## GAINES ET AL. *vs.* BANK OF MISSISSIPPI.

This court is inclined to the opinion that *nul tiel corporation* may be pleaded either in abatement or in bar.

Under the plea of *nul tiel corporation*, to an action by a foreign corporation, the plaintiff must prove the act of incorporation, and that the corporation went into operation under the act.

To show that a corporation (a Bank) went into operation under its charter, it is not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such; and for this purpose, proof of one or more such acts is sufficient.

The execution of a note, by the defendant, to a Bank as a corporation, is sufficient to show that the Bank went into operation under its charter.

This was an action of assumpsit on a note by the Bank of Mississippi; defendant pleaded non-assumpsit and nul tiel corporation, to which plaintiff took issue: HELD, That under the issues, the execution of the note, by the defendant to the Bank, as a corporation, was competent evidence to prove that the Bank went into operation under its charter; but that it was erroneous for the court to charge the jury, under the issues, that defendant was estopped by the note from denying the existence of the Bank, inasmuch as, if the execution of the note was an estoppel at all, plaintiff should have replied it as such; and that the effect of the charge of the court to the jury, was to withdraw from them the consideration of the issue of nul tiel corporation.

An estoppel must be pleaded.

*Appeal from the Chicot Circuit Court.*

This was an action of assumpsit on a promissory note given to the Bank, on 1st January, 1841, payable nine years after date, for $2,500.

Defendants pleaded non-assumpsit, and that there is no such corporation as the plaintiff, and no such corporation exists, in manner and form as alleged in said declaration.

Issues were joined on both pleas.

The case was tried by jury, and verdict for plaintiff.

Defendants objected to the reading in evidence an act of the Legislature of the State contained in a pamphlet.

Defendants asked the court to instruct the jury, that under the pleadings in the cause, the plaintiff was bound to prove her corporate existence under the laws of Mississippi; and that she was authorized to make such contracts as that in the declaration.

That in order to prove her corporate existence, she must show a compliance with all conditions precedent prescribed to her in the charter; and that she was actually organized and went into existence as prescribed by the charter.

That where the existence of the corporation is put in issue, the contract sued on could not be taken as evidence of the existence of the corporation—as that would be taking for granted the very fact in issue.

That an act of the Legislature of another State is no evidence of facts.

The court refused all these instructions, except the first.

The court then on its own motion instructed:

That it is not necessary for the Bank to prove a compliance on her part with any conditions imposed on her by charter.

That by executing the note sued on, the defendants recognized the existence of the Bank, and under the pleadings could not deny it.

PIKE & CUMMINS, for the appellants. By the instructions given, the court directly took from the jury all consideration of the issue in respect to the existence of the corporation.

The note, not being under seal, could not have been replied, as an estoppel, to defendant's plea. 18 *J. R.* 490. The court therefore clearly erred in the last instruction.

When the existence of the corporation is put in issue by special plea, the plaintiff is bound to reply, and set out specially how she acquired her corporate existence, and show a compliance with all conditions precedent. *Bank of Auburn v. Aiken et al.*, 18 *J. R.* 137.

Although, when an act of incorporation is produced, it is not necessary to prove a compliance with every pre-requisite, yet it

is indispensable to produce the charter, and show continuous acts of user. *United States v. Stearns,* 15 *Wend.* 314. Something more than the mere existence of a note must be proven. *Williams v. The Bank of Michigan,* 7 *Wend.* 539.

The court by its instruction nullified the last issue, and released the plaintiff from the proof which she took upon herself.

MEANY, contra. The plea *nul tiel corporation* should have been plead in abatement. *Conard v. Atlantic Ins. Co.,* 1 *Pet.* 450. *Society, &c. v. Town of Pawlet,* 4 *ib.* 480. 5 *Eng.* 423. *Ib.* 516.

User is sufficient evidence of compliance with conditions precedent, except as against the sovereign. *Ang. & Ames on Corp. ch. 2, sec.* 3. And if not complied with they may, as in this case, be waived by subsequent legislation. *People v. Man. Co.,* 9 *Wend.* 351.

The act of incorporation was properly authenticated. 5 *Eng. Rep.* 516.

The execution of a note payable to a corporation estops the party to deny that there existed such a corporation, at the date of the note: if there has been a forfeiture, the debt cannot set it up as a defense. 8 *B. Mon.* 122. 1 *J. J. Marsh.* 380. 6 *B. Mon.* 601. 5 *Litt.* 47.

