KERMOR TALAWALY, Petitioner, *v.* HON. GEORGE C. McGEE, Probate Judge, Marshall Territory, Respondent.

PETITION FOR A WRIT OF MANDAMUS.

Decided September 8, 1971.

1. Where the indemnification provided in the appeal bond has been approved by the justice of the peace, and no allegation is made of additional consequential damages to the appellee should he prevail, then in an appeal from such court to a probate court the judge therein can be compelled to accept such bond as adequate.

After an action in damages was decided against petitioner by a justice of the peace in Marshall Territory, an appeal was taken to the probate court, where the appellee successfully moved to dismiss the appeal on the ground of an insufficient indemnity, though the justice of the peace approved the bond which covered the total amount of the judgment. A writ of mandamus was sought, which the Chief Justice ordered issued and served on the respondent judge, since there was no indication that the appellee would be prejudiced, in the event he prevailed, by the damages provided for in the bond.

Petition granted.

Alfred Raynes for petitioner. *Dessaline T. Harris* for respondent.

PIERRE, C. J., presiding in chambers.

The petition alleges that after an action in damages was heard and determined by a justice of the peace in Marshall Territory, an appeal was taken to the Probate Court in Marshall Territory. An appeal bond was presented, but the respondent judge of the aforesaid Probate

Court, on motion of the appellee, dismissed the appeal, because the appellee claimed that said appeal bond was defective, in that the indemnity therein provided was less than one and one-half times the damages claimed. The appeal was dismissed for the reasons stated.

The appellant in his resistance to the motion to dismiss his appeal, contended that he had done all that was required of him in such cases. He claims that in keeping with provisions of the Civil Procedure Law he filed a bond duly approved by the justice of the peace, from whose court he took the appeal. He also contends that the amount fixed in his appeal bond, $56.00, was inserted by the trial court in keeping with the law, and that the bond carries two sureties as the law requires. The face of the bond bears out these contentions.

According to the ruling of the justice of the peace, recorded on the back of the writ, the amount of the judgment was $43.00 which with costs, came to $56.00.

Appeals from courts not of record are governed by the Civil Procedure Law, § 5203, L. 1963–64, ch. III.

> "Within fifteen days after announcement of the taking of an appeal, the appellant shall secure the approval of the magistrate or justice of the peace who tried the case to an appeal bond and shall file it with the court. Notice of the filing shall be served upon the opposing counsel. The bond shall be in an amount to be fixed by the court and shall be conditioned on compliance with the final judgment together with costs, interest, and damages for delay. Failure to furnish a bond as required by this section shall be ground for dismissal; provided, however, that an insufficient bond may be made sufficient at any time before the trial court loses jurisdiction of the action."

In this case the bond is in the amount sufficient to cover the judgment, $43.00, which with costs and fees make a total of $56.00, all that is legally required as sufficient indemnity herein. Therefore, I cannot see how

this bond is insufficient. Nowhere in the case has "interest or damages for delay" been claimed by the appellee. All that is required to indemnify him should the appellant lose on appeal, are: (1) the amount of the judgment; (2) all costs and all legal fees incident to the determination of the case in the trial court. These altogether amount to $56.00, the amount in which the justice of the peace approved the appeal bond.

The appellee's motion to dismiss the appeal relies upon the principle laid down in *Wright* v. *Wright,* 6 LLR 229 (1938). In that case the amount of the final judgment, excluding costs, amounted to more than $72.00, whereas the appeal bond was approved for only $50.00. Naturally this was an amount insufficient to cover the judgment itself, not to mention costs, which should have been included. The Supreme Court, therefore, correctly ruled to dismiss the appeal on the ground of insufficiency of the appeal bond. But that case is not analogous to this, in which the appeal bond has been approved in an amount sufficient to cover the judgment and all costs and legal fees.

Let us consider for a while the contention raised in the motion to dismiss, to the effect that an appeal bond should carry as indemnification an amount one and one-half times the amount of the judgment. We cannot enforce anything which is not specifically mentioned as a requirement of a statute. I have cited the statute on appeal bonds in justice of the peace and magistrate courts, and nowhere in that statute is there any provision made for indemnification in appeal bonds from these courts to be in amounts one and one-half times the judgment. Therefore, the respondent judge had no legal authority to dismiss the appeal on this ground.

In view of the foregoing, the respondent judge will *nunc pro tunc* approve the petitioner's appeal bond, and thereby afford him the opportunity of completing his appeal if he so desires. The Clerk of this Court is or-

dered to send such mandate to the Probate Court in Marshall Territory. Costs are ruled against the respondent; however, because the appellee was not joined as a party respondent in these proceedings, Judge McGee is relieved from the payment thereof.

Petition granted.