1941 *Present :* **Howard C.J. and Keuneman J.**

SIYADORIS *v.* DANORIS *et al.*

317—D. C. Galle, 37,135.

Deed—Admission in evidence without objection—Objection to due execution in appeal—Civil Procedure Code, s. 154.

Where a deed has been admitted in evidence without objection at the trial, no objection that it has not been duly proved could be entertained in appeal.

***Andrishamy v. Balahamy* (*1 Matara Cases 49*) followed.**

APPEAL from a judgment of the District Judge of Galle.

E. B. Wikramanayake, for second to seventh defendants, appellants.

L. A. Rajapakse, for plaintiff, respondent.

Cur. adv. vult.

February 6, 1941. KEUNEMAN J.—

This is a partition action. The main point urged for the appellant is that the deed of transfer of immovable property, P. 2 of 1935, on which the plaintiff depends to establish his title has not been proved in accordance with section 68 of the Evidence Ordinance (Cap. 11), in that neither the party executing it nor the Notary nor any of the attesting witnesses have been called for the purpose of proving its execution. Emphasis was laid on the words, "It shall not be used as evidence", appearing in the section. It is to be noted that no objection was taken to this document at the trial, and that the objection was taken for the first time in appeal.

In *Shib Chandra et al v. Gour Chandra Paul et al*[1], in respect of this section 68, it was held that "where evidence has been admitted without objection, it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence has been received in direct contradiction of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel, none of which is available against a positive legal enactment, does not apply".

It was further held in that case that the existence of section 70, whereby an admission of due execution was sufficient proof against the party admitting, lent colour to the supposition that the Legislature desired to add no further exception to the law laying down the special method of proof of instruments required by law to be attested. It is to be noted that it was held that acquiescence, waiver or estoppel was not available against a positive legal enactment.

Mr. Rajapakse for the respondent argued that account should be taken of another positive enactment in our law, namely, section 154 of the Civil Procedure Code. The explanation to clause (3) of that section is as follows :—

> "If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the Court should admit it."

[1] *I. R. (1922) Calcutta 160.*

Counsel argued that the words, "forbidden by law", did not apply to the case where the document was required not to be received or used unless a certain method of proof had been complied with. In this case, he argued, there was no absolute prohibition of the document, which was valid if proved in a particular form.

I think there is substance in this contention. The Civil Procedure Code requires that on the tendering of a document in evidence, if the opposing party fails to object, the Court should admit it. No doubt such admission will not give the document any greater force or validity than it has in law, but I think objections as to the proper method of proof of the document must be taken at that stage, and cannot be entertained after the trial is over. It has to be remembered that if the special method of proof required had been insisted upon, it was possible for the party tendering the document to supply that proof. In this case, the appellants not only failed to object to the document P 2, but they also produced three deeds—6 D 1 of 1933, 7 D 2 of 1934, and 7 D 3 of 1919—upon which they depended to prove their title, without proof of due execution.

After the argument of the appeal was completed, Mr. Rajapakse gave me an authority which is in point, namely, *Andrishamy v. Balahamy*[1] where it was held in 1909 that, in a partition action, if a deed is admitted in evidence without objection, it is too late to object in appeal that the deed had not been duly proved. This is a decision of two Judges, which, I think, we should follow, all the more so as the procedure in our Courts in partition and other cases appears to have proceeded on the footing that this decision is correct—*vide Silva v. Kindersley*[2]. Further, I think the decision can be supported.

There is no other point of substance in the appeal, which is dismissed with costs.

HOWARD C.J.—I agree.

Appeal dismissed.

[1] *Matara cases 49.*

[2] *18 N.L.R. 85.*