CRAWFORD COUNTY *vs.* WILSON.

County warrants issued in the form prescribed by the State, payable to an individual or bearer, are negotiable, and transferable by delivery so as to divest the payee of the legal interest.

When such warrants are issued to an individual for a debt due him by the county, and he transfers them, the legal interest passes to the transferee, who may bring an action against the county for the amount of them, and the county is discharged from obligation to the original payee.

Though the original payee may have parted with them at a sacrifice on account of the failure of the county to pay them on demand, he cannot recover of the county the difference between the nominal amount of the warrants, and the price he sold them at.

Writ of Error to the Circuit Court of Crawford County.

COVENANT determined in the Crawford circuit court, in October, 1844, before BROWN, judge.

Daniel Wilson sued the county of Crawford upon articles of agreement entered into between himself and Henry Starr, Jr. as county commissioner, on the 23d December, 1841, whereby Wilson covenanted to build a court house for the county, for which, Starr, as such commissioner, covenanted that the county would pay him $6,400 by stipulated installments, falling due as work progressed.

Wilson averred performance on his part, and failure and refusal of the county to pay him for the building according to agreement.

The attorney for the county pleaded *non infregit conventionem,* payment, and accord and satisfaction, in short upon the record, by consent, with the privilege of giving special matter in evidence. Plaintiff took issue to the first plea, replied in short to the others, to which issues were taken. The cause was submitted to the court, sitting as a jury, the court found for the plaintiff, assessed his damages at $2,667.50, and rendered judgment accordingly. Defendant's counsel moved for a new trial, upon the ground that the finding was contrary to evidence, the court refused it, he excepted and took a bill of exceptions, from which it appears that the cause was submitted to the court on the following state of facts agreed upon by the parties, to wit: From time to time as plaintiff progressed with the building, and as the installments severally fell due under the stipulations of the covenant sued on, he applied to the county court of Crawford county for allowances of what was due him under the contract. The court, on such applications, made orders allowing the sums due, and directing the clerk to issue warrants upon the county treasurer therefor, which the clerk accordingly did. In this way the whole sum of $6,400 due plaintiff for the building under the contract, was allowed by the county court, and warrants therefor issued to him by the clerk upon the treasurer. That the clerk kept a register of all warrants issued by him, and registered therein those issued to plaintiff in the usual manner. None of the warrants issued to plaintiff were paid by the treasurer of the county—he presented a number of them for payment, and it was refused for want of funds. That plaintiff had parted with all of said warrants: at the time he received them they were at a discount of fifty per cent: he had never executed any receipt or release to defendant upon receiving the warrants: a large amount of them had been redeemed by the treasurer since he parted with them. Defendant brought error.

WATKINS & CURRAN for the plaintiff. Warrants drawn by the clerk on the county treasury are negotiable and pass by delivery,

(*Rev. Stat. p.* 226, *sec.* 28) and it is well settled that the acceptance of a negotiable instrument on account of prior debts is *prima facie* evidence of payment, and the plaintiff cannot recover upon the original debt without showing the note to have been destroyed or producing and cancelling it at the trial. *Holmes & Drake* v. *De-Camp,* 1 *J. R.* 34. *Pintard* v. *Tackington,* 10 *J. R.* 104. *Burdick* v. *Green,* 15 *J. R.* 247. *Raymond* v. *Merchant,* 3 *Cow.* 147. *Monerly* v. *McGee et al.,* 6 *Mass. Rep.* 143. *Thatcher et al.* v. *Dismore,* 5 *Mass. Rep.* 299. *Chapman* v. *Durant et al.,* 10 *Mass. Rep.* 47.

The reason for the rule for denying a right of action upon a junior debt, unless the note, bill or check given be produced, is that otherwise the debtor might be put to great inconvenience, and perhaps be obliged to pay his debt twice, as he could not set up a payment of his original debt against the claim of an innocent indorsee after a seasonable indorsement; consequently it can make no difference whether the original debt is by specialty or simple contract.