Mr. Justice WALKER delivered the opinion of the Court.

This was an action of assumpsit on a promissory note executed by the plaintiff in error to the Bank, to which they plead *non assumpsit,* and *nul tiel corporation;* on which pleas issues were formed, and a trial by jury, verdict and judgment for plaintiff in the court below.

The errors assigned and which we are called upon to decide, arise out of the instructions given by the circuit court to the jury. As the propriety of giving or refusing the instructions given or refused, must depend upon the nature of the issue and the amount of evidence necessary to sustain it, these become preliminary considerations, and will first be determined. Under the general issue, the contract was the only subject of consideration, and the

note was sufficient evidence to sustain the issue on the part of the plaintiff.

It is a question not altogether free from doubt whether *nul tiel corporation* should be plead in abatement or in bar of the action. For, although it relates to the disability of the plaintiff to sue, and in that respect partakes of the nature of abatement, yet as it is a perpetual, not a temporary disability, it is in that respect like a plea in bar, and we are inclined to believe comes within that class of defences which Chitty says may be plead either in abatement or in bar. 1 *Chitty Pl.* 446. At all events, it was in this case treated as a defence in bar by the parties in the court below and will be so considered here. Unlike the case of *Alderman and Council of Washington v. Finley,* 5 *Eng.* 423, this suit was commenced by a foreign corporation, and its corporate existence and powers put directly in issue by special plea.

As the court could not take judicial notice of the act of incorporation of a sister State, or that the Bank had gone into operation under it, it became necessary under this issue for the plaintiff to establish these facts by proof. The duly authenticated act of the General Assembly of Mississippi, read in evidence by the plaintiff, was certainly sufficient evidence to prove the grant of corporate power and its extent, but not that it actually went into existence as a corporation. To establish this latter fact, it was not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such, and for this purpose proof of one or more such acts was sufficient. The execution of the note in this instance by the defendants to the Bank as such corporation, which was the only evidence of user, was in our opinion sufficient to sustain the issue, so far as proof that the Bank went into operation was concerned. In support of this position, we find several decisions directly in point. In Kentucky, it has been held that by executing a note to a corporation, the defendants were estopped from denying its existence at that time. *Jones v. Bank of Tennessee,* 8 *B. Mon.* 123. 1 *J. J. Marsh.* 380. 6 *B. Mon.* 601.

In New York, it has been held that transactions of business with a Bank by the defendant was an admission that it had capacity to transact business as a corporation. *Bank United States v. Stevens,* 15 *Wend.* 316.

And in Alabama, where like issues were formed as in this case, the court in delivering its opinion said, "The plea of *nul tiel corporation* did doubtless put in issue the corporate existence of the plaintiff. But the notes themselves being executed to the corporation by its corporate name, was an admission by the defendant of the fact and prima facie evidence of the charter of the company, and user under it." *Montgomery Rail Road Company, use, &c., v. Hunt,* 9 *Ala. Rep.* 516.

From the view which we have taken of the issues and the evidence adduced to sustain it, we are of opinion that the only error committed by the circuit court in giving and refusing instructions to the jury, was in giving the last instruction given on the court's own motion. The effect of that instruction was to withdraw from the jury the consideration of the issue of *nul tiel corporation.* The instruction was, that by executing the note in suit, the defendants could not deny the existence of the Bank. It is true that the Kentucky decisions would, under the rule of estoppel, seem to sustain the circuit court to the full extent to which the instruction went; and even the Alabama courts give countenance to some extent to this rule, yet we cannot, in view of the decision in that case, taken all together, consider it as going that far. But allowing the execution of the note to be an estoppel, it is evident that the plaintiff should have replied setting it up. An estoppel cannot be taken by inference, but must be relied on in pleading. *Co. Litt.* 227, *a* 352. And STARKIE says an estoppel should be pleaded, and if not done, the court and jury are not bound by it: but the jury may find the matter according to the fact, and the court will give judgment accordingly. 1 *Stark. Ev.* 303. There is but little doubt that the note was competent, though, perhaps, not conclusive evidence of user under the charter, and in connection with the other evidence, was no doubt, sufficient to warrant a verdict in favor of the plaintiff; but of the

sufficiency of this evidence, the jury were the judges, and to tell the jury that a material fact in issue could not be denied, did in effect withdraw that fact from their consideration, or was an instruction that no proof was required upon it. In this there was error.

Because, therefore, the court erred in giving this instruction, the judgment must be reversed, and the cause remanded, to be proceeded in according to law.