

view of this court, the argument is not sound, and we think that the weight of judicial determination is greatly the other way."

It is claimed, further, on the part of the petitioner, that this mortgage virtually recognizes the permanent water right, and the income from it, and therefore that a conveyance of the kind mentioned in this scrip has been agreed to or acknowledged by the company. I do not so understand the provisions of this mortgage. It conveys all the "lands, tenements, hereditaments, privileges, franchises, rights of way, flowage and riparian rights, easements, and fixtures, now owned or hereafter to be acquired, and all its canals, flumes, head works, gates, dams, bridges," etc., "now constructed or to be hereafter constructed, \* \* \* and all the estate, right, title, and interest, claims and demands, rights of way and other easements, whether in law or in equity, of the said company, of, in, and to the same, and each and every part and parcel thereof; and also all buildings, fixtures, and personal property thereon or belonging to said company, and all receipts, incomes, and profits which said company shall derive on account of any contract or agreement for the transfer of water rights, as appurtenant to specified lands, excepting and not including the annual rentals for the use of said water, and interest on such contracts or agreements." This is very broad language, and it appears to me that whatever right there was, whatever right in the permanent water right there might be, in connection with this ditch or irrigation company, that right was mortgaged to the trust company, and, in that view, these claims must be held subordinate to the mortgage in this case. This disposes of the petitioner's third proposition, that the scrip should be recognized in the decree.

It was urged upon the argument that the permanent water rights referred to in the scrip were outside the provisions of the constitution of this state, and therefore the action of the officers of the company in issuing the scrip was *ultra vires*. In the view I take of the subordinate character of the scrip contracts, it will not be necessary to pass upon that question at present; but if, upon the sale of the property, the proceeds should prove to be in excess of the amount due on the bonds secured by the mortgage, the petition may be presented as against such surplus proceeds, and whatever question then remains will be determined. The demurrer to the petition must therefore be sustained.

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#### NASH v. INGALLS.

(Circuit Court, S. D. Ohio, W. D. March 29, 1897.)

#### EQUITY JURISDICTION—SIMPLE CONTRACT DEBT.

An independent suit against a railroad receiver to recover a simple contract debt owing by the receiver is not sustainable in equity.

David Stuart Hounshell, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

TAFT, Circuit Judge. This case was begun in the superior court of Cincinnati. The petition avers that on October 1, 1868, Joseph Butler leased to the Cincinnati & Indiana Railroad Company, for 99 years, renewable forever, a piece of real estate on the southwest corner of Carr and Sixth streets, in the city of Cincinnati; that by the lease the railroad company agreed to pay Butler an annual rental of \$3,504, in monthly installments, together with the taxes and assessments; that the Cincinnati & Indiana Railroad Company took possession of the premises, and subleased the same to the plaintiff, John Nash, at an increased annual rental, for the term of 25 years, with the privilege of renewal; that the plaintiff erected buildings and improvements upon the lot, at a cost of \$25,000, and paid his rent as the same fell due; that the railroad company defaulted in rent under its lease to Joseph C. Butler on April 1, 1876; that on August 1st of the same year, in a mortgage foreclosure suit brought against the railroad company, Melville E. Ingalls was appointed receiver of the property of the Cincinnati & Indiana Railroad Company, and entered upon his duties as such receiver; that on January 26, 1878, the executors of Joseph C. Butler, deceased, filed a petition in the receivership suit, reciting the facts, and praying an order against Ingalls, as receiver, directing him to pay the rents due the petitioners under the lease from the railroad company; that Ingalls answered this petition, and in the answer stated that there was due from him to Nash \$4,350 for merchandise furnished to him as receiver. The petition avers that this amount was due as admitted; that said Ingalls, as receiver, paid to the plaintiff the sum of \$2,200 down to the 4th day of January, 1888, when the receivership suit was ordered off the docket of this court. Plaintiff further avers that in the foreclosure suit the leasehold of the railroad company, with the buildings, structures, and improvements thereon, was sold, and realized \$10,000, which was applied to the arrearage in rent due to Butler's executors. The plaintiff further states that the last payment made to him by Ingalls was made in October, 1887, during the pendency of the foreclosure suit, and that Ingalls claimed to hold back the remainder of said \$4,350 on account of the claim made by the said executors of the said Joseph C. Butler. Plaintiff further states that the said defendant, Melville E. Ingalls, at all times promised to pay him the residue of said \$4,350, until November 27, 1895, when he refused to pay the residue of said sum, or any part thereof, and wholly denied his trust. Wherefore the plaintiff prays judgment against the receiver for the sum of \$3,450, with interest thereon from the 5th day of June, 1878, until paid, subject to a credit of \$2,200, and for all general relief.

A demurrer is filed to the petition—First, on the ground that the petition does not state grounds sufficient to constitute a cause of action; and, second, that neither this court nor the superior court of Cincinnati, from which this action was removed, had any jurisdiction of the subject-matter thereof. The petition is docketed on the equity side of the court, and the demurrer on the ground that the petition does not state a cause of action may properly be treated as a demurrer for want of equity. The cause of action, as stated

upon the petition, is merely a suit for merchandise furnished to Ingalls as receiver. The facts stated in the petition do not give the case any equitable features. They do not create the defendant, Ingalls, a trustee holding a fund for the use of the plaintiff. It was a simple contract debt owing by the receiver to the plaintiff, which the receiver failed to pay; and if the debt is not barred by the statute of limitations, and if the receiver has not been discharged from his office, the plaintiff would be entitled to recover a judgment at law against the receiver, as such. The demurrer, therefore, must be sustained, on the ground that there is no equity stated in the petition. It may be remarked that it was the duty of counsel, after removal, to reframe the pleadings according to the rules in equity, if he intended, as it may be inferred he did, both from his brief, and from the fact that this petition appears on the equity docket, and from his praying for general relief, that he wished this action treated as one in equity. As the demurrer for want of equity is sustained, the plaintiff may take leave either to amend his bill so as to make it state a cause in equity, or may have leave to refile the cause on the law side of the court, striking out from his petition the prayer for general relief.

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PROVIDENCE STEAM-ENGINE CO. v. HATHAWAY MANUF'G CO.

(Circuit Court, D. Massachusetts. March 9, 1897.)

No. 780.

1. REFORMATION OF CONTRACT—MISTAKE—ESTOPPEL.

Where a written contract for the sale of an engine contained a clause guarantying that the engine should develop a certain horse power at a boiler pressure of 100 pounds, the fact that the seller has brought an action at law to recover the balance of the purchase price, stating the warranty as it appears in the written contract, does not preclude him from maintaining a suit in equity to reform the contract upon the ground that the pressure at which the required horse power was to be developed was by mistake stated at 100 pounds instead of 130 pounds, as the effect of such a change will not be to increase the complainant's own right, but merely to deprive defendant of the right to maintain a cross action brought by him upon the warranty as stated by plaintiff in his action at law.

2. SAME—PLEADING.

In a suit in equity to reform a written contract on the ground of mistake, the allegations of the bill that the terms of the contract were agreed upon, that they were to be put in writing by plaintiff, and that both plaintiff and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, fully meet the objection that the bill states merely a case of unilateral mistake in making a proposition.

3. SAME.

The lapse of nearly three years from the making of an error in a contract to the filing of a bill to reform the contract, in the absence of a substantial change of condition, is not sufficient, under the circumstances alleged in the bill, to bar the plaintiff's right of reformation.

Williams & Copeland, for complainant.  
Charles W. Clifford, for defendant.