BAZ BROTHERS CORPORATION, Appellant, *v.* SIAFA GRAY, Appellee.

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

Argued March 16, 1977. Decided April 29, 1977.

1. It is unnecessary for the validity of an appeal bond signed by an attorney-in-fact for the signature to indicate that it was inscribed in that capacity if the power of attorney did in fact exist and authorized the action taken.
2. An appeal bond is not fatally defective where the property of one of the sureties is sufficient to indemnify the appellee, even though no recourse is possible to the property of the other surety.
3. The trial judge approving an appeal bond should indicate clearly for what amount the bond is approved.

On an appeal to the Supreme Court in an action of specific performance, the appellee filed a motion to dismiss on the ground that the bond was defective because the names of the sureties on the affidavit of sureties were not the same as on the bond, and because one of the sureties who signed the affidavit had no property valuation attached from the real estate tax division of the Ministry of Finance, as required by statute. The Court upheld the validity of the bond, finding as to the first of the above contentions that the same persons signed both the bond and the affidavit of sureties, and as to the second contention, that the certificate of the Ministry of Finance related to property of the son of one of the signers on the bond who was acting as duly authorized attorney-in-fact for the son. The Court found that the value of the two pieces of property offered as security by the sureties was far in excess of the penalty of the bond. The *motion* to dismiss was *denied.*

M. Fahnbulleh Jones and *Clarence L. Simpson, Jr.,* for appellant. *Samuel E. H. Pelham* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

On April 22, 1976, appellee instituted an action of specific performance against appellants in the June Term of the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, in which appellee petitioned the court to order appellant to deliver to him three motor vehicles which the appellee had allegedly purchased from appellant or to pay him the equivalent cash value of the vehicles.

The case was heard by the trial court at its June 1976 Term. On July 14, 1976, the trial judge ruled granting the petition and ordering appellant, respondent in the court below, to deliver the three vehicles designated in the petition to appellee, petitioner in the lower court, or the equivalent in cash to the value of $10,500. Appellant announced an appeal and in due course completed all the jurisdictional steps to perfect it.

Before the appeal could be heard by this Court on its merits, appellee filed a motion to dismiss, mainly on the ground of an insufficient and defective appeal bond. The points made by appellee in the motion which we deem necessary to consider are as follows:

> "The sureties to said bond, as contained in the body thereof, are Esther L. A. Tubman and Wilmot and Gabriel Scott. Petitioner/appellee submits that the names of Esther L. A. Tubman and Wilmot and Gabriel Scott appear in the body of the said bond, yet they did not sign same as sureties; instead, Lavoisier A. Tubman and Ella J. Scott whose names do not appear in the body of the bond signed same, thereby making said bond insufficient and contradictory. . . .
>
> "The said affidavit of sureties is signed by Ella J. Scott and Esther Tubman and not by Esther L. A. Tubman and Wilmot and Gabriel Scott as mentioned in the appeal bond. . . .

"Ella J. Scott who signed the affidavit of sureties as one of the sureties to the appeal bond has no property valuation attached from the Real Estate Tax Division of the Ministry of Finance, Republic of Liberia, as provided by our statute and numerous opinions of this honorable Court, and that Wilmot E. Scott and Gabriel D. Scott whose property valuation is attached did not sign the affidavit of sureties."

Appellee concluded that the appeal bond was defective in failing to conform to the statutory requirement (Civil Procedure Law, Rev. Code 1:51.8) that such a bond be signed by two or more legally qualified sureties.

Appellant filed a resistance to the motion to dismiss in which he argued that the motion should be denied because the appeal bond was signed by a sufficient number of persons authorized to do so. According to his averments:

"There are *de facto* three signatures on the bond, whereas *de jure,* there are four signatures in that L. A. Tubman and his wife, Esther Tubman, signed the bond themselves, whilst Wilmot and Gabriel Scott signed by and through Ella J. Scott, who long prior to the affixing of her signature thereon had been duly clothed with the authority so to do by powers of attorney from her two sons, issues of her very own body, Gabriel Scott and Wilmot E. Scott. . . . By careful reading of the appeal bond filed in this case, it is easily seen that same bears three signatures, two of which being those of Esther and L. A. Tubman, husband and wife. This fact is clearly borne out from a careful scrutiny of the affidavit of sureties wherein the said husband and wife again signed the said affidavit together with Ella Scott, who signed for her principals, having previously been duly clothed with proper authority."

Answering and replying affidavits were filed by appellee and appellant, respectively. However, before we

could take up the motion, appellant withdrew his resistance and filed an amended resistance, which in addition to the points raised in his original resistance, stated the following:

"3. Appellant says that the bond is legally sufficient in that sureties Esther and L. A. Tubman whose signatures read as 'Lavoisier A. Tubman and E. N. Tubman' on the face of the bond's affidavit of sureties, revenue certificate and notary certificate, are legally qualified sureties who possess real property to the value of twelve thousand six hundred ($12,600) dollars over and above the sum of ten thousand five hundred ($10,500) dollars stated in the judgment rendered from which this appeal is taken and have signed the affidavit of surety describing their real property therein as the law contemplates. Appellant requests the Court to take judicial notice of the revenue certificate issued in favor of Lavoisier A. Tubman and Esther N. Tubman and the affidavit of appellant's appeal bond.

