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judgment and gave respondent all his costs—clearly quite right. The provisions of Rule 52 do not apply to a case of this sort at all. As to the authorities which have been quoted—the case of *Meintjes* vs. *Theunissen* (*supra*) has been referred to—we are not bound by the practice at the Cape. It seems most convenient that in a re-opened case of this sort the parties should be before the Court and the matter fought out as provided by Rule 52 which points out the course to be adopted in certain cases. There seems no reason for a different rule to this 52nd Rule to be laid down in the Magistrate's Court, especially when the Magistrate's Court Rules make no provision for applications by way of motion. Procedure by motion might conveniently be adopted where both parties are agreed that the procedure was wrong, but that is not the case here.

The appeal must be dismissed.

FAWKES, J., concurred.

[Appellants' Attorney, G. A. HILL.
Respondent's Attorneys, GORDON FRASER & MCHARDY.]

[Reported by R. C. STREETEN, Esq., Advocate.]

MAASDORP, C.J., and FAWKES, J.
May 13th, June 1st and 15th, 1912.

ZUIDMEER *vs.* BERNHARDI AND MUNGEAM, N.O.

Execution.—Judgment of Provincial Court in Case where Jurisdiction Founded by Attachment of Property.—Effect in Other Provinces.—Operation of Alias Writ.—S.A. Act, sec. 112:

Where property has been attached to found jurisdiction and judgment has been obtained in the divisional court of one Province such judgment is available only against the property so attached and consequently execution cannot be levied under sec. 112 *of the S.A. Act through the Court of another Province upon property situate in the latter for the balance of the judgment debt.*

An order granting an alias writ is not operative outside the jurisdiction of the divisional court by which it is granted.

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Application to set aside a writ of execution issued on the 11th May by the second defendant, the Registrar of the O.F.S. Divisional Court, on an order for an *alias* writ granted by the Cape of Good Hope Provincial Division of the Supreme Court on the 2nd April, 1912. A rule *nisi* was granted on the 13th May in Chambers calling upon the respondents to show cause on the 1st June, 1912, why the writ of execution should not be set aside. The hearing was postponed on the return day till the 15th June. The other facts sufficiently appear from the judgment.

P. V. Fischer, for the applicant: It has been held that the necessity of applications to arrest property to found jurisdiction has not been affected by the South Africa Act where the defendant resides in a Province within the Union other than that in which the property is situated. See *Jackson* vs. *Pretorius* (1910, O.F.S. 68) and *Ex parte Marais* (1910, C.P.D. 285). Apart from the South Africa Act such an arrest limits the jurisdiction to the amount of the property arrested. See Story's *Conflict of Laws*, sec. 549, and *Acutt, Blaine & Co.* vs. *Colonial Marine Assurance Company* (1 S.C. 402); *Schlimmer* vs. *Rising's Executrix* (1904, T.H. at p. 111); and *Mendelssohn* vs. *A. Mendelssohn's Executor* (1908, T.H. 190). The Cape Court had no power to grant an order against a person not resident within its jurisdiction. The judgment is only binding on the applicant to the extent of the property attached and not on him *in personam*. See Story's *Conflict of Laws*, secs. 539, 546, 549 and note on sec. 586; *Sirdar Gurdyat Singh* vs. *Rajah Faridkote* (1894, A.C., at p. 684). The position of the State Courts in the United States of America is analogous. See Story's *Conflict of Laws*, paragraph 609, and note on paragraph 549. The debt is prescribed under paragraph 2 of Chapter XXIII of the Law Book. The words "any judgment of any Court" in that paragraph do not refer to Courts outside this Province.

E. W. Fichardt, for the first respondent: Judgment was properly given against the applicant in the first instance. The presumption is that the judgment is in order.

[FAWKES, J.: If there was no jurisdiction before Union, did the South Africa Act extend the jurisdiction of what are now the Provincial Courts?]

