1956 *Present :* Sinnetamby, J., and L. W. de Silva, A.J.

K. E. SEYED MOHAMED *et al.*, Appellants, *and*
M. C. PERERA *et al.*, Respondents

S. C. 313—D. C. Kandy, 2841/L

Evidence—Actio rei vindicatio—*Boundaries of land in dispute—Deeds tendered in evidence without objection by opposing party—Evidentiary value of statements therein—Civil Procedure Code, s. 154—Evidence Ordinance, ss. 32, 91, 92.*

To identify the premises in dispute in an action for declaration of title to immovable property, the Court may take into consideration statements of boundaries in title deeds of adjoining lands belonging to persons who are strangers to the action and who have not been called to give evidence. The evidence of such title deeds may become inadmissible only if objection to their production is taken in the court of first instance; they cannot be objected to for the first time in appeal.

Peeris v. Savunhamy (1951) 54 N. L. R. 207 and *Solomon v. William Singho* (1952) 54 N. L. R. 512, not followed.

[1] *(1883-84) 3 E. D. C. 254 at 256.*

APPEAL from a judgment of the District Court, Kandy.

C. Thiagalingam, Q.C., with *E. G. Wikramanayake, Q.C.*, *T. A. Dunuwila*, and *V. Arulambalam*, for the plaintiffs-appellants.

H. W. Jayewardene, Q.C., with *L. G. Weeramantry* and *P. Ranasinghe*, for the defendants-respondents.

Cur. adv. vult.

October 10, 1956. SINNETAMBY, J.—

The plaintiffs sued the defendants for declaration of title to premises bearing Assessment Nos. 60, 62 and 64, Kandy Road, Gampola, for an order of ejectment against the defendants and for damages. At the hearing learned Counsel for the plaintiffs-appellants stated that he did not ask for damages as no income could have been derived from the property in view of a closing order that had been issued by the Gampola Magistrate at the instance of the Urban Council. The property in dispute is depicted in plan " X " and D1 made by a Commissioner appointed by the Court at the instance of plaintiffs and defendants respectively.

Defendants also claimed the same land on different deeds. The learned District Judge held that plaintiffs' title deeds refer to another land and dismissed the action with costs. The appeal is against this finding.

Plaintiffs based their title on two deeds bearing Nos. 3916 (P1) dated 15/7/80 and 578 (P2) dated 7/11/79. The transferee on those deeds is Cader Ibrahim Rawther a predecessor in title of the plaintiffs. Document P1 establishes the manner in which title devolved on the plaintiffs. It is not disputed that whatever Cader Ibrahim got on these deeds devolved on the plaintiffs. Defendants have produced deeds which trace the title of plaintiffs title still further back. One Meedin Kandu and U. M. Sulaiman Lebbe were the original owners of the land described in P1 and P2. On a Fiscal's Conveyance D2 of 1868 the land was sold and purchased by two persons, viz., Seyadu Assen Lebbe and A. M. or H. M. Sulaiman Lebbe. The Fiscal's Conveyance refers to a plan which has not been produced. These two gentlemen by deed No. 571 of 24/8/68 D11 transferred to Omar Lebbe Sinna Lebbe one of the two houses towards the south conveyed to them by D2, presumably the one belonging to Sulaiman Lebbe as the northern boundary is described in the deed as " the house of Seyadu Assen Lebbe. " This deed does not refer to a plan but plaintiffs had produced plans P3 and P4 which they say were with their title deeds. P3 bears an endorsement by a notary certifying that a house and land belonging to Sulaiman Lebbe has been transferred by Deed No. 571. This plan on the face of it does not show that it has been made by a surveyor. By deed D10 Sinna Lebbe transferred to Simeon Meedin on 27/4/75. This deed expressly refers to Plan P4. Simeon Meedin by deed P1 transferred to 1st and 3rd plaintiffs' grandfather Cader Ibrahim Rawther. The other share conveyed by Fiscal's

Conveyance D2, which was the northern portion, was by deed P2 conveyed to the same Cader Ibrahim Rawther. These deeds show that whatever was conveyed on D2 eventually devolved on the plaintiffs. It is to be noted that all these deeds refer to T. S. Pieris' land as being one boundary: P1, P2 and D11 give it as the southern boundary, D10 as the western boundary. This mistake in D10 is presumably due to the fact that in plan P4 the Kandy Road has been shown as the northern boundary and not the eastern. T. S. Pieris is the predecessor in title of the defendants.

