AMERICAN LIFE INSURANCE COMPANY, by and thru its General Manager (Vice President), ALLEN BROWN**,** Appellant, *v.* **EMMANUEL SANDY**, Appellee.

MOTION TO DISMISS APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: June 5, 1984. Decided: June 28, 1984.

1. Any issue not raised in the pleadings will not be entertained and passed upon during arguments before the court, for to do so would violate the fundamental right of the other party to notice.

2. Essentially, the purpose of the appeal bond is to indemnify the appellee from all costs and injury arising from the appeal, if unsuccessful, and to guarantee that the appellant will comply with the judgment of the appellate court, or any other court to which the case is removed.

3. The statute does not require that the bank certificate must allege or indicate thereon that the appellant has deposited the value of the bond.

4. An appeal bond will not be deemed defective simply because its validity has been limited to a specific date, especially when the date has not expired at the time the question arises as to the bond's validity.

5. Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following: cash to the value of the bond; or cash deposited in the bank to the value of the bond, as evidenced by a bank certificate...

6. An appeal bond given upon an appeal from a money judgment is a contract for the payment of money collateral to the judgment. Therefore the appellant, as the principal obligor to such contract, is bound by law to sign said contract.

7. One cannot be charged with liability on an appeal bond unless he signed the bond, and the fact must appear on the records in order to authorize a summary judgment against the obligor. An appellant who does not sign his appeal bond is not bound thereby, although it is binding on the sureties who do sign.

The appellee filed a motion to dismiss the appellant's appeal from an adverse judgment in the lower court, contending that the appellant had failed to perfect the appeal by filing an

appeal bond which was defective in several respects, namely: (1) that the appellant had attached a "bank cash guarantee" rather than a bank certificate as required by law; (2) that the "certificate" did not indicate that any funds had been deposited in the bank but, instead, simply indemnified the appellee in an amount not exceeding the judgment of US$257,700.00; (3) that the bond was defective since its validity was limited, in that it extended only up to December 9, 1985; (4) that the bond was defective since it had been issued by the appellant who effectively held the dual roles of appellant and surety; and (5) that the Supreme Court had not legally acquired jurisdiction over the case since the appeal had not been perfected due to the many defects of the appeal bond.

The Court found that the appellee did not contend that he had not been sufficiently indemnified by the appeal bond issued by the appellant. Instead, the appellee's basic contention hinged on the construction of the "certificate", maintaining that it was a cash guarantee and not a certificate of deposit as required by law. The Court further observed that "the main purpose of an appeal bond is to indemnify the appellee from all costs and injury arising from the appeal and, if unsuccessful, to guarantee that the appellant will comply with the judgment of the court, or of any other court to which the case is removed". In the court's opinion, the appellee had been sufficiently indemnified by the appellant and, therefore, since there was no defect in the appeal bond to render it dismissible, the appellee's motion to dismiss the appeal was denied.

John T. Teewia and *Victor D. Hne* for appellant. *Ephraim Smallwood* and *George E. Henries* for appellee.

MR. JUSTICE MORRIS delivered the opinion of the court.

When this case was reached for hearing, we discovered two motions in the case file, one to dismiss the appeal and the other for diminution of record. We decided to first dispose of the motion to dismiss because we must decide on our jurisdiction before passing upon the motion for diminution of record. We shall therefore consider the appellee's six-count motion to dismiss the appeal with its ten-count resistance. The six-count motion is quoted hereunder for the benefit of this opinion:

"1. Because appellee says that final judgement in the above entitled cause was rendered by His Honour Eugene L. Hilton, Assigned Circuit Judge Presiding, of the People's Civil Law Court for Montserrado County, on the 25th day of October 1983, to which the appellant excepted, announced an appeal to this Honourable Court, sitting in its March Term, A.D. 1984. A copy of the court's final judgment is hereto attached and marked exhibit "A" to form a part of this motion.

2. And also because appellee says that the appellant has failed to perfect its appeal as provided by statute, in that, the statute has laid down certain provisions by which an appeal bond can be secured. One of the provisions required is "cash to the value of the bond or cash deposited in the bank to the value of the bond as evidenced by the bank certificate." In the instant case the appellant has obtained a "Bank Certificate Cash Guarantee to Defendant's Appeal Bond" which is not provided for under the statute and therefore the bond is defective and renders the appeal dismissible.

