INTRUSCO CORPORATION, by and thru its Vice President, VINCENT McCANN, Appellant, *v.* **FANTASTIC STORE,** by and thru its Proprietor, AHMED H. AHMED, Appellee.

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

Heard: April 9, 1984. Decided: June 28, 1984.

1. The name of the depositor on a bank certificate may be inferred as per the wording of the bank certificate.

2. It is an elementary principle that both the surety and the guarantor promise to perform or answer for the obligation of the principal in the event the principal defaults on the obligation.

3. When the bond required to file precepts on appeal is a cash bond, and not an appeal bond, it is not necessary that it is signed by natural person (s) and be accompanied by a real property valuation from the Ministry of Finance.

4. A bond secured by two or more natural persons requires a real property valuation from the Ministry of Finance indicating that the property offered as security is owned by the sureties in fees, a statement of the total amount of the lien (s); unpaid taxes and other encumbrances against such properties offered; and a statement showing the assessed value of the property.

5. If an appellant tenders an appeal bond and an affidavit of sureties when only a cash bond is required, it is considered a mere surplusage and, if defective, will not invalidate the cash bond tendered as a security in the case.

6. A court of justice will only decide on points of law or facts that are raised expressly by the parties in their written pleadings which, of course, include motions.

7. In applying the principle of *stare decisis*, the issue(s) raised in the previous case must be specifically traversed in the pleading of the subsequent case.

The appellee filed a motion to dismiss the appellant's appeal against an adverse judgment in the Sixth Judicial Circuit Court, Montserrado County, in an action of damages for breach of contract. The appellee moved to dismiss the appeal stating that: (1) the certificate filed with

the appeal bond, even though designated a "certificate", was actually a guaranty, and not a surety as required by law; (2) the "certificate" did not clearly indicate that the amount of the bond had actually been deposited in the bank; it simply stated that the depository bank guarantees that the appellant will comply with the judgment and costs in this case; and (3) that the Agricultural and Cooperative Development Bank ("ACDB") cannot act as surety for the appellant since the former is not an insurance company authorized to execute surety bonds.

Resisting the motion, the appellant contended that it had complied with the law as evidenced by the "bank certificate" which unequivocally showed that it was prepared to comply with a judgment to the tune of US$675,000.00 out of monies available at the Agricultural & Cooperative Development Bank if final judgment is in favor of the appellee. The appellant further stressed that the "guaranty" was issued expressly for the purpose of the appeal bond.

The majority of the Court decided that the bond posted was sufficient and in keeping with the statute. Therefore, the motion to dismiss was denied.

Mr. Justice Smith, with whom Mr. Chief Justice Gbalazeh concurred, dissented. Both justices concurred with the appellee's position that the document offered to support the bond was a guaranty and not a certificate as required by law, since there was no indication on the document that any money had actually been deposited in the bank. The "certificate," they further observed, was a legal nullity and of no negotiable value, thereby rendering the bond defective. They also contended that the surety on a bond must be accompanied by real property valuation to the value of the bond and either two natural persons, or an insurance company, as sureties. Since the ACDB is neither a real person nor an insurance company, and no real property valuation accompanied the bond, it was the opinion of the minority that the motion to dismiss should have been granted.

Joseph A. Dennis for appellant. *Toye C. Bernard* and *George E. Henries* for appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

The appellee has filed a motion to dismiss the appeal in this case on the following grounds to wit: (a) the certificate of deposit does not state that any money was deposited in the bank by the appellant; (b) the certificate states that the bank guarantees that Intrusco Corporation, the appellant, will comply with the judgment in this case together with costs up to the sum of $675,000.00; (c) the appeal statute does not provide for guaranty by the bank; (d) the bank certificate does not show that the cash has been deposited in the bank to the value of the bond as evidenced by the bank certificate; (e) the certificate attached to

appellant's appeal bond is a "bank guaranty" and not a "bank certificate" as contemplated by statute, therefore rendering the appeal bond detective; (f) the Agricultural and Cooperative Development Bank is not legally authorized to stand as surety to an appeal bond since it is not an insurance company authorized to execute surety bond.

In its resistance, appellant contended, *inter alia*, that a bond may be secured by giving cash to the value of the bond, or cash deposited in a bank to the value of the bond as evidenced by a bank certificate. Appellant contended that it has complied with the latter as evidenced by the bank certificate in which it is unequivocally stated that appellant "will comply with the judgment together with costs up to the sum of $675, 000, 00, out of monies available at this bank if final judgment should be rendered in favor of Fantastic Store, the above appellee." Further, "this guaranty is issued for the purpose of the appeal bond of Intrusco Corporation, the said appellant in this case".

With respect to issue (a) above in the motion to dismiss, it is admitted by both parties that one of the four ways of posting a bond is cash deposited in a bank to the value of the bond, as evidenced by the bank certificate. There is absolutely nothing in the sentence referred to above which suggests that the person or appellant's name must be expressly stated in the certificate as the depositor of the amount. What the sentence does require is that the sum of money equivalent to the value of the bond, that is $675,000.00, must be deposited in a bank and there must be proof to that effect, such as a bank certificate, which has been fully met by appellant in this case.

It is plausible that the depositor or appellant's name should be specifically stated in the certificate. The bank is a business institution, organized and only existing to manage and control the funds of its customers, and only the interest derived there-from is what the bank uses to meet its financial obligations. It is therefore inconceivable that the bank will obligate itself as follows:

"KNOW ALL MEN BY THESE PRESENTS: That we, the Agricultural & Cooperative Development Bank, Monrovia, Liberia, hereby guarantees that Intrusco Corporation, the above named appellant, will comply with the judgment together with cost, up to the sum of $675,000.00, out of monies available at this bank if final judgement shall be rendered in favor of Fantastic Store, the above named appellee, the same being the principal sum of $675,000.00 awarded the appellee as damages in the above case, plus interest."

