the writ is intended to be executed within the limits of Calcutta or ten miles thereof, but where the writ is to be executed at Moulmein, sixty days are allowed. If the Defendant had been arrested in Calcutta, or within the prescribed distance, he would have been able to put in the required bail, but this became an utter impossibility, when he was arrested at Moulmein.

SIR L. PEEL, C.J.—We think the arrest was not properly made. The Sheriff is bound to know his duty, and he must be presumed to have ascertained from the form of the writ, whether it was intended to be executed in Calcutta, or within ten miles thereof or otherwise. Here the form of the writ shows, that the Judge who granted it, did so with the intention that it should be executed in Calcutta or its neighbourhood—when it was discovered, that execution of the capias, according to its terms, had become impracticable, application ought to have been made to the Court, with a view to alter its form, in accordance with the altered circumstances of the case. As the writ only allows eight days' time to perfect bail from the date of arrest, it follows, that if the party is arrested at Moulmein, he is called on to perform an impossibility. We cannot say that the writ was irregular, but we have no doubt whatever, that it was granted for the purpose of being executed in Calcutta, or the neighbourhood, and not elsewhere. The arrest, therefore, under it was not made in pursuance of the intention of the Court in granting it. The party must be discharged on filing common bail.

Order accordingly.

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[70] *IN EQUITY.*

SREEMUTTY BAMASOONDERY DOSSEE *v.* SREEMUTTY RAJCOOMAREE DOSSEE, AND OTHERS. (1847. *May* 10. *Monday.*)

Jurisdiction—Constructive inhabitancy.

One Khistnochunder, in his life-time, possessed a dwelling house in Calcutta, where he occasionally resided with his family. After his death the Defendant Rajcoomaree, his younger widow, became entitled to a share in that family dwelling house, but never did during her widowhood actually reside there. *Held* that she was subject constructively to the jurisdiction.

THIS case came on for hearing upon evidence, taken on a plea to the jurisdiction by the defendant Rajcoomaree.

The bill had been filed by the younger widow of one Kistnochunder Biswas, a wealthy Hindoo zemindar, against his elder widow, and other parties, in respect of his estate, real and personal. The ground of jurisdiction laid in the bill, was "*constructive inhabitancy*" founded on the possession of a share of an alleged family dwelling house, situate at Simlah in Calcutta.

Mr. *Clarke* and Mr. *Dickens* for the complainant.

A case of constructive inhabitancy has clearly been made out. The evidence taken on behalf of complainant shows, that Kistnochunder in his life-time was possessed of two houses, one at Kurdah near Barrackpore, and another in Calcutta, and that he used the latter as a residence, nearly, if not

quite as frequently, as the old family house at Kurdah. He bought the house in Calcutta about seven years previous to his death, and always, from the time of the purchase until his death, kept a large establishment there. The property in question descended to his widows, and the same establishment of servants was kept up, although the widows never resided in the house, or had even been there, since the death of Kistnochunder. This amounts to a "constructive inhabitancy" sufficient to support the jurisdiction laid. *Khamah Dossee* v. *Sebpersaud Bose* (a), and *Golucknath Bose* against *Raj-*[71]*kissen Bose* (a). The only case to be relied on by the other side is that of *Tumsook Roy* against *The Nawab of Moorshedabad* (b), which was decided on its own special grounds. There, although by the residence of the Vakeel, a beneficial use resulted to the owner—yet there was not any *user* in fact. A collateral, rather than a contradictory case, is set up by the defendant, viz: that the Court of Wards had taken possession of the property in question, but it does not appear when the inception of their tenure took place. Besides, it is submitted, the possession of the Court of Wards does not affect the question in the least.

Mr. *Morton* and Mr. *Fulton* contra:

The doctrine of constructive inhabitancy has never been extended to the length contended for here. In *Toomsook Roy* v. the *Nawab of Moorshedabad*, the defendant was held *not* subject, although he was the proprietor of a residence in Calcutta; it appearing he had never resided there himself, although he had placed a Mooktear and an establishment of servants there. So in the present case, although it is admitted on the evidence, that Kistnochunder had occasionally resided in the Calcutta house, with his family, yet that occurred only when he came down on matters of business, probably with a view to confer with the revenue authorities. The defendant, it is proved, has never during her widowhood resided there, nor has she done any act signifying her intention to treat the Calcutta house as a residence. On Kistnochunder's death the Court of Wards took possession of the whole estate, and it was by their orders, and under their direction, that the establishment was kept up. It is a very material question, whether that Court was in possession at the time of bill being filed. The documentary evidence shows that [72] the Court was in possession at one time, and it does not appear that such possession has since been given up. Besides, it is a question in dispute between these parties, to whom this very house belongs, and the right to it is yet *sub judice*.

The real questions here are—1st, whether the Court of Wards was actually in possession at the time of filing the bill; and 2ndly, whether the defendant has by her acts raised a constructive jurisdiction. In Khamah Dossee's case, there was a family house where the family *continued* to reside. So in