JOHN B. JOHNSON, Appellant, *v.* **MADAM S. GOODING BURGE**, Appellee.

MOTION TO DISMISS APPEAL FROM THE DEBT COURT FOR MONTSERRADO COUNTY.

Heard: October 18, 1984. Decided: November 22, 1984.

1. In computing any period of time prescribed or allowed by statute, by order or rule of court, by rule or regulation, or by executive order, the day of the act, event or default after which the designated period of time begins to run is not to be included.

2. The last day of any computed period is to be included unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday.

3. When any computed time prescribed or allowed by law is less than ten days, intermediate Sundays and holidays shall be excluded from the computation. Civil Procedure Law, Rev. Code I :1.7

4. A condition for appeal is that the appellant secures the approval of an appeal bond by the trial judge and files the same with the clerk of the court within sixty days after the rendition of judgment. Civil procedure Law, Rev. Code I :51.8

5. The statutory provisions of the Civil Procedure Law on appeals from courts of record, being strictly intended to accomplish the purpose of appeal to the Supreme Court, the Court is precluded from giving any other construction to it.

6. As an appeal bond is intended to indemnify the appellee, the entire purpose would be defeated if the appellant was made to correct a neglect or violation that could terminate the case in favor of the adverse party.

7. The statutory requirement that the affidavit of sureties should sufficiently describe the property offered as security to the appellant's appeal bond means that the affidavit must state the property number, the quantity of property, and the designated

metes and bound of the property, with their terminal points and angles. Where the description omits these points, the case is subject to dismissal.

8. An appeal bond which lacks an indemnification clause may be dismissed upon a showing of such defect.

9. In an appeal bond, the appellee enters into a contract with the appellant to the effect that the appellant will give security to be approved by the court that he will indemnify appellee from injuries arising from the appeal, and that the appellant will comply with the judgment. Thus, where any provision is bridged, the violation is material and the appeal may be dismissed.

This is an appeal by the appellant from a judgment rendered against him by the Debt Court for Montserrado County. When the case was called for hearing by the Supreme Court, the Court was notified of the filing of a motion to dismiss the appeal and a resistance thereto. In the motion to dismiss, appellee asserted that the approved appeal bond had been filed beyond the statutorily prescribed time of sixty days from the date of rendition of judgment by the lower court; that the affidavit of sureties had failed to sufficiently describe the property used as security to the bond; that the bond sought to indemnify the appellant rather than the appellee; and that the notice of completion of appeal was served and filed beyond the sixty day period prescribed by statute.

The appellant, in resisting the motion, contended that the appeal bond was approved and filed within the time stipulated by the statute, according to his mathematical calculation. The appellant also contended that under the Civil Procedure Law, it was the responsibility of the clerk of court to issue, order served, and filed with the court the notice of completion of appeal, and that in any case, the law did not require service and filing of the notice of completion of appeal within sixty days. With regards to the defectiveness of the appeal bond, the appellant asserted that the appellee was guilty of lashes for her failure to challenge the bond within three days of its filing; that the property stated in the bond as security was sufficiently described; and that the indemnity clause was clearly intended to apply to appellee. The appellant noted that the reference to indemnifying appellant was a mere typographical mistake and a harmless and immaterial error which did not affect the rights of the appellee. Appellant cited cases of the Supreme Court to the effect that mere technicality

should not be the basis of dismissal of a case.

The Court rejected the various contentions of the appellant, holding that the errors were significant enough to warrant dismissal of the appeal. On the question of the late filing of the approved appeal bond, the Court, noting that the appeal statute was to be strictly construed, observed that the bond was filed sixty-one days after the rendition of judgment by the trial court, one day later than the period prescribed by the appeal statute.

The Court further noted, with reference to the lateness of the notice of completion of appeal, that the law contemplated the service and filing thereof within sixty days from the rendition of judgment. Where this was not done, the Court said, the appeal was fatal and should be dismissed. The Court rejected the contention that it was the sole responsibility of the clerk to issue and order served the notice of completion of appeal, noting that the statute imposed on the appellant the responsibility to superintend an appeal taken by him from a judgment of the lower court.

