

Deed.

PROOF OF DEEDS IN CIVIL
CASES



Section 68 of the Evidence Ordinance reads as follows.

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

Wijegoonathilake V Wijegoonathilake 60 NLR 560

Marian V Jesuthasan 59 N L R 348

Some relevant sections in evidence ordinance

69. If no such attesting witness can be found, or if the document purports to have been executed in any foreign country, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

73. (1) In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose. (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person. (3) This section applies also, with any necessary modification, to finger impressions, palm impressions and foot impressions.

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Presumption as to document thirty years old.

90. Where any **document** purporting or proved to be **thirty years old** is **produced from any custody** which the court in the particular case considers **proper**, the court **may presume** that the signature and every other part of such document which purports to be in **the handwriting** of any particular person is in that person's handwriting, and, in the case of a document executed or attested, **that it was duly executed and attested** by the persons by whom it purports to be executed and attested.

Section 68 of partition act

68. It shall not be necessary in any proceedings under this Law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof.

Explanation to section 154 of the civil procedure code

Explanation.- 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.

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Explanation to section 154 of the civil procedure code

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Cont.

If, however, on the document being tendered **the opposing party objects** to its being admitted in evidence, then commonly **two questions arise for the court** :-

Firstly, whether the document is authentic-in other words, is, what the party tendering it represents it to be; and **Secondly, whether**, supposing it to be authentic, **it constitutes legally admissible evidence** as against the party who is sought to be affected by it.

The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a prima facie case of authenticity and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.

If, however, the court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document.

Whether the document is admitted or not it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it must, at least, be marked when the court decides upon admitting it.

In a civil suit, when a document is tendered in evidence, by one party is not objected to by the other, the document is to be deemed to constitute legally admissible evidence as against the party who is sought to be affected by it.

Silva Vs. Kindersley (18 N.L.R. 85.)

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.

Siyadoris Vs. Danoris (42 N.L.R. 311.)

In a civil case when a document is tendered the opposing party should immediately object to the document. Where the opposing party fails to object, the trial judge has to admit the document unless the document is forbidden by law to be received and no objection can be taken in appeal.

Cinamas Ltd. Vs. Soundararajanm (1998 (2) S.L. R. 16.)

Where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the *curius curiae*. **Sri Lanka Ports Authority Vs Jugolinija Boal East (1981) 1 Sri L R 18 Balapitiya Gunanandana Thero Vs. Talalle Mettananda Thero. (1997 (2) S.L.R. 101.)**

Sri Lanka Ports Authority V Jugolinija Boal East (1981) 1 Sri L R 18

- Has to object to the document when it is first going to be marked in evidence as contemplated by section 154 of the Civil Procedure Code and the objection has to be reiterated at the close of the case of the opposite party when the opposite party close its case reading the documents marked in evidence
- If the objection is not reiterated, it is considered that the objection originally raised as waived.
- This is the practice of the court.

“cursus curiae est lex curiae”
“the practice of court is the law of the court”

“Every Court is the guardian of its own records and master of its own practice” and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in law generally stands upon principles that are founded in justice and convenience.” – (Taken from **Broom’s Legal Maxims- 10th Edition page 82.**)

“A court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it cannot adopt a practice or procedure contrary to or inconsistent with rules laid down by statute or adopted by ancient usage. - (Taken from **Halsbury’s Laws of England 4th Edition Vol.10, Para 703.**)

Supreme Court Cases:

Rolax Enterprises(pvt) Ltd. V People's Bank SC CHC Appeal 12/2011, Balapitiya
Gunananda Thero V Talalle Methananda Thero (1997) 2 Sri L R 101, Stassen
Exports Ltd.
V Brooke Bond Group Ltd. (2010) 2 Sri L R 36, Samarakoon V Gunasekara and
another
(2011) 1 Sri L R 149.