"This guarantee is issued for the purpose of the APPEAL BOND of Intrusco Corporation, the said appellant in this case."

Without first receiving any money from the depositor, appellant herein, as contended by the appellee in the motion to dismiss. Certainly it is not logical and a court of justice should not encourage what appellant has referred to in the resistance as "far fetched and a hair string technicality" designed to dissuade the court from hearing the case on its merits. *Liberty* v. *Horridge*, 2 LLR 422 (1922). In our opinion, the name of the depositor or appellant on a bank certificate may be inferred as per wording of the bank certificate.

As to paragraphs (b) and (c) of the motion mentioned above concerning the fact that there is no provision in the appeal statute for "guaranty," we will examine the question of forms.

Our only statute on forms is the Old Blue Book which consists of laws that were enacted prior to 1847, and another on forms is the Revised Statute Volume II. Those books are the nucleus of forms in this jurisdiction, but they are completely out of print and there are very few practitioners, if any, who have seen or have copies of those books. In any case, none of those books contain any form on a bank certificate. It is important to mention also that there is no specific wording provided in the current appeal statute as to how a certificate showing bank deposit should be framed, except that the statute requires evidence of deposit to the value of the bond, the purpose of the deposit and, of course, indication of the title of the relevant case. Civil Procedure Law, Rev. Code 1:63.1(a) and 8.1(3) *idem.* These pertinent data clearly appear on the certificate issued by the bank in this case. Further to the argument that there is no provision in the statute referable to the word "guaranty", this reminds us to ascertain what is "guaranty". It is defined thus:

"An undertaking or promise, on the part of one person called the guarantor, which is collateral to a primary or principal obligation on the part of another, and which binds the guarantor to performance in the event of nonperformance by such other person, the latter being primarily bound to perform. Concisely, a promise to answer for the debt, default, or miscarriage of another person, provided such person does not respond by payment or performance..."

"The fundamental difference between a contract of guaranty and one of suretyship is that the guarantor's contract is collateral to, and independent of the contract the performance of which he guarantees, while that of a surety is an original obligation." BALLENTINE'S LAW DICTIONARY 539.

In our opinion, therefore, the word "guaranty" as used in the certificate, does not negate but, rather, fortifies the intent of the document as well as the statute on appeal.

Our learned colleagues who dissented, quoting from 38 AM. JUR. *Guaranty,* 2d, § 5, at 1011,

have defined the words "guaranty" and "surety" pointing out the difference between the two and their respective obligations. In either case, neither one can be required to perform or answer for the debt or obligations of the principal unless the principal defaults and every effort to secure performance has been exhausted. It is an elementary principle that both the surety and the guarantor promise to perform or answer for the obligation of the principal, with the provision that the principal fails or defaults. Thus, the difference between the two, or how their respective obligations are created is not what is vital. What is important is whether the appellee is sufficiently secured, in accordance with the appeal statute, or whether the judgment in this case will be fully complied with in the event the appellate court confirms same in accordance with the proviso specified in the certificate of deposit? The question posed in this respect has been fully answered as per the certificate of deposit and as required by the procedural statute.

We have already discussed at length the effects of (d) and (e) of the paragraph in the motion to dismiss *supra.* Nevertheless, we wish to reiterate that the appellee has attacked the certificate of deposit for being defective because of the word "guaranty" thereon, and this argument is sustained by the minority of this Court. However, in the opinion of the minority, a certificate of deposit is defined, quoting from 7 AM. JUR. *Banks,* § 491, at 351, thus:

"...No particular form is necessary to constitute a certificate of deposit. For instance, a letter of advice written by the cashier of one bank to another stating that a person therein has deposited with the former bank a sum of money therein stated, to the credit of the latter bank for the use of another, has been held to be a certificate of deposit. The words "promise to pay" are not essential. The law implies such promise when the fact of deposit is established."

In the minority opinion, it is held also that the certificate of deposit does not "show on its face that Intrusco Corporation, the appellant, deposited any money with the Agricultural & Cooperative Development Bank; instead the bank certificate states that the bank guarantees that Intrusco Corporation will comply with the judgment together with costs out of monies available at the Agricultural & Cooperative Development Bank, and not sum of money deposited in said bank by the appellant to the value of the bond as mandatorily required by statute. There being no money deposited in the Agricultural & Cooperative Development Bank by the appellant as shown by the so-called certificate of deposit, said certificate falls short of the statutory requirement that a bond may be secured by cash to the value of the bond or cash deposited in the bank as evidence by a bank certificate."

We have already quoted earlier the pertinent part of the certificate of deposit in this case. In

our opinion, the certificate is clear and fully meets all the requirements of the statute. To hold otherwise, therefore, will be a denial of due process of law and a defeat of the primary intent of the statute we have already cited above, which is relied upon in both this majority and the dissenting opinions in this case. *See also Wolo* v. *Wolo*, 5 LLR 423, 426 and 427 (1937).

Appellee also cited for reliance the opinion of this Court handed down in its October Term, 1982, in the case *The Management of International Trust Company (ITC) v. Wiah et. al. and The Board of General Appeals*, 30 LLR 751 (1982), which opinion apparently influenced the minority of this Court in arriving at its conclusion in this case. In our opinion, there are many material dissimilarities in points of facts and law featuring in the two cases. In *The Management of the International Trust Company* case, the appellees moved the Court to dismiss the appeal on the grounds that (1) appellant had deposited the cash with itself and had issued its own certificate, and (2) that as the appellant was the same appealing party in the case, it therefore could not at the same time be a surety to its own appeal bond.