The Court also opined that the bond was defective because it sought to indemnify the appellant rather than the appellee. It observed that the error was material and bridged the contract between the appellant and the appellee as to the indemnification of the appellee. Moreover, the Court said, the affidavit of sureties had failed to sufficiently described the properties of the sureties as contemplated by the statute. The test of sufficiency, the Court said, required a statement of the number and location of the property, the quantity of property offered, and the metes and bound of the property. The Court rejected the appellant's contention that the appellee had suffered waiver and lashes in not challenging the defects in the bond within three days of the filing of the bond, noting that the appeal statute was different from the general statute on bonds, which was relied upon by appellant.

The Court therefore granted the motion, *dismissed* the appeal and ordered the *judgment* of the lower court enforced.

Moses M. Agbaje, Sr. appeared for appellant. *Clarence E. Harmon* appeared for appellee.

MR. JUSTICE KOROMA delivered the opinion of the Court.

Madam S. Gooding Burge, appellee in this action has, by and through her counsel, moved this Court to dismiss the appeal taken from the final judgment of the Debt Court for Montserrado County, for reason that the appellant, John B. Johnson had failed and neglected to comply with the statutory requirements for perfecting an appeal to this Court. The appellee contends in this regard that the appellant had not filed an approved appeal bond; nor had he served and filed a notice of completion of appeal as required by law, so as to bring the parties under the appellate jurisdiction of this Court. Hence, appellee says, the appeal should be dismissed and the judgment of the court below affirmed.

Countering this motion, the appellant has filed a seven-count resistance which, for the benefit of this opinion, we quote herein below:

'1. Because appellant submits as to count one (1) of the purported motion that the contention of appellee that appellant's appeal bond was filed beyond the statutory period of 60 days is a mathematical error and misleading, in that, final judgment in this case having been rendered on the 26th day of August, A. D. 1983, the 60th day fell on October 26, 1981, the date on which the approved appeal bond was filed and therefore the appeal bond was filed within statutory time.

2. And also because further to count one (1) of the purported motion, appellant submits that the service of the notice of completion of appeal on appellee on the 27th day of October, A. D. 1983, was also in accordance with statute and cannot be regarded as a fatal error, in that under the statute governing appeals from courts of records.... After the filing of the bill of exceptions and the filing of the appeal bond as required by sections 51.7 and 51.8, the clerk of the trial court on application of the appellant, shall issue a notice of completion of the appeal, a copy of which shall be served by the appellant on the appellee." (*See* Civil Procedure Law, Rev. Code 1 :51.9). Appellant strenuously contends that each of the steps required in taking an appeal is prescribed by the statute from section 51.5 through 51.9 and the time and manner in which each act shall be done specifically stated.

Unlike under the old 1956 Code, where notice of completion of appeal and appeal bond must be completed within 60 days, the Revised Statute does not require notice of completion of appeal to be issued and served within 60 days after final judgment but only after the filing of an approved bill of exceptions. The contention of appellee is therefore

without legal foundation and groundless.

3. And also because further to count (1) of the purported motion, appellant submits that the notice of the completion of appeal having been issued by the clerk of the trial court upon application of appellant, within the statutory time, on the 60th day after final judgment, appellant has substantially performed the duties required of him by statute and can suffer no neglect. Therefore, the service of said notice on the appellee by the sheriff on the 61st day after final judgment is an act of officers of court which cannot prejudice the right of any party since appellant has no further duty to perform in the service of the notice on appellee. This Court has consistently held that. . . . . "Where timely completion of an appeal was precluded by circum-stances entirely beyond the appellant's control, the appeal will not be dismissed for untimeliness. The right of appeal on the merits will not be denied for violation of a procedural rule when such violation is neither negligent nor deliberate. *Duncan v. Perry,* 15 LLR 210 (1958).

4. And also because as to count two (2) of the purported motion, appellant submits that appellee is guilty of waiver and laches to question the description of the property offered as security on the appeal bond or to challenge the legal sufficiency of the sureties to said bond, in that, under the statute, appellee should have filed her exceptions to the sureties within three (3) days of filing of the appeal bond, and failure to do so, the bond cannot now be questioned or disturbed. *See* Civil Procedure Law, Rev. Code 1 :63.5; *Kerpai v. Kpene,* 25 LLR 422 (1977). Appellant maintains that the property offered having been sufficiently identified and con-firmed by the certificate of valuation from the Ministry of Finance, the requirement of the statute has been satisfied.