The defendants also relied on title deeds in support of their claim. According to them the original owners of this land were T. Simon Peiris and his wife Simona Mendis. By deed No. 382 of 1/11/64, D3, husband and wife divided the property described in that deed consisting of 11 houses into 11 parts each containing a house and numbered them 1 to 11 from north to south, No. 1 being at the extreme north. The property was then partitioned as follows :—

Nos. 1, 4 and 5 were given to Francisco Pieris.

Nos. 2 and 3 to Davith the grandfather of 2nd defendant.

Nos. 6, 7 and 8 to Bastiana's husband.

No. 11 to Bastiana.

The boundaries given show that on the north and east is Sulaiman Thamby's land. Plaintiffs contend that this Sulaiman Thamby is the same as their predecessor in title H. M. Sulaiman Lebbe in respect of whose land Fiscal's Conveyance D2 issued in 1868. After the execution of this deed D3 there has been no transfer of their interests till 1948, i.e., for 80 years, when 1st defendant transferred to 2nd defendant on deeds No. 806 of 26/7/48 and 2211 of 29/11/48. D7 and D8 purport to transfer the property bearing Assessment Nos. 60, 62 and 64.

According to the plaintiffs the defendants claimed title to the premises and disputed plaintiffs' claim in about August, 1949, and they were compelled to file this action.

At the argument both counsel agreed that the judgment of the learned District Judge was far from helpful. He has misdirected himself on many matters and has reached conclusions without considering evidence on important and relevant matters. Learned Counsel for the respondents found himself unable to support many observations and statements made in the course of his judgment by the trial judge and we were obliged to consider the case independently of the trial judge's findings: indeed learned Counsel for the respondents asked that the case be sent back for a re-trial. Having considered the matter very carefully although at a certain stage we felt inclined to favour this suggestion, we have come to the conclusion that justice demands a final adjudication in regard to all matters except on the question of compensation.

As stated earlier the only question that arises is whether the land claimed by the plaintiffs on D2, P1 and P2 is the land in dispute. The defendants say it is further to the north and have produced a series of deeds to show that the land called Gallewatte, which is the name given in plaintiffs' title deeds, is elsewhere.

What then is the material on which plaintiffs rely to establish the identity of the lands referred to in their title deeds ? The main grounds on which they base their claims may be summarised as follows :—

1. They rely on the fact that the southern boundary given in their deeds is T. S. Pieris' land. The land to the north is the mosque at the present moment. Defendants' contention is that Isabella's share eventually went to the mosque. According to the deed of division D3 Isabella got house Nos. 6, 7 and 8 while Davith's share which devolved on plaintiffs comprised of house Nos. 2 and 3 which are to the north of Isabella's lots. This is inconsistent with the location in situ of the two lands for according to the above their land would be to the north of the mosque property and their contention is that Isabella's lots now form the mosque property.

2. They rely on plans P3 and P4. P4 in particular is a survey plan attached to their title deed, D11, and referred to therein. The configuration of the land depicted in P4 strongly resembles the shape of the land they now claim, which is surrounded on all sides by a wall and is depicted in plan X and as lot 2 in plan D1. The orientation is, however, different in P4 though it is correct in P3. The extent shown in X and D1 is 19·5 perches while the extent given in P4 is twenty perches and 8 sq. yards which for all practical purposes may be considered the same. The defendants' original deed of division D3 gives the northern boundary as Sulaiman Thamby's land which may well be a reference to Sulaiman Lebbe, plaintiffs' predecessor in title.