3. And also because appellee says further that the said "Bank Certificate Cash Guarantee to Defendant's Appeal Bond" apparently issued by Citibank Monrovia, Liberia, does not indicate that the appellant has deposited any money with Citibank cash bond in favor of the appellant in the above entitled cause. Instead, the bank certificate alleges that we "(Citibank) undertake to fully indemnify Emmanuel P. Sandy, the above named plaintiff in an amount not exceeding $257,700.00 U. S. Dollars (Two Hundred Fifty-Seven Thousand Seven Hundred) out of monies now available and set aside in this Bank for, and in respect to, all costs and injuries which the said Emmanuel P. Sandy might suffer by reason of an appeal prayed for and granted the said defendant, in the event the defendant fails to prosecute the said appeal or should final judgment be rendered against the said defendant, otherwise these presents shall remain null and void." Appellee submits that the wording of this certificate clearly shows that the bank certificate is a bank guarantee and not a certificate of deposit. Hence, the bond, not having met the requirement of the statute, is defective and therefore the appeal should be dismissed.

4. And also because appellee says further that according to the bank certificate filed by the appellant, "this bond is valid until December 9, 1985, after which time it will be considered null and void." This clause in the bank certificate limits the validity of the bond, which is contrary to the statute, so that in the event that the case is not heard and determined by December 9, 1985, the defendant/appellant would be without an appeal bond and appellee would not be secured. The said bank certificate, being a cash guarantee for a limited period, and not a certificate of deposit, further renders the appeal bond filed by the appellant defective and therefore the appeal should be dismissed. Appellee respectfully prays this court to take judicial notice of the "Bank Certificate Cash Guarantee to Defendant's Appeal Bond" No. CKD440, dated December 12, 1983, hereto attached and marked exhibit "B" to form a part of this motion.

5. And also because appellee says further that the appeal bond is further defective because defendant/appellant's bond which was filed on December 21, 1983, is issued and signed by the appellant itself, which is the appealing party in this case, and witnessed by Citibank,

Monrovia, Liberia. The binding clause of said appeal bond states that "the defendant/appellant, by this bond, firmly binds itself unto the plaintiff/appellee in the amount of Two Hundred Fifty-Seven Thousand Seven Hundred Dollars ($257,700.00). Contrary to statute governing appeal bond, the appellant is attempting to file a surety bond and posing itself as surety in a case in which the said appellant is the appealing party. The appeal bond being without surety and being materially defective renders the entire appeal dismissible. Therefore appellee prays this Honourable Court, to dismiss appellant's appeal. A copy of said appeal bond is hereto attached and marked exhibit "C", to form a part of this motion.

6. And also because appellee says that the appellant has failed to file a proper appeal bond and therefore has not met one of the essential statutory requirements for the perfection of an appeal. This Honourable Court consequently has not legally acquired jurisdiction over the case, hence the appeal should be dismissed.

WHEREFORE, in view of the foregoing, appellee respectfully prays this Honorable Court to refuse jurisdiction, dismiss the appeal, filed by the appellant, and order the court below to resume jurisdiction and enforce its judgment. Appellee further prays this Honourable Court to order the sheriff for Montserrado County to produce before this Honorable Court the original copy of the Bank Certificate Cash Guarantee to Defendant's Appeal Bond, deposited with the said sheriff on December 21, 1983 by the appellant, for inspection and verification by the Honourable the Supreme Court in support of the allegation made by the appellee in this motion.

A careful perusal of the above quoted motion will indicate that the appellee has not contended, and is not contending, that he is not sufficiently indemnified by appellant's appeal bond, nor is he doubting the availability of the $257,700.00 laid in the appeal bond to indemnify him when and if the judgment of the lower court is confirmed. Instead, he has attacked the construction of the certificate of deposit and claimed that it is a cash guarantee and not a certificate of deposit.

During the arguments, the counsel for appellant was asked to explained the writing on the side of the certificate of deposit which reads "the credit is subject to the uniform rules for tender performance and repayment guarantees, contract guarantees of the International Chamber of Commerce publication No. 325." The counsel explained that all negotiable papers such as checks, bank certificates and credit notes are to conform to the uniform rules. The issue regarding the writing on the side of the bank certificate, and the issue relating to the heading, referring to "our irrevocable letter of credit," raised during the closing arguments, were not raised by the appellee in his motion to dismiss the appeal. Another

interesting phase of this case is that counsel for appellee raised the issue regarding the heading of the Bank's Certificate at the time of his closing argument, when the appellant's counsel had already submitted his side of the argument. The appellee, having failed to raise these issues in his motion to dismiss the appeal, this Court of last resort cannot tolerate the incorporation of such issues in the motion and at the same time pass upon them. This Court should not, and will not, entertain such strange practices, foreign to the fundamental rule of pleading, which requires notice to one's adversary of what is intended to be proven against him. These issues are therefore not conceded, for to do so is tantamount to the opening of a floodgate for Counsellors of this bar to raise and introduce issues for the first time in this Court, which dehors the record, and expect the Court to pass upon them. We shall now proceed to pass upon the motion and its resistance.