5. And further because appellant also submits as to count three (3) of the purported motion, that the contention raised therein is an immaterial and harmless technicality which does not prejudice the legal right of appellee and should be disregarded, in that, an inspection of the appeal bond will clearly reveal that appellant and the sureties are....firmly bound unto Madam S. Gooding in the sum of $6,000 00, current money of the Republic of Liberia to be paid to Madam S. Gooding, appellee.... Appellant contends that the mere statement "That condition of this Bond is that we IDENTIFY THE APPEL-LANT'....is a clerical mistake in misspelling which does not contradict nor invalidate the binding force and effect of the obligation assumed by appellant and his sureties in the obligatory paragraph of

the bond and the condition of this obligation" is only an explanation of $6,000.00 and therefore does not render the bond detective nor insufficient. Appellant submits that the modern tendency of the law is to discourage the dismissal of cases on immaterial technicalities. See *Kerpai v. Kpene,* 25 LLR 422 (1977); *Levin v. Juvico Supermarket*, 23 LLR 201 (1974).

"1. . . . .When the appeal bond and the property valuation statement both contain the assessed valuation of the property pledged, the failure to set forth valuation in the affidavit of sureties will not be considered such a defect as to warrant dismissal of the appeal.

2. . . . . Mere technicalities which do not affect the merits of the case are not favored by the Supreme Court as a basis for deciding cases on appeal...."

6. And further because appellant submits and strongly maintains that a dismissal of this appeal will only vest the debt courts of Liberia with jurisdiction over criminal and other cases of civil nature other than debts; in that the trial court has no trial jurisdiction of the subject matter because it is a criminal action of GRAND LARCENY which originated in the office of the assistant county attorney for Montserrado County, M. G. Travers, as the promissory note, issued to secure the release of appellant from prison and which is the basis of this case, prove. Appellant maintains that the payment of $812.50 in the office of the assistant county attorney after being charged and imprisoned for grand larceny at the time was RESTITUTION which is part of the punishment for grand larceny or theft of property upon conviction and the issuance of a promissory note to pay the balance of $4,000.00 through the office of the Assistant County Attorney cannot in any wise change the criminal character of the offense to a civil action; especially so, when said promissory note authorized the Assistant County Attorney to continue with the prosecution in case of default. This legal and material point the trial court disregarded and assumed jurisdiction over the cause. Under our law, a civil court cannot legally exercise jurisdiction over a criminal cause of action and for this the entire case is dismissible for want of jurisdiction in the trial court and appellant so prays. (*See Davis v. Diggs,* 11 LLR 237 (1952). *See* also *Compagnie des Cables Sud-Americaine (French Cable) v. Johnson,* 11 LLR 264 (1952); *Lee v. Republic,* 1 LLR 184, 185 (1884).

7. And also because appellant further submits that as appellant's answer in the court below and the construction contract between the parties herein will reveal, the only civil

right of action available to recover the amount paid against the total price of the contract for failure of appellant's company to perform, is an action of damages over which the debt court has no trial jurisdiction, which jurisdictional issue was raised in appellant's answer in the trial court, but the court adamantly ignored this issue and maintained that debt is an action growing out of a contract, which is prejudicial and arbitrarily rendered, and any judgment of a court or tribunal rendered without jurisdiction over the subject matter is void. *Compagnie Des Cables Sud-Americaine (French Cables) v. Johnson,* 11 LLR 264, 269 (1952).

WHEREFORE AND IN VIEW of these salient legal reasons, appellant most humbly prays that the purported motion of appellee to dismiss this meritorious appeal be denied and the case dismissed in its entirety with costs against appellee for want of jurisdiction in the trial court.

