JONES *vs.* ROBINSON.

In a declaration by an endorsee, against the endorser of a promissory note, upon the endorsement, it is not necessary to aver the insolvency of the maker, because, under our Statute, the liability of the endorser attaches on receiving due notice of non-payment or protest.

A general averment of notice of non-payment is good, without specifying the time it was given.

Where the action is assumpsit, it is irregular to render the judgment in debt, and in such case if the debt and damages adjudged to plaintiff exceed, together, the damages claimed in the declaration, the judgment is erroneous and reversible.

Appeal from the Circuit Court of Johnson County.

Assumpsit, determined in the Johnson Circuit Court, September term, 1846, before Hon. R. C. S. BROWN, Judge.

Declaration:

"Isaac N. Robinson, assignee of James H. Jones, complains of said James H. Jones of a plea of trespass on the case.

For that, whereas, heretofore, to wit: on the 29th day of July,

A. D. 1837, at, &c., one Abraham Sharp made his certain promissory note in writing, now here to the court shown, bearing date the day and year aforesaid, and thereby then and there promised to pay, twelve months after the date thereof to said defendant the sum of one hundred and fifty dollars, value received, and then and there delivered the said promissory note to the said defendant. And the said defendant, to whom the payment of the said sum of money in said promissory note specified was to be made, after the making of said promissory note, to wit: on the 27th day of September, A. D. 1841, at &c., endorsed the said promissory note, which said endorsement bears date the day and date last aforesaid, and is now to the court here shown, by which said endorsement, he the said defendant then ordered and appointed the said sum of money in the said promissory note specified to be paid to the said plaintiff, and then and there delivered the said promissory note so endorsed as aforesaid to the said plaintiff. And the said plaintiff avers that afterwards, to wit: on the day and year last aforesaid, at, &c, the said promissory note was duly presented and shown to the said Abraham Sharp for payment thereof, and payment of the said sum of money therein specified, was then and there duly required according to the tenor and effect of the said promissory note; but that the said Abraham Sharp nor any person or persons on behalf of the said Abraham Sharp did, or would, at the said time when the said promissory note was so presented and shown for payment thereof, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; *of all of which said several premises, the said defendant afterwards at the county aforesaid, had notice in writing.*"

"By means whereof, and by force of the Statute," &c. &c.—then follows the usual allegation of liability, promise to pay, and breach, in assumpsit, concluding to plaintiff's damage, $200.

Defendant demurred to the declaration, on the grounds that it did not allege the insolvency of the maker of the note, or that he was prosecuted to insolvency; and that no time was alleged when defendant was notified of the non-payment of the note by the maker. The court overruled the demurrer, and the defendant declining to plead

over, the record states that, on production of the note and notice set out in the declaration, judgment was rendered "that plaintiff recover of defendant the said sum of one hundred and fifty dollars for his debt in his said declaration mentioned, and the further sum of seventy-two dollars and seventy-five cents for his damages occasioned by the detention of said debt," &c.

Defendant appealed.

FOWLER, for appellant. By our legislation the "endorser" or "assignor" of a note becomes liable for the payment of the amount, "on receiving due notice of the non-payment or protest" thereof. *Rev. Stat. p.* 108, *sec.* 9. And in order to sustain a judgment rendered against such endorser or assignor, we have to look to the general principles of law and general current of adjudications to ascertain what facts are material and necessary to be set forth in the declaration.

The declaration in personal actions must, in general, state a time when every material or traversable fact happened. 1 *Ch. Pl.* 257. But the precise time is not necessary to be stated, unless it constitutes a material part of the contract. 1 *Ch. Pl.* 258.

It is the demand and refusal to pay, coupled with the notice, which fixes the liability of the endorser: therefore they must both be material. The time of the demand is given in this declaration, but that of the notice is not pretended to be stated at all. For which the demurrer ought to have been sustained. *Ch. on Bills* (9 *Amer. Ed.*) 465 *et seq.*, 471 *et seq.* 1 *Term. Rep.* 170, *Tindall* v. *Brown.* 1 *Selw. N. P.* 317. 2 *Eng. Rep.* 459, *et seq.*, *Ruddell & McGuire* v. *Walker.* Demand upon the maker of a note is indispensable to the endorser's liability. 1 *Pick. Rep.* 404, *Sped* v. *Brett.* 1 *Nott & McCord Rep.* 439, *Price* v. *Young.* *Ch. on Bills* (*old Ed.*) 330 *in note*—1 *Selw. N. P.* 317. It is also a most material averment that the defendant had notice of the dishonor of the note. *Ch. on Bills,* (9 *Amer. Ed.*) 592. 5 *Burr. Rep.* 2672, *Blesard* v. *Hirst et al.,* 1 *Selw. N. P.* 287, 289.

Proof of notice (and of course the allegata) ought to fix with precision the day when it was given. 1 *Nott & McCord Rep.* 439,

Price v. *Young.* On a note due Oct. 26th, and notice given early in November, is too late and too indefinite. 1 *Nott & McCord Rep.* 439. 1 *Selw. N. P.* 317, 318. And an error in stating the notice in the declaration will be fatal even after verdict. *Ch. on Bills* (9 *Amer. Ed.*) 592.

In case of a dishonored note, it is the notice to the endorser that fixes his liability, 1 *Term. Rep.* 170, *Tindall* v. *Brown.* *Story on Bills, p.* 346, 347, *sec.* 306, 307. *ib. p.* 357, *sec.* 314.

And we submit on the part of the plaintiff in error, whether a judgment for *debt,* &c. can stand where the declaration and cause of action is in *assumpsit.*

Besides, this is an action of assumpsit and only claims damages to the amount of $200, and the judgment is for $222.75, exclusive of costs, which is clearly erroneous. In assumpsit and other actions for the recovery of damages, the sum in the conclusion of the declaration must be sufficient to cover the real demand. And if judgment be given for more, it is error: and a court of error cannot reduce the sum to the amount stated in the declaration. 1 *Ch. Pl.* 398. 4 *Litt. Rep.* 265, *Baltzell* v. *Hickman.* 5 *Mo. Rep.* 424, *Maupin* v. *Triplett.* 4 *Maule & Selw. Rep.* 94. *Usher et al.* v. *Dansey et al.* 1 *Saund. Pl. & Ev.* 418. 2 *Bac. Abr. p.* 4.

WATKINS & CURRAN, contra.

CONWAY B, J. This was an action of assumpsit against the endorser of a promissory note. The defendant demurred to the declaration, and his demurrer was overruled. Saying nothing further, final judgment was rendered against him, and he appealed. Two causes were assigned for demurrer: first, that the insolvency of the maker of the note was not averred: and, secondly, that the date of the notice was not averred. It is sufficient to aver notice without specifying the time it was given; under such averment all necessary proof is admissible. And it is not requisite to aver the insolvency of the person that made the note. Under the Statute the liability of endorsers attaches on receiving due notice of non-payment or protest. *Rev. St.* 108, *sec.* 9. The demurrer was, therefore, properly overruled.

But it appears the court below gave judgment for $150 debt, and

$72.75 cents damages for the detention of the debt. The action being assumpsit, this judgment was inappropriate and irregular. It should have been for the damages assessed, and the court might have assessed them. *Rev. St.* 630, *sec.* 80. Besides, plaintiff laid his damages at only $200, and yet had judgment for $222.75. If, therefore, the judgment could have been considered substantially formal, it is erroneous for excess. The judgment is reversed.