Count one of the motion simply refers to the time when final judgment was rendered by Judge Eugene L. Hilton, assigned Circuit Judge presiding over the People's Civil Law Court for the Sixth Judicial Circuit, Montserrado County.

The appellee contends in count two of the motion to dismiss the appeal that the appellant has failed to perfect its appeal in that it has filed a Bank Certificate Cash Guarantee to Defendant's appeal bond which is not provided for under the statute and, therefore, the bond is defective and the appeal dismissible. Appellee maintains in count three of his motion to dismiss the appeal that it is not indicated in the bank certificate issued by Citibank that the defendant/appellant has deposited any money with Citibank as cash bond in favor of the appellant in the above entitled cause of action. Instead, the bank certificate alleges that "we (Citibank) undertake to fully indemnify Emmanuel P. Sandy, the above named plaintiff in an amount not to exceed $257,700.00 (Two Hundred Fifty Seven Thousand Seven Hundred Dollars) out of monies now available and set aside in this bank for and in respect to all costs and injuries which the said Emmanuel P. Sandy might suffer by reason of an appeal bond prayed for and granted the said defendant in the event the defendant fails to prosecute the said appeal or should final judgment be rendered against the said defendant; otherwise, these presents shall remain null and void. The relevant statute controlling the deposit of money in a bank evidenced by a bank certificate, states:

"Except as otherwise provided by statute, any bond given under this title shall be secured by one or more of the following:

(a) Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate. . . ."

We shall first consider the object or purpose of an appeal bond. The Civil Procedure Law,

Rev. Code 1: 51.8, at 250, under appeal bond, stipulate:

"Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment. Notice of the filing shall be served on the opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action."

The above provisions of the statute are in conformity with the common law which states the object of an appeal bond as follows:

"The appeal bond or undertaking is for the benefit of the appellee, its purpose being to secure the appellee against loss when there is no merit in the appeal, or the appeal is not prosecuted with effect. It is not intended, however, as an additional security for the original indebtedness of the appellant, but as an indemnity to the appellee against further trouble, expense and costs, while the case is undergoing a review to ascertain whether or not error has been committed or injustice done the appellant by the decree of the court below. Another purpose of the requirement for an appeal bond, or undertaking based upon considerations of public policy, is to discourage frivolous and vexatious litigation."

The appeal bond is in no sense a substitute for the judgment appealed from. In fact, its vitality depends upon the survival of the judgment, and its fate is inseparably linked with it. If the judgment is reversed, the obligation of the appeal bond becomes void; if the judgment is affirmed, the obligation remains in full force and effect." 4 C. J. S., *Appeal and Error*, § 500, at 967 & 968.

We can readily conclude from the above citations that the main purpose of an appeal bond is to indemnify the appellee from all costs and injury arising from the appeal, if unsuccessful, and to guarantee that the appellant will comply with the judgment of the appellate court, or of any other court to which the case is removed. This Court has held, in many of its opinions, that an appeal bond shall be secured by one or more of the provisions of the Civil Procedure Law, Rev. Code 1: 63.1 (a), (b), (c), and (d) and 63.2 (1) and (2) which provide that:

"63.1.(a)Cash to the value of the bond; or cash deposited in the bank to value of the bond as evidenced by a bank certificate;

(b) unencumbered real property on which taxes have been paid and which is held in fee by the person furnishing the bond;

(c) valuables to the amount of the bond which are easily converted into cash; or

(d) sureties who meet the requirements of section 63.2.

Section 63.2 of the Civil Procedure Law refers to legally qualified sureties which include an insurance company authorized to execute surety bonds within the Republic of Liberia, and people who have real property located in the Republic which shall have an assessed value equa1 to the total amount specified in the bond, exclusive of all encumbrances, as such bond shall create a lien on the real property offered for the bond.

