Statement of the case.

The law of California, while it required the sheriff to offer the smallest portion of the land which any one would take and pay the judgment and costs, undoubtedly contemplated that if no one would take any less than the whole of the land and pay the judgment and costs, that then it should be sold to the highest bidder. If this were not so, the State could not collect the taxes in half the cases, because the right of redemption left no inducement to bidders for a smaller amount than the whole.

It is, therefore, a fair presumption from the recital in the deed, that although the sheriff sold the land to the highest bidder, it was because no one would take less than the whole and pay the taxes and costs. And the recital that is made, as well as that which is omitted, are neither of them necessary to the validity of a deed made in a judicial sale.

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## RAILROAD COMPANY v. SOUTTER ET AL.

A railroad belonging to an incorporated company, and then under a first and second mortgage, was sold on execution and bought in by certain bondholders, whom the second or junior mortgage was given to secure. These purchasers organized themselves (as they were allowed to do by statute in the State where the road was) into a new corporation, and worked the road themselves, and for their own profit. After a certain time, the mortgagees under the first or senior mortgage pressed their debt to a decree of foreclosure; and to prevent a sale of the road the new corporation paid the mortgage debt. Subsequently to this, and on a creditors' bill, the sale made to the creditors under the second mortgage was set aside as fraudulent and void as against other creditors of the corporation which owned the road originally. *Held*, that no bill in equity would lie by the new corporation against the mortgagees under the first mortgage, to be paid back (as paid under a mistake of fact), what had been thus paid to them by the new corporation, or to be subrogated to their decree of foreclosure.

APPEAL from the Circuit Court for the District of Wisconsin.

The Milwaukee and Minnesota Railroad Company filed a bill in equity, in June, 1859, against Soutter (survivor of

Bronson), Russell Sage, and several other natural or individual persons, as also against the Milwaukee and St. Paul Railway Company, a corporation, to recover back certain large sums of money, amounting in all to $462,057.80, which they had paid into court, in December, 1865, in part liquidation of certain bonds held by the individual defendants, in this suit, which bonds had been issued by the La Crosse and Milwaukee Railroad Company in 1857, and were secured by a mortgage upon a portion of the railroad of the last named company. By way of alternative relief, the complainants prayed that they might be subrogated to the benefit of the decree of foreclosure of the mortgage, under which they had paid the money in question. The Milwaukee and St. Paul Railway Company were made defendants because they were the parties now in possession of the railroad and other mortgaged premises, and asserted themselves to be the owners thereof.

The facts, on which the complainants rested their claim, as set forth in their bill, were substantially as follows:

The La Crosse and Milwaukee Railroad Company, in 1858, after giving the bonds and mortgage above mentioned, gave two other mortgages, one on their road and one on their land grants, to secure certain other bonds issued by them. Failing to pay the interest coupons on the latter bonds, William Barnes, the trustee named in the mortgages, in May, 1859, sold the mortgaged premises, and all the franchises of the company, at public auction, and became the purchaser thereof, in trust for the bondholders, under the laws of Wisconsin, for the sum of $1,593,333. The *bondholders* thereupon, in May, 1859, *organized a new company by the name of the Milwaukee and Minnesota Railroad Company* (*the corporation now complainant in the case*), and Barnes conveyed the property to *the said company;* which thereafter conducted its business under and in pursuance of the charter of the La Crosse and Milwaukee Railroad Company, and immediately entered into possession of the said property and franchises.

But the prior mortgage of 1857 still subsisted on a portion of the road. Of this mortgage Bronson and Soutter

were the trustees, and they filed another bill to foreclose their mortgage, and, after protracted litigation (of which the part in this court is reported in *Bronson* v. *La Crosse Railroad Company*) obtained a final decree in 1865,* for the amount of interest coupons due on the bonds secured thereby, amounting to upwards of $450,000; which decree contained a proviso, that if the Milwaukee and Minnesota Railroad Company (the now complainants) should pay the amount of the decree before a sale of the mortgaged premises, the receiver (the road being then in the hands of a receiver) should deliver the property to them; that is to say, they had the usual privilege of redeeming the property by paying the decree. Thereupon, the complainants, on the 30th of December, 1865, paid into court the amount of $462,057.80, as above stated, the money being afterwards distributed to the holders of the various bonds secured by the Bronson and Soutter mortgage, who are the individual defendants in this suit. The money thus paid was paid by the complainants as purchasers, and claiming to be owners, of the property, upon an acknowledged incumbrance, and in relief of the property claimed.

