WHEELER *v.* SAGE.

Where a firm, whose business was "a general produce business," owned a mortgage on real estate, which real estate itself the firm was desirous to purchase under the mortgage, and intrusted the subject generally to one of the firm,—*held*, that the legal obligation of the partner intrusted being only to get payment of the mortgage, he might make an arrangement for his own benefit with a third person, without the knowledge of his partners, by which such third person should buy the mortgaged estate, giving him, the intrusted partner, an interest in it; and if the mortgage debt was fully paid by such partner into the firm account, that there was no breach of partnership or other fiduciary relation in the transaction; *or, at least*, that no other partner could recover from him a share of profits made by a sale of the real estate; all parties alike having been originally engaged in a scheme to get the real estate by depreciating its value through a process of entering a judgment for a large nominal amount, and by deceiving or "bluffing off" other creditors.

THIS was an appeal from the District Court of the United States for the District of Wisconsin; the case in that court having been one of a bill in equity, by which the appellant Wheeler sought to charge Sage as his trustee. The material facts, as set forth in the bill, were these:

On the 12th day of September, 1851, Wheeler, Sage, and Slocum entered into an equal copartnership, to carry on "a *general produce business*" in Troy, New York. The firm became the owner of a large debt against Alanson Sweet, of Milwaukee, which was secured by mortgage on valuable real estate. Proceedings to foreclose were commenced in October, 1854, and a decree passed in November, 1855. Sweet was insolvent, with heavy judgments against him. The parties were desirous of getting a perfect title to the mortgaged premises, their value being, when the mortgage was given, $50,000. In order to do this, it was thought necessary that certain judgments should be purchased and other arrangements perfected, which Sage informed Wheeler and Slocum could be done through a certain Alexander Mitchell, for $10,000. Sage was authorized to perfect the agreement, and to charge Wheeler and Slocum their proportionate amount on the books of the firm. This agreement, or a

similar one, was made by Sage with Mitchell, and judgments purchased under it. Without the knowledge of Wheeler, Sage, however, abandoned this agreement, and made one with Mitchell for his own benefit. The mortgaged property was sold, and Mitchell became the purchaser, letting Sage have one-third interest on certain conditions; this being done, as alleged, in violation of the rights and without the knowledge of Wheeler and Slocum. The mortgage debt was fixed at $24,000, two-thirds of which amount was paid over by Sage to Wheeler and Slocum, being, as he said, the best that could be done, and which was accepted by Wheeler and Slocum on that hypothesis. Enough of the mortgaged property, the bill alleged, had been sold to produce $105,000, leaving unsold what was worth $27,000. The prayer of the bill was, that Sage might be declared to be trustee for Wheeler for one-third of the mortgaged property still held and unsold by Mitchell, and for one-third of the proceeds of what had been sold; and be decreed to account.

Sage, in his answer, admitted that the firm was desirous of becoming the owner in fee of the premises mortgaged, and that it was thought by an expenditure of $10,000 that the object could be attained; and that an arrangement to this effect was contemplated with Mitchell, but became impracticable, and was abandoned: that Mitchell controlled the defence, which was serious and complicated, and it was feared by Wheeler that it might so far prevail as to lessen the amount of the mortgage debt. After considerable negotiation, a basis of settlement was agreed to by the partners and Mitchell, which fixed the amount due on the mortgage at $24,000. The defence was withdrawn, and a decree entered (at the instance of Mitchell) for $33,000, which was to be discharged on the payment of $24,000 by Mitchell, or at his election the decree was to be assigned to him. Mitchell preferred a sale to cut off an intervening claim. Sage admitted that, after the sale, he became interested in one-third of the property, but denied that Wheeler and Slocum have ever had, or were ever entitled to any interest whatever therein, and averred that when the sale was made there was

no subsisting agreement or understanding other than that said Mitchell should pay the amount agreed upon at the time of sale. The answer also denied that the mortgaged premises were of the value stated in the bill, and insisted that enough had not been realized from their sale to pay Sage the sum of $24,000.

