

length, we do not find it necessary, or within our rightful power, to decide. While under the rule of equity pleading it was proper, and perhaps necessary, that the appellant, in order to avail itself of the decree of the superior court as a bar, if it be a bar, to the further prosecution of the suit to foreclose, should set it up by a cross bill (Story, Eq. Pl. § 393), the pleading, it is conceded, was in the nature of a plea puis darrein continuance; and, having been pleaded in bar, if it did not, like a plea puis at law, constitute a waiver of other pleas or answers, it was necessary that it should be disposed of together with or in the same manner as the answer theretofore filed, before a final decree in the case could be entered. Until the merits of the cross bill as an alleged bar to the prosecution had been determined there could not properly be a final decree upon the principal bill, any more than there could be such a decree without disposing of an answer in bar. There was, therefore, no conceivable necessity for an injunction against proceeding to a decree in the main case or on the principal bill. In fact this cross bill made no new, subordinate, or collateral case, which could be carried to a separate conclusion, for the obtaining of which it might be important that there should be a suspension or stay of proceedings on the original bill. It is, of course, conceded, as in *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, the supreme court has decided, that the right of appeal from interlocutory orders granting or refusing injunctions, conferred by the acts of March 3, 1891 and February 18, 1895, is to be interpreted liberally, but there is no necessity for going, and there could be no propriety in going, the length necessary to sustain this appeal. The cross bill, as filed, contained no prayer for an injunction, and the effort made to amend the prayer would seem to have been an afterthought, not germane to the bill, and as "manifestly pretentious" as the like prayer which was condemned by this court in *Safe-Deposit Co. v. Dickson*, 24 C. C. A. 60, 78 Fed. 205. The appeal is therefore dismissed.



NATIONAL HARROW CO. v. HENCH et al.

(Circuit Court, E. D. Pennsylvania. April 26, 1897.)

1. COSTS—APPEAL FROM TAXATION.

Whether an appeal lies from the order of the circuit court dismissing exceptions to the clerk's taxation of costs,—quære? Appeal allowed in order to save expense, without prejudice to the right of appellees to move to dismiss in the circuit court of appeals; the main cause having also been appealed to that court.

2. APPEAL—SURETY ON BOND FOR COSTS.

The appellee having objected to the surety tendered on a bond for security for costs upon an appeal from an order dismissing exceptions to the taxation of costs, and the appellant having stated that it was ready to furnish a bond satisfactory to the court, the court required another bond, with a different surety, to be submitted to it for approval; 48 hours' notice to be given appellee's counsel.

3. SAME.

Where a surety on a bond for costs upon appeal has been approved for about one month, it is too late for appellee to move for the withdrawal of the approval.

This was a petition for allowance of an appeal from the order of the court dismissing exceptions to the clerk's taxation of costs. Motion for the withdrawal of the approval of surety upon appellant's bond.

The motion for the withdrawal of the approval of the surety was supported by an affidavit setting out that the surety was a foreign corporation, organized under the laws of the state of Maryland, without assets in Pennsylvania; that the bond approved did not provide for execution in the event of default; that the president of the appellant, the principal in the bond, is one of the firm who are agents and attorneys for the surety at Utica, N. Y.; that the alleged certificate of the attorney general attached to the appointment of Herman Hoopes as local agent for the surety provides only that the surety is "granted authority to do business under" the act of congress of August 13, 1894 (2 Supp. Rev. St. U. S. p. 237), and is not a proper certificate, but only a printed circular; that the bond was not properly executed by the surety; and that the surety was also surety on a prior bond given by complainants in the same cause for costs, and that, when costs became due, secured by the bond, the surety failed to pay, and the appellee was compelled to bring suit upon the bond. This bond had been approved March 26, 1897, and the motion was not filed until April 19, 1897.

Risley, Robinson & Love, for complainant.
Strawbridge & Taylor, for defendants.

