BOREN ET AL. *vs.* STATE BANK.

Johua is a material variance from *Joshua,* in declaring the style of the maker of a note.

Plaintiff declared on a note signed by A., B. and C., and offered in evidence on the trial a note signed by *A.* and *B.,* but not *C.*—Variance held material.

Appeal from the Madison Circuit Court.

DEBT, determined before the Hon. W. W. FLOYD, Judge, in the Madison Circuit Court, May term, 1847. The facts are stated in the opinion of this court.

FOWLER, for the plaintiff. As Phillips and Titsworth never appeared to the action, and pleaded, so as to cure defects in the declaration, any error in the declaration may now be looked into, and the judgment reversed therefor, if sufficient. 1 *Ark. Rep.* 52, *Gilbreath* v. *Keykendall.* 3 *Ark. Rep.* 560, *Rutherford et al.* v. *State Bank.*

There is no breach alleged in the declaration as to the note for $128, and therefore no judgment by default could be properly rendered. 3 *Ark. Rep.* 407, *Sumner* v. *Ford & Co.*

The breach is far wider than the contract, which is erroneous, and judgment should be reversed on that ground. 3 *Ark. Rep.* 264, *Clary & Webb* v. *Morehouse, adm'r.* 1 *Ch. Pl.* 328 *et seq.*

The note was improperly admitted as evidence because it is not the same described in the declaration: the said Phillips not being a party to the former, when the declaration avers that he is to the latter. The smallest variance in matter of description vitiates. 1 *Term. Rep.* 240. 3 *Ark. Rep.* 45 *et seq., Sumner* v. *Ford & Co.* 4 *ib.* 421, *The State Bank* v. *Hubbard.* 1 *Ch. Pl.* 304. 4 *Term. Rep.* 560, *Drewry* v. *Twiss.* 5 *Cond. Rep.* 679, 680, *Lebue et al.* v. *Dorr.* 2 *Cond. Rep.* 478, *Sheeley* v. *Mandeville.*

Even a variance between the date of the bond declared on and that given on oyer, is fatal. 3 *Cranch's Rep.* 235, *Cooke* v. *Graham's*

adm'r. 5 *Ark. Rep.* 70, *Field* v. *Pope.* 4 *Ark. Rep.* 600, *Hanly* v. *Real Estate Bank.*

In an action against three on a note, and two of them outlawed, the third pleaded the general issue, and was properly allowed to take advantage of the misnomer of one of his co-defendants on the trial, on the ground of variance: the note appearing not to be the same declared on. 4 *Term. Rep.* 612, *Gordon* v. *Austin et al.*

LINCOLN, contra

CONWAY B, J. The Bank sued Joshua Boren, Pleasant M. Phillips and Benjamin Titsworth on a promissory note made to her by them and Richard Withrow. It was alleged in the declaration that Joshua Boren, by the style and description of Johua [his X mark] Boren promised, &c. Boren appeared and filed *nil debet.* Phillips and Titsworth made default. The issue on Boren's pleas was referred to the court by consent, and at the trial the Bank offered as evidence a promissory note executed to her by Richard Withrow, Joshua [his X mark] Boren and Benjamin Titsworth. Boren objected to its being read as evidence in the case, on the ground of its variance from the description of the note in the declaration. The objection was overruled and Boren excepted. The court found the issue for the Bank and gave her judgment against Boren, Phillips and Titsworth, and they appealed.

The note read in evidence by the Bank varied materially in two particulars from that described in the declaration. *First,* it did not appear to have been executed by Joshua Boren, by the style and description of Johua [his X mark] Boren: *Secondly,* it did not appear to have been signed at all by Phillips. (*a*) The court therefore erred in allowing it to be read as evidence, and the judgment is reversed.

(*a*) Phillips' name is in the body of the note, but not under-written. REPORTER.