1957 *Present :* **Gunasekara, J.**

THE QUEEN *v.* W. SURABIEL PERERA *et al.*

Southern Circuit—2nd Criminal Sessions

S. C. 5—M. C. Balapitiya, 17,716

APPLICATION FOR AMENDMENT OF INDICTMENT

Indictment—Amendment in respect of clerical errors—Permissibility—Can amendment be made before trial begins ?—Courts Ordinance (Cap. 6), ss. 4, 28, 43—Criminal Procedure Code, ss. 165 F, 172(1), 186.

The accused persons were duly committed for trial before the Southern Circuit on a charge of murder. The prosecution sought to amend the indictment by the substitution therein of the words "Southern Circuit" for "Western Circuit", "Balapitiya" for "Ratnapura", "Galle" for "Colombo", and "Balapitiya" for "Balangoda". The object of the amendment was to correct a clerical error and the consequential errors.

Held, that the amendment of an indictment is permissible in respect of clerical errors if no prejudice is caused to the accused by such amendment.

Held further, that section 172 (1) of the Criminal Procedure Code does not prevent such amendment before the trial begins.

APPLICATION for amendment of an indictment.

I. F. B. Wikramanayake, Crown Counsel, in support.

T. W. Rajaratnam, for accused-respondents.

Cur. adv. vult.

October 14, 1957. GUNASEKARA, J.—

An application made on behalf of the prosecution for amendment of the indictment in this case was allowed by me at the close of the argument, and this judgment sets out the reasons for my order.

The two accused persons have been duly committed for trial before this court on a charge of murder. The charge upon which they have been committed for trial describes the place of the alleged offence as being situated in the judicial division of Balapitiya, and the committing magistrate is the Magistrate of Balapitiya. That division is, in terms of section 4 of the Courts Ordinance (Cap. 6), comprised within the Southern Circuit, for which the current sessions of this court are being held before me, and the names of the two accused are included in the calendar submitted by the Fiscal for the Southern Province, under section 28 of the Ordinance, as persons committed in this case by the Magistrate of Balapitiya.

The indictment that has been forwarded to this court, and of which copies have been served on the accused, describes itself as follows :

" Magistrate's Court of Balapitiya Case No. 17,716

INDICTMENT

In the Supreme Court of the Island of Ceylon

CRIMINAL JURISDICTION

Western Circuit :
District of Ratnapura
Session, 1957

At a Session of the said Supreme Court in its Criminal Jurisdiction for the Western Circuit, to be holden at Colombo in the year One Thousand Nine hundred and Fifty Seven."

It proceeds to describe the offence charged as being one committed "in the division of Balangoda" and to include in the list of productions "Statements made by accused before Magistrate, Balangoda". The amendments sought to be made were the substitution of "Southern" for "Western", "Balapitiya" for "Ratnapura", "Galle" for "Colombo", and "Balapitiya" for "Balangoda".

The word "Balapitiya" in the only place where it appeared in the document (in "Magistrate's Court of Balapitiya Case No. 17,716") had been typewritten over an erasure. It is obvious that by a clerical error the word "Balangoda" was originally typewritten wherever the word "Balapitiya" should have appeared and that the mistake was detected and corrected only in one place and not in the other two. The other mistakes appear to have been the result of this error.

It was contended by Mr. Rajaratnam that either the document in question was not an indictment or it was an indictment charging an offence the trial of which had been transferred by the Attorney-General from the Southern to the Western Circuit in the exercise of the discretion vested in him by section 43 of the Courts Ordinance : and that therefore there was no indictment at all or none that could be amended at a session held for the Southern Circuit.

A view that the document is not an indictment cannot help the accused ; for they have been duly committed for trial, and if the Attorney-General has not forwarded an indictment to this court it is still open to him to do so. In my opinion, however, the document is an indictment : it so describes itself and it complies with the requirements of section 186 of the Criminal Procedure Code as to the form, contents and signature of an indictment.

The power vested in the Attorney-General by section 43 of the Courts Ordinance to transfer a trial from one court or place to another can, in terms of that section, be exercised by him only by the issue of a fiat, in writing, which must "be filed of record with the proceedings in every case so transferred". No fiat of transfer relating to this case has been received by the court, and I have been assured by the learned crown counsel that no such instrument has been executed by the Attorney-General. A fiat is an order, and an indictment is not a fiat, and cannot be construed as one even if it happens to be signed (as this indictment is not) by the Attorney-General. The presence in the indictment of words

implying that it is a proceeding in the Supreme Court at a criminal session to be held at Colombo for the Western Circuit cannot give to the document the character of a fiat.

Mr. Rajaratnam sought to find in section 165 F of the Criminal Procedure Code support for his contention that the Attorney-General had transferred the trial to Colombo. Sub-section (1) of that section provides that if the Attorney-General is of opinion that the case is one which should be tried upon indictment before the Supreme Court or a District Court, an indictment shall be drawn up and when signed in accordance with the provisions of section 186 (1) shall be forwarded to the court of trial selected by the Attorney-General to be filed in that court; and that the fact that the indictment has been so signed, forwarded, and filed shall be equivalent to a statement that all conditions required by law to constitute the offence charged and to give such court jurisdiction have been fulfilled in the particular case. The argument is that " the court of trial selected by the Attorney-General ", as evidenced by the caption of the indictment, is the Supreme Court sitting at Colombo, and by operation of the provisions of section 165 F (1) there is in effect a statement made on behalf of the Attorney-General that all conditions required by law to give the court jurisdiction to try the case in Colombo have been fulfilled; and, therefore, that there is a statement made on his behalf that he has transferred the trial to Colombo.

It does not seem to be necessary to examine the validity of this argument; for if there is here the equivalent of such a statement it is also apparent that it is the equivalent of a statement that is incorrect. The trial could not have been transferred by the Attorney-General except by a fiat in writing, and there is no such fiat.

A further ground on which the application was opposed was that an indictment cannot be amended before the trial begins. Section 172 (1) of the Criminal Procedure Code provides that " Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the Supreme Court or a District Court with assessors, before the verdict of the jury is returned or the opinions of the assessors are expressed ". It was contended that the reference to " trials before the Supreme Court or a District Court with assessors " implies that an indictment can be amended only after the trial has begun. I am unable to accept this contention. The section only prescribes the point of time before which an indictment or a charge can be altered.

The object of the amendment asked for by the prosecution was to correct the clerical error to which I have referred and the consequential errors. That " Balangoda " was a clerical error for " Balapitiya " would have been clear to the accused and their advisers as soon as they read the indictment, and the amendment sought to be made was therefore one that could cause no prejudice to the accused. The application was therefore allowed.

Application allowed.

1959 **Present: Basnayake, C.J., and Pulle, J.**

THENUWARA, Appellant, *and* THENUWARA and others, Respondents

S. C. 126—D. C. Colombo, 16,607/T.

Appeal—Several respondents—Security for costs of appeal—Notices of tender of security—Point of time at which each of them should be lodged—Failure to observe it—Application for relief—Procedure—Circumstances when relief will be granted—Tender of money as security for costs of appeal—Hypothecation by bond before date of acceptance of security—Regularity—Journal entries—Duty of Judge to be neat and accurate—Civil Procedure Code, sections 92, 754 (2), 756 (1) and (3), 757, 765 (1).

On 4th September 1957 judgment was entered in the District Court. On Saturday, the 14th September 1957, a petition of appeal and the notices of tender of security were lodged in the office of the District Court and " accepted " by the Judge. There were ten respondents to the appeal, including the petitioner-respondent. The notices of tender of security, save the one meant for the petitioner-respondent, were defective because they stated that the appellant would tender security on 19th September 1957 by deposit of Rs. 250 for the costs of the petitioner-respondent only ; no notices of tender of security informing the other respondents that security for their costs of appeal would be tendered on 19th September were lodged in the office of the District Court on 14th September.

