NICHOLAY ET AL. *vs.* KAY.

The declaration averred that the bond sued on was made to *Kay*, by name and description of the *Bank of the State of Arkansas*, through mistake—Held that it is good upon demurrer, upon motion in arrest of judgment, or upon writ of error.

Such an averment is a material, traversable allegation, upon which issue may be taken, and if denied by plea, must be supported by proof to entitle the plaintiff to a recovery.

The plea of *non est factum* does not put such an averment in issue, but only the execution of the deed, and its continuance as a deed at the time of the plea, and the only proof required of the plaintiff under the issue is, first the sealing, and second the delivery of the deed.

Writ of error to the circuit court of Pulaski county.

THIS was an action of debt, brought by Nimrod E. Kay against John B. Nicholay and William D. Taylor, partners under the style of Nicholay and Taylor, Henry F. Pendleton, and John Robins; and determined in the circuit court of Pulaski county, at the November term, 1843, before Judge Clendenin.

The substance of the declaration follows:—Plaintiff complains of defendants that they render to him $1096.22, which they owe to and detain from him.

For that on the 12th day of October, 1840, at, &c., the defendants John B. Nicholay and William D. Taylor, by their partnership name and style of Nicholay & Taylor, and the said Pendleton and Robins, made their certain joint and several writing obligatory, sealed with their seals, &c., the date whereof, &c., and then and there delivered the same to the plaintiff, whereby the said Nicholay & Taylor as principal, and the said other defendants as securities, jointly and severally promised to pay, *by mistake*, to the *Bank of the State of Arkansas*, or order, when, in truth and in fact, the said writing obligatory was, at the time of making thereof, meant, intended and understood, by the said plaintiff and the said defendants, to be payable to the said Nimrod E. Kay, or order, the said sum of $1096.22, eighteen months after date thereof, *negotiable and payable at the principal Bank in Little Rock*, without defalcation, for value received, which said period has elapsed.

Second count—That the defendants, on, &c., at, &e., made their certain other joint and several writing obligatory, sealed with their seals, &c., the date whereof is, &c., and thereby then and there promised to pay, eighteen months after the date thereof, one thousand and ninety-six dollars and twenty-two cents, *negotiable and payable at the principal bank in Little Rock* without defalcation, for value received, and then and there delivered the said writing obligatory to plaintiff; and by such delivery they the said defendants, in fact and in truth, promised and bound themselves to pay when, and to the said plaintiff, or order, as the legal holder of said writing obligatory, the said last mentioned sum of money, in manner and at the place aforesaid, although, by mistake, the said writing obligatory is payable, on the face thereof, *to the bank of the State of Arkansas,* or order, but the plaintiff avers that the said bank never had, at any time, any interest, legal or beneficial, in said writing obligatory, but that the same, and every part and parcel thereof, was and is the property of the plaintiff, &c.

Third count—That the defendants, on, &c., at, &c., made their certain other joint and several writing obligatory, sealed with their seals, &c., the date whereof, &c., and then and there delivered the same to the plaintiff. Whereby, and by means whereof, they the said John B. Nicholay and William D. Taylor, by their said partnership name of Nicholay and Taylor, as principal and the said other defendants as securities, in fact and in truth, jointly and severally promised to pay to the said plaintiff, by the description and designation of the *Bank of the State of Arkansas,* or order, 18 months after the date thereof $1096.22, negotiable and payable at the *principal bank in Little Rock,* without defalcation, for value received, which period has long since elapsed. And the said plaintiff avers that, at the time of making the said writing obligatory, it was meant, intended and understood, by the said plaintiff and the said defendants, to be payable to the said plaintiff, or order, by the said description of the bank of the State of Arkansas, and that he was constituted and made, by said delivery to him, the legal holder thereof, by means whereof an action hath accrued to the plaintiff, &c. The breach was in the usual form.

On oyer the bond sued on was filed, and was as follows—

"*Little Rock, October* 12*th,* 1840.

$1096.22.

Eighteen months after date we Nicholay & Taylor as principal, and Henry F. Pendleton and John Robins as securities, jointly and severally promise to pay to the *Bank of the State of Arkansas,* or order, one thousand and ninety-six dollars and twenty-two cents, *negotiable and payable at the principal bank in Little Rock,* without defalcation, for value received. Witness our hands and seals, (and the cashier of said bank is hereby authorized to insert the date on the day of the discount thereof.)

