BEN T. WILLIE-JORCIE, JAYBOY JORCIE, KARNGA JORCIE, Administrators and Administratrix of the Intestate Estate of the Late **FLEHN JORCIE, et al.**, Respondents/Appellants, v. **HAYEL AZZAM**, by and thur his Attorney-In-Fact, **TOUFFIC AZZAM**, Movant/Appellee.

MOTION TO DISMISS APPEAL FROM THE MONTHLY AND PROBATE FOR MONTSERRADO COUNTY.

Heard: November 23, 1983. Decided: December 22, 1983.

1. The Court has every right to take judicial notice of any records certified to it, and to decide its own jurisdiction.

2. An affidavit is not a pleading to which a statement or another instrument could be adopted by reference.

3. A description of the real property pledged as security in an appeal bond should be set forth in the affidavit of sureties, as mandatorily required by statute; otherwise, the appeal is dismissible on the ground of defectiveness.

4. The law does not direct that deeds of the property pledged be attached to the affidavit of sureties.

5. A motion to refuse jurisdiction over an appeal because the bond is imperfect without proferting a copy of the defective bond with the motion neither deprives the appellant of notice nor precludes the court from taking judicial notice of the already certified records before it, and therefore, inspecting such files does not amount to opening the records for the purpose of deciding the case on the merits.

This case, which involved an objection to the probate and registration of a lease agreement for lot no. 38D of Block 25, which was a part of the intestate estate of the late Flehn Jorcie, originated from the Second Judicial Circuit Court, Grand Bassa County.

The facts certified to the Supreme Court indicated that on June 27, 1963, the late Flehn Jorcie entered into a lease agreement with one H. I. Farhat for lot no. 38D, Block No. 25, located in Lower Buchanan, Grand Bassa County, for twenty (20) years, with the right to sublet. Later the said property was sublet to one Mr. Arif H. Rasamny for a period of sixteen (16) years, also with a right to sublease. As a result of this, Rasamny subsequently entered into a lease agreement with Mr. Hayel Azzam for a period of sixteen (16) years and six (6) months.

After the death of the late Flehn Jorcie, the original lessor, and with less than a year to the expiration of the first twenty-year lease, Mr. H. I. Farhat sought and obtained a renewal of the lease agreement on the property for twenty (20) additional years from the administrators of the estate. However, when the lease agreement was offered for probation, Mr. Hayel

Azzam, by and through his attorney-in-fact, Mr. Touffic Azzam, interposed a caveat and filed an objection because, according to him, he had a leasehold interest in the property which was the subject of probation and registration. After hearing arguments on the objection, the trial judge denied the probation of the lease agreement and revoked the letters of administration. The lessee, Mr. Farhat, and the administrators took exception to the ruling and appealed to the Supreme Court for a final review of the cause, filing a four-count bill of exceptions. However, prior to the hearing of the case, the appellee filed a motion to dismiss the appeal based on the defectiveness of the appeal bond.

The Supreme Court granted the motion and dismissed the appeal, noting that the appeal bond filed by the appellant was indeed defective. The Court held that the affidavit of sureties filed by the appellants had failed to sufficiently describe the property put up as security to the bond as mandatorily required by the appeal statute, and in the face of such defect in the affidavit of sureties, the entire bond will be regarded as defective. That defect, the Court concluded, was a sufficient basis for the dismissal of the appeal.

Joseph P. H. Findleyappeared for the respondents/appellants. M Fahnbulleh Jones appeared for the movant/appellee.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