A general replication was filed, and proofs were taken. In regard to the plan of getting a "perfect title" to the premises, it appeared by these that Sweet had about *thirty different judgment creditors* (Mitchell holding a judgment for $18,556.04, and the remaining creditors, exclusive of the Troy firm, for $59,597.73); that the principal item of the mortgaged premises was a *warehouse*, valued, when the mortgage was given, at $50,000, but of which the rise in value had been so great, that when the bill was filed it had come to be valued by some persons at twice that sum. The firm, accordingly, did not want to receive their money and interest under the proceeding to foreclose, but wanted to get the warehouse itself; of which, indeed, they had been for some time in possession, and which they were now actually occupying, with apparent exercise of ownership. But there were difficulties in the case. Sweet thought that with the rise of this property, which would occur by a railroad about to be made near it,—the Lake Shore Railroad,—he would be able to reinstate his affairs, and his judgment creditors looked to the same possibility as the means of at least getting the amount of their debts. Sweet accordingly threatened to redeem; and the creditors were watching the course of events. The object of Wheeler, Sage, and Slocum was, therefore, to get the warehouse itself under their mortgage, and for no more, or for little more, than its principal and interest. The operation was to be performed, in part, by buying in certain judgments at a discount, and in part by securing Sweet's acquiescence, in virtue of a consideration, to their getting a decree as speedily as possible, and an arranged sort of sale on foreclosure. The following extracts, or parts or copies of letters, selected from a large number in the record, give an idea of the process. The firm, it ap-

peared, was represented in Troy by Messrs. Sage (M. C.) & Slocum, as R. Sage & Co.; and in Milwaukee by Mr. Wheeler, as Wheeler & Co.

[WHEELER TO SAGE.]

MILWAUKEE, October 11, 1853.

MESSRS. R. SAGE & CO.

GENTLEMEN: Had conversation this morning with Mr. Sweet; says he shall try and have some one redeem, and knows where he can get the money; that the property was worth $90,000, as other property was selling, and wanted $10,000 for his aid in perfecting title, which he says he can do. I remarked to him that it would be no object to him to redeem, as his judgment-creditors would take it all from him again. He said he knew it, but in all human probability he should defend. I remarked that his services might be worth something to you in perfecting title, but no such sum as he named. . . . I think if you can secure his quietness, that you would be safe from any creditors. I am of the opinion that if terms could be made with him for $3000, payable when title is perfected, it would be a good thing to do. Let us hear from you what you think.

Yours, truly,
WHEELER & CO.

On the 26th November, 1853, Wheeler writes to Sage: "Mr. Sweet is *defending* the suit of foreclosure of warehouse property; can't imagine what he does it for, unless it is to make you pay him for keeping still, or to stave it off until the property should rise more in value. *Sweet is willfull.*" Wheeler says subsequently, at different dates: "I think there is a game, an intrigue in the defence, against the warehouse property. There may be a collision of parties that we little expect. . . *Sweet is ugly*, and is determined to make you all the trouble he can;" "is trying to make some defence in your chancery suit of warehouse property; is around amongst the warehouse men making inquiries what it is worth." "These chancery suits are long-winded." "There is no earthly doubt but that the warehouse property is worth $50,000; nor but that it would sell for that now." "The property is variously estimated from $50,000 to $100,000."

"I think I have found a responsible man who will take it at $4000 rent."

[WHEELER TO SAGE.]

MILWAUKEE, September 11, 1854.

HON. R. SAGE.

DEAR SIR: Mr. Sweet says that he has figured up, and finds he can cancel all obligations (and that there is about $100,000), for $12,000, and that if you were disposed to take hold and give paper to that amount, on three, six, nine, and twelve months, he could clear the property in twenty days. Also, there is parties here who have proposed to him to raise what money is necessary to pay your mortgage, and buy up the other obligations, and divide with him what they could make out of it. I am of the opinion, and I say it to you in confidence, that your attorney did not crowd the suit at the last term with sufficient energy. If he had, he could have got the decree. I say it to you, as the fraternity say, "on the square," and there is no mistake about it. There has been some collusion for others' benefit somewhere. If I could see you, I could tell you, so you would see through the whole arrangement better than I can on paper. But you now have enough to put you on the alert.