The doctrine in Massachusetts is, that where a negotiable note or bill is given for a pre-existing debt, the presumption is that it was the intention of the parties that it should be a payment or satisfaction, and if suit was brought upon the original debt, it devolves on the creditor, although he may still hold the note and produce it on the trial, to prove that it was so received. *Read* v. *Upton,* 10 *Pick. Rep.* 525. *Jones* v. *Kennedy,* 11 *Pick. Rep.* 131. *Watkins* v. *Hill,* 8 *Pick. Rep.* 522.

In the case of *The Real Estate Bank v. Rawdon Wright & Hatch,* decided by this court at the last term, the doctrine of payment was thoroughly examined and discussed, and that decision must place this case beyond all cavil. The notes given by the agents of the bank were still in the hands of the plaintiff, were tendered to the bank before suit brought and produced on the trial.

It may be true that a check drawn by a debtor on his clerk for the amount of the debt in favor of a creditor, is not of itself a payment, yet the aspect of the case is materially changed if the check or bill is actually paid, or is transferred by the creditor, even at a discount, to a third person.

If A. owes a debt to B. for which he executes his note—B. sells the note to C., and from the fact that A. is in embarrassed circumstances B. is compelled to make the sale at a discount of fifty per cent., and A. afterwards pays the note or it is still outstanding in the hands of C.—Is any proposition clearer than that B. could not sustain an action against A. for the loss on the sale of the note? Where is the difference between the case we have supposed and the one at bar? Wilson had not only parted with the warrants, but the greater part of them had actually been redeemed at the treasury. That he sold them at a discount, (which does not appear) or that they were at discount, cannot affect the case; because if he had intended to have recourse on the county for the depreciation, he could have returned or at least offered to return them.

The evidence warrants the conclusion that it was the understanding of both parties that Wilson received the warrants at par. The allowances were made to him by installments, and if it was his understanding that he was receiving the warrants at a discount of fifty per cent., why did he not exact warrants to double the amount of each installment? It is evident that the idea of claiming two for one was an afterthought, and that he received them at their nominal value in full for each installment.

But this case occupies a much more favorable position than any of the cases above cited, because the only mode by which the creditor of a county can enforce his demand is by applying to the county court for an order allowing it and requiring the clerk to issue his warrant on the treasurer for "the amount of the debt," and although the county scrip is not worth a cent on the dollar, the county court cannot allow, or be compelled to allow, and order a warrant for more than the amount of the debt. See *Rev. Stat. p.* 226, *sec.* 28. So if Wilson had refused to receive the warrant, and had instituted suit in the circuit court and recovered judgment for $6,400, the amount which he was to receive for building the house, execution could not have issued; he could only have enforced payment by an application to the county court for a warrant on the treasurer, which, notwithstanding the scrip might have been at a discount, could not have been issued for more than "the amount of the

judgment and costs." *Rev. Stat. p.* 208, *sec.* 14. The reason of the statute for thus restricting the county court is manifest by considering the disastrous results which would necessarily flow from a contrary policy.

PIKE & BALDWIN contra. The contract sued on was made under *sec.* 8 *&* 9 *of chap.* 35 *Rev. Stat.* It was "valid and effectual to bind the county to all intents and purposes."

The county court made its orders that the treasurer should pay Wilson, under sec. 18 of chap. 36. The county had no right to erect the court house without funds in the treasury to pay for it, or without levying a tax to meet the expenditure. *Rev. Stat.* 209, 210.

For these sums ordered to be paid, the clerk was to issue warrants and register them. Secs. 15, 28 and 30, chap. 41. If presented to the treasurer, and there were no funds wherewith to pay them, he was to endorse them and then they would bear interest. *Ib.*

The warrants were not *payments* but *orders* by the principal on her agent, directing payment. They were the means of obtaining payment. Not being paid suit could be brought on the contract. *Cromwell* v. *Scott,* 1 *Hall* 56.

