

MAYOR AND ALDERMEN OF LITTLE ROCK vs. STATE BANK.

Objections to the sufficiency of an affidavit to a plea must be raised by motion to strike out, not by demurrer.

Where an agent varies from a particular authority given him, his acts will not bind his principal.

By resolution of the board of Alderman of Little Rock, the Mayor was authorized to borrow money from the Bank and to execute the *note* of the corporation therefor: the mayor accordingly borrowed the money, and executed a *bond* therefor under the seal of the corporation—held that he did not pursue his authority, and his act was not binding on his principal.

Writ of Error to the Circuit Court of Pulaski County.

DEBT, by the Bank of the State of Arkansas against the Mayor and Aldermen of the city of Little Rock, determined in the Pulaski Circuit Court, in May, 1846.

There are two counts in the declaration: the first merely alleging that defendants, as a corporation, by their Mayor, executed the bond sued on to plaintiff under their corporate seal: the second count alleges that the Mayor and Aldermen of the city passed a resolution authorizing the Mayor to borrow five hundred dollars from the Bank, and give the note of the corporation therefor; and that in pursuance of that resolution the writing obligatory sued on was executed.

The resolution of the board authorizing the execution of the note, and the instrument sued on, as exhibited on oyer, are as follows:

“COUNCIL CHAMBER, CITY HALL,
Little Rock, May 24th, 1842.

At a meeting of the Mayor and Aldermen of the city of Little Rock, held this day, Alderman Brown offered the following resolution:

Resolved by Mayor and Aldermen of the City of Little Rock,
That the Mayor be and is hereby authorized to borrow from either or both of the Banks in this city the sum of five hundred dollars, for the

use of the city, and that he be authorized to sign a note in behalf of the corporation for the same: Which resolution was adopted.”

(Certified by the Recorder.)

Instrument sued on: }
 “UNITED STATES OF AMERICA, }
 STATE OF ARKANSAS, }
 Corporation of the City of Little Rock.)

SEVEN PER CENT. LOAN—500 DOLLARS.

By virtue of an ordinance of the Mayor and Aldermen of the city of Little Rock, in council assembled, passed on the 24th day of May, 1842, authorizing the Mayor of the city of Little Rock, Arkansas, to negotiate a loan of five hundred dollars from the Bank of the State of Arkansas:

FIVE HUNDRED DOLLARS.

Know all men by these presents that the corporation of the city of Little Rock acknowledges to be indebted to the Bank of the State of Arkansas in the sum of five hundred dollars, which sum the said corporation of the city of Little Rock promises to pay to the order of the said Bank of the State of Arkansas, for value received, with interest at the rate of seven per cent. per annum from the date hereof till paid.

IN TESTIMONY WHEREOF, the Mayor of the city of Little Rock has signed these presents and affixed the seal of the corporation of the city of Little Rock, this 31st day of May, A. D. 1842. S. G. TROWBRIDGE, Mayor.”

The court sustained a demurrer to the second, and overruled it as to the first, count in the declaration.

Defendant then pleaded a special plea of *non est factum* as follows:

“And now on this day come the said defendants and defend, &c., and say *actionem non*, &c., because they say that heretofore, to wit: on the 24th day of May, A. D. 1842, the said Mayor and Aldermen, at a city council duly held according to law at the City Hall, in the city of Little Rock, acting in their corporate capacity, adopted and passed the following resolution, to wit: [Here the resolution copied above is set out in the plea.] And after the adoption of said resolution and the approval and recording thereof, Samuel G. Trowbridge, who was then the Mayor of said city of Little Rock, proceeded to act

under and by virtue of said resolution; and then there proceeded to, and did borrow and receive of and from said plaintiff the said sum of five hundred dollars; and in consideration of said money so borrowed and received, said Trowbridge, acting as such Mayor, and pretending to be authorized by said resolution, executed said writing obligatory in said declaration mentioned, and caused the seal of said corporation to be affixed thereto; and said defendants aver that said Trowbridge never had any other or further authority from said defendants than the aforesaid resolution to execute and seal in their behalf the said writing obligatory; and therefore said defendants say that said writing obligatory sued on and described in said declaration is not their deed; and of this they put themselves upon the country, &c.; wherefore they pray judgment. E. CUMMINS, *Attorney.*"

The plea was verified by the affidavit of J. A. Hutchings, Recorder.

Plaintiff demurred to the plea on the grounds: first, that it was repugnant and inconsistent: second, that it was not sworn to by the party charged with its execution, as required by Statute: third, that a special *non est factum* could not be pleaded.

The court sustained the demurrer, and rendered final judgment for plaintiff, and defendants brought error.

CUMMINS, for the plaintiffs. A special *non est factum*, is a proper plea *Reed v. Latham*, 1 *Ark. Re.* 72. *Cross & Bizzell v. State Bank*, 5 *Ark. Re.* 525.

A special agent must act strictly within his authority, or his acts will be void as to his principal. *Story's Agency*, 141, 199, 200, 1, 2, 3, 4.

The authority will be strictly construed. *Sug. on Pow.* 265, 6, &c. *Story's Ag.* 47. 2 *Kent's Com.* 617.

The Mayor, under the charter, had no authority by virtue of his office to contract. *Act of Nov. 2d, 1835.* *Acts of '37-8*, p. 65. *Acts of '40*, p. 42.

In the absence of any provision in the charter, a corporation may contract without seal. 2 *Kent's Com.* 288, 9, 90.

LINCOLN, contra. The only question in this case is, whether the Circuit Court ought to have sustained the demurrer of the Bank to the plea of *non est factum* filed by the defendant in the Circuit Court. The court was warranted in sustaining the demurrer.

A plea denying the execution of the instrument sued on, and admitting its execution at the same time, cannot be pleaded. *Pope, Gov. v. Latham et al. Ark. Rep. 74.*

When any declaration, petition or pleading, shall be founded on any instrument or note in writing, whether the same be under seal or not, charged to have been executed by the other party, and not alleged therein to be lost or destroyed, such instrument shall be received in evidence, unless the party charged with having executed the same, deny the execution of such writing, by plea supported by the affidavit of the party pleading, and the affidavit shall be filed with the plea. *Rev. Stat. p. 633.*

In this case the plea of *non est factum* was sworn to by a person not a party in any way to the suit, but a stranger to the record.

The plea of *non est factum* was not sworn to as the statute requires and ought to have been treated as a nullity. *McFarland v. The State Bank, 4 Ark. Rep. 55.*

When after demurrer a party pleads over, he is considered as having withdrawn his demurrer, and can afterwards take advantage of no defect that would be aided on general demurrer. *McLaughlin v. Hutchins, Ark. Rep. 211.*

CONWAY B, Judge. The only question presented in this case is, whether the Circuit Court decided correctly in sustaining the Bank's demurrer to the plea of *non est factum*. The plea was good and the court ought to have overruled the demurrer to it. If the bank wished to avail herself of the objection, that it was not properly sworn to, she ought not to have demurred to it, but moved the court to strike it from the rolls.

When an agent's authority is particular, he must pursue it. If he vary from it, what he does is void as to the principal. *Paley on Agency, 150. Salk. 96. 1 Dows Rep. 40.*

The resolution of the corporation did not empower the Mayor to

execute a writing obligatory. It only authorized him to sign a note. In giving the bank a bond, therefore, he did not pursue his commission, but departed from his authority; and his acts are not binding on the corporation.

The judgment of the Circuit Court is reversed, and the case remanded with instructions to allow the parties to amend their pleadings, if they ask to do so.