Very truly, yours,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, April 24, 1855.

MESSRS. WHEELER & Co.

Mr. Slocum returned yesterday; says he saw Sweet, and had a long talk with him; thinks Sweet has a friend that is going to bid in the property; but thinks an *arrangement could be made to avoid this by giving a certain sum to Sweet, conditioned that we should get a decree for the amount, and sell the property, and perfect our title.* I think he and I may come out there next week, and look into the matter, and see if something of the kind may not be best. Of course, you must keep all quiet, and treat Sweet kindly.

Very truly,

RUSSELL SAGE.

[WHEELER TO SAGE.]

MILWAUKEE, May 5, 1855.

HON. R. SAGE.

DEAR SIR: I have seen F. in regard to you and Mr. Slocum

coming here; he thinks favorable of it; but said you made a mistake in not buying up those old judgments. However, he now thinks if you can buy Sweet's peace, *that the creditors of Sweet could be bluffed off by getting a large decree, and taking a proper time to sue it, and the price of Sweet's peace to be contingent to the final adjustment of title.* Sweet is now at Grand Haven. . . . So you had better come out next week, or at farthest week after next, and you will almost be sure to see him.

Yours, truly,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, May 19, 1855.

C. H. WHEELER, ESQ.

DEAR SIR: I saw Mr. Mitchell a few minutes last night, on his way to New York; and agreed with him to have the suit put over. . . . Mr. Mitchell repeated what he said to you, as you state in your letter of the 15th, and said you offered to pay $10,000 for a clear title. I told him I thought we would do this. I have talked with Mr. Slocum, and he is in favor of it. . . . In the meantime everything must be kept quiet, as I will advise further after seeing him in New York on Monday next. I am satisfied we can't do anything without some such course of action as this. This must be kept still, however, until all is accomplished. Now I have some fears about the renting of the warehouse until we get through. I will consider it, and advise you hereafter.

Yours, truly,

RUSSELL SAGE.

[WHEELER TO SAGE.]

MILWAUKEE, May 18, 1854.

HON. R. SAGE.

DEAR SIR: We have telegraphed you to-day as follows: "See Mitchell; come to Milwaukee, court setting; Sweet here; adjust title now or never." I have had long conversation with Finch in regard to our suit with Sweet. I have ordered him to buy what judgments that he represented, some $5000, at twenty-five to thirty cents on the dollar, if he could. If we do not make some arrangements with S. to stop defence, and let us have a decree this term, we will, in the ultimation, have to take the money on the mortgage, as the property has risen more than 100 p. c. within the last two years, and we came to the conclu-

sion that you and Mr. Slocum should come out at once and try to perfect something. Yours, truly,

WHEELER & Co.

[SAME TO SAME.]

MILWAUKEE, May 9, 1855.

HON. R. SAGE.

DEAR SIR: I dislike this delay in our warehouse suit, as the property is increasing in value so fast, and now the Lake Shore Railroad is done, it will give a fresh impetus, and if we do not get a decree pretty soon, there will be hordes of speculators that will run the property, on sale, to $50,000, if not more.

Yours, truly,

WHEELER & Co.

[SAGE TO WHEELER.]

TROY, May 23, 1855.

C. H. WHEELER, ESQ.

DEAR SIR: Yours of 18th and 19th are before me. As to the warehouse suit, would say we cannot hurry it. I think my arrangement with Mitchell will succeed. . . . You can readily see that with this arrangement, we shall be quite sure to succeed with Mitchell at home. *At any rate, we shall get a large and full decree, which we could not get without this, and with the judgments in our own hands, it is almost a certainty that we shall get through just as we expect to.* As to the renting of the warehouse, would say I think it would have been better to have kept along as we are, until we get a decree and sale, and should prefer it now, if you can arrange with your man. If you cannot, then you must do the best thing you can, and keep as quiet as you possibly can. I think the least said the better. Mitchell will put all right with Sweet. Yours, truly,

RUSSELL SAGE.

[SAME TO SAME.]

TROY, June 4, 1855.

MESSRS. WHEELER & Co.