In the resistance to the motion in that case, the appellant contended that ITC was not the same entity as the International Trust Company Bank, and it was the latter that issued the certificate of deposit as the banker of the former.

In that opinion, this Court, in granting the motion to dismiss, held *inter alia* that:

"We do not agree, in the absence of any 1egal proof, that the appellant, ITC, is not the same entity that issued the certificate in question. We also disagree that the certificate in question was issued by ITC Bank or any other bank for that matter, as claimed by the appellant, because the subject bank certificate does not indicate on its face that it was issued by ITC Bank and signed by an authorized officer, that is to say, the president, or manager, of said bank. Under the circumstances, count three of the resistance is not sustained."

In the instant case, the appellant parted possession with the $675,000.00, cash which is an amount equaled to the value of the bond, and been deposited in another bank, which is not a party in this case before us, but rather a perfect stranger. The bank is 1egally authorized to do banking business in and under the laws of Liberia. Accordingly, the certificate of deposit duly signed by its general manager, and approved by the trial judge, was obtained and filed within the time allowed by statute. Therefore, that case, *The Management of the International Trust Company* v. *Wiah et. al.* and The Board of General Appeals, is not applicable in the case at bar.

Coming now to summary "B" of the motion to dismiss, it should be remembered that the subject of the motion to dismiss in this case is cash bond provided for the Civil Procedure

Law, Rev. Code 1: 63.1(a), and not an appeal bond covered in sections 63.1 (b), (c) and (d), which provision requires that the natural persons (sureties) who sign the appeal bond must own unencumbered real property on which taxes have been paid, and which is held in fee by the person furnishing the bond. That section also requires that valuables to the amount of the bond which are easily converted into cash, as well as sureties who meet the requirements of section 63.2 idem. However, where a bond is secured by two or more natural persons, a statement is required from the Ministry of Finance, indicating that the property offered as security is owned by the sureties in fee, the total amount of the liens on the property, unpaid taxes and other encumbrances against such properties offered, and a statement showing the assessed value of each property offered. Consequently, the appeal bond, as well as the affidavit of sureties referred to in the minority opinion, were not accompanied by a statement from the Ministry of Finance. Thus, they are left wondering whether or not the bond is a cash bond, for which the case should be dismissed. They do not have a valid ground for dismissal. Certainly, the appeal bond and the affidavit of sureties issued by the appellant, as found in the record before us, are mere surplusage, and if defective, do not vitiate the cash bond tendered as a security in this case. The majority opinion in those cases did not deal with the issue of cash bonds, as in this case, but rather, bonds signed by natural persons in accordance with the Civil Procedure Law, Rev. Code 1:63.1 (b), *idem*. Hence, it is quite clear that the four cases *supra* are not analogous to the case at bar in which adequate cash bond was executed, and the sufficiency of the cash deposited in the bank is not questioned in the motion to dismiss.

Another reason for the position that we have taken in this case is that a court of justice only decides points of law or facts that are raised expressly by the parties in their written pleadings which, of course, include motions. *Clark* v. *Barbour*, 2 LLR 15 (1909). We have already summed up earlier in this opinion the grounds contained in the motion to dismiss the appeal in this case and there is no allegation therein to the effect that the certificate of deposit was presented to the sheriff as mandated by section 63.1 of the current statute on appellate procedure. Therefore, it must have been an oversight by the majority of the Court when it was held that:

"When the appellant elects to deposit cash in the bank to the value of the bond as provided in section 63.1(a) quoted *supra,* the certificate obtained by him from the bank as evidence of the deposit is equivalent to cash and must be presented to the sheriff."

Appellant has filed the certificate of deposit in the sum of $675,000.00 as the value of the bond and the bank has acknowledged receiving the amount named in the certificate, stating that it is available and the bank promised to pay upon affirmation of the final judgment in the case in favor of appellee. Yet, it is the holding of the minority of this Court that:

"The so-called certificate of deposit issued by the bank is not a certificate based on money deposited by the appellant and received by the bank to the value of the appeal bond. Instead, it is in the nature of a guaranty and cannot be taken as a negotiable instrument for which the Agricultural and Cooperative Development Bank could be bound to release money available in the bank not belonging to, and deposited by, Intrusco Corporation, the appellant. The certificate could not have been received by the Sheriff as cash and by him deposited in the government depository or in any reliable bank as the law directs, because it is not equivalent to cash which the bank could release upon orders of the court."

In view of the certificate of deposit issued, the availability of the adequate amount deposited in the bank, and the bank's promise to pay same in accordance with the terms and conditions stated in the certificate as provided by statute, can this Court of last resort hold that the amount stated in the certificate was not deposited by appellant, and that the bank is not bound by its own certificate, duly signed by the general manager of the Bank? There is only one answer to these inquiries, in my humble view and conscience, and that is no.

Before concluding this opinion, we have observed that in the minority opinion, Mr. Justice Yangbe is quoted in *Liberia Indus-trial Development Corporation* v. *El Nasr Export and Import Company*, 30 LLR 295 (1982), decided by this Bench during the March 1982 Term of this Court, as follows:

"Why today in this case, under the same circumstances and principle, the very Justice who spoke for the Court in the *Liberia Industrial Development Corporation* case has inconsistently spoken against that opinion of the Court which he wrote and delivered?"

We observe further that this quoted portion of the dissenting opinion has not clarified the alleged inconsistency, and in what respect the position of Justice Yangbe is against that opinion which he wrote and delivered, referred to above, for the benefit of scholars.

