trial the counsel for the defendant, at the conclusion of the plaintiff's testimony, moved for a nonsuit, which was refused by the court. This refusal of the court to direct a nonsuit is assigned as error. Other assignments of error relate to the action of the court in refusing to admit certain evidence offered by, and in declining to give certain instructions requested by, the defendant below.

After the court overruled the motion for a nonsuit, the defendant proceeded to examine a number of witnesses, introduced other testimony, and presented various propositions of law which it asked the court to make part of the charge to the jury. This was an abandonment of the motion for a nonsuit, and the action of the court below thereon is not now reviewable here. A defendant has the right to rely upon his motion for a nonsuit, and to have his writ of error if it be refused, but he has no right to insist upon his exception, founded on said motion, after he has offered testimony and made his case upon the merits, for the court and jury then have the right to consider the whole case as it has been made by the testimony. The defendant, having thus abandoned the nonsuit, may move to have the case taken from the jury upon the conclusion of the entire evidence. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685; Railroad Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321; Insurance Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534; Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591; Runkle v. Burnham, 153 U. S. 216, 14 Sup. Ct. 837.

The assignment of error relating to the refusal of the court to permit the introduction of certain testimony is without merit. The court properly declined to admit evidence hearsay and secondary in character, and we refer to it only for the purpose of expressing our disapproval of exceptions evidently untenable and clearly frivolous.

We are unable to consider the points suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error. It therefore follows that we must presume there was no such evidence, in which event the court properly declined to give the instructions asked for. Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171; Newman v. Iron Co. (decided during the present term of this court) 42 U. S. App. —, 80 Fed. 228.

The judgment of the court below is affirmed.

SHAW ELECTRIC CRANE CO. v. SHRIVER.

(Circuit Court, S. D. New York. April 15, 1897.)

1. COSTS—CERTIFICATION OF DOCUMENTS.
A party cannot tax as costs the fees for certifying documents for use in evidence, which, in the absence of stipulation, would require certification, but have not in fact been certified.

2. SAME—ALLOWANCE AND DISALLOWANCE.
Where a nontaxable charge for certifying and a taxable charge for printing have been combined in a bill of costs, and the amount of the latter can be separated from the former, it should be allowed, though the former is disallowed.

Francis Forbes, for complainant.
John R. Bennett, for defendant.

LACOMBE, Circuit Judge. I do not see any authority for taxing this sum of $500, which is practically charged as "constructive" fees. The order of this court restoring the cause to the calendar contained the proviso that complainant (who had made the motion) should file a stipulation that the "evidence taken in" the New Jersey case "be used in this case with the same force and effect," etc., "as though originally taken herein." A stipulation to this effect, including, also, testimony "to be taken" in the New Jersey suit, was forthwith filed by complainant. Thereupon the defendant had the choice either to take the evidence de novo, or to use the evidence taken in New Jersey. Of course, the order and stipulation authorizing the use of this testimony taken in another case presupposed that proper assurance of its authenticity would be made. If defendant decided to use it, the only proper shape in which it could have been offered to this court was under the certification of the clerk of the court in which it was filed, unless some further stipulation should dispense with this requirement. Had defendant obtained this certification, he could, of course, tax the disbursements necessary to obtain it, but he surely cannot charge anything for certification fees which he has not paid. Probably there was a further stipulation entered into by the parties (although the papers do not clearly show one) to the effect that an uncertified copy of the New Jersey evidence might be put in with the same effect as if it were certified, but, in the absence of any stipulation as to allowance of whatever sum defendant chose to pay for the uncertified copy, I cannot see how the court can include such sum in the bill of costs. The rules of this court, however, require that records for final hearings shall be printed. Defendant has paid out money in part to put the New Jersey evidence into print, which he was bound to do, and from which obligation no stipulation of his adversary could relieve him. The disbursements necessary to print this evidence should be allowed. Defendant ought not to lose them because he has paid both for copy and for printing in a lump sum. The proper amount is readily ascertainable, since the number of pages is known, and the price per page for such work is shown by the charge for printing so much of the record as was made up in this court.

HAYES et al. v. CITY OF NASHVILLE.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1897.)

No. 464.