DALLAS, Circuit Judge (after stating the facts as above). 1. The petition of the plaintiff, praying allowance of appeal from the order of this court of April 10, 1897, dismissing the exceptions to the clerk's taxation of costs, has been argued by the counsel of the respective parties, and fully considered. I have great doubt as to whether an appeal lies from such an order, but think that this doubt should not induce a refusal to allow it. My present action will not prejudice any motion which the defendants may make for dismissal in the court of appeals; but, if the present application were denied, the plaintiff would be compelled to resort to a proceeding involving expense and inconvenience to correct my judgment, if erroneous. Upon compliance by the plaintiff with the requirements of law, its appeal will be allowed.

2. In view of the opposition of counsel for defendants, and of the statement in the affidavit of the president of the corporation plaintiff that the latter "is ready to furnish a bond satisfactory to the court," the surety named in the bond submitted will not be accepted upon the appeal above referred to, but another bond, with different surety, may be submitted at chambers, upon 48 hours' notice to defendants' counsel.

3. Appellee's motion for order withdrawing court's approval of bond for costs on appeal allowed March 26, 1897, has also been argued and considered. The surety was approved about one month ago, and I do not think that the facts now disclosed show that the protection of the defendants require that approval to be withdrawn. Therefore this motion is denied.

MICHIGAN STONE & SUPPLY CO. et al. v. HARRIS et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 501.

1. CONTRACT FOR SALE OF BONDS—MUTUALITY.

A contract for the sale of municipal bonds, to be delivered and paid for in the future, is not invalid for want of mutuality because of a provision that before acceptance of the bonds the seller shall furnish the buyer with a certified transcript of proceedings evidencing legality of issue to the satisfaction of the buyer's counsel, as such provision requires the buyer to submit the evidence to his counsel, and the counsel to pass thereon in good faith, and not capriciously.

2. SAME—SELLER'S RIGHT TO RESCIND.

A refusal to accept and pay for such bonds until all the stipulated evidence of their legality is furnished, where such evidence is obtainable, is not a repudiation of the contract on the part of the buyers, authorizing the sellers to rescind it.

In Error to the Circuit Court of the United States for Eastern District of Michigan.

John C. Donnelly, for plaintiffs in error.

Horace S. Oakley, for defendants in error.

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

LURTON, Circuit Judge. This is an action at law for breach of a contract for the purchase and sale of certain negotiable bonds. The memorandum of sale was in the following words and figures:

"Detroit, Michigan, October 3, 1893.

"Messrs. N. W. Harris & Co., Bankers, Chicago, Ills.—Gentlemen: We hereby sell and agree to deliver to you \$100,000 boulevard improvement bonds, issued by the city of Detroit, Michigan, to be dated November 1, 1893, to bear interest at the rate of 4 per cent. per annum, payable semiannually in gold coin, and due and payable in 30 days from the date of bonds. You agreeing to pay us for same par, less a commission of 2 per cent., or, in other words, 98 cents on the dollar for same. We to furnish you with certified transcript of proceedings evidencing legality of issue to the satisfaction of your attorneys prior to the delivery of same. You agreeing to take up and pay for said bonds upon their delivery to you in such amounts and at such times after November 1, 1893, as we may receive same from the city: provided, however, that we deliver all of said bonds between November 1, 1893, and February 1, 1894. This contract is made with you subject to our bid for said bonds made by us this day to the city of Detroit being accepted, it being understood that, if the city does not accept our bid for the above bonds, this contract is null and void. It is further understood that, in case we succeed in obtaining these said bonds in payment for our work, or by direct bid to the city, at any future time, we will deliver same to you on the same terms and conditions.

"Yours, truly,

Michigan Stone & Supply Company,

"By Gus F. Smith, President.

"Henry Collins.

"Accepted: N. W. Harris & Co., by M. A. Devitt, Agent."

The Michigan Stone & Supply Company was awarded the bonds for which it had bid, and thus placed in position to carry out its contract with N. W. Harris & Co. By agreement between the parties, the amount agreed to be sold to Harris & Co. was reduced to