Respectfully submitted,
John B. Johnson...APPELLANT
By and thru his Counsel
.....
ATTORNEY & COUNSELLOR-AT-LAW"

In passing upon counts one, two and three of the resistance, we take recourse to the appeal statute and the statute controlling the computation of time. For, it appears that the appellant is contending that two months, that is, from August 26, 1983 to October 26, 1983, is exactly sixty days whether or not any month therein is more than thirty days. Further, the appellant seems to be basing his argument, as to the computation of time, on calendar months rather then statutory days.

The statute requires that:

"In computing any period of time prescribed or allowed by statute, by order or rule of court, by rule or regulation, or by executive order, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Sunday or a lega1 holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than ten days, intermediate Sundays and

holidays shall be excluded from the computation." Civil Procedure Law, Rev. Code 1:1.7.

Predicated upon the above quoted provision of the statute, the final judgment in this case having been rendered on August 26, 1983, the period of time allowed by statute for appellant John B. Johnson to perfect his appeal to this Court commenced to toll on August 27, 1983, and continued to do so for sixty days including Sundays and legal holidays. A mathematical calculation of the sixty days, commencing with August 27, 1983, will show that the 26th day of October 1983, was the sixty-first day from the time of the announcement of the appeal.

1. August 27, to 31, 1983 – 5 days
2. September 1 to 30, 1983 – 30 days
3. October 1 to 26, 1983 – 26 days

The three addends--that is five days, thirty days and twenty-six days respectively--will make up a total sum of sixty-one days.
The statute requires that: "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. Rev. Code I: 51.8. From an inspection of the appellant's appeal bond, which is part of the records certified to this Court, we observe that it was approved by the trial judge on October 26,1983, a date which is by mathematical calculation said to be the sixty-first day after the rendition of final judgment in the case at bar. The notice of completion of appeal was issued on October 26, 1983, and served and returned served on October 27, 1983. While the statute on the issuance and service of the notice of completion of appeal needs to be construed as to time, the statutory provision on the time of the filing of the appeal bond is unequivocally clear. That is, the appeal bond must be approved by the trial judge and filed with the clerk of the trial court within sixty days after the rendition of final judgment. The appeal bond having been approved and filed on October 26, 1983, the same being the sixty-first day after the rendition of final judgment, counts one, two and three of the resistance crumble against count one of the motion.

Count two of the motion attacked the affidavit of sureties to the appeal bond as being fatally defective. That is, for failure to sufficiently describe the real property offered as security so as to create a lien on the bond for the purpose of indemnifying the plaintiff/appellee. This

violation of the statute, appellee stated, was an incurable legal blunder which renders the appeal bond fatally defective and the appeal dismissible.

The appellant countered this attack in count four of the resistance, stating that the appellee had suffered waiver and laches for not having questioned or challenged the legal sufficiency of the sureties to said bond and failing to file his exceptions to the sureties within three (3) days of the filing of the bond. Appellant cited for legal support of this argument the Civil Procedure Law, Rev. Code I: 63.5 and the case *Kerpai v. Kpene,* 25 LLR 322 (1976). After carefully reading these citations, we cannot see that the statute cited by the appellant synchronizes with the issue of contention. In taking advantage of the statute controlling appeals to this Court, the appellee has attacked the appellant for violation thereof. Instead of addressing himself specifically to the issue, the appellant has decided to rely on the general statute on bonds and security. Every statute, says Mr. Justice Tubman, must be construed with reference to the object intended to be accomplished by it. *Roberts v. Roberts.* 7 LLR 358 (1942). The statutory provisions of the Civil Procedure Law on appeals from courts of record are strictly intended to accomplish its purpose of appeals to this Court and this Court is precluded from giving any other construction to it. There is no provision under this statute which provides for challenge to the sufficiency of sureties. An appeal bond being intended to indemnify the appellee, its entire purpose would be defeated if the appellant was made to correct a neglect or violation that could terminate the case in favor of the adverse party. How-ever, the issue before us is not that of challenging the sufficiency of the sureties; rather, it is that the affidavit to the appeal bond is incurably defective because it fails to sufficiently describe the real property offered as security so as to create a lien on the bond for the purpose of indemnifying the appellee. For the purpose of this opinion, we quote below the affidavit of surety to the appeal bond:

