FERGUSON ET AL. *vs.* STATE BANK.

The liquidation act of 1843, did not destroy the corporate existence of the Bank of the State. *Underhill* v. *State Bank*, 1 *Eng. R.* 135. *Murphey* v. *same*, 2 *ib.* 57.

To debt on a note, the plea of *nil debet*, sworn to, under our statute, puts in issue the execution of the note, and the *onus* is on the plaintiff.

Nil debet, sworn to, by one of several defendants, does not put in issue the execution of the note by the others: the plaintiff need only prove that the party denying executed the note.

To debt on a note by the State Bank, it is a good plea at law, by the security, that the Bank took a mortgage security from the principal, and gave him day of payment without the consent of the surety.

But under issue to such a plea, the defendant must prove that the board of directors of the Bank accepted the mortgage security.

Writ of Error to Pulaski Circuit Court.

This was an action of debt brought by the Bank of the State of Arkansas, against William D. Ferguson, George Redman, Francis B. Reed, and Wiley Lewis, and determined in the Circuit Court of Pulaski county, at the April term, 1846, before the Hon. JOHN J. CLENDENIN, Judge.

The declaration is founded on a note executed by the defendants, William D. Ferguson, as principal, and the other defendants, as securities, to the plaintiff, on the 7th day of February, 1841. The defendants, Ferguson and Redman, each filed two separate pleas: 1st, *nul tiel corporation*, at the institution of the suit, and the time of pleading; 2d. That the property, notes, moneys, assets and effects of the bank, were turned over to the receivers, under the act of 31st January, 1843, by means whereof the corporate existence of the bank then ceased. Demurrers to these pleas were sustained. The defendant, Redman, filed three other pleas: 1st. *Nil debet*, verified by affidavit; 2d. That the plaintiff, after the note fell due, in consideration of a mortgage security for the debt, extended the time of payment to the defendant, Ferguson, the principal debtor, without the consent or knowledge of the other defendants, who are securities;

3d. A similar plea specifying the conditions of the mortgage, &c. Plaintiff took issue to the first and third of these pleas, and demurred to the second, which demurrer the court sustained. The issues were submitted to a jury, verdict for plaintiff, and final judgment against all the defendants. Redman moved for a new trial, which was refused, and he excepted. From Redman's bill of exceptions, it appears that, on the trial, the plaintiff proved by N. T. Gaines, who was clerk in the bank at the date of the note sued on, that the note was "chiefly filled up in his hand-writing; that he had seen the hand-writing of Redman, but did not recollect much about it, and could not swear to it; Redman wrote a bad hand; did not know that he ever saw him write his name; thinks the signature to the note sued on, purporting to be his, resembles Redman's hand-writing, but thinks it is, perhaps, written better than his hand-writing."

John H. Crease, cashier of the bank when the note was executed, testified that he was not sufficiently acquainted with Redman's hand-writing to swear to it; could not say that the signature to the note was his.

S. H. Hempstead testified that he had seen Redman's hand-writing some two or three years before the trial; he received letters from him, which, from subsequent conversation with him, he knew to be genuine. He could not swear that the signature to the note was genuine—never saw him write—thinks the signature to the note resembles Redman's writing, but thinks it is a more cramped hand-writing than his. Has not seen Redman's letters for about two years, and never examined them with the view of ascertaining the genuineness of the signature to the note sued on.

Plaintiff, after offering the above testimony as to Redman's signature, proposed to read the note sued on to the jury, to which Redman objected, but the court overruled the objection, and he excepted.

Redman then, after proving its execution by John H. Crease, introduced the mortgage set out in his last plea, to which was appended a certificate of its acknowledgement by a magistrate, and a certificate of the recorder of Crittenden county, that the mortgage was filed for record in his office on the 10th September, 1841, the day it bears date.

Crease also testified that the said mortgage was sent to the bank by Ferguson soon after its execution and recording; and the attorney for the bank admitted that it had remained in the possession of the bank ever since. Crease also testified that after the note sued on fell due, on the 14th August, 1841, Ferguson made a proposition to the bank, in writing, to consolidate all his individual debts due the bank into one note, and give a mortgage on his property to the bank, to secure the payment thereof, payable in ten yearly installments, with curtail and interest as required by the rules and charter of the bank.

That Crease was then cashier of the bank, and was ordered by the board of directors of the bank, to inform Ferguson that the charter of the bank did not warrant an extension of the time of paying his debts beyond the period of five years. That on the 26th August, 1841, and 1st Sept. 1841, Crease, as such cashier, wrote to Ferguson, giving him the information ordered to be given by the board of directors as aforesaid. That the above mortgage was sent to the bank by Ferguson, upon the receipt of the information aforesaid, and continued in the possession of the bank. That the debt sued for in this case was to be embraced in the arrangement with Ferguson, and was embraced in the indebtedness named and mentioned in said mortgage. It was the practice of the bank to indulge parties principal, who were exerting themselves to secure the debts due the bank, and not to sue during the pendency of negotiations to secure the bank. That nothing was done with the note sued on in this case from the time it fell due until the present suit was instituted thereon.

