hundred thousand ($100,000.00) dollars in the treasury of the city of San Antonio realized from the sale of the sewer bonds for the purpose of building and constructing said sewers, that only so much of the work specified and mentioned in this contract shall be done as will absorb the amount in the treasury at this time; conditioned, however, that as soon as any amount not less than fifty thousand (50,000.00) dollars is realized from the remainder of said bonds and deposited in the city treasury, that then this contract shall be carried on until such sum or sums are absorbed, or said contract is fully carried out and completed, as hereinbefore contemplated and set out."

Viewing this provision in the light of the undisputed fact that at the time of making this contract both of the parties thereto had in mind the amount of the then estimated costs, which was also the amount of Hindry's bid, it is reasonable to conclude that the limit of the sum or sums to be absorbed was $331,209.45. The contention of the appellants is that the plans and specifications covered the whole area of the four districts into which the consulting engineer divided the surface of the city, calling for about 73 miles of sewer of specified dimensions and price for materials and work, which the contractor was bound to do and furnish, and the city was bound to receive if well done, and pay for at the contract price. It was estimated that there would be not more than 100 cubic yards of hard rock excavation, to be paid for at the price of $3 per yard, but the appellants claim that they have already made excavations that should be classed as hard rock excavations to the value at the contract price for that class of $117,095.69, and they have reason to believe that the same disproportion will obtain throughout the two-thirds of the projected work yet to be performed. It would strain the bias of interest or of advocacy to seriously suggest that this result was in the contemplation of either of the parties when this contract was made, in January, 1895. The order or decree of the circuit court refusing the application for a preliminary injunction is affirmed.

FLORIDA MORTG. & INV. CO., Limited, v. FINLAYSON et al.

(Circuit Court, S. D. Florida. February 24, 1896.)

EQUITY PLEADING—IMPERTINENCE.

Passages in a defendant's answer to a bill in equity, which, without alleging any facts which do not appear in the bill, or denying any allegations of the bill, consist merely of argument as to the effect of facts, already apparent in the bill, as amounting or not amounting to notice or to laches, and as to the legal rights of the defendant under state statutes, are impertinent, and, upon exception thereto, will be stricken out.

This was a suit in equity, brought in the United States circuit court for the Southern district of Florida by the Florida Mortgage & Investment Company, Limited, a corporation organized and existing under the laws of the kingdom of Great Britain, against Daniel A. Finlayson, as administrator of the estate of A. Florida Finlayson, deceased, and against Daniel A. Finlayson in his own right, for the removal of a cloud from title. The bill of complaint alleges that complainant was seised in fee of 800 acres of land, therein described, situated in the county of Hernando, and state of Florida, all of said lands being wild and unoccupied, and no one in actual possession thereof; that complainant derived title thereto from one J. Hamilton Gillespie, whose title was based on a deed executed to him by a master in chancery, dated April 23, 1889, under a final decree and sale in a foreclosure suit instituted by complain-

