Bb. 89/87

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VENETA MINERARIA SPA .... Appellant

and

CAROLINA COLLIERIES (PTY) LTD .... Respondent
(IN LIQUIDATION)

CORAM : VILJOEN, SMALBERGER, VIVIER, JJA, BOSHOFF et STEYN AJJA

HEARD : 12 MARCH 1987

DELIVERED : 17 SEPTEMBER 1987

J U D G M E N T

VILJOEN, JA

During June 1981 the appellant, an Italian company which at the time carried on business in Milan, Italy,

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instituted an action in the Durban and Coast Local Division against Carolina Collieries (Proprietary) Limited (hereinafter referred to as "Carolina") claiming from Carolina, which had its head office in Johannesburg, Transvaal, and operated a colliery in Carolina, Transvaal, damages for breach of contract, interest and costs. Carolina resisted the claim and instituted a counterclaim. The matter was heard during March 1985 and in pursuance of a judgment handed down on 7 May 1985 (which is fully reported in 1985(3) SA 633 (D), hereinafter referred to as "the report",) the learned trial Judge, Kumleben J, dismissed the claims in convention and reconvention with costs. Leave to appeal having been granted by the Court *a quo* to appeal to this Court against that part of the order whereby the learned trial Judge dismissed the appellant's claim with costs, an appeal was duly noted and appeal proceedings were instituted. On 25 February 1986 a final winding-up order was made against Carolina. The liquidatrix who had received proper notice that the appellant desired to prosecute the appeal indicated that she did not intend to become involved in the appeal proceedings or to intervene in any way. Before this Court there was consequently no appearance for Carolina. An application at the commencement of the argument on appeal that the name of the respondent should be altered to "Carolina Collieries (Proprietary) Limited (in liquidation)" was granted.

As a perusal of the report reveals, the learned trial Judge, even though he upheld a special plea that, despite a written consent to the jurisdiction, the trial Court did not have jurisdiction to try the matter, nevertheless proceeded to state his views on the breach of contract issue and decided that against the appellant as well.

The only ground advanced in this Court in support of a contention that the Court *a quo* had jurisdiction was the written consent to the jurisdiction signed on behalf of Carolina. The facts which are relevant for the purposes of the adjudication of this issue are, as set out in the report at 637 B - D, that the parties were neither domiciled nor resident

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within the area of jurisdiction of the Court *a quo*, nor was the contract concluded or to be performed within such area. Both parties were therefore *peregrini* of the Court *a quo*. They differed in status, however, in the sense that the defendant was, even though a *peregrinus* of the Court, an *incola* of the Republic of South Africa, whereas the appellant was not - it was an out-and-out *peregrinus*.

Jurisdiction (gerigtsdwang) is defined by Vromans, following Berlichius, as "a lawful power to decide something in a case or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction." See Wright v Stuttaford & Co 1929 EDL 10 42. In so far as South African courts are concerned their jurisdiction is the right or authority of entertaining actions or other legal proceedings which is vested in them by the state. When the Supreme Court of South Africa was created on the establishment of the Union of South Africa by the South Africa Act, 9 Edw VII ch 9 section 95, the Supreme Courts of the former colonies became provincial or local divisions of the Supreme Court of South Africa. These divisions retained the jurisdiction which the courts to which they succeeded enjoyed.

The statute which currently governs the

system of the Supreme Court in the RSA, its several divisions and their respective jurisdictions and powers is the Supreme Court Act 59 of 1959 (hereinafter referred to as "the Act"). According to it the original jurisdiction of each division is territorial - it is to be exercised within a particular geographical area specified in the First Schedule to the Act. Section 19(1) of the Act provides broadly that a provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising within its area of jurisdiction and all other matters of which it may according to law take cognizance.

In view of the indefinite wording of

s 19(1) of the Act and its predecessors, no doubt deliberately so couched because the intention of the legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain what competency each of the supreme courts in the RSA possesses to effectively adjudicate and pronounce upon a matter brought before and heard by it. In the course of time it seems that, as our law on jurisdiction developed, it was also influenced to a minor extent by principles of the private international law applicable in other legal systems.