There are many factors, in respect to the application of the doctrine of *stare decisis*, which have not been taken into consideration by the minority in its opinion which are: (1) Mr. Justice Yangbe is quoted out of context in the minority opinion to begin with, and (2) in the *Liberia Industrial Development Corporation* case, a motion was filed which attacked the appeal bond signed by sureties since the statute requires that in the surety affidavit accompanying the appeal bond, the property offered as security must be described therein. As a result, in *West Africa Trading Corporation* v. *Alrine,* 24 LLR 224 (1975), this Court stressed the wordings of the statute to the effect that the realty offered as security to the appeal bond must be described by its metes and bounds, which was not done in that case. Consequently, appellee

contended that the property was not sufficiently described, and therefore, the appeal bond was defective. It was this defect in the affidavit of sureties that this Court dealt with, and not a cash appeal bond, nor a certificate of deposit as in the case before us.

We wish also to observe that earlier in this opinion, we also mentioned and held that in case of cash bond, as in this case, the affidavit of sureties and appeal bond are legally and absolutely unnecessary. Therefore, in our opinion, if the affidavit of sureties and the appeal bond filed by the appellant in this case are defective, same are mere surplusage and do not invalidate the cash deposited in the bank and available to satisfy the judgment in this case, in the event the appellant failed to prosecute, or did not prevail in the appellate court.

Furthermore, the statute which provides for a bank certificate as evidence of deposit of cash bond was enacted in 1971, while Mr. Justice Grimes delivered the opinion in *Cavalla River Company, Ltd.* v. *Fazzah*, 7 LLR (1939), relied on and quoted in the minority opinion, in 1939. This therefore presents an obvious discrepancy in the minority opinion, for it was nearly thirty-two years after Justice Grimes' opinion that the current statute of appeal was enacted and published. Furthermore, Chief Justice Grimes died in 1943. Obviously, Justice Grimes, in 1939, did not have to decide any issue concerning appeal bond as cash deposited in the bank, and evidenced by a bank certificate. Therefore, in our view, the *Liberian Industrial Development Corporation* case cited *supra,* and all other cases cited in the minority opinion, are not applicable, and the facts, circumstances and laws in those cases, in which Mr. Justice Yangbe and Chief Justice Grimes spoke for the Court, are not pertinent to this case.

We wish also to put on the record that in *The Management of the International Trust Company* case, decided by this Court during its October Term 1982, Mr. Justice Yangbe consistently held a similar view in accordance with the position that the majority of this Bench has taken today in this case. Therefore, in our view, clearly there is no inconsistency with respect to the position Mr. Justice Yangbe has taken in both cases.

It is important to hold here that in applying the principle of *stare decisis,* the issues that were raised in the former case must be specifically traverse in the subsequent pleading. The Court must, of necessity, pass upon and decide same, otherwise, the mere expressions in an opinion in the absence of the above, are mere *dictum,* and not the holding of the Court. The issues of cash bond and alleged defect of the bank certificate, not having been raised nor decided in the case cited in the minority opinion, the principle of *stare decisis* is inapplicable to the case before us.

Therefore, in view of the narration above and the citations of law contained herein, we are of the opinion that there is absolutely no factual or valid reason for this Court to refuse

jurisdiction in this case and to dismiss the appeal. Hence, the motion to dismiss is denied and the Clerk of this Court is ordered to re-docket the case to be heard on its merits. And it is so ordered

Motion denied.

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

I withheld my signature from the judgment just read because I disagree with the holding of my distinguished colleagues of the majority. I am strongly of the opinion that by such holding on their part, this Court has been rendered inconsistent by its departure from the doctrine of *stare decisis*, which tends to make meaningless our statutory law on bonds and security.

The defect on the appeal bond, as pointed out in appellee's motion to dismiss appellant's appeal, is not a mere legal technicality as held by the majority, but rather it is a material defect which cannot be cured without damage to the long line of opinions of this Court. I think our feeling and desire to hear a case on its merits should not be imposed against the requirements of the statute. Courts of justice will not construe any provision of the statute beyond the legislative intent. If we disagree with the specific statute, we have no choice and authority whatsoever to add to, or subtract from it, but to follow the command of the statute unless it breaches a constitutional provision.

In this case, appellee attacked appellant's appeal bond as being materially defective because it failed to comply with the provisions of the statute on bonds and security. For the benefit of the future, I will recite, as follows, the relevant counts of the motion to dismiss:

"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 a bank certificate. In the instant case, the appellant has obtained a certificate of deposit from Agricultural & Cooperative Development Bank but the said certificate of deposit does not show that any money was deposited in the Agricultural & Cooperative Development Bank by the appellant, Intrusco Corporation. Instead the so-called certificate of deposit states: 'That we, the Agricultural & Cooperative Development Bank, corner of Carey & Warren Streets, Monrovia, Liberia, hereby guarantee that Intrusco Corporation, the above named appellant, will comply with the judgment together wish cost up to the sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) . . . Appellee submits that the statute governing appeal bond does not provide for any guaranty by the bank. The statute specifically states

that the certificate of deposit must show that cash has been deposited in the bank to the value of the bond as evidenced by the bank certificate. The certificate attached to appellant's appeal bond being a bank guarantee and not a bank certificate as contemplated by the statute, renders the appeal bond defective and therefore the appeal should be dismissed. A copy of the so-called certificate of deposit is hereto attached and marked exhibit "B" to form a part of the motion.