In the case at bar, the appellee is questioning the caption of the certificate which reads "Bank Certificate Cash Guarantee to Defendant's Appeal Bond" because the statute only provides for a bank certificate, and not a "Bank Certificate Cash Guarantee to Defendant's Appeal Bond." Hence, appellee claims that the appeal bond is defective and renders the appeal dismissible. In 12 AM JUR.2d, *Bonds*, § 7, at 483, it is provided that:

"The validity of a bond purportedly given in compliance with a statute, which meets the requirements of the statute, is not affected nor is its nature changed by the inclusion in the bond separable conditions which are neither authorized by, nor repugnant to, the statute. Unless the statute, expressly or by necessary implication declares such a bond void as a whole, conditions which are not authorized or which are repugnant to the statute may be rejected as surplusage. The residue may be sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common law bonds partly good and partly bad. In some jurisdictions this principle is adopted by statutory declaration."

The bank certificate, in clear and unequivocal language, has indicated that the amount of Two Hundred Fifty-Seven Thousand Seven Hundred Dollars ($ 257,700.00) is now available and set aside in Citibank for the appeal bond prayed for and granted the appellant, which amount is sufficient to indemnify the appellee from all costs and injuries resulting from the appeal as provided for by the Civil Procedure Law, Rev. Code 1: 51.8.

The availability of the amount laid in the bank certificate is not doubted, nor is it questioned. Hence, it is our candid opinion that the bank certificate in question has met the requirements

of the statute relating to cash deposit in the bank as evidenced by a bank certificate. If we should even delete the words "Cash Guaranteed to Defendant's Appeal Bond," the words "Bank Certificate" will suffice and conform to the statutory provision of section 63.1 (a). Further, the statute relied upon does not state that the bank certificate must allege or indicate that the appellant has deposited the value of the bond. Therefore, counts two and three of the motion to dismiss are not sustained.

With reference to the validity of the appeal bond up to and including December 9, 1985, we hold that this is not sufficient ground for the dismissal of the appeal, especially so when December 9, 1985 is more than a year from now. This issue is rather prematurely raised at this time and therefore cannot be conceded. If the validity of the bond expires on December 9, 1985 by operation of its term, and the bond thereby becomes invalidated while the case is still pending, it is then and only then that the appellant may be without an appeal bond, whereupon the appellee may have to take steps necessary to safeguard his interest. Until then, the appellant's appeal bond cannot be dismissed on the ground that the validity of the appeal bond is limited to December 9, 1985, when it is possible that this case may finally terminate prior to that date. Count four of the motion is therefore overruled.

Count five of the motion to dismiss the appeal states that "appellant's appeal bond which was filed on December 21, 1983, is issued and signed by the appellant itself, the appealing party in this case, and witnessed by Citibank, Monrovia, Liberia. The binding clause of said appeal bond states that the defendant/ appellant, by this bond, firmly bind itself unto the plaintiff/ appellee in the amount of Two Hundred Fifty-Seven Thousand Seven Hundred Dollars ($257,700.00). Contrary to statute governing appeal bonds, the appellant is attempting to a file surety bond and posing itself as surety in a case in which the said appellant is the appealing party." We quote a portion of the appeal bond in question:

"KNOW ALL MEN BY THESE PRESENTS:

That we, American Life Insurance Company, Liberia branch office, represented by and thru its administrative manager of Monrovia, Roydee M. Murray, with and by virtue of the CITIBANK CERTIFICATE, hereto attached and herein incorporated, are held and firmly bound unto the Sheriff for Montserrado County in the sum of Two Hundred Fifty-Seven Thousand Seven Hundred Dollars ($257,700.00) current money of the Republic of Liberia, same being one and one half times the value of the judgment in the above entitled cause, to be paid to Emmanuel P. Sandy of the City of Monrovia, Montserrado County, plaintiff/appellee herein or his legal representatives, jointly and severally by these presents.

That the condition of this bond is that we will indemnify the plaintiff/appellee from all costs or injury arising from the appeal, if unsuccessful, taken from the final judgment of His

Honor Eugene L. Hilton, Assigned Circuit Judge, presiding over the September Term, A.D. 1983 of the People's Civil Law Court, Sixth Judicial Circuit, Montserrado County, Republic of Liberia, rendered on the 25th day of October, A.D. 1983, against the defendant/appellant, and that it will comply with the judgment of the appellate court or of any other court to which the case is removed ...."