For the purposes of this appeal it will be convenient to distinguish between the so-called grounds of jurisdiction by virtue of which a court would normally ipso jure have jurisdiction and jurisdiction which is conferred on a court. In the former category the grounds of jurisdiction - the rationes jurisdictionis - may be classified. In Einwald v The German West African Company 5 SC 86 De Villiers CJ said at 91 that the grounds upon which jurisdiction can be exercised in respect of any contract over a defendant without his consent, express or implied, are threefold:

> "viz by virtue of the defendant's domicile being here, by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject-matter in an action in rem being situated in this Colony."

In the second category of cases whereby

jurisdiction may be conferred upon a court attachment of the goods or arrest of the person ad fundandam jurisdictionem as well as consent to jurisdiction (known by the term prorogatio in Roman Dutch law) may be classified. In this respect the learned trial Judge refers, at 639 of the report, to Vromans who observes in his treatise De Foro Competenti 1.1.7 note 12:

> "Uyt het Gemeine Regt is een Regter competent, of door sig selfs, ofte door toeval"

and points out that Vromans proceeds to classify, among others, both consent and attachment as instances of jurisdiction "door toeval". Among the others Vroman includes "door saaks t' samehang, in saken van eene natuur sijnde en die gevolglyk

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van den anderen niet konnen gescheiden werden." Cf <u>Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd</u> 1962(4) SA 326(A).

It seems to me - and I express this view <u>en passant</u> and of course <u>obiter</u> - that there is, in so far as South African law is concerned, another type of case, arising from the provisions of s 9 of the Act, which may be added to this category. This section reads as follows:

> "(1) If any civil cause, proceeding or matter has been instituted in any provincial or local division, and it is made to appear to the court concerned that the same may be more conveniently or more fitly heard or determined in another division, that court may, upon application by any party thereto and after hearing all other parties thereto, order such cause, proceeding or matter to be

removed to that other division.

(2) An order for removal under sub-section (1) shall be transmitted to the registrar of the division to which the removal is ordered, and upon the receipt of such order that division may hear and determine the cause, proceeding or matter in question and shall in that event apply the practice governing the division in which it was instituted and the law according to which that division would but for the removal have heard and determined such cause, proceeding or matter."

In Fraser v Lee 1904 TS 377 an application by the defendant, the plaintiff consenting, under s 29 of Proclamation 14 of 1902 (the forerunner in the Transvaal of s 9 of the Act), for the venue to be changed from the Supreme Court of the Transvaal to the Witwatersrand High Court, was granted. The latter court also had jurisdiction. At 378 Solomon J said:

> "It may be that if the Johannesburg court had no jurisdiction whatsoever, either over the cause or over the defendant, by reason of the fact that he resided out of the jurisdiction of the court, some difficulty might have arisen. I express no opinion whatsoever about that ....."

In a long line of later cases this point, which was left open in the Fraser v Lee case was decided, the courts holding that it was not necessary for the transferee court to have jurisdiction; in other words,the practice seems now to be firmly established that jurisdiction can in this manner be conferred upon a court. See the cases collected in Nathan Barnett & Brink Uniform Rules of Court 3rd edition at 562. It is submitted by the authors that, although the court to which it is sought to remove the proceedings need not originally have had jurisdiction, the fact that it has no jurisdiction will be a matter to be taken into account in deciding whether the application for removal should be granted. It is not necessary, for the purposes of this case, to express any view on the correctness of this submission.

But to revert to the present case - the crisp point to be decided is whether a consent to the jurisdiction can stand alone as conferring jurisdiction on a court or whether it serves merely to supply, complementarily to some causa jurisdictionis, an element to the jurisdiction which would, but for such consent, be defective. The latter was the view of the learned trial Judge.

The question arises of what relevance, apart from the fact that they are both considered to be instances of jurisdiction "door toeval", arrest or attachment _ad fundandam jurisdictionem_ is to the present problem concerning prorogation. They have this in common, as pointed out in the report at 639 H - J, that neither can be regarded as one of the ordinary _rationes jurisdictionis_ which are traditionally based on the doctrine of effectiveness. The anology is, in my view, important because it has repeatedly been stressed by the authorities and in decisions of the courts, that effectiveness is the basis of jurisdiction. This doctrine of effectiveness was thorougly probed by Potgieter JA in the matter of Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969(2) SA 295 (A) 305C - 310H and I need not add anything in this regard.

