ROYAL EXCHANGE ASSURANCE, Appellant, *v.* HIPPOLITO BARRIERO, et al., Appellees.

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

Argued October 19, 1976. Decided November 19, 1976.*

1. Certification by a foreign government that one of its subjects is not engaged in any diplomatic function is conclusive and thereby terminates his claim to diplomatic immunity.
2. In the absence of certification from the foreign ministry of a receiving state that a foreign envoy is entitled to diplomatic immunity, the courts of that state may determine if he is entitled to it.
3. A revolutionary movement in the sending or receiving state which creates a new government terminates the diplomatic mission of that state except for envoys who receive new letters of credence.
4. The statutory requirement that an appeal bond be accompanied by an affidavit of sureties containing a description of the property offered as security sufficient to identify such property is not a technicality that can be disregarded by an appellate court, since the bond is unenforceable unless the property can be identified; and an omission of such description from the affidavit authorizes dismissal of the appeal.

This is an appeal from a judgment awarding appellees damages against appellant insurance company resulting from a fire. On motion filed in the October 1975 Term of the Supreme Court, consideration of the case was suspended because of the diplomatic immunity of the appellee-husband as an accredited ambassador of the Argentine Republic. After the termination of his duties in that office in 1976, appellees moved to dismiss the appeal, arguing that the appeal bond was defective because the description of the property offered as security by the sureties was insufficiently identified to establish the lien of the bond. Appellants opposed dismissal of the appeal on the grounds that the appellee-husband still enjoyed diplomatic immunity and also that the affidavit of sure-

* Mr. Chief Justice Pierre did not participate in this decision.

ties annexed to the appeal bond was substantially in conformity with the statute, but that in any event the requirement as to identification of the property was a technicality which would not justify dismissal of the appeal.

The Supreme Court found that the appellee-husband no longer had diplomatic status, and could therefore participate in court proceedings. The insufficient description of the real property offered as security on the bond was more than a technicality and was a valid reason for dismissal of the appeal. The *motion* to dismiss was therefore *granted.*

Henry Reed Cooper and *Joseph Findley* for appellant.
Moses K. Yangbe for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellees, Dr. and Mrs. Hippolito Barriero, brought an action against the appellant, Royal Exchange Assurance, an insurance company, to recover damages as a result of a fire which destroyed their residence and clinic. The trial court's judgment, in accordance with the verdict of the jury, awarded the appellees $129,920.50, and the appellant appealed from the judgment to this Court. During the pendency of the appeal, Dr. Barriero was accredited to Liberia as Ambassador Extraordinary and Plenipotentiary of the Republic of Argentina.

In passing, we note that prior to the trial of this action in the lower court, one of the appellees, Dr. Barriero, had been tried on a charge of arson and acquitted.

During the October 1975 Term of this Court, the appellees filed a motion requesting that Honorable Anthony Barclay be allowed to substitute for them because, as an Ambassador, Dr. Barriero and his wife could not personally appear as parties before this Court. The motion for

substitution of parties was denied because of the diplomatic immunity enjoyed by the appellees, and it was ordered that the case remain dormant on the docket until such time as the appellees should return to nondiplomatic status.

At the present term of this Court, the appellees filed a two-count motion to dismiss the appeal for the following reasons: (1) that since Dr. Barriero had been relieved of his duties as Ambassador of Argentina, as shown by a note dated March 31, 1976, to the Ministry of Foreign Affairs from the Embassy of Argentina, the appellees have returned to the *status quo ante;* and (2) that the appeal bond is defective because the affidavit of sureties contains neither a statement that the sureties are the owners of the real property offered as security, nor a description of the property offered as security sufficiently identified to establish the lien.

In countering the motion to dismiss the appeal, the appellant filed a seven-count resistance which can be narrowed down to two main points:

(1) Dr. Barriero still enjoys diplomatic immunity because the Embassy's note does not state that Argentina, the "sending state," has recalled him, or any reason for the termination of his duties as Ambassador; and

(2) The affidavit annexed to the appeal bond is substantially in conformity with the statute governing the affidavit of sureties.

We shall consider these issues in the order in which they were raised. With respect to the issue of whether or not the appellees still enjoy diplomatic immunity, it is our opinion that their diplomatic status ended when Dr. Barriero's duties as Ambassador Extraordinary and Plenipotentiary of the Argentine Government to the Republic of Liberia were terminated, as evidenced by the Argentine Embassy's notice to the Ministry of Foreign Affairs of Liberia.

The note reads as follows:

"Embajada
de la
Republic of Argentina
"A.E. No. 4.