This case originates from the Second Judicial Circuit, Grand Bassa County, and it involves the intestate estate of the late Flehn Jorcie of Grand Bassa County. The facts as gathered from the records certified to this Court reveal that on June 27, 1963, the late Flehn Jorcie entered into a Lease Agreement with one H. I. Farhat for lot no. 38D Block no. 25 located in lower Buchanan, Grand Bassa County for a period of twenty (20) years certain with the power to sublet. Accordingly, Farhat sublet the property to one Mr. Arif H. Rasamny for a period of sixteen (16) years with also the right to sublease. Subsequently, Rasamny entered into another sublease agreement with Mr. Hayel Azzam for a period of sixteen (16) years and six months. After the death of the original lessor, the late Jorcie and while the first twenty (20) years lease was barely a year to its expiration, Mr. H. I. Farhat sought and obtained a renewal of the lease agreement on the property for a further period of twenty (20) years from the administrators. However, when the said lease agreement was offered for probation, Mr. Hayel Azzam by and through his attorney-in-fact, Mr. Touffic Azzam, interposed a caveat and filed an objection because according to him he had a leasehold interest in the property which was the subject of probation and registration. The trial judge heard the objection and denied the probation of the lease agreement and also revoked the Letters of Administration. The lessee, Mr. Farhat and the administrators thereupon took exceptions to the ruling and appealed to this Court for a final review of the cause upon a four-count bill of exceptions, hence this appeal.

Upon the call of this case, appellee/movant informed the Court that he has filed a one-count motion to dismiss the appeal because the appeal bond was defective in that the sureties' affidavit attached to said bond failed to carry within its body and on its face the description of the real property pledged as security by the sureties as required by both statute and case laws and called on the Court to take judicial notice of the sureties's affidavit which forms part of the records before the Court. He submitted that said description ought to be in the body of the affidavit and not merely attached to it.

In resisting, the appellants/respondents maintained that the motion lacked the required notice since it failed to show on its face the defective bond with its sureties' affidavit so as to put appellants on notice and afford the Court the opportunity to consider the allegation in said motion without recourse to the records in the case. Appellants, therefore, prayed that the motion be denied because the allegations as contained therein regarding the defectiveness of the appeal bond were incorrect, for the sureties' affidavit referred to by appellee carries on its face a description of the property pledged by means of the deeds which were attached to the sureties' affidavit as exhibits "A" and "B".

From a careful perusal of the motion and the resistance thereto, the following issues present themselves for this Court's consideration and determination:

1. whether or not a motion to refuse jurisdiction over an appeal because the bond is imperfect without proferting copy of the defective bond with the motion deprives the appellants of notice and precludes the Court from taking judicial notice of the certified records before it and consequently cognizance of such fault amounts to opening the records in the case?

2. Whether or not an affidavit is a pleading to which another instrument could be attached?

The issues will be resolved in the order of presentation. Appellants' counsel argued that the failure of appellee to attach a copy of the alleged defective bond to his motion for easy reference did not only deprive the appellants of that required notice, but also precluded this Court from opening the records to substantiate the factual allegations stated in the motion, because where the jurisdiction of the Court over an appeal has been challenged, it has no authority to open the records. Appellee cited the Civil Procedure Law, Rev. Code 1: 10.4(3) and 63.2(3), and Magbine v. Soko, 29 LLR 292 (1981).

Counsel for appellee on the other hand argued that a court must first of all, be assured of its own jurisdiction over the parties and cause before proceeding to hear the case and therefore, the records should be inspected to decide the jurisdictional issues but not issues relating to or connected with the merits and demerits of the case, and cited Mim Liberia Corporation v. Toweh, 30 LLR 611 (1982).

For the benefit of this opinion, let us see what a judicial notice is. Black's Law Dictionary 761 (5th ed.) states the following:

"JUDICIAL NOTICE: The act by which a court, in conducting a trial or framing its decision, will, of its own motion, and without the production of evidence, recognize the existence and truth of certain facts, having bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e.g. the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc. The cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them."

As can be gathered from the above definition, the Court has every right to take judicial notice of any records certified to it and to decide its own jurisdiction. 4 C.J.S., Appeal and Error, § 2373, at 562. In the instant case, the certified records are before us which the appellee has requested us to take judicial notice of and by operation of law, we are indeed bound to do so as a court. 14 AM. JUR., Courts, § 168 and the Civil Procedure Law, Rev. Code 1: 25.1. This Court may examine the transcribed records before it to ascertain if the jurisdictional steps have been taken so as to confer jurisdiction over the parties and the case.