GENTLEMEN: As to the renting of the warehouse, would say I consider it risky to do so, and should favor keeping along in its full possession until we get a decree and sale. *You can readily see what the effect of a* $4000 *rent would have with a court or jury compared with one of* $2000. I think you had better say to

Mr. Butten that I own the house, and will not consent to rent it until my suit is ended, which I supposed would have been done at the present term; that he should have the preference of it so soon as this can be accomplished, &c. This, it strikes me, is clearly the most wise and politic course to take; certainly it is, if we expect to get the property, and keep down competition. . . . It may be a little embarrassing to you, but thrice it me.

Yours, truly,

RUSSELL SAGE.

At a subsequent date, Sage went to Milwaukee, and took the negotiation largely into his own hands; the issue of it being as already stated.

The court below dismissed the bill, which dismissal was the matter now complained of on appeal.

Mr. Emmons, for the appellant, Wheeler:

1. It may be mentioned as a preliminary objection that the complainant has never offered to refund the money received from Sage. If Wheeler would take advantage of Sage's contract with Mitchell, he must take it in whole, and exactly as Sage made it. He should not be permitted to hold us in a lawsuit, and to speculate upon the chances of prospective value of what Sage received from Mitchell.*

2. The bill of complaint itself states in the outset that the partners were engaged in "a general produce business." Admit that the mortgage debt was treated as a partnership adventure. What then? The partnership gained thereby no interest in the mortgaged *premises*. The complainant assumes that with the ownership of the *debt* the firm acquired a vested interest in the real estate by which it was secured, and a right to "secure a perfect title;" but this is not so. When Sage had collected the debt, and accounted for it, there all agency ceased. He might, during the existence of the copartnership, have acquired in his own right the equity

* 1 Leading Cases Equity, by Hare & Wallace, 157, note; Ibid., 167, note; Wilson *v.* Poulter, 2 Strange, 859; Reid et al. *v.* Hibbard, 6 Wisconsin, 175; Clark *v.* Baker, 5 Metcalf, 452.

of redemption, without violating any legal duty or trust springing from his relation as a copartner. His contract, therefore, with Mitchell for an interest in the premises —whether before or after the foreclosure sale—was no breach of his obligation as a partner. He could in his own right have become a purchaser at the sale, paying down, of course, the mortgage-moneys.

3. If the complainant has established any theory by his bill and proofs, it is that the firm of Wheeler & Co. aimed at purchasing title to the mortgaged premises, not by paying the value of them, or what they would bring by fair competition at public sale, but by combination tending to outvie or deceive other creditors, and to repress rivalry and competition. That courts will refuse relief in such a case is undeniable. *Randall* v. *Howard*,* in this court, is in point, and the authorities show that the refusal will be made under almost any variation of circumstances that can be conceived.†

Mr. Carpenter, contra:

1. The objection that in his bill the complainant did not offer to pay back the sum which Sage paid him at the time of the sale, as his proportion of the money secured by the mortgage, is a technical objection only; one to the frame of the bill; and can be taken advantage of only by demurrer.‡ The bill states that Sage has received under said contract with Mitchell much more than the amount paid by him to Wheeler, and it is for his proportion of that surplus that Wheeler brings this suit.

2. We may admit that the proper business of the partnership was dealing in produce, and not in purchasing real estate. Still a purchase of real estate which had been mort-

* 2 Black, 585.

† Phippen *v.* Stickney, 3 Metcalf, 384; Bexwell *v.* Christie, 1 Cowper, 395; Howard *v.* Castle, 6 Term, 642; Veazie *v.* Williams, 8 Howard, 134; Hawley *v.* Cramer, 4 Cowen, 717; Fuller *v.* Abrahams, 3 Broderip & Bingham, 116; Jones *v.* Caswell, 3 Johnson's Cases, 29; Doolin *v.* Ward, 6 Johnson, 194; Wilbur *v.* Howe, 8 Id., 444; Thompson *v.* Davies, 13 Id., 114.

