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*

agreement the "N. H. or G." Church applied to the Court for an order, as a preliminary step, placing them in possession of the property from which they had been ejected. The Court held *that the applicants were estopped by their agreement from obtaining such an order, and dismissed the application, with costs.*

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The facts of this case which are relevant to the decision appear sufficiently from the judgment.

Leonard, with him *Esselen* and *Curlewis*, for applicants. Much that appears in the declarations and documents has nothing to do with this application. It is all only relevant to the main question, viz., whether the property belongs to the church community, and whether the Church Assembly is lawful or not. We have not come as far as that yet. We are only making a provisional application for a *mandament van spolie*. We allege that possession of our Church property is being taken away from us unlawfully and by force. (*Cf. v. d. Linden*, 13, 114.) It is impossible for the Court to deal finally with such a case as this upon affidavits, and for that reason we apply for reinstatement in possession, for we were in lawful and peaceful possession of the Church building at Zeerust *Spoliatus ante omnia restituendus est.* The two congregations or churches at Jacobsdal and Zeerust were united or amalgamated for several years. This appears from the declaration of the Rev. Mr. van der Spuy. Even Diederick Coetzee, the man who presented the church building and ground, was an elder of the united Church. In order to prove violence or the forcible taking possession it is not necessary to prove that anybody has been assaulted. It is enough if anyone has been deprived of possession in an unlawful manner. Before the events of July 19th, 1890, the church building was not in possession of the "Hervormde" Church: see letter of Joubert on December 9th, 1889, to the consistory (Kerkeraad) of the "Vereenigde" Church; letter of January 6th, 1890, from the representatives of the "Hervormde" Church to the "Kerkeraad" of the "Vereenigde" Church; letter of July 7th, 1890, from the same party to the same. As a matter of fact acts of force and violence have been committed. The old locks were taken from the doors and new locks substituted. Blows with the fist were inflicted.

Kleÿn, with him *Buskes* and *Tobias*, for respondents: The other side state they are asking for *mandament van spolie*. This petition is not the means of which the parties who are applicants can avail themselves. § 4 of the petition says that the property, and not merely the possession, is in the applicants. How can they now come and say they are merely making a complaint about possession? The arrangement proposed by the Government, and accepted by both parties, is that the case—*i.e.*, the question of property itself—should be brought before the Court. They cannot fall back upon a provisional application like this. The letter from the State Secretary proceeds altogether upon this supposition. No act of violence was committed. The church was open. We had transfer, and we went into the church, which was standing open—our property. The other party only had possession *precario*. This we had given them. See declaration of the Rev. Mr. van der Spuy, page 2.

Postea, February 14th.

Kleÿn, for respondents, continued: The name of the church has been altered. It is not as was agreed upon, and consequently it cannot be said that the union in the name of the United (Vereenigde) Church is lawful, and in consequence it cannot be said that Diederick Coetzee—the donator—has not remained consistent. He was heart and soul for the union, but as the conditions of the union have not been observed, he was certainly entitled to withdraw. That he has done, and he gave transfer in terms of the original donation. The Rev. Mr. van Warmelo also—the minister of Wakkerstroom and Standerton—did not agree to the subsequent decision as to the name of the United (Vereenigde) Church, as being in conflict with the previous resolution upon this subject. Now, it was only on the ground of the provisional union, which was not carried out with all its conditions, but was broken, that the Rev. van der Spuy *cum suis* came into possession. The United (Vereenigde) Kerkeraad resolved to give the use to the "Vereenigde" Church. See p. 4 of the Rev. Mr. van der Spuy's declaration. (*Cf. Modderman*, vol. 2, pp. 158, 159 *in fin.*, p. 160, *in fin.* p. 161; *Goudsmit*, vol. 1, 204; *Wassenaar*, vol. 1, c. 14, § 7; *Goudsmit*, vol. 1, pp. 66, 67.)

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Tobias, on the same side, cited several decisions reported in the *Weekblad van 't Recht ; Windscheid Pandekten*, p. 517, § 156, 4. There has been no change upon our side.

Leonard, in reply : The union of the Churches was final. There was no occupation *precario*. (*Gail. obs., bk.* 2, *obs.* 75.)

Cur. adv. vult.