The appellant then signed the bond. Below its signature in the surety's column, we find the words "CITIBANK CERTIFICATE", the certificate number, the names of witnesses and their signatures in the left column and, finally, the judge's signature of approval as well as the date of approval. This procedure is in conformity with the procedure hoary with age in this jurisdiction for an appeal bond secured by either cash to the value of the bond, or cash deposited in a bank. If a manager's check is tendered, the number of the check and other relevant descriptions are stamped in the surety's column. Hence, once all of these requirements have been met, as in the instant case, we cannot hold that the appeal bond is invalid. The procedure has been to have the trial judge approve and date the bond, so as to be able to readily determine whether or not the bond was filed within the statutory time. As for the binding clause after the condition, this in itself is not a ground to dismiss the appeal, in view of the two paragraphs of the bond quoted above. Referable to the signing of the bond above the surety's column by the appellant, we feel that this is right because appellant is the principal obligor. It has been held that "an appeal bond given upon an appeal from a money judgment is a contract for the payment of money, collateral to the judgment." 4 C. J. S., *Appeal and Error,* § 499, at 967, and 3 C. J., *Appeal and Error*, § 1136, at 1104. Therefore the appellant, being a party principal to the contract, is bound by law to sign said contract, as he did. Law writers maintain that:

"One cannot be charged with liability on an appeal bond unless he signed the bond, and the fact must appear of record in order to authorize a summary judgment against the obligor. An appellant who does not sign his appeal bond is not bound thereby, although it is binding on the sureties who do sign ... 4 C. J., *Appeal and Error*, § 3316 (2), at 1249.

Furthermore, there is no provision in the statute authorizing the trial judge to approve a bank certificate, evidencing the deposit of money in the bank for bond, nor is there any statutory provision empowering the sheriff to file a bank certificate given to him as evidence of a deposit for an appeal, nor can a receipt from a sheriff for a bank certificate received by him for an appeal substitute for the filing of an appeal bond thereby satisfying the completion of the jurisdictional steps of an appeal. Since the requirements for the completion of an appeal include the filing of an approved bond by the appellant within sixty days from the date of the rendition of final judgment, the filing of a paper bond and incorporating the bank certificate therein to be approved by the trial judge, is in order until

such time as the lawmaking body shall have provided another remedy. Count five of the motion to dismiss is therefore overruled.

Count six of the motion to dismiss is not sustained because the bond filed by the appellant is in conformity with the statute controlling appeals from the lower court of record to this Court.

Our colleagues who have disagreed with us maintain that the bank certificate in this case is not a bank certificate but, rather, a bank guarantee, contrary to the statute, therefore the appeal should be dismissed. The caption of section 63.1 of the Civil Procedure Law, Rev. Code 1, is "Security for Bonds." Security is defined thus:

"SECURITY: Protection, assurance, identification. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc.,... given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation. The name is also sometimes given to one who becomes surety or guarantor for another...." BLACK'S LAW DICTIONARY 1522 (4th ed.).

The above quoted definition of the word "security" plainly implies or shows that the provisions of sections 63.1, (a), (b), (c) and (d) and 63.2 (1), (2), (3), (4) and (5) are all intended for the appellant to protect, assure and indemnify the appellee from all costs or injuries arising from the appeal in the event the judgment of the court of origin is affirmed by the appellate court. Law writers maintain that:

"...In order to arrive at a correct construction of the bond or undertaking the court may look to the statute and the purpose for which it was enacted, since the statute in legal effect enter into and forms a part of the obligation. Reference may also be had to the nature and character of the judgment appealed from and to the record of the proceedings, to determine the purpose and intent of the bond. The rights of the obliges and the liabilities of the obligor on an appeal bond are contractual, and the legislatures of the states have no power by a retrospective law to modify such rights or liabilities..." 4 C. J. S., *Appeal and Error,* § 3321 (b).

To correctly construe the appeal bond in the instant case we have to analyze and interpret the statute creating an appeal bond, as we did earlier in this opinion, in order to properly apply the relevant provisions to this case. The relevant portions of the statute with which we are concerned are: 1) Section 51.8 of the Civil Procedure Law dealing with indemnification of appellee "from all costs or injury resulting from the appeal and to comply with the judgment of the appellate court or any other court to which the case is removed..."and section 63.1(a) regarding "...cash deposited in the bank as evidenced by a

bank certificate." Where a bank certifies that a stipulated amount is reserved and earmarked in its bank, and is available for an appeal bond, specifying the parties, the case, the time of the judgment and such amount deposited, reserved and earmarked, being one and half times the judgment sum, as is in the instant case, such bond has met the statutory requirements for cash deposited in the bank, since there is no special form for wording a bank certificate of deposit.

We also wish to note here that appellee, in counts two, three and five, contends that the appeal bond is invalid, yet in count four of the same motion he argues that "the validity of the bond is limited to December 9, 1985" which, according to him, is contrary to the statute, as in the event the case is not heard and determined by December 9, 1985, the defendant/appellant would be without bond and appellee would not be secured. We wonder what is the appellee's contention, the validity of the bond for a limited period, or the invalidity of the bond itself. These statements are contradictory and render the entire motion dismissible for inconsistency.