3. Plaintiffs also rely on the assessment sheet P18 issued by the Urban Council of Gampola. According to this in 1917, 1919 and 1920 Abrahim Saibo the plaintiffs' father is given as the owner of premises Nos. 174, 175 and 176. In 1922 Ibrahim Saibo is given as owner of 176, 177 and 178. Plaintiffs contend that about this time the numbers were changed. Although the assessment register itself does not on the face of it show the change, to establish it the plaintiffs rely on a deed of lease P32 executed in 1924 by Abrahim Saibo which describes the leased land as " premises bearing Assessment Nos. 174, 175 and 176 presently 176 to 178 ". This document certainly supports their contention. The numbers continued to be the same till a change was effected in 1941. The Assessment Register itself gives both the new and the old numbers. No. 178 was changed to 60,177 to 62 and 176 to 64. Ibrahim Saibo continued to be given as owner. It is certainly unfortunate that no officer from the Urban Council has been called to speak to these facts, but extracts of the Assessment Register were produced without objection for the purpose of proving ownership.

4. Plaintiffs then rely on a closing order issued in 1939 and served on Ibrahim Saibo. A note appears in the Assessment Register in regard to this. The plaint P19 and the closing order itself P20 were produced. They are in respect of premises Nos. 176, 177 and 178 which were the numbers of the disputed premises at that time. Ibrahim Saibo

retained a proctor to appear for him, a course which one would not expect a man who was not the owner of the premises to take: 1st defendant admits that no closing order was served on him.

5. Notices of assessment P21 and P23 were served on Ibrahim Saibo. They were for the year 1940 in respect of premises Nos. 176 to 178.

6. A man by the name of Ghani claimed this property and plaintiffs filed a case against him in 1948 and obtained a decree. P24 is plaint, P25 is answer and P26 is decree. Second plaintiff stated that at that time no one was in occupation—*the closing order had been served*. The schedule to the plaint gives the assessment numbers of the premises as 176 to 178 though by this time the numbers had been changed to 64, 62 and 60.

7. Second plaintiff's account book P28 shows at page 36 (P29), that the collected rents from September 1936 to January 1937 from Abdul Gani & Co., for the premises Nos. 176, 177 and 178.

8. Lease Bond No. 18257 of 1942 (P32) shows that the premises Nos. 176 to 178 was leased by plaintiffs' father Ibrahim Saibo.

Apart from dealing very briefly with the assessment register the learned District Judge has not considered any of the other matters referred to above when he was considering the question of identity. Much of the above evidence is of a documentary nature relating to deeds, leases, assessment registers, etc., and are of a kind that cannot be fabricated for the purposes of a case. They certainly constitute compelling evidence requiring careful consideration. In the absence of any reference to many of them it must be inferred that the learned trial judge did not appreciate their significance and importance. In these circumstances we are unable to accept his finding that the plaintiffs' land is to the north of the land in dispute: indeed we have come to just the opposite conclusion. The learned trial judge relied on certain deeds and documents produced by the defendants which I shall now consider.

Dealing with D14 the learned judge says that the lots allotted to one of T. S. Pieris' heirs went to some Muslims. He draws attention to the fact that some of these properties have gone to Muslims and that the register shows that the premises No. 173 in respect of which certain deeds were registered gives the northern and southern boundaries as No. 172 and No. 174 respectively. If anything this would only show that 173 is to the north of 174 and at the time of the first registration, i.e., in 1918. The disputed lands, however, bore numbers 174, 175 and 176 according to Assessment Register P18 taken in conjunction with the recital in lease P32. In fact the evidence shows that D14 and D13 were only produced to show that a land called Madegederawatte which defendants claim is their land and a land called Galewatte which is the name given in deed D2 to plaintiffs' land existed in Gampola as two separate lands registered in two separate folios—vide evidence of 1st defendant. D20 and D21 were also produced for the same purpose. These documents may, however, well refer to other lands with similar names or other portions.