On behalf of the appellant it was submitted that, until the decision in Towers v Paisley 1963(1) SA 92 (E) it appears to have been generally accepted that consent was sufficient to confer jurisdiction. We were referred to Pollak South African Law of Jurisdiction 92 and an article The Civil Jurisdiction of the Supreme Court of South Africa by the same author in Vol XLVI (1929) SALJ 237 at 241 and also to the decision in Sonia Proprietary Limited v Wheeler

1958(1) SA 555(A) 563C - F.

In _Towers v Paisley_ _supra_ Jennett JP held (at 95A) that a peregrine plaintiff had always been able to sue a peregrine defendant only if one of the three grounds of jurisdiction viz _ratione rei sitae_, _ratione rei gestae_ or _ratione contractus_ existed and that consequently the applicant, being a _peregrinus_ as far as the court was concerned, could not bring an action against the respondent on the ground only that the latter had consented to the court having jurisdiction (95E). In arriving at this conclusion the learned Judge President derived support from the law relating to arrest and

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attachment *ad fundandam jurisdictionem*. The learned Judge President said at 94 F:

> "In the case of action against a *peregrinus*, the Courts of the four Provinces before Union allowed a plaintiff *incola* to sue such *peregrinus* provided there was a ground of jurisdiction *ratione rei sitae*, *ratione rei gestae* or *ratione contractus* with an arrest of the defendant or attachment of some of his property."

It was pointed out on behalf of the appellant that the *dictum* did not express the law correctly because in the case of an *incola* in the Transvaal, at any rate, no ground of jurisdiction other than arrest was required and we were referred to

Pollak op cit 58 - 9. It appears, however, that the learned Judge President did not quite intend to say what is reported at 94F because he proceeds to say in the second sentence of the very next paragraph (94G):

> "In addition, however, a plaintiff incola could sue a defendant peregrinus even if none of the three grounds referred to were present but there had been an arrest of the defendant or attachment of some of his property."

It is true, however, that in the case of a plaintiff incola in the Transvaal no ground of jurisdiction other than arrest of the defendant peregrinus or attachment of his property was required. In fact, the practice which obtained in the Transvaal (see _Lecomte v W & B Syndicate of Madagascar_ 1905 TH 295; 1905 TS 696) was subsequently approved and followed in the Cape (see _Halse v Warwick_ 1931 CPD 233).

In the case of a defendant _peregrinus_ who is, however, resident in another province of the RSA different considerations apply. As Jennett JP points out in _Towers v Paisley_ _supra_ at 94 _in fine_, by s 5 of Act 27 of 1912 arrest of the person or attachment of his property was prohibited in such a case. As a result the right of an _incola_ to found jurisdiction solely on the arrest of such a _peregrinus_ disappeared.

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He correctly interpreted s 5 of Act 27 of 1912 as prohibiting arrest of the person or attachment of his property in respect of a defendant *peregrinus* who was resident in another province. The relevant portion of the section provided: "Whenever a defendant resides in the Union no attachment of his person or property to found jurisdiction shall be ordered." In this respect Pollak *op cit* 68 expresses the view that Maasdorp CJ in *Smit v Cramer* 1913 OPD 123 and Kotzé J in *Brooks v Maquassi Halls Ltd* 1914 CPD 371 wrongly interpreted the section not as prohibiting but merely as doing away with the necessity of an arrest of the person or attachment of his property to found jurisdiction. This difficulty was compounded by s 7 of Act 27 of 1912 which provided

that/.....

that:

> "Nothing in the preceding sections of this Act shall be construed as conferring upon any court jurisdiction to hear and determine any matter which it would not have had authority to hear and determine if the defendant had been served with a civil summons within the jurisdiction of the court wherein the proceedings are being taken."

About this section Pollak correctly remarks (op cit 67 n 1) that it is impossible to give effect to the literal meaning thereof without restricting the jurisdiction of the divisions of the Supreme Court in actions against persons who reside in the Union of South Africa to the case in which the defendant is an incola of the area to which the court belongs.

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A proper reading of s 5 might well, as Pollak at 68 of _op cit_ points out, have led to the construction that with the prohibition of arrest and attachment to found jurisdiction the divisions of the Supreme Court had indirectly lost their jurisdiction to entertain an action against a peregrine defendant who resided in the Union even though the cause of action arose or the contract in respect of which the plaintiff's claim was brought was entered into within the area to which the court belonged. S 5 of Act 27 of 1912 has now been re-enacted in s 28(1) of the Act in the following terms:

> "No attachment of person or property to found jurisdiction shall be ordered by a court of any division against a person who is resident in the Republic."