ant against Virginia H. Tucker and James F. Tucker, her husband; said Gillespie taking said master's deed in his own name, but as agent for complainant. Said bill further recites that at the time said mortgage was executed to it by said Tucker, to wit, on July 25, 1885, the public records of said Hernando county showed that the said Virginia H. Tucker was seised in fee of said lands, the title thereto having been in the name of her father, W. J. Bailey, who departed this life in Jefferson county, Fla., in 1872, seised of said lands; that on or about the 30th day of December, 1882, all the heirs at law of the said Bailey executed good and sufficient deeds to each other to the different tracts of land owned by the said Bailey at the time of his death, by one of which said deeds the title to the lands in question was vested in the said Virginia H. Tucker; that at the time of the execution of said mortgage, and at the date of said final decree, and up to the date of the institution of this suit the public records of said Hernando county showed no incumbrance or cloud on the title to said lands; that in June, 1895, the defendant, as administrator as aforesaid, obtained from the circuit court of Jefferson county, Fla., a writ of execution issued upon the order of said court upon scire facias proceedings to revive a certain judgment recovered by the said A. Florida Finlayson in her lifetime on the 6th day of September, 1875, in said court, against James F. Tucker, as administrator of the estate of W. J. Bailey, deceased, and after certain proceedings had thereon in said county of Jefferson the said execution was sent to the sheriff of said Hernando county, and under the instructions of defendant was levied upon about 7,500 acres of land in said county as the property of said Bailey at the time of his death, in which was embraced complainant's land, and said land was advertised and sold under said execution, and sheriff's deed executed thereto to defendant in his own right; that no transcript of said judgment was ever filed in Hernando county, and that complainant had no knowledge or notice of the existence of said judgment until said levy was made; that the laws of the state of Florida have at all times since the recovery of said judgment provided a method by which lands belonging to the estate of a deceased person situated in counties other than that where said estate was being administered could be proceeded against and sold to satisfy the indebtedness of said estate; that the method so prescribed is the only one by which lands so situated could be sold for the payment of such debts; that said method was not followed by defendant; that for a period of nearly 20 years after the recovery of said judgment no effort was made by the judgment creditor or her representatives, as complainant is informed and believes, to obtain the satisfaction of same out of the personal and real property belonging to the estate of said Bailey in said county of Jefferson, where said judgment was so recovered, although the amount of said judgment could have been realized within any reasonable time after its recovery, said estate having been at all times solvent, and having plenty of property, both real and personal, in said Jefferson county, out of which it could have been satisfied; that no execution ever issued thereon until June, 1895; that by reason of said delay and inaction on the part of both decedent and her representative they have been guilty of gross laches and neglect, which deprives the said defendant of all recourse against the lands of complainant for payment of said judgment, if such recourse could have ever been had. The bill prays that said levy of said execution on complainant's land and all proceedings had thereon, including the sheriff's deed, may be declared illegal and void, and the cloud on title occasioned thereby removed. The defendants answered the bill, and complainant filed three exceptions to certain paragraphs thereof, the language of which was as follows, on the ground of impertinence: "But defendant avers that no such record was requisite or necessary to give validity to the proceedings had under said judgment and execution. And the defendant denies the allegation in complainant's bill that it had no knowledge or notice of the existence of any claim or judgment of A. Florida Finlayson against the estate of William J. Bailey, deceased, until the levy of the said execution upon the lands described in said bill and the publication of the notice of the sale thereof, but, on the contrary, the defendant is informed and believes, and therefore alleges, that the complainant or its agent or attorney who passed upon the title to said lands, before the mortgage from Virginia F. Tuck-

