

exception amounts to this, that it is not competent to the plaintiff to insert a count under the common law as well as under the "*Insolvent Ordinance*"; and it has been further argued that under the count at common law the plaintiff is not entitled to succeed, inasmuch as the remedy which he relies upon has been abolished with the *cessio bonorum*. In regard to the common law relating to insolvency having been entirely superseded by Ordinance 6, of 1843, we have the decision of the Privy Council in the case of *Thurburn vs. Steward*, the judgment of Lord Cairns being clear. From that judgment we may take it that, in his opinion, the intention of the framers of the Ordinance was not entirely to supersede the common law. I can find nothing in the Ordinance from which it would appear that it was intended to deprive creditors or trustees of any right they might have under the common law consistently with the provisions of the Ordinance. I think the declaration would have been better drawn if a prayer had been attached to each count, but I do not think there is sufficient informality to justify the Court in upholding the exceptions, which must be overruled, with costs.

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Estate of Smith  
vs. Smith.

[Plaintiffs' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]  
[Defendant's Attorneys, J. & H. REID & NEPHEW.]

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THE TOWN COUNCIL OF CAPE TOWN *vs.* THE COMMISSIONER OF CROWN LANDS AND PUBLIC WORKS,  
AND THE RAILWAY ENGINEER OF THE COLONY.

*Act 1 of 1861, § 75.—Act 19 of 1874, § 3.—Act 9 of 1858, §§ 11, 12, 13.—Public Roads.—Right of Crown to appropriate lands for purpose of making such roads.—Rule as to municipal lands.*

*The Railway Department of the Colony required a portion of the Cape Town Parade for railway purposes. The Governor in terms of Act 1 of 1861, gave the Council leave to alienate. The department could not come to terms with the Town Council and appropriated the land in question under the provisions of Act 19 of 1874, and*

*Act 9 of 1858, leaving the question of compensation to be settled afterwards. On the Town Council applying for an interdict to restrain the Railway Department from thus expropriating the land—*

*Held, that even independently of Act 9 of 1858, the Crown may when authorized by the Legislature to construct roads for the use of the public take or use any lands not its own required for the purpose, upon paying a reasonable compensation to the owner, and that this rule would apply to municipal lands as soon as their alienation had been consented to in terms of Act 1 of 1861, § 75.*

*And further that since under Act 19 of 1874, § 3, the Railway Department was entitled to expropriate the land in question, for the purpose of any railway authorized to be constructed by that Act, and to leave the question of compensation to be settled afterwards; and since the purpose for which the land was required was authorized by the said Act, the application for an interdict must be dismissed with costs.*

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The facts of this case were as follows:—The Railway Department of the Colony required a certain portion of the Cape Town Parade for railway purposes, and informed the Town Council of the fact, requesting it to state on what terms it was willing to cede the land. The Governor gave the Town Council permission in terms of Act 1 of 1861, § 75, to alienate the ground in question. The Railway Department refused the terms offered by the Town Council, and gave notice that it would take possession of the land under the provisions of Act 19 of 1874, and Act 9 of 1858. Subsequently the Railway Department offered the Town Council the sum of one shilling as nominal compensation for the land, and called upon the Council to state before a certain date whether it would accept the offer or not. Before the arrival of this date, however, the Railway Engineer of the Colony, acting under the orders of the Commissioner of Crown Lands and Public Works, took possession of the land in question, and commenced working upon it without the consent of the Town Council. The Town Council now applied for an interdict to restrain the respondent from effecting this appropriation,

*Leonard* (with him *Innes*), for applicants. The Town Council is willing to alienate the land on certain terms. The Railway authorities do not agree to these terms, and instead of coming to some arrangement with the Town Council, have proceeded forthwith to appropriate the ground. Government has no right to take the ground without the consent of the Town Council. The *Municipal Act of 1861* vested this land in the Municipality. It is freehold land. It is not land as to which any prescription can be shown to exist in favour of the Government or any private bodies for the purpose of making roads and railways. The *Act of 1858*; and the *Railway Act of 1874* do not empower the Government to proceed so far as it has done in this matter. It has not been shown that the Town Council is obliged, in the absence of any legislative enactment, to give up this land without compensation.