On Monday, the 16th September 1957, the appellant filed a motion and moved for the issue on each of the respondents of a fresh notice of tendering security in Rs. 250 for the costs of the petitioner-respondent and separate security in the sum of Rs. 250 for the costs of the other respondents.

Held, that the second set of notices of tender of security handed on 16th September 1957 were not tendered " forthwith " within the meaning of section 756 (1) of the Civil Procedure Code inasmuch as they were not given on the same day as the petition of appeal, viz., 14th September 1957. Accordingly, the appeal should be rejected. In such a case, relief under sub-section 3 of section 756 of the Civil Procedure Code cannot be granted.

Where a sum of money is tendered as security for costs of appeal, hypothecation of that sum by bond may take place before the Court makes its order accepting the security.

Objection to the failure to give security in the manner prescribed by section 756 of the Civil Procedure Code should be raised in the Court of trial. If such objection is taken for the first time in the Supreme Court, the respondent will not be awarded his costs.

Per BASNAYAKE, C.J.—(i) A petition of appeal is received by the Court for the purposes of section 756 of the Civil Procedure Code when it is handed to the appropriate officer of the Court at its office and not within a reasonable time after the Court decides whether or not it should refuse to receive it in terms of section 754 (2) of the Code. (ii) The effect of the word " forthwith " in section 756 (1) of the Civil Procedure Code is that notice of tendering security, unless waived, must be tendered or filed on the day on which the petition of appeal is handed to the appropriate officer of the Court. (iii) Sub-section 3 of section 756 of the Civil Procedure Code was not designed to give relief in cases in which the acts, omissions, or defects for which relief is sought are deliberate or are due to negligence or could have been avoided with the exercise of such care as Proctors are expected to exercise in the performance of their duties. The applicant for relief must satisfy the Court that the mistake, omission, or defect, was due to causes not within his control and that it was not due to his or his Proctor's negligence or want of care and also that the respondent has not been

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materially prejudiced. (iv) Where application for relief is made under section 756 (3) of the Civil Procedure Code, it is essential for the proper determination of the issues involved that a written petition supported by an affidavit or affidavits shall be made by the party seeking relief. (v) It is the duty of Judges of first instance to maintain a neat, legible and accurate journal in each action in compliance with the provisions of section 92 of the Civil Procedure Code.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. F. N. Gratiaen, Q.C.*, and *K. N. Choksy*, for 1st Respondent-Appellant.

Colvin R. de Silva, with *C. G. Weeramantry, Carl Jayasinghe, H. Rodrigo* and *Stanley Perera*, for Petitioner-Respondent.

V. J. Martyn, with *D. T. P. Rajapakse*, for 5th Respondent-Respondent.

Cur. adv. vult.

June 25, 1959. BASNAYAKE, C.J.—

This is an appeal from the judgment of the District Judge of Colombo allowing an application, under section 537 of the Civil Procedure Code (hereinafter referred to as the Code), for the recall of probate of the will of Arthur Silva Thenuwara granted to the appellant, his widow. Of the ten persons who were named as respondents to that application the first is the appellant. The applicant (hereinafter referred to as the petitioner-respondent) and the 3rd and 4th respondents are brothers of the testator while the 2nd, 5th and 6th respondents are his sisters. The 7th to 10th respondents, all of whom are majors, are the children of a deceased sister of the testator. The respondents will be referred to in this judgment in the order in which their names appear in the petition of appeal. The petitioner-respondent alone was represented by a proctor at the hearing of the application. Besides the petitioner-respondent only the 5th respondent appeared at the hearing of the objections to this appeal.

When the appeal came on for hearing learned counsel for the petitioner-respondent took objection to its being heard on the ground that the appellant had failed to comply with certain imperative requirements of section 756 of the Code. Although the notice of tender of security had been given in his case in accordance with the section the petitioner-respondent was nevertheless entitled to object on the ground that there had been a non-observance of section 756. He submitted that the appellant's failure to comply with those requirements was fatal to the reception of the appeal by this court.

Shortly the material facts are as follows :—On 4th September 1957 judgment was delivered in favour of the petitioner-respondent allowing his application for the recall of probate. At 10.35 in the morning of Saturday 14th September 1957 the appellant's proctor lodged in the

office of the District Court a petition of appeal, an application for type-written copies of the record under the Civil Appellate Rules 1938, and other documents referred to in the following motion in writing bearing the caption of the proceedings :—

" I move to tender the Petition of Appeal of the 1st Respondent-Appellant abovenamed against the judgment and order of this Court dated the 4th day of September 1957, together with stamps to the value of Rs. 85 and Rs. 85 for the Secretary's certificate in appeal and the judgment of the Supreme Court.

I also move for a paying-in-voucher for Rs. 50 being fees for a type-written copy of the brief.

I further move for a notice under section 756 of the Civil Procedure Code for service on the Petitioner-Respondent and on each of the 2nd—10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent, that I shall on behalf of the 1st Respondent-Appellant abovenamed on the 19th day of September 1957 at 10.45 o'clock in the forenoon or soon thereafter tender security by deposit of Rs. 250 for the Petitioner-Respondent's costs in appeal and hypothecate the same and will on the said date deposit in Court a sum sufficient to cover the expenses of serving notice of appeal on the Petitioner-Respondent and on each of the 2nd—10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

I also tender notices for service on the Petitioner-Respondent and on each of the 2nd—10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

Colombo, 14th day of September 1957."

The notice of tender of security referred to in the motion reads as follows :—

" Take notice that the Petition of Appeal presented by me in the abovenamed action on the 14th day of September 1957, against the judgment and decree of the District Court of Colombo dated 4th day of September 1957 in the said action, having been received by the said Court, counsel on my behalf will on the 19th day of September 1957 at 10.45 o'clock of the forenoon or so soon thereafter, move to tender security by deposit of a sum of Rupees Two hundred and Fifty (Rs. 250) for the Petitioner Respondent's costs in appeal and by hypothecation of the same and will on the said day deposit in Court a sum of money sufficient to cover the expenses of serving notice of appeal on you."

The minute in the journal of the action made on that day reads—

" (139) Mr. F. J. P. Perera, Pro., for 1st Respondent files petition of appeal against the judgment of this Court dated 4/9/57 together with stamps to the value of Rs. 85 for Secy's Certificate in appeal and Rs. 85 for S. C. Judgment.

He also moves for a p.i.v. for Rs. 50 being fees for typewritten copies.

He further moves for a notice under section 756 of the C. P. C. for service on the Petnr-Respdt and on each of the 2–10 Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt that he will on 19/9/57 at 10.45 in the forenoon or soon thereafter tender security by deposit of Rs. 250 for the Petnr-Respdt's costs in appeal and hypothecate the same and will on the said date deposit in Court a sum sufficient to cover the expenses of serving notice of appeal on the Petnr-Respdt and on each of the 2–10 Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt.

He also tenders notice of security for service on the Petnr-Respdt and on each of the 2–10 Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt : Stamps Rs. 85 affixed to blank forms of certificate in appeal and cancelled.

1. Accept.
2. Issue P. I. V. for Rs. 50.
3. Issue notice of tendering security for 19/9."

On the same day the following further minutes were made in the journal :—

" (140) P. I. V. for Rs. 50 issued to F. J. P. Perera."

" (141) Proctor for 1st Respdt-Appelt tenders application for typewritten copies together with K. R. 0/14 No. 067035 of 14.9.57 for Rs. 50."

" (142) Notice of security issued Petnr-Respdt 2–6, 8–10 and Pro. for Petnr-Respdt to W. P. and on 7th Respdt to Gampaha."

