OTTO *vs.* PRETORIUS.

Real servitude.—How constituted.—can be acquired by dominus utilis.

Where, in a suit for declaration of rights to declare plaintiff P. entitled to a servitude of water and to damages it was proved that P., the owner of a farm, bartered one portion to J. with water-right, and sold the other portion to S., stipulating for J.'s water-right, and J., after being in occupation for eleven years without having received transfer, returned his portion of the farm to P., and S. meantime had received transfer and in turn transferred to O., stipulating also for J.'s water-right, and O. claiming that the water-right was personal to J., interfered with P.'s use of the water, the Court held *that a real servitude had been constituted, and that the* dominus jure praetorio *can acquire a servitude as well as the* dominus jure civili.

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This was an appeal from a judgment of Mr. JUSTICE DE KORTE, on Circuit at Zeerust, in the case *Pretorius* vs. *Otto*. Judgment was in favour of Pretorius, plaintiff in the Court below, now respondent, for £25 damages and a declaration that plaintiff possessed a right of leading water, with costs. The facts appear sufficiently from the judgment

Curlewis, for appellant: The question here is whether the alleged servitude is merely a personal right or permission granted to Smit in his personal capacity. The transfer to Otto shows that it is a personal right granted in favour of Jacobus Smit to lead water for his lands and garden. Smit never had transfer of any property. He never *owned* any *praedium dominans*. The right of *dominium* remained always in Pretorius, and without transfer of the *dominium* Smit could not pass a real servitude to Pretorius. Pretorius could not have a servitude over his own property. Schoeman got transfer from Pretorius in August, 1884, while it was in 1881 that Smit returned the land to Pretorius. No real servitude was ever granted, and thus there ought to have been in the first instance at least absolution from the instance in favour of defendant in the Court below (now appellant). See *Steyn and Geldenhuys* vs. *Van Wyk*, 1887.

Keet, with him *Tobias*, for respondent: The servitude exists and is real. This is the clear intention of parties as proved by the documents. From the nature of the case it cannot be a personal servitude, it was to irrigate lands and gardens. If it was not a real servitude, why was it reinserted in Otto's transfer in 1888 ? If it was personal, it would have been excluded in 1881 when Smit gave the ground back to Pretorius. It was always acted upon right up to 1890. (*Cf. Meintjes* vs. *Mears*, decided in this Court in 1889. where the wording of the grant was precisely as in this case, and the Court pronounced it a real servitude.)

Cur. adv. vult.

Posteà, February 13th.

KOTZÉ, C.J.: This is an appeal from the judgment of my brother DE KORTE sitting in the Circuit Court at Zeerust. The plaintiff (Pretorius) sued Otto for an order by way of declaration of rights, that he, the plaintiff, was and is entitled to a certain servitude of leading water and to damages. The Judge in the first instance, after having heard the evidence, came to the conclusion that plaintiff was entitled to the servitude which he claimed and to damages, and consequently gave judgment in his favour for the servitude of leading water and £25 damages and costs. It appears that in the year 1870 Pretorius was the owner of two portions of the farm Doornkloof, and in March, 1870, he transferred a certain portion to J. Smit by way of barter with water-right. In May, 1870, Pretorius (plaintiff) sold the remaining portion of Doornkloof to Schoeman, and in the declaration of sale the following clause appears, "on condition that Mr. Jacobus Smit shall have the right of water for the irrigation of his garden and lands which are situated there, and free pasture for his cattle on the south side." No transfer was, however, given to Smit of the ground which he had obtained by barter, although he occupied it from 1870 to 1881, when he returned the ground to Pretorius, who then again occupied it. In 1884 Pretorius gave transfer to Schoeman of the portion sold to him, and in June, 1888, Schoeman gave transfer of his portion to Otto (appellant). In Otto's deed of transfer the following clause

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appears; "on condition that Jacobus Smit shall have the right of water for the irrigation of his garden and lands situated there, and free pasture for his cattle." In 1889 Otto dammed up the water-furrow which provided the lands of Pretorius with water, and from this fact arose the action. In appeal Mr. *Curlewis* confined himself principally to two points: *First*, that the servitude claimed was only a permission to use water personal to Jacobus Smit, and not a real servitude in the proper sense of the term; and, *secondly*, that if the right of water conveyed to Smit can be considered as equivalent to a servitude, still there can be no question of a real servitude, as Pretorius never gave transfer or conveyed in any way either to Smit or to Schoeman *coram lege loci* the portions sold to them respectively, and thus when Smit in 1881 gave his portion back to Pretorius, Pretorius was still the *dominus* or owner of the two portions, and as therefore neither Smit nor Schoeman was ever *dominus praedii* when Pretorius received back the portion from Smit, Smit could not have acquired any real servitude; and, as Pretorius was still in law the *dominus* of the two portions in 1881, he could not have any servitude over his own *praedium*.

With regard to the first contention, I must remark that if the clause in Otto's transfer is read alone, the deduction might be made that only a personal permission for the use of water was granted to Smit, but taken together with the evidence it is clear that the intention was to create a real servitude, especially as Smit in 1881 ceased to be occupier of the portion bought by him from Pretorius, and the reservation about the water appearing in Otto's transfer in favour of Jacobus Smit was thus not intended in favour of Smit personally, but in favour of Smit's portion of Doornkloof, as so indicated, and it was, as a matter of fact, taken over from the deed of sale between Schoeman and Pretorius of May, 1870. This being so, the intention clearly was to call into existence a real servitude for the use of water.

The second point adduced by Mr. *Curlewis* appeared to me deserving of serious consideration. Now, although it is quite true that only the *dominus praedii* or the person *qui habet prædium* can acquire a real servitude (*Dig.*, 8, 4, 1, and *Mackeldey, Systema Juris*, § 291 b), Noodt in his commentaries to *Dig.* 8, 4, pp. 173–4, says that not only the person who is *dominus jure civili*, but also the person who *jure præ-*

torio pro domino habetur can acquire a real servitude. It is enough that anyone should be *dominus omni modo*, although not *dominus omni jure*, to acquire a real servitude. This quotation from Noodt is precisely applicable to the case before the Court. In 1870 it was the intention of Pretorius and of Smit that the latter should be owner of the portion granted to him, and he has always acted as such, although not *jure civili dominus*, and exercised owner's rights, especially with regard to the water. The same remark is also applicable to Schoeman. Consequently Smit could acquire and exercise a real servitude of right to water, and he has further actually exercised it as against Schoeman's portion of Doornkloof, and when Pretorius in 1881 got back that portion of Doornkloof which he had granted to Smit by way of barter, there was nothing to prevent him exercising the right of servitude of water both as *dominus jure civili* and *jure praetorio, i.e.*, as *dominus omni jure* over the portion that was in possession and occupation of Schoeman *jure praetorio, i.e.*, as *dominus utilis* or owner of the *dominium utile* in the portion which was sold to him in May, 1870, by Pretorius, and this servitude was subsequently specifically taken over and described in the transfer of Otto, the appellant. I am therefore of opinion that the appeal ought to be disallowed, with costs.

JORISSEN and MORICE, JJ., concurred.

OTTO *vs.* VILJOEN AND OTHERS.

Ejectment.—Application for reinstatement.—Estoppel by agreement.

The "N. H. or G." Church and the "N. H." Church at Zeerust both claimed the ownership of certain property there, and the latter forcibly ejected the former from possession. At the instance of the Government the disputants then agreed to submit the question of the ownership to the High Court for decision, and to leave everything else in statu quo *until such decision should be given. Notwithstanding this*