1. CONTRACTS—RESCISSION—ABANDONMENT.
Besides technical rescission of a contract, releasing each party from every obligation under it, as if it had never been made, there is a mode of abandoning a contract, as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment; and courts, in construing the language used by laymen in such cases, will consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission, and the probability or improbability of the party's intending such a result.

2. SALES—DEFAULT IN PAYMENTS—RIGHT TO RESELL.
When the title passes to something which is sold, one of the remedies of the vendor for a failure by the vendee to make payments in accordance with the contract at the time fixed for the deliveries and payments is, after notice, to resell the subject-matter of the sale, and to hold the defaulting vendee for the difference between the proceeds of the sale and the contract price.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

The action below was by W. J. Hayes & Sons, a firm of brokers of Cleveland, Ohio, to recover from the corporation, the mayor and city council of the city of Nashville, Tenn., $3,750, a part of the sum deposited under a contract made between the parties for the sale and purchase of $400,000 of negotiable bonds. The defendants filed a plea averring they were entitled to retain the amount sued for because of damages in that sum sustained by them through the failure of the plaintiffs to take the bonds as agreed. The contract was as follows:

Agreement, made this 13th day of April, 1893, by and between the mayor and city council of Nashville, a corporation organized under the laws of the state of Tennessee, hereinafter to be known as the city of Nashville, and W. J. Hayes & Sons, of the city of Cleveland, in the state of Ohio, witnesseth: Whereas, the said city of Nashville did on the 11th day of April, 1893, offer to sell to the said W. J. Hayes & Sons the $400,000 of city of Nashville 4½ per cent. trunk-sewer bonds, issued under the act of the general assembly of the state of Tennessee, approved February 2, 1892, and an ordinance of said city passed in pursuance thereof on the 13th day of March, 1893, at the par value of said bonds, less 2 per cent. thereof, to be allowed and paid by said city of Nashville to said W. J. Hayes & Sons as commission; and whereas, said W. J. Hayes & Sons did on the 11th day of April, 1893, accept said offer, and agree thereto: Now, therefore, the said city of Nashville does hereby agree to and does sell to the said W. J. Hayes & Sons the said four hundred thousand dollars of trunk-sewer bonds for the sum of four hundred thousand dollars, less the 2 per cent. commission aforesaid to be paid and allowed said W. J. Hayes & Sons by said city. Said bonds are to be dated April 1, 1893, of denomination of $1,000, with semiannual interest coupons attached, interest at the rate of 4½ per cent. per annum, payable semiannually at the Chemical National Bank of New York City, or at the office of city treasurer, Nashville, Tennessee, at the option of the holders of the same. Said bonds are to mature in thirty years from the date thereof, with principal payable at the office of the treasurer of the said city of Nashville, Tenn. Said bonds are to be numbered from 1 to 400, inclusive, and are to be legally issued, and the said city of Nashville shall

furnish the said W. J. Hayes & Sons a transcript of said proceedings relating to said issue, showing the legality thereof. The said bonds are to be delivered to the said W. J. Hayes & Sons at the Chemical National Bank of New York City as follows, at expense of city: $75,000 on or before the 1st day of May, 1893, $75,000 in thirty days thereafter, and $50,000 every thirty days thereafter, successively, until the entire issue is taken up. In consideration whereof, the said W. J. Hayes & Sons hereby agree to purchase, to take up and pay for said bonds when delivered, not only the par value thereof, less the two per cent. commission aforesaid, but in addition thereto all interest which shall have accrued on the par value of each installment of said bonds; interest to be calculated from April 1, 1893, up to date of such installments, as above provided: provided, however, that the said W. J. Hayes & Sons shall have the option of taking up and paying for the entire issue at any time after legality of bonds is established. If the said W. J. Hayes & Sons fail to take and pay for any installment of bonds as above provided when delivered, then, at the option of the said city of Nashville, this contract may be declared null and void in all its provisions. As an evidence of good faith upon the part of the said W. J. Hayes & Sons, and as a guaranty upon their part that they will faithfully carry out the provisions of their contract, they have delivered to the recorder of the city of Nashville a draft for the sum of five thousand dollars, receipt of which draft is hereby acknowledged by the said city of Nashville. A pro rata of said deposit, with 6 per cent. interest thereon, will be refunded to the said W. J. Hayes & Sons as each installment of bonds is taken up and paid for. The conditions of this contract are subject to the opinion of Judge John F. Dillon, of New York, as to the legality of bonds; the legal services for same to be paid by W. J. Hayes & Sons. In witness whereof, the mayor and city council of Nashville has caused this agreement to be signed by the finance committee of the city council, by the mayor of said city, and by the recorder, and has caused its official seal to be affixed thereto; and the said W. J. Hayes & Sons have caused the same to be signed by T. W. Heatley, their duly-authorized agent.