The appellants have also relied upon section 10.4 subsection 3 of the Civil Procedure Law, Rev. Code 1, which reads thus:

"3. Furnishing papers to the court. The moving party shall furnish at the hearing all papers not previously filed and necessary to the consideration of the question involved. Where such papers are in the possession of an adverse party, they shall be produced at the hearing by the latter on notice in accordance with the provision of this section, shall be read in support of, or in opposition to the motion, unless the court for good cause shall otherwise direct."

This provision of the statute does not prevent the court from taking judicial notice of its own records in a case before it because this subsection clearly stipulates "furnishing papers to the court..." meaning papers not already before the court.

Therefore, the statutes relied upon by appellants are not applicable to the instant case as the "sureties' affidavit" referred to is already an integral part of the records submitted to us in this case for our consideration. The case Magbine v. Soko, 29 LLR 292 (1981), cited by appellants to support their contention, having been recalled by this Court in the case Mim Liberia Corporation v. Toweh, 30 LLR 611 (1982), can no longer serve as a reliance to support any legal contention. The contention therefore of the appellants in count one (1) of the resistance is not sustained.

Regarding the second issue, that is, whether or not an affidavit is a pleading to which another instrument could be attached, counsel for appellants has further argued that copies

of the deeds of the property pledged as security, having been attached to the sureties's affidavit, appellants had thereby complied with the statutory requirement since indeed the best description of a realty should be found in the deed itself. Hence, appellants argued that the approved appeal bond tendered by them was not defective as contended by appellee, citing in support of said contention the Civil Procedure Law, Rev. Code 1: 9.3(4), at 106 and 107. For his part, appellee's counsel maintained that the law mandatorily requires that a description of the real property pledged in an appeal bond shall be set forth in the affidavit of sureties. He also cited the Civil Procedure Law, Rev. Code 1: 63.2(3), as well as West African Trading Corporation v. Alrine (Liberia) Ltd., 25 LLR 3 (1976) and Lamco J. V. Operating Company (LAMCO) v. Verdier, 26 LLR 180 (1977) to support his contention.

At this juncture, it is also necessary to define affidavit for the purpose of this opinion. Black's Law Dictionary 58 (5t h ed.) defines affidavit as follows:

"AFFIDAVIT: A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation."

Our statute on affidavit of sureties' states:

"The bond shall be accompanied by an affidavit of the sureties containing the following:

a. A statement that one of them is the owner or that both combined are the owners of the real property offered as surety;

b. A description of the property sufficiently identified to established the lien of the bond;

c. A statement of the total amount of the liens, unpaid taxes, and other encumbrances against each property offered, and

d. A statement of the assessed value of each property of-fered. Civil Procedure Law, Revised Code 1: 63. (3).

An inspection of the bond tendered by appellants showed that there was an affidavit sworn to on June 21, 1983, filed with it, and for the purpose of this opinion we shall quote from it:

"PERSONALLY APPEARED BEFORE ME, a duly qualified Justice of the Peace for Grand Bassa County, at my office in Lower Buchanan, County of Grand Bassa, and Republic of Liberia, Levi R. Johnson and Solomon N. Greaves, sureties of the City of Buchanan, County of Grand Bassa and Republic aforesaid and made oath according to law, to wit:

"1. That they are owners of or one of them (Levi R. Johnson, Solomon Greaves) is the owner of the real property in the Republic of Liberia.

2. The description of the property subject of the lien of this bond is as follows (see exhibits "A" and "B attached.) (These latter underlined are in his hand writing).

3. That there is no other lien, unpaid taxes and other encumbrances against the property offered herein.

4. The assessed value of the property is $27,700.00.

5. That all information and allegations contained herein are true and correct in fact and in substance to the best of their knowledge and belief and as to those matters of information they verily believe them to be true and correct."

Does this affidavit contain a description of the sureties' property sufficiently to establish a lien on the bond as the statute requires? Lest we forget, this statute does not say that the bond shall be accompanied by an affidavit of sureties with the deeds of the property pledged as security attached, to be referred to in the affidavit and incorporated by adoption, reference or exhibits as has been done here in this case. This Court has interpreted subsection of the statute quoted above to mean that the description of the real property pledged in an appeal bond must be set forth in the affidavit of the sureties as a strict mandatory requirement of the statute.

