WESEH TEE and W. T. SAVICE, Appellants, *v.* PIOH CHEA *et al.*, Appellees.

MOTION TO DISMISS AN APPEAL

Argued October 14, 1954. Decided December 10, 1954.

1. Since jurisdiction over appellees is procured only by service of a duly issued notice of appeal, failure to join all appellees is ground for sustaining a plea of disjoinder.
2. An appeal bond lacking an indemnification clause is materially defective, and the appeal may be dismissed upon showing of such defect.

On motion to dismiss an appeal from the judgment of the court below in an injunction action, motion *granted* and appeal dismissed on showing of defectiveness of the appeal bond.

William A. Johns for appellants. *Nete Sie Brownell* for appellees.

MR. JUSTICE SHANNON delivered the opinion of the Court. *

At the call of this case, counsel for appellees gave notice to this Court of the filing of a motion to dismiss the appeal. Said motion contains three counts which, in substance, allege that: (1) the appeal was not completed within the time prescribed by law in that the final judgment was rendered on September 18, 1953, and the notice of appeal was not issued and served until February 11, 1954, two months over and above the period of sixty days allowed by statute; (2) the appeal bond filed in this case was materially defective and bad in that it did not carry any indemnification clause as required by statutes and numerous decisions of this Court; and (3) there was a disjoinder of the proper parties in interest and of record

* Mr. Chief Justice Russell was absent because of illness, and took no part in this case.

in that, although the party-defendants in the court below were Pioh Chea purported landowner of the late Weseh Monah's real property, and Pyne Johnson, John David, Doe, John Kumoo, Johnny, Doegbay, Jeffrey Jaywree, Walker, Miss Lewis, Timothy and Joseph Manee (inmates residing with Pioh Chea), yet the appeal in the selfsame case is being prosecuted solely against Pioh Chea because the notice of appeal was directed to and served only on Pioh Chea without joining the other appellees or putting them under the jurisdiction of this Court.

Resisting this motion, the appellant submitted that the delay in the issuance of the notice of appeal, as appears upon the records, was no fault of theirs, but rather that of the clerk of the trial court who, because of a prolonged absence from the seat of the court, was not able to perform his duties earlier; but that, as soon as the records were presented, the appellants satisfied the financial requirements of the assistant clerk, and said notice of appeal was at once prayed for and issued, and the records were immediately transmitted. Moreover, appellants submitted further that the issuance of a notice of appeal in civil causes is predicated upon the completion of the preparation of the records for transmission to the Supreme Court, so that they could not have applied for said notice of appeal until the preparation of the records for transmission had been completed. By this pleading, appellants conceded that said notice of appeal was issued after the expiration of the time allowed by statute, but sought to ascribe the dereliction to the clerk of the trial court.

As to Count "2" of the motion to dismiss the appeal, appellants countered by claiming that the appeal bond was not materially defective, in that it carried the indemnification clause required by law in civil appeals. As to Count "3," respecting the disjoinder of party-defendants, now appellees, appellants submitted that "the failure

to insert the names of Pyne Johnson and others, as defendants on the notice of appeal is absolutely immaterial, same being a minor issue, and the decision of this Court will only operate either in favor of or against Pioh Chea, the defendant proper, and not the sub-defendants Pyne Johnson *et al.*" Appellants also submitted on this score that the absence of a notice of appeal "does not fall within the category for the dismissal of an appeal as enumerated in the Appeal Act of 1938."

We will decide the issues in reverse order. Upon inspection of the records of the case, we discover that there were several party-defendants, but there is no showing of who was defendant proper and who were sub-defendants despite the fact that the significance of such terminology is not shown clearly enough to give an understanding of what is meant. However, it is needless to say that, in the absence of this plea of disjoinder or nonjoinder of party-appellees, who were defendants before the trial court, and in whose favor the decree was given, they would be debarred from taking advantage of any legal right where an adverse ruling reversing the decree was entered by this Court, even though there is a process placing them under the jurisdiction of this Court. Having been defendants who succeeded in the trial court, they should have all been joined as appellees in the notice of appeal so as to give this Court jurisdiction over them; for this Court has repeatedly held that it is only the notice of appeal duly issued and served that gives it jurisdiction over appellees. *McAuley* v. *Laland,* 1 L.L.R. 254 (1894); *Jackson & Company* v. *Summerville,* 1 L.L.R. 339 (1899); *Coleman* v. *Republic,* 2 L.L.R. 137 (1913); *Buchanan* v. *Arrivets,* 9 L.L.R. 15 (1945). The plea of disjoinder is therefore sustained; but we have not decided that it would, independently of any other issue, be sufficient to effect the dismissal of an appeal.

As to the alleged material defectiveness of the appeal

bond because of the absence of an indemnification clause, we deem it necessary to quote that part of the said appeal bond:

> "Now, therefore, should the said Weseh Tee and W. T. Savice, appellants and principals, faithfully prosecute injury he may sustain as the result of their failure so to do, and will abide by the judgment of the appellate court, or any other to which said case may be taken or remanded, then these presents shall become null and void, otherwise to remain in full force and virtue."

This is the clause of the appeal bond that the appellants claim carries an indemnification clause. We are unwilling to agree with their claim. From the wording of said bond as quoted above, there is an apparent disconnection in construction which might give cause to conclude that there is something omitted somewhere. But we are helpless to offer or suggest any relief in the absence of any showing from the appellants to that effect. It is therefore our opinion, that the appeal bond is wanting in a material requirement in that it does not carry the required indemnification clause.

With respect to the first count of the motion, which attacks the out of time issuance and service of the notice of appeal, we regret that, despite numerous decisions by this Court, we are constantly being called upon to deal with this subject. Since the very issue has been raised in several cases to be decided today in a joint opinion, we are not passing upon it in this opinion; but the decision in the other cases will also apply in this case.

Because of what has been said herein the motion to dismiss the appeal is granted and the appeal ordered dismissed with costs against appellants; and it is hereby so ordered.

Motion granted.