[Signed] Geo. B. Guild, Mayor.
A. S. Williams,
[Seal.] J. B. Murray,
G. P. Lipscomb,
Finance Committee.
James T. Bell, Recorder.

W. J. Hayes & Sons, per Thos. W. Heatley.

The bonds were declared to be legal by Judge Dillon of New York, in accordance with the contract, and the city issued them. It delivered $100,000 of them to the plaintiffs, and received payment thereon; and, in accordance with the contract, it delivered up to the plaintiffs $1,250 of the $5,000 guaranty deposit. Though requested frequently by the city to take and pay for the remaining $300,000 of the bonds the plaintiffs failed to do so. There was a good deal of correspondence between the parties, and the city authorities made a number of efforts to secure the completion of the contract by the plaintiffs. Finally a meeting of council was called for the purpose of considering the situation, the minutes of which were as follows:

Minutes of the Meeting of the City Council of Nashville of February 10, 1894:

Minutes.

City Hall, Nashville, Feb. 10, 1894.

The Hon. the city council met this evening at 4 o'clock in extra session, pursuant to a call from his honor the mayor. Present—Messrs. Barthell, Dalton, Goodloe, Goodman, Harwell, Moore, Murray (P. A.), Murrey (J. B.), Stewart, Sykes, Williams, and Prest. Higginbotham. The message of his honor the mayor, convening the council, was as follows:

"Gentlemen of the Council: You are called to meet in extra session this evening at 4 o'clock to consider the matter of declaring forfeited the trunk-sewer

bonds contracted for by W. J. Hayes & Sons, Cleveland, Ohio, and to take such steps as the emergency of the case may demand, and the interest of the city requires.

"Feby. 10th, 1894.

"Respectfully, Geo. B. Guild, Mayor."

Which message was received and filed.

Mr. Sykes offered the following:

"Be it resolved by the mayor and city council of Nashville that whereas, the mayor, recorder, and finance committee, the commissioners appointed by ordinance approved March 13, 1893, to negotiate and sell the trunk-sewer bonds, have this day sent the following communication to the city council, to wit:

" 'To the Mayor and City Council: We herewith submit the resolutions of the commissioners appointed to negotiate the trunk-sewer bonds, which resolution was passed at a recent meeting held January 23, 1894, and is as follows: "Whereas, W. J. Hayes & Sons, of the city of Cleveland, Ohio, have failed to comply with the provisions of their contract made with the city of Nashville April 13, 1893, with reference to the sale of the trunk-sewer bonds (that is to say, said W. J. Hayes & Sons having failed to take the installments of said bonds at dates provided for under the terms of said contract); and whereas, by the terms of the said contract the said city of Nashville has authority, at its option, to declare said contract null and void upon failure of the said W. J. Hayes & Sons to comply therewith: Therefore be it resolved by the commissioners appointed by ordinance approved March 13, 1893, namely, the mayor, recorder, and the finance committee, that said contract is hereby declared null and void and of no further effect. Be it further resolved that said commissioners report their action to the city council for ratification and approval."

" '[Signed] Geo. B. Guild, Mayor.
" 'James T. Bell, Recorder.
" 'Chas. Sykes.
" 'A. S. Williams.
" 'M. J. Dalton.
" 'W. H. Higginbotham.
" 'Frank Goodman.'

"Therefore be it resolved by the mayor and city council of Nashville that said action of the commissioners be ratified and approved. Be it further resolved that said contract be declared null and void, in accordance with the suggestions and recommendations of said commissioners. Be it further resolved that W. J. Hayes & Sons be notified of the action of the mayor and city council with reference to the said contract, and that they be further notified that the mayor and city council of Nashville, in accordance with the provisions of said contract, claim the guaranty deposited by them (the said W. J. Hayes & Sons) for the faithful performance thereof, not yet refunded to them, amounting to the sum of $3,750.00. Be it further resolved that the treasurer and comptroller be directed to draw from the Fourth National Bank the said sum of $3,750.00, and deposit the same with the legal depositories of the city, the First National Bank."

