

Case No. 4,848.

[3 Sumn. 84.]<sup>1</sup>

FLAGG V. MANN ET AL.

Circuit Court, D. Massachusetts.

Oct. Term, 1837.

TRUSTEE'S COMMISSION—SALE IN VIOLATION OF TRUST—TORTIOUS SALE OF  
ANOTHER'S PROPERTY—DAMAGES.

1. Commissions are not allowed to a trustee, who makes a sale in violation of his trust.
2. A person who tortiously sells the property of another, without his consent, is liable for the full value of it at the time of the sale; and

this, even if he does not receive a cent of the purchase money.

[Cited in *State v. Berning*, 74 Mo. 94.]

3. Decretal order passed on the master's report.

This case came on again—see *Flagg v. Mann* [Case No. 4,847]—to be heard upon the report of the master, which was as follows:

“In pursuance of an order bearing date at the May term of this court, A. D. 1837, whereby it was referred to me, to take an account of all moneys received and paid, and expended in the premises, which formed the subject-matter of the above-entitled cause, and especially to take an account of all moneys paid by the said Mann for the purchases in the said order mentioned, and the expenses incident thereto; and also of all the moneys paid by the said Fuller to the said Mann, and the times when the same were paid, &c., and whether, and at what time he had notice of the said Flagg's equity and right in the premises, and what sums now remain due from the said Fuller; also, to report upon any other matter and thing which may be necessary and proper to carry into full effect the interlocutory decree, and especially in regard to interest, &c., &c.

“I have been attended by the solicitors of all the parties; and the solicitors of the said Mann and Fuller, defendants, having brought in before me an account of the respective sums paid by the said Mann and Fuller, I have, in the presence of the solicitors for the plaintiff and defendants, proceeded to take the said accounts; and I find as follows:

“First. Moneys paid by Mann, &c. On the 8th and 9th of August, 1831, the said Mann paid to Samuel A. Coburn, Esq. for the use of Walker and Fisher, as the price and consideration of their deed to the said Mann of their title to the said land, the sum of ten thousand dollars. On the 6th August, 1831, the said Mann paid to Luther Lawrence, Esq. for the use of the heirs of Polly Frye, and some other expenses incident to the said purchase, the sum of three thousand three hundred and seventy-five dollars, being half the price and consideration of their deed of their pretended title and claim to the land in question in this cause, and other adjoining land of equal extent and value, claimed by Josiah Wood, Jr., and of the expenses above referred to, the other half of the consideration for the releases of the Frye heirs, and the expenses aforesaid being paid by John R. Adams, to whom the deeds of the Frye heirs, and of Wood were made. On or about the 8th August, 1831, the said Mann, by release, conveyed a moiety of the premises described in the plaintiff's bill to the said Adams, and Adams at the same time conveyed one half of the Wood lot to Mann in exchange; it being to make them tenants in common of the whole. There was no other consideration. The said defendant, Mann, further claimed to be allowed for his services in the purchase and sale of the land in question in this cause, and for his professional services in the same a commission of five per cent. upon the sums paid for the said land, and upon the sum for which the same was sold to the said Fuller. This claim I have not allowed.

“Second. Time when Fuller had notice of Flagg’s equity and right. In my inquiries under this head I have found that the bill of the present plaintiff against Mann, Adams and Fuller, was filed in the supreme court of the commonwealth of Massachusetts, on the 15th February, 1832; that the subpoena was served on all the defendants above-named on the 16th February, 1832, the day on which the deed from Richardson to Flagg and Mann was recorded; that the answers of Mann, Adams, and Fuller were sworn to on the 28th of April, 1832; that the bill in the present suit was filed on the 28th of October, 1833. In further proof of notice to the said Fuller of Flagg’s equity and right, Benjamin Rand, Esq., of counsel for the plaintiff, referred to the alleged admissions in Fuller’s answers, in the supreme court above mentioned, and also in the present cause, now on the files of this court and to be found at pages 84 and 118 of the printed book containing the pleadings and proceedings in this cause, to which, for the sake of convenience, reference is hereby made; also to the deposition of F. Hobbs, on the files of this court, to be found at page 188 of the printed book above referred to. On a survey of all that has been offered on either side with regard to this point, I find that the said Fuller had notice of the plaintiff’s equity and right in the premises on the 16th day of February, 1832, being the date of the service on him of the subpoena under the plaintiff’s bill in the supreme court of Massachusetts.

