GREEN ET AL. *vs.* THORNTON.

Breach of a contract is essential to an action upon it—and must in all cases be averred in the declaration.

It should be assigned in words co-extensive with the contract.

An assignment of breach may be bad for uncertainty.

Where the breach is postponed to the last count, it must negative the payment of the several, above demanded.

To charge an endorser protest or notice must be averred.

Writ of Error to the Circuit Court of Clark County.

DEBT, determined in September 1845 before Clendenin, judge. The declaration had three counts on a writing obligatory for $110, neither count containing a breach in itself—there was a fourth count for money paid, and the fifth count was on an account stated. The breach was that the defendants had not paid the sum of money in the writing obligatory specified. There was a demurrer to the declaration for want of a breach; which was sustained as to the 2d and 3d counts and overruled as to the others. Final judgment was taken for the plaintiffs, the defendants refusing to say anything.

FLANAGIN, for the plaintiffs. The writings described in the first and third counts are different from that described in the second; and it is uncertain to which the breach applies.

It is immaterial whether the demurrer be sustained or not to the fourth and fifth counts; because a judgment even upon verdict, would be of no avail, as there is no breach in said counts. *Saund. Plead.* 157, 3 *Cro. R.* 415, 425, 486, 661.

The first count is defective because there is no allegation of presentment to the payor and notice to the assignor of non payment. *Chitty on Bills* 592.

The second count is defective for the same reasons; and also, for that there is no charge showing any liability on the part of Green.

The third count avers presentment and notice, but such a notice as is wholly useless: being some six months before the maturity of the note as charged in the count.

The fourth and fifth counts contain no breach.

JORDAN, for defendant. The only question is as to the sufficiency of the breach. The breach expressly denies the payment of the sum of money by the defendants in the said writing obligatory specified, which is sufficiently broad to show that the debt remained wholly unpaid. The words "the debt still remains wholly unpaid" distinctly negative the idea of payment, and are sufficient though the whole breach be not in the strict form of the most approved precedents. *Dickson vs. Morrison,* 3 *Ark. R.* 316. If the breach be assigned in words containing the sense and substance of a contract, it is sufficient. 1 *Chit.* 8 *Amer. Ev.* 332. It is enough that the words of the assignment show a substantial breach. *Fletcher vs. Peck,* 6 *Cranch* 127. *Hughes vs. Smith,* 5 *John.* 168. 8 *John.* 111, and 7 *John.* 376. *Craghill vs. Page,* 2 *Hen. & Mun.* 446.

The fourth and fifth counts are good in form and substance, as they charge the defendants below with a joint indebtedness to the plaintiff, and negative the payment of the sum of money set out in each count.

JOHNSON, C. J. This case is brought into this court upon a demurrer to the declaration. The court below sustained the demurrer as to the second and third counts and overruled it as to the first, fourth and fifth. The breach of the contract being essential to the cause of action, must in all cases be stated in the declaration. The breach must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it. The declaration in this case contains five separate and distinct counts, and no breach is assigned except in the last and that simply negatives the payment of the sum of money in the writing obligatory specified. When the plaintiff inserts several distinct counts in his declaration, each of which is based upon a separate and distinct cause of action, and then postpones his breach until he concludes his last count, he must negative the payment of the several sums therein demanded. The breach in this case is not in the words of the contract either negatively or affirmatively, nor can it be said to be co-extensive with the import and effect of it. The first and second counts contain but few of the essentials of a good declaration and are wholly insufficient to fix any liability upon the endorser. They show no notice of non-payment by the maker or that the instrument sued upon had been protested for non-payment. The third is in due form, and if a sufficient breach had been added, it would have been sufficient to put the defendants upon their defence. The fourth and fifth are in the usual form of common counts for money laid out and expended and for an account stated, but are wholly insufficient for want of the necessary breach. We think that there can be no doubt but that the circuit court erred in sustaining any one of the counts in the declaration. The judgment is therefore reversed.