

IRVIN, PUB. ADM'R, vs. SEBASTIAN AND HANLY.

ERROR to the circuit court of Phillips.

Declaration describes the bond sued on as having been signed by one of the defendants, by his abbreviated signature of T. B. Hanley, and the bond filed on oyer is signed by T. B. Hanly—variance held frivolous and not fatal on demurrer.

Bond sued on is described in the declaration as having been executed by the defendants,—“together with one Andrew J. Greer, written A. J. Greer, not sued”—and the bond filed on oyer is signed, *And'w* J. Greer—variance held immaterial.

ACTION of debt, by Miller Irvin, public administrator of Phillips county, against W. K. Sebastian and T. B. Hanly, determined in the circuit court of Phillips county, at the October term, 1843. The suit was upon a bond, described in the declaration, after the usual commencement, as follows:

“That the said defendants, by their abbreviated names and signatures of “W. K. Sebastian” and “T. B. Hanley,” together with one Andrew J. Greer, written “A. J. Greer,” (who is not sued herein) heretofore, to wit, on the 3d day of December, A. D. 1841, at the county aforesaid, made their certain writing obligatory sealed with their seals, and which is to the court now here shown, bearing date the day and year last aforesaid, by which writing obligatory they, the said defendants, promised six months after the date thereof to pay to the said plaintiff, public administrator as aforesaid, the sum of three hundred and fourteen $18\frac{3}{4}$ -100 dollars, with interest on the same at the rate of ten per cent. per annum from due until paid.” Concluding with the usual breach.

The defendants craved oyer of the bond sued on, and it was granted, by filing the original, which is as follows:

“\$314.18 $\frac{3}{4}$ -100. Six months after date we Andrew J. Greer as principal, and Wm. K. Sebastian and Thomas B. Hanly as securities, jointly and severally promise to pay Miller Irvin, public administrator of the county of Phillips and State of Arkansas, the just and full sum of three hundred and fourteen dollars and eighteen and $\frac{3}{4}$ cents, with interest at ten per cent. per annum from due

until paid, for value received of him. This third day of December, A. D. 1841.

AND W. J. GREER, [SEAL.]

W. K. SEBASTIAN, [SEAL.]

T. B. HANLY, [SEAL.]

The defendants demurred to the declaration, assigning a number of causes, in substance as follows:

That the plaintiff had attempted to describe the bond sued on not by its legal effect, but by its terms, and had failed. That on oyer it appeared that the bond was not signed by T. B. Hanley, as stated in the declaration, but by T. B. Hanly. That the name of Sebastian was mis-described in the declaration. That there was a variance as to the description of the mode in which Greer signed the bond, &c.

The court sustained the demurrer, and gave judgment for the defendants, which the plaintiff assigns as error in this court.

PIKE & BALDWIN, for the plaintiff. It is fortunate, to the end that the law may be rescued from the imputation of being a mere bundle of frivolous technicalities, that such variances are no longer considered material. *Holman vs. Borough*, 2 Salk. 658. *Wilson vs. Mawson*, cited 1 T. R. 235. *Hendray vs. Spencer*, id. *ibid.* *Rex vs. Lockup*, id. *ibid.* *Cuming vs. Sibley*, id. *ibid.* *Alcorn vs. Westbrook*, 1 Mils. 115. 1 Scammon, 388, 451. *Petrie vs. Woodworth*, 3 Caines, 219. *Meredith vs. Hindale*, 2 Caines, 362. *Wood vs. Buckley*, 13 J. R. 486. *Wardell et al. vs. Pinney*, 1 Wend. 217. *Andrews vs. Williams*, 11 Conn. 331. *Booth vs. Grave*, 1 Mo. & M. 182. 3 C. & P. 335.

WATKINS & CURRAN, contra. The variance between the instrument described in the declaration and that given on oyer was fatal. *The State Bank vs. Hubbard*, 4 Ark. 419. *Caruthers vs. R. E. Bank*, ib. 447. *Hanley vs. R. E. Bank*, ib. 598.

In all actions upon special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. It is not necessary to recite the contract *in haec*

verba: but if it be recited the recital must be strictly accurate. *Wilson vs. Godman's ex'r*, 1 *Cond. R.* 493.

Where a pleading purports to recite a deed or record *in haec verba*, trifling variances have been deemed fatal. *Ferguson vs. Hayward*, 2 *Cond. R.* 548.

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

The objections raised by the demurrer to the plaintiff's declaration are wholly frivolous and untenable. The declaration has described the instrument sued on according to its legal effect, and does not attempt to set it out *in haec verba*; and had it so attempted to describe it, the objections raised by the demurrer would not avail the defendants. The doctrine of *idem sonans* applies in this case as well as in any other. The circuit court should have overruled the demurrer; wherefore the judgment is reversed and this cause remanded.
