FRANCES C. WILSON, et al., Appellants, *v.* A. DASH WILSON, et al., Appellees.

MOTION TO DISMISS APPEAL.

Argued December 2, 1975. Decided January 2, 1976.

1. A check drawn on a bank to the value of the appeal bond may be posted as security, provided that it has been certified.

Appellees moved to dismiss the appeal, contending that the appeal bond was defective, in that the check posted as security for the bond was uncertified and, therefore, did not comply with the provision that a check to the value of the appeal bond may be posted provided it was certified. The majority of the Court agreed with the contention, and found the appeal bond otherwise defective as well.

Mr. Chief Justice Pierre concurred in a separate opinion in which Mr. Justice Henries joined, expressing the view that, in order for an appeal bond to be valid the bond had to have, except for cash posted or a bank certificate, sureties thereon. The motion was *granted*.

J. Dossen Richards for appellants. *Joseph J. F. Chesson* for appellees.

MR. JUSTICE AZANGO delivered the opinion of the Court.

The appellees have moved to dismiss the appeal on the ground that the appeal bond posted is defective.

In order to determine the issues the questions below need to be answered: (1) Are the reasons given by appellees' counsel grounds for dismissal of an appeal before this Court? (2) Have the cash and bonds tendered by appellants met the legal requirements of an appeal bond

and are sufficient to indemnify appellees against loss or injury?

The following acts are necessary for the completion of an appeal according to statute: (a) announcement of the taking of the appeal; (b) filing of the bill of exceptions; (c) filing an appeal bond; (d) service and filing a notice of completion of the appeal.

Failure to comply with any of these requirements within the time allowed by statute shall be ground for dismissal of the appeal.

Our Civil Procedure Law requires that an appeal bond must be secured in the manner 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." Rev. Code 1.63.1.

In giving effect to the statutory provisions applicable herein, we must say that the provisions are optional or elective in nature and character. That is, the avenues postulated for security for an appeal bond are left with a party to an action to choose from. Having chosen, it is incumbent upon him to strictly abide by the statute. Failing in this regard cannot be regarded as posting a valid appeal bond, as contemplated.

In the instant case, appellants elected to give a check in the amount of $2,000.00, being the amount of the bond, which appellees contend should have been certified by the bank as evidence that the amount was in the depository. Appellants' counsel also argued that the check had been properly certified by the bank according to its practice of certifying checks. Moreover, they contend there

is no hard and fast rule as to how the check should be certificated. These arguments have led us to give further consideration to legislative intent as it relates to the statement in the applicable statute concerning "cash deposited in the bank to the value of the bond as evidenced by a bank certificate."

The practice of certifying checks has grown out of the business needs of the commercial world. The object of certifying a check is to make it equivalent to and a substitute for money; the check, as a consequence of certification, becomes a reliable basis of credit and enables the person accepting it to take it with the same readiness with which he would take the notes of the bank. The certification of a check is equivalent to the acceptance of it. It is equivalent to a certificate of deposit, inasmuch as the funds of the drawer to the amount of the check are set aside or appropriated for the holder thereof.

No particular form is essential to the certification of a check. The usual practice is to stamp or write on the check the word, "certified," "good," "accepted," or an equivalent expression, with the signature of the certifying officer.

Moreover, it is a well-settled rule that where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. It imports that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for the satisfaction of the check and that they shall be so applied whenever the check is presented for payment by a holder entitled to the funds. The certification of a check is a statement of fact which constitutes an estoppel precluding denial of sufficient funds. It is a warrant that sufficient funds are on deposit and have been set aside.

The holder of a check which has not been certified has no right of action against the drawee bank based upon its failure or refusal to honor the check, even though at the

time the check was presented for payment the bank had sufficient funds of the drawer on deposit to pay it. The acceptance may be inscribed upon the check itself or may be extrinsic to it; it may also be constructive, as by the retention or destruction of the check by the drawee; or it may consist of what is tantamount to acceptance, a promise to accept an existing check or a nonexisting check when drawn. Furthermore, the acceptance of a check contemplates a promise on the part of the bank to pay and is essentially different from the payment thereof. The certificate of the bank is substantially equivalent to an acceptance of a bill for that amount, and in respect to all the subsequent holders the party making and uttering the certificate stands in the position of an acceptor with all the responsibilities incident to that relationship. Certification binds the bank to have and hold sufficient funds to pay the check to one lawfully demanding payment, and thereafter the bank cannot as between itself and a bona fide holder of the check dispute that the drawer had funds on deposit when the check was certified.

We, therefore, assume that it is based upon the foregoing recital that the Legislature intended to curb deception in the enforcement of the security posted for an appeal bond. It declared that any bond given as a cash deposit in the bank to the value of the bond should be evidenced by a bank certificate or certification.

We have further observed the omission of the words "certified, accepted, and good" specifically written on the face of the check, thereby indicating an obligation on the part of the Bank of Liberia, giving assent to the check and pledging it will, therefore, honor it when presented for payment. There is no acknowledgment by the bank that the signatory has funds sufficient to cover the check. Neither is there a letter of advice written by the cashier or manager of the bank to the court, attached to the check stating that the person therein named had deposited with

the bank a sum of money therein named to the credit of the person named therein for his or her use, which would be a sufficient certificate of deposit.