NICHOLAY & TAYLOR, [SEAL.]
HENRY F. PENDLETON, [SEAL.]
JOHN ROBINS, [SEAL.]"

The defendants demurred to the declaration, and for causes assigned—

1st, That the writing sued on is declared to be the joint and several writing obligatory of all the defendants, whereas upon oyer thereof the same appears to have been executed by the defendants Nicholay and Taylor by their partnership name, and is not by the law of the land their writing obligatory.

2d, That the writing declared upon appears to be executed in favor of the Bank of the State of Arkansas and not in favor of the plaintiff.

3d, That the declaration aforesaid, and each and every count thereof, shows no such contract as will or can entitle the plaintiff to maintain his action thereof against the defendants.

4th, That the declaration and matters therein, in manner and form, &c., are not sufficient," &c.

The court overruled the demurrer, and the defendants put in a general plea of *non est factum;* upon which issue was taken.

By consent, the case was submitted to the court, sitting as a jury, and after hearing the evidence, the court found, "that said writing is the act of the said defendants," and rendered judgment accordingly for the plaintiff.

From a bill of exceptions, taken by the defendants, it appears

that the following testimony, in substance, was adduced on the trial.

It was proven, by Jas. De Baun, that the signatures of the firm of Nicholay & Taylor to the original writing sued on, was the signature of that firm. That they were in partnership at the date of the bond, and the signature was in the hand-writing of Taylor. About the date of the bond, they had told witness that they had purchased of plaintiff a stock of goods, for about $3,000, for which he understood the bond in question and two others had been given, and were to be paid in Arkansas money, and that one of the bonds had been paid to plaintiff in such money, without objection on his part.

By John H. Crease, Esq., Cashier of the Bank of the State of Arkansas, that said bank had not at that, or any other time, any interest in the bond sued on—that Nicholay & Taylor, nor either of them had, at any time, any account in the bank, and that the bond was never presented to the bank for discount.

By S. H. Hempstead, Esq., that Nicholay & Taylor never denied, but admitted the execution of the bond, but claimed the right to pay it in Arkansas money, and expressed a willingness to pay it to plaintiff in such money. He also proved the signatures of Pendleton and Robins. It was further proven, that the State Bank was not in the habit of discounting notes, bonds or bills having longer to run than six months, from 1840, until it went into liquidation in the year 1842, but there was no rule against it, and it might have been done.

It was further proven, that, at the maturity of the bond, it was presented to the cashier of the bank for payment, by a notary public at the request of the holder, Kay; that the cashier answered that there was no funds in bank to meet its payment, and that it was thereupon regularly protested for non-payment, &c.

The defendants brought the case to this court, by writ of error, and assign as error:

That the judgment of the court below was for Kay, whereas it should have been for plaintiffs in error.

ASHLEY & WATKINS, for the plaintiffs. The plaintiffs in error make the following points:

1st, That the insufficiency of the declaration is not cured by the verdict. *Martin & Van Horn vs. Webb,* 5 *Ark.* 74.

2d, It is a fundamental rule that the *allegata et probata* must correspond. The plaintiff below, in his declaration, violated that rule by offering to contradict and destroy by parol testimony, the plain, positive and unambiguous language of a sealed instrument.

3d, The intention of the parties appears on the face of the obligation that it should be payable to, and discounted by the bank. This court knows judicially that there is such a person or corporation as the bank of the State, and the plaintiff below does not pretend that he was usually known by that description.

4th, If the obligation was knowingly made to the bank, and delivered to the plaintiff, Kay, it was not made at all. It is simply void, the allegation of making, includes that of delivery.

5th, If the obligation was made by mistake, it must mean that the obligors made the instrument to the bank, when they supposed they were making it to Kay. Then it is not their deed.

6th, Parol evidence is admissible to show the meaning attached to the words used, (this principle runs through a vast range of cases); but never to show that the party did not use the words he has used in the instrument. *Vide Grant vs. Naylor,* 4 *Cranch,* 224.

7th, There was no need to break down the old and established rules of pleading and evidence. If the obligation was made to the bank, Kay, as the holder, could have sued in the name of the bank for his use, and he would have been protected in his right. If there was any fraud, accident, or mistake in its execution, he could have had adequate relief in equity.

8th, If the declaration, as we contend, showed no cause of action on its face, it does not come within the rule laid down in *Janett ad. vs. Wilson ad.,* 1 *Ark. Rep.* 137.

