knowledge or information concerning the alleged execution and delivery of the memorandum and articles of association are insufficient, because they relate to matters which are of record, and of which the defendant can inform itself, or to such things as are presumptively already within its knowledge, and therefore it is not at liberty to controvert the allegation otherwise than by a positive denial; citing, *Heatherly* v. *Hadley*, 2 Or. 275; *State* v. *McGarry*, 21 Wis. 500; *Hance* v. *Rumming*, 2 E. D. Smith, 48; *Curtis* v. *Richards*, 9 Cal. 38; *Nelson* v. *Murray*, 23 Cal. 338; Pom. Rem. § 641; Moak's Van Santv. Pl. § 517. But none of these authorities go so far as to hold that because the subject of an allegation in a pleading is of record, that therefore the party answering or replying thereto must take the trouble to inform himself so as to be able to deny the allegation positively, if at all. A party may, by the force of a statute, have constructive notice or knowledge of the existence and contents of a private writing duly admitted to record in a public registry, but there is no presumption that he has any actual knowledge or information on the subject, unless it also appears that he had some connection with the transaction contained in the record or relation to the proceeding out of which it grew. The rule was long ago stated by Mr. Justice FIELD in *Curtis* v. *Richards*, *supra*, as follows:

"If the facts alleged are presumptively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description, or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as *must* be within the personal knowledge of the defendant, he may answer according to his information and belief."

—Or, rather, he may deny knowledge or information thereof sufficient to form a belief. See, also, on this point, Pom. Rem. § 641, wherein it is said in effect that a party may controvert an allegation by a denial of any knowledge or information thereof whenever such denial would not, in the light of the circumstances, appear to be palpably false.

Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it, or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information

of the matter which he once had and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances. And if such a denial is improperly made, it may be stricken out as sham—manifestly false, in fact. But it is not for that reason either "frivolous" or "immaterial." That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material.

Another ground of this motion, as set forth in the brief, is that the denial of the plaintiff's corporate existence is a plea in abatement, and, being pleaded with a defense to the merits, it is to be considered as waived and abandoned; citing rule 40 of this court; *Hopwood* v. *Patterson*, 2 Or. 49; *Oregon Cent. Ry. Co.* v. *Wait*, 3 Or. 91. And, first, it is not absolutely necessary to strike out of an answer matter in abatement which has been waived by a subsequent defense, in the same answer or otherwise, to the merits. Being waived by such subsequent pleading, it is impliedly out of the case. But it may be convenient, particularly in a doubtful case, to move to strike out before going to trial, so as to ascertain and determine the material issues in the case. But such motion, if it includes the whole answer, as in this case, must fail; and should, in my judgment, be made on the ground that the matter being waived has become redundant or irrelevant.

There is no doubt that the rule and authorities on the subject of pleading matter in abatement with matter to the merits is as stated by counsel for plaintiff. But are these denials of the plaintiff's corporate existence generally, or of particular facts necessary thereto, or of its power to make the contract in question, pleas in abatement or in bar of the action? These denials are equivalent to an allegation that the plaintiff is not only without power to make this contract, but is really a fictitious person. A plea that the plaintiff is a fictitious person is sometimes classed by the text writers as a plea in abatement. 1 Chit. Pl. 482; Gould, Pl. c. 5, § 38. But the latter, in section 60 of the same chapter, says: "That the plaintiff never was *in esse*, seems also to be a good plea in bar; for that a right of action should exist in favor of an imaginary person is plainly impossible."

This is not a case, where an admitted cause of action is being prosecuted in the name of a fictitious person, like *Doe* v. *Penfield*, 19 Johns. 308. In that case the fact that the plaintiff was a fictitious person was pleaded in abatement of the action, while the cause of action or indebtedness of the defendant to the real party in interest was not controverted. But this is a case in which the cause of action—the liability of the defendant—is bound up in and dependent upon the legal existence of the alleged plaintiff, and a denial or defense which puts that fact in issue is to all intents and purposes a plea in bar, and, unless expressly pleaded in abatement merely, should be so considered.

It is also contended by counsel for the plaintiff that the defendant, having contracted with the plaintiff as a corporation existing under the laws of Great Britain by the corporate name of "The Oregonian Railway Company, (Limited,") for the lease of its railway, is not now permitted to deny such corporate existence or the power to make such contract. The law is well settled that a person who contracts with an apparent corporation as such is estopped, when sued on such contract, to say that the plaintiff had no corporate existence or power to make such contract. A corporation, like an individual, when sued on a contract may set up as a defense its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such want of power or capacity as a defense to an action by the corporation for a breach thereof. And the reason of the distinction is that legal disability, as in the case of a minor, is a defense personal to the party who is under it, and cannot be taken advantage of by another. *Cowell* v. *Springs Co.* 100 U. S. 61; Bigelow, Estop. (3d Ed.) 464, 465. But, notwithstanding this, the defense of a want of corporate existence or power, if made, is not a "frivolous" one. A defense is only "frivolous" when it contains nothing that can affect the plaintiff's case. *Witherell* v. *Wiberg*, 4 Sawy. 233. But these denials, unless the plaintiff sets up and claims the benefit of the estoppel whenever the opportunity occurs, are a good defense to the action. They are material, and if the plaintiff waives the estoppel and goes to trial on the issue arising thereon, and fails to prove its corporate existence and power, the verdict and judgment must go against it.

The matter which may estop the defendant in this case from denying the corporate existence of the plaintiff is the fact of its contracting with the latter as such corporation. If this fact did not already appear in the complaint, the plaintiff could not have the benefit of the estoppel, unless he set it up in a replication, and that is the way in which the point is generally made in the pleadings. But in this case, the matter which operates as an estoppel—the contract of leasing—is set forth in the complaint. In such case the defendant may claim the benefit of the estoppel by a demurrer to the plea, which contains the defense of a want of corporate existence or power. 1 Chit. 634; Bigelow, Estop. (3d Ed.) 591. I have not seen a precedent of such a demurrer, but the form may be readily devised from the usual replication of an estoppel to a plea. The demurrer should not be general, that the facts contained in the plea do not constitute a defense to the action, but special, and to the effect that the defendant ought not to be heard or allowed to say or allege that the plaintiff is not a corporation, or has no power to make the contract sued on, contrary to its own acknowledgment and deed as appears by the complaint and as admitted by the answer. The first, second, third, and part of the fourth and fifth of these denials are intended to and do controvert the corporate existence and power of the plaintiff, and cannot, therefore, be