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

considered frivolous; and the same may be said of the denial of the defendant's power to enter into this contract. But the question of the plaintiff's corporate existence or the power of it or the defendant to execute the lease, should more properly be made by demurrer to the complaint.

The denial of indebtedness is clearly frivolous; for, taken as a whole, it only amounts to an averment that all the prior installments of rent have been paid. So of the denial that the plaintiff has complied with the laws of the state on the subject of foreign corporations. The act requiring certain foreign corporations to comply with certain provisions thereof before doing business in the state, has no application to railway corporations, and is confined in its operation to the corporations mentioned in the title thereof. *Oregon & W. T. & I. Co.* v. *Rathbun*, 5 Sawy. 32. But the motion to strike out on the ground of frivolousness being taken to the whole answer, cannot be allowed in part, and is therefore disallowed altogether.

The defendant also moves for leave to file a third amended answer containing the same matter as the one under consideration, with two additional affirmative defenses. Without considering its materiality, I think proper to allow it to be filed, and thus give the plaintiff an opportunity to meet the defenses attempted to be made by it, in the light of this decision, and as it may now be advised.

UNITED STATES *v.* GORDON and others.

(*District Court, D. Minnesota.* October Term, 1884.)

1. CONSPIRACY TO DEFRAUD UNITED STATES—REV. ST. UNITED STATES, § 5440—INDICTMENT—DEMURRER.
   Section 5440 of the United States Revised Statutes makes it a crime to conspire to defraud the United States in any manner, and a count in an indictment is not demurrable because it charges a conspiracy without setting forth the means by which the fraud is to be consummated.

2. SAME—FRAUDULENT ENTRY OF PUBLIC LANDS—FALSE AFFIDAVITS.
   A count in an indictment under Rev. St. § 5440, charging a conspiracy to defraud the United States by presenting for approval to the register and receiver of a land-office false and fraudulent affidavits and proofs of settlement and improvement under the pre-emption law of 28 persons, stating that such persons were entitled to enter public lands, and had severally complied with the pre-emption laws, and had severally entered such lands for their individual benefit and not for speculation, is sufficient.

3. SAME—ENTRY FOR SPECULATION.
   A count in an indictment under section 5440 of the United States Revised Statutes, charging a conspiracy to defraud the United States by hiring 28 persons to enter at a land-office, under color of the pre-emption laws, certain public lands of the United States, solely for the purpose of selling the same on speculation to defendant, and L., and some other person to the grand jury unknown, is not demurrable.