er and James F. Tucker, her husband, to complainant was executed, was advised of the existence of said claim and judgment; that the records of Hernando county showed that the title to the lands described in complainant's bill was vested in William J. Bailey, and by dealing with his heirs as the owners of said lands, and accepting a mortgage thereon from Virginia F. Tucker, one of said heirs, and James F. Tucker, her husband, who was then administrator of the estate of William J. Bailey, the complainant was put upon notice of the death of said William J. Bailey, and upon notice that the property owned by William J. Bailey at the time of his death was subject and liable for the payment of his debts, and that the heirs held said lands from their ancestor subject and liable to the payment of any of his debts then outstanding and unsatisfied; and with this knowledge and notice, to put the complainant upon inquiry, it was incumbent upon the complainant to ascertain if any debts of said William J. Bailey remained outstanding and unpaid, and by the exercise of that reasonable and proper diligence required of the complainant under the circumstances it could have been easily informed from the public records of the county in which said William J. Bailey died, and where his estate was under the law being administered, of the claim and judgment aforesaid, and of the condition of the estate of said William J. Bailey, deceased. And the complainant cannot now claim any benefit from its own negligence, and from its failure to exercise reasonable and proper diligence, but should be left by a court of equity in the position it has voluntarily put itself by taking the chances that these lands would not be subjected to the payment of any debts of William J. Bailey, deceased." "Second. Defendant avers that the method alleged and set forth in complainant's bill of subjecting lands of decedents lying in different counties to the payment of debts is available only for administrators and executors of such decedents, and he denies that said method so prescribed is the only method 'by which lands so situated could be sold for the payment of such debts'; but, on the contrary, defendant avers that under the laws of the state of Florida real estate and personal property of a decedent are equally liable to levy and sale under an execution upon any judgment against the administrator or executor of such decedent. And that the method pursued in subjecting the lands of said William J. Bailey, deceased, to the payment of the judgment of A. Florida Finlayson, deceased, was in pursuance of, and expressly authorized by, the statutes of the state of Florida in such cases provided, and in obedience to and by virtue of the judgments and orders of a court of competent jurisdiction." "Third. And, further answering, defendant says that he denies that he, as administrator of the estate of A. Florida Finlayson, deceased, or that said A. Florida Finlayson in her lifetime, was guilty of such laches and neglect in the enforcement of the said judgment against the estate of William J. Bailey, deceased, as deprived this defendant, as administrator as aforesaid, of all recourse against the lands described in complainant's bill for the payment of said judgment; but, on the contrary, this defendant avers that the claim of said A. Florida Finlayson against the estate of said William J. Bailey, deceased, was duly and legally presented to the administrator thereof immediately upon his appointment, and was sued to judgment against said administrator within two months after the date of his appointment; that said suit has been a pending proceeding in the circuit court in and for Jefferson county since the institution of the same, and said judgment has remained unsatisfied, and the administration of the estate of said William J. Bailey has never been finished, nor the administrator discharged, and said estate is still opened and unsettled; that during the life of said judgment, and before action on the same was barred at law, this defendant, as administrator of the estate of A. Florida Finlayson, deceased, by scire facias proceedings continued the prosecution of the action commenced by said A. Florida Finlayson in her lifetime against James F. Tucker, as administrator of the estate of William J. Bailey, deceased, in the said circuit court of the Second judicial circuit of Florida in and for Jefferson county, and by the consideration and judgment of said court execution was awarded upon said judgment before rendered by said court in said action, to be levied on the goods and chattels, lands and tenements of which said William J. Bailey died seised or possessed; that the execution so awarded and issued upon the said judgment was levied first

upon all the lands in Jefferson county, Florida, of which said William J. Bailey died seised, and said lands were sold by the sheriff of Jefferson county, and the proceeds of the sale thereof duly credited upon said execution; that after the proper application of all the proceeds of such sale there still remained a large amount due upon said execution; that said execution was afterwards sent to the sheriff of Hernando county, and by him levied upon certain lands there situate of which said William J. Bailey died seised, including the lands described in complainant's bill, and the same was sold and conveyed to this defendant in his own right as herein aforesaid." The case came on for a hearing on said exceptions.

T. M. Shackleford and N. B. K. Pettingill, for complainant.
Thomas L. Clarke, for defendant.

LOCKE, District Judge. The allegation of the answer to which the first exception is taken alleges no fact, but is simply an argument as to what might be, under the law, presumptive notice. It is true that there is an allegation of denial, but the subsequent language shows conclusively that such denial is not a denial of fact, but a denial that the law of the case would not compel the presumption of notice. The exception should be sustained.

The portion of the answer excepted to by the second exception is solely and entirely confined to arguing a point of law, and the exception should be sustained.

The subject-matter of the answer to which the third exception is taken is the laches of the defendant. The bill had stated the date of the judgment and the date of the issue of the execution under it, and alleges laches. The answer stated no new facts, but simply alleged that the execution was sued out during the life of the judgment, and before it was barred at law. This was already apparent by the statements of the bill, and I cannot consider that this was any answer to the allegation of laches. It gives no reason why the judgment was not enforced before, and only alleges what necessarily appears to be claimed as an inference of law,—that, since the judgment was not barred at law, there could have been no laches. There is no allegation in the answer of the insufficiency of personal property to pay the debts of the estate at the time of obtaining the judgment, or any other matter which would, outside of the existence of the judgment and its life, which fully appeared in the bill, excuse or explain away such delay as is alleged in the bill, and which is claimed to be laches. No facts were alleged which did not appear in the bill, or which could assist the court in arriving at a conclusion as to whether or not there was laches; and it cannot be held to be an answer to the allegations of the bill, as it, in its allegations, coincides with them. The exceptions should be sustained.