In view of the facts and circumstances outlined and the laws cited, it is our considered opinion that the motion is baseless and should not be granted. The motion is therefore denied. And it is hereby so ordered.
Motion denied.

CHIEF JUSTICE GBALAZEH, with whom MR. JUSTICE SMITH concurs, dissents.

One of the most carelessly and recklessly prepared documents I remember having ever seen are the papers filed by appellant as appeal bond in this case, and it is hardly necessary to recall that the filing of a legal bond is the second of the many jurisdictional steps in the prosecution of an appeal. *Wodawodevy v. Kartiehn*, 4 LLR 102 (1934) and Civil Procedure Law, Rev. Code 1: 51.8.

The defectiveness of appellant's appeal bond cannot properly be described as a microscopic occurrence and therefore a cause for denying appellee's motion to dismiss it. Furthermore, it is not logical to imagine that the issues raised by appellee in his motion are legal technicalities designed to prevent a straight plunge into the merits of the case. In the case of *Gabions* v. *Toe*, 23 LLR 43 (1974), this Court held, as follows:

"While we are in agreement that modern practice does not favor too many technicalities, but prefers to hear a case on the merits, the basic principles of appellate procedures cannot be, as in the instant case, disregarded as they apply to appeal bonds."

The cited case further requires that the sections of the statutes setting forth the requirements necessary for validation of an appeal bond are to be complied with as the Legislature intended, and may not be treated casually by the appellant.

This motion to dismiss appellant's appeal is directed against two documents purported to be the appeal bond. The documents are (1) the bank certificate of guarantee which is in fact a letter of credit, and the paper bond which as a straw bond falls far below the basic requirements of a surety bond, for it lacks sureties. It is these two documents, appellee contends, that do not represent an appeal bond, under any circumstances, in keeping with the relevant statute. Said documents are quoted for the purpose of this opinion:

"DEFENDANT/APPELLANT'S APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That, we, American Life Insurance Company, Liberia branch office represented by and thru its administrative manager of Monrovia, Roydee M. Murray, with and by virtue of the CITIBANK CERTIFICATE, hereby attached and herein incorporated, are held and firmly bound unto the Sheriff for Montserrado County in the sum of Two Hundred Fifty- Seven Thousand Seven Hundred Dollars ($257,700.00) current money of the Republic of Liberia, same being one and one half times the value of the judgment in the above entitled cause, to be paid to Emmanuel P. Sandy of the City of Monrovia, Montserrado County, plaintiff/appellee here-in, or his legal representative, jointly and severally by these presents.

That the condition of this bond is that we will indemnify the plaintiff/appellee from all costs or injury arising from the appeal, if unsuccessful, taken from the final judgment of His Honor Eugene L. Hilton, Assigned Circuit Judge Presiding over the September Term, A. D, 1983 of the People's Civil Law Court, Sixth Judicial Circuit, Montserrado County; Republic of Liberia, rendered on the 25th day of October, A. D.1983, against the defendant/ appellant, and that it will comply with the judgment of the appellate court or of any other court to which the case is removed."

The defendant/appellant, by this bond, firmly binds itself unto the plaintiff/appellee in the amount of TWO HUNDRED FIFTY SEVEN THOUSAND SEVEN HUNDRED DOLLARS ($257,700.00).

In witness whereof, we have hereunto subscribed our names this 20th day of December, A. D. 1983.

CITIBANK, N.A. American Life Insurance Company by & thru its Administrative Manager, Roydee Murray

CKU440

CITIBANK-CERTIFICATE ATTACHED

APPROVED FOR: $257,000.00

APPROVED BY:_____ Eugene L. Hilton-

Trial Judge

Date of approval: 12/21/83"

"Citibank, N.A.

P. O. Box 280

Monrovia, Liberia

Sixth Judicial Circuit Date: December 12, 1983

Montserrado County

Monrovia, Liberia

BANK CERTIFICATE CASH GUARANTEE TO DEFENDANT'S APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS THAT, we, the Citibank, N.A. Monrovia, Liberia, of the City of Monrovia, Republic of Liberia, hereby certify that we undertake to fully indemnify Emmanuel P. Sandy, the above named Plaintiff in an amount not exceeding $257,700.00 (U.S. DOLLARS TWO HUNDRED FIFTY SEVEN THOUSAND SEVEN HUNDRED) out of monies now available and set aside in this bank for and in respect to all cost and injuries which the said Emmanuel P. Sandy might suffer by reason of an appeal bond prayed for and granted the said defendant in the event the defendant fails to prosecute the said appeal or should final judgment be rendered against the said defendant; otherwise, these presents shall remain null and void.