"The Embassy of the Republic of Argentina presents its compliments to the Ministry of Foreign Affairs of the Republic of Liberia and has the honor to inform the latter that Dr. Hippolito Barriero has terminated his duties as Ambassador Extraordinary and Plenipotentiary of the Argentine government, and that Mr. Oscar Guillermo Galie, the Embassy Secretary, will act as charge d'affaires a.i.

"The Embassy of the Republic of Argentina takes this opportunity to renew to the Ministry of Foreign Affairs of Liberia, the assurance of its highest consideration.

[Seal]

"Monrovia, 31st, March 1976.

"To the Ministry of Foreign Affairs,
Ashmun Street,
Monrovia."

The appellant contends that the note should not be given any credence because it is not sufficient notice of termination of the Ambassador's services, since it does not state that the "sending state" has recalled him, or give any of the usual grounds for such termination. Therefore, this Court cannot proceed with the hearing of this matter without violating the diplomatic immunities of the appellees.

Before considering this issue, we must mention that it is strange that the opposing party, rather than the former Ambassador himself, is insisting on appellees' diplomatic immunity. The usual international practice when a diplomat is involved in a dispute in the courts of the receiving state, is that the diplomat protests the service of the writ, pleads immunity, informs the foreign ministry of the receiving state of the problem and requests the ministry to direct an appropriate communication or suggest

immunity to the court. The basis of diplomatic privileges and immunities is the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the state which he represents.

In *Carrera* v. *Carrera,* 174 F 2d 496 (1949), it was held that it is enough that an ambassador has requested immunity, that the foreign ministry has recognized that the person for whom it was requested is entitled to it, and that the ministry's recognition has been communicated to the court. The courts are disposed to accept as conclusive of the fact of diplomatic status of an individual claiming an exemption, the views thereon of the political department of their government. See also *In re Baiz,* 135 U.S. 403, 421, 10 S.Ct. 854 (1890); Hyde, INTERNATIONAL LAW, Vol. 2, 1268 (2d rev. ed., 1945).

In the instant case, the appellees instituted the action prior to their achieving diplomatic status. Having allegedly relinquished such status, they now assert their right to pursue their matter through the courts. If they were still enjoying diplomatic immunity, the appellees could not waive it because, even though in practice diplomatic privileges are frequently waived, as, for instance, when an envoy enters an appearance to an action against himself and allows the action to proceed without pleading his immunity, in the case of the Chief of Mission, the decision to waive or not to waive lies with the government of the sending state. The only evidence of the appellees' status presented to this Court is the note, quoted *supra,* which was proferted with the motion to dismiss. It is our opinion that if the appellant feels the note is inconclusive it should have produced some evidence to show that the appellees are still entitled to diplomatic immunity. Appellees having alleged and produced evidence that they no longer are exempt from the jurisdiction of the court, the burden of proving that they are exempt shifts to the appellant. We have stated in countless de-

cisions of this Court that he who alleges a fact must prove it. Nevertheless, in the absence of certification from the foreign ministry that a claimant to immunity is entitled to it, the court may determine if he is entitled to it.

The fact that the note does not state that the sending state, Argentina, has recalled its ambassador is of very little import. Neither can much weight be given to the fact that the note does not give any reason for the termination of the ambassador's duties. It is true that a diplomatic mission may come to an end from different causes, but it is not the practice that the sending state include in the letter of recall or note the reasons for termination of the envoy's duties. Oppenheim, INTERNATIONAL LAW, Vol. 1, §§ 406–417 (8th ed., 1955). It is enough if the sending state informs the receiving state of the termination of the diplomatic mission of the envoy.

Certification by a foreign government that one of its subjects is not engaged in any diplomatic function is conclusive. *United States* v. *Arizti,* 229 F.Supp. 53, 55 (S.D., N.Y., 1964). Even if one could successfully challenge his government's denial that he was engaged in a diplomatic function, the immunity is that of his government and is not personal to him. His government's waiver of diplomatic immunity, if any existed, does not require his consent. In order to establish the protection afforded by diplomatic immunity, the evidence must establish actual service as a diplomat by the one claiming the right. *United States* v. *Coplon,* 88 F.Supp. 915, 920 (1950).

Shortly before the termination of Dr. Barreiro's duties, the Argentine Government experienced a revolutionary change. The Head of State, Mrs. Peron, was ousted in a military coup, and a military regime replaced the ousted government. According to Oppenheim, INTERNATIONAL LAW, Vol. 1, § 415 (8th ed., 1955): "A revolutionary movement in the sending or receiving State which creates a new Government, changing, for example, a re-

public into a monarchy or a monarchy into a republic, or deposing one sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new letters of credence, but no change in seniority takes place if they do receive them. It may happen that in cases of revolutionary changes of government, foreign states for some time neither send new letters of credence to their envoys nor recall them, watching the course of events in the meantime and waiting for some proof of a permanent settlement. In such cases the envoys are, according to international usage, granted all privileges of diplomatic envoys although in strict law they have ceased to be such." The situation is similar in the present case except that after the revolutionary change, the Ambassador's mission was terminated. It is clear that whatever diplomatic immunity the appellees enjoyed prior to this change effectively ended with the termination of his duties as Ambassador, as evidenced by the note from the Argentine Embassy.