Mr. Justice Azango, speaking for the Court in the case West African Trading Corporation v. Alrine (Liberia) Ltd., 25 LLR 3 (1976), stated the following:

"Sitting forth a description of real property pledged in a document accompanying the appeal bond, such as the certificate from the Bureau of Revenues, does not cure the defect caused by the failure to describe the property in the affidavit of the sureties."

The statute on adoption by reference as found in the Civil Procedure Law, Rev. Code 1: 9.3(45), says "any statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in a motion." As quoted above, an affidavit is not a pleading to which a statement or another instrument could be adopted by reference as have been done by appellants in this case. See also 41 AM. JUR., Pleading, § 2. The law requires that a description of the real property pledged as security in an appeal bond should be set forth in the affidavit of sureties; otherwise, the appeal is dismissible on the ground of defectiveness, while the deed may appear to offer a better description of the property offered as security; yet, the law does not direct that deeds of the property pledged be attached to the affidavit of sureties, and this requirement of the law not having been met by filing a valid appeal bond in which the description of the property is set forth in the body of the sureties' affidavit, the entire resistance must crumble under the legal contention raised in the motion.

As we have pointed out in this opinion, failure to file an appeal bond in which the sureties' affidavit does carry in its body the description of the property offered as surety as required

by statute, and several opinions of this Court, is indeed a ground for which a motion to refuse jurisdiction over an appeal can be granted. Civil Procedure Law, Rev. Code 1: 51.16. Further-more, a motion to refuse jurisdiction over an appeal, because the bond is imperfect without proferting copy of the defective bond to the motion neither deprives the appellant of notice nor precludes the court from taking judicial notice of the already certified records before it and therefore inspecting such a file does not amount to opening the records to decide the case on its merits as contended by the appellants. This Court also says that an affidavit is not a pleading to which another instrument can be attached. To this conclusion, our learned Colleague, in person of Mr. Justice M. Kron Yangbe, disagreed and filed a dissenting opinion.

Having thus declared the appellant's appeal bond defective and bad under the foregoing circumstances and the laws cited, this Court is of the considered opinion that the motion should be, and the same is hereby granted and the appeal is ordered dismissed, with costs against appellants. The Clerk of this Court is hereby instructed to send a mandate to the trial court commanding the probate judge presiding therein to give effect to this Court's judgment and opinion. And it is hereby so ordered.

Motion to dismiss granted.

MR. JUSTICE YANGBE dissents.

The one count motion to dismiss the appeal reads:

"Because appellee says that the appeal bond is defective and bad for reason that the sureties' affidavit does not carry in its body and on its face the description of the realties offered as security by the sureties as is mandatorily required by the statute and confirmed by numeral opinions of this Court. Objector/appellee/movant requests Court to take judicial notice of the sureties affidavit which formed part of the records in this case, especially count two thereof. For this violation of the statute controlling appeals, objector/ appellee/movant prays the dismissal of the appeal."

To this motion, a three-count resistance was filed and because of the majority holding of this Court in Mim (Lib.) Corporation v. Toweh, 30 LLR 611 (1982), which recalled the opinion in Magbine v. Soko, 29 LLR 292 (1981), I will focus my attention mainly on and discuss the last count of the three-count resistance and it reads, as follows:

"1. Because the motion lacks and is void of notice; in that, it does not show from its face the defective bond even the sureties' affidavit referred to by appellee to warrant this Honourable Court's attention and also to give appellants that notice required under the law to intelligently and legally rebut the allegation contained in said motion."

2. Appellants submit that it is elementary that this Honourable Court cannot refer to and/or open 'the records in this case', to determine the allegation contained in this motion for all

motions to dismiss are determine without recourse to the records. In view of the lack of notice on the face of the motion, appellants respectfully pray Your Honours to deny the motion.

3. And also because appellants say further to the motion that the appeal bond is not defective for the sureties' affidavit does carry the description of the property as the law requires as it is stated in count two thereof with the deeds attached." See exhibit "A: filed herewith as part of this resistance."