On cross examination by plaintiff, Crease testified that said mortgage was received by the bank in Sept. 1841, together with Ferguson's note for the debt therein mentioned, and no action was had thereon until Nov. 1841. In Nov. 1841, the board of directors of the bank required that Ferguson should furnish a certificate of the clerk of Crittenden county, that there were no liens on the property contained in the mortgage; and should also procure a relinquishment of his wife's dower therein. That he simply informed Ferguson (in answer to his proposition to give a mortgage), that the bank could not extend the time of payment to ten years, but only to five, as directed by the directors, leaving the inference to be drawn by Ferguson, that

the bank would accept the proposition at five years. Witness never knew of any acceptance by the bank of the mortgage of Ferguson.

Hempstead, who was a director and attorney for the bank at the time referred to by Crease, testified that the said mortgage was received by the bank in Sept. 1841, and in November, it was placed before the board of directors by Crease, cashier. That witness advised that the said mortgage should not be accepted by the bank until Ferguson should furnish a certificate of the clerk of his county, that there were no liens on his property, and also a relinquishment of his wife's dower therein. The board of directors then directed that Ferguson be informed that such certificate and relinquishment were necessary to render the deed acceptable to the bank, and that Ferguson should be requested to furnish the same; and that the bank would not depart from its rule to require personal security on all notes received by it. That this information was given to Ferguson; and he often disputed with witness about the matter, and insisted that, under the charter, the bank was bound to accept the individual note of himself, which was sent up with the mortgage to the bank. That witness informed him that the bank never would accept such note. Witness was director of the bank for some time after the dates aforesaid, and was almost always in attendance at the meetings of the directory, and he never knew of the acceptance of Ferguson's proposition by the bank, and it never was accepted to his knowledge. That Ferguson never, to his knowledge, furnished the certificate that there were no liens on his property, or the relinquishment of his wife's dower. This was all the evidence.

At the request of the bank, the court instructed the jury as follows:

"1st. That the note sued on and presented before the jury, in this case, is evidence before them, and that if the jury believe from the testimony, that Redman signed the note, they should find for the plaintiff.

2d. If the jury believe from the testimony, that the mortgage of Ferguson, read in evidence, was not accepted and received by the bank, they should find the issue on the 2d plea for plaintiff." To the giving of which instructions, Redman excepted.

Redman asked the following instructions:

"1st. That the plaintiff, under the issue to the plea of *nil debet,* must have proven to the satisfaction of the jury that the note sued on was executed by the *parties,* and in the manner stated in said declaration, before she is entitled to a finding on that plea:

2d. That if the jury believe from the evidence, that in consideration of the mortgage produced to the jury being executed and delivered to the bank, that the bank delayed and gave time of payment to Ferguson, the principal debtor, the securities are released from liability on the note:

3d. That under the plea of *nil debet,* the plaintiff is bound to prove to the satisfaction of the jury, that Redman did execute and deliver said note to the plaintiff, or to some one else to be used and negotiated."

The court refused the first two of these instructions, and gave the third; and Redman excepted to the refusal of the first two.

Defendants brought error.

BERTRAND & CUMMINS, for plaintiff.

LINCOLN, contra.

JOHNSON, C. J. The Circuit Court ruled correctly in sustaining the demurrer to each of the pleas of Ferguson, and also the two first filed by Redman. They are all substantially the same, and nothing more nor less than pleas of *nul tiel corporation.* The point presented upon these pleas was fully discussed and definitively settled by this court in the case of *Underhill* v. *The State Bank,* 1 *Eng. Rep. p.* 138; and in *Murphy* v. *The Same,* 2 *Eng. Rep. p.* 58. Redman also filed three additional pleas. The first of these was *nil debet,* which he verified by his affidavit; to this plea the Bank filed her similiter. We will first proceed to test the correctness of the finding and judgment upon the issue formed upon this plea. The 104 *sec.* of *chap.* 116 of the *Revised Code,* provides that, "The pleas of *nil debet* and *non assumpsit* may be filed in all actions of debt or assumpsit founded on any instrument of writing not under seal; but such

pleas shall not put in issue the execution of such writing unless the same shall be verified by affidavit." It was clearly the design of the Legislature, under this provision of the Statute, that where a party should interpose the plea of *nil debet*, in an action of debt founded upon an instrument of writing not under seal, and should also support it by his affidavit, that it should rebut the legal presumption of the genuineness of the signature, and consequently throw the *onus* of proving that fact upon the plaintiff. This being the legal effect of the plea verified by affidavit, the question to be met and decided is, whether the Bank made out her case by competent testimony. It is manifest that the plaintiff below utterly failed to prove that the signature of Redman was his own proper hand-writing, or that it had been placed upon the note by his authority. Neither of the witnesses introduced to that point would go so far as to say that they were sufficiently acquainted with his hand-writing to enable them to establish its identity. So far from showing that the signature is genuine, Hempstead, who seems to be best acquainted with his hand-writing, gives it as his opinion that the hand was more cramped than that of Redman. It would be difficult to conceive how the jury arrived at the conclusion from the testimony that the signature was either placed upon the note by Redman or by his authority. The proof is totally insufficient to establish either state of case.

