Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Middleton.

1906. *October* 4.

AHAMADO NATCHIA *et al. v.* MUHAMADO NATCHIA *et al.*
D. C., Galle, 7,459.

Jus superficiarium—*How acquired—Agreement of parties—Notarial writing—Interest in land—Inference of agreement—Ordinance No. 7 of* 1840, *s.* 2.

In order to create the right of superficies (*jus superficiarium*) it is necessary that there should be a distinct agreement between the parties to that effect.

In exceptional cases such agreement may be inferred from the fact that the owner permits another to build on his land.

Semble,—A *jus superficiarium* involves an interest in land, and as such cannot be created except by a notarial writing, as required by section 2 of Ordinance No. 7 of 1840.

APPEAL from a judgment of the District Judge of Galle (G. A. Baumgartner, Esq.).

The facts and arguments sufficiently appear in the Judgments.

The previous judgment in appeal is reported in 8 *N. L. R.* 330.

Bawa, for the plaintiffs, appellants.

Van Langenberg, for the defendants, respondents.

Cur. adv. vult.

4th October, 1906. LASCELLES A.C.J.—

This appeal was presented to us on the footing that this Court by its judgment of 11th October, 1895 (1), had finally decided that the plaintiffs had established their claim to a *jus superficiarium* in the house in question, and the District Judge was therefore wrong in reopening the question and holding that the plaintiffs had not in fact established this right. There are, it is true, passages in the judgment which appear to assume that the plaintiffs' claim to this right has been established, but, taken as a whole, I do not think that the judgement amounts to a specific finding in favour of the plaintiffs. But, even if this is the true construction of the judgment, I should still feel myself at liberty to review that finding by the light of the further evidence which shows that the house in dispute was built not as was supposed by this Court, upon the site donated

(1) (1905) 8 *N. L. R.* 330.

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by Idroos Lebbe to his daughter in 1864, but on another lot. This error, for which the Court was not responsible, may well have misled the Court into the belief that there was an express agreement that the site of the house in question was specifically reserved out of the donation for the use of Idroos Lebbe.

I am therefore of opinion that we are not excluded by the previous judgment of this Court from discussing the question whether or not the plaintiffs have acquired the *jus superficiarium*. Beyond the passage in *Grotius* cited by the late Chief Justice the text-books of the Roman-Dutch Law contain few refrences to the *jus superficiarium*. It is, however, clear that agreement between the landowner and the person who acquires the right is the foundation of the right. *Voet* 43, 17, defines " superficies " as denoting things such as trees, plants, and especially buildings, growing or built on the surface of the soil which any one has erected on land belonging to another *with the consent of the owner, on the condition that he may keep them in perpetuity or for a considerable period and generally on payment of rent.*

Paulus (*Dig. VI.*, 1, 74) defines the " *superficiarius* " as " *qui in alieno solo superficiem ita habet, ut certam pensionem præstet,*" as if the obligation to rent is inseparable from the possessor of the right. It may be noted that the German Civil Code of 1900, which, so far as it is based on the Civil Law, represents the most modern development of that system, expressly provides (article 1,015) that the agreement of the owner of the soil and of the person who acquires the right is necessary in order to constitute the right of " superficies," and requires this agreement to be made with the same formalities as are necessary to transfer the title to immovable property. It is true that the passage from *Grotius* cited by Layard C.J. contemplates the possibility of the agreement being inferred from the fact that the owner pemits another to build on his land. But, in my opinion, it is only in exceptional cases that such an inference could be made safely. In my opinion claims to a right of " superficies " should not be allowed unless the ageement between the parties is clearly demonstrated. To sanction laxity of proof in this respect would be to expose proprietors of house property to serious danger from claimants alleging that some former owner has permitted them or their ancestors to build on his land.

I do not propose to review the evidence as to any agreement between Idroos Lebbe and his daughter Asia Umma that the fomer should have a *jus superficiarium* in the house in question. I entirely concur in the finding of the District Judge. I think that the point is disposed of by asking the following questions:—

What was the agreement between Idroos Lebbe and his daughter?