of the same land. The learned Judge then refers to D4 of 1919 and D5 of 1906 which deal with premises No. 174 and 175 and concludes that these are the numbers of the mosque property but in 1917 the premises in question bore numbers 174, 175 and 176 and it was only in 1922 that they were changed to 176, 177 and 178. Actually D5 is a gift by Isabella's husband to Joslin de Silva *nee* de Mel executed in 1906 and referred to premises Nos. 174 and 175. There is a plan referred to in this deed which was not produced. The next deed is D6 of 1917 which is a sale by the donee on D5 to Uduma Lebbe. In this deed the same numbers are repeated and also refers to the same plan. D4 is a mortgage bond executed by Uduma Lebbe in 1919. This property is obviously the property which Isabella got under the deed of division D3. D4 also refers to Nos. 174 and 175. It is quite possible that in giving the numbers 174 and 175 in D4 and D6 the notary followed the description in the earlier deed D5 : what the assessment numbers were in 1906 is not known and is not shown in P18. Uduma Lebbe's mortgage bond was put in suit and Fiscal's Conveyance D15 and D16 executed in favour of the purchasers. It is significant that neither of these deeds has any assessment numbers given in the description of the property but both refer to plans which defendants listed but did not produce. D15 is a transfer to Adam Lebbe and D16 to Uduma Lebbe. D15 and D16 it was contended show that Nos. 174 and 175 would in the opinion of the Fiscal not correctly describe the property sold. The learned judge relying on these deeds came to the conclusion that Abrahim Saibo did not have possession of Nos. 174 and 175. Such an inference it will be seen is completely erroneous.

It is interesting to note that D13 which is the encumbrance sheet of the mosque property gives as the southern boundary the property of Cader Ibrahim Rawther, the 1st and 3rd plaintiffs' grandfather who probably was alive at the date of the first registration. Deed No. 13175 which is a deed of transfer to the trustees of the mosque is the last registration appearing at folio 35 of this document and in the remarks column the assessment number of the property transferred is given as 175 and the southern and south-western boundaries as the property of Ibrahim Saibo, plaintiffs' predecessor in title. This deed No. 13175 was executed in 1922 when the assessment numbers of the disputed property had been changed according to P13 to 176, 177 and 178. This document was produced by the defendants.

Defendants' main contention was that the land in dispute was called Madegederawatte while plaintiffs' earliest deed D2 refers to a land called Galewatte. Some of plaintiffs' deeds—vide P1, D10 and D11—refer to it as land in Mollegodapitiya (misspelt as Mannegodapitiya in D11). While it is relevant to take into consideration the names given in deeds to lands dealt with what is more important is the boundaries. Galewatte may well be the name for a larger area of which Maddegederawatte forms a part. Defendants for instance claim that Isabella's share of Maddegederawatte eventually went to the mosque but D13 shows the registration of a deed dealing with mosque property bearing assessment No. 175 registered under "Galewatte" in 1922. This would immediately adjoin the disputed property.

The evidence reveals that plaintiffs and their predecessors in title never possessed any land other than the land in question in Kandy Street but 1st defendant owns other lands as well. The Gani whom the defendant charged with criminal trespass is one N. Gani and the plaint and proceedings in that case (P23) do not show what land was trepassed upon. The Gani whom the plaintiffs sued for declaration of title in respect of premises Nos. 176 to 178 in 1948 is one Abdul Gani. They may be the same person or different persons but P23 does not show it is in respect of the same property.

As regards prescriptive possession the learned trial judge summarily rejects the plaintiffs' evidence. He does not consider the effect of the several documents produced by plaintiffs such as the assessment notices, the lease P32, the action against Gani and 2nd plaintiff's evidence. He does consider but rejects the evidence of the closing order and the account book P28, but with his conclusions we cannot agree. In view of the closing order no one was in actual possession of the property since 1939 and this perhaps accounts for the paucity of evidence relating to possession in recent times. The Assessment Register P18, the closing order and the account books P28 while by themselves may not *per se* be evidence of actual possession they certainly corroborate the evidence of the 1st and 2nd plaintiffs.

