

1905.

October 11.

AHAMADO NATCHIA *et al.* v. MUHAMADO NATCHIA.

D. C., Galle, 7,459.

Jus superficarium—Acquisition—Framing of issues—Prescription—Compensation—
Civil Procedure Code.

According to the Common Law of Ceylon a person has the right to build on land belonging to another, and to use such building until the owner of the land tenders the value of the building. This right, which is known as the *jus superficarium*, is acquired and lost, in the same manner as any other right to immovable property; it may be acquired by prescription. The *jus superficarium* is capable of alienation and also of passing to the heirs of the owner of the right.

THE facts appear sufficiently in the judgment of the Chief Justice.

Bawa, for plaintiff, appellant.

Van Langenberg, for 1st defendant, respondent.

H. J. C. Pereira (*Wadsworth* with him), for 2nd defendant respondent.

11th October, 1905. LAYARD, C.J.—

The plaintiff's claim is in respect of a two-ninths share in a house, to which house, he alleges, one Aidroos Lebbe Maricar (deceased) was entitled. He was the original owner of the whole land, and by a deed in 1864 he transferred it to his daughter, reserving to himself a tiled house standing thereon. That house appears to have fallen down in 1867, whereupon Aidroos Lebbe built himself another house on the same site and he continued to live there until his death. The first plaintiff is a granddaughter of Aidroos Lebbe, the mother being dead, and the second plaintiff is another daughter of his, and by right of inheritance they claimed two-ninths of the land. We are

not concerned on this appeal with the other undivided seven-ninths of the land. It would have been desirable to have had all the other owners as parties to this suit. No objection has been taken for non-joinder in this Court or in the Court below. It was argued in appeal that the right reserved to himself by Aidroos Lebbe was not a right to the house exclusive of the ground, but to the soil also. The District Judge has distinctly, however, stated in his judgment that the plaintiffs' claim at the trial was to a two-ninths share of the house without its site. The ownership of a house apart from the site on which it stands is well known to our law. It is called the right of *superficies*. The *jus superficarium* is the right which a person has to a building standing on another's ground. It cannot be termed full ownership, for no one can be legally full owner of a building who has not the ownership of the soil. It is the right to build on the soil and to hold and use the building so erected, until such time as the owner of the soil tenders the value of the building, if the amount to be paid has not been previously agreed upon. The right is acquired and lost like immovable property, and is even presumed to be granted when the owner of the ground permits another to build thereupon. The right can be alienated, and consequently there can be no doubt of its passing to the heirs of the original owner of the right (*Grot.* 2, 46, 9, 10, and 11). The District Judge's attention does not appear to have been drawn to our Common Law as to the *jus superficarium*. The law is clear; the only difficulty in this case is to apply it. That is largely due to the non-observance of the provisions of the Civil Procedure Code by the Judge and the parties in the District Court. I cannot find that any issues were settled before trial. The parties do not appear to have agreed upon issues. What appears to have been done in the Court below is this. There were issues suggested by the plaintiff (which I presume means plaintiffs). Then on the 19th October the defendant's proctors accepted those issues and suggested further ones. There is nothing to show that the plaintiffs' proctors accepted the further issues. The journal minutes contain the mythical entry "Issues perfected," whatever that may mean. Seeing that the parties had not agreed as to the issues, the District Judge should certainly have settled them. Further, the very first issue proposed by the defendant's proctor can hardly be called an issue, as it leaves one to speculate as to whether on the facts proved at the trial any cause of action had accrued to the plaintiffs, and the parties are not tied down to one or more distinct and specific causes of action to be tried and determined by the Court at the trial of the case. The non-observance of the rules of procedure of the District Court is much to be deprecated, for it must

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1905. conduct in many cases to miscarriage of justice. Further, unintel-
 October 11. ligent appreciation of such rules by the parties and proctors and by
 LAYARD, C.J. the presiding judge causes great difficulties in arriving at a right
 conclusion between the parties interested. The respondent's coun-
 sel wished to limit the plaintiffs' action to a right of action to recover
 damages for wilful and fraudulent omission to make the plaintiffs
 parties to a certain partition suit mentioned in plaintiffs' plaint. The
 respondent's proctors, however, were according to the terms of the
 issues proposed by them ready to meet any cause of action that
 might arise from the facts established at the trial. Whether the
 plaintiffs ought or ought not to have been joined in the partition suit
 does not matter, for by section 9 of the Partition Ordinance they
 would have a right of action to recover the damages they claim, if
 not joined. If there was no necessity to join them they would not
 be deprived of their Common Law right to retain the *superficies* until
 the value of the house was paid them, or if dispossessed, to recover
 the value thereof. It is properly admitted by respondent's counsel
 that the District Judge's judgment, which limits the period under
 our Prescription Ordinance in which Aidroos Lebbe could claim
 compensation to three years, even though he lived in the house until
 his death, cannot be supported. For the right to hold and use the
 building erected on another's land continues until such time as the
 owner tenders the value of the building, and is presumed to be parted
 with when the owner of the soil allows another to build on his soil.
 Aidroos Lebbe's rights and subsequently that of his heirs continue
 as long as they remain in possession, and his right to recover the
 value of the house would only terminate when turned out of posses-
 sion by the owners of the soil.

The respondents' counsel urges that the appellant's possession had
 ceased long previous to her bringing this action. There is no
 material before us to show when or at what time the heirs were dis-
 possessed. The judgment of the District Judge must be set aside,
 and the case remitted to the District Court for a further trial to
 enable that Court to decide, for the purpose of determining the ques-
 tion of prescription, the date of dispossession of the persons entitled
 to the *jus superficium*, the law to be applied to the determination
 of such right by prescription being that applicable to immovable
 property, for Grotius (2, 46, 10) states that the *jus superficium* is
 acquired and lost in the same manner as immovable property.
 Appellants are entitled to the costs of appeal; the other costs to abide
 the final judgment of the District Judge.

WENDT, J.—Agreed.