"3. And also because appellee says further that the appeal bond is further defective because the Agricultural & Cooperative Development Bank is not legally authorized to stand as surety to an appeal bond, it not being an insurance company authorized to execute surety bond within the Republic. The affidavit of sureties attached to appellant's appeal bond shows that the Agricultural & Cooperative Development Bank has represented itself to be surety to the appeal bond filed by the appellant. The appeal bond itself indicates that the Agricultural & Cooperative Development Bank is representing the appellant as its surety, which is contrary to the statute. Copies of the affidavit of sureties and the appellant's appeal bond are hereto attached and marked exhibits"C" and "D", respectively, to form part of this motion.

"4. And also because appellee says that 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 acquired jurisdiction over the case. Hence, the appeal should be dismissed.

To this motion appellant filed a six-count resistance in which it denied that the appeal bond is defective and fails to meet the requirement of the statute. It is also contended in the resistance, and counsel for appellant strongly argued, that the averments that appellant has failed to perfect its appeal as provided by statute "is far fetched and a hair-string technicality", and that the only grounds on which an appeal could be dismissed under the statute are by the non-filing of the bill of exceptions, non-filing of an appeal bond, insufficient indemnification, that is, where the bond does not state an amount or an amount sufficient to cover the principal and costs, and non-service of a notice of completion of the appeal. The counsel for appellant argued that the statutory requirements, having been met, the motion to dismiss should be denied.

The contentions raised in the appellee's motion to dismiss are that, this Court is without jurisdiction to open the record and hear the case on its merits because one of the jurisdictional steps in taking an appeal to this Court was not complied with, in that no cash to the value of the bond was deposited in the Agricultural & Cooperative Development Bank, the said bank which has presented itself as surety is not an insurance company

authorized by law to execute a surety bond, and that the appeal bond and the affidavit of sureties do not meet the statutory requirements, which make the appeal bond materially defective and subjects the appeal to dismissal. These are the questions to which this Court is bound to address itself and which can only be answered by our statute law on bonds and security, but not by what we feel should have been the law, or to allow our sympathy to supercede the command of the statute.

Firstly, I will discuss the question of the certificate of deposit raised in count two of the motion quoted *supra* before coming to the question of suretyship raised in the third count of the motion, so as to arrive at the conclusion as to whether or not this Court has been given jurisdiction to hear the appeal on its merits. The certificate of deposit which appellee attacked as not having shown on the face that money was deposited by appellant in the Agricultural & Cooperative Development Bank reads as follows:

CERTIFICATE OF DEPOSIT

"KNOW ALL MEN BY THESE PRESENTS: That we, the Agricultural & Cooperative Development Bank, corner of Carey and Warren Streets, Monrovia, Liberia, hereby guarantee that Intrusco Corporation, the above named appellant, will comply with the judgment together with costs up to the sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) out of monies available at this bank if final judgment shall be rendered in favor of Fantastic Store, the above named appellee, the same being the principal sum of $675,000.00 (Six Hundred Seventy-five Thousand Dollars) awarded the appellee as damages in the above case, plus costs.

This guarantee is issued for purpose of the appeal of Intrusco Corporation, the said appellant in this case . . . "

A careful scrutiny of this certificate quoted *supra* reveals that (1) it is not a certificate of deposit because it does not show on its face that any cash was deposited in the bank by the appellant to the value of the bond as the law commands; (2) it is much more a certificate of guaranty than a certificate of deposit because it states in its body that "the Agricultural & Cooperative Development Bank, corner of Carey & Warren Streets, Monrovia, Liberia, hereby guarantees ... " And further states that "this guarantee is issued for purpose of the appeal bond . . ."; and (3) it tends to be a guaranty but lacks a binding indemnity clause on part of the bank to pay the $675,000.00 in the event Intrusco Corporation fails to comply with the judgment.

The relevant statute on bonds and security reads, as follows:

"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;

(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". Civil procedure Law, Revised Code 1 :63.1.

By the provisions of this statute, a bond may be secured by one or more of the ways listed, depending on the choice of the person furnishing the bond, he may choose more than one provision as surplusage does not vitiate, and the choosing of only one way will not be insufficient, so long the security offered does not fall short of the amount of the bond, and so long the statutory requirements are strictly adhered to. By the statute quoted *supra,* the appellant should have deposited the $675.000.00 named as the amount of the bond and not to simply rely on the money belonging to the bank, and available thereat, contrary to the statute on bonds and security. 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, is the command of the statute, and this requirement should have been strictly complied with by the appellant. The requirement of the statute is not a bank certificate *per se*; the depositing of cash in the bank to the value of the bond is the command, and the certificate is only the evidence to substantiate that cash has been deposited in the bank to the value of the bond.

Black's Law Dictionary 286 (4th ed.), has defined a certificate of deposit as: "A written acknowledgment by a bank or banker of a deposit with promise to pay to the depositor, to his order, or to some other person or to his order . . . A bank's promissory note". Bouvier Law Dictionary (3rd Revision), has also defined a certificate of deposit as: "Written statement from a bank that the party named therein has deposited the amount of money specified in the certificate and that the same is held subject to his order in accordance with the terms thereof".

A certificate of deposit, ordinarily, is defined as a written acknowledgment by a bank of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the order of the depositor, or to some other person or to his order whereby the relation of the debtor is created between the bank and the depositor. For instance, a letter of advice, written by the cashier of one bank to another stating that the person therein had deposited with the

former bank a sum of money therein stated to the credit of the latter bank for the use of another, has been held to be a certificate of deposit". *See* 7 AM. JUR., *Banks*, § 491 (1973).The certificate of deposit, quoted *supra,* does not show on its face that Intrusco Corporation, the appellant, deposited any money with the Agricultural & Cooperative Development Bank whereby the relationship between the bank and the depositor is created; instead, the bank in its certificate states that, it guarantees that Intrusco Corporation will comply with the judgment together with costs, when our statute on bonds and security does not require a bank guaranty as one of the means to secure a bond. In fact, the bank is not shown to be a guaranty company authorized to give guaranty on bonds.

