seized by the marshal upon another claim, but was released upon bond. The libel was not filed until September 28, 1877. On September 13th, 1876, James Dewey, the claimant, took a mortgage from Scott & Brown upon the schooner, conditioned to pay all negotiable paper upon which he might then be or might become liable as indorser, and to indemnify him against all loss by reason of such indorsements. This was 13 months after libellant's bill was contracted, and just one year from the time the draft on Scott & Brown matured. Prior to the giving of the mortgage, Dewey had indorsed for Scott & Brown to a considerable amount. And after the mortgage was given he indorsed three notes in the aggregate sum of three thousand four hundred and twenty dollars, all of which he

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was obliged to take up. On the 28th of April, 1877, the schooner, then being at Hamilton, Ontario, claimant having previously taken possession of her, bought her in upon his mortgage sale, and from that time assumed sole possession and control of her. In May she left Hamilton and was put in trade between the Bruce mines on the river St. Mary, and Detroit. Dewey swears that he received no notice of the claim until July 24th, 1877, when he received a letter from Capt. Fitzgerald, requesting payment. It seems that at the time he took the mortgage, Dewey made every effort possible to ascertain the claims outstanding against the vessel, and Scott testifies that some time in November of that year, he did notify him of libellant's claim, but informed him he had supposed it was settled by his note.

Atkinson & Atkinson, for libellant.

Burt & Burritt, for claimant.

BROWN, District Judge. Defendants' claim that the bill was settled and paid by the acceptance of Scott & Brown, the owners, cannot be maintained. It is too well settled to need even the citation of authorities, that the lien of a material man is not waived by taking the negotiable paper of the owner or master of the vessel. Captain Scott's testimony that these drafts were given in payment for the mast; that he supposed it was paid, and therefore did not constitute a lien upon the boat, is nothing more than his own opinion upon the subject. There was no conversation proven to have taken place at the time the draft was given, indicating any intention on the one to give it or of the other to receive it, in payment of the bill.

The second defense, that the claim has become stale as against the mortgagee, is better supported by the testimony. How far a mortgagee is to be regarded as a bona fide purchaser without notice, depends much upon the character of the transaction. A bona fide purchaser is one who at the time of his purchase advances a new consideration, surrenders some security or does some other act, which if his purchase were set aside, would leave him in a worse condition than his original position: *Johnson v. Graves*, 27 Ark. 558. Had Dewey taken this mortgage simply as security for the debt already existing, and made no further advances upon the strength of it, it would be a serious question whether he could be protected as against this lien. Though the question does not seem to have been passed upon directly in any admiralty suit, it has been discussed with great learning and elaboration in several cases where a vendor has sought to enforce his lien upon land, which has been conveyed to trustees for the benefit of creditors or to assignees in bankruptcy, or mortgaged for a prior indebtedness. The decided weight of authority seems to be that in such cases the mortgagee cannot assert his claim as against the vendor's lien: *Brown v. Vanlier*, 7 Humph. 249; *Eubank v. Poston*, 5 T. B. Mon. 286; *Shanks v. McWhorter*, 26 Ga. 315; *Shurley v. Sugar Refinery*, 2 Edw. ch. 505; *Repp v. Repp*, 12

Gill & J. 341; Harris v. Homer, 1 Dev. & B. 455; 1 Hill. Mortg. 52; 2 Story, Eq. Pl. 1225-1230.

Were it not for the case of Bayley v. Greenleaf, 7 Wheat [20 U. S.] 46, I should feel no hesitation in holding that the claimant, by the mere taking of this mortgage, did not stand in a position to test this claim as a bona fide purchaser. That case, however, held directly that the vendor cannot enforce his lien for unpaid purchase money as against trustees for the creditors of the vendee to whom the land has been conveyed, without notice of the lien. The opinion of Chief Justice Marshall in this case has been criticised with great ability by the courts in several of the cases above cited, and were the question to come before the supreme court again, it is at least doubtful whether it would adhere to this opinion; or at least whether it would be adopted so far as to sustain the claim of a mortgagee against the lien of a material man. I see nothing to distinguish his possession from that of an assignee in bankruptcy, against whom it is well settled the lien of the material man will prevail. It is well settled, however, that a mortgagee for a present valuable consideration, is a bona fide purchaser, to the extent of his mortgage interest: The Nevada [Case No. 5,839]; The Key City. 14 Wall. [81 U. S.] 653; The Columbia [Case No. 3,036]; The Dubuque [Id. 4,110]. But even though no money be advanced at the time the mortgage is made, if upon the faith of the security, the mortgagee afterwards advances money, or becomes liable as indorser, to that extent he becomes a bona fide purchaser. Ladue v. Detroit & M. R. Co., 13 Mich. 380. That is the position of the claimant in this case. Upon the day the mortgage was executed, he indorsed for Scott & Brown a note to the amount of \$1,200; soon thereafter he indorsed two other notes in the aggregate sum of \$2,220, all of which he was obliged to take up at maturity. Under these circumstances, I deem it quite clear that he should be considered as a bona fide purchaser. The libel not having been filed until two years after his claim accrued and one year after the mortgage was given, and the advances made, I think libellant's claim must be adjudged to be stale.

The view which I have taken of the case renders it unnecessary to consider whether Dewey gained any additional rights by the purchase made April 28th, 1877, upon the foreclosure of his mortgage. The libel will be dismissed.