“Third. Moneys paid by Fuller to Mann, and the times when paid. On the 8th day of August, 1831, the said Mann sold to the said Fuller one undivided half of the piece of land in the plaintiff’s original bill mentioned, and by him therein claimed, and an undivided half of the piece of land adjacent thereto, of equal extent and value, and claimed by Josiah Wood, Jr., in his original bill now pending in this court. The consideration for the undivided half of both the said parcels was \$54,450, which was agreed to be paid by the said Fuller. Of the above sum, the following payments have been made at the times mentioned, viz.: In cash, on the delivery of the deed to Fuller, \$5,000. By note negotiable at 60 days, for \$5,000, with interest which was paid at maturity, \$5,050. By like note negotiable, at 90 days, for \$4,450, with interest which was paid at maturity, \$4,516.75. The residue of the said consideration, being \$40,000, was secured to be paid to the said Mann by a mortgage of the undivided half of both parcels of the said land to the said Mann from the said Fuller; a copy of which mortgage is on the files of the court,

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and is also to be found at page 330 of the printed book abovementioned, to which, for the sake of convenience, reference is hereby made. No notes were given for the moneys mentioned in this mortgage. On receiving the said mortgage, the said Mann gave to the said Fuller a written covenant and agreement, (on the files of this court, a copy of which will be found at page 122 of the printed book abovementioned), whereby the said Mann bound himself to release to the said Fuller, and discharge from the said mortgage parts of the premises mortgaged, in proportion to payments made therefor; to wit, that he would make such releases, until two acres had been discharged, on being paid one shilling for each square foot, and all the residue on being paid twenty cents for each square so released. Of the above sum of \$40,000, secured by the mortgage abovementioned, the following payments have been made, and endorsed on the mortgage, at the times mentioned; and the endorsements on the mortgage are as follows, viz.:

\$2827.12	October 7th, 1831. Received of Elisha Fuller, twenty-eight hundred and twenty-
16962	seven dollars and twelve cents, in part payment of the sum secured on this mort-
3-4 feet.	gage, and in consideration thereof, I did yesterday release to said Fuller, sixteen
	thousand nine hundred and sixty-two square feet and three quarters, from the
	incumbrance of this mortgage.
(Signed)	S. H. MANN.
	May 2nd, 1832. Received five thousand seven hundred and fifty-five dollars and seven
	cents, in part of this mortgage.
(Signed)	S. H. MANN.
	Received five thousand dollars by note.
	Received fifteen hundred and eighty-seven dollars, in part.
(Signed)	S. H. MANN.
	Discharged 58,522 feet of land, May 16.
	Received four hundred and forty-seven dollars and thirty-one cents, by note.
(Signed)	S. H. MANN.
	Released 18215 feet, May 24.

“In pursuance of the covenant and agreement above mentioned, on the part of the said Mann, the said sums last above mentioned were applied to redeem certain parts of the premises, and hereinafter stated to be released at the time of the payment, from the mortgage aforesaid; that these applications were made by three deeds of release, executed by the said Mann to the said Fuller, one bearing date October 6th, 1831, and another bearing date May 16th, 1832, and a third bearing date May 24th, 1832, copies of which are hitherto annexed, and marked X. All the land contained and described in the two releases first above mentioned belonged to that part of the premises claimed by Josiah Wood, Jr. The land contained and described in the third release above mentioned party belonged to the premises claimed by Josiah Wood, Jr., and partly belonged to the premis-

es claimed by the present plaintiff; but the relative proportions which belonged to each piece, I have had no means of determining. No other part of the premises claimed by the plaintiff, Flagg, has been discharged from the mortgage above mentioned; and this small portion was discharged, after Fuller had notice of the plaintiff's right and equity in the premises.