Section 7 has, however, not been re-enacted. No doubt, to meet the objection to the possible, and in Pollak's view the correct, construction of s 5 and the difficulty in construing s 7 of Act 27 of 1912, s 19(3) of the Act now provides:

> "The provisions of this section shall not be construed as in any way limiting the powers of a provincial or local division as existing at the commencement of this Act, or as depriving any such division of any jurisdiction which could lawfully be exercised by it at such commencement."

In my view this provision now sanctions the construction placed upon s 5 of Act 27 of 1912 by Maasdorp and Kotzé J in Smit v Cramer supra and Brooks v Maquassi Halls Ltd supra respectively. The prohibition is still there in s 28(1) of the

Act but s 19(3) now provides in effect that the prohibition does not in any way deprive a court of any jurisdiction which could lawfully have been exercised by it prior to the provision. Such jurisdiction could only have been exercised by virtue of one of the grounds of jurisdiction. In Brooks v Maquassi Halls Ltd supra Kotzé J said at 376 - 377:

> "According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz:
> (1) Ratione domicilii; (2) ratione rei sitae; (3) ratione contractus; that is, where the contract has either been entered into or has to be executed within the jurisdiction. This is a correct statement of the law as summarised by Burge in his Commentaries, vol 3, chap 24, and has generally been adopted by our courts. But, in order to exercise juris-

diction under either the second or third ground which I have mentioned, the practice has always been to grant an arrest either of the property or person of the debtor <u>ad fundandam jurisdictionem</u>, and in this way the debtor or his property, to use the expressive language of the Dutch lawyers, becomes bankvast. There is, therefore, always something against which, in the event of the judgment being in favour of the plaintiff, the decree of the Court can operate, and not amount to a mere nullity, for the Court, like nature, should do nothing in vain. There is yet a fourth means of exercising jurisdiction, clearly recognised by the Roman-Dutch law, and which has been adopted in our South African practice, although it seems that the cases in the courts of this Province are not quite uniform on the point, viz, where, upon the application of an <u>incola</u>, the court will grant an attachment of a foreigner or of his property found within the territorial limits in order to establish jurisdiction. It is, however, not necessary to pursue this question any further in the present application.

Such was the law at the time when Act 27 of 1912 was passed, by which some important changes have been introduced in the existing practice. The Act (secs 3, 5 and 7) has not increased the jurisdiction of the Court over a defendant in regard to the subject-matter of the suit, it has merely simplified the procedure. It has done away with the necessity of an attachment of person or property to found jurisdiction, and of edictal citation where the summons can be duly served in some other manner. It has thus dispensed with the inconvenience and cost of such proceedings. As I understand the three sections read together, it comes to this: Sec 5 provides that a creditor or plaintiff, resident in one Province of the Union, can in the court of his Province sue the defendant resident in another Province, without the process of attachment and without edictal citation, if the defendant can be duly served with a summons in some other way, e g, by personal service, provided (as sec 3 requires) that the court out of which the summons issues has jurisdiction in respect of the matter or proceedings in which the summons is taken out; while sec 7, as the marginal note correctly indicates, simply provides that no greater

> jurisdiction is conferred upon the court out of which the summons issues than that which it already possesses in regard to the subject-matter or proceedings."

Thus, section 28 read with s 19(3) of the Act facilitates the procedure as far as effectiveness is concerned, but effectiveness does not _per se_ confer jurisdiction on a court. The fact that in this case the respondent was not a _peregrinus_ in the full sense of the word, as counsel put it, and the reliance on _Roberts Construction Company Limited v Willcox Brothers (Proprietary) Limited_ _supra_, does not, in my view, assist the appellant. See also _Estate Agents Board v Lek_ 1979(3) SA 1048 (A) 1061B - 1063E.

