BIZZELL *vs.* WILLIAMS & BLEVINS.

The maker of a note, payable on a particular day, in notes of the Arkansas Banks, and if not paid on presentation, on or after that day, then to be paid in par funds, becomes liable to pay the note in par funds on its being presented, and not paid at or after maturity.

When such note is sued upon, and judgment for the amount thereof in specie, this court will presume, in the absence of an affirmative showing upon the record to the contrary, in favor of the judgment below, that the evidence necessary to fix the liability of the maker of the note for par funds, was produced on the trial.

Writ of Error to Hempstead Circuit Court.

On the 18th February, 1846, Williams & Blevins sued Bizzell, before a Justice of the Peace of Hempstead county, on the following instrument:

"On or before the first day of May next, we promise to pay Williams & Blevins, fifty dollars in notes of the Arkansas Banks, and if not paid on presentation, on or after that day, then to be paid in par funds: February 17th, 1842."

Signed by Bizzell and another.

The Justice gave judgment in favor of plaintiffs, for the full amount of the note, and Bizzell appealed to the Circuit Court of Hempstead county.

The cause was tried at the November term, 1846, before the Hon. JOHN O. HIGHTOWER, special Judge. It was submitted to the court sitting as a jury, and the record states: "and from the evidence before the court, the court doth find that the said appellant is indebted to the appellees in the sum of fifty dollars, on a note bearing date 17th February, 1842, and due on the first day of May, 1842: the note filed in this case. It is, therefore, considered by the court," &c. Judgment for appellees for the amount of the note, and interest from the first of May, 1842.

Bizzell brought error.

HEMPSTEAD, for plaintiff. 1. This note was primarily payable in Arkansas bank notes, and could not be converted into a promise to pay money directly, except upon the contingency that the note was not paid at maturity, and was then, or at some subsequent time, actually presented to the payors and payment refused by them. In that event only they were bound to pay in "par funds," and no right of action for the latter could accrue until actual presentation and refusal; and it was, therefore, necessary to prove it before any judgment could be rendered for the amount specified in the note. *Pullen* v. *Chase,* 4 *Ark.* 214. *Gregory* v. *Bewley,* 5 *Ark.* 319. This is the legal effect of the stipulation of the parties, and something more than a

demand by suit was necessary to entitle the payees to a judgment for the amount of the note. *Martin* v. *Webb,* 5 *Ark.* 74. *Miller* v. *Cook,* 2 *J. J. Marsh,* 80. *Jackson* v. *Berry,* 3 *Bibb* 85. *Worley* v. *Mourning,* 1 *Bibb* 254.

2. This is not like an obligation for the direct payment of money and for a certain sum with an alternative condition attached to it, for the benefit of the maker, that it may be discharged at maturity in Arkansas money or other property. *Gregory* v. *Bewley,* 5 *Ark.* 320. In such a case the failure of the maker to avail himself of the privilege when the obligation matures amounts to a forfeiture of it, and the obligation becomes absolute and will support an action of debt for money. *Dorsey* v. *Lawrence, Hardin* 508. But here it could not become a promise to pay money until certain pre-requisites were performed by the payees, of which there is no proof of any kind, and which in point of fact were not performed.

3. The utmost that could be recovered on the note was the market value of Arkansas notes, at its maturity; and it was erroneous for the court without the intervention of a jury to render judgment for the sum of fifty dollars specified in the note, and the interest thereon, for it was an Arkansas money transaction. *Hudspeth* v. *Gray,* 5. *Ark.* 158. *Dillard* v. *Evans,* 4 *Ark.* 178. *Blevins* v. *Blevins,* 4 *Ark.* 442. *Mitchell* v. *Walker, id.* 146. *McKiel* v. *Porter, id.* 534.

RINGO & TRAPNALL, *contra.* No brief filed.

JOHNSON, C. J. The only objection urged against the judgment of the Circuit Court, is, that it is rendered for the whole amount of the note, when it does not appear that the condition ever was performed, upon which the sum specified was to become payable in par funds.

It is not denied but that the plaintiff in error would have been liable for the full amount, in the event that it had been presented and not paid, on the day of its maturity or at any time thereafter. The ground then assumed is, that the proof was insufficient in not showing that the note had been presented for payment, either on or after maturity; and that the plaintiff had failed to discharge it in the notes of

the Banks of Arkansas. Whether that fact was not proved, or what the testimony was, does not appear from the record. The principle is well settled by the repeated adjudications of this court, that, where the record fails to show the contrary, the presumption of law is, that the inferior court had sufficient evidence before it to warrant the judgment. If the testimony was not sufficient in the particular indicated, and the plaintiff intended to insist upon it in this court, he should have had the whole of it spread upon the record, and brought before us for our inspection and revision. The record brought here wholly fails to show what the evidence was, upon which the Circuit Court based its judgment; and consequently all the presumptions of law are in favor of its correctness. The judgment of the Circuit Court is, therefore, affirmed.