PIKE & BALDWIN, on same side. Every fact proven in this case is reconcilable with the hypothesis that the bond, when executed,

was intended to be discounted in bank; and many of the facts are explainable on no other hypothesis.

This case falls within the ordinary principle that parol evidence is not admissible to show an intention contrary to the express words of the instrument, and where there is no ambiguity. The admissibility of parol evidence to substitute one name for another depends on this, whether the evidence is necessary to give an effective operation to the instrument, or whether without that evidence there appears to be sufficient to satisfy the terms of the instrument and the intention of the maker as expressed on its face. *Beaumont vs. Fell,* 2 *P. Mons.* 140. 1 *Cowen's Phil.* 531, 532. *Brown vs. Brown,* 11 *East.* 441. *Doe vs. Oxenden,* 3 *Taunt.* 147. *Tyrrell vs. Lyford,* 4 *M. & S.* 550. *Tytler vs. Dalrymple,* 2 *Mer.* 419.

Where a description or designation of the person or thing intended is applicable indifferently to more than one subject, extrinsic evidence is admissible to show which was intended. *Lord Cheney's case,* 5 *Co.* 68 *b.* 3 *Cowen's Phil.* 1362.

The rule of *falsa demonstratio non notet* is correct. But the intention of the maker or party, which the court is to effectuate, must be one which is expressed in the instrument. If a description of a person or thing is inaccurate, the instrument will be held void, unless, (and this is indispensable), after rejecting the *falsa demonstratio,* enough of certainty remains to ascertain the object or subject matter intended. *Thomas vs. Thomas,* 6 *T. R.* 671. The *falsa demonstratio* must be superadded to that which was sufficiently certain before. *Miller vs. Travers,* 8 *Bing.* 244.

Extrinsic evidence cannot be called in to introduce into the instrument an intention not apparent on its face, and still less an intention repugnant and contrary to the expressed intention. *Denn vs. Page,* 3 *T. R.* 87. *Hob.* 171. *Jackson vs. Sill,* 11 *J. R.* 218. *Wing vs. Burgis,* 1 *Shepley,* 141. *Hall vs. Leonard,* 1 *Pick.* 31. *Andrews vs. Dobson,* 1 *Cox,* 425. *Jackson vs. Hart,* 12 *J. R.* 77. *Jackson vs. Lawton,* 10 *id.* 23.

You cannot prove intention as an independent fact, but may affirm and evolve the meaning of a description, *prima facie* obscure, but certain enough when construed in reference to extrinsic cir-

cumstances. *Parsons vs. Parsons,* 1 *Ves. Jr.* 266. *Powell vs. Biddle,* 2 *Dall.* 70. *Edge vs Salisbury, Amb.* 70. *Dowsett vs. Sweet, id.* 175. *Baylis vs. Atto. Gen.,* 2 *Atk.* 239. *Maybank vs. Brooks,* 1 *Bro. C. C.* 84. *Goodinge vs. Goodinge,* 1 *Ves. Sen.* 230. *River's case,* 1 *Atk.* 410. *Crolunden vs. Clarke, Hob.* 32. *Com. Bank vs. Classier,* 3 *Rawle,* 339. *Seay's heirs vs, Walton's devisee,* 5 *Mon.* 368. *Stanlan vs. Wright,* 15 *Pick.* 523, 530. *Lady Newbury's case,* 5 *Madd.* 364. *Rothmaler vs. Myers,* 4 *Desaus,* 19. *Iddings vs. Iddings,* 7 *Serg. & R.* 111. *Webb vs. Webb,* 7 *Mon.* 126. *Tudor vs. Terrell,* 2 *Dana,* 49. *Comstock vs. Hadlyme,* 8 *Conn.* 254, 265. *Reeves vs. Reeves,* 1 *Dev. Eg.* 386. *Cesar vs. Chew,* 7 *Gill & John.* 127. *Selwood vs. Mildway,* 3 *Ves. Jun.* 306. *Delmarc vs. Rebello,* 1 *Ves. Jr.* 412.

Beaumont vs. Fell and *Thomas vs. Sterens,* 4 *J. C. R.* 607, cannot be sustained. *Sir A. Chichester vs. Oxenden,* 3 *Taunt.* 137. 4 *Dow.* 65. *Thomas vs. Thomas,* 6 *T. R.* 671.

If a blank is left for the name, this cannot be supplied by parol evidence. *Baylis vs. Atto. Gen.,* 2 *Atk.* 239. *Castleton vs. Turner,* 3 *Atk.* 257. *Hunt vs. Hart,* 3 *Bro. C. C.* 311.