"Fourth. What sums now remain due from Fuller? In entering upon this inquiry, it is important to consider, that the interest purchased by Fuller of Mann was an undivided half of two parcels; one known as the Wood lot, and the other claimed by the plaintiff; that the consideration agreed to be paid was on account of the two parcels; and that the mortgage deed for \$40,000, already mentioned, applied to an undivided half of both parcels. It has already appeared, that the whole consideration was \$54,450,—and that, of this sum, various portions had been paid at different times. Taking into consideration the several sums already paid, and which have been hereinbefore mentioned, and applying them to the reduction of the principal above mentioned, and of the interest thereon accruing, according to the rule laid down by the supreme court of the commonwealth of Massachusetts, in the case of *Dean v. Williams*, 17 Mass. 417, I find that the said Fuller owes on the mortgage above mentioned, the sum of twenty-six thousand, one hundred and sixty-four dollars and fifty-one cents (\$26,164.51), with legal interest on the said sum from May 24th, 1832. I further find, that the said Fuller, at the time at which he received notice of the equity and right of the said Flagg in the premises, namely, on the 16th February, 1832, owed on the mortgage above mentioned, the sum of thirty-eight thousand, three hundred and eighty dollars and seventy cents (\$38,380.70), with legal interest thereon, from the said 16th day of February, 1832.

"The foregoing results seem to exhaust the inquiry with regard to the sums still due from Fuller. Some further facts have, however, appeared before me, to which, at the request of Henry H. Fuller, Esq., I beg leave to call the attention of the court; though, in estimating the sums still due from Fuller, for the purposes of this inquiry, I have not regarded them as important. It appears, that on the 29th March, 1837, by a contract of that date (a copy of which is in the paper hereto annexed), between Josiah Wood, Jr., of the one part, and Samuel H. Mann, John R. Adams, and the said Fuller, of the other part, a settlement by compromise was made of the suit of Wood against Mann and others, on account of the parcel of land adjoining that claimed by the present plaintiff. Another agreement, bearing date on the same 29th March, 1837, (a copy of which is in the paper hereto annexed), was made between the said Mann and Adams, wherein it was agreed that the said Adams should pay the whole amount, which, by the said compromise, was stipulated to

be paid to the said Wood, and that the said Mann, in order to secure to the said Adams, the half of the said sum, which ought to be paid by the said Mann, should assign the said mortgage of \$40,000, made by the said Fuller, to the said Adams; and that the said mortgage should, when so assigned, be held by Franklin Dexter, Esq., who should not deliver the same unto the said Adams, until the said Mann and Fuller should settle and adjust by themselves, or some referee or referees by them chosen, the amount which ought to be indorsed as paid upon the said mortgage, upon a full hearing between the said Fuller and Mann, taking into consideration the damages and inconvenience sustained by the said Fuller, by reason of the suits of Wood and of the present plaintiff, and all other matters to be alleged, proved, and considered between the said Mann and the said Fuller, which ought to reduce the amount to be paid on the said mortgage by the said Fuller; and when the said sum should be agreed and ascertained, it should be indorsed upon the said mortgage, and should go to reduce the amount which should be payable by the said Fuller, before the same should be delivered to the said Adams. The said Fuller and Mann failing to agree upon the amount which ought to be indorsed as paid upon the said mortgage, the matter was referred, according to the foregoing agreement, to Seth Ames, Samuel A. Coburn, and Jonathan Morse. 2d, all of Lowell, Esquires, who made an award, wherein they decided that an indorsement should be made on the said mortgage, setting forth that the whole sum secured thereby had been paid, except the sum of five thousand dollars, which said sum of five thousand dollars should draw interest from the day of the making of the said award, which was the 18th of April, 1837; and the said Franklin Dexter, Esq., in pursuance of the award aforesaid, indorsed down the said mortgage to the sum of \$5,000, with interest from April 18th, 1837. (A copy of which indorsement is hereto annexed, and marked 'B.')

“I have proceeded to ascertain and find the foregoing facts under this head, at the request of the said Fuller, and have hereto annexed to this report, at his request, the state of facts or petition (marked 'A'), in which the said facts, among other matters, are set forth by the said Fuller. I have not regarded the said facts, and the other matters mentioned in the said state of facts or petition, as having any practical bearing on the points of inquiry into which I have been charged to enter, or as affecting the sums which are still due from the said Fuller to the said Mann, so far as the rights of the plaintiff are concerned under the decretal order of this court.