Postea. February 16th, 1891.

KOTZÉ, C.J. : This is an application on behalf of the " Ned. Gereformeerde of Hervormde " Church (generally known as the United Church) of Zeerust to be provisionally placed in possession of the church building and church property at Zeerust. The applicants complain that they were forcibly ejected by members of the " Hervormde " Church. and they now ask the Court to order, as a preliminary step, that they be immediately placed in possession again. I regret very much that the parties in this case have not found it possible to come to an amicable settlement, as I suggested at an earlier stage, of the dispute that has unfortunately arisen with regard to the ownership of the church building and church property at Zeerust, but as they are now in Court and have submitted the matter to judicial decision, there is nothing else for me to do but to do justice in accordance with the facts of the case.

Now, for the purposes of this application, I shall assume for the sake of argument that the United Church was in peaceable possession of the church building at Zeerust and that it was ejected on July 19th, 1890, by representatives and members of the " Hervormde " Church there, and then the question still arises whether the applicants (that is, the United Church) have not waived any right that they may have had to ask for a provisional order, as they are doing in this case, whereby the dispute between the parties would still remain quite open and undecided, by agreeing to the proposal of the Government that if they could not succeed in coming to an amicable agreement they should lay the Church question as speedily as possible before the High Court for decision. On behalf of the United Church it is stated that, by adopting the proposal of the Government, they did not waive any right to make an application like the present,

while it is maintained by the opposite party that they did thereby waive such right. After carefully reading the documents, it is perfectly clear to me that the applicants have been ill-advised and that there can be no doubt that by consenting to the proposal of the Government of July 23rd, 1890, the United Church is debarred by its own action in so consenting, from asking for a provisional order from the Court, so far as the dispute which has arisen at Zeerust is concerned. The question which had arisen and which existed at the time of the occurrence at Zeerust on July 19th, 1890, was a claim which the " Hervormde " Church made to the ownership of the church building and church property at Zeerust. This is clear from the following documents :—

(*a*) Letter dated December 9th, 1889, from the Chairman of the Committee of Management of the " Hervormde " Church to the Church Council of the " Hervormde of Gereformeerde " Church (that is, the United Church).

(*b*) The resolution of January 6th, 1890, taken by the Church Council of the " Hervormde " Church at Zeerust, a copy of which was sent to the Rev. Van der Spuy.

(*c*) Letter from the Church Council of the " Hervormde " Church, dated July 7th, 1890, to the Church Council of the United Church.

The taking possession of the church on July 19th, 1890, was therefore nothing more than an attempt to bring the already existing question with regard to the ownership in the church and church property to a head. Whether the " Hervormde " Church, by taking this step, has gone beyond its rights or not is a question which it is not necessary now for me to decide. A committee was then appointed by the Government to endeavour, if possible, to arrive at an amicable settlement in the matter. In the letter from the State Secretary, dated July 23rd, 1890, which contains the instructions to the committee, I find the following :—

" It will be your task to endeavour to induce the different parties to settle *the existing dispute* in peace and love. The Government will even go so far as to promise that the Church which waives *her claims to the church building* will get four erven in Zeerust, to be selected by such Church from the available Government erven in Zeerust. If the parties do not wish to come to such a settlement, you must

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try to induce them to have *their dispute* settled by the High Court without one of the parties taking the law into its own hands; in other words, the parties should together bring *the case* before the Court in a friendly manner. If the parties wish to do this, the Government is willing to promise the party losing the case in Court four erven, as mentioned above." On July 28th, 1890, the committee began to sit, and I find, *inter alia*, the following in the minutes :--

"The committee asks whether the congregation will be satisfied if the Church Council comes to an agreement with the committee. This question, being put to both Church Councils, is answered by their Chairman in the affirmative. . . . . The committee says if both parties claim *one and the same property* and will not waive any part of their claim no agreement can be arrived at." Thereupon the resolutions taken by both Church Councils separately were handed in. In the resolution taken by the Church Council of the "Ned. Hervormde of Gereformeerde' Church (*i.e.*, the United Church) I read the following: "The Church Council adopts the second proposal made by our Government, that is, to have the case decided by the High Court at Pretoria, and promises to do everything it possibly can to keep the peace. The Church Council of the "Ned. Hervormde of Gereformeerde" Church of Zeerust heartily thanks the Government for their good will and friendly desire to arrive at an amicable settlement by sending a committee to us *and also for the gift promised to the losing party.*"