For the reasons we have given we are of the opinion that plaintiffs have established satisfactorily the identity of the premises in dispute as the premises referred to in his title deeds. We are also satisfied that he has established his claim to prescriptive possession. The learned judge has held that the 2nd plaintiff is a bona fide possessor having purchased the premises from the 1st plaintiff. We do not propose to interfere with that finding. Learned Counsel did not seem to contest it and we were not addressed on it, but the evidence relating to compensation is very meagre and most unsatisfactory. The 2nd defendant says she spent about "Rs. 4,000 or something". The 1st defendant says that 2nd defendant spent Rs. 5,000 and the judge awards Rs. 6,000, a sum which neither defendant claimed. No evidence of any kind apart from these mere statements was led. While we hold that compensation is payable we think that the case should go back for proper adjudication of the amount.

In the course of the argument learned Counsel for the appellants cited the case of *Solomon v. William Singho* [1] and contended that we should not take into consideration boundaries described in title deeds of adjoining lands belonging to "strangers to the action" who have not been called to give evidence in the lower Court. The defendants particularly relied on many such deeds including encumbrance sheets where the name of the land and the description of the boundaries are taken from the first deed registered in that folio. Plaintiffs-appellants also made use of entries in the encumbrance sheets produced by the defendants in support of their case. Learned Counsel for the defendants-respondents likewise objected to these descriptions of boundaries being considered on the same ground. Both Counsel relied in the case already referred to and on the

[1] *(1952) 54 N. L. R. 512.*

earlier case of *Peeris v. Savunhamy* [1] in which the same question was considered. As this matter involved an important question of practice we heard as full an argument as was possible in the circumstances particularly as we were not disposed to agree with the decisions cited. It was contended by learned Counsel that the learned judges who decided these cases held that the principles therein enunciated were of general application irrespective of whether objection to the production was or was not taken in the court of first instance. Learned Counsel for respondents, who also appeared in the Appeal Court at the hearing of both these cases, assured us that no objection had been taken at the hearing of the cases in the original courts. I have since verified and found this statement correct by reference to the original record in the case of *Solomon v. William Singho*. In *Peeris v. Savunhamy* Dias, J. who delivered the judgment of the Court referred to the judgment of *Soney Lall v. Darbdeo* [2] where the Full Bench expressed its view on certain questions of law referred to for its opinion and held that statements of boundaries in title deeds between third parties are not admissible under section 32 of the Evidence Ordinance. Dias, J. did not, however, expressly follow it. Instead he said, " the value of the deed as evidence even if admissible is almost nil ", and proceeded to give his opinion on that basis. In the case of *Solomon v. William Singho*, Gratiaen, J. who was one of the two judges who constituted the Bench in *Peeris v. Savunhamy* held that such recitals in deeds between third parties are " hearsay evidence on the issues under consideration and are inadmissible ". The recitals in question were used for the purpose of establishing the identity of lands alleged to be lying on one of its boundaries. The opinion of so eminent a judge of this Court is entitled to the greatest weight and we have accordingly given it very careful consideration. Documents are constantly put in evidence in the course of a trial, sometimes without objection and sometimes by express consent. To rule every such document out on the ground of hearsay would necessitate parties calling into the witness box persons whose testimony in regard to the authenticity of the document neither side disputes though the contents may be disputed. To accept such a proposition as a legally sound and valid basis on which trials in the original courts should be conducted would add in no small measure both to the cost of litigation and to the law's delays, which we constantly hear so much about. We have therefore investigated this matter as fully as we can with such assistance as learned Counsel were able to give us and we have come to the conclusion that evidence of documents of title of persons who are strangers to the action and have not been called may become inadmissible only if objection to their production is taken in the original Court and that they cannot be objected to for the first time in appeal. We are fortified in our view by certain decisions of our own Courts and the express provisions of section 154 of our Code of Civil Procedure, which incidentally finds no counterpart in the Indian Code—learned Counsel who assisted in investigating this matter for us were unable to point to any corresponding provision.