If the Legislature intended to include "guaranty" as one of the means by which a bond may be secured in Liberia, it would have included it in the provision of the statute on bonds and security; but a guaranty, not being one of such means, its issuance as a bond renders the bond defective and the appeal dismissible. A guaranty company, according to Black's Law Dictionary 834 (4th ed.), is a corporation authorized to transact the business of entering into contract of guaranty and suretyship as one, for fixed premiums, may become surety on judicial bonds, fidelity bonds and the like.

Guaranty and suretyship do not create the same legal obligation concurrently with the principal debtor. Guaranty is a collateral agreement for performance of another's undertaking, according to Black's Law Dictionary 813 (4th. ed.). It is a contract by which the guarantor undertakes to do, to pay damages for such failure. It is distinguished from an engagement of suretyship in this respect, in that, a surety undertakes to do this very thing which the principal has promised to do, in case the latter defaults. In 38 AM. JUR. 2d, *Guaranty,* § 15, it is provided that:

"A guarantor, not being a joint contractor with the principal, is not bound like the surety to do what the principal has contracted to do, but answers only for the consequences of the default of the principal. There are certain well-defined distinctions and defenses in the nature of the legal obligations created. A surety is primarily and jointly liable with that of the principal debtor. An action can be maintained against both jointly, even without statutory authority so to do. But the obligation of a guarantor is collateral and secondary to that of the principal debtor to discharge the obligation for which he is primarily liable. The contract of surety is made at the same time with that of the principal, while that of the guarantor is a contract separate and distinct from that of the principal. Unless authorized by statute, a guarantor cannot be sued jointly with the principal debtor".

Where an appellant in a case elects to deposit cash in the bank to the value of the bond as provided by the law quoted *supra*, the certificate so obtained by him is only an evidence of

the deposit and is equivalent to cash and must be presented to the sheriff who is required to receive it as cash and, by him, deposit in the government depository or in any other reliable bank for the cash to be withdrawn by orders of court. Here is our statute on the point:

"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 deposit and containing a statement that the deposit will be released only upon the written order of a judge of the court". Civil procedure Law, Rev. Code 1: 63.1.

In the instant case, there was no cash deposited in the bank by the appellant for the purpose of its appeal. The certificate of deposit in question is therefore a nullity and is of no negotiable value to be received and deposited by the sheriff in the government depository or in any reliable bank in Liberia, and the court, therefore, would be without legal authority to order the release of any money available at the Agricultural & Cooperative Development Bank in which the appellant did not deposit any money for the purpose of the appeal bond in this case. The certificate aforesaid cannot be considered as a certificate of deposit as defined herein above because no cash was deposited in the bank by the appellant to the value of the bond. Since the bank had money available, and if it intended to help the appellant, it should have issued a manager's check to the value of the bond which is negotiable and the amount of such a check, when deposited in the government depository or in any other reliable bank, could be withdrawn therefrom by order of court, and this would have sufficed. But the certificate aforesaid is more of a guaranty because the bank itself refers to it as a guarantee issued for the purpose of the appellant's appeal bond. It cannot be considered a certificate of deposit simply because it is captioned "certificate of deposit." In such a situation, the so-called certificate of deposit is like a bat which is neither a bird nor an animal. It can only be correctly classified as a fiasco instrument which does not fulfill the requirements of the statute on bonds and security. The certificate is intended, in my opinion, not only to deceive the courts of Liberia, but to also test the legal ability of the judges of our courts, and I regret very seriously that my distinguished colleagues of the majority, whom I know very well, had to succumb to the feeling that suretyship and guaranty have the same meaning and purpose, and lost sight of the fact that our statute on bonds and security does not require guaranty. The terms "guaranty" and suretyship", according to text writers, are sometimes used interchangeably, but they should not be confounded. The contract of a guarantor is his own separate contract. It is in the nature of a warranty by him that the thing guaranteed to be done by the principal shall be done, not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract, and he is not bound to take notice of its nonperformance. A guarantor of a bill or note (as in the instant case), is said to be one who engages that the note shall be paid, but he is not an

endorser or surety. Guaranty is a collateral agreement, and so a collateral guaranty is a contract by which the guarantor undertakes that the debtor will pay debt or perform the obligation. In such a case the guarantor undertakes, in case the principal fails, to do what the principal had promised or undertaken to do, or pay damages for such failure. Distinguished from engagement of suretyship in the respect that, a surety undertakes to do the very thing which the principal has promised to do, in case the latter defaults. *See* BLACK'S LAW DICTIONARY 833 (4th ed.)

I now take recourse to the appellant's appeal bond and the affidavit of sureties thereto attached. For the benefit of the future, I quote both the appellant's appeal bond and the affidavit of sureties which read, respectively, as follows:

"APPELLANT'S APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Intrusco Corporation, Monrovia, Liberia, the above named appellant/principal, and Agricultural & Cooperative Development Bank, represented by its general manager, Samuel R. Divine, "CERTIFICATE OF DEPOSIT" SURETY, being freeholder and householder within the Republic of Liberia, are held firmly bound unto the sheriff for Montserrado County, in the sum of Six Hundred Seventy-five Thousand ($675,000.00) Dollars, to be paid to the above named appellee or his legal representatives for which payment we bind ourselves and our personal representatives jointly and severally, firmly by these presents.