Was the former to retain a right to the house in perpetuity, for life, or a term, and if so what term of years?

The evidence furnishes no answer to these questions.

It is not necessary for the purposes of this case to express a final opinion on the ruling of the District Judge that under the Ordinance of Frauds the *jus superficiarium* cannot be created except by notarial deed. But in view of the extent of the interest of the *superficiarius* in the subject matter of the right (*Voet* 43, 17), I find it difficult to resist the conclusion that an agreement creating a *jus superficiarium* is an agreement to establish an interest in land within the meaning of section 2 of Ordinance No. 7 of 1840, which is of no force unless made by a notarially executed instrument.

The appeal must be dismissed with costs.

MIDDLETON J.—

The first question in this case is whether a *jus superficiarium* in favour of Idroos Lebbe was found by the judgment of Layard C.J. to have come into existence.

It is certainly not found in direct terms as I read the judgment. To me it seems that the learned Chief Justice was enunciating the law in reference to the *jus superficiarium* generally, and it is only when we come to the words "Idroos Lebbe's rights, and subsequently that of his heirs, continued as long as they remained in possession, and their right to recover the value of the house would only accrue when turned out of possession by the owners of the soil," that there is some ground for supposing that the Chief Justice had arrived at a specific conclusion. I think, however, taking into consideration the preceding general character of the judgment, its evident desire to instruct the District Court that there was no issue settled on the question of the *jus superficiarium*, that it had not even been considered in the Court below, and that there was no consideration of the grounds for such a decision by the Chief Justice, that the words quoted were merely a concrete expression of the opinion of what would be the position of a person who had established the rights in question, and not that Idroos Lebbe had in fact established them.

This was the view also that the District Judge appears to have taken of the judgment when he proceeded to re-hear the case.

The issues settled on the hearing also appear to show that the contention between the parties was as to the *plenum dominium* in the house, not as a right to share in its occupation or in the proceeds arising from the sale of its materials.

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The next question is, Was the District Judge right when he held that no *jus superficiarium* ever came into existence in favour of Idroos Lebbe?

I think that he was right, and that there is also some good ground for holding that the *jus superficiarium* is an interest in land which would only be grantable and transferable by notarial document under the terms of the Ordinance No. 7 of 1840.

It is not, however, I think, necessary in this case to hold this, and I desire to guard myself from appearing to do so.

Maasdorp in his *Introduction to Gotius* (p. 278) translates section 10, chapter 46, thus: "The right (*jus superficiarium*) is presumed to be granted when the owner of the ground allows another person to build on his ground."

Herbert in his *Introduction to Grotius* translates the same section (p. 258): "The right is sufficiently understood to be granted when the proprietor of the ground suffers another person to build thereupon."

The difference in translation leaves room for the doubt that it is an inevitable presumption.

In the present case, assuming the evidence of Idroos' building, a father built a house on the portion of land which his daughter, who had married a poor man, had got separated by partition called lot No. 1.

This seems to me quite consistent with a gift by the father to his daughter of the materials and labour for the building of the house. There is no reservation as to the House; the reservation referred to applies to another house which was fallen down and was on another land.

The District Judge found that Idroos Lebbe never lived in one house nor claimed any right of *jus superficiarium* upon it, while the house was registered as the property of Asia Umma in the Municipal books of Galle from 1871 to 1903 continuously.

No claim was put forward to the house by the heirs of Idroos Lebbe in the partition action in 1902, though the surveyor states that they were aware of the survey.

The house and land was mortgaged in 1873 by Asia Umma, when Idroos signed that mortgage as a security, although in 1876 we find Idroos joining Asia in another mortgage. The latter mortgage may only have been joined in by Idroos for security, as he did in the mortgage of 1873.

I would hold, therefore, even without applying the Statute of Frauds, that there was ground for the District Judge to hold that the *jus superficiarium* in favour of Idroos Lebbe never came into existence, and dismiss the appeal with costs.