The question in every case is, not what was the meaning and intention of the maker *abstractedly,* but what was his meaning by the words used. *Beaumont vs. Field,* 2 *Chitty Rep.* 275. *Comstock vs. Van Denson,* 5 *Pick.* 166.

The only exception to the general rule is, where the language is applicable, indifferently, to more than one object or subject. *Osborn vs. Wise,* 7 *C. & P.* 761. *Doe ex Dem. Gold vs. Needs,* 2 *Mees. & Wels.* 129.

Such evidence is not admissible to show that a person, described as grantee or payee, was not intended. *Milling vs. Crankfield,* 1 *McCord,* 262. *Jackson vs. Foster,* 12 *J. R.* 488. The case of *Thompson vs. Gray,* 2 *Stew. & Port.,* is at war with all principles and authority. *Coleman vs. Crampler,* 2 *Dev.* 508.

And even if the intention could be shown there would have to be *direct* evidence of it, either by declarations or acts. *Coit vs. Starkweather,* 8 *Conn.* 289. *Selwood vs. Mildway,* 3 *Ves.* 306. *Doe vs. Huthwaite,* 3 *B. & Ald.* 632. *Price vs. Page,* 4 *Ves.* 680. *Hodg-*

son vs. Hodgson, 2 *Vern.* 293. *Doe vs. Westlake,* 4 *B. & Ald.* 57. *Steele vs. Hoste,* 6 *Madd.* 192.

The plea of *non est factum* denies that the deed *mentioned in the declaration,* is the deed of the defendant. *Stephen* 159. It is proper where the deed varies from he declaration. *Howell vs. Richards,* 11 *East.* 633. *Hoar vs. Mill,* 4 *M. & S.* 470. 5 *Mod.* 164, 2 *D. & R.* 662. *Morgan vs. Edwards,* 6 *Taunt.* 394. *Ekle vs. Purdy,* 6 *Wend.* 629.

The making of a deed is not perfect without *delivery.* The plea puts in issue the *delivery* as well as the *signing* and *sealing.* If it had been on its face payable to plaintiff, his possession would have been *prima facie* evidence of delivery.

It is not true that the plea puts in issue the execution and delivery of the deed *produced in evidence.* It puts in issue the *deed:* the deed mentioned in the declaration. *Gardner vs. Gardner,* 10 *J. R.* 47. *Thomas vs. Woods,* 4 *Cowen,* 173. *Dale vs. Roosevelt,* 9 *Cowen,* 307.

The plea denies the making of a bond payable *to plaintiff*—payable to him *in law.* Finding the issue for plaintiff, is to find that they did make a bond payable in law to plaintiff.

HEMPSTEAD & JOHNSON, contra. Where an obligation is made to a person by a name varying from the true name, the plaintiff may sue *in his own name,* and aver in the declaration that the defendant made the same *to him by the name mentioned* in the obligation. This has become a fixed rule, not only with regard to corporations, but as applicable to natural persons. *New York African Society vs. Vanick,* 13 *J. R.* 39. 3 *Wilson,* 184. 10 *Co.* 125 *b., Kyd on Corp.* 287. 6 *Co.* 65 *a., Miles Rep.* 557. *Pendleton vs. The Bank of Kentucky,* 1 *Monroe Rep.* 175. *Jackson vs. Stanly,* 10 *J. R.* 133. *Bower vs. The State Bank,* 5 *Ark. Rep.*

If it was not so made it will be competent for the defendant to try and test the truth of the averment by a proper traverse, which was not done in this case; if the issue is found for him he will be discharged. *Pendleton vs. The Bank of Kentucky,* 1 *Mon.* 175. *Bower vs. The State Bank, ut sup.*

Our law authorizes the holder or owner of a bond to sue, (*Rev.*

Stat. p. 152), and, that Kay was the legal owner is shown by the proof, if that can be considered at all; if it cannot, then it is shown by direct averment, which is not contradicted by pleading on the other side, and therefore stands admitted. *Story's Pl.* 55. 1 *Wilson,* 338. *Raymond vs. Wheeler,* 9 *Cow.* 302.

