THOMAS H. GREAVES, Appellant, v**. CHARLES A. JOHNSTONE** and **MARY J. JOHNSTON E**, his wife, Appellee.

ARGUED JUNE 4, 1913. DECIDED JUNE 13, 1913.

Dossen, C. J., MeCants-Steweart and Johnson, JJ.

1. The omission from the records of a return to the notice of appeal is a material error, and is ground for dismissal of the appeal.

2. A bond which is not stamped in accordance with the Stamp Act, is invalid.

Mr. Justice Johnson delivered the opinion of the court:

Damages on a Written Contract—Motion to Dismiss Appeal. In this case counsel for appellees submitted a motion to dismiss the appeal for the following reasons :

1. Because no notice of appeal was served upon appellees.

2. Because there is no legal bond filed in the case, the paper filed purporting to be a bond being fatally defective in that (a) there is no revenue or postage stamp affixed thereto ; (b) the purported appeal is not conditioned to indemnify the appellees from all injury arising from the appeal, and (c) said purported appeal bond is not conditioned to comply with the judgment of this court nor any other court to which the case may be remanded.

We deem it unnecessary to consider points "b" and "c" which involve questions of a technical nature, as was admitted by counsel for appellees in his arguments. In the case *Moore v. Gross* (Lib. Ann. Series, No. 2, p. 18, the court said : "this court will give little or no attention to technicalities not affecting the merits of a controversy." We will, therefore, confine ourselves to the salient points of the case.

The Act approved January 17, 1894, entitled "An Act amendatory to the Act establishing the Judiciary and fixing the powers common to the several courts and amending the Acts regulating appeals" provides, *inter alia,* that the clerk

of the court from which the appeal is taken shall issue a notice to appellee informing him that the appeal is taken and to which term of the court, and that appellee appear to defend the suit which shall complete the appeal. A similar provision was also embodied in the appeal Act found in the chapter on appeals in the Blue Book.

On inspecting the records we find that the notice of appeal was issued by the clerk, but there were no returns thereto or other matter of record to show that the said notice was served upon appellees. It was held by counsel for appellant that as the Act made it the duty of the clerk to issue and serve the notice of appeal the neglect of that officer to perform said duty, should not prejudice the rights of appellant. We must however, repeat the views expressed by the court in the case *McCauley v. Laland* (I Lib. L. R. 254) that "while we must admit the dictum of the legal maxim that the act of the court should prejudice no man, we are of the opinion that the acts of the court should be carefully distinguished from the unauthorized, unlawful or neglectful actions of its officers or of the parties to the suits." In that case it was held that it is the writ of summons or the notice served upon appellee and the returns thereto made, which gave the court jurisdiction over the case.

This principle has also been established in the case *Johnson et al., v. Roberts* (I Lib. L. R. 8) and recently in the case *Moore v. Gross* (Lib. Ann. Series, No. 2, p. 18). We are therefore of the opinion that the omission from the records of a return to the notice of appeal is a fatal defect.

With regard to the point raised in appellee's motion that the bond has no revenue or postage stamp affixed thereto the court will observe that this question has been decided in the case . *Moore v. Gross* already cited, in which case it was held that the omission to affix a stamp to the bond was a material error. On inspecting the copy of the appeal bond filed in the case, we find nothing to show that the stamp had been affixed to the appeal bond filed in the case below.

It was earnestly contended by counsel for appellant that from the fact that the judge approved the bond, it is presumed that it was properly stamped in accordance with the Stamp Act. We must here, however, reiterate the opinion expressed by this court in the case *Manheimer v. Fuller* (I Lib. L. R. 211) that the approval of an appearance bond by an inferior court does not constitute a

bar to a motion as to its insufficiency before a superior court.

For the above reasons we are of the opinion that the case should be dismissed, with costs against appellant, and it is so ordered.

Arthur Barclay, for appellant. *L. A. Grimes,* for appellees.