The moment the treasurer failed to pay an order, there was a breach of the contract and a consequent right of action. The pleas of payment and accord and satisfaction are wholly unsustained, and breaches of the contract clearly proven.

Even the receipt of a note or bill of the debtor or another, is not payment even of a simple contract, unless agreed at the time to be received as payment. *Watson's Ex'r* v. *McLaren,* 19 *Wend.* 557. *Olcott* v. *Rathbone,* 5 *Wend.* 490. *Lightbody* v. *Ontario Bank,* 11 *Wend.* 9. *Reed* v. *Van Ostrand,* 1 *Wend.* 424. *Waldron* v. *Whitlock,* 1 *Cowen* 290. *Hoar* v. *Clute,* 15 *J. R.* 224. *Maze* v. *Miller,* 1 *Wash. C. C. R.* 328. *Hamilton et al.* v. *Cunningham,* 2 *Brock.* 350.

No instrument so received need be produced and cancelled on the trial, except *negotiable* instruments *on which an action may be maintained. Raymond* v. *Merchant,* 3 *Cowen* 147. *Holmes & Drake* v.

DeCamp, 1 *J. R.* 34. *Pintard* v. *Tuckington,* 10 *J. R.* 104. *Bendick* v. *Green,* 15 *J. R.* 274. *Wilson* v. *Ex'rs of Hurst, Peters C. C. R.* 441.

JOHNSON, C. J. Upon the state of facts as exhibited by the bill of exceptions we are called upon alone to determine whether the warrants issued to the defendant in error, were transferable by mere delivery, so as to vest the legal interest in the holder. It is in evidence that they were issued in the usual form, and if so, then they must have been made payable to the defendant or bearer. It is contended by the defendant that the cases which hold that the instruments ought to be produced and cancelled on the trial, are cases where negotiable notes had been given, and that those issued to the defendant in this case were mere protested orders of no value. That the cases to which he has referred are good authority will not be disputed, but whether they furnish him any support in this case, is a more doubtful question. The statute authorizing the issuing of warrants in favor of persons having claims against the county, prescribes the form thereof, and under that form there can be no doubt but that they are endowed with the properties of negotiable instruments; and being made payable to a certain individual or bearer, the legal interest in the same can be transferred by delivery alone, without the necessity of a formal assignment. The county of Crawford, through her authorized agent, acknowledged herself indebted to the defendant in a certain sum, and drew an order upon the treasurer for its payment. Whether the orders were protested or not we are not informed by the testimony. The proof is that they were presented to the treasurer for payment, and that he refused to do so for the want of funds. If Wilson did not elect to consider the warrants themselves in the light of a payment, he should not have parted with them, but on the contrary he should have retained the possession until the money was received, at the treasury, or have instituted his suit against the county, and upon the trial have tendered them as evidence in support of his demand. The instant he parted with the possession whether for their nominal or real value, the legal interest vested in the transferee, and he

thereby became clothed with ample power to maintain a suit in his own name for the sum expressed upon their face. If the holder of a negotiable instrument parts with it for a less sum than what is expressed upon its face, it most unquestionably does not lie in his mouth to take advantage of his own act by having recourse back upon the maker for the amount discounted by himself. We presume it would not be contended that the payee of a promissory note, after having assigned it and delivered possession, could have recourse back upon the maker, upon the ground that he had not received the full amount expressed upon its face. We can see no good reason upon which to ground a distinction between the two cases. If the instruments received by Wilson passed by delivery, and that they did we entertain no doubt, then it is that a payment to the bearer, would have been a complete and effectual bar to any action subsequently instituted by himself. Under this view of the law we are forced to the conclusion that by parting with the warrants, whether he received their nominal amount or not, he elected to regard them as a payment, and that having thereby transferred his right of action to another, he therefore has no claim against the county of Crawford. Judgment reversed.