UNION PAC. RY. CO. v. SCHIFF et al.

(Circuit Court, S. D. New York. June 6, 1896.)

INDEMNITY—AGREEMENT FOR BOND.

The U. Railway Company having learned that certain securities, belonging to it and deposited as collateral for loans from a firm of bankers

who had become insolvent, had been rehypothecated by such firm with K. & Co., the railway company, for its own protection, took up the loan from K. & Co., with the collaterals, and at the same time left with K. & Co. certain securities and gave to them an agreement that such securities, or an indemnity bond, which might be substituted if satisfactory to K. & Co., should be held for K. & Co.'s protection against claims, all suits and expenses. Three years later, the railway company brought suit against K. & Co. to obtain a redelivery of such securities, making the assignee and a receiver of the insolvent banking firm parties. *Held* that such redelivery would not be decreed against the will of K. & Co., who were entitled to insist upon the agreement, but that inasmuch as the probability of claims against them was very slight, the requirement of an indemnity bond, which must receive a reasonable construction, ought to be satisfied by the giving of a bond, limited as to time and amount, against future claims.

This was a bill in equity, in the nature of a bill of interpleader, filed by the Union Pacific Railway Company, in behalf of S. H. H. Clark and others, its receivers, against Jacob H. Schiff and others, composing the firm of Kuhn, Loeb & Co., C. W. Gould, as assignee of the firm of Field, Lindley, Wiechers & Co. for the benefit of creditors, and Norman S. Dike, as receiver of the assets of said last-named firm.

The Union Pacific Railway Company had borrowed various sums, amounting to $850,000, from the firm of Field, Lindley, Wiechers & Co., upon collaterals deposited with that firm. On and prior to November 27, 1891, the railway company was ready and offered to pay the loans, all of which, but one note, were then due, and redeem the collaterals, but the Field firm made excuses to postpone returning the collateral, and it was not returned, nor the notes paid. On November 27, 1891, the Field firm made an assignment. Shortly after the railway company learned that a part of its securities had been rehypothecated by the Field firm with Kuhn, Loeb & Co., as part of the collateral for two loans of £50,000 sterling each, made by Kuhn, Loeb & Co. to the Field firm in good faith and in the usual course of business. In order to protect its securities, the railway company arranged with Kuhn, Loeb & Co. to buy these loans with their collaterals. Accordingly, on December 14, 1891, the railway company gave its check for the amount of the loans to Kuhn, Loeb & Co., the latter transferred the notes and collaterals to it, and the railway company gave to them the following agreement:

"New York, Dec. 14th, 1891.

"Messrs. Kuhn, Loeb & Co. having this day transferred to the Union Pacific Railway Company two obligations of Messrs. Field, Lindley, Wiechers & Co., each for fifty thousand pounds sterling, dated November 7th, 1891, and November 14th, 1891, respectively, with the collaterals therefor as they now stand, to protect Messrs. Kuhn, Loeb & Co. against any and all claims by reason of the transfer, or to any of the collaterals, the Union Pacific Railway Co. leave with Messrs. Kuhn, Loeb & Co. the following: Eighty-five thousand dollars Oregon Short Line & Utah Northern Railway collateral trust bonds; eighty-five thousand dollars of Oregon Short Line & Utah Northern consolidated 5 per cent. bonds,—it being understood that the Union Pacific Railway Co. may substitute other securities satisfactory to Messrs. Kuhn, Loeb & Co., or an indemnity bond, if satisfactory to them. The protection is against claims, all suits, and expenses. The Union Pacific Railway Co. agrees that, in addition to the above deposit, it personally will protect Messrs. Kuhn, Loeb & Co. against all such claims, suits, and expenses.

