1923.

Present : Jayewardene A.J.

ISSAN APPU *v.* COORAY.

173—C. R. Kegalla, 17,986.

Agreement of parties not to call witnesses, except a surveyor, as to identity of land—Judgment based on admissions of parties, and documents put in—Does appeal lie against judgment ?

At the trial parties made certain admissions, invited the Court to inspect the land, and then agreed to put in their documents and call no witnesses except the surveyor. Then issues were framed, and counsel addressed the Court, and the surveyor was called to identify certain lots. The Commissioner held that the lot in question was part of defendant's land.

Held, that the parties had not constituted the Commissioner an arbitrator, and that plaintiff was entitled to appeal against the judgment.

THE facts appear from the judgment.

Keuneman, for plaintiff, appellant.

H. V. Perera, for defendant, respondent, raised the preliminary objection that no appeal lay as parties had constituted the Judge as it were their arbitrator. He was to decide on the documents. [JAYEWARDENE A.J.—Evidence might be either oral or documentary.] Counsel referred to *De Hoedt v. Jinasena*[1] ; *Ameru v. Appusinno*[2] ; *Babun v. Andris Appu.*[3]

The objection was over-ruled, and the case was argued on the facts.

August 3, 1923. JAYEWARDENE A.J.—

This is an action *rei vindicatio,* and the lot in dispute is marked B in plan No. 735 made by Mr. Nugapitiya, surveyor, and also in plan No. 913 made by Mr. Marcus, surveyor. The plaintiff's contention is that lot B forms part of the land called Boraluwehena which was conveyed to him by the defendant on deed P 4 of 1920. The defendant says that what he conveyed to the plaintiff on that deed was the land to the south of B marked C in plan No. 735 and A in plan No. 913. The plaintiff says that Boraluwehena is a land which consists of three blocks indicated in these two plans, and that C or A be acquired by inheritance and by right of purchase on P 1 in the year 1920. At the trial the parties made certain admissions, invited the Court to inspect the land, and then agreed to put in their documents and call no witnesses, except Mr. Marcus, the surveyor. Then issues were framed raising the points in dispute, and the

[1] *(1919) 6 C. W. R. 178.*
[2] *(1914) 4 Bal. N. C. 24.*
[3] *(1910) 5 Bal. 89.*

plaintiff also admitted that he has had no possession of lot B up to date. On these admissions and agreement the parties went to trial, counsel on each side addressed the Court at length, and Mr. Marcus was called, and his evidence was directed to identify the land in plan D 1 with lots B and D in his plan No. 913. Thereafter the learned Commissioner decided the case, holding that lot B formed part of the defendant's land, and that no portion of it was sold to the plaintiff. The plaintiff appeals against this decision, and the defendant has taken a preliminary objection to the competency of the appeal. He relies upon certain cases, the last of which is the case of *De Hoedt v. Jinasena* (*supra*). There this Court, following the Judgments in *4 Balasingham's Notes of Cases, p. 24*, and two others, held that where the Judge had recorded that the parties wished him to inspect the land and give judgment on inspection of the land and documents, and where the Judge inspected the land and also inspected some of the documents and gave his judgment, that there was no appeal from such judgment. I do not think that the *ratio decidendi* of that case and the cases on which it is based applies to the present case. Here oral evidence was not called, because the possession of the defendant was admitted, and the plaintiff also admitted that he had no possession, so that there was nothing for the parties to do, except to put in their documents and call Mr. Marcus to explain the application of D 1 to his plan. I do not think that in these circumstances it can be said that the parties agreed to abide by the decision of the Court and to give up their right to appeal. I accordingly over-ruled the objection and heard the appeal. Counsel for the appellant has referred to various documents, P 1, P 2, P 4, and P 5. P 4 is the document granted by the defendant to the plaintiff, and there the western boundary of the lot in dispute, which the plaintiff says is C or A, is the high road and Boraluwehena. The Commissioner inspected the spot, and has marked the boralu pit, because it was evidently indicated to him by the defendant as being on the west of A or C. There is no boralu pit as a boundary in the deed of 1920 on the west of B. Further, the southern boundary of the lot conveyed on P 4 is given as a ditch. There is a ditch both to the south of B and the south of A or C. I may also mention that the road does not form the western boundary of lot B. There are other boundaries in the other documents which, however, strongly support the appellant's contention, but I think the document D 1, which has been put in, practically decides the matter. That is a survey of the land Tuttiripitiwatta, which includes the whole of B and a portion to the east of it marked D. This plan was made in 1884, that is thirty-nine years ago, and made for the purpose of some execution sale, as the facts set out in D 1 show, so that in 1884 the portion B was described on a survey as forming part of the land Tuttiripitiwatta. In view of this strong piece of evidence upon which the learned Commissioner was called upon to decide the case, it is idle to suggest that there are

various boundaries given in the documents P 1 to P 5 which show that B is a part of Boraluwehena. Perhaps the plaintiff did not appreciate the strength and significance of the document D 1 at the trial, but it is too late now to remedy his mistake. He has agreed to take the decision of the Court upon the documents, and on the documents the decision has been rightly given against him.

I dismiss the appeal, with costs.

Appeal dismissed.