‡ Story, Equity Pleading, § 453, 528.

gaged to the firm, for a produce debt, or of which the mortgage came into the firm as cash assets, was quite within its sphere. The purchase was by way of protection; and the estate was to come into the firm, *incidentally* only. The question then is, whether in such a case, *i. e.* where one partner has been *intrusted* by his copartners as agent of the firm to purchase on joint account, and on joint account has undertaken so to buy, he can, in good conscience, carry on a long operation, corresponding with his confiding partners in a most confidential way, and then, when he sees the path clear to a profitable operation, dismiss those copartners—copartners, in this special operation, independently of all general relations—and put the profits into his own pocket? We submit that he cannot. As the agent of his copartners, Sage's relation was a highly fiduciary one, and he must not abuse it to his own benefit.

3. We admit, too, the general rule of law, that where a bill seeks to enforce a contract which rests in illegality, or which was entered into to defraud others, the court will not hear the parties, and thus give effect to an illegal agreement. Such was the case of *Randall* v. *Howard*, in this court, cited on the other side. But when a defendant is called to an accounting in a court of equity *for breach of trust*, he is never permitted to set up that the fund was created in some illegal way. In *Barney* v. *Saunders*,* this court compelled a trustee to account for usurious interest, illegally taken by him on the trust fund. This, then, is not a case where the Hon. Mr. Sage can make infamy his shield, and by setting up this defence, sacrifice his character for a money "equivalent."

Mr. Justice DAVIS delivered the opinion of the court.

The right to recover is placed mainly on two grounds.

First. That Sage, in the absence of any agreement, could not by private treaty become interested in the mortgaged property, to the exclusion of the other partners.

Second. That there was an agreement that Sage should act

* 16 Howard, 535; see also McBlair *v.* Gibbes, 17 Id. 232.

as the agent of his copartners in perfecting the title to the mortgaged premises; and having violated his agreement and made a private bargain with Mitchell for his individual benefit, he is chargeable as trustee.

Each partner is the agent of his copartners in all transactions relating to partnership business, and is forbidden to traffic therein for his own advantage, and if he does, will be held accountable for all profits. But beyond the line of the trade or business in which the firm is engaged, there is no restraint on his right to traffic. As one partner has no authority to bind the firm outside of their ordinary business, he cannot of course be held liable to account, should he make a profitable adventure in a matter not legitimately connected with the business of the firm. The difficulty generally is, to ascertain what acts are within the scope of the particular trade or business. But in this case there is no embarrassment whatever in the application of the principle. This was a partnership to do a general produce business. It contemplated no dealings in real estate, and each partner was at liberty to buy and sell real estate, and was under no legal liability to account to his copartners. The debt due from Sweet belonged to the partnership, and not the premises mortgaged. To the extent of their debt the partners had an interest in the mortgaged property, and no further. They were interested to have the debt paid, not to procure title to the mortgaged property. It can readily be seen that it would be profitable to get a real estate worth $50,000 for $34,000; but *how* an engagement to do a general produce business could embrace that speculation is not so apparent. Sage's legal relations to his copartners extended to the procurement of the money due from Sweet. They were neither more nor less. But it is said that the copartners were desirous, if possible, of obtaining the title to the mortgaged premises, and that Sage undertook the negotiation for them, and made an effective arrangement with Mitchell, which he afterwards relinquished, and secured clandestinely an advantage to himself, to the injury of the other partners, and should, therefore, be held to account for profits.

The evidence in this case, consisting mainly of letters interchanged between Wheeler and Sage, shows clearly enough that a scheme was initiated to get the title to the property, and that Sage was the active agent to perfect it, but for some unexplained reason it failed. The evidence does not prove that Sage made a contract with his copartners to perfect the title, but his engagement was to consummate a contract with Mitchell, if it could be done, by which the object could be accomplished. All parties rested in the belief that the negotiations with Mitchell would be successful; but from some motive not disclosed in the record, Sage abandoned the idea of buying the property on joint account, and bargained with Mitchell in his own behalf.