Moreover, since the termination of his duties as Ambassador, Dr. Barreiro has been arrested and investigated, and has also resumed his practice in Monrovia as a medical doctor without any intervention from either the sending state or the receiving state. All of this leads us to conclude that the appellees no longer enjoy diplomatic status that would entitle them to claim diplomatic immunity. Once immunity is terminated there is no reason why they should not be amenable to the jurisdiction of the courts in respect of events occurring either prior to their being, or while they were, privileged, and which are comprehended by the local law. Therefore counts 1 to 4 of the appellant's resistance are not sustained.

On the question of the appeal bond, it is our opinion that the motion to dismiss should be granted because the appellant's affidavit of sureties does not conform to the statute governing affidavits of sureties and appeal bonds as interpreted by this Court in *West African Trading*

Corporation v. *Alrine,* 24 LLR 224 (1975), 25 LLR 3 (1976) (reargument). In that case it was held that the section of the Civil Procedure Law, Rev. Code 1:63.2(3), which states that "the bond shall be accompanied by an affidavit of the sureties containing . . . (b) a description of the property, sufficiently identified to establish the lien of the bond," is a mandatory requirement that the description of the property must be done "by stating the number of the plot and the metes and bounds." Such a description makes for certainty and definiteness; locating the property would not be difficult; and satisfaction of any obligation out of the property offered as security would not be denied to the appellee. This holding was followed in *Zayzay* v. *Jallah,* 24 LLR 486 (1976), *Boima Lartey* v. *Corneh,* 25 LLR 248 (1976); *VanDam* v. *Firestone Plantation Co.,* 25 LLR 255 (1976); *Liberia Mining Company* v. *Kromah,* 25 LLR 259 (1976).

The appellant has argued that suits on appeal should not be dismissed on such a technicality. The question then arises as to whether or not this requirement is a technicality. To determine this question it might be necessary to look briefly at the legislative history relating to sureties on appeal bonds.

Beginning with Volume I of Revised Statutes of Liberia (1848–1911), section 315 dealt with the qualification of sureties, while section 426 dealt with appeal bonds. These two sections required only that the sureties who were to indemnify the appellee from all costs and from all injury arising from the appeal must be householders or freeholders and must be worth the amount specified in the bond exclusive of exempt property and over and above all their debts and liabilities; and upon failure to give such a bond, the appeal would be dismissed.

In the Liberian Code of Laws of 1956, Title 6, sections 463, 1013, 1014, the provisions are basically the same as those in the Revised Statutes, except that section 1014

states that failure to file an appeal bond within the specified time or filing of an insufficient bond shall be ground for dismissal of an appeal. Thus it can be seen from the above-mentioned statutes that the procedure for giving appeal bonds was fairly simple, and an appeal could be dismissed either where no bond was filed, or where it was filed after the specified time, or where, even though timely filed, it was insufficient.

The present statute governing appeal bonds and legally qualified sureties is found in sections 51.8 and 63.2 of the Civil Procedure Law, Rev. Code, Title 1. Section 51.8, which relates to appeal bonds, is similar to section 1013 and 1014 of the corresponding title of the 1956 Code of Laws, and section 426 of the Revised Statutes. However, section 63.2, which deals with legally qualified sureties, is the most elaborate legislation on this subject that has ever been enacted by the Legislature. It states in detail who may be sureties, how a bond shall be secured by real property, and what documents should accompany the bond in order for the bond to be sufficient. Here, word for word, is the relevant portion of this legislation:

"§ 63.2. *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. Such a bond shall create a lien on the real property when the party in whose favor the bond is given has it recorded in the docket for surety bond liens in the office of the clerk of the Circuit Court in the county where the property is located. Each

bond shall be recorded therein by an entry showing

"(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

"(e) A statement of the assessed value of each property offered.

"A duplicate original of the affidavit required by this section shall be filed in the office where the bond is recorded.

"*4. Certificate of Treasury Department official.* The bond shall also be accompanied by a certificate of a duly authorized official of the Department of the Treasury that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value therein stated, but such a certificate shall not be a prerequisite to approval by the judge."