The condition of this obligation is that we will indemnify the said appellee from all costs and from all injuries arising from the appeal taken by the above named Appellant, and will comply with the judgment of the court to which said appeal is taken or any other court to which said action may be removed....."

"AFFIDAVIT OF SURETIES

PERSONALLY APPEARED BEFORE ME, Agricultural & Cooperative Development Bank, represented by its general manager, Samuel R. Divine, 'CERTIFICATE OF DEPOSIT', surety, to the attached bond duly sworn deposes and says:

1. That said Bank is a freeholder and householder within the Republic of Liberia and has possession of the amount of Six Hundred Seventy-five Thousand ($675,000.00) Dollars given as security to the attached bond;

2. That the said amount is in cash in American currency or Liberian coins being in Monrovia, Montserrado County, Republic of Liberia;

3. That there are no claims or other encumbrances on the said amount . . . ."

By the appeal bond and the affidavit of sureties tendered by the appellant and quoted supra, it is assumed that the appellant has also elected to tender a surety bond. A surety bond, under our statute, is that type of bond which only natural persons qualified under the law on bonds and security can execute. A surety bond must be accompanied by an affidavit of sureties and only real property to the value of the bond is offered and accepted as security. The affidavit of sureties must describe the metes and bounds of such property in its body. The affidavit must contain a statement that the sureties are the owners of the property offered, the amount of the lien on the bond, unpaid taxes and encumbrances against the property, and the assessed value thereof. It must be accompanied also by a certificate of property valuation obtained from the Bureau of Internal Revenues, Ministry of Finance, to the effect that the surety or sureties to the bond are the owners of the property and that said property is of the assessed value as stated in the sworn affidavit. Unless the court orders otherwise, a surety on a bond must be either two natural persons who fulfill the requirements as stated above, or an insurance company authorized to execute surety bonds within the Republic. Civil Procedure Law, Rev. Code 1: 63.2(1), (3) and (4).

From the provision of the statute cited supra, anything that falls short of its requirements renders the bond defective and subjects the appeal to dismissal. The surety on the appellant's appeal bond quoted above is not a natural person as contemplated by the law, no real property is offered as a security and the assessed value thereof stated in the affidavit of sureties, substantiated by a certificate of property valuation from the Ministry of Finance. In the case *Ghandour Brothers, Inc.* v. *Breckwoldt & Company, Ltd.* as reported in 20 LLR 34 (1970), this Court held that: "When the sureties on an appeal bond are not legally qualified under statutory provisions, the appeal bond is defective and the appeal is subject, therefore, to dismissal". Also in the case *Baky* v. *Nah,* 20 LLR 38 (1970), this Court held that: "An appeal bond is defective when not accompanied by an affidavit of the sureties complying with the provisions of the Civil Procedure Law . . . and is further defective when not accompanied by a certificate from the Bureau of Internal Revenues, required under paragraph four of the same section, rendering the appeal, therefore, subject to dismissal". The sureties named in an appeal bond must be owners of the property pledged and their affidavit accompanying the bond must bear evidence to that effect. When the documents accompanying the bond do not precisely show that the sureties named are owners of the pledged property, the bond will be considered defective and the appeal subject to dismissal. *Jarboe* v. *Jarboe,* 24 LLR 352 (1975).

The appellant's appeal bond as quoted supra states in its body, as follows: "We, Intrusco Corporation, Monrovia, Liberia, the above named appellant/principal and Agricultural &

Cooperative Development Bank, represented by its general manager, Samuel R. Divine, "Certificate of Deposit" Surety, being freeholder and householder within the Republic of Liberia ...." By this statement in the bond, it is difficult to understand as to who is the surety on the bond. Is it the bank, represented by its General Manager or the certificate of deposit referred to therein? It cannot be the bank because it is not a natural person required and qualified to be a surety on a surety bond, neither is it an insurance company authorized to execute surety bonds within Liberia, nor is it a guaranty corporation organized for that purpose. It cannot be the certificate of deposit either, because a certificate of deposit does not form part of a surety bond. A certificate of deposit is only evidence that cash has been deposited in the bark. This non-compliance with the requirement of section 63.2 as cited *supra* makes the appeal bond the more defective and cannot, therefore, be treated and considered as a mere technicality.

In *Liberia Industrial Development Corporation* v. *El Nasr Export & Import Company*, 30 LLR 295 (1982), decided during the March A. D. 1982 Term of this Court, the appellee filed a motion to dismiss the appellant's appeal on the ground that the real property offered was not described in the affidavit of sureties, contrary to law, neither did the bond name two natural persons, one or both of whom were owners of real property offered as security on the bond, nor was the surety an insurance company authorized by law to execute surety bonds within Liberia. Just as in the case of *El Nasr Export & Import Company* so it is in the instant case: no natural person is named as surety on the bond neither is there any real property offered as security and described in the affidavit of sureties, nor has the Agricultural & Cooperative Development Bank been shown to be an insurance company authorized to execute surety bonds in Liberia. The Agricultural & Cooperative Development Bank is also not shown to be a guaranty company authorized to engage in guaranty and suretyship in Liberia.

The surety on the appeal bond in the case *Liberia Industrial Development Corporation v. El Nasr Export & Import Company*, referred to hereinabove, was the commercial bank, and Mr. Justice Yangbe, speaking for the Court, correctly said at page 3 of that opinion that:

"An insurance company which is authorized by law may execute a surety bond; otherwise, there must be at least two or more natural persons who must meet the requirements of section 63.2 of the Civil Procedure Law, Rev. Code 1: There is no showing that the commercial bank is authorized by the statute to execute a surety bond. The affidavit of sureties attached to the appeal bond in this case does not contain a description of the property sufficiently identified to establish the lien of the bond".

