[74] *IN EQUITY.*

MUDOOSOODUN PYNE AND OTHERS *v.* HURRYDOSS MULLICK [a].

(1847. *July* 2. *Friday.*)

Jurisdiction—Constructive Inhabitancy.

The Defendant jointly with his two brothers, inherited a house in Calcutta, wherein the latter usually resided; but the Defendant only came down occasionally to reside there.

Held that he was constructively subject to the Jurisdiction.

PLEA to the Jurisdiction.—The bill of complaint set out a Bengally Ekrar or agreement, dated 2d July, 1846, entered into between the complainants and defendants, whereby the latter was appointed agent or manager of the house of business of the former, carried on at Charnock, or Barrackpore, and whereby (amongst other conditions) the defendant bound himself not to deal on his account, in any such articles as were sold and purchased by him, in his capacity of manager, for the complainants. The bill proceeded to allege misappropriation of receipts, false accounts, and attempts, by defendant, to set up another shop at Barrackpore, for the purpose of dealing in the same articles as those dealt in by the complainants, in contravention of the terms of the agreement, and prayed for an account, and also an injunction against further interference, by the defendant, in the complainant s business.

In the introductory part of the Ekrar above referred to, the defendant described himself as "a Basindah or resident of Jorosanko, in the station of Calcutta."

The jurisdiction clause charged the defendant to be subject, on the ground of inhabitancy, and of his having so stated and represented himself in the Ekrar: also, that he had a family house in Calcutta, where some members of his family resided, and where he occasionally resided himself. The defendant having pleaded to the jurisdiction, the question now came on for hearing on evidence taken on both sides.

[75] Mr. *Clarke* and Mr. *Ritchie* in support of the plea. The evidence shows, that the defendant had left Calcutta for Serampore fifteen years ago, and taken his wife, and children, and family idols with him: and that he had gone down to Calcutta from time to time, but only when employed in the complainant's business; and had never resided there. He had never contributed anything to the family house at Jorosanko, but had, in fact for a long time, lived separate in food and worship from his family. Besides he had conveyed away his interest in the Jorosanko house two days before the filing of the bill. This evidence, therefore, shows a discontinuance of residence in Calcutta for the last fifteen years. The fact of his going to the Jorosanko house from time to time, when he came down on business, without keeping up any establishment there, does not amount to constructive inhabitancy, the mere *right* or *power* of resorting to the house not being sufficient for that purpose.

[74] (a) This case is inserted out of order, simply for facility of reference.

Mr. *Dickens* and Mr. *Morton* contra. The evidence of the brother of the defendant as well as that of other witnesses, clearly shows, on the contrary, that the defendant was in the habit of coming down to the Jorosanko house, and residing therein, and that he was only a temporary resident of Serampore. The evidence given by the defendant, for the purpose of showing that he had not been resident in Calcutta for fifteen years, is falsified by his own statement, in the commencement of the Ekrar, "that he was a *resident of Jorosanko*," at the time of its execution, which was only six weeks before filing of the bill. The defendant is tenant in common with his brothers of the Jorosanko house, and that of itself is sufficient to constitute constructive inhabitancy—he would be subject to the rates and taxes, and participate in the privileges of such constructive inhabitancy, and upon the principle of "*qui sentit commodum sentire debet et onus*," he ought to **[76]** be held subject to the jurisdiction. As to the alleged conveyance by him of his interest in the Jorosanko house, only two days before the filing of the bill, that is a mere suggestion; for no conveyance has been put in, nor evidence given of its existence. But, whether true or not, it seems to be a most suspicious circumstance, and has very much the appearance of evading the jurisdiction. *Bamasoonderee Dossee* v. *Rajcoomaree Dossee* (a) and the cases there cited were referred to.

SIR L. PEEL, C.J.—In this case the question is one of jurisdiction. A plea to the jurisdiction has been pleaded and replied to, and evidence gone into on both sides. It appears to the Court, that the evidence on the side of the complainant clearly preponderates. The presumption from the facts is in favor of the continuation of that residence, which at one time clearly existed. The house belonged to the three brothers, who are presumably joint, till the contrary be established, and it is not denied that this dwelling house was their joint house, in which two of the brothers with their families constantly resided, and to which the other brother was occasionally in the habit of resorting as to his own house, and of sleeping there when in Calcutta. If it had been shown that he was a mere guest or inmate, having a residence elsewhere, and only sleeping in another man's house, during a temporary limited visit to Calcutta, the case would have been one which I should hold on principle, not to subject him to the civil jurisdiction of the Court; but this is not the case; and the defendant recently, in a paper which is in proof, described himself as resident in this very house, which, in my opinion, was an accurate legal description, though it was not his sole residence, nor a residence, indeed, which, latterly was often actual. The presumption before mentioned, and **[77]** his own admission, decide the case in this conflict of testimony against him. But it was urged, that he had parted with his property in this house before the suit was actually commenced. The evidence, however, does not establish this clearly: the defendant might have shown, by secondary evidence, the character of this bill of sale, (which was not in his possession, nor under his control, and which the purchaser declined producing); that it was a sale out and out, and not merely an instrument, a bill of sale in form, or in effect a mere security;

[76] (a) See last case.

and he might have shown (if the fact be so) a treaty or negotiation for the sale, preceding the execution of this instrument, which was not produced. I think strict proof should be required of a deed executed but two days before the actual institution of the suit; and the defendant's neglect to procure sufficient evidence, cannot entitle him to an issue.