The plaintiff below also demurred to the fourth plea interposed by Redman. This alleges in substance that the Bank, after the note sued upon fell due, accepted from Ferguson, the principal debtor, a mortgage by way of security for the debt, and extended the time of payment, and that too without his knowledge or consent. It is contended that this matter, admitting it to be true, is not a fit subject for the cognizance of a court of law, and that it could alone be made available in a court of equity. This court in the cases of *Hempstead and Conway* v. *Watkins, adm'r of Byrd,* when discussing this point, used the following language, to wit: "The leading case upon this subject is *Rees* v. *Barrington,* 2 *Ves.* 540, in which it was definitely settled that if the obligee in a bond with a surety, without communication with the surety, takes notes from the principal and gives further time, the surety is discharged. Since that case, the giving of time has

been considered a settled subject of defence in equity, and has never been doubted. This principle having become firmly engrafted in the system of equity jurisdiction, courts of law, acting upon the same broad and liberal principles of equity, have adopted the same rule as the subject of legal remedy, except in cases where the surety was estopped, as, for instance, by his bond, from averring his suretyship in a court of law. But Mr. JUSTICE STORY remarks, 'But still the jurisdiction now assumed in courts of law upon this subject, in no manner effects that originally and intrinsically belonging to equity.'" *Com. on Eq. Ju.* 475. If this doctrine be correct, it is thought that for a much stronger reason would the surety be exonerated when the creditor had taken a mortgage upon property for the avowed purpose of securing the debt sought to be recovered, and in consideration of the mortgage extended the time of payment. We consider it clear from the authorities that the matter set up in the plea is pleadable as well at law as in equity, and if true and supported by satisfactory proof would fully and completely exonerate the surety; the demurrer was therefore improperly sustained. The fifth and last plea of the defendant, Redman, is of the same import of the fourth, but sets out more specifically the terms and condition of the mortgage. Upon this plea the defendant took issue, and the point to be determined is whether it was sustained by the testimony. It was not sufficient for Ferguson, the principal in the note, to have made the deed and forwarded the same to the Cashier of the Bank, but it was of the very essence of the defence that the whole arrangement was accepted and ratified by the board of directors. They were the only tribunal which had authority to make such arrangements, and if in their judgment it should be deemed expedient, to release the securities. The testimony is clear and conclusive that the board never accepted the deed and consequently never consented to give time. Hempstead testified that when the deed was presented to the board for acceptance or rejection, they directed that Ferguson be notified that in order to render the deed acceptable to the Bank, it would be necessary for him to furnish the certificate of the clerk of his county, that there were no liens on his property, and also a relinquishment of his wife's dower. It is not in evidence that any such certificate was ever fur-

nished, or that his wife's dower was relinquished, and it was expressly upon that condition that the deed was to be accepted and time to be given. This being the state of case, we think that the plea was not sustained by the testimony. This brings us to the consideration of the instructions given and refused by the court. The plaintiff below moved the court to instruct the jury that the note sued upon and presented before the jury, was evidence before them, and that if they believed from the testimony that Redman signed the note they should find for her, and also that if they believed from the testimony that the mortgage of Ferguson, read in evidence, was not accepted and received by the Bank, they should find for her on the issue formed upon the third plea. The court erred in giving the first instructions. It did not follow that the jury should find for the plaintiff in case that they were satisfied that the signature was genuine and placed there by his own proper hand. This might have been strictly true, and yet he might have been released and exonerated by the exceptance of the mortgage and the extension of time set up in another plea. So that in order that the instruction should have been commensurate with the case as presented by the pleading, it was necessary that it should have gone to that extent. The second instruction was properly given. The defendant, Redman, also moved three instructions, the two first of which were refused and the third was given by the court. He first moved the court to instruct the jury that the plaintiff below under the issue on the plea of *nil debet* must have proven to their satisfaction that the note sued on was executed by the parties and in the manner stated in said declaration, before she was entitled to a finding on that plea. The second is, that if they should believe from the evidence that in consideration of the mortgage produced to them being executed and delivered to the Bank that she delayed and gave time of payment to Ferguson, the principal debtor, the securities were released from liability on the note. And thirdly, that under the plea of *nil debet,* the Bank was bound to prove to the satisfaction of the jury that Redman did execute and deliver said note to her, or to some one else to be used and negotiated. The court erred in giving the first instruction. The plea only put in issue the signature of Redman; the signatures of the other defendants, were proved by the note itself, as they

had taken no steps to impeach it. The second instruction was properly given. The third one should also have been given to the jury, as it is clear that the onus of proving the signature of Redman was thrown upon the Bank. We think, therefore, that for the reasons assigned, the court below erred in refusing a new trial. The judgment of the Circuit Court is consequently reversed and the cause remanded with directions to permit both parties to amend their pleadings if they desire to do so, and also that the same be proceeded in according to law and not inconsistent with this opinion.