This bond is valid until December 9, 1985, after which time it will be considered null and void.

Please return the original of this instrument to the Bank for cancellation after the purpose for issuance of the instrument has been fulfilled.

Very truly yours,

James K. Forkpa

cc: American Life Insurance Company

P. O. Box 60

Monrovia, Liberia"

Added to the main body of the letter of credit quoted above is a notation stamped to the left corner which reads: "The credit is subject to the Uniform Rules for Tender Performance and Repayment Guarantees; Contract Guarantees of the International Chamber of Commerce Publication No. 325."

The second instrument, whether you call it a certificate of guarantee or a letter of credit, does not depict the characteristics of a cash deposit; nor does it serve as evidence in support of an appeal as claimed by appellant. In the case *Wilson* v. *Wilson*, 24 LLR 534 (1976), the Court held that an uncertified check to the value of an appeal bond is no evidence of cash deposit as required by our law. *See* also the Civil Procedure Law, Rev. Code 1:63.1.

In the documents offered as appeal bond, there are no natural persons named as sureties except James J. Forkpa, who alone signed the letter of credit, without any designation. Roydee Murray, designated as administrative manager of American Life Insurance Company, signed the purported paper bond as defendant/principal, which was witnessed by Citibank as the person in whose presence the principal had signed same. Instead, in the place of sureties we find a Citibank certificate attached and identified as follows: CKU440. This certainly does not fulfill what is meant by "surety" under our statute.

I strongly feel that these papers do not conform to the law regulating surety bond or appeal bond. Mr. Chief Justice Grimes, speaking for this Court in the case *Cavalla River Company* v. *Fazzah,* 7 LLR13 (1939), stated:

"An appeal bond which fails to name and be signed by two or more sureties who are householders or freeholders within the Republic of Liberia is fatally defective, and the appeal should be dismissed."

In this jurisdiction the controlling statute in such cases provides four ways by which one may secure an appeal bond:1) by offering cash to the value of the bond as evidenced by a bank certificate or deposit; 2) by giving unencumbered real property on which taxes have been paid up-to-date and which property is held in fee by the person furnishing the bond; 3) by giving valuables to the amount of the bond which can easily be converted into cash; 4) by two or more sureties who meet the requirements of section 63.2 of the statute with respect to legally qualified sureties. Civil Procedure Law, Rev. Code 1: 63.1 and 63.2. In our opinion defendant/appellant has not, in any way, met any of the above requirements.

In the instant case, appellant filed a paper appeal bond to which it attached a letter of credit in favor of appellant in the sum of $257,700.00 (U.S. Dollars Two Hundred Fifty-Seven Thousand Seven Hundred), ostensibly to indemnify the appellee. The validity of said Letter of Credit is limited to December 9, 1985, even if the litigation were to be delay beyond that time.

Then there is the stamped notation on the left corner of the document referred to *supra*. This

notation makes payment on the letter of credit conditional upon the approval and endorsement of appellant. The effect of this condition is that no other person may reach the reportedly available funds under the credit guarantee without the consent of appellant. This means that appellant will still have exclusive control over what is purports to be staking in the bond, contrary to the holdings in the cases *Greenfield* v. *Tubman,* 29 LLR 200 (1981) *and The Management International Trust Company of Liberia v. Wiah. et al., 30 LLR 751 (1982)* decided by the Supreme Court at its March Term 1981 and 1982, respectively, in which the Court required that the property, real or personal, placed in the bond, be parted with to the satisfaction of the court.

In fact, the statute specifically states that: "The sheriff receiving cash, a bank certificate, stocks or other negotiable securities, or valuables shall deposit it or them in the government depository or a reliable bank, and secure a receipt therefor showing the amount deposited and the purpose of the deposit and containing a statement that the deposit will be released only upon the written order of the judge of the court." Civil Procedure Law, Rev. Code 1: 63.1. So also does the court have exclusive right to real property pledged in the bond on account of the lien established thereon.

In all cases the intent of the statute seems to be that property offered on the bond shall be placed under the exclusive control of the court for the benefit of the appellee. *Dennis and Dennis* v. *Holder et al.,* 10 LLR 301 (1950). But the purpose of the statute is defeated when appellant in any way retains control, in which case the interest of the appellee is in jeopardy, and by holding otherwise the Court would be legislating itself, which it cannot do.