In my opinion the general current of cases, decided in this Court, establishing what is termed "constructive inhabitancy" ought to be followed to their legitimate consequences. Those cases rest on established principles of law, and have the sanction of the authority of the most approved text writers, including Lord Coke, and of several decisions of the Courts at Westminster, in analogous cases. An actual presence is not legally requisite to constitute a man a resident. He may reside constructively by his family, by his servants, by his partners. The word "inhabitant" used in the statute, is used without any words importing qualification on those points, which relate to the civil jurisdiction of the Court; no such words as actually resident or actually inhabiting are found; or words implying in any way a strict personal presence. Residence necessarily includes inhabitancy, though the converse does not hold; every man, therefore, who is legally resident in Calcutta is an inhabitant of it. If this Court, therefore, had limited inhabitancy, to a residence importing actual personal presence, it must have run into **[78]** inconsistencies as to the legal definition of residence, and have arbitrarily adopted a limitation unknown to the law, without any evidence whatever that the Legislature meant such limitation to prevail. There is nothing in the reason of the thing to lead to a supposition that the Legislature meant, that if one, by his servants, carried on trade in a house of business of his own in Calcutta, contracted engagements, and incurred debts there, and resided there, by his servants or otherwise constructively, he should not be liable to the jurisdiction of the Court locally established there, merely because he himself constantly slept out of Calcutta: or that a party there resident, being his creditor, should be forced to sue such a debtor in a Court not locally situate there, and possibly distant. There is no reason, therefore, in the nature of the case, and none can be derived from the words of the Charter or Legislative Acts, to depart from the acknowledged general legal import of the words, "resident" or "inhabitant." If a house can truly be described in an indictment for burglary, as the dwelling house of A in Calcutta, A is legally resident in Calcutta, and if he be a resident he is an inhabitant—constructive residency or inhabitancy is not the construction of this Court, but of the law; every one who can claim a privilege by reason of inhabitancy, must be an inhabitant for purposes of charge—as in the cases of *Rex* v. *Hall*, 1 B. & C. 123, and the case of *Rex* v. *Poynder*, 1 B. & C. 179. The case of *Rex* v. *Adlard*, 4 B. & C. 779, whilst it upholds the general doctrine, supports and explains an exception on its particular and special grounds. The preamble of the 14th Geo. 2d., c. 10, is worth looking at, as explaining that the Legislature considered that the words "inhabitant and resident," (as founding the jurisdiction of the London Court of Requests) were meant to include constructive, as well as actual residence and

inhabitancy. A referene to *Dalton's Office of Sheriffs: title Sheriff's Courts*, p. 384, and *title Sher-*[79]*iffs Torne*, p. 388 will show, that in the County Court, (an ancient Court of Civil Jurisdiction between party and party,) the Common Law held constructive inhabitancy and residence sufficient to support the jurisdiction of the Court: though in the Sheriffs Torne, (a Criminal Court) none were compellable to appear for the lands; "for this suit to the Sheriffs Torne, Lords Leet is a suit Royal, or which is always by reason of the person and not of any land," whereas in the Court of Civil Jurisdiction, the County Court, as well as the Hundred Court, (carved out of the County Court,) "all the *inhabitants* within such liberty or hundred, *by reason of their tenements* there, shall be attendant, and one suit to the hundred." There are certain cases in which liability to jurisdiction is a privilege of the debtor, as where he is exempted from the jurisdiction of a general remote Court, as to certain limited claims, and subjected thereby to an inferior and cheaper jurisdiction. In such cases, liability to the jurisdiction of a Court, on the ground of inhabitancy or residency, would be claimed on the footing of privilege; but in general cases it would rather be viewed in the nature of a liability or charge. Viewed in this latter light, inhabitancy would fall within the authority of Lord Coke's comment on the statute of bridges. It is not, however, necessary, to insist on this, as the decisions in this Court are within the principles of Common Law, on the subject of liability to be sued in a Court of Civil Jurisdiction, on the ground of constructive inhabitancy. I trust that the decisions of the Court, on any ground of jurisdiction, will never be extended, in any degree, beyond the fair reach of the principles, on which any particular branch of jurisdiction is founded, but I can see no reason for declining to give to the decisions establishing constructive inhabitancy, their full application to new circumstances.

Plea overruled.

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[80] BEHARRIRAM *v.* SEWEMBERRAM & KISSENPERSAUD.

(1847. *June* 22. *Tuesday.*)

Practice—Irregularity—New 28*th Eq. Rule of* 1842, *Construction of.*

Under this rule it is complainant's duty to set the plea down for argument within the time limited thereby, otherwise its validity in point of law is admitted; and *semble*, if he do not either set the plea down or reply thereto, within such limited time, he admits its validity in point of fact as well as law.

MOTION on behalf of the defendant Kissenpersaud, "that the order directing the plea of the defendant Kissenpersaud to be set down for argument, (as well as the entry thereof with the Registrar) be set aside, for irregularity with costs."

Mr. *Colvile* (Adv. G.) in support of the motion. The order in question was obtained at chambers *ex parte* from Mr. Justice Grant. The bill was filed on the 23rd November, 1846. The subpœna ad respondendum was served on the defendant Kissenpersaud on the 24th March, 1847, and appearance entered on