It is not clear whether these minutes are signed by the District Judge or someone else. If they are not signed by the District Judge it is irregular and contrary to the requirements of section 92.

On 16th September 1957 the following further motion in writing bearing the caption of the application was filed by the appellant's proctor :—

" The Petition of Appeal of the 1st Respondent-Appellant against the judgment and order of this Court having been filed, I move for a notice under Section 756 of the Civil Procedure Code on the Petitioner-Respondent and on each of the 2nd to 10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent, that I shall on behalf of the 1st Respondent-Appellant abovenamed on the 19th day of September 1957 at 10.45 o'clock in the forenoon or soon thereafter tender security by deposit of Rs. 250 for the Petitioner-Respondent's costs in Appeal and a further sum of Rs. 250 for the 2nd to 10th Respondents-Respondents costs in Appeal and hypothecate the same by bond and will on the said date deposit in Court a sum

sufficient to cover the expenses of servince (sic) notice of appeal on the Petitioner-Respondent and on each of the 2nd to 10th Respondents-Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondent.

"I also tender notices for services on the Petitioner-Respondent and on each of the 2nd to 10th Respondents Respondents and on Mr. R. L. de Silva, Proctor for the Petitioner-Respondents."

The notice of tender of security lodged with the above motion reads—

"To: 1. The Petitioner-Respondent, 2, 3, 4, 5, 6, 8, 9 and 10 Respondents abovenamed.

2. Mr. R. L. de Silva
Proctor for Petitioner-Respondent
No. 39 Ferry Street, Hultsdorf, Colombo.

'Take notice that the petition of appeal presented by me in the abovenamed action on the 16th day of September 1957 against the judgment and decree of the District Court of Colombo dated 4th day of September 1957 in the said action, having been received by the said court, Counsel on my behalf will on the 19th day of September 1957 at 10.45 o'clock of the forenoon or so soon thereafter, move to tender security by deposit of a sum of Rupees Two hundred and Fifty (Rs. 250) for the Petitioner-Respondent's costs in appeal and Rupees Two hundred and Fifty (Rs. 250) for the 2nd to 10th Respondents-Respondents costs in appeal and by hypothecation of the same by Bond and will on the said day deposit in Court a sum of money sufficient to cover the expenses of serving notice of appeal on you '."

The following minute has been made in the journal in respect of this motion :—

"(143) 16.9.57—Pro. for 1st Respdt-Appellant moves for a notice under section 756 on the Petnr-Respdt and on each of the 2–10 Respdts-Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt that he shall on behalf of the 1st Respdt-Appellant on the 19/9/57 at 10.45 in the forenoon or soon thereafter tender security by deposit of Rs. 250 for the Petnr-Respdt's costs in appeal and a further sum of Rs. 250 for the 2–10 Respdts-Respdts costs in appeal and hypothecate same by Bond and will on the said date deposit in court a sum sufficient to cover the expenses of serving notice of appeal on the Petnr-Respdt and on each of the 2–10 Respdts-Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt. He also tenders notice for service on Petnr-Respdt and on each of the 2–10 Respdts and on Mr. R. L. de Silva, Pro. for Petnr-Respdt."

The above minute is followed by another which reads: "Issue Notices retble 19.9.57."

By 19th September 1957 the notices lodged on 14th September had been served on the petitioner-respondent and the 2nd, 3rd, 4th, 5th, 8th, 9th and 10th respondents, but not on the 6th and 7th respondents.

The precepts for service in respect of those two respondents were endorsed " Extended and reissued for service returnable 23rd September 1957". In the case of the 6th respondent a further extension was granted and substituted service by affixing the notice to the gate and outer door was ordered. Although he did so, the learned District Judge had no power to extend the date on which the appellant stated, in his notice, that he would give security. That is evident from the section and it has also been so held by this court (*Rahuman v. Mohamed*[1]; *Sulama Levai v. Iburai Naina*[2]). Except in the case of the 7th respondent each of the notices appears to have been addressed to the Petitioner-respondent and 2nd to 6th and 8th to 10th respondents-respondents and Mr. R. L. de Silva, proctor for the petitioner-respondent.

On 25th September 1957 the District Judge made order accepting security and ordered the issue of notice of appeal returnable on 17th October 1957. By that date notice of appeal had been served on the petitioner, his proctor, and 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents and order was made —" Forward record to S. C."

Of the objections taken by the petitioner-respondent the most important is that the notice of tendering security has not been given to the other respondents in the manner prescribed by section 756. This is a convenient point at which that section may be examined. It reads—

> " When a petition of appeal has been received by the court of first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days, or where such court is a Court of Requests, fourteen days, from the date when the decree or order appealed against was pronounced, computed as in the same section is directed for the periods of ten days and seven days therein respectively mentioned, tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent. And on such day the respondent shall be heard to show cause if any against such security being accepted. And in the event of such security being accepted and also the deposit made within such period, then the court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the Fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the court of first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or order appealed against; retaining, however, an office copy of the decree or order appealed against, for the purposes of execution if necessary. And such proceedings shall be accompanied by a certificate (form No. 128, First Schedule) from the secretary or clerk of the court, stating the dates of the institution and decision of the case, in whose favour it was decided, the respective days on which petition of appeal was filed and security given, and whether either the plaintiff sued or the defendant defended in *forma pauperis*. . . ."

[1] *(1949) 40 C. L. W. 41.* [2] *(1910) 2 Cur. L. R. 183.*

For the purpose of deciding the objection it is necessary to ascertain the meaning and content of the words—

(*a*) " when a petition of appeal has been received by the court of first instance under section 754 " ,

and

(*b*) " the petitioner shall forthwith give notice to the respondent."

In deciding the question whether the words " received by the court " in (*a*) above mean received by the Judge himself or the appropriate officer of the court office, it is necessary to ascertain the meaning of the word "court" in this context. The expression though defined in section 5 is not used throughout the Code in the sense of a Judge empowered by law to act judicially. The meaning of the expression varies with the context. In certain contexts it means the Judge exercising judicial functions, in others it means the Judge exercising ministerial functions, in still others it means the appropriate ministerial officer of the court and not the Judge himself. There are also contexts in which the expression is used to mean the court-house, the hall in which the Judge sits when exercising his judicial functions, or the institution known as the District Court or Court of Requests of a particular district or division.

Those functions of the court which involve the making of a decision or the giving of an order, permission, or leave, or a direction must be performed by the Judge himself. These functions I shall for convenience call judicial functions. Examples of such functions are found throughout the Code and the sections are too numerous to mention here. It is sufficient to say that those functions are conferred by words such as " the court may direct ", " the court sees reason to require ", " the court is satisfied ", "the court shall order ", " allowed by the court ", " imposed by the court ", " confirmed by the court ", and " the court thinks fit ". Whether such function may be performed when the Judge is not sitting in open court would depend on its nature and on the provision of the Code which prescribes the function. Neither the Code nor the Courts Ordinance expressly authorises the performance of any of the functions of the court by the Judge when he is not sitting in open court. But there are decisions of this court which hold that functions vested by the Code in " the court " need not in every case be performed in open court. (*Mohidin v. Nalle Tamby* [1]; *Kulantaivelpillai v. Marikar* [2]). But where, as in sections 39, 184, 186 and 373, express provision is made by the Code that certain functions should be performed in open court, those functions cannot be validly performed elsewhere. There are other functions vested in the court which do not involve the making of a decision or the giving of an order, permission, or leave, or a direction. They are not judicial functions and may for convenience be called ministerial functions. The ministerial functions of the court fall into two categories. Those which the Judge himself must perform, though not in every case, in open court and those which he need not perform himself. In the latter category are functions which involve manual

[1] (*1896*) *1 N. L. R. 377.* [2] (*1918*) *20 N. L. R. 471.*

acts and which by their nature are not such as need be performed by the Judge himself. They are mainly functions connected with receiving and filing in the proper place documents tendered by parties, or receiving documents forwarded to the court by other courts, the Fiscal and the Kachcheries, and the making of entries in registers or returns. As in the case of the judicial functions, the ministerial functions are found throughout the Code and the sections are too numerous to be specified. Without attempting to give an exhaustive list of the various contexts in which the ministerial functions of the " court " are prescribed it would be sufficient to say that such functions are conferred by words such as " application to court ", " file or filed in court ", " apply to court ", " deposit or deposited in court ", " deliver to the court ", " pay into court ", " paid into court ", " paid out of court ", " presenting to the court ", " upon such notice being received by the court ", " sending to such court ", " Fiscal shall certify . . . to the court ", " notified to the court ", " notice shall be given to the court ", " shall return . . . to the court ". Where the receiving and filing of documents or the receiving of money or stamps is required by the Code the functions of the " court " in receiving and filing them may in my opinion properly be performed by the appropriate member of the court staff ; but it is the Judge alone that has power to make any order thereon.