It is legally important to observe that no mention whatsoever is made in the motion with reference to the attachment of the deed to the affidavit of sureties as being irregular, except the alleged lack of description of the property offered in the body of the affidavit, therefore, the deed should have been recognized, accepted for the purpose.

The first case in which the issue of omission of the description of the property offered as surety on the appeal bond was raised is West African Trading Corporation v. Alrine (Liberia) Ltd, 25 LLR 3 (1976). In that case, there was no deed of the sureties attached at all as an exhibit, nor was any kind of document attached thereto with the description of the property pledged. Therefore, this Court sustained the motion for lack of description of the property offered as security on the affidavit of sureties. Unlike the case at bar, appellant attached to the affidavit of sureties photocopy of the deed of the sureties who signed the appeal bond and the affidavit. There is no precedent in the history of this Court where the deed of sureties was proferted to an appeal bond or affidavit. Hence, the case cited above is not applicable in this situation. The sole purpose of the requirement for the description of the property is to easily establish the lien on the property and to locate the same during the enforcement of the bond. I do not want to believe that the majority view, as expressed in its opinion just read, is that the mere metes and bonds that are usually quoted in an affidavit of sureties are more accurate and contain more data than the photocopy of the deed of the sureties for the purpose of locating the land for easy enforcement of the appeal bond.

The sole reason for the majority ignoring the description of the pledge property in the deed attached is because same is not inserted in the affidavit of sureties, although in the affidavit the deed is referred to as an exhibit and to form a part thereof. Civil Procedure Law, Rev. Code 1: 9.3.

In the majority opinion, it is recorded on page two that:

"Upon the call of this case, appellee informed the court that he has filed a one-count motion to dismiss the appeal because the appeal bond is defective in that the sureties; affidavit attached to said bond fails to carry within its body and on its face the description of the real property pledge as security by the sureties as required by both statute and case laws and

called on the court to take judicial notice of the sureties' affidavit which forms part of the record before the court."

Predicated upon this request, the Full Bench while considering the issue of its jurisdiction over the appeal opened and searched the records in the case file for evidence to determine the question of authority of the court over the appeal. The appellants also made a similar request in the resistance quoted above, praying the Court to take judicial notice of the photocopy of the deed of the sureties who signed the appeal bond and also the deponents on the affidavit, but the majority refused because, in its opinion, there is no law or practice which authorized profert of document to an affidavit. The law cited in the majority opinion and relied upon for the decision, certainly does not prohibit attachment to an affidavit, but only define what an affidavit is. In my view, since all the records, including the alleged defective affidavit of sureties as well as the deed of the sureties are before this Court and in the same case file of this Court, under the same parity of reasoning and procedure, and out of fairness to the appellants, the Court is bound to also take judicial notice of the deed attached to the affidavit.

Although in my dissent in MIM Liberia Corporation v. Toweh, 30 LLR 611 (1982), supra, I pointed out that judicial notice does not include records in a case in which the authority of the Court over the appeal is attached, therefore, all the documents relied upon to establish lack of jurisdiction over the appeal, must be annexed to the motion to dismiss, as notice to the Court and opposing party. Civil Procedure Law, Rev. Code 1: 9.3. For, it is logical that the court is without any authority to inspect the records prior to its decision on the issue of jurisdiction. But the majority was of a different view, and has again applied the same procedure in this case by opening the case file and searching for evidence to decide the issue of jurisdiction over the appeal. Therefore, under the principle of stare decisis, in order to balance the equation, we should take judicial notice of the deed attached to the affidavit of sureties. Additionally, it is admitted in the opinion by the majority that:

"....the surety's affidavit referred to is already an integral part of the records submitted to us in this case for our consideration."

Assuming that our law and practice preclude proferts to affidavits of sureties of deeds and other documents, such technicalities are forbidden in A. H Basma & Son (Liberia) Incorporated v. Camer Liberia Corp., decided this very Term, (31 LLR 618), wherein we cited Liberty v. Horridge, 2 LLR 422 (1922), which stated that "courts of justice will avoid the refusal to hear litigants because of immaterial technicalities."

Consequently, I have refrained from signing the judgement in this case.