We do not wish to make this judgment an order of this Court. There is a good judgment against the applicant in the Cape Court and by sec. 112 of the South Africa Act the first respondent is entitled to an order or writ. Before Union the judgment could have been made a judgment of this Court, but that is no longer necessary. See sec. 116 of the South Africa Act. This Court cannot sit in judgment on appeal from the Cape Court.

This Court can only interfere if applicant shows we have not complied with terms of sec. 112.

The applicant's remedy is to apply to the Cape Court to reopen the case or appeal to the Appeal Court.

[MAASDORP, C.J.: The order granting an *alias* writ in the Cape Court does not purport to be operative outside the Cape Province: it cannot be served here.]

Having jurisdiction in the main action the Court had jurisdiction in any further subsidiary matters. See *Spilhaus & Co.* vs. *Muntwijler* (10 C.T.R. 530).

In re F. C. Bell (1 C.T.R. 241); and Westlake's *Private International Law* (3rd. ed.), p. 349 f.

MAASDORP, C.J.: This is an application to have a rule *nisi* granted on the 13th May made absolute. This rule *nisi* calls upon the respondent to show cause why a certain writ of execution dated the 11th May, 1912, and issued by the second respondent in his official capacity against the goods and chattels of the applicant should not be set aside.

The original proceedings out of which this application arises date as far back as the year 1900, on the 24th October in which year a certain Pieter Casper Page obtained leave from the Supreme Court of the Cape Colony to sue the applicant Zuidmeer by edictal citation in that Court upon a promissory note for the sum of £453 8s. 9d. made by the applicant in favour of Page and payable at

the Bank of Africa at Ladybrand in the then Free State; and leave was at the same time granted to attach a sum of £76 18s. 0d. belonging to the applicant which was at the time in the hands of the Master of the Supreme Court to found jurisdiction, service of the said edict being ordered to be personal.

What the nature of the service was which satisfied the Supreme Court this Court has not been informed, but upon the 13th December, 1900, the Supreme Court granted provisional sentence against the applicant with costs, but for some reason or other made the somewhat unusual order that execution was to be stayed for two months, that notice was forthwith to be served upon the defendant's wife that such provisional sentence had been granted, and that the writ of execution was not to issue without proof that such notice had been served. The money attached *ad fundandam jurisdictionem*, namely, £76 18s. 0d., was at the same time declared executable. Thereafter on the 13th February, 1901 a writ of execution was taken out and the £76 18s. 0d. attached in reduction of the amount of the judgment, leaving a balance of £352 12s. 9d. with interest and costs still due.

Where the defendant's, that is, the applicant's wife was at the time of this order resident does not appear from the papers before us, but the applicant swears, and no attempt has been made to contradict him, that at the time of the commencement of the said suit and of the judgment and since he has never been domiciled in the Cape Province but has always been domiciled in what is now the Orange Free State Province. The judgment was therefore a judgment obtained in the Supreme Court of the Cape Colony against a foreigner by the aid of the extraordinary process of edictal citation and attachment to found jurisdiction.

The edict in question had been ordered to be personally served, but, as a matter of fact, as the applicant swears, there was a war at the time in progress between the Imperial Government and the Free State Republic, and the edict was never served upon him, nor had he any notice or knowledge at any time that the action was proceeding against him.

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The first question which arises therefore is what was the effect of the judgment so obtained against a foreigner after the money attached to found jurisdiction had been realised in execution and applied to satisfaction of the judgment. The law applicable to such a case is well laid down by *Story* in his book on the *Conflict of Laws*, sec. 549, where he says " In such cases, for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding, to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding *in rem*, and not as personally binding on the party as a decree or judgment *in personam;* or, in other words, it only binds the property seized or attached in the suit, to the extent thereof, and is in no just sense a decree or judgment binding upon him beyond that property. In other countries it is uniformly so treated, and is justly considered as having no extra-territorial force or obligation."

The principle laid down by *Story* in this passage was adopted by the Supreme Court of the Cape Colony in the case of *Acutt, Blaine & Co.* vs. *Colonial Marine Assurance Company* (1 S.C. 402) in which DE VILLIERS, C.J., stated that the principle was so clear that no authority was needed to support it.