REPUBLIC OF LIBERIA MONTSERRADO COUNTY, IN THE OFFICE OF THE JUSTICE OF THE PEACE, MONTSERRADO COUNTY MONROVIA, LIBERIA.
Madam S. Gooding Burge...Plaintiff Versus John B. Johnson,...Defendant
ACTION OF DEBT BY ATTACHMENT

AFFIDAVIT OF SURETY

PERSONALLY APPEARED before me, Peter T. Nma, the undersigned, a duly qualified Justice of the Peace in and for Montserrado County and Republic of Liberia aforesaid,

Aaron G. Russ and Rebecca Kpan, sureties and after being sworn as provided by law, deposed as follows, to wit:

1. That they are sureties to the attached appeal bond in which they obligate themselves to the appellee in the sum certain named and mentioned in said appeal bond.

LOT NO.	LOCATION	VALUATION	ACREAGE	PROPERTY OWNER
N/N	Paynesville	$36,000.00	N/N	Aaron G. Russ

2. That the government taxes on said properties have been fully paid up to date and there is no further liens on said property. That the value of said property is far in excess of the amount named and specified in the appeal bond, hereto attached, above their debts and liabilities.
Sworn and subscribed to before me this 26 day of October, A. D. 1983.

Peter T. Nma
JUSTICE OF THE PEACE
MONTSERRADO COUNTY
Aaron G. Russ) SURETIES/DEPONENTS
Rebecca Kpan)
$3.00 Revenue Stamps
affixed on original."

It can easily be observed from this affidavit of surety that the real property offered is not sufficiently described at all for any location, needless to say easy location. Firstly, the said real property carries no number of Paynesville where it is said to be located. Secondly, there is no showing as to the quantity of real property offered as security. Thirdly, the property offered is not described and designated by metes and bounds, or the boundary lines of land, with their terminal points and angles by which alone said parcel of land could be demarcated and set aside from other lands. In the absence of these facts, it is impossible to locate and set aside this property offered as security for the purpose of indemnifying the appellee if the appeal was dismissed and the judgment of the lower court confirmed. Therefore count four of the resistance is dismissed as against count two of the motion.

In count three of the motion the appellee has contended that the principal office and purpose of an appeal bond is to indemnify the appellee and that where said indemnification is lacking, the bond is of no legal effect and the appeal is dismissible. The appellee maintains that the indemnity clause indemnifies the appellant and not the appellee, thereby making the bond a lega1 nullity.

The appellant has neither denied nor admitted the factuality of the appellee's contention, but has argued that the issue is immaterial and technically harmless, and does not prejudice the legal rights of the appellee. Therefore, appellant says, this Court should disregard same. Recourse to the appeal bond shows that the condition of said bond is to indemnify the APPELLANT FOR ALL COSTS AND INJURIES ARISING FROM THE APPEAL TAKEN BY THE ABOVE NAMED APPELLANT. The conditional or indemnity clause indemnifies the appellant and not the appellee. An appeal bond lacking an indemnification clause is materially defective and the appeal may be dismissed upon showing of such defect. *Savice v. Chea et. al.,* 12 LLR 157 (1954). In the instant case, the appellant has failed to admit the defect in the indemnification or conditional clause but contends that it is an immaterial and harmless technicality which does not prejudice the legal rights of the appellee. In an appeal bond, an appellee enters into a contract with appellant to the effect that appellant will (1) give security to be approved by the court that he will indemnify the appellee from all injuries arising from the appeal and (2) comply with the judgment of the court to which the appeal is taken or with the judgment of any other court to which the case may be removed. *Beysolow v. Gibson,* 8 LLR 79, 80 (1943). Where any provision of such contract is bridged, it cannot be said that the violation thereof is immaterial and harmless. Therefore, count five of the resistance is overruled as against count three of the motion.

Count six and seven of the resistance being irrelevant to the issue raised in the motion for our determination are hereby over-ruled as well, and with them, the resistance crumbles.

Wherefore and in view of all the 1aws, facts and circumstances herein stated, the motion to dismiss is hereby granted and the appeal taken from the *judgment* in the lower court is hereby *dismissed.* And it is hereby so ordered.

Motion granted; appeal dismissed.