[1] *(1951) 54 N. L. R. 207.* [2] *(1935) A. I. R. Patna 167.*

The recital of the facts in the Patna case which was referred to in *Peeris v. Savunhamy* does not disclose whether objection was taken in the original Court to the documents which formed the subject matter of the reference. It is difficult to assume, however, that in the original Court no objection was taken in view of the numerous decisions of the Indian Courts under Order 13 rule 6 of the Code to the effect that " when evidence has been led without objection it is not open to the opposite party to challenge it at a later stage of the litigation. But where evidence had been recorded 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. " (*Sahob Chandra v. Gour Chandra* [1].)

This statement of the law in the Calcutta case is however embodied as a positive enactment in our Code of Civil Procedure in the explanation to section 154, which finds no counterpart in the Indian Code. This provision has been construed and acted upon in our Courts over a long period of time, vide *Silva v. Kindersley* [2], and the cases referred to therein and *Siyadoris v. Danoris* [3]. The explanation in question 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. "

What is meant by the expression " forbidden by law " was considered in the case of *Siyadoris v. Danoris* [3] and construed to mean absolute prohibition and not to include a case where evidence was required not to be received or used unless certain requirements were fulfilled—an instance of absolute prohibition which immediately comes to mind is income tax returns made by a person to the Income Tax Department.

The *18 N. L. R.* case was decided by de Sampayo, J. and Walter Pereira, J., two very distinguished and experienced judges of this Court, and this case was not considered in the two cases which we have been invited to follow, nor were the express provisions of section 154 taken into account.

The judgment in *Solomon v. William Singho* does not indicate what the arguments of Counsel were in regard to this matter but there is no reference in it either to the earlier decisions we have referred to or to section 154 : instead the decision in the Patna case was presumably adopted. As we have pointed out the facts do not clearly indicate whether in the Patna case objection was taken at the trial to the production of the deeds in question or not.

We accordingly in reaching our decision have taken into account description of boundaries in deeds between strangers to the action and in doing so have followed several earlier decisions which approved of that.

[1] *(1922) A. I. R. Calcutta 160.* [2] *(1914) 18 N. L. R. 55.*
[3] *(1941) 42 N. L. R. 311.*

practice as being in conformity with the law of the land and which unfortunately were not considered by the learned Appeal judges who decided *Peeris v. Savunhamy* and *Solomon v. William Singho.*

We would accordingly set aside the judgment appealed from and enter judgment for plaintiffs-appellants as prayed for subject to the following modifications:

Plaintiffs are not awarded any damages, but plaintiffs will pay 2nd defendant compensation for improvements which will have to be assessed on proper evidence led before the District Judge. The case will go back for that limited purpose. Plaintiffs will be entitled to costs of appeal and costs of trial so far had in the Court below. The costs of the further hearing in regard to compensation will be in the discretion of the District Judge.

L. W. DE SILVA, A.J.—

I have nothing to add to the judgment of my brother except in regard to the reception and value of documentary evidence bearing on the identity of the property in suit. At the hearing of this appeal, learned Counsel for the appellants objected to the admissibility of certain documents which are either deeds of title relating to contiguous lands or encumbrance sheets descriptive of them. They were produced at the trial for the purpose of enabling the Court to identify the land in issue by reference to boundaries. No objection was taken to these documents at the time they were tendered in evidence at the trial. At the end of it, however, the plaintiff's counsel in the course of his argument did no more than cite to the District Judge the case of *Peeris v. Savunhamy* [1].

