RECTOR *vs.* TAYLOR, GARDINER & CO.

A bond signed "*H. M.* Rector," held to support an allegation that it was executed by *Henry M.* Rector, there being no attempt in the declaration to set out the peculiar manner in which defendant signed the instrument "Gardiner" and "Gardner" held not materially variant in sound.

The declaration alleged that the bond sued on was made at "*The City* of Little Rock, Ark's., and the one granted on oyer was dated "Little Rock, Ark's;" HELD, That the variance was immaterial.

Error to Pulaski Circuit Court.

Debt in the Pulaski Circuit Court. Declaration as follows:

William R. Taylor and Charles Gardiner, partners in trade, under the style and firm of Taylor, *Gardiner,* & Co., by attorney complain of Henry M. Rector of a plea of debt, and demand that he render unto them, the plaintiffs, the sum of two hundred and fifty dollars, with eight per centum per annum interest thereon, from the 31st day of April, A. D. 1848, until paid, which to them he owes, and from them unjustly detains.

For that, whereas, the said defendant heretofore, to wit: on the 21st day of April, A. D. 1848, at the *City of* Little Rock, Ark., *to-wit*: in the county of Pulaski, and State of Arkansas, by his certain writing obligatory, sealed with his seal, and to the Court now here shown, the date whereof is the same day and year aforesaid, acknowledged himself to owe and be indebted to the said plaintiffs under their style of Taylor, Gardiner & Co., in the said sum of two hundred and fifty dollars, with eight per cent. per annum, interest thereon from the date thereof, to be paid at the expiration of one year after the date thereof.

Yet, the said defendant, although often requested, has not as yet paid the said sum of two hundred and fifty dollars, or any part thereof, or the interest, or any part of the interest thereon, but hitherto has wholly neglected and refused, and still does neg-

lect and refuse to pay the same to the plaintiffs; to the damage of the said plaintiffs $300, and therefore they sue.

E. CUMMINS.

Defendant craved oyer of the instrument sued on, and the following was filed:

$250.00. LITTLE ROCK, ARK'S., April 21, 1848.

One year after date, I promise to pay Messrs. Taylor, *Gardiner* & Co., order the sum of two hundred and fifty dollars, with interest thereon from date until paid, at the rate of eight per cent. per annum, for value received:

Witness my hand and seal, this 21st day of April, A. D., 1848.

H. M. RECTOR, [L. S.]

Demurrer to the declaration for variance overruled, and final judgment for plaintiffs. The grounds of demurrer are stated in the opinion of this Court.

The cause was determined below before the Hon. WILLIAM H. FEILD, Judge.

Rector brought error.

FOWLER, for the plaintiffs, relied upon the variance between the contract declared on and that given on oyer, in the description of the contract, and also as to its legal effect, and cited, as to the points made by the demurrer, *Peake's Ev.* 197. *Sebree vs. Dorr,* 5 *Cond. R.* 680. *Lemon et al. vs. Hill,* 2 *Eng.* 73. *Nicholay et al. vs. Kay,* 1 *Eng.* 68. 5 *Ark.* 236. *Wilson & Turner vs. Shannon & wife,* 1 *Eng.* 99. *Boren vs. State Bank,* — *Eng.*—. *Bank vs. Hubbard,* 4 *Ark.* 421. *Ib.* 447.

PIKE & CUMMINS, contra, upon the question of variance, referred to the cases of *State Bank vs. Clark,* 2 *Ark. Rep.* 375. *Taylor et al. vs. Auditor,* 2 *Ark. R.* 174. *Rodman vs. Forman,* 8 *J. R.* 26. *Wood vs. Bulkley,* 13 *J. R.* 486. *Field vs. Field,* 9 *Wend.* 394. *Conly vs. Anderson,* 1 *Hill* (*N. Y.*) 519. *Lewis vs. Few,* 5 *J. R.* 1. 1 *Eng.* 33. 1 *Ark.* 503. 2 *Eng.* 70. 21 *Pick.* 491. 1 *Metc.* 359. 1 *Smedes & Marsh.* 666. 5 *Blackf.* 24.

Mr. Justice WALKER delivered the opinion of the Court.

This suit was instituted by Taylor, Gardiner & Co., against the defendant, upon a writing obligatory. At the trial of the case, the defendant filed his plea of oyer, which was granted by filing the original, and thereupon he demurred for variance between the bond as given on oyer and that declared upon in the declaration, and assigned for cause of demurrer, 1: That it was averred that the bond sued upon was executed at the "City of Little Rock, Arks.," whereas that given on oyer was executed at "Little Rock, Arks;" 2: That the name of one of the plaintiffs in the declaration is "Gardiner," and that in the bond "Gardner;" 3: That the declaration is against Henry M. Rector, and the bond is executed by H. M. Rector.