Prior to this payment, however, certain judgment creditors of the La Crosse and Milwaukee Railroad Company filed in the United States District Court for Wisconsin a *creditor's* bill against the present complainants, alleging that the sale by Barnes was fraudulent and void, and praying that it might be set aside as such, and that the complainants might be enjoined from any further interference with the property or franchises of the La Crosse and Milwaukee Railroad Company. This suit had been pending for some considerable period, and was pending here on appeal—the case of *James* v. *Railroad Company*†—when the complainants paid their money into court, as before stated, and, some time after its payment and distribution, a decree was made on said creditor's bill, in accordance with the prayer thereof, and directing that the property should be resold, and the proceeds

* 2 Wallace, 283.

† 6 Wallace, 752.

applied, after payment of prior liens, *to the satisfaction of the judgments on which the creditor's bill was founded.*

The complainants accordingly now asked to have their money returned to them, on the ground that they paid it under a mistake. Their allegation was that they supposed they owned the property when they did not; that they supposed they were lifting an incumbrance off of their own property, when they were, in fact, lifting it off of property decided to belong to other parties. Their bill, speaking of the order allowing them to pay the amount of the decree, represented that the "said order was made by this court upon the understanding and theory entertained and believed by the judges of said court, and by your orator, and by all persons and parties interested in said cause, that your orator was the owner of said equity of redemption." And again, that "your orator paid said sum of money into this court, this court distributed the same, and the several persons hereinbefore named in that behalf received the same with, upon, and under, and only with, upon, and under, the belief, understanding, and theory, that your orator was the owner of the equity of redemption of the mortgaged premises and property in said cause, and that your orator was thereby paying and extinguishing a lien, charge, and incumbrance upon property owned by your orator as aforesaid." It further stated that "after paying the money, your orator for the first time discovered that the said foreclosure of the Barnes mortgage was fraudulent and void *as to the creditors of the La Crosse and Milwaukee Railroad Company, and as against the said last-named company*, and that, in fact and in law, your orator never was the owner of the said equity of redemption, and that the payment made by your orator into court, and the distribution of the said moneys and the receipt thereof by the said defendants was made, had, and received in mistake of *fact* as aforesaid."

The bill further stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and had advised and encouraged the sale by

Argument in favor of the recovery.

Barnes, and participated in the organization of the complainants' company; and alleged further that the board of directors of the corporation complainant became totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment were persons who had no interest at the time of the foreclosure, and no participation in the proceedings.

The defendants demurred to this bill, and on the hearing of the same the demurrer was sustained, and the bill dismissed. From the decree dismissing the complainants' bill, this appeal was taken.

*Messrs. G. B. Smith and M. H. Carpenter, for the appellant:*

Whether money paid under a mistake of *law* can or cannot be recovered back, it is certain that money paid under a mistake of *fact*, may be so recovered, and by suit in equity.* Mistake is one of the original heads of chancery jurisdiction; it is one of the great trinity of subjects from which all equity jurisdiction flows. No chancellor would be anything without fraud, accident, and mistake.

This money was paid under a mistake of fact. In almost every instance of the payment of money the ultimate determination rests upon some legal conclusion of the parties' right to, or interest in the subject-matter to be affected by such payment. The conclusion must rest upon facts to which it is attempted to apply the legal principle. And the rule is that if any one of a supposed complicated state of facts is unfounded, and that supposed fact induced, or tended to induce, the payment of the money, the party paying is entitled to relief. A man's title to property is always a question of law, after facts are ascertained. But if a man acts upon the belief that he is the owner of property and that belief is based upon a supposed state of facts, which if well founded, would in law make him the owner, and such

* Wilkins *v.* Woodfin, 5 Munford, 183.

supposed facts are misapprehended, the erroneous conclusion of ownership is a mistake of fact, not of law.

In this case the Minnesota company paid this money into court upon the supposition that it was the owner of the equity of redemption; that supposition being a legal conclusion based upon certain supposed facts, one being that the Barnes mortgage was a valid incumbrance. But unfortunately for the company *the supposed state of facts* did not exist. The mistake, therefore, under which the company acted in paying the money was a mistake in regard to the existence of certain facts; or in other words the company paid the money under a *mistake of fact.*

This view of the subject is established by the single consideration that this court, *which cannot make any mistake of law*, expressly declared in its opinion in *Bronson* v. *La Crosse Railroad Company*,* that the foreclosure of the Barnes mortgage had vested the equity of redemption in the Minnesota company. This tribunal knew all law when it made this decision just as well as it did when in the subsequent case of *James* v. *Railroad Company*,† it decided that the Minnesota company had no interest whatever in the premises.

The different conclusions reached by that court, first, that the company did own the property, and second, that it did not, were both sound in law as applied to the cases made by the respective suits.

The difference between the two, in other words, is a difference of fact, not of law. In the first suit, it appeared to the court that the case before mentioned did exist, and therefore the law said: "The Minnesota company is the owner of the equity of redemption." In the second case, the case was shown not to exist, and the law said, "The Minnesota company is not the owner of the equity of redemption." It was the mistake in regard to the facts that induced the court to say, *and induced the company to believe*, that the company was such owner. And the mistake of the company was the same as that made by the court; and as the court cannot make a mistake of law, it follows that the company *did not*

* 2 Wallace, 304.