Court of Appeal Cases:

Hemapala V Abeyratne (1978-1979) 2 Sri L R 222, Jayalath V Karunathilaka
(2013) 1 Sri L R 337, Wijewardena V Ellawala (1991) 2 Sri L R 14, Gunawardane
V Indian Overseas Bank (2001) 2 Sri L R 113, Vellage Sumanasiri De Silva V
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However, a different view was expressed in some recent decisions

(Practice referred to in Jugolinja Boal East case does not apply to deeds ?)

- **Mohamed Naleem Mohamed Ismail V Samsulebbe Hamithu SC Appeal 04/2006**
- **Dadallage Anil Shantha Samarasinghe v Dadallage Mervin Silva & another SC Appeal 45/2010.**
- **Kadireshan Kugabalan V Sooriya Mudiyansele Ranaweera SC Appeal 36/2014** (One judge affirmed the practice. Majority decision refused to accept the practice in relation to deeds)

Few previous decisions....

Perera & Others V Elisahamy 65 C L W 59

“ Even though, no objection was taken to the document when its contents were first spoken to by a witness , it should not have been used as evidence and acted upon by court. A court cannot act on facts which are not proved in the manner prescribed in the evidence Ordinance.”

- “ The fact that its genuineness was impeached rendered formal proof necessary regardless of whether objection was taken or not”
- However, it appears that the genuineness of the deed was impeached in this case.

Robin vs Grogan 43 N L R 269 - held that a document cannot be used in evidence unless its genuineness has been either admitted or established by proof. (This is a criminal case which has no application of section 154 of the CPC)

Samarakoon V Gunasekara (2011) 1 S L R 149 – here also the application section 68 of evidence ordinance was considered after referring to the reiteration of objections to the relevant document at the close of the case of the opposite party. This specifically referred to the ratio in Jugolinija and has never stated that it does not apply to deeds.

How a Document Including a deed Can be Impeached or Challenged in a Civil Suit?

1. Through pleadings- it may be waived by not raising an issue

2. By raising relevant issues

3. By objecting to it in terms of section 154 of the Civil Procedure Code

4. if it is a partition action in terms of section 68 of the Partition Law.

CIVIL
PROCEDURE
CODE
(AMENDMEN
T) ACT, No. 17
OF 2022

Insertion of new section 154A into
Chapter 101

(Proof of deed or document unnecessary in
certain events)

154A. (1) Notwithstanding the provisions of the Evidence Ordinance (Chapter 14), in any proceedings under this Code, **it shall not be necessary to adduce formal proof of the execution or genuineness of any deed, or document which is required by law to be attested, other than a will** executed under the Wills Ordinance (Chapter 60), and on the face of it purports to have been duly executed, **unless-**

(a) **in the pleadings** or further pleadings in an action filed under regular procedure in terms of this Code, **the execution or genuineness of such deed or document is impeached and raised as an issue; or**

(b) **the court requires such proof:**

Provided that, the provisions of this section shall **not be applicable** in an event, a party to an action seeks to produce **any deed or document not included in the pleadings** of that party at any proceedings under this Code.

CIVIL
PROCEDURE
CODE
(AMENDMEN
T) ACT, No. 17
OF 2022

Transitional Provisions.

In any case or appeal pending on the date of coming into operation of this Act :

(a) (i) if the opposing party **does not object or has not objected to it being received as evidence** on the deed or document being tendered in evidence; or

(ii) if the opposing party **has objected to it being received as evidence on the deed or document being tendered in evidence but not objected at the close of a case** when such document is read in evidence,

The **court shall admit such deed** or document as evidence without requiring further proof;

Summary...

If a deed (other than a Will) is impeached through pleadings and raised as an issue or the judge requires the formal proof, it has to be formally proved in terms of section 68 of the Evidence Ordinance

With regard to deeds tendered while leading evidence or through cross examination, it is my view still the practice of court applies, but one may argue that the recent Judgments that took a different view applies to such documents but the spirit of the amendment seems to be the codification of the practice existed in courts.

For Pending cases and appeals, the amending act has confirmed the application of the practice of Court that I explained.

Thank You