The first two grounds may properly be said to rest upon the ground of variance, but the third is not strictly a variance. The pleader did not undertake to show in what terms, abbreviated or otherwise, the bond was executed, as was the case in *Boren vs. The Bank,* (3 *Eng.* 500,) where the pleader averred that the note was executed by a particular description or abbreviation by name, but declared in general terms according to the legal effect of the bond; in which case, it is only necessary to show a legal liability on the part of the defendant to pay the debt, and if on oyer the bond corresponds in the essential descriptive averments thus made, it is all that is required.

If, in order to fix upon Rector a liability to pay, it had been necessary to have shown the manner of executing the bond, and the pleader had failed to do this, then the declaration would have been demurrable without oyer, or if an obligor could only bind himself by his unabbreviated name, then there might be more force in the objection. To say the least of this ground of objection, it rests rather upon an omission to make an averment than a variance from one made; which, when oyer was granted, was as fully supplied as if the pleader had set it forth in his declaration *in haec verba;* and, when set forth, it neither shows a substantive condition or requisite of the bond variant from that described

in the declaration. The signature, H. M. Rector, is not inconsistent with the averment that Henry M. Rector bound himself to pay. If he did not execute the bond by the abbreviated name, he should plead *non est factum* under oath; he cannot indirectly deny that it is his deed by demurrer. If, on the other hand, he did execute it by that name, then it is his deed in form and substance as set forth, and there is no variance.

We have heretofore made several decisions which cover the whole ground presented in this case. In the case of *Webb vs. Jones & Prescott,* (2 *Ark. R.* 333,) it was held that where the petition was against Abert W. Webb, and the note given on oyer was signed A. W. Webb, there was no variance. So a bond executed by "Andre J. Green," was held to support an allegation that it was executed by "Andrew J. Green." (1 *Eng.* 33.) Where the declaration stated the assignment to have been made by "William Thompson," and the bond given on oyer was signed by "Wm. Thompson, ad. of Watt Dickinson." RINGO, Ch. J., in his opinion, said: "The declaration does not purport to set forth either the writing obligatory or the assignment *in haec verba,* or according to their legal tenor, but simply according to their legal operation and effect, and therefore the plaintiff, according to the well established principles of pleading, will not be prejudiced by any verbal misdescription of the instrument, and the pleading must be adjudged good if it states correctly the legal effect and operation of the instrument constituting the foundation of the action. Upon a careful comparison of the writing obligatory, and the assignment thereof as shown on oyer in this case, with the allegations descriptive thereof in the declaration, we do not perceive any material variance between them, and cannot conjecture in what particular a variance was supposed to exist."

So it was held in New York, that, a note executed by "Christ. Bulkley," sustains an allegation that Christopher Bulkley promised to pay. (*Wood v. Bulkley,* 13 *John. R.* 486.) So, in Alabama, a note executed by "J. C.," was held to support an averment that John C. promised, &c. A bond, signed "Philp. T." will support a declaration against "Philip T." *Taylor vs. Rogers, Miner R.* 197.

These exceptions fully sustain the views which we have taken of this point. Indeed it was unnecessary to have referred to authorities but for the fact that the question seemed to have been blended by counsel with a very distinct class of cases, where the objection went to variances affecting the terms of the contract itself, or where the pleader had attempted to set out the contract itself, or give a particular description of some part of the contract, which it was unnecessary to describe; but, in cases like the present, where the instrument is declared upon according to its legal effect, the main inquiry is as to whether the oyer when granted presents a new, variant or different contract in legal effect from that set forth in the declaration.

As regards the first and second grounds above referred to, either of them is entitled to serious consideration. The venue is transitory; the place of making the contract immaterial; and, if otherwise, in this case "The city of Little Rock, Ark.," and "Little Rock, Arks.," are wholly unimportant, if a variance at all. So we held a bond dated at "Little Rock," no substantial variance from an allegation that it was executed "in the county of Pulaski." *Watkins v. Weaver,* 4 *Ark.* 556.

The names "Gardiner" and "Gardner," are not variant in sound; the letter "i" in the one name makes no necessary difference in sound. So we held "Gravaier" and "Gravier" to be the same name. The decisions have already gone as far as may be allowed in support of such technicalities, which do but tend to produce delay in the due administration of the law, and should rather be modified than extended further.

There was no error in the judgment of the Circuit Court in overruling the demurrer of the defendant. Let the judgment be in all things affirmed.