† 6 Id. 752.

The true distinction between a mistake of law and a mistake of fact is well stated by the court in *Hurd* v. *Hall*,* and there can be no doubt that the money in this instance was paid under a mistake of fact.

An action for money had and received, is maintainable wherever the money of one man has, without consideration, gone into the pockets of another.†

*Mr. J. W. Cary, contra*, contended that on the face of the bill no case was made, and that judgment was rightly given on the demurrer for the defendants.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner choose to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, "He that hath

* 12 Wisconsin, 124.

† Hudson *v.* Robinson, 4 Maule & Selwyn, 478; Kelly *v.* Solari, 9 Meeson & Welsby, 54; Chatfield *v.* Paxton, note, 2 East, 471; Milnes *v.* Duncan, 6 Barnewall & Cresswell, 671; Townsend *v.* Crowdy, 8 C. B. (New S.) 477.

committed iniquity shall not have equity." And various illustrations of it are furnished by the books.*

But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property when they paid into court the money which they are now seeking to recover back.

They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law. They mistook the legal effect of transactions of which they were chargeable with notice. They were the persons for whose benefit the purchase was made, which was declared to be fraudulent. They were the principal defendants in the creditors' bill, upon which this decree was rendered. All the evidence in that suit had been taken when they made the payment in question. The cause was pending, on appeal, in this court. There was not a fact, therefore, of which they were ignorant. They had full and actual notice of all the transactions, and all the evidence on which the decree was ultimately founded.

All this appears from the statements of the bill in this case. We do not see how such a bill can possibly be sustained. The pleader who drew it evidently felt the force of these objections, and interjected some special circumstances for the purpose of showing that the case is distinguishable from the class of cases referred to. It is stated that Russell Sage, one of the defendants, who received a large portion

* See Francis's Maxims, Maxim VII.

of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and advised and encouraged the sale by Barnes, and participated in the organization of the complainants' company. All these facts may be true, and on the demurrer to the bill must be taken as true; but they do not show, nor is it alleged, that Sage was personally a participant in the fraud which was committed in the sale under the Barnes mortgage. And if it were so alleged, can one fraud-doer obtain relief in equity against his *particeps criminis?*

Again, it is alleged that the board of directors of the complainant was totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment were persons who had no interest at the time of the foreclosure, and no participation in the proceedings. This cannot alter the case. A corporation aggregate retains its identity through all the changes that may take place in its individual membership. This corporation, by its own statement, was adjudged to be the child of a fraudulent and corrupt transaction, and entered upon its career as purchaser of the property, with all the risks of its illicit origin and fraudulent purchase upon its head. Change of membership cannot change its rights. If it can, when is the change effected? How many, or what proportion, of the members must be changed?

It is needless to pursue the subject further. If the present individual stockholders of the complainants have been wronged that wrong cannot be redressed in this proceeding without violating the clearest principles of equity jurisprudence. The bondholders who received the money that was paid into court were entitled to that money. It was due them. Had not the complainants interposed they could have sold the property and realized their claim from the proceeds. How can they be called to account? The present owners of the road have purchased it (it is to be presumed) under the proceedings had in favor of the judgment credit-

ors. How can their title be disturbed by the complainants? What equity would there be in subjecting the property in their hands to an incumbrance from which it was free when their purchase was made?

The decree must be

AFFIRMED.

Mr. Justice FIELD, dissenting.

I differ from Brother Bradley in the construction of the bill in this case, and, therefore, differ from him in the conclusions to be drawn from the facts which it discloses. To my mind it presents a clear case, where money, amounting to over four hundred and sixty thousand dollars, was paid under a mistake of fact, into which the complainant was led by the decision of this court. And it would be, in my judgment, only administering simple justice to the company to compel the defendants to make restitution, or to give to the company the benefit of the decree in the foreclosure suit, upon which the money was paid. I, therefore, dissent from the judgment rendered.

The CHIEF JUSTICE and Mr. Justice MILLER also dissented.

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## COMMONWEALTH v. BOUTWELL.

Mandamus to the Secretary of the Treasury to compel him to deliver a warrant under the act of July 27th, 1861, directing him to refund to the governor of any State the expenses properly incurred in raising troops to aid in suppressing the rebellion, refused; the Secretary not having been asked to pay the money until the time limited in the appropriation act for the appropriation to take effect had expired; the right of the court to issue such order under other circumstances not being meant to be passed upon.

THIS was a petition by the State of Kentucky, through its constituted authority, asking this court, in the exercise of its original jurisdiction, for a writ of mandamus to com