It follows therefore that the judgment originally obtained against Zuidmeer was only available in execution against the money actually attached, and was of no force or effect against Zuidmeer personally or against any property situate in the then Orange Free State, and that, if the High Court of the Republic had at that time been approached for the purpose of obtaining its assistance in enforcing the judgment, that Court would have very properly refused such assistance. The plaintiff would therefore, have been obliged to sue Zuidmeer afresh in the High Court of the Free State if he wished to make him personally liable or to proceed against property situate in that State. He did not however, do so and by the time

that any further proceedings were taken in the matter, the promissory note in question had been long prescribed.

At a later date the estate of the plaintiff Page was sequestrated as insolvent and on the 12th March, 1912, the trustees of his estate ceded the balance of the judgment debt to the respondent Bernhardi who thereupon applied to the Supreme Court of the Cape Province for an *alias* writ in execution of the balance of the said judgment alleged to be due by Zuidmeer. The Court thereupon granted a rule *nisi* calling upon Zuidmeer to show cause, if any, why an *alias* writ should not be issued. There is nothing in such rule *nisi* to show that it was issued against a person who was not an *incola* of the Cape Province and who had no property there. We can therefore only come to the conclusion that, though the fact was stated in the petition of Bernhardi, it was not brought to the notice of the Court that Zuidmeer was at the time of the judgment domiciled and resident in the Free State and at the time of the order was domiciled and resident in this Province, and not in the Cape Province, otherwise it is difficult to understand how the Court could have granted a rule against a person domiciled and resident outside its own Province, seeing that it has been decided by that Court that the process of edictal citation and attachment to found jurisdiction is still necessary as between Province and Province notwithstanding the provisions of the South Africa Act (*Ex parte Marais*, 1910, C.P.D. 285), see also *Jackson* vs. *Pretorius* (1910, O.F.S. 68).

The *alias* writ which was subsequently granted purported to be issued against H. R. Zuidmeer who formerly resided at the Paarl and now resides at Thaba' Nchu and curiously enough was taken for execution to the Paarl where admittedly Zuidmeer was not at the time residing and where he now swears that he was never at any time residing since the commencement of the original action.

Later on, upon the 11th May, 1912, Bernhardi obtained from the Registrar of this Court the issue of a writ in terms of section 112 of the South Africa Act, and the present application is for an order setting aside this writ.

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For the reasons already adumbrated the Court is of opinion that the original judgment was exhausted after the appropriation of the money attached in satisfaction thereof and was therefore fully satisfied and does not come under section 112 of the South Africa Act which requires proof that such judgment remains unsatisfied.

The Court is further of opinion that such satisfied judgment could not be in any way revised or strengthened by the *alias* writ which in itself was *ultra vires* of the Cape Supreme Court as regards the applicant or his property situate in this Province and therefore null and void.

The application must therefore be granted and the writ of May 11th, 1912, set aside with costs.

FAWKES, J., concurred.

[Applicant's Attorney, G. A. HILL.
Respondents' Attorneys, FRASER & SCOTT.]

[Reported by R. C. STREETEN, Esq., Advocate.]

MAASDORP, C.J., and FAWKES, J.
July 2nd, 1912.

NEL *vs.* STRAUSS, N.O.

Community.—Right of Survivor to take over on Intestacy of First Dying.—Husband and Wife.—Time of Valuation.—Sec. 47 *of Ordinance* 18 *of* 1905.

The valuation at which a survivor of a marriage in community is entitled, under sec. 47 *of Ordinance* 18 *of* 1905, *to take over the share of a joint estate belonging to the first-dying spouse, in case of intestacy of such spouse, must be made as at the date of the survivor's expressing his intention to exercise his right to take over and not as at the death of the deceased spouse.*

Sec. 47 of Ordinance 18 of 1905 provides as follows :—

"If one of two spouses married in community of property shall die intestate . . . . and shall have made no provision to the contrary in the will, the survivor may take over the share of the joint estate belonging to such deceased spouse at a valuation to be made by a Government appraiser instead of being realised according to law . . ."