Appellees' counsel has also argued that the cash bond tendered by appellants does not indemnify appellees against costs and all injuries arising from the appeal taken by appellants. Neither is there any showing by written document that appellants jointly and severally bind themselves and their personal representatives with the said check.

Further inspecting the appeal bond, we find that it is defective in other respects as well. That is, it is not a lien on real property nor does it have an affidavit of the sureties, nor an official statement from the Ministry of Finance regarding the valuation of the property. Hence, we have no alternative but to declare it invalid. The appellants should have complied with the law.

In the instant case, it is the uncertificated check that is the security for the appeal. This is a glaring error that cannot be corrected.

As much as we would have desired going into the merits of this case, we are precluded from doing so because of the violations of the statutes governing appellate procedure. In view of the foregoing, we are of the opinion that the motion should be and the same is hereby granted and the appeal dismissed, with costs against the appellants. And it is hereby so ordered.

Motion granted.

MR. CHIEF JUSTICE PIERRE in a separate opinion.

Our Civil Procedure Law requires that in order to perfect an appeal after announcement thereof, and after presentation of a bill of exceptions, the appealing party shall also file an approved appeal bond within sixty days. Rev. Code 1:51.8. According to section 51.8 the bond: (1) shall be given in an amount to be fixed by court;

(2) shall carry two or more legally qualified sureties; (3) it shall state that the appealing party will indemnify the appellee against costs or injury arising from the appeal; and (4) it shall also carry a statement promising that the party appealing will comply with the judgment of the appellate court, or of any other court to which the case might subsequently be removed. These are the mandatory requirements for an appeal bond. I get the impression from the wording of the statute, that only a paper bond may properly perfect an appeal. Moreover, there is nothing more said about bonds in this section, except that it is required that the appeal bond should be approved by the trial judge; that notice of the filing of the bond should be served on opposing counsel; and that a failure to file a sufficient bond is ground for dismissal of the appeal.

Later on in Civil Procedure Law, in section 63.1 of the chapter entitled "Bonds and Securities," the following is set forth:

> "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."

For the purpose of this opinion, and because of the circumstances appearing in this case, we will eliminate subparagraphs (b) and (c), since the appeal bond in this case is secured by a bank check and a surety bond; and these latter come under subparagraphs (a) and (d).

Subparagraph (d) quoted above refers to sureties who meet the requirements of section 63.2 set forth below.

"Legally Qualified Sureties.

"*1. Who may be sureties.* Unless the court orders otherwise a surety on a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic.

"*2. Lien on real property as security.* A bond upon which natural persons are sureties shall be secured by one or more pieces of real property located in the Republic, which shall have an assessed value equal to the total amount specified in the bond, exclusive of all encumbrances. . . . Each bond shall be recorded . . . by an entry showing the following: (a) the names of the sureties in alphabetical order; (b) the amount of the bond; (c) a description of the real property offered as security thereunder, sufficiently identified to clearly establish the lien of the bond; (d) the date of such recording; (e) the title of the action, proceeding or estate.

"*3. Affidavit of sureties.* 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 security; (b) a description of the property, sufficiently identified to establish 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 offered."

In addition to these requirements, the section also requires that an authorized official of the Treasury Department, now the Ministry of Finance, issue a certificate saying that the sureties own the property offered as security, and that the assessed value stated in the affidavit is correct.

According to section 63.2, anyone electing to file a bond on which sureties pledge security for the bond, must comply with all of the foregoing provisions, or fall short in the requirements necessary for a valid surety bond. In this case, the appeal bond was a check to which was annexed a paper bond. Let us now examine the two kinds of bonds relied upon to complete the appeal.

I will first address myself to the paper bond filed with the bank check. It states on its face that Frances C. Wilson, et al., are appellants/principals; that certified check No. 142056 in the sum of $2,000 represents the sureties "being freeholders or householders within the Republic of Liberia." The bond also states that the $2,000 would if required be paid to the appellees or their legal representatives, and that by the same amount appellants jointly and severally bind themselves and their personal representatives firmly. It states that the appellants will indemnify the appellees against all costs and all injury arising from the appeal taken from the judgment rendered on May 27, 1975. It also obligates the appellants to comply with the judgment of the Supreme Court, or that of any other court to which the action may be removed.

To this document there were no persons named as sureties, but Frances C. Wilson signed as defendant/principal, and Margaret Traub and Joseph H. David signed as persons in whose presence the principal had signed. In the place of sureties we find: "Certified check No. 142056 for $2,000.00 Sureties." I hold strongly that this paper does not conform to the law regulating surety bonds or appeal bonds. In the case of either of these two kinds of bonds, two or more natural persons who own real property upon which taxes had been paid, shall sign as sureties. To the bond shall be attached an affidavit of the sureties, as described in section 63.2(3), as well as a certificate from an authorized official of the Ministry of Finance certifying that the sureties named own the property offered, and

that the assessed value is correct. Any paper bond devoid of these legal requirements is invalid.