The statute states "cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate", and not a bank certificate of guaranty for the availability of funds. In this regard, the appellant had substituted "guaranty" for "cash" and "availability" for "deposit", to which act my distinguished colleagues had acquiesced. I therefore hold the view that such substitution, as mentioned *supra*, amounts to an invasion of the province of the legislature *Wolo* v. *Wolo*, 5 LLR 423 (1937) . The Court is only empowered to pass upon the wordings of a statute and place a legal interpretation on the text. Our power to construe and interpret does not extend to adding words or phrases to the text of a statute. That power solely belongs to the Legislature. We can only interpret what has been legislated. 25 R. C. L., §§ 216-218, at 960.

The filing of an appeal bond is a statutory creature; hence it must be strictly governed by the statute. Under this principle the court is not expected to add or subtract from the language of the statute but is strictly required to say what the law is and not what it ought to be, for it has also been held in the *Cavalla River* case, above cited, that:

"Statutory requirements governing appeal bonds must be complied with, and the Supreme Court is powerless to dispense with such requirements, no matter who is the principal on the bond and no matter what amount is fixed on the bond."

The responsibility for the wisdom of legislation rests with the legislature, and it is the province of the courts to construe, not to make the law.

It has been held in other common law jurisdictions that the term "security", as used in a statute, and which provides that one appealing from a court shall file a bond in such sum and with such security as may be fixed and approved by the court, is synonymous with "pledge", "stake"' and "bond". 4A C. J. S., *Appeal and Error*. Note 30, at 202. Certainly both appellant's certificate of guaranty and its purported paper appeal bond cannot reasonably be regarded as being synonymous with the statutory word "security".

There are other common law authorities holding that the statutory provisions for giving of security for costs of appeal are mandatory. *Farmers Equipment Co. v. Clinger,* 222 P. 2d, at1077, cited in note 49. 4A C. J. S., *Appeal and Error*, at 205. The said authorities further require that if record shows that the bond required on appeal has not been given, motion to dismiss the appeal must be granted since statute requiring the giving of a satisfactory bond before appeal may be allowed is mandatory.

In the case under review, the bank certificate of guarantee is not a bank certificate of cash deposit, and it puts the sheriff in the position wherein he will possess the letter of credit, which is a conditional promise to make funds available to appellant, with-out the power to reach the funds as is required by the controlling statute. The bank certificate of guarantee is just a mere conditional promise that certain funds will be made available to appellant at its request, which promise does not in any way directly bind the bank to the court. Moreover, such promise requires certain complicated legal processes to enforce.

Consequently, the intent of the statute that appellee receives security of indemnity, if the appellant loses its appeal or fails to prosecute same, is thereby aborted by the documents which our colleagues have decided to honor as the proper appeal bond, even though the statute speaks of "security" and not "guarantees". In my opinion if the funds referred to in the bank certificate of guarantee were actually available appellant, by custom, would have issued a manager check which would have sufficed.

It will indeed be naive to compare the instant condition created by the certificate of guarantee to one in which real property is offered in the bond as security with appellant

remaining in physical possession. In the case of real property, the lien created on the property by the bond puts the fee simple interest in the sole custody of the court, to indemnify appellee in case the appeal is dismissed, or withdrawn.

The statute does not provide that an appeal bond should be secured by a bank certificate of guarantee as has been done by appellant here, or that the appellant should secure its own bond without parting with the property offered. Appellant in this case has done just the reverse of what the statute directs and requires.

Accepting this certificate of guaranty as my colleagues have done, on the assumption that the amount contained therein is available to indemnify the appellee in this case, is tantamount to holding that any kind of promissory note from a bank is sufficient to stand the test of an appeal bond. What a floodgate, indeed, that has opened for indiscreet and obstinate lawyers. Can this Court from now on, in view of the majority holding, question the validity of an affidavit of sureties to an appeal bond which fails to contain the metes and bounds of realty pledged as security where the deponents notoriously own real estates? Would not that be a microscopic technicality? Let us be consistent in our decision, for this is the court of last resort and we stand to be judged by the future generations. It is highly regrettable that the majority opinion did not quote verbatim the two documents in question, which would have paradoxically cleared their position.

I am of the opinion that the appeal bond tendered by appellant in this case, being neither cash deposited in the bank to the value of the bond nor a surety bond as contemplated and required by the controlling statute, is irreparably defective, and the appeal should therefore be dismissed. From the facts, and for all the defects contained in the purported appeal bond, I have decided not to append my signature to the majority view. I therefore dissent.