To deal more directly and specifically with prorogation, I revert to the other references relied upon by counsel for the appellant. I do not read the references to Pollak _op cit_ 92 and the author's article in 1929 SALJ 237 241 or to _Sonia's_ case _supra_ as being authority for the proposition that consent to the jurisdiction by a peregrine defendant _per se_ confers jurisdiction on the court concerned. In his book and in the article referred to Pollak was dealing with jurisdiction over the person only and not jurisdiction of the court generally. In his book on _Jurisdiction_ Pollak s v "When the Defendant is a Corporation" mentions at 91/2 seven cases in which, when the defendant in an action sounding in money is a natural person, South African courts exercise jurisdiction. Among these he includes a defendant who submits to the jurisdiction of the court. The learned author then proceeds to deal with the situation in which the defendant in an action is a corporation. Pollak does not however say that submission alone confers jurisdiction on the court. At 84/5 he deals with submission by a defendant to the jurisdiction of the court and refers to Voet 2.1.35 and to a passage in Ueckermann v Feinstein 1909 TS 913 920. This passage appears in a dictum of Innes CJ at 919 - 920 which I quote in full:

> "There remains the much more difficult question, whether acquiescence in a judgment in personam, pronounced by a court competent as to the cause, against

a defendant over whose person the court had at the time no jurisdiction, operates to prevent such defendant from thereafter challenging the validity of the judgment. The inquiry may be put in a different shape - could such a defendant, under such circumstances, have conferred jurisdiction originally upon the court by consent? Because, if he could consent originally, it follows that he could acquiesce subsequently. Apart from statute, the common law of Holland undoubtedly recognised the doctrine of the prorogation of jurisdiction - that is, that jurisdiction might be conferred or extended by consent of parties so as to enable the court to deal with a dispute which, apart from such consent, it would have had no jurisdiction to entertain. And that prorogation of jurisdiction might take place in regard to inferior as well as superior courts is clear from what Voet says at 2, 1, 15. Some of the authorities favoured a very wide application being given to this doctrine of prorogation. But I think it must be recognised as settled law in South Africa that there can be no prorogation in regard to cases where the court has no authority at all to adjudicate upon the

> subject-matter of the dispute; because in such cases, the matter at issue being by law outside the cognisance of the court, the consent of parties cannot confer a coercive jurisdiction upon the court, which the law expressly denies to it."

In XLVI (1929) SALJ 241 Pollak expresses the view that it is only common sense that a defendant who expressly consents to the plaintiff bringing his action in a particular division of the Supreme Court, should not be allowed thereafter to object to the jurisdiction of such division. Again, nowhere in this article does Pollak state that consent alone confers jurisdiction upon a court.

The _dictum_ in _Sonia's_ case _supra_ at 563 C which is relied on reads as follows:

> "Save for the principle of submission, that

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is, a voluntary submission by a defendant to the Court exercising jurisdiction over him which it does not possess in law, the basic principle of jurisdiction is effectiveness. (Schlimmer v Executrix in Estate of Rising, 1904 TH 108 at p 111). This point is fully discussed by Mr Pollak in his book on Jurisdiction from p 15 onwards. He quotes several dicta, one from an American case - McDonald v Mabee 243 U S 90 (1917) where Holmes, J said: 'The foundation of jurisdiction is physical power.'"

I do not read this passage as indicating that prorogation or submission by itself confers jurisdiction on a court. Regard being had to the context in which the comment was made by Price AJA it is evident that the court did have jurisdiction over the cause. As far as the person of the defendant was concerned Price AJA distinguished between a defendant who submits to the jurisdiction and one who does not do so. In my view, the effect of the judgment is that, in the latter case, the added requirement of effectiveness has to be satisfied. That would be attained by the arrest of the person or attachment of his property in the area of jurisdiction of the court. Were he an incola of the Republic though a peregrinus of the court, such arrest or attachment would, in view of the removal by legislation of certain procedural impediments, no longer be necessary. (563 E - H) The words "submission by the Defendant to the Court exercising jurisdiction over him which it does not possess in law" in the passage quoted above must be read in the restricted sense in which it was intended to apply. The emphasis must be placed on the word him. That this was the connotation in which the remark by Price AJA should be read acquires added force when regard is had to a passage by Pollak *op cit* 19 to which Price AJA refers and the footnote thereto. The passage reads as follows:

> "For reasons of policy it is held that a person who voluntarily submits himself to the judgment of the court, to whose jurisdiction he would not otherwise be subject, confers, by so doing, jurisdiction on such court and that he cannot afterwards be heard to say that the court had no jurisdiction over him."