This method of trying to whittle away evidence already received is not known to our law. It has been held in the case cited that for the purpose of identifying property in dispute, statements of boundaries in title deeds between third parties are not admissible under Section 32 of the Evidence Ordinance. Some of the documents were held by Dias S. P. J. to be inadmissible in evidence while the evidentiary value of another document, even if it was admissible, was considered to be almost nil. This decision, with which Gratiaen J. concurred, followed a ruling by a Full Bench of Patna in *Soney Lall v. Darbedo* [2]. In the course of the argument before us, the appellants' counsel also brought to our notice the case of *Solomon v. Don William Singho* [3] where too the view was taken by Gratiaen J., with whom Gunasekara J. agreed, that the recitals of boundaries in the deeds of third parties were at best hearsay evidence and were inadmissible. No other decisions were cited to us. In neither of these reported cases had the parties to the documents or their successors given evidence at the trial. Learned Counsel for the respondents also supported these judgments. Both decisions have assumed that a Court of Appeal has an unqualified right to rule on the admissibility of documents received without objection in the court of trial.

[1] *(1951) 54 N. L. R. 297.* [2] *(1935) A. I. R. Patna 167.*
[3] *(1952) 54 N. L. R. 512.*

I do not think that the matter could be disposed of in that way, and regret I am unable to agree with the view taken in the two cases reported in *54 N. L. R.* In *Siyadoris v. Danoris* [1], the point was specifically decided that objection to a deed admitted in evidence without objection at the trial cannot be entertained in appeal on the ground that the document had not been duly proved. The same principle was followed in *Opalgalla Tea and Rubber Esates Ltd. v Hussain* [2], where no objection was taken to certain letters admitted in evidence without legal proof in the District Court.

In neither case reported in *54 N. L. R.* is there any reference to Section 154 of the Civil Procedure Code, the Explanation to which 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.

In *Shahzadi Begam v. Secretary of State for India* [3], the Privy Council held that it was too late on the appeal to object to the admissibility in evidence of a document which had been admitted without objection in the first court.

The appellants' Counsel, however, argued that the law of evidence should receive primary consideration and cannot be made subordinate to a rule of procedure. There is no substance in this contention since it is in direct opposition to the Explanation to Section 154 of the Civil Procedure Code. A similar argument was rejected by Hutchinson C.J. in *Sangarapillai v. Arumugam* [4], where it was held that if evidence, which is repugnant to Sections 91 and 92 of the Evidence Ordinance is let in by consent, it is too late for either party to object to it in appeal since the requirements of Section 154 of the Civil Procedure Code were not observed. The question raised as to admissibility cannot therefore now be entertained.

The only other matter for consideration is the evidentiary value of the documents. This is covered by the decision in *Silva v. Kindersley* [5] which I brought to the notice of Counsel at the hearing of this appeal. Pereira J., with whom de Sampayo A.J. agreed, pointed out that a document not objected to by the opposing party in a civil suit is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. The contention that the testimony of a Superintendent of Surveys was of no value, because the plans and surveys he relied on depended largely for their correctness on a third party's field books, was rejected because those field books had been admitted in evidence in the Court below without objection.

The Patna case on which the decision of *Peeris v. Savunhamy* [1] rests is neither sufficient nor persuasive authority for at least two reasons. Firstly, the Patna Court was called upon to deal with a general problem.

[1] *(1941) 42 N. L. R. 311.*
[2] *(1914) 45 N. L. R. 251.*
[3] *(1907) 34 Cal. 1059.*
[4] *(1909) 2 Leader 161.*
[5] *(1914) 18 N. L. R. 85.*

Two questions of law formed part of the reference put before the Patna Bench: (i) whether statements of boundaries in documents of title between third parties are admissible in evidence under Section 32 (3), Evidence Act. Are they admissible under any other provision of the Act if the third parties are dead, or outside the jurisdiction of the Court ? and (ii) was the case of *1916 Pat. 416* correctly decided ? Secondly, the Patna Bench did not take into account provisions of law similar to those contained in Section 154 of the Civil Procedure Code. This Section is one of several provisions regulating the orderly manner in which trials are to be conducted in courts of first instance. To permit objections to be taken for the first time in appeal regarding the admissibility of documentary evidence not forbidden by law is to divert the orderly conduct of trials into an undesirable course not sanctioned by our law.

I concur in the order made by my brother and agree that the appellants have proved their title to the property in suit and are entitled to succeed.

Appeal allowed.