Which resolutions were on motion adopted, and then council adjourned.

[Signed] W. H. Higginbotham, Prest.

Notice of these resolutions was conveyed to the plaintiffs in the following letters:

Letter of Recorder James T. Bell, of February 12, 1894:

Office of City Recorder.

Jas. T. Bell, Recorder and Judge of City Court.

Nashville, Tenn., February 12, 1894.

W. J. Hayes & Sons—Dear Sirs: I am directed to inclose a copy of resolutions adopted by the Hon. city council of Nashville February 10, 1894. I regret that things have assumed the shape as indicated. But Nashville has suffered considerably for your failure to comply with the terms of your contract, and

to-day is suffering for want of funds to carry on the work for which the bonds were issued.

Respectfully, yours, James T. Bell, Recorder.

To which W. J. Hayes & Sons made the following reply:

February 14, 1894.

Hon. James T. Bell, Recorder, Nashville, Tenn.—Dear Judge: We have yours of the 12th inst., inclosing action of the council in accordance with a report signed by you and the other commissioners. We know none of your people intend to take any advantage of us, and we can assure you we have been acting under a great many disadvantages. We telegraphed you as per inclosed copy, saying we could take up $50,000 in New York. When you come to know the difficulties which have arisen on this issue, you will not blame us.

Yours, truly, W. J. Hayes & Sons.

Dict. by H. E. H.

The city then made efforts to sell the remaining bonds, and secured a purchaser in New York. The council (on February 15, 1894) then passed the following resolution:

Resolution.

City Hall, Nashville, February 15, 1894.

The Hon. city council met this morning at 11 o'clock, in extra session, pursuant to a call from his honor, the mayor. Present: Messrs. Barthell, Crutcher, Dalton, Goodloe, Goodman, Harwell, Hitchcock, Moore, Murrey (J. B.), McConnell, Sharenberger, Stewart, Sykes, Warren, Williams, and Prest. Higginbotham. The following message, convening the council, was transmitted from his honor the mayor, to wit:

"Nashville, Tenn., February 15, 1894.

"Gentlemen of the City Council: You are called to meet in extra session at 11 o'clock this a. m., to consider the proposition in regard to sale of the sewer bonds. Geo. B. Guild, Mayor."

Which message was received and filed.

Mr. Sykes offered the following: "Be it resolved by the mayor and city council of Nashville that the trunk-sewer bonds commission be authorized and empowered to sell the $300,000 trunk-sewer bonds at par and accrued interest to March 1, 1894, and to allow 2 per cent. commission on the par value of the bonds, and the $3,750 forfeited by W. J. Hayes & Sons, of Cleveland, Ohio. The bonds, if sold, are to be paid for as follows: $100,000 on March 1, 1894, $100,000 not later than April 1, 1894, and the remaining $100,000 not later than May 1, 1894." After being generally discussed by the members present, the resolution was adopted without dissent, and the council then adjourned. W. H. Higginbotham, Prest.

These terms were accepted by the purchaser, Quintard, and the bonds were sold. It was in evidence that the method taken by the city to sell the bonds was according to the usual course of business in the disposition of such securities.

Parts of the court's charge to the jury to which the plaintiffs excepted were as follows:

"Now, then, looking to the provisions of this contract, viz. that the indemnity fund was deposited as an evidence of good faith, and as a guaranty of good faith, on the part of Hayes & Sons, that they would faithfully carry out the contract, if, in view of that, and in view of their failure to carry it out, it resulted, on conditions presently to be named, that the city was compelled to resell the bonds at a loss equivalent to the three thousand seven hundred and fifty dollars, or if, after the city had used due care and diligence to effect a sale, which I shall presently instruct you about, was unable to do so, and was compelled to sell the bonds in order to realize money which it expected under the contract, and had a right to expect, it would, in such a case as that, have a right to retain out of the indemnity fund enough to make itself whole

as it would have been if the plaintiffs had faithfully carried out their contract, to secure which this indemnity deposit was made; and that is a question you must determine.

