15 Ohio 118

Augustus W. Swetland and Fuller M. Swetland *vs.* David M. Creigh and others.

A promissory note for $200, payable *in current Ohio bank notes*, is for a *sum of money certain*, and negotiable.

This suit is by a Writ of Error to the Court of Common Pleas of Knox County, and reserved for decision in this Court.

The plaintiffs in error were the makers of a certain written instrument, the foundation of the original action, which is in the words and figures following:

"Sparta, Sept. 1st, 1841.

"We promise to pay L. H. Newcomb, or order, two hundred dollars *in current Ohio bank notes*, two years after date, for value received.

"A. W. SWETLAND,
"F. M. SWETLAND."

And indorsed on its back, "L. H. Newcomb."

On this instrument, the defendants in error, the indorsees, brought their action of assumpsit against the plaintiffs in error. The declaration contains a special count, founded on the indorsement, and, also, the common counts for money lent, had and received, and on an account stated between the parties.

The plaintiffs in error demurred specially to the first, and plead the general issue of non-assumpsit to the other counts.

The causes assigned for the demurrer, are, that the instrument declared on is not a promissory note; that it is not negotiable, and that no consideration is averred for the indorsement. The defendants in error joined in demurrer, and this issue of law being submitted to the Court, the demurrer was overruled.

The issue of fact, as well as the assessment of damages on the first count in the declaration, then being submitted to the Court, the instrument before described was offered in evidence by the defendants in error, in support of the common counts.

To this proof the plaintiffs in error objected, but the Court admitted the instrument, and gave judgment for the defendants in error, no other evidence being adduced; and the plaintiffs in error excepted to the ruling and judgment of the Court.

Several errors are assigned upon the record which need not be noticed. They are not, apparently, relied upon by the counsel for the plaintiffs in error, as they are not alluded to in their argument. The fifth assignment is, that the instrument declared upon and admitted in evidence is not such an one as authorized the assignees to sue in their own name.

Vance & Smith, for Plaintiffs in error.

To constitute a promissory note, it is necessary the instrument should be made payable in a sum of money certain.—Chitty on Bills, 55; Swan's Stat. 587.

Is a note, made payable in current bank notes, for a sum certain any more than though payable in flour or pork? We can see no distinction, in principle. Bank notes are not money, nor do they necessarily import a certain sum in money; for, though current, they are often below par.

We are aware that a devise of all one's money has been held to include bank notes, but this is but carrying out the intention of the devisor. 1 Roper, 3.

In England, it has been decided that an action for money had and received, will not lie against the finder of bank notes, unless he has actually converted them into money. Chitty on Bills, 556, and cases there cited.

But the precise question now before the Court, has been decided in the Courts of several of the States, and such paper held not to be negotiable, and for the reason that, being made payable in bank notes, they were not for a sum of money certain. *Jones* v. *Fales*, 4 Mass. Rep. 245; *Leiber* v. *Goodrich*, 5 Cowen Rep. 186; *Large* v. *Kahn*, 1 McCord's Rep. 115; *McClarren* v. *Nesbit*, 2 Nott & McCord's Rep. 519; *Collins* v. *Lincoln*, 11 Vir. Rep. 268; *Irvine* v. *Lowry*, 14 Peters' Rep. 293.