The real payee could be shown by extrinsic facts. The parol proof was to give effect to the instrument, according to the intention of the parties, not to contradict or destroy it, and for that purpose the proof was admissible. *Starkie on Ev.* 2 *Vol.* 544, lays down that such evidence is admissible "in order to give to the instrument its legal effect." It was a *latent ambiguity* that could be explained for the purpose indicated by *Starkie* by parol evidence, as is amply shown by other high authorities. *Jackson vs. Cody,* 9 *Cow.* 140. *Jackson vs. Bowen,* 7 *ib.* 13. *Houseman vs. Hart,* 12 *J. R.* 77. *Jackson vs. Soes,* 13 *J. R.* 518.

Where a contract in writing is made and signed, but the name of the party contracted with is omitted by mistake, the omission may be supplied by parol evidence, per *Parker, C. J. Brown vs. Silmore,* 13 *Mass. Rep.* 161.

So where the name of one of the children of a testator was *omitted* in the will, the court permitted parol evidence to be given, that the omission was through mistake, and corrected it. *Greer vs. Winds,* 4 *Desaus,* 85.

The office of a bill of exceptions is to object to the opinion of the court on some *points of law,* and it never applies to *matters of fact. Coolidge vs. Inglee,* 13 *Mass. Rep.* 50. *Jackson vs. Caldwell,* 1 *Cowen Rep.* 622. *Frier vs. Jackson,* 8 *J. R.* 495. *Danly vs. Edwards,* 1 *Ark.* 443. *Lenox vs. Pike,* 2 *Ark.* 14. *Robins vs. Fowler, id.* 133. In this case there was no point of law excepted to: no instruction asked and overruled: no evidence excluded: no motion for a new trial; and the exception is to the *finding of the court, sitting as a jury,* which is matter of fact, and to which a bill of exceptions could not apply; and it is therefore contended that the bill of exceptions is no part of the record.

OLDHAM, J., delivered the opinion of the court.

Can a person, to whom a bond is made payable by a name differing from his own name, declare upon it in his own name, averring that it was made to him by the wrong name? We have carefully searched for authorities to settle this intricate question, but can find none directly in point; it will therefore have to be determined upon the authority of analogous cases.

The case of *Lynne Regis,* 10 *Coke,* 122, was upon a bond made to the plaintiffs by the name of *"The Mayor and Burgesses of King's Lynne,"* when the true name was, *"The Mayor and Burgesses of the borough of our Lord the King of Lynne Regis, commonly called King's Lynne in the county of Norfolk."* The declaration averred the fact, and upon special verdict, it was adjudged good by the court, and judgment was given for the plaintiffs. And in the case of the Abbot of York, cited by Lord Coke in the above case, 10 *Coke,* 125, the declaration averred that the bond was made to the *"Abbot of the monastery of the blessed Mary of York,"* by the name of the *"Abbot of the Monastery of the blessed Mary without the walls of the city of York,"* and it was decided to be good. And so in the case of *"The New York African Society for mutual relief vs. Vanck et al.,* 13 *John. Rep.* 38, the declaration alleged that the bond was made to the plaintiffs, by the style and description of *"The standing committee of the African Society for mutual relief,"* and the court held that when a deed is made to a corporation by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration, that the defendant made the deed to them by the name mentioned in the deed. So in the case of *"The Inhabitants of the township of Upper Alloway's creek, in the county of Salem vs. String and others,* 5 *Halstead's Rep.,* the declaration averred that the bond was made to the plintiffs by the name and description of *The taxable inhabitants of the township of Upper Alloway's creek, in the township of Salem, in the State of New-York,* to which a demurrer was filed, relying upon the variance between the name in the bond and the true name of the corporation. The demurrer was overruled, and the declaration adjudged good.

In the case of the *President, Manager, and Company of the Berks and Dauphin Turnpike Road vs. Myers,* 6 *Serg. & Rawle,* 12, the

declaration averred that the bond was made to the plaintiffs, by the name of *The Berks and Dauphin Turnpike Road Company.* The court adjudged the action well brought, and reversed the judgment of the court below, and held that "in the pleading, the style or corporate name must be strictly used; and while the law was, that a corporation could speak only by its seal, the same strictness was also required. But when courts began to allow these artificial beings most, if not all, the attributes of natural existence, and to permit them to contract pretty much in he ordinary manner of natural persons, a correspondent relaxation in the use of the exact corporate name for the purpose of designation, necessarily followed. In *Medway Cotton Manufactory vs. Adams,* 10 *Mass. R.* 360, the declaration alleged that the promissory note sued on, was made to the plaintiffs by the name of *Richardson, Metcalf & Co.,* to which the defendants demurred, and the demurrer was overruled. This we conceive to be a case strikingly analogous to the one now under consideration; the only difference being, that this is a bond given to an individual by the name of a corporation, that, on a promissory note given to a corporation by the name of an individual firm. The same reason applies to justify the propriety of an individual suing upon an instrument given to him by a corporate name, as a corporation suing upon an instrument given to it by an individual name. And it is proper here to remark that, no distinction whatever is taken, in any of the cases upon this point, between bonds and promissory notes.