"The question, then, would turn upon the city's dealing with these bonds after the contract was declared forfeited, and after it undertook to handle them, and after it became the owner of them. So that if, upon the proof, you believe that Hayes & Sons defaulted (to which there seems to be no controversy), and the city declared the contract forfeited (about which there seems to be no controversy), and the city then, for the purpose of realizing immediate proceeds upon the bonds, undertook to sell them, and did sell them, your next inquiry will be as to whether or not the city's conduct in the sale of them was lawful and just towards the plaintiffs, and if it acted properly, and was damaged by reason of having to resell them, to the extent of this three thousand seven hundred and fifty dollars, and taking the bonds back under a forfeiture, it became the duty of the city, in the reselling of these bonds, to exercise good faith and to exercise reasonable diligence in the reselling of these bonds for the best price they could obtain upon the market. That would have reference to the usual method or methods of selling securities at places where it was reasonable to expect there would be a demand for such securities. The city was not required to adopt any particular mode, but the mode they adopted must have been adopted in good faith, and must have been reasonable under the circumstances; and, to determine whether it was reasonable or not, you must look at the method pursued by the city in such cases, and the methods that are ordinarily pursued in handling securities of that kind; and whether it exercised good faith, through its officers, and used reasonable care and diligence to obtain the best price possible, is for the jury to decide upon the evidence before you."

W. G. Hutcheson, for plaintiffs in error.

John B. Keeble, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Though other questions are raised by the assignment of errors, we shall discuss only the two which were presented and argued to the court

It was first contended on behalf of the plaintiffs in error that the city could not claim damages for breach of the contract, by way of set-off, because its action in annulling the contract was a complete rescission of it, releasing each party from every obligation under it, as if there never had been a contract made. It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment. In Mining Co. v. Humble, 153 U. S. 540, 551, 14 Sup. Ct. 876, 879, defendant excepted to the following instruction of the trial court:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance, to such an extent as to render the performance of it difficult, and greatly decrease the profits

which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

In sustaining the correctness of the charge the supreme court, speaking by Mr. Justice Brewer, said:

"It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract, and at the same time recover damages for his nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule—and it lays that down correctly—which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and if such other party interferes,—hinders and prevents the doing of the work,—to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop, and sue for the damages which it has sustained by reason of the nonperformance which the other has caused."

It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention is only to declare his release from further obligation to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases, courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used. In this case the original contract provided for an "annulment" of the contract. If we can satisfy ourselves as to the meaning of the contract in this regard, it will throw a useful light on the meaning to be given to the subsequent action of the city authorities. The clause of the contract referred to is as follows:

"If the said W. J. Hayes & Sons fail to take and pay for any installments of bonds as above provided when delivered, then, at the option of the city of Nashville, this contract may be declared null and void in all provisions. As an evidence of good faith on the part of the said W. J. Hayes & Sons, and as a guaranty upon their part that they will faithfully carry out the provisions of this contract, they have delivered to the recorder of the said city of Nashville a draft for the sum of five thousand dollars, a receipt of which draft is hereby acknowledged by the said city of Nashville. A pro rata of said deposit, with 6 per cent. interest thereon, will be refunded to the said W. J. Hayes & Sons as each installment of bonds is taken up and paid for."

We cannot suppose that the city, in making this contract, intended to reserve to itself only the right completely to destroy the contract,

and thus to obligate itself to give up to the defaulting party the indemnity it had been careful to secure against loss; and yet such must be the construction of the contract, if the annulment provided therein means a complete rescission. The obvious intent of the parties was that upon default the city might free itself from any obligation thereafter to deliver the subsequent installments of bonds to W. J. Hayes & Sons, and that the fund deposited should be an indemnity against any loss the city might suffer by reason of the default. And it was in accordance with such an intent that the city declared its annulment of the contract, for it appropriated to itself the $3,750 which still remained on deposit as indemnity for the performance of the contract. The declared intention of the city to retain its deposit can only be reconciled and made consistent with its declaration of annulment by construing the latter to be merely an abandonment of the contract, and not a complete rescission. This case presents many points in common with that of Cherry Valley Iron Works v. Florence Iron River Co., decided by this court, and reported in 22 U. S. App. 655, 12 C. C. A. 306, and 64 Fed. 569. That was a suit for damages for the breach of a contract to purchase 10,000 tons of ore. The contract provided for the payment of the price in installments according to periodical deliveries of the ore, and contained this stipulation:

"And, in case said party of the second part fails to make any or either of the above-named payments for the period of ten days after the same becomes due, said Florence Iron River Company shall have the right to cancel this contract for all ore not delivered at the time such default is made."