"The Union Pacific Railway Company,
"By [Signed] James G. Harris, Treasurer."

Certain other parties afterwards established their rights to part of the collaterals hypothecated by the Field firm with Kuhn, Loeb & Co., and by them transferred to the railway company, and the same were returned to their owners, upon payment of their respective shares of the cost to the

railway company. More than three years having elapsed without the assertion of any claim against Kuhn, Loeb & Co., the railway company filed this bill to obtain a redelivery to it of the securities left with Kuhn, Loeb & Co. under the agreement of December 14, 1891. Proof was made by the complainant, without dispute, of all the facts. Kuhn, Loeb & Co. insisted upon their rights to retain the securities unless furnished with an indemnity bond unlimited as to time and amount. Gould, as assignee, asserted a right to the collaterals after payment of the loans, and Dike, as receiver, claimed to be entitled to such of the collaterals as were not owned by the railway company or other third parties, and that Kuhn, Loeb & Co. owed him for any surplus of the collaterals over the loans upon an accounting.

E. Ellery Anderson and Holmes & Adams, for complainant.

John E. Parsons, for defendants Kuhn & Co.

Jasper W. Gilbert, Frederic A. Ward, and James S. Bishop, for defendants Gould and another.

Jabish Holmes, Jr., for defendant Colgate.

COXE, District Judge. The agreement of December 14, 1891, provides "that the Union Pacific Railway Company may substitute other securities satisfactory to Messrs. Kuhn, Loeb & Co., or an indemnity bond, if satisfactory to them. The protection is against claims, all suits and expenses." The complainant now proposes to take the substituted securities from the possession of Kuhn & Co. and put nothing in their place, in short to ignore the agreement and proceed in all respects as if it had never been executed. The complainant insists that upon thepayment of the sterling notes the title of Kuhn & Co. to the collaterals was transferred to and vested in the complainant; that as matter of law the complainant took the title of the bankers and that the delivery of the collaterals could have been compelled by a judgment of the court. It is not thought necessary to decide what might have been the legal status had the complainant decided to rely upon its strict legal rights. It did not do so. It preferred to resort to negotiation. The result was the agreement of December 14th. This agreement was made intelligently and deliberately. There was no mistake of law or fact. It was made after the entire situation had been surveyed by eminent counsel whose ability to protect their clients' interests no one can dispute.

By the agreement of December 14th the complainant recognizes two propositions: First, that adverse claims to the collaterals might arise; and, second, that the bankers might be held liable. It is too late now to recede from this position. By recognizing the right of Kuhn & Co. to a reasonable indemnity the complainant obtained possession of the bulk of its securities it cannot now ignore the obligations thus imposed. The covenant to give a bond is as sacred as the bond itself and it will hardly be contended that had the complainant obtained possession of the collaterals by giving an indemnity bond, the court would release the sureties less than six years thereafter upon the doubtful theory that the bond was unnecessary. In short, the court is perfectly clear that the agreement of December 14th is a valid instrument which cannot be ignored. It must be dealt with in determining the rights of the parties.

The complaint alleges no offer to give a bond but simply a naked demand for the delivery of the substituted securities and its refusal. The only allusion to the subject in the proof relates to the informal negotiations between counsel in which the complainant contended that the proposed bond should be limited as to time and amount and the bankers insisted that it should be as broad as the agreement of December 14th. The court is of the opinion that this question should be disposed of in limine. If Kuhn & Co. are entitled to retain the securities it would seem an inconsequential proceeding to pass upon the rights of the other parties to the action. Obviously the first step is to get securities in a position where they can be taken fairly and legally from the possession of the bankers. Having reached this point the court deems it prudent to take the suggestion of counsel as to the future course of the litigation. If, as the court assumed at the argument and still assumes, counsel are animated by a desire to waive technicalities there should be no great difficulty in arriving at a fair solution of the problem. It may conduce to this end if the court states its present impressions as to the manner in which this may be brought about.