“Fifth. Interest on the purchase money. I have found that the consideration of the undivided half of the two parcels above mentioned, was \$54,450; of which \$5,000 was paid in cash; \$5,000 by a note negotiable at sixty days, with interest, which was paid at maturity; \$4,450 by a note negotiable at ninety days, with interest, which was paid at maturity; the remainder, being \$40,000, was secured, with interest, by mortgage. I therefore, find



that the said Mann is justly chargeable with interest on the purchase money above mentioned.

“Sixth. Moneys due to Flagg from Mann. Deducting the moneys paid by Mann, on account of the premises claimed by the plaintiff, pursuant to the decretal order, I find that there is due from Mann to Flagg, one half of ten hundred and seventy-five dollars, being the balance which Mann received in cash and notes on the delivery of the deed to Fuller, over and above the consideration and expenses of the purchase, hereinbefore stated; also one half of forty thousand dollars, with legal interest on both the said sums from the 8th day of August, 1831; to wit, in the whole, twenty thousand, five hundred and thirty-seven dollars and fifty cents, with legal interest as aforesaid.

“Exceptions. The draft of the foregoing, being duly exhibited to the respective solicitors of the several parties, the following objections were made by Franklin Dexter, Esq., of counsel for the defendant, Mann:

“First. That the amount paid by Mann to the Frye heirs was \$3,500; and not \$3,375, as hereinbefore found.

“Second. That the master disallowed the claim of five per cent. made by Mann for commissions and professional services.

“Third. That the master, according to the decretal order, should have found to be due from Mann to Flagg only half the balance of cash and notes above mentioned (\$537.50), and that portion of the amount received by Mann on the mortgage, which was applicable to the portion of the Flagg lot, released to the proprietors of the locks and canals.

“Henry H. Fuller, Esq., of counsel for the defendant Fuller, objected,—

“That the master refused to take into consideration the award above mentioned, and the other matters therewith connected, in determining the moneys now due from the said Fuller, so far as the plaintiff is concerned.

“Charles Sumner, Master in Chancery.”

The papers referred to in the report are omitted.

The question on the validity of the exceptions was argued by Dexter, for the defendant Mann, and by Rand, for the plaintiff, and by Washburn and Greenleaf, for the defendant Fuller, who objected to the report for not taking into consideration the claims of Fuller, set forth in his petition before the master.

STORY, Circuit Justice. I lay altogether out of the case the claims of Fuller, asserted in his petition. They are not such as could in this stage of the cause come before the

master. They constitute, indeed, an equitable claim, which is to be carried into effect, if at all, by an original bill by Fuller against Mann, in some competent court of equity. But Flagg has no connection with them, and if he had, they cannot be asserted under the present bill.

In regard to the exceptions filed by Mann, the first is well founded; and the error has been corrected without objection.

In regard to the second exception; as the conduct of Mann was unauthorized by Flagg, and the sale itself was a constructive fraud upon Flagg, I cannot perceive any ground, upon which the claim of five per cent. commissions on the sale, or any other commission, can be allowed to him. A trustee, doing an act in violation of his trust and duty, ought not, upon principle, to be allowed any thing for his services. They are not, in a just sense, beneficial acts; but must be treated as torts, injurious to the rights of the cestui que trust.

In regard to the third exception, I think the master's report right. It ascertains the sum correctly, for which Mann is responsible to Flagg, according to the intent of the original decree. The sale of Mann was, as I have stated, a wrongful act, and a constructive fraud. By it Flagg has been deprived of his entire right in the premises sued for. By the decree of the court, Flagg is compelled to receive the purchase money instead of the lands. Mann must be deemed liable to Flagg for the purchase money. Flagg has not, by his voluntary election, taken the obligations of the purchaser for the purchase money, or adopted the acts of Mann in the sale. If a man tortiously sells my property, without my consent, he is liable to me for the full value of it at the time of the sale, whether he ever receives a cent of the purchase money, or not.

