

insurance companies do not intend to give credit for the payment of premiums, they should not deliver the policies without payment. There is no evidence in this case to indicate a conditional delivery of the policy. On the contrary, I am of the opinion that the agent waived the terms of the policy requiring the prepayment of the premium before the policy took effect, which was binding upon the company. The plaintiff is entitled to a judgment for the sum of \$1,000, with interest from May 29, 1883, to date, deducting the amount of the premium due, \$16.13. Judgment will be entered for that amount.

MERRILL v. TOWN OF MONTICELLO.

(Circuit Court, D. Indiana. December 20, 1884.)

1. MUNICIPAL BONDS—AUTHORITY OF INDIANA TOWNS TO ISSUE FOR SALE—INDIANA ACT OF 1852, § 27—REVISION OF 1881, §§ 3342-3345, 3348, 3349.

An incorporated town in Indiana may issue bonds for sale in the market to raise money to meet at maturity a lawful indebtedness for which it has no other legal means of providing payment.

2. SAME—"FUNDING BONDS."

That the bonds so issued purport to be "funding bonds" will not affect their validity.

On Demurrer to Reply.

Roache & Lamme and *Harris & Calkins*, for plaintiff.

David Turpie and *W. E. Uhl*, for defendant.

WOODS, J. This action is brought to recover principal and interest of 143 bonds of \$100 each, with coupons attached for interest at the rate of 7 per cent. per annum. The complaint alleges the execution of the bonds by the defendant, default in the payment of the second interest coupons, and that the plaintiff had elected to treat as due the principal of each bond, and before bringing the suit had notified the defendant of this election. Copies are filed with the complaint, of a bond and one coupon, which read as follows:

EXHIBIT A. (COPY OF BOND.)

United States of America.

No. 1.

STATE OF INDIANA.

\$100.

Funding Bond of the Town of Monticello.

Ten years after date, the town of Monticello, in the county of White, state of Indiana, promises to pay to the bearer, at the Importers' & Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent. per annum, payable annually in gold at the same place, upon presentation of the proper coupon hereto attached, without any relief whatever from the valuation or appraisement laws of the state of Indiana. The principal of this bond shall be due and payable at the option of

the holder, on the non-payment, after due presentation of any of said coupons, for ninety days after the maturity thereof.

This bond is one of a series of \$21,000, authorized by the said town, by an ordinance passed by the board of trustees thereof, on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of the said town.

In witness whereof, the board of trustees of the town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk, and the seal of the town to be affixed hereto, at the said town of Monticello, this twentieth day of May, 1878. R. W. CHRISTY, President.

Attest: F. BOFINGER, Clerk.

(COPY OF COUPON.)

The town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from valuation or appraisal laws of the state of Indiana, at the Importers' & Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on Bond No. 1.

R. W. CHRISTY, President.

Attest: F. BOFINGER, Clerk.

The sixth paragraph of answer, in substance, is this:

That the defendant is, and when the bonds mentioned were issued, was, a town incorporated under the general laws of the state of Indiana, and possessed of such powers only as were conferred by law upon such bodies; that upon the twenty-fourth day of January, 1869, upon and in compliance with a petition of its school trustees, the defendant, by its board of trustees, enacted an ordinance to the effect that bonds of the town to the amount of \$20,000, with coupons for interest at the rate of 10 per centum, be issued to the school trustees of the town to aid in the building of a school-house; that afterwards, on the first day of May, 1869, the town issued its bonds accordingly to the amount stated, to mature 10 years after date; that these bonds were sold, and yet remain outstanding and unpaid obligations of the town, as to the principal sum thereof, and are, and when the bonds in suit were issued, were, the only indebtedness of the town; that on the eleventh day of May, 1878, a petition was presented to the trustees of the town by the owners of taxable property therein, which petition (omitting date and the names of signers) reads as follows:

"The undersigned, citizens of the town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said town, contract a loan for said town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

That afterwards, on the same day, the board of trustees entered in their record the following ordinance:

"Be it ordained by the board of trustees of the town of Monticello, Indiana, that said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town; and be it further ordained, that when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale; and be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

That afterwards, on the twentieth day of May, 1878, there were made and issued by the board of trustees of said town the coupon bonds of the town to the amount of \$21,000, each entitled "Funding Bond of the Town of Monticello," and purporting to be issued "for the purpose of funding the indebtedness of said town;" that these are the bonds and coupons sued on; that when issued they were delivered to J. C. Wilson, under the ordinance aforesaid, who negotiated and sold them upon his own account, and converted the proceeds to his own use, the town not having received any part of the proceeds. A demurrer to this answer, for want of facts, was overruled. *Merrill v. Town of Monticello*, 14 FED. REP. 628.

The reply, which is now in question, besides other things not deemed material to be stated here, contains allegations to the effect following:

That said Wilson negotiated and sold the bonds on June 1, 1878, in the market at par, for cash, and delivered them to the purchaser, for and on behalf of the town, and received from the purchaser for the town the price, to-wit, \$21,000; that thereafter, in July, the plaintiff bought one hundred and forty-three of the bonds, being those sued on, in open market in the city of Boston, at par, and paid cash therefor, without notice of the failure of Wilson to pay the money received by him therefor to the defendant; that there was lawful authority for the issuance of the bonds, because the town was without means, and without power by tax levies or otherwise to obtain means, to pay its said indebtedness then due and about to become due.

Is this a good reply? Manifestly the case presented differs essentially from that shown by the answer, in this: The reply shows a necessity to borrow money to meet at maturity an indebtedness, for which, under existing laws, the town had no other means of providing payment. The question, therefore, is whether, under this necessity, the town had power to borrow and to give bonds for the amount of the loan. If so, it is insisted that the authority must be found in section 27 of the act of 1852, (section 3342, Revision 1881,) which reads as follows:

"No incorporated town under this act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same."

In 1867, 1869, 1873, and 1875, special laws were passed defining the powers of cities and towns in Indiana to borrow money for the purchase of grounds for school-houses, and for the building of school-houses, and authorizing the issue and sale of bonds to obtain money for these purposes. The provisions of these laws, so far as yet in force, are contained in sections 3343, 3344, 3345, 4488, and 4489 of the Revision of 1881. In *Clark v. Noblesville*, 44 Ind. 83, it was held that section 27 of the act of 1852 was repealed by the act of March 3, 1873, (sections 4488, 4489, *supra*,) for the purposes specified in the latter act. By the same rule section 27 must be deemed to have been