In the footnote to this passage reference is made to *Ueckerman v Feinstein supra*, a passage from which I quoted above and to *Otto v Schurink and Another* 1911 TPD 367 in which case it was clear that the magistrate's court had jurisdiction as to the cause. At 374 Wessels J, after having referred to Vinnius, said:

> "In other words, if a Magistrate has jurisdiction over a cause, and a party defendant acquiesces in the judgment of the Magistrate, it is too late for him to say that all the necessary formalities have not been complied with."

Mr Shaw also sought to draw a distinction between the law relating to arrest and attachment <u>ad fundandam jurisdictionem</u> and prorogation. As it seems probable, he argues,that the right of arrest was a privilege extended to <u>incolae</u> (see Wessels History of the Roman Dutch Law 690-1) the rule of the South African law refusing the right of arrest to a peregrinus, except where there is a ground of jurisdiction other than arrest, is generally in accordance with the common law. These considerations, he submits, clearly however do not apply with regard to a consent to jurisdiction where there is no element of enforcing appearance.

No direct authority, either in our case law or in the Roman-Dutch law, has been quoted to this Court in support of this proposition. On the contrary, the dictum of Innes CJ in Ueckermann v Feinstein supra to the effect that there can be no prorogation in regard to cases where the court has no authority at all to adjudicate upon the subject-matter of the dispute, has never been departed from in this country. The phrase "The consent of the parties cannot confer a coercive jurisdiction upon the court" in the dictum referred to is derived from Farquharson v Morgan 1894 1 QB 552 in which case Lord Davey said:

> "Parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess".

These words were quoted by Mason J in Ellis v Morgan; Ellis v Dessai 1909 TS 576 582 and, as appears above, referred to by Innes CJ in the Ueckermann v Feinstein judgment supra.

The crucial question that presents itself is: what jurisdiction does a Supreme Court in S A law possess?

A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment. (See Steytler NO v Fitzgerald 1911 AD 295 346/7). By virtue of the provisions of s 28(1) of the Act (and, of course, its predecessor, s 5 of Act 27 of 1912, which was worded very similarly) the procedural impediment in so far as effectiveness in respect of any person resident in the Republic is concerned has been eliminated but it still has to be established in every case that, in terms of s 19(1) of the Act, a court has the power of taking cognisance of the suit. In the matter of The Owners Master and Crew of the S S "Humber" v The Owners and Master of the S S "Answald" 1912 AD 546 554 Innes ACJ referred to the conclusion to which the court had come in Beckett & Co v Kroomer as to the interpretation of the words "causes arising" in s 16 of the Transvaal Adminstration of Justice Proclamation (the very words which appear in s 19(1) of the Act) as being:

> "... that the expression 'causes arising' formed the dominating feature of the section; and that when a Court was given unlimited jurisdiction in all 'causes arising' within a certain area, that amounted to a jurisdiction to entertain all suits for which, by the common law of the Colony, the highest Court of first instance would in that area be the proper forum. The presence of a contemplated defendant would of course be an important element in the inquiry; but the question in each instance would be whether the particular 'cause' was one of which the Court concerned could, according to the principles of law, rightly take cognizance. ..... The claim being based upon tort, and the Provincial Division being

> neither the _forum loci delicti_ nor the _forum rei_, it is clear that, apart from the machinery of arrest, that inquiry would have to be answered in the negative."

This _dictum_ again emphasises the principle that in addition to the machinery of arrest (which, in the case of a local _peregrinus_, is dispensed with by law) something more is required before a court can take cognisance of a matter in its area of jurisdiction. By prorogation a defendant subjects his person to the jurisdiction of the court, but that is not enough. One or more of the traditional grounds of jurisdiction must also be present.

For these reasons I have come to the conclusion that the consent of the defendant did not confer any jurisdiction on the Court *a quo* and that the latter had no authority to take cognisance of the matter. The appeal cannot, therefore, succeed on the jurisdiction point. It is, consequently, not necessary to consider the breach of contract issue.

Mr Shaw has not addressed us on the question of costs. Some costs might have been incurred both before and after the liquidation of Carolina in respect of, for instance, the receipt and consideration of documents served upon it or the executrix. Under these circumstances it is only just, in my view, to order the appellant to pay the costs of appeal.

In the result the appeal is dismissed, with costs.

JUDGE OF APPEAL

SMALBERGER	JA)		
VIVIER	JA)	-	Concur
BOSHOFF	AJA)		
STEYN	AJA)		