The purchaser had failed to make the payments according to the contract, and correspondence ensued, in which the seller threatened that, unless payment was made, the undelivered ore would be sold for account of plaintiff, and the difference between the selling price and the unpaid purchase price would be charged to the plaintiff. Finally the sellers notified the buyers, in a letter in which they quoted in full the clause permitting cancellation of the contract for all ore undelivered, that they canceled the contract in accordance with that clause. It was vigorously contended on behalf of the purchaser that the cancellation was necessarily a complete rescission, and that it released both parties from the obligation of the contract, and that no damages could be recovered for failure to receive and pay for the undelivered ore. This court did not yield to the contention, but held that, upon the exercise of the right of cancellation provided by the contract after a failure to make the agreed payment, the further performance of the contract was abandoned and the aggrieved party had the right to pursue its remedy for the damages sustained by it in consequence of the breach of the contract which was the cause of its abandonment. The court, in reaching this conclusion, was fortified by the case of Lumber Co. v. Bates, 31 Mich. 158, 163, in which one party, by a declaration of rescission based on a default of the other party, was held not to intend a rescission in law, but a mere abandonment, because in the same letter was the declaration that the writer intended to look to the defaulting party for damages sustained by its failure to perform the contract. In the case of Railroad Co.

v. Howard, 13 How. 307, the contract between the railroad company and the building contractor contained the following clause:

"Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then and in such case he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same, in any place, under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said noncompliance, irregularity, or negligence."

The railroad company availed itself of this provision, and notified the contractor, after he had done part of the work, that in its opinion the contract had not been duly complied with by him, and, therefore, that the contract be, "and the same is hereby, declared to be forfeited." At the time of the forfeiture, money was due under the contract to the contractor, and he brought suit for the same. It was contended on behalf of the company that by its action in accordance with the contract, annulling the same, all rights acquired under the contract had been destroyed. The court below had given the following instruction:

"But this annulling did not deprive him [i e. the contractor] of any rights vested in him at that time, or make the covenant void ab initio, so as to deprive him of a remedy upon it for any money then due him for his work, or any damages he had then already sustained."

Error was assigned to this charge on the ground stated above. In affirming the correctness of the charge, Mr. Justice Curtis spoke as follows:

"The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one to show plainly his right to it. The language used in this contract is susceptible of two meanings: One is the literal meaning, for which the plaintiff in error contends,—that the declaration of the company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the company to the contractor, and as to which the company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end. Another interpretation is that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract, might be annulled. We cannot hesitate to fix on the latter as the true interpretation. In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and 'expressio unius exclusio alterius.' And, finally, it is highly improbable that the parties could have intended to put it in the power of the company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that vested rights were absolutely destroyed by the act of the company; and he suggested that, though the covenant was destroyed, assumpsit might lie upon an implied promise. But if the intention of the parties was to put an end to all obligations on the part of the company arising from the covenant, there would remain nothing from which a promise could be implied; and, if this was not their intention, then we come back to the very interpretation

against which he contended, for, if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct."

In the case of Mayor, etc., of City of New York v. New York Refrigerating Construction Co., 146 N. Y. 210, 40 N. E. 771, the city made a contract with a refrigerating company to introduce a refrigerating apparatus into one of the markets of the city. The contract provided that, in case of the default of the company after certain proceedings, the city comptroller might notify the company to discontinue its system. After the contract had been partially performed, the comptroller did notify the company that the contract was canceled and annulled. By reason of the prior occupancy of the market houses by the company under the terms of the contract, certain rent was due from the company to the city. The company claimed that the cancellation destroyed any cause of action arising under the contract and that the rent could not, therefore, be recovered. It was held that the cancellation was not a rescission, in a strict, technical sense, which destroyed all right of action, but was simply a termination of the contract, leaving undetermined all existing liabilities. It was said that this result might be implied from all the surrounding circumstances, and grew out of the obvious meaning of the parties when the contract was executed, and that the position assumed by the appellants was "technical, forced, and unnatural." The court said:

"We have been referred to numerous authorities laying down the general doctrine that, where a contract is rescinded while in the course of performance, no claim in respect of performance, or of what has been paid or received thereon, may thereafter be made. This general rule is subject, however, to the qualifications that any claim founded on the contract must be referred to the agreement of rescission, to ascertain whether it has been expressly or impliedly reserved. See McCreery v. Day, 119 N. Y. 5, 23 N. E. 198. In the case cited, Judge Andrews says that the liability 'depends on the intention to be deduced from the agreement of annulment, construed in the light of attending circumstances.'"

In Hinsdale v. White, 6 Hill, 507, a landlord terminated the tenancy of a tenant under a section of the statute which provided for the issuing of a warrant at the instance of a landlord by the magistrate for the removal of the tenant, with declaration that "the contract or agreement for the use of the premises, if any such exist, and the relation of landlord and tenant between the parties, shall be deemed to be canceled and annulled." It was contended that the effect of this annulment and cancellation was a complete rescission of the contract of tenancy, and prevented the landlord from recovering any rent due him for occupancy by the tenant prior to the issuing of the warrant. The court refused to give the statute and removal of the tenant such effect; holding that the annulment operated only from the time the warrant issued, leaving the contract in full effect previous to that time. The court said:

"The words of the statute admit of either construction, inasmuch as they do not expressly fix the time; and, in determining which should prevail, it is our duty to regard consequences. To say that the contract shall be considered as void and inoperative from the beginning, would not only cut off the remedy afforded by its terms for rent which may have accrued at any time past, but

would even enable a tenant to recover back all he had paid. A consequence so unjust we cannot allow without words expressly declaring it."

This view was approved by the court of errors in McKeon v. Whitney, 3 Denio, 452, 453.

The foregoing cases seem to justify the interpretation we have put upon the act of the city in declaring the contract of sale with the plaintiff at an end. The charge of the court below with reference to the action of the city of Nashville in annulling this contract was therefore correct.

The second and only remaining question for our consideration is the question of damages. In the case of Cherry Valley Iron Works v. Florence Iron River Co., 22 U. S. App. 655, 12 C. C. A. 306, and 64 Fed. 569, the question was of the proper measure of damages for the breach of the contract to take iron ore. The ore contracted to be sold in that case had not yet been taken from the mass. The subject of the bargain was not identified at the time when it was made, nor had it afterwards been identified before the breach. In considering the rule of damages, Judge Severens, in delivering the opinion of this court, said:

"If the subject-matter is identified when the contract is made, the title passes to the vendee, in the absence of controlling stipulations. When the subject-matter is subsequently identified by its appropriation to the contract, the title passes at the time of such appropriation; but, when there has at no time been any identification of the subject, the title remains in the vendor. In those cases where the title has passed before the contract is broken, and the rights of the parties have been converted into claims for damages arising from the breach, the nature and kind of remedies to which the vendor may resort are the subject of much controversy in the opinions of the courts. There is high authority for the proposition that the vendor in such a case may, among other remedies, by virtue of a species of lien for the purchase price, sell the goods as those of the vendee, and hold the latter for the difference between the price obtained and the contract price. This was the remedy resorted to here. It is not necessary for us to decide whether the vendor has this remedy in the class of cases just mentioned."

The learned judge then proceeded to show that the case he was dealing with did not belong to that class, that the title never passed, and that the goods to be sold at all times remained the property of the vendor, and, therefore, that the measure of damages was not to be reached by the remedy resorted to, of a resale, but that the vendor must recover the difference between the contract price and the market price at the time fixed for the delivery. In the case at bar, the subject-matter of the contract was bonds which were issued and appropriated to the contract within a very short time after it was made. The language of the contract is that of present sale. The title, therefore, did pass; and we have presented to us the question stated by Judge Severens in the passage just referred to, but which the court in that case did not find it necessary to decide, to wit, whether, when the title passes to something which is sold, one of the remedies of the vendor for a failure by the vendee to make payments in accordance with the contract at the times fixed for the deliveries and payments is, after notice, to resell the subject-matter of the sale, and to hold the defaulting vendee for the difference between the proceeds of the resale and the contract price. We think that the