But the master's report does not touch the point, what, upon the whole case, the final decree ought to be, supposing the report to be accepted. It seems to me, notwithstanding this liability of Mann to Flagg, the court ought not to enforce the rights of Flagg against him, until he has exhausted the other funds, which are within the reach of the court. Fuller is personally liable for the unpaid purchase money to an amount, exceeding the amount due to Flagg; and the land, purchased by Fuller, is subject to a lien for the purchase money. I think, therefore, that the final decree ought to be, that Fuller should be ordered to pay to Flagg so much of the unpaid purchase money as will extinguish Flagg's demand, if he is able to pay it. If he does not pay it within a time to be prescribed by the court, then the land, or so much as is necessary for the purpose, ought to be sold to pay the amount due to Flagg, under an order of the court. If, upon the sale, there is any deficiency, then Mann should be decreed personally to make up that deficiency, besides immediately paying to Flagg the sum of \$537.50, admitted to have been received by him, and now in his hands, as part of the purchase money. The decree for the sale should also require Mann and Fuller to join in releasing their title to the land which should be so sold, in such manner and form as the master shall, and they should, direct. Both of them



are to be perpetually enjoined against setting up any title thereto, after the sale shall have been made and confirmed by the court. Report accepted.

A further decretal order was passed for a sale of the premises, &c., &c., at the same term, as follows:

Saturday, 30th December. This cause coming on again to be heard before the Honorable Joseph Story, associate justice of the supreme court of the United States, and the Honorable John Davis, judge of the district aforesaid, in the presence of the counsel for the parties, upon the report of the master, Charles Sumner, Esq., to whom it was referred by a decretal order, heretofore made, at the last May term of the said court, to report upon the matters in the said decretal order mentioned, and the exceptions taken to the said report on behalf of the said Mann and Elisha Fuller, respectively, and for further directions: Upon reading the said decretal order and interlocutory decree heretofore made in the said cause, the said report, and the exceptions thereto, and upon debate of the matter, and hearing what was alleged by the counsel for the parties respectively, the said court doth think fit, and doth order and decree, that the exceptions aforesaid to the said report, except the first, which having been allowed and admitted by the parties, had been corrected, be, and the same are overruled, as wholly insufficient, and that the said report, and all the matters and things therein contained, do stand ratified and confirmed. And the said court doth declare, that there is due from the said Mann to the said Flagg, for a moiety of the purchase-money for which the moiety of the premises mentioned in the said interlocutory decree, were sold by the said Mann to the said Elisha Fuller, after deducting from such purchase-money, agreeably to the said interlocutory decree, one moiety of the several sums paid by the said Mann to Walker and Fisher, and the Frye heirs in the said interlocutory decree mentioned, for the purchase, assignment, and extinguishment of their interest, right, and title to the same premises, and all expenses incident thereto, the sum of twenty thousand five hundred and thirty-seven dollars and fifty cents, with legal interest thereon, at six per cent, to be calculated from the eighth day of August, in the year of our Lord eighteen hundred and thirty-one, the time of the said sale of the said Mann to said Elisha Fuller, until the same shall be fully paid and satisfied unto the said Flagg. And the said court doth further declare, that inasmuch