We come now to the check, which, according to the appellants, is a cash bond. The first question raised in my mind is, can a check or cash be posted in the place of an appeal bond? I have said earlier in this opinion, that it is my view that only a surety bond can complete an appeal. While holding firmly to this position, let us for argument's sake say that in this case both the check and a paper bond were filed. For them together to have been able to fill the place of a valid appeal bond, both must have had to be above reproach, because the check by itself could not have been approved by the trial judge, which is a requirement. On the other hand, the paper bond by itself must have met all of the legal requirements of a surety bond before it could fulfill the functions of an appeal bond. We now know that this paper bond has not done so. But could the two taken together fulfill the requirement? We have not been able to find how this could have been done in the present circumstances, and neither party has suggested a solution to the problem.

But let us go back to the check which is supposed to represent a cash bond. This check is drawn on the Bank of Liberia for $2,000.00, and stamped on its face with a rubber stamp are the words: "Certified Bank of Liberia 23381, 6/6/75." The section governing cash bonds requires that there must be "cash deposited in the bank to the value of the bond as evidenced by a bank certificate." My interpretation of this statute is that the money intended to be used as a cash bond should be deposited in the bank, and the bank should then issue a certificate to the effect that this amount is available to the credit of the appealing party. For this view I have relied upon the following authorities:

> "*Certificate of Deposit.* A 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." BOUVIER'S LAW DICTIONARY, Rawle, 3rd rev.

"*Certificates of Deposit.* A certificate of deposit ordinarily is defined as a written acknowledgement by a bank of the receipt of a sum of money on deposit which the bank or banker promises to pay to the depositor, to the order of the depositor, or to some other person or to his order, whereby the relation of debtor between the bank and the depositor is created. 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 bank stating that a person therein named 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. The words 'promise to pay' are not essential; the law implies such a promise when the fact of deposit is established. An ordinary deposit slip, though signed by the cashier of the bank in which the deposit is made, is not a certificate of deposit." 7 AM. JUR., *Banks,* § 491 (1937).

"*Nature of.* Whether a certificate of deposit is a note or merely a receipt for money has long puzzled the courts. Such certificates, however, if containing proper words to express that intention, is negotiable in the usual manner by indorsement, and although not negotiable in fact, if negotiable in form, it may be assigned. Moreover, where they are negotiable their transfer is governed by the rules that apply to promissory notes, as is also the liability of the parties thereon." 5 CYC. 420 (1902).

We would like to emphasize here that during argument before the Court, appellants' counsel made reference to a certified check, and implied that the rubber-stamped words appearing on the face of the check, in

this case, represented the bank's certification of the check. It is my opinion that a certified check and a bank certificate are two different things; and the sections on appeal bonds make no reference to certified checks serving as cash bonds. The wording of the statute is definite and certain, to the effect that the money intended to be used as a bond deposited in the bank, must be evidenced by "a bank certificate." I have given the legal definition of a bank certificate, let us see now what is a certified check.

> *"Certified check.* A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition." BOUVIER'S LAW DICTIONARY.

BOUVIER'S LAW DICTIONARY has also defined the phrase to mean: "a practice . . . of marking checks "good" by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance. . . . Such a marking is called certifiying; and checks so marked are called certified checks. . . . The bank thereby becomes the principal debtor . . . to the holder, not the drawer." This definition of a certified check does not make such checks meet the requirements of an appeal bond. There are certain fixed requisites of an appeal bond, which no check can meet. In fact, the statutory requirements for appeal bonds cannot apply to a check.

The lawmakers intended the law to be as they enacted it. We, however, have no authority to change it, or to read into it words and phrases not specifically used in the text of the statute passed by the Legislature. The Legislature intended that a bank certificate should be the controlling evidence that there is deposited in the bank a sum sufficient to indemnify the appellees against loss or injury. No matter how much money the appellants had deposited in the bank, they could not use it as a cash bond

without a bank certificate, in keeping with our most recent statutes. And, no matter how valid a certified check might be, it cannot be used as a cash bond, because the law requires a bank certificate and not a certified check.

The appellees have contended that appellants neglected to notify them of the filing of the appeal bond as the statute requires. Counsellor Chesson argued that this was a statutory requirement, and that it should have been met. I agree that every requirement of the sections on appeals must be fulfilled, but I am not able to agree that this neglect constitutes a ground to dismiss the appeal. It is my opinion, however, that the appeal bond filed in this case is defective, for the several reasons I have stated hereinabove.

In *Cavalla River Co., Ltd.* v. *Fazzah,* 7 LLR 13 (1939), we said that an appeal bond which fails to name and be signed by two or more sureties who are householders or freeholders within the Republic of Liberia is defective, and the appeal should be dismissed. It is still our practice. It is for this reason that I have voted with my colleagues to grant the motion to dismiss the appeal, and in this position Mr. Justice Henries joins me. While I am in full accord with the conclusion reached in the majority opinion, I have decided to express a personal view as to why the motion should be granted. Hence, this concurring opinion.