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

vendor has such a remedy. The leading American authority is Sands v. Taylor, 5 Johns. 395. In that case the suit was for failure to receive part of a cargo of grain by a contracting purchaser. Chief Justice Kent stated the rule as follows:

"Nor was the subsequent act of the plaintiffs, in selling the wheat not delivered, a waiver of their claim for damages for nonperformance of the contract. The usage in such cases is to sell the article, after due notice to the other party to take it, and that in default of doing it the article will be sold. The usage is convenient and reasonable, and for the best interest of both parties."

In McClure v. Williams, 5 Sneed, 718, Judge McKinney, speaking for the supreme court of Tennessee, said:

"If goods have been bargained and sold by a valid contract, so that the right of property has thereby passed to the purchaser, the failure of the latter to receive and pay for the goods at the time and in the manner agreed upon will not have the effect of rescinding the contract, and revesting the right of property in the vendor, so as to entitle him to resell the goods, without something more on his part. In such case the seller has an election to proceed either, in an action for goods bargained and sold, to recover the price stipulated to be paid, or he may give the purchaser notice of his intention to resell the goods within a reasonable time from the service of such notice; and if, after notice, the purchaser will not take the goods or pay the price, the seller is not bound to keep them, to his own injury, but may resell them, and the purchaser will be held to have assented, and to have given the seller an implied authority to resell, and he will be responsible for the reasonable loss, if any, as also for the expenses of the resale,—that is, the difference between the price obtained on such resale and that originally agreed to be paid by the purchaser."

See, also, Hughes' Case, 4 Ct. Cl. 64.

Mr. Benjamin, in his work on Sales (section 788), after having stated the English law, says that:

"In the United States the law is somewhat different; and in Dustan v. McAndrew, 44 N. Y. 72, it was stated as follows: 'The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice, ordinarily, for one of three remedies: First, he may store or retain the property for the vendee, and sue him for the entire price; second, he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price of resale; or, third, he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.' "

See, also, the American cases cited by the American editors on page 775 of Bennett's Edition of Benjamin on Sales (1892).

In Sedg. Meas. Dam. § 750, the learned author says, referring to cases where the title to the subject-matter of the sale has passed:

"It seems to be well settled in such cases that the vendor can resell them, if he see fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent, it is not necessary that the sale should be at auction. It is only requisite to show that the property was sold for a fair price."

See, also, Suth. Dam. § 647, and cases cited.

In the case at bar the correspondence between the parties, and the action of the city council, communicated to Hayes & Sons, leave no doubt that due notice of the intention of council to resell the bonds was conveyed to Hayes & Sons, though this was not expressly stated in the contract of annulment. The situation of the city was

such, as explained in previous letters by its recorder to Hayes & Sons, that Hayes & Sons could have been left in no doubt as to the intention of the city to resell. Indeed, the letters of Hayes & Sons show that they supposed that the city was looking for a purchaser even before the formal action was taken by the city council, and approved its action in so doing. It was proved in the case that the city took the usual mode of disposing of such bonds, in its resale of them to Quintard; and the court left it to the jury to say whether the city had used due diligence, and had pursued the usual methods in disposing of such property, charging them that, if it had done so, then the difference between the price at which the bonds sold and the contract price was the proper measure of damages, and that it might be set off against plaintiffs' claim to recover the indemnity deposit from the city. This was correct. On the whole case, we find no error in the charge of the court below, and the judgment is affirmed.

JOHN HANCOCK MUT. LIFE INS. CO. v. CITY OF HURON.

(Circuit Court, D. South Dakota. May 8, 1897.)

1. NEGOTIABLE BONDS—BONA FIDE HOLDERS—PRESUMPTIONS.
   In an action upon negotiable bonds, when evidence has been given to show that they are illegal, the plaintiff cannot rely on the presumption arising from title and possession thereof, but must prove that he gave value therefor in the usual course of business, in order to constitute himself a bona fide holder.