The same principle was recognized and acted upon by the court of appeals of Kentucky in the case of *Pendleton and others vs. The Bank of Kentucky,* 1 *Mon. R.* 171, and finally by this court, in the case of *Bowers and others vs. The State Bank,* 5 *Ark. Rep.* 234.

The reason of this rule, as quaintly given by Lord Coke in the case before cited, applies with equal force to individuals as to corporations, and courts would be equally justifiable in being governed by it in both cases, viz: "if a writ abates, one might, of common right, have a new writ, but he cannot of common right have a new bond," &c. And the Supreme Court of Pennsylvania, in the case of *The President, Managers and company of the Berks*

and Dauphin Turnpike Road vs. Myers, 6 *Serg. & Rawle,* 17, allowed the doctrine to prevail in the case of corporations, because, they said, that "when courts began to allow these artificial beings most of, if not all the attributes of natural existence, and to permit them to contract pretty much in the ordinary manner of natural persons, a correspondent relaxation in the use of the corporate name for the purposes of designation, necessarily followed." Thus maintaining that, in this particular, corporations were only put into a condition corresponding with that of natural persons. The case of *Templeton vs. Craw and others,* 5 *Greenleaf's R.* 417, was a suit brought on a promissory note, given to the wife of the plaintiff, after her marriage, by her maiden name of Joanna Balch, when her true name was Joanna Templeton. The court held it no valid objection to the note, that it was thus made payable by a wrong name, and gave judgment for the plaintiff. As before observed, there is no authority, and we can perceive no reason, why the same rule should not govern in contracts to, or by individuals, as in the case of corporations; and this position seems to be sustained by the reason given in the case of *King's Lynne,* and the authority of the case cited from 6 *Serg. & Rawle.* We are therefore of opinion that the declaration in this case would be good upon demurrer or arrest of judgment, and is, consequently, good upon writ of error.

The averment thus made is a material traversable allegation, upon which issue may be taken. *Pendleton & others vs. The Bank of Kentucky,* 1 *Mon. R.* 171. *Bowers & others vs. The Bank of Arkansas,* 5 *Ark. R.* 234, and, if denied by plea, must be supported by proof to entitle the plaintiff to a recovery.

The next inquiry is, whether this averment is put in issue by the plea of *non est factum.* In debt on bond or other specialty, where the deed is the foundation of the action, the plea of non est factum is proper when the plaintiff's profert cannot be proved as stated, or the deed was not executed, or varies from the declaration, either by a mis-statement, or by the omission of a covenant or clause constituting a condition precedent, or an exception. 1 *Chit. Pl.* 519. This plea puts in issue the execution of the deed,

and its continuance as a deed to the time of the plea. 2 *Stark. Ev.* 270, and the plaintiff need not prove the other averments in his declaration. *Gardner vs. Gardner,* 10 *John. R.* 47. *Legg vs. Robinson,* 7 *Wend. R.* 194; and the only proof, required of the plaintiff under the issue, is, first, the sealing, and secondly, the delivery. 1 *Stark. Ev.* 321.

There is no variance between the writing obligatory and the declaration, but it is described with particularity and certainty. The plea does not put in issue the averment, that the writing was made to the plaintiff, by the name of the Bank of the State of Arkansas. The case of *The President and Managers of the Berks and Dauphin Turnpike Road vs. Myers,* 6 *Serg. & Rawle,* 12, is in point. In that case, as in this, the bond was correctly described containing a similar averment, and the court decided that the plea of *non est factum* did not reach it, and further said that if A. declare on a bond made to B. the plea of *non est factum* would not reach the defect, but that the defendant ought to demur, or move in arrest of judgment, on the ground that the plaintiff has not set out a title to recover.

The only points, put in issue by the plea, being the sealing and delivery of the bond or writing obligatory, all other material averments in the declaration, according to the rules of pleading, are admitted to be true. *Stephens on Plead.* 217. On the trial before the circuit court, the execution of the bond was satisfactorily proven, and therefore the finding and judgment thereon by the court were correct and proper. Judgment affirmed.