"4. Appellant says that the motion should be denied because this Court has held in several opinions that where the property of one of the sureties is equal and/or over and above the sum stated in the judgment, the said bond is legally sufficient and the appeal will not be dismissed. . . .

"8. Appellant says that the intent of offering an appeal bond is to indemnify the appellee from costs and injury arising from the appeal, if unsuccessful, and that appellant will comply with judgment of the appellate court or of any other court to which the cause may be removed. In the instant case, the appellee is indemnified in the sum of twelve thousand six hundred ($12,600) dollars which is over and above the sum of ten thousand five hundred ($10,500) dollars, the value of the articles for which the action was in-

stituted, and hence the bond is legally sufficient to all intents and purposes.

"9. Recourse to the affidavit of surety shows on its face the signatures of Lavoisier A. Tubman and Esther N. Tubman and their names appear in the affidavit of surety and the certificate of revenue and the appeal bond.

"10. Even though Ella J. Scott signed the affidavit of surety and Wilmot E. Scott and Gabriel D. Scott, whose property is given in the certificate of the Bureau of Revenues, did not sign yet this does not make the bond insufficient for the reason that the other two sureties' property is over and above the value of the property subject of these proceedings."

The points we consider important for the decision of this case are: (1) whether the appeal bond before us is insufficient and defective; (2) whether an appeal bond is insufficient when the property of one of the sureties is sufficient to indemnify the appellee; and (3) whether the act of Ella J. Scott who signed as surety was legal since she was allocating property which she controlled under powers of attorney executed in her behalf by her two sons. We will consider these points in reverse order.

According to the record before us, Ella J. Scott signed both the appeal bond and the affidavit of sureties, but the certificate from the Ministry of Finance showed that the properties indicated for the bond were in the names of Wilmot E. Scott to the value of $8,417 and Gabriel D. Scott to the value of $7,000. When the issue was raised by appellee in his motion to dismiss, appellant with his resistance made profert of powers of attorney that had been executed by the property owners to Ella J. Scott, their mother, for the handling of their property, prior to the execution of the appeal bond. The validity of the powers of attorney has not been questioned by appellee, but he has contended that Ella J. Scott should have shown

that she was signing by authority and not in her personal capacity.

We have carefully examined the powers of attorney in question and we find that of Gabriel D. Scott, whose property is valued at $7,000, to have specifically empowered his mother to conclude "all negotiations relative to the execution of a lease agreement entered into between Relda Scott, et al., and Monrovia Fair Corporation." We can reasonably conclude that Ella J. Scott was without authority to use that property as a lien on the appeal bond as she did. On the other hand we find the power of attorney of Wilmot E. Scott, whose property is valued at $8,417, authorizing his mother to "operate and exercise control over said property as I would personally do."

Considering the matter from a legal point of view we feel that Ella J. Scott was within the scope of her authority as attorney-in-fact of Wilmot E. Scott to use his property as a lien on an appeal bond since she was empowered to "operate and exercise control" over said property. "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. . . . The primary purpose of a power of attorney is not to define the authority of the agent as between himself and the principal, but to evidence the authority of the agent to third parties with whom the agent deals." 3 AM. JUR. 2d, *Agency,* § 23 (1962).

The argument was advanced by appellee's counsel, though not squarely raised in the motion, that the powers of attorney made profert with the resistance to the motion to dismiss were improperly used because, if it was on that authority that Ella J. Scott signed as surety to the appeal bond, that should have been indicated on the appeal bond. We have been unable to find legal backing for this contention. On the contrary, we find that the existence of the power of attorney is the principal

factor for consideration, except as otherwise provided by statute, for the general rule is that "it is unnecessary to the validity of a deed of conveyance [in this case an appeal bond] by an attorney in fact for the power of attorney to be recorded with the deed, or even for it to be recorded at all, if it can be shown to in fact exist as a genuine and legal instrument executed under seal; the mere fact that . . . the power of attorney may have been belatedly recorded or improperly admitted to record, because the attesting foreign notary failed to affix his official seal, would not render the deed of conveyance void." *Johnson* v. *Johnson,* 184 Ga. 783, 193 S.E. 345 (1937), noted 114 A.L.R. 660 (1938). In the instant case the powers of attorney were regularly notarized under seal of a notary public.

We come to the next point—whether an appeal bond is insufficient when the property of one of the sureties is sufficient to indemnify the appellee.

The present statute on appeal bonds reads as follows:

> "Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he will indemnify the appellee from all costs or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or of any other court to which the case is removed. The appellant shall secure the approval of the bond by the trial judge and shall file it with the clerk of the court within sixty days after rendition of judgment. Notice of the filing shall be served on opposing counsel. A failure to file a sufficient appeal bond within the specified time shall be a ground for dismissal of the appeal; provided, however, that an insufficient bond may be made sufficient at any time during the period before the trial court loses jurisdiction of the action." Rev. Code 1:51.8.