2. MUNICIPAL BONDS—VALIDITY—EXCESSIVE INDEBTEDNESS.
   Municipal bonds issued at a time when the debt of the municipality exceeds 5 per cent. of its assessed valuation, and without any provision for a sinking fund, are illegal, under article 13, §§ 4, 5, of the constitution of South Dakota.

Jones & Culver, for plaintiff.
A. W. Wilmarth, for defendant.

CARLAND, District Judge. This action was commenced by the plaintiff, a Massachusetts corporation, against the defendant, a municipal corporation of this state, to recover from the defendant the amount of money claimed to be due to plaintiff on 240 coupons, of $15 each, detached from 20 bonds, of $500 each, issued by defendant on the 26th day of September, 1890. The bonds issued were all of the following form:

"The United States of America, State of South Dakota.

"$500.00.

"Bond of the City of Huron, Beadle County, State of South Dakota.

"The city of Huron, twenty years after date, for value received, will pay to bearer the sum of five hundred dollars at the banking house of Kountze Bros., New York City, with interest thereon at the rate of six per cent. per annum, payable semiannually, according to the terms of the annexed coupons.

"Issued pursuant to an election held September 25th, 1890, by authority granted by article 32 of section 7 of the charter of the city of Huron; said charter approved by the legislative assembly of the territory of Dakota March 8th, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron.

"In testimony whereof the city of Huron, Beadle county, South Dakota, has caused this bond to be signed by the mayor thereof, and countersigned by the city clerk of said city, and the seal of said city is affixed, this 26th day of September, A. D. 1890. H. J. Rice, Mayor of the City of Huron.
"B. M. Rowley, City Clerk of the City of Huron."

A jury having been waived in writing, this action was on the 27th day of April, 1897, tried to the court.

The defendant seeks to defeat a recovery by the plaintiff in this action upon certain grounds, which may be specified as follows: First, that at the time the bonds were issued the defendant had no power to fund its floating indebtedness; second, that at the time the bonds were issued the defendant had exceeded the amount of indebtedness which it lawfully could contract under the limitation contained in the constitution of this state; third, at or before the time said bonds were issued the defendant made no provision for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; fourth, that the proceeds of said bonds were used by the officers and agents of defendant for the purpose of paying the expenses incurred in carrying on a campaign to secure the location of the state capital at Huron, S. D., and that said proceeds never were paid into the treasury of defendant. The undisputed testimony shows that the bonds were issued for the purpose of raising money to carry on a capital campaign, and that the proceeds arising from the sale thereof were so used; that the equalized assessed value of the property subject to taxation in the city of Huron for the year 1890 was $3,014,764; that neither before or at the time of the issue of said bonds was there any provision made by defendant for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; that the indebtedness of the defendant, exclusive of the money in its treasury, at the times these bonds were issued, was $197,949.79. The plaintiff alleges in its complaint that it is the holder in good faith for value, before maturity, of the bonds and coupons involved in this action. This allegation is denied by the defendant in its answer. The plaintiff, in making out its prima facie case, relied upon the presumption that the holder of negotiable paper payable to bearer, subsequent to its date, holds it clothed with the presumption that it was negotiated to him at the time of its execution in the usual course of business, and for value, and without notice of any equities between the prior parties to the instrument. Goodman v. Harvey, 4 Adol. & El. 870; Goodman v. Simonds, 20 How. 365; Noxon v. De Wolf, 10 Gray, 346; Ranger v. Cary, 1 Metc. (Mass.) 373. Title and possession are one and inseparable to clothe the instrument with the prima facie presumption that it was indorsed or delivered at the date of its execution, and that the holder paid value for it, and received it in good faith in the usual course of business, without notice of any prior equities. It was not necessary for the plaintiff to show that it paid value for the coupons or bonds, in making out its prima facie case upon which it rested; but the defendant, in support of the denial in the answer, after the plaintiff had rested, had the undoubted right to show that the consideration of the bonds and coupons was illegal; that the instruments sued on were fraudulent in their inception, or that they had been lost or