much as it appears that the said Mann, at the time of the said sale by him to the said Elisha Fuller, did receive from the said Elisha Fuller in cash and promissory notes, which were soon afterwards paid to the said Mann, with interest thereon until payment, as a part of the purchase-money upon the said sale, more than sufficient to reimburse to him, the said Mann, all the moneys paid by him to the said Walker and Fisher and the said Frye heirs, and the said incidental expenses; by the sum of one thousand and seventy-five dollars; the said Mann is liable to pay immediately to the said Flagg one moiety thereof, namely, the sum of five hundred and thirty-seven dollars and fifty cents, with interest, to be calculated thereon at six per cent., from the said eighth day of August, in the year last aforesaid, until the same shall be fully paid and satisfied to the said Flagg; the same being a part of the said sum of twenty thousand five hundred and thirty-seven dollars and fifty cents and interest. And the said court doth further declare, that, inasmuch as it appears that the said Elisha Fuller was liable for, and there was due from him to the said Mann, after the said Elisha Fuller had full notice of the claim and equity of the said Flagg in and to the said premises, as a part of the purchase money aforesaid unpaid, a sum exceeding the residue of the said sum of twenty thousand five hundred and thirty-seven dollars and fifty cents, and interest thereon, to be calculated as aforesaid, there was and is a lien upon the said moiety of the said premises for the purchase money unpaid as aforesaid, to the benefit whereof the said Flagg is entitled, so far as it may be necessary to secure the payment of the said residue, that is to say, the sum of twenty thousand dollars, and the interest thereon at six per cent., to be calculated from the said eighth day of August, in the year last aforesaid, until the same shall be paid and satisfied unto the said Flagg; and that the said Elisha Fuller, on account of the said unpaid purchase money, is liable to pay to the said Flagg so much thereof as may be necessary to satisfy unto the said Flagg the sum last mentioned, and interest to be calculated thereon as aforesaid. And the said court doth further declare, that in case the said Elisha Fuller shall fail to pay to the said Flagg the said sum last mentioned, with interest thereon, to be calculated as aforesaid from the said eighth day of August until payment thereof as aforesaid, within the time hereinafter mentioned, the said moiety of the said premises, or so much thereof as may be sufficient therefor, ought to be sold under the order and decree of this court; and the proceeds thereof, after deducting all incidental charges and expenses of such sale, applied towards the payment to the said Flagg of the said sum last mentioned, and interest, to be calculated thereon as aforesaid, before the said Mann shall be required to pay any part of the said last-mentioned sum and interest thereon as aforesaid; and in case the net proceeds of such sale shall be insufficient to pay and satisfy the said last-mentioned sum to the said Flagg, the said Mann ought thereupon to be required immediately to pay and satisfy unto the said Flagg such sum as may be wanting, to supply such deficiency; and the said court doth order and decree, that the said Elisha Fuller, on or before the first Wednesday of

June next, do pay and satisfy unto the said Flagg so much of the said purchase-money unpaid as aforesaid, as will be sufficient to satisfy unto the said Flagg the said sum of twenty thousand dollars, and interest, to be calculated thereon as aforesaid, from the said eighth day of August, in the year of our Lord eighteen hundred and thirty-one, until payment as aforesaid; and that, if the said Fuller shall fail to pay the same sum and interest to the said Flagg on or before the said first Wednesday of June next, the said moiety of the said premises be sold thereupon, immediately, by one of the masters of this court, under the order and decree of this court, he giving due notice of such sale in one or more public newspapers, fourteen days at least before the day appointed for such sale,—and that the proceeds of such sale, after paying therefrom all incidental charges and expenses thereof, be applied towards the payment and satisfaction to the said Flagg of the said sum last-mentioned, and interest to be calculated thereon as aforesaid; and that the said Mann, Elisha Fuller, and all proper parties, as the master shall direct, do join in releasing all right, title, and interest in the said moiety of said premises, or so much thereof as may be sold as aforesaid, upon the confirmation of such sale by this court; and that they be enjoined thereupon, perpetually, against setting up any title or claim thereto. And the said court doth further order and decree, that, if the net proceeds of such sale shall be insufficient to pay and satisfy to the said Flagg the said sum last-mentioned, and the interest thereon, to be calculated as aforesaid, the said Mapn do, within thirty days immediately after the confirmation of such sale, pay and satisfy to the said Flagg such sum as shall be then wanting to supply such deficiency. And the said court doth further order and decree, that the said Mann, within thirty days from the date of this decree, do pay and satisfy unto the said Flagg the said sum of five hundred and thirty-seven dollars and fifty cents, and interest thereon, to be calculated from the said eighth day of August in the year aforesaid, until payment thereof. And all further orders and decrees in the premises are reserved for the further order of the court.

The object of postponing the sale to so late a period was to avoid the disadvantages

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of a sale arising from the extreme pressure and the commercial embarrassment of the times; and to bring the whole matter before the court during its next term, if any exigencies should require any variation or alteration of the decree.

<sup>1</sup> [Reported by Charles Sumner, Esq.]