The learned Justice cited in support of the Court's position Civil Procedure Law, Rev. Code 1: 63.2(2), and the cases *West Trading Corporation v. Alraine (Liberia) Ltd.,* 24 LLR 224 (1975)

and *Taylor* v. *Pasi et al.,* 25 LLR 453 (1977). The motion to dismiss was granted by the unanimous votes taken in which the other two Justices, now forming the majority in this case, participated.

Why today in this case, under the same circumstance and principle, the very Justice who spoke for the Court in the *El Nasr Export & Import Company* case, has inconsistently spoken against that opinion of the Court which he wrote and delivered? In the case *Cavalla River Company* v. *Fazzah,* 7 LLR 13 (1939), Mr. Chief Justice Grimes, speaking for this Court said, and I quote to remind my distinguished colleagues, 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 in the bond. It is stated in 73 AM. JUR.2d, *Statutes,* § 145, p. 351 that:

"In the interpretation of statutes, the legislative 'will' is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the Legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the Legislature, and to carry such intention into effect, to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the Legislature."

Today, this bench has gone on record, by the majority opinion just delivered, to set aside the principle followed in the long line of opinions of this Court and, as such, has subtracted from, and added to, the statutory provisions on bonds and security to include guaranty, by accepting as genuine a certificate of deposit on which no money was deposited contrary to the normal internationally accepted business practice.

To conclude, and for the benefit of those who confuse the purpose and functions of bond with guaranty, with whom the majority of this sacred bench share view, I want to reiterate that we are talking about the appellant's failure to deposit money in the bank as required by statute, as security to satisfy the primary purpose of indemnity. We are talking about an instrument containing a clause with a sum fixed therein as penalty, binding the parties to pay the same, conditioned, however that the payment of the penalty may be avoided by the performance by one or more of the parties of certain acts, one which is intended to protect the assured from liability for damages or to protect the persons damaged by injuries occasioned by the assured as specified, when such liability should accrue and be imposed by law, as by court. We are talking about a kind of contract between two parties entered before a court of justice whereby one party undertakes and agrees to indemnify the other against

loss or damages arising from such contemplated act on the part of the indemnitor, or from some responsibility assured by the indemnitee, or from the claim or demand of a third party, that is, to make good to him such pecuniary damages as he may suffer. But such a contract is not intended to be such as are sought in case one intends to borrow money and is required to secure collateral agreement--a guarantee to insure payment of debt.

Under the law in our jurisdiction, which I have already quoted hereinabove, a judicial bond may be secured by giving to the sheriff cash to the value of the bond against a receipt, or cash deposited in the bank to the value of the bond, according to the election of the party, and obtain a certificate therefor. The certificate is to serve as evidence that cash, to the value of the bond, has been deposited in the bank by the party, and by such certificate the bank is prepared to release the money only upon orders of court. This is commonly referred to as cash bond. On the other hand, the party may elect to give valuables to the sheriff to the value of the bond, that is, valuables which are easily converted into cash. Some evidence of ownership of the valuables must be shown. Another means is that appellant could offer to the sheriff, not merely by words of mouth but by presenting to him, the deed or deeds to real property owned by him indicating in writing the reason for so parting with such documents on condition. The real property so offered must be to the value of the bond, and there must be no encumbrances on them, taxes thereon must have been paid. This will also serve as security on the bond. Lastly, the party may give a surety bond. A surety bond is where two or more natural persons, who are sureties, are owners of real property to the value of the bond. This type of bond must be supported by affidavit of the sureties showing that the property is theirs, and the assessed value thereof stated. The affidavit must show if there are any encumbrances on such property, and the unpaid taxes thereon, if any. The property must be described in the affidavit by their metes and bounds to be easily identified on the ground, and must be accompanied with the bond a certificate from the Real Estate Tax Division, Ministry of Finance, to the effect that the property as described in the affidavit of sureties are owned by the sureties, and the certificate must indicate the value of each of the property so offered, and that taxes thereon have been paid and there is no lien on said property. A surety bond may also be executed for a party by an insurance company authorized by the Legislature to execute suretyship bonds; but no insurance company or any banking institution or corporation can elect to engage in the execution of bonds in Liberia without being authorized specifically by its charter from the Legislature. These are the only statutory requirements in securing a bond in Liberia. We have no provision in our statute that a secondary or collateral contract of the bank can substitute for security on bonds. A guaranty or guarantee may be generally defined as a collateral promise or undertaking by one person to answer for the payment of some debt, or the performance of some contract or duty, in case of the default of another person, who, in the first instance, is liable for such payment or performance. It is a collateral promise or under-taking to pay a debt owed by a

third person in case the latter does not pay. It is an agreement by one person to answer to another for the debt, default, or miscarriage of a third person, and as has been pointed out, the latter is the definition given by statute in a number of jurisdictions. 32 C.J.S., *Guaranty*, § 1. In our jurisdiction, a guaranty is not required by our statute to secure a bond. And also, a contract of guaranty is not a bond which our statute requires to be given to either secure the presence of a party when needed by court until judicially discharged, or to indemnify the appellee from injuries, damages, or cost, and to comply with the judgment of court. In the case *Durham* v. *Greenwold,* 3 SE 2d 555, it was held that:

"A contract of guaranty exists where one lends his credit for the benefit of another, but under an obligation which is separate and distinct from that of the principal debtor, whereby he renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract".

A contract of guaranty not being one of the requirements of our statute on bonds and security, I am in total disagreement with the holding of my distinguished colleagues of the majority. Hence, I dissent.