When one compares the present statute, which is the subject of review in this matter, with the prior legislation referred to above, it can be seen that the Legislature has been gradually tightening up, or closing up possible loop-

holes in the statutory provisions governing sureties to bonds. It seems clear that the Legislature by its enactment of section 63.2, intended to remedy certain defects in the law, namely, among other things, the uncertainty and indefiniteness in the location of property offered as security by sureties.

At this point it might be well to reiterate the principle as was done in *Harris* v. *Harris,* 9 LLR 344, 349 (1947), that "courts are not concerned with whether or not legislation is wise or unwise, oppressive or democratic; it is the especial function of the courts to interpret the law. Any legislation considered pernicious, unwise, or oppressive may be remedied only by the people who, where the legislators refuse to change the law, may change their representatives in the legislature from time to time until such repugnant legislation is repealed."

Section 51.8 and section 63.2 read together specifically set forth certain conditions to be stipulated and included in every appeal bond, and failure to file a bond containing these requirements authorizes the dismissal of the appeal. The requirements are: (1) that every appellant shall give a bond with two or more legally qualified sureties; (2) that the sureties shall be natural persons owning real property located in the Republic with an assessed value equal to the amount of the bond; (3) that the bond shall contain a clause indemnifying the appellee from all injury and all costs arising from the appeal; (4) that the bond shall stipulate that appellant shall comply with the judgment of the court to which the appeal is taken; (5) that the bond shall be approved by the trial judge; (6) that the bond shall be accompanied by an affidavit of sureties containing *inter alia* "a description of the property, sufficiently identified to establish the lien of the bond"; and (7) that the bond shall be accompanied by a certificate of the Ministry of Finance stating that the property is owned by the named sureties and is of the assessed value stated therein.

Upon inspection of the appeal bond filed in the case at bar we observe that the properties offered by the sureties as security are not described in the affidavit of sureties in accordance with interpretations made by this Court in previous decisions cited *supra*. Instead the affidavit of sureties states that "said property consists of houses and unencumbered land of $206,326 as evidenced by this affidavit." Recourse to the Finance Ministry certificate shows that six pieces of the properties offered are designated as Lot N/N (meaning no number) located in Sinkor, Paynesville, Mamba Point, and Caldwell. The rest of the properties have lot numbers only. In *Smith* v. *Page,* 10 LLR 361, 368 (1950), Mr. Justice Davis, speaking for the Court, said: "To render a bond defective, it must possess certain defects; and a defect in legal parlance is a lack or absence of something essential to completeness. In other words, the want of something required by law. The questions therefore arising out of the foregoing definition are: whether the descriptive omissions complained of by appellee are essential to the completeness of an appeal bond and whether such description is required by law, and whether the omission of same will render the bond unenforceable."

The affidavit of sureties accompanying the bond in question lacks the description of the property required by the statute, which has been held to be essential to the completeness of an appeal bond; and where the property offered as security is not properly described, it is doubtful that the bond can be enforced. Therefore the omission of such a description is sufficient to render the bond defective. See *West African Trading Corporation* v. *Alrine,* and other cases cited *supra.*

Further with regard to the contention that this issue is a technical one and should not be given cognizance, it must be observed that section 51.4 of the Civil Procedure Law, Rev. Code, Title 1, provides that failure to comply with any of the following requirements within statutory

time shall be ground for dismissal of an appeal: (a) announcement of the taking of the appeal; (b) filing of the bill of exceptions; (c) filing of an appeal bond; (d) service and filing of notice of completion of appeal.

This Court, speaking through Mr. Justice Barclay, has said that the intention of the Legislature in passing such an act was "to discourage the dismissal of appeals on technical legal grounds and to give to appellants an opportunity to have their cases heard by this Court on their merits in order that substantial justice be done to all concerned, for in many instances prior to the passage of said act important and far-reaching cases had been dismissed on mere technicalities and appellants had suffered seriously and irreparably because of the fact that from this Court there was no other appeal. Hence it is that the Legislature . . . set out definitely the cases for which an appeal should be dismissed." *Johns* v. *Pelham* and *Pelham* v. *Witherspoon,* 8 LLR 296, 305 (1944). And see *Buchanan* v. *Arrivets,* 9 LLR 15, 18 (1947). From these decisions, it is clear that this Court does not regard any of these statutory grounds for dismissal of appeals as being a mere technicality.

This Court would have liked to determine the several issues brought up for review on appeal, but the failure of the appellant to complete one of the jurisdictional steps for hearing of its appeal precludes us from going into the merits of the matter, much to our regret.' Under the circumstances and the controlling law, the motion to dismiss the appeal is hereby granted, and the Clerk of this Court is instructed to send a mandate to the lower court ordering it to resume jurisdiction over this matter and proceed to enforce its judgment forthwith. And it is hereby so ordered.

Motion to dismiss granted.