It must be apparent to all that the danger of any claim, other than those represented in this suit, being made against the bankers is almost infinitesimal. No one here asserts any personal liability against them. If, then, they are released from all liability by the complainant and the other defendants and their costs and expenses paid it would seem that a bond sufficient to secure them from future attacks would be sufficient. Such attacks are so improbable that they may be regarded as well-nigh impossible. It is true that the contract provides that the security shall be satisfactory to the bankers, but this provision must have a reasonable construction. The bankers ought not to demand a bond absurdly out of proportion to the risk. A bond limited as to time and amount will, in the circumstances, indemnify against every conceivable claim, and more than this the bankers ought not to require.

Enough has been said to indicate the difficulties which seem to prevent a satisfactory decision of the cause unless, by the assistance of counsel, the court is enabled to remove them. If the court can be assured that upon the final decision being rendered the various parties will release Kuhn & Co. from all claims and that the plaintiff has agreed with Kuhn & Co. as to the bond to be given it will proceed and determine the other questions involved. Counsel may be heard orally at Canandaigua on the 16th inst., at Utica on the 23d inst., or at New York in October, or they may submit their views in the form of short printed briefs at any time within two weeks from the date of the filing of this decision.

FOSTER et al. v. JETT et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1896.)

No. 656.

PROMISSORY NOTES—SEALS—ARKANSAS STATUTES.

Under the statutes of Arkansas and the constitutions of the state of 1868 and 1874, as interpreted by its courts, two kinds of promissory notes are recognized, those under seal and those not under seal, which differ only in the periods of limitation applicable to them, respectively, the former being barred in ten and latter in five years. Accordingly, *held* that, where a deed of trust in the nature of a mortgage recites that it is made to secure promissory notes, though not specifying that such notes are under seal, one who accepts a subsequent mortgage on the same property, more than five but less than ten years from the making of the first mortgage, cannot claim the benefit of the Arkansas statute (Acts 1889, c. 58) limiting suits to foreclose mortgages to the period within which actions may be brought on the debts secured, and providing that payments to continue the life of the debt, as against third parties, must be indorsed on the record before the statute has run. *Held*, further, that in such case the subsequent incumbrancer was bound to inquire whether the notes secured by the first incumbrance were executed under seal, and having failed to do so the first incumbrancer was not estopped from showing that the notes by him held were sealed instruments.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

D. F. Jett, as trustee, and W. B. Mallory and W. J. Crawford, who are the appellees, filed a bill against Thomas Foster and Vienna Foster, his wife, and against E. C. Hornor, trustee, Sidney H. Hornor, and Hamilton S. Hornor, who are the appellants, to foreclose a certain deed of trust in the nature of a mortgage, which was executed by Foster and wife on March 5, 1884, to secure the payment of certain notes that were drawn by said Thomas Foster in favor of the firm of Mallory, Crawford & Co., said firm being composed of the appellees W. B. Mallory and W. J. Crawford. A statute of the state of Arkansas, which was approved on March 25, 1889 (Acts Ark. 1889, c. 58, p. 73), contains the following provision:

"Section 1. That in suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, that when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate to revive said debt, or to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

The defendants to said bill of complaint, namely, Foster and wife, Edward C. Hornor, trustee, Hamilton S. Hornor, and Sidney H. Hornor, filed an answer to the bill, wherein they averred, in substance, the following facts: That the deed of trust in favor of Mallory, Crawford & Co. was executed as charged in the bill on March 5, 1884, to secure the notes therein specified, but that said notes were not executed under seal; that, if any payments had been made on said notes as was charged in the bill of complaint, such credits had never been indorsed on the margin of the record where the deed of trust was recorded as the aforesaid statute of the state of Arkansas required; that on January 10, 1894, Foster and wife executed a second deed of trust on a part of the lands covered by the first deed of trust in favor of E. C. Hornor, as trustee, to secure a certain indebtedness which Thomas Foster then owed