We would call attention to the fact that the wording

of the present statute on appeal bonds is almost word for word the same as that found in section 426 of the Revised Statutes of 1912, published in 1929, and section 1013 of Title 6 of the Liberian Code of Laws of 1956. We mention this because some of the decisions of this Court on the point date back to 1950, and we would like it to be remembered that those decisions were based on the Revised Statutes and earlier laws, the wording of which as stated was substantially the same as that of the existing statute.

This Court has held that the object of an appeal bond with sureties is to secure costs to the appellee and to assure the court of compliance with its judgment, and that where an appeal bond from the circuit court to the Supreme Court omits the signature of one surety, and the other surety is financially able to back the bond, and the bond is otherwise faultless, said bond is not fatally defective. *Dennis* v. *Holder,* 10 LLR 301 (1950).

In the case *Kerpai* v. *Kpene,* 25 LLR 422, 431 (1977), in denying a motion to dismiss made because one of the sureties' property was not properly described in the affidavit of sureties even though the surety whose property was properly described was more than sufficient to indemnify appellee, this Court held:

> "Wherefore, since we have found that the property offered by Martha Burphy-Carey complemented by that of Josephine Badio has fully met the statutory requirements with a value far over and beyond the penalty of the appeal bond thus securing the appellees from all injuries that may arise from the appeal taken by appellants; and since an appeal bond is not fatally defective for having one surety if the financial ability of the surety is not questioned in the court below by the appellee on the ground that he is not satisfied with the indemnification; and since appellee did not move the court below to have the sureties sufficiently justify the properties offered on the bond, thus allowing the

bond to stand, we hold that the motion to dismiss is not sustained as against appellants' resistance. This Court therefore has jurisdiction over the subject matter and will proceed to hear the above entitled cause of action on its full merits."

In his argument before this Court counsel for appellee contended that inasmuch as the penalty of the bond is $15,150, and, according to him, the only legal sureties have property valuation of only $12,600 and the trial judge approved the bond with the amount inserted in its body by appellant, said bond is insufficient. When we take into consideration that the amount of the judgment is $10,500 and that appellee admits the validity of one set of sureties whose property is valued at $12,600, we find it hard to accept appellee's argument of insufficiency of the bond, especially so in face of the pronouncements of this Court on the subject.

But we will go further. The property of the Tubmans (husband and wife) who both signed the appeal bond and affidavit of sureties is valued at $12,600, while the property of Wilmot E. Scott whose mother signed the bond on his power of attorney, and it was within her right to do so, is valued at $8,417. Together these two pieces of property are valued at $21,017, far in excess of the penalty of the bond insisted on by appellee in the amount of $15,150. So his argument cannot stand by any reasoning whatsoever.

We will now consider the last point, that is, whether the appeal bond before us is insufficient and defective. It must be remembered that appellee has not once questioned the financial ability of the sureties to the appeal bond. Nor has he questioned the genuineness of the titles of the sureties. Neither has he questioned the genuineness of the signatures of the sureties. His main contention has been the irregularities attending the execution of the bond, that is, that the names of the Tubmans on the affidavit of sureties are not the same as on the bond

and that Ella J. Scott could not sign the bond because the certificate from the Ministry of Finance accompanying the bond did not show her as owner. With respect to the first of these contentions we have carefully examined the affidavit of sureties and the appeal bond and found that L. A. Tubman and his wife Esther Tubman signed both instruments. With regard to the second point of contention, that is, the right of Ella J. Scott to sign the bond, we have already dealt with that issue earlier in this opinion. We are fully convinced that the appeal bond before us is neither insufficient nor defective.

Although the statute holds that an appeal bond must be signed by two legally qualified sureties, this Court has held that since the main object of an appeal bond is to secure costs to the appellee and indemnify him against injury, an appeal bond is not fatally defective for having only one surety if the financial ability of the surety is not questioned and appellee does not allege that he is insufficiently indemnified. *Van Ee* v. *Gabbidon,* 11 LLR 65 (1951).

As far back as 1893, the Court held that a bond which is sufficiently descriptive in its construction to make its conditions clear and intelligible, and possible of enforcement, though wanting in other formalities, is nevertheless legal. *Williams* v. *Johnson,* 1 LLR 247 (1893).

One irregularity that was brought forward in the argument at this bar is that the appellant inserted the amount of the penalty in the body of the bond and the judge approved the bond as it was, meaning that he approved it for the amount inserted in the body of the bond although this was not indicated by him when he approved it. There is no doubt that the trial judge approved the appeal bond, but there is no indication for what amount, though it can be reasonably inferred that he approved it for the amount stated in the body of the bond. This is, nevertheless, irregular. All judges approving bonds should indicate clearly for what amount the bond is ap-

proved. We hope this rule will be observed by all judges in the future.

In view of what has been hereinabove stated, it is our holding that appellee's motion to dismiss the appeal be and the same is hereby denied, and the appeal will be heard on its merits. Costs to abide final determination. And it is so ordered.

Motion to dismiss denied.