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*Uppington, A.G.*, for respondents. Applicants' contention, if worth anything at all, will apply to a very considerable portion of land in this Colony. The intention of the Legislature is perfectly clear from *Act 9 of 1858*, §§ 11 & 12. The Parade and other waste lands, in Cape Town, are vested in the Town Council, which is not allowed to alienate without the consent of the Government. It has more than once alienated portions of the public squares, in Cape Town, with the consent of the Government, and is willing to alienate the land at present in dispute, if its terms are agreed to. It is clear from the *Public Roads Act of 1858*, and the *Railway Act of 1874*, that the Government has a right to take the land in question upon giving compensation. The 11th and 12th sections of *Act 9, 1858*, are especially in point.

*Cur. adv. vult.*

*Postea* (Feb. 10th),—

DE VILLIERS, C.J.:—This is an application for an interdict to restrain the Commissioner of Crown Lands and Public Works from appropriating any portion of the Grand Parade in Cape Town for railway purposes. It is admitted on both sides that the property in the land is vested in the Town Council, and that they have obtained the consent of the Governor to the sale or alienation of the land in terms of the

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75th section of *Act No. 1 of 1861*. The applicants, however, deny the right of the Government to take the land without their consent; or, in other words, until the Town Council has exercised the power of selling or alienating the land to the Government. The respondent, on the other hand, as representing the Government, relies on the 3rd section of *Act 19 of 1874*, as authorizing him to take the land, leaving the question of compensation to be afterwards settled. The effect of this section is to bestow on the Governor, or any person charged by him with the making or maintaining of the railways authorized by the *Act*, all the powers which are by *Act No. 9 of 1858* bestowed upon the Commissioners of Roads in regard to the taking or acquiring lands or materials necessary for the making or repairing of any main road, or of any works in connection therewith. There is this important difference, however, that under the *Act 19 of 1874*, the Governor or his representative may enter upon, take possession of, and use any land or materials which may be required for railway purposes, whenever he may think fit, leaving all question as to the compensation to be settled afterwards, whereas under the *Act 9 of 1858*, proceedings to settle the amount of compensation had to be taken before the Commissioners were entitled to exercise the power of expropriation given to them by the *Act*. The applicants contend that under the *Act No. 9 of 1858*, the Commissioners of Roads had no power to expropriate municipal lands for road purposes, and that the respondent has no larger powers than the Commissioners of Roads possessed. Now the object of the *Act 9 of 1858* was, as the preamble expresses it, to make better provision for the maintenance and improvement of the public roads of the Colony, and the 7th section provides that, subject to the direction and control of the Governor, all roads, declared by Act of Parliament to be main roads, shall be under the charge of certain salaried officers of the Government, styled "Commissioners of Roads." The 11th section proceeds to give the Commissioners the same powers as the Crown possessed in respect of quitrent lands, as well as in respect of freehold lands in the grants of which the right of the Crown to make roads has been reserved. Then comes the 12th section, which confers certain powers upon the Commissioners in respect of land belonging to any person who may not be bound by law to allow them to take

or use the land without requiring any recompense or payment. The applicants fairly contend that this section can only refer to land, the owner of which is bound by law to allow it to be taken or used for main road purposes upon receiving reasonable compensation, and that municipal land has not been shown to be the subject of this liability. The question is an important one, for if the objection is valid in the present case, it would be equally valid in regard to all freehold lands, the grants of which do not reserve any rights of road-making to the Crown. In considering this question it becomes necessary to enquire into rights of the Crown independently of the *Act No. 9 of 1858*,—an enquiry which appears to have been lost sight of by counsel on both sides. The result of my own enquiry is that, where the Crown is authorized by the Legislature to construct roads for the use of the public, the Crown may, in the exercise of the powers conferred upon it, take or use any land not its own that may be required for the purpose upon payment of reasonable compensation to the owner. The right to make the roads involves the right to exercise such powers as are absolutely necessary to enable the Crown to make the roads (*cf. Voet*, 1, 4, 7). If this view is correct, it is evident that all freehold lands fall within the provision of the 12th section of *Act No. 9 of 1858*. The same remark would apply to municipal lands belonging to the Town Council so soon, at all events, as the requisite consent to their alienation has been obtained. Under the *Act of 1858*, the power of expropriation vested in the Crown could only be exercised after payment of compensation, and the object of the last proviso of the 3rd section of *Act 19 of 1874* was to authorize the exercise of this power, even before compensation is given. It follows that the application for an interdict must be refused, with costs.

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DWYER and STOCKENSTRÖM, JJ., concurred.

[Applicants' Attorneys, FAIRBRIDGE, ARDERNE & SCANLEN.]  
[Respondent's Attorneys, J. & H. REID & NEPHEW.]

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