Generally, when a party obtains an advantage by fraud, he is to be regarded as the trustee of the party defrauded, and compelled to account. But if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him. "The Warehouse Case," as it is somewhere called in the record, is anything but creditable to the parties concerned, and it is surprising that they should have been willing to give publicity to it through a legal proceeding. Sweet was an insolvent debtor, owing Sage, Wheeler & Slocum $24,000, secured on real estate in Milwaukee, which was worth, when the security was given, $50,000, and over $100,000 when the bill in this case was filed. In 1854 and 1855, when the scheme to perfect the title was in full progress, the property was appreciating in value. Judgments had been entered against Sweet in favor of Mitchell to the amount of $18,556.04, and in favor of various other creditors for the sum of $59,597.73. Suit to foreclose was commenced, and a vigorous defence interposed. Sweet denied that there was as much due on the mortgage as was set forth in the bill, and he claimed a share of the general business, and that he was entitled to a credit of $12,000 for the rent of the warehouse for three years, during which time it had been occupied by Wheeler & Co. If this defence was successful, they

could not hope to "perfect the title." The property was too valuable and the venture too great to lie idle and wait the ordinary progress of a suit in chancery. The property must be saved at all events and Sweet's peace bought. Wheeler writes to Sage, May 5, 1855: "F. thinks if you can buy Sweet's peace, that the creditors of Sweet could be bluffed off, by getting a large decree and taking a proper time to sue it, and the price of Sweet's peace to be contingent to the final adjustment of title." Again, under date of May 18, he writes to Sage, "that if we do not make some arrangement with S. to stop the defence and let us have the decree at this term, we will have to take the money on the mortgage, as the property has risen in value more than 100 per cent. within the last two years, and we want you and Mr. Slocum to come out at once and do something."

"To perfect the title" and grasp the coveted prize, the defence must be stopped, Sweet bought off, and the decree enlarged beyond the just sum, so as to "bluff creditors." The nearer the decree was to the actual value of the property, the less was the chance of being outbid. To pay value for the property was not embraced in the scheme, but if Sweet was silenced, there would be no difficulty of fixing the decree at a sum which would tend to repress competition, and the decree was actually made for the sum of $33,000, when the amount due was only $24,000. It is true that Sage, in his answer, says that Mitchell had this done from motives of his own. But the correspondence between Wheeler and Sage abundantly proves, that to get a decree for the nominal instead of the real amount due on the mortgage, was one of the main parts of their project.

The court was imposed on, and a combination formed, the object and direct tendency of which was to secure the title to the valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors.

A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either

party in such controversies. The maxim, "*in pari delicto potior est conditio defendentis*," must prevail.

DECREE AFFIRMED WITH COSTS.

BURR *v.* DURYEE.

1. The practice of surrendering valid patents, and of granting reissues thereon in cases where the original patent was neither inoperative nor invalid, and where the specification was neither defective nor insufficient—the purpose being only to insert in the reissue expanded or equivocal claims—is declared by the court to be a great abuse of the privileges granted by the thirteenth section of the Patent Act of 1836, authorizing a surrender and reissue in certain cases, and is pointedly condemned.
2. As the Patent Act grants a monopoly to any one who may have discovered or invented "any new and useful art, *machine*, manufacture, or composition of matter," and as a machine is a concrete thing, consisting of parts or of certain devices and combinations of devices, a patent must be granted, in cases where the invention comes within the category of a machine, for *it*, and not for a "mode of operation," nor for a "principle," nor for an "idea," nor for any abstraction whatsoever: and this rule of law is not affected by the fact that the statute requires the patentee to *explain* "the mode of operation" of his peculiar machine which distinguishes it from all others.
3. The machine patented to Seth Boyden, January 10, 1860, for an improvement in machinery for forming hat-bodies, is no infringement of any of the patents granted to Henry A. Wells for the same thing. The patents to Wells, so far as they related to an improvement in the *process* of making hat-bodies, were void; William Ponsford having invented and patented the thing before him, and Wells having seen Ponsford's invention.

APPEAL from the Circuit Court for the District of New Jersey.

The complainant, Burr, as assignee of a patent granted to Henry A. Wells for "an improvement in the *machinery* for making hat-bodies, and in the *process* of their manufacture," filed a bill in the court below against Duryee and others for infringement. The patent to Wells was granted originally April 25, 1846. It was surrendered in 1856, and reissued in two separate patents; one for the improved *ma-*