The resolution of the Church Council of the "Hervormde Church" reads as follows: "This meeting adopts the second proposal made by the Government and is satisfied to have '*this matter*' settled by the High Court on condition that the "Ned. Hervormde" Church remains in possession of the property which has been transferred to her name and is now in her possession until such time as the High Court shall have given a decision on this Church question." After these two resolutions, taken separately by the two parties, had been handed in to the committee, some further discussion took place, and then, *with the consent of both parties*, the following telegram was sent by the committee to the State President: "Both Church Councils have agreed to have the matter decided by the High Court and request the Government to apply to the High Court to hold a special session as

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speedily as possible to hear the case." Now I repeat that from this only one conclusion can be drawn, *viz.*, that *both* parties agreed to submit for the decision of the Court *the case or church question*, that is, which of the two Churches is entitled to the *ownership* of the church and church property, on the understanding that the losing party should receive compensation in the shape of four erven from the Government. But now the applicants wish to go behind all this, to practically set aside the agreement, and to make a preliminary request to be again placed in possession of the church building. This would leave the very question which *both* parties had bound themselves to bring before the High Court still quite open and undecided. The resolutions taken by both parties and handed in to the committee upon which the telegram was sent to the State President show most clearly that everything was to remain in *statu quo*, that the parties would leave everything for the time being in the same position as it was on July 28th, the date of the resolutions, and in conjunction with the telegram the resolutions also show that it was not only agreed, but that the parties were anxious that the main point as to the right of ownership in the church and church property should be brought before the Court as soon as possible. Why the applicants have not abided by this agreement does not appear, and they certainly erred when they decided to depart from their own agreement and to make an application of a provisional nature, viz., to obtain possession again of the church as a preliminary step, as they are now doing, entirely at variance with their agreement to leave the matter as it was until the Court had given a decision in the principal case—that is, with regard to the right of ownership. It therefore speaks for itself that under the circumstances brought to light in this case the Court cannot grant the request to be provisionally placed in possession, as the applicants bound themselves to go into the principal case, and to submit that for judicial decision. The view which I take of the facts is not only in accordance with common sense, but is also in accordance with law, and if any authority is desired on the point, I refer to *Wassenaar, Jud. Practyck*, vol. i., ch. 14, § 7, which is precisely applicable to this case.

I desire not to be misunderstood in this matter. I have confined my attention solely *to the application* before the

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Court. I give no opinion as to the legality or otherwise of the Church Union, nor do I wish to say anything about the rights of those persons who allege that as members of a *universitas* those who have not entered the union are entitled to all the church buildings and property. These two points, which were touched upon during the argument have nothing to do with the application now before the Court. I wish, however, to add this. When I was asked to hear this application I consented to sit as sole judge, for the law permits this to be done. As I have now ascertained what the precise question is, and that the parties have agreed to have the principal case finally settled, I consider it my duty to remark that, regard being had to Law No. 3 of 1883 and Law No. 1 of 1888, one judge sitting alone is not competent to deal with the principal case, and as I cannot sit with any of my brother judges in the case, owing to all of them having excused themselves on the ground that when they were advocates at the bar they gave professional advice in the case, there seems nothing for the parties to do, in the event of their not being able to settle the matter, but to have recourse to the Volksraad, the Legislature of the land, to have it dealt with there. The application is dismissed, with costs.

Moir, N.O., *vs.* Wood.

Sequestration.—Transfer of land by insolvent after sequestration set aside.—The date of registration is the date of transfer.

Where, in a suit for the setting aside of a certain transfer of land by an insolvent, it was pleaded that transfer was passed before the date of the provisional sequestration, although the transfer was only registered after such date, the Court held *that the rule to be followed is that laid down in the case of* Harris vs. Buissinne's Trustee (2 *Menzies' Reports*), *and that the transfer must be set aside.*

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Moir, N.O. *vs* Wood.

This was an application for the setting aside of a transfer of a quarter share in an undivided quarter of a farm Elands-