The case of *Queen v. Judge of Bloomsbury County Court* [1] shows that the position is not different under the English statutes governing court procedure. In that case Denman J. stated " There are many cases in the superior courts where an application to the court does not mean a formal application to the Judge or Judges in open court, but to the Judge's clerk or to a master."

A discussion of the words of section 756 referred to at (*a*) above necessarily involves a consideration of section 754 as it is expressly mentioned therein. That section requires that the petition of appeal should be " presented to the court " of first instance. I would construe the words " presented to the court " therein as meaning lodge with the proper officer of the court—not hand over to the Judge in open court. The long-standing practice in the courts is in accord with this construction.

It is common ground that it is not the practice to hand over a petition of appeal to a Judge sitting in open court. The practice is to hand over a petition of appeal at the office of the court to the officer whose duty it is to receive such petition. Once that is done the petition is submitted to the Judge by the proper officer with the record of the case and a minute for the Judge's signature.

I now come to the word " receive " in the same section. It occurs twice therein—first in the context " the court to which the petition is so presented shall receive it ", and next in the context " If those conditions are not fulfilled it shall refuse to receive it". In the first context in which the word " receive " occurs it is obligatory on the court to receive the petition. The receiving contemplated there is the manual act of accepting the document. It involves no judicial process. When the

[1] *(1886) 17 Q. B. D. 788.*

document is handed over at the office of the court by the petitioner or his proctor in obedience to the requirement that the petition should be presented to the court within a prescribed period the appropriate officer in the office of the court must receive it and submit it to the Judge. In this context " court " does not necessarily mean the Judge himself; it includes the appropriate officer of the court office. The Judge may himself receive the petition of appeal if it is handed to him by the appellant or his proctor; but if it is handed to the appropriate officer of the court instead of to the Judge it is nevertheless received by the court. In the second context " it " means the Judge himself and no other because the act of refusing to receive the petition is a judicial function which the Judge alone can perform. The Judge has a function to perform, viz., to refuse to receive it if the conditions in the section are not fulfilled. That function is not the manual act of accepting the petition from the appellant or his proctor, but, once the petition has been handed in, the mental act of deciding whether the conditions prescribed by section 754 have been fulfilled. If they have not been fulfilled the Judge must refuse to receive it. There is no time limit for the performance of that function. He can perform it within a reasonable time after the petition of appeal has been lodged at the office of the court. The function may be discharged by making an order rejecting the petition for the reason that the prescribed conditions have not been fulfilled. The document itself should not be returned to the party that lodged it. The effect of the order refusing to receive the petition is that the appellant may not proceed under section 756.

The present practice seems to be, judging by minute (139) quoted above, for the Judge to make an order that the petition be accepted; but there is no requirement of the Code that such an order should be made. No legal consequences attach to such an order. Although learned counsel both for the appellant and for the respondent argued the case on the footing that " receive " in the first context meant received by the Judge, I find myself unable to accept that view, even though there is support for it in the observations of Bertram C.J. in the case of *Fernando v. Nikulan Appu* [1]. With the greatest respect for so eminent and distinguished a Chief Justice of this court I find myself unable to subscribe to those observations which I think are *obiter* and are no part of the *ratio decidendi* of that case. I quote them below—

> " The receipt is the act of the Court, and before receiving the petition the Court must verify the fact that the petition is in time. It is not for the Court to communicate the receipt to the petitioner. It is for the petitioner to ascertain whether his petition has been received or not. In this case it is not clear at what precise time the Judge ' received ' the petition. He may well have done so at the end of the day on the conclusion of the Court."

The view of Bertram C.J. does not take into account the words of section 754 (2) which make it obligatory on the court to receive the petition when it is presented regardless of whether the prescribed conditions have been fulfilled or not and also make it obligatory to refuse to

[1] *(1920) 22 N. L. R. 1.*

receive it if the prescribed conditions are not fulfilled. If " receive " where it occurs first is construed as receive after verifying whether the prescribed conditions have been fulfilled, then the court will not be complying with the requirement embodied in the words " shall receive ". Without receiving the document into its hands the court cannot perform the function of " refusing to receive it ", because it must examine the document to arrive at its decision. The view of Bertram C.J. also imposes on the appellant the burden of maintaining a watch in order to ascertain when the petition of appeal receives the attention of the Judge in order that he may " forthwith " thereupon tender security. It may also result in shutting out a petition of appeal tendered on the last day if, by any chance, the Judge fails at the end of each day's work in court to stay over to attend to petitions lodged in the course of the day. The construction I seek to place on section 754 (2) enables the court to discharge both the obligations of " receiving " and of " refusing to receive " the petition of appeal while no undue burden is imposed upon the appellant or his proctor.

Now I come to the second question propounded by me—What is the meaning of the word " forthwith " in section 756 ? Its ordinary meaning is " immediately ", " at once ", " without delay or interval ". In section 756 the notice of tender of security has to be given forthwith upon the petition being received by the court. The words " under section 754 " in section 756 indicate that the word " received " in the latter section bears the same meaning as it bears in the place where it first occurs in the former. The petition of appeal is therefore received by the court for the purposes of section 756 when it is handed to the appropriate officer of the court at its office. Learned counsel for the appellant placed great reliance on the meaning given to the expression " forthwith " in *Fernando v. Nikulan Appu* (*supra*). Bertram C.J. observes therein—

> " It appears that hitherto the word ' forthwith ' has not been in practice strictly construed. I am prepared to take this circumstance into account in considering whether in this particular case the delay has been explained. In all the circumstances I am not prepared to declare that the delay of one day prevents us from holding that the notice was given ' forthwith ' within the meaning of the section.
>
> " I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

Even according to the view of Bertram C.J. a notice not filed on the *same day* as that on which the receipt by the Judge is verified or can reasonably be verified is not given " forthwith ". I have already explained above why I am unable to share the view that in order to give the notice of tender of security it is necessary that the Judge should make an order " receiving " the petition of appeal.

Apart from this difference of opinion I am in respectful agreement with the view that " forthwith " should be construed in the context as meaning the same day on which the petition of appeal is presented to the court and received by it. I use the words " received by it " in the sense which I have explained above. That is also the meaning given to the expression " forthwith " by a Bench of five Judges of this court in the case of *de Silva v. Seenathumma* [1]. That Bench was specially constituted by the Chief Justice in 1940 in view of the " misapprehension and uncertainty " as to the meaning of section 756. In that case Soertsz J. who delivered the judgment of the court adopted the view of Bertram C.J. in *Fernando v. Nikulan Appu* (*supra*) that what was intended by the words " give notice forthwith " in the section was not that the notice should be served forthwith but that it should be " tendered or filed " forthwith. But the Judges do not appear to have accepted the view, expressed for the purpose of that particular case, that notice of security given a day after the day on which the petition is presented is given " forthwith ". They appear to have preferred the general rule expressed by Bertram C.J. " that notice should be filed the same day " as that on which the petition is received, for, Soertsz J. in summing up the conclusions of the court says, " notice of security, unless waived, must be tendered or filed on the day on which the petition of appeal is received by the court." In neither *Fernando's* case (*supra*) nor *de Silva's* case (*supra*) did the questions that have been raised in the instant case arise for decision. This is the first time that, so far as reported decisions go, this court has been called upon to determine the meaning of the expressions " court " and " receive " in sections 754 (2) and 756.

Now I shall revert to the facts of the instant case. The petition of appeal and the notices of tender of security were lodged in the office of the District Court on the same day and at the same time ; but the notices, save the one meant for the petitioner-respondent, were defective in that they informed the other respondents that security would be tendered for the costs of the petitioner-respondent on 19th September 1957. No notice of tender of security informing the other respondents that security for their costs of appeal would be tendered on 19th September was lodged in the office of the District Court on 14th September.

The notices lodged in the office of the District Court on 16th September were in accordance with form 126 of the First Schedule to the Code and informed each of the respondents that security would be given for the costs of that respondent, but they contained the erroneous statement that a petition of appeal was presented on 16th September whereas the previous notices contained the correct statement that a petition of appeal was presented on 14th September. Learned counsel for the appellant sought to justify the second notice lodged on 16th September as being the correct notice given forthwith, in the sense of within a reasonable time, after the proctor had ascertained the fact that the Judge had received the petition of appeal.

[1] (*1940*) *41 N. L. R. 241.*

It is therefore necessary to decide the following questions that arise for consideration :—

(*a*) What was the day on which the petition of appeal was received by the court in the instant case ?

(*b*) Were the notices of security tendered on the same day ?

The petition of appeal bears on its face the seal of the District Court of Colombo with the date " 14th September 1957 " in the centre of it. The words " Received at 10.35 a.m. today " are written over it and initialled by the writer. The minute in the journal of the same date quoted above shows that the petition of appeal was handed in at the office of the District Court on 14th September 1957 and submitted on the same day to a Judge of the court who made the orders referred to therein by initialling the minute.

It is common ground that the District Court of Colombo does not ordinarily sit on a Saturday and that 14th September being a Saturday no District Judge was sitting in open court on that day. It is also common ground that, on every Saturday, one of the District Judges is present in his chambers and attends to such work of the court as may be performed in chambers. The minutes (140), (141) and (142) indicate that after minute (139) in the journal was initialled by the Judge in chambers steps were taken to give effect to his orders by issuing a paying-in-voucher for Rs. 50 and also issuing the notices of security to the Fiscal for service on the respondents. The precepts to the Fiscal to serve the notices of security on the respondents bear the date 14th September 1957. The minutes (139), (140), (141) and (142) establish that the petition of appeal was handed in at the office of the District Court and that the officer whose duty it was to do so submitted it to the Judge in chambers on 14th September 1957 and that he made the orders contained in minute (139), and that the steps referred to in minute (140), (141) and (142) of the journal were taken thereafter on the same day.

In my view the petition of appeal was received by the " court " on 14th September 1957 when it was lodged in the office of the court. The notices of security tendered on the same day informed only the petitioner-respondent that security for his costs of appeal would be tendered on the date specified therein. Certain notices meant for the other respondents were in fact delivered ; but they were to the effect that the appellant would tender security for the petitioner-respondent's costs of appeal.

In the case of *Sivagurunathan v. Doresamy* [1] this court held that where a statute requires that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form. A notice under section 756 must be addressed to the party to whom notice has to be given and delivered to that party and inform him that on the date specified therein security for his costs in appeal will be tendered. Section 756 requires that notice of security

[1] *(1951) 44 C. L. W. 38.*

should be given to each of the respondents named in the petition of appeal. (*Katonis Appu v. Charles and another* [1]; *Sivagurunathan v. Doresamy* (*supra*)).

The appellant has therefore not given notice of security to respondents other than the petitioner-respondent as required by section 756. The second set of notices of tender of security handed on 16th September though properly addressed to the respective respondents were not tendered " forthwith " as they were not given on the same day as the petition of appeal. Now what is the consequence of that failure ? This court has authoritatively decided in *de Silva's* case (*supra*) that non-compliance with the section is fatal to the appeal and that it cannot be entertained by this court.

The question that arises next is whether relief under sub-section (3) of section 756 can be granted. That sub-section reads—

> " In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

Before considering the meaning of the words used in the above provision I shall discuss its ambit. At the time of the introduction in 1921, by amending Ordinance No. 42 of 1921, of the provision now appearing as sub-section (3), which was so numbered at the revision of the legislative enactments in 1938, there was and there still is a provision of the Code (s. 765) which empowers this court to admit and entertain a petition of appeal from the decree of any original court, although " the provisions of sections 754 and 756 have not been observed." In introducing the provision for relief in subsection (3) the legislature clearly did not intend to make provision for the very matters for which provision already existed in section 765 (1). Therefore in determining the scope of sub-section (3) there must be excluded from it those matters which fall within the ambit of section 765 (1). As that provision enables the Supreme Court to admit and entertain a petition in a case where the provisions of section 754 or 756 or both have not been observed, there must be excluded from the scope of subsection (3) all cases of non-observance of or non-compliance with the provisions of section 756. Apart from the above considerations the very words " any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section " seem to exclude from its ambit cases of non-compliance of the provisions of the section.

The view that cases of non-compliance with the provisions of section 756 do not fall within the ambit of subsection (3) is of long standing. In the case of *Silva v. Goonesekere* [2], Fisher C.J. observed—

> " I do not think that this additional paragraph can be held to apply to cases where there has been a substantial non-compliance with the provisions of the section. In my opinion it applies to more or less

[1] (*1933*) *12 C. L. W. 162.*

[2] (*1929*) *31 N. L. R. 134.*

trivial omissions where it may be said that although the strict letter of the law has not been complied with the party seeking relief has been reasonably prompt and exact in taking the necessary steps."

In the same case Drieberg J. who took the same view quoted the statement of objects and reasons of Ordinance No. 42 of 1921 which are as follows :—

" It has been found lately that a number of appeals have had to be dismissed owing to failure of strict compliance with the provisions of section 756 of the Civil Procedure Code. This non-compliance has in certain cases been in respect of matters not of material importance ; and it is thought well to give the Supreme Court power to waive such failures to comply in cases where the respondent is not materially affected by such waiver."

In *Zahira Umma v. Abeysinghe et al.* [1] a Bench of three Judges affirmed the view previously expressed that the provision for relief did not extend to cases of non-compliance with the requirements of section 756. Abrahams C.J. who delivered the judgment of the court states—

" I think, however, that if we gave relief in this case we should be completely ignoring that provision of section 756 which says that notice of security must be given and the fact that no material prejudice has resulted, and I see no reason why in the circumstances we should inquire as to whether it has resulted, cannot be regarded as an excuse for non-compliance with an essential term of section 756. The petitioner says that she did everything she could, but she has not given any excuse for not doing what she should.

" It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned."

This decision has since been followed in *Siyadoris Appu v. Abeyenayake* [2] and in *Suppramaniam Chettiar v. Senanayake and others* [3], where de Kretser J. refused to grant relief in a case in which no notice of tendering of security and no security had been given to two of the respondents named in the petition of appeal. He refused to do so on the ground that the provision applies only to formal defects and not to a non-compliance with the requirements of section 756. This was the view taken by Abrahams C.J. earlier in *Katonis Appu v. Charles and another* (*supra*) wherein he stated—

" In this connection, I would refer to *Saleem v. Yoosoof et al.* (17 Ceylon Law Recorder 117) and, as this has been complete non-compliance with the provisions of the law, I do not see how it can be excused."

[1] *(1937) 39 N. L. R. 84.*
[2] *(1938) 13 C. L. W. 22 ; 18 Law Recorder 120.*
[3] *(1939) 16 C. L. W. 41.*

Finally it was confirmed by the authoritative decision of a Bench of five Judges in *de Silva v. Seenathumma* (*supra*) where it was held that relief under subsection (3) cannot be given in a case in which no notice of tender of security has been given as required by the section. In that case Soertsz J. who delivered the judgment of the court elaborated the view expressed earlier by Abrahams C.J. in *Zahira Umma v. Abeysinghe* (*supra*) where it was held that relief under subsection (3) cannot be given in a case in which no notice of tender of security has been given as required by the section, thus—

> " The first part of that statement is intended to lay down that where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for peremptory requirements of the law must be given full effect. "

Having determined its ambit by exclusion of cases of non-compliance I shall now proceed to examine the meaning of the subsection. It is permissible to consult the dictionary when ascertaining the meaning of a word in a statute. Now according to the dictionary (S. O. E. D.) the expressions " mistake ", " omission ", and " defect " have the following meanings :—

" Mistake " means a misconception of the meaning of something, an error or fault in thought or action.

" Omission " is the act of omitting or fact of being omitted, and " omit " means to leave out, not to insert or include.

" Defect " means the fact of falling short, lack or absence of something necessary to completeness, a fault, flaw or imperfection.

" Mistake " is also discussed in Sweet's Law Dictionary thus : " Although ' mistake ' and ' ignorance ' are strictly speaking not identical, the one being positive and the other negative, they are commonly used as convertible terms in law, their effects being identical. " Mistake " may then be defined as a misapprehension as to the existence of a thing, arising either from ignorance in the strict sense, that is, absence of knowledge on the subject, or from mistake in the strict sense, that is, a false belief on the point."

It would appear from the history of the legislation as set out in the decisions I have examined above and the setting in which the subsection occurs that it was not designed to give relief in cases in which the acts, omissions, or defects for which relief is sought are deliberate or are due to negligence or could have been avoided with the exercise of such care as proctors are expected to exercise in the performance of their duties.

The subsection vests in this court a discretionary power to be exercised in cases which fall within its ambit. The existence of a mistake, omission or defect of the kind contemplated in it will by itself not be a ground for the grant of relief. It is not to be given for the mere asking. It would not be advisable to attempt to compile an exhaustive list of cases that fall within the ambit of subsection (3). In our reports there

are instances in which relief has been given. The considerations that should govern the grant of relief would depend on the circumstances of each case. The burden on an applicant for relief under the subsection is not less than that imposed on an applicant for leave under section 765. An applicant for relief must, as in the case of an application under section 765, satisfy the court that the mistake, omission, or defect, was due to causes not within his control and that it was not due to his or his proctor's negligence or want of care and also that the respondent has not been materially prejudiced (*Rahuman v. Mohamed*[1]; *Noris Appuhamy v. Udaris Appu*[2]). The adoption of any other standard would place a premium on laxity and encourage appellants and their proctors not to devote sufficient attention or attach sufficient importance to the procedure governing appeals.

Now reverting to the instant case it would appear that the appellant's difficulties in this case are entirely due to her proctor's negligence in not examining with care the notices of tender of security lodged with the petition of appeal on 14th September. This court has in a number of cases held that the negligence or mistake of the proctor of a party is not a ground on which relief can be claimed.

In the case of *Rankira v. Silindu et al.* [3] which was an application for leave to appeal notwithstanding lapse of time Middleton J. observed—

> "In this case I am asked to admit a petition of appeal notwithstanding lapse of time, and it is clear that the petition is out of time solely and entirely by the laches of the proctor engaged by the applicant, and I take it when a proctor is retained in an action he becomes the recognized and accredited full agent of the party in the action, and any act of his in the proceedings must be looked upon as an act of the party himself. He is also fortified by the peculiar technical knowledge that his office is clothed with, and if he makes an error, it is to all intents and purposes the error of his client which that client must be responsible for."

The same principle has been laid down in *Silva v. Goonesekera* [4] and in an unreported case in S. C. Min. Aug. 23, 1907—D. C. Galle 8398, both of which are referred to by Middleton J. In the case of *Julius v. Hodgson* [5] this court refused to grant relief in a case where an appeal petition was not presented in time owing to the default of the proctor of the party seeking to appeal. This case was followed in *Mendis v. Mendis and others* [6] where relief was refused against the mistake of the proctor of the party in computing the appealable period. In the case of *Nagendran v. Algina Peiris* [7] relief under subsection (3) was refused as the default was due to the proctor's incompetence or negligence.

The conclusion I have reached on the main objection makes it unnecessary for me to deal with the other points. But I wish to refer to one of those points as a question of practice is involved. Objection was taken to the execution of the bond hypothecating the money in deposit

[1] (*1949*) *40 C. L. W. 41.*
[2] (*1957*) *58 N. L. R. 441.*
[3] (*1907*) *10 N. L. R. 376.*
[4] (*1907*) *1 A. C. R. 100.*
[5] (*1908*) *11 N. L. R. 25.*
[6] (*1916*) *2 C. W. R. 155.*
[7] (*1953*) *49 C. L. W. 26.*

before the date on which the security was accepted. The appellant offered security by the deposit of Rs. 250 and hypothecation of that sum by bond. Before the court can accept the security the perfected bond must be submitted to it. Section 757 also indicates it. My view finds support in the cases of *Kandappan v. Elliot* [1] and *Mendis v. Jinadassa* [2] wherein De Sampayo J. says—

> " When the rest of the section is read with the expression ' accepted ', it appears clear that ' acceptance ' really implies ' completion ' of the security within the time limit, namely, twenty days. It cannot be completed unless the bond provided for in section 756 is executed."

The objection based on the ground that the hypothecary bond was executed before the acceptance of the security by the court is therefore not sound.

Learned counsel for the appellant submitted that it was highly undesirable that parties should raise objections of this nature in this court over a year after the petition of appeal was presented. He submitted that objection to the failure to give security in the manner required by section 756 should be raised in the court of trial, which is empowered to decide the matter and hold that the appeal has abated in a case where the petitioner has failed to give security and to make the deposit as provided in the section. I am inclined to agree with learned counsel that any objection that can be taken before the trial Judge should be taken before him, before the petition of appeal is forwarded to this court, and that respondents should not wait till the hearing of the appeal to do so. Where an objection is successfully taken in the lower court the record with typewritten copies of the briefs will not be forwarded to this court, nor will it be necessary for the appellant to go to the expense of retaining counsel to argue the appeal. We shall therefore in future not only not allow costs to a respondent who has failed to take an objection which he may properly have taken before the trial Judge and which he successfully takes here in appeal, but also order him to pay the appellant the costs he would have been saved if the objection had been taken timeously. I am fortified in the view I have expressed above by the judgment of Bertram C.J. in *Kangamy v. Ramasamy Rajah* [3]—

> " I think it is desirable if it is in the power of the party to raise the point in the District Court, that he should do so there, and that, if he prefers to wait until the case comes to the Supreme Court before taking the point, he should then run the risk of losing his costs."

There is one other matter to which I should like to refer and that is the form in which applications for relief under section 756 (3) should be made. There is no uniform practice. In some cases, as in the instant case, the appellant's counsel makes the application orally, in the course of his argument of an objection taken to the hearing of the appeal, and invites the court to grant relief in the event of the respondent's objection being upheld. This court is at a disadvantage in dealing with such an oral application. The decision of an application under section 756 (3) involves

[1] *(1892) 1 S. C. R. 37; 2 C. L. R. 17.* [2] *(1922) 24 N. L. R. 188.*
[3] *(1918) 21 N. L. R. 106.*

the decision of questions of fact. The material necessary for the decision of such questions should be placed before the court in an affidavit or affidavits which should be attached to the petition. If the respondent does not admit the appellant's version of the facts he should be afforded an opportunity of filing a counter affidavit or affidavits. This court cannot decide such a question of fact as whether " the respondent has not been materially prejudiced " without the necessary material before it. It is therefore in the interests of all parties, and essential for the proper determination of the issues involved in an application for relief under subsection (3), that a written petition supported by an affidavit or affidavits shall be made by a party seeking relief. The burden is on the party seeking relief to establish that his case falls within the ambit of subsection (3) and to place before the court all the facts on which he relies for the grant of relief. That this is the proper procedure to be followed in obtaining relief is also indicated in the cases of *Zahira Umma v. Abeysinghe* (*supra*) and *Rahuman v. Mohamed* (*supra*). In the instant case the appellant tendered an affidavit from her proctor which we did not entertain, as it was for the purpose of showing that the action he took was correct and according to law, and not for the purpose of the application for relief.

Learned counsel for the appellant strenuously maintained that there had been no mistake, omission, or defect, on her part, and at the same time asked for relief. It seems to me that the basis of an application under subsection (3) is the existence of an admitted mistake, omission or defect. The applicant should in seeking relief admit the fact that a mistake had been made or that there had been an omission or that a defect exists and state what it is and ask for relief against such mistake, omission or defect.

Whether a mistake or omission has been made by the appellant is a matter within his knowledge. If he does not admit by way of affidavit that he has made a mistake or that an omission has occurred then there would be no material before the court that his act or omission is not deliberate. The court does not lend its aid even under subsection (3) to those who deliberately flout the requirements of the law. The same principle would govern the grant of relief against a defect.

The appeal is rejected. We make no order for costs as the main objection is one that the respondent was free to take in the court below.

Before I part with this judgment I must not omit to refer to the unsatisfactory manner in which the journal of this action has been maintained. Going by the records that have come up before me in appeal I cannot escape the conclusion that Judges of first instance do not seem to realise that it is their duty to maintain a neat, legible and accurate journal in each action. They should supervise and control the recording of minutes in the journal and not leave it entirely to their clerks. Section 92 of the Civil Procedure Code declares that the journal shall be the principal record of the action, and that section requires that the Judge shall sign and date each minute. The signatures to the minutes in this case are illegible and the minutes are not dated. Judges should not disregard express provisions of the Code. On the contrary

they should take pains to observe them. They should write their signatures legibly so that it will appear that the minutes have been signed by the Judges themselves.

In the instant case especially in regard to the entries material to this appeal, the minutes have been so carelessly, illegibly, and untidily written with erasures, cancellations and corrections that the journal does no credit to the premier District Court of this country. The irregularities are so many that learned counsel for the petitioner-respondent suggested that some person interested in the appellant had been at work. I am unable to say that the suggestion is entirely unfounded especially as the portion of the all important minute (139) where the date should have appeared under the Judge's signature is not there.

I hope that Judges of first instance will take to heart these remarks of mine and give the journal of an action or proceeding the attention that it deserves as the principal record of the action.

PULLE, J.—

Before the hearing of the appeal in this case the petitioner-respondent gave to the Proctor for the 1st respondent, who is the appellant, a written notice dated 22nd November, 1958, in which were formulated the grounds on which it was proposed to take objection to the validity of the appeal. The petition of appeal bearing the date 14th September, 1957, was placed in the record on the same day and submitted to an additional District Judge in Chambers and the order made thereon, also on the same date, is that it be " accepted ". The argument proceeded on the basis that the " receiving " of a petition of appeal for the purpose of section 754 (2) is a judicial act and that in the present case that act was performed when the Judge signed the journal entry No. 139. Section 756 (1) of the Civil Procedure Code provides, *inter alia*,

" When a petition of appeal has been received by the court of the first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days . . . from the date when the decree or order appealed against was pronounced . . . tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of appeal on the respondent."

Along with the petition of appeal the Proctor for the appellant tendered for service, through the Fiscal, on the petitioner-respondent and his Proctor and on the other respondents to the appeal notices informing them of the tender of security. On the same day on which the petition of appeal was accepted by the Judge, namely, the 14th September, 1957, these notices were placed in the hands of the Fiscal who took the usual steps to have them served. Except the notices intended for the petitioner-respondent and his Proctor the rest were admittedly bad, because the notice intended for the others stated that the appellant would tender security not for their costs of appeal but for the costs of the petitioner-respondent.

On Monday, the 16th September, 1957, the appellant filed a motion and moved for fresh notices tendering security in Rs. 250 for the costs of the petitioner-respondent and separate security in the sum of Rs. 250 for the costs of the other respondents. The submission on behalf of the petitioner-respondent and the 5th respondent is that the appellant did not comply with the imperative provision in section 756 (1) in that he failed " forthwith " to give the specified notices when the petition of appeal had been received by the Judge on the 14th September and that, therefore, the appeal should be rejected. This submission was based largely on the decision given by a bench of five Judges in *De Silva v. Seenathumma et al.* [1]. The ruling of this bench was that " notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court."

The second submission that the appeal should be rejected is based on that part of section 756 which provides for giving notice of appeal after the security tendered by the appellant has been accepted. It reads as follows :

" And in the event of such security being accepted . . . then the court shall immediately issue notice of appeal together with a copy of the petition of appeal, to be furnished to the court for that purpose by the appellant, to the Fiscal for service on the respondent who is named by the appellant in his petition of appeal, or on his Proctor if he was represented by a proctor in the court of the first instance, and shall forward to the Supreme Court the petition of appeal together with all the papers and proceedings of the case relevant to the decree or the order appealed against."

It is alleged that the appellant tendered for service along with the notices of appeal two copies less of the petition of appeal than were needed for service on the petitioner-respondent and his Proctor and on the other respondents, with the result that all the respondents could not have been served with copies of the petition of appeal.

Thirdly, there was a group of objections associated with the actual tender and acceptance of security for the costs in appeal of all the parties opposed to the appellant. The notices handed to court on the 14th and 16th September for service specified 19th September as the day on which the appellant would tender security for costs. It was not done on that day because all the notices—there were two sets of them—could not be served before that day. It may here be mentioned that the 2nd to 10th respondents to the petition filed by the petitioner-respondent contesting the will did not at any time in the court below enter an appearance and, therefore, difficulties with which one is familiar were bound to arise in attempting to serve processes on parties at addresses not given by the appellant but by the petitioner-respondent. It so happened in this case that two of the respondents were not found at the places to which the notices were directed, so that when the notices were ultimately served the date for tendering security, namely, 19th September—which could not be altered—had already passed. In regard to the tendering of

[1] *(1940) 41 N. L. R. 241.*

security it was contended that as the bond hypothecating the two sums of Rs. 250 had been executed on the 23rd September and the court " accepted " the security on the 25th September there had been a failure to " tender " security prior to its acceptance by court. Assuming that the notices of tender of security had been given " forthwith " in terms of section 756 it could not be argued, having regard to the events which occurred after the notices were handed in for service, that the appeal had necessarily to be rejected. Provision is made in sub-section 3 of section 756 that

" In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem fit. "

It was not necessary for the appellant to invoke the relief provided by this sub-section because in my opinion the bond which had been duly executed on 23rd September could become valid security in the sense that the obligor would become liable at the time the court accepted it and incorporated it in the record. I do not see any merit in the argument that there was a failure to comply with section 756 (1) solely on the ground that the execution of the bond had taken place before the court made its order accepting the security already embodied in a bond which had been executed. The requirement is that on the due date the appellant has to tender security and not make an offer to tender it or otherwise express a willingness to execute later an instrument securing the costs in appeal of the opposite parties.

There remain for consideration the first two objections which, if upheld, would according to the decision in *De Silva v. Seenathumma et al.* [1] be fatal to the appeal. Of these objections the second raises questions of a factual character and I shall deal with it at once.

The petitioner-respondent who in the District Court petitioned against the appellant taking any benefits under the will named ten respondents of whom the first named is the appellant. The latter was apparently advised to give notice of appeal to both the petitioner-respondent and his Proctor, so that eleven notices of appeal, with a copy of the petition of appeal attached to each, had to be furnished to court. Eleven notices of appeal were sent for service under the authority of three Precepts addressed to the Fiscal. There was one Precept relating to service on the 5th respondent who was then residing in Nuwara Eliya District. The third Precept at page 703 of the record related to the service of notices on the petitioner-respondent and his Proctor and on the 2nd, 3rd, 4th, 6th, 8th, 9th and 10th respondents. This Precept refers to nine notices of appeal but only to *seven* copies of the petition of appeal from which it is sought to be inferred that nine notices of appeal with only seven copies of the petition of appeal had been furnished to court and that, therefore, there was a breach of section 756 (1). I am not prepared to reject the appeal on this ground for the following reasons :

(*a*) It is unlikely that, if the Fiscal was asked to serve nine notices with seven copies of the petition of appeal, he would have

[1] *(1940) 41 N. L. R. p. 241, at p. 249.*

refrained from calling the attention of the court to the fact that two copies were short. There appears to be no query by the Fiscal.

(*b*) There is not even an affidavit from any one of the nine persons, notices on whom were covered by the third Precept, stating that when the notice of appeal was served there was not attached to it a copy of the petition of appeal.

(*c*) Over a year elapsed between the service of notices and the formulation of objections and it is now too late to enter on an investigation to ascertain whether two of the respondents were served with notices unaccompanied by copies of the petition of appeal.

(*d*) An error in stating the number of copies of the petition of appeal which accompanied the third Precept cannot reasonably be ruled out.

I come now to the most important of the objections, namely, the first. As stated earlier the notices regarding tender of security which were filed on 14th September, save the two notices relating to the tender of security for the costs of the petitioner-respondent, were admittedly bad. It was submitted to us on behalf of the petitioner-respondent that the appellant's right to have his appeal heard was conditioned on his conforming strictly to the requirement in section 756 (1) that upon the petition of appeal having been received by court the petitioner shall " forthwith " give notice to the respondents of the tender of security within twenty days reckoned from the date of the order appealed from. It is said that the appellant did " forthwith " give notice but that notice was bad and no question could arise of giving another notice " forthwith " on 16th September. A large part of the argument involved the examination of both the original and the typed copy of the journal entries which indicated that on the 14th September itself the appellant's Proctor had obtained a paying in voucher (referred to in the entries as P. I. V.) to deposit Rs. 40 to cover the expenses of serving notices of appeal on the respondents. This sum was deposited at the Kachcheri and the receipt tendered to court on the same day. From this circumstance it was sought to be argued that the appellant's Proctor must have known on 14th September that the District Judge had made order receiving the petition of appeal. It was also argued that the Proctor sought to conceal the mistake he had made in drawing up irregular notices of tender of security filed on the 14th September by representing in the notices filed on the 16th September for service that the petition of appeal was presented to court on the latter date. Our attention was also drawn to certain alterations in the journal entries relating to the P. I. V. which, according to learned counsel for the petitioner-respondent, reinforced his contention that the Proctor for the appellant knew on the 14th itself of the order made by court. It is not possible, judging by the alterations in the journal entries, for me to say with any degree of confidence that the circumstances point unmistakably to the Proctor's knowledge on the 14th itself of the order made on that day. I am, therefore, content to deal with the case on facts which are beyond dispute. It cannot be contested that when the appellant's Proctor tendered at the office of the

District Court the set of papers minuted in the journal against entry No. 139 he foresaw the possibility of the Judge on that day itself receiving the petition of appeal and making the ancillary order to issue the notices tendering security. The notices were left with the court with no other object than that of complying with section 756 (1) of giving them " forthwith " upon the Court accepting the petition of appeal.

It was submitted to us on the authority of *Fernando et al. v. Nikulan Appu et al.* [1] that the tendering of fresh notices of security on the 16th September was a compliance with the requirement to do " forthwith " the act of giving notice. The argument was that the set of notices handed in on the 14th September did not have any legal validity and could be ignored and that, in the absence of evidence that the appellant's Proctor had verified on the 14th itself that the Judge had made order " accepting " the petition of appeal, he had given the necessary notices " forthwith ". In *Fernando's* case the petition of appeal was tendered on 5th February, 1920, and the notice was filed on 7th February, 1920. Bertram, C.J., said,

> " It is not for the court to communicate the receipt to the petitioner. It is for the petitioner to ascertain whether his petition has been received or not. In this case it is not clear at what precise time the Judge *received* the petition. He may well have done so at the end of the day on the conclusion of the Court. On this supposition the petitioner could have ascertained the fact of the receipt the next day and could on the same day have filed his notice . . ."

He went on to add,

> " I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

In the present case what the appellant thought were correct notices were filed along with the petition of appeal but we were asked to ignore them on the ground of their invalidity and look to the notice filed on 16th September as being the first and proper act of giving notice " forthwith ". It is at this point that I am unable to find an adequate answer to the contention of learned counsel for the petitioner-respondent. The practice is long standing that the Proctor for an appellant hands to the Secretary or other official of the court the petition of appeal and the necessary notices for service through the Fiscal. If the appeal is in time the Judge signs the minute in the journal which also contains words to the effect, " Accept petition of appeal, issue paying in voucher and notices tendering security ". Had the notices of the 14th September not been defective it could not possibly be argued that there was a failure to comply with section 756 (1) because they had been tendered before the act of " receiving " by the court. It may here be repeated that two of

[1] *(1920) 22 N. L. R. 1.*

the notices, namely, the one intended to be served on the petitioner-respondent and the other on his Proctor, were quite in order. Counsel for the petitioner-respondent put his argument in this form that there cannot be acts done " forthwith " twice, once on the 14th and once again on the 16th. The contention is that the appellant had " forthwith" tendered notices of security on the 14th but it turned out that all but two were not the notices required to be given by the section. Assuming that in *De Silva v. Seenathumma et al.*[1] the Bench of five Judges approved the ruling in *Fernando v. Nikulan Appu*[2], the latter case is distinguishable on the facts. I have, therefore, with considerable reluctance come to the conclusion that the first objection must be upheld.

Before I conclude I wish to make some observations. Within three weeks of the date of the judgment under appeal the appellant had given adequate security for the costs of appeal of the petitioner-respondent and the other respondents. It could hardly be urged that by reason of the appellant tendering on the 16th and not on the 14th a set of correct notices the respondents have been materially prejudiced. Having regard to the wide terms in which sub-section 3 of section 756 is expressed I would be inclined to grant relief to the appellant but I am precluded from doing so by the decision in *De Silva's* case which has laid down that the failure to tender notice of security contemporaneously with the receipt of the petition of appeal by the Judge is fatal to the appeal and not curable by sub-section 3. *De Silva's* case was decided in 1940 and it has since been consistently followed, even though a decision on all the points enumerated at p. 249 of 41 N. L. R. was not necessary for the disposal of the preliminary objection raised in that case.

I agree to the order proposed by my Lord, the Chief Justice.

Appeal rejected.

[1] *(1940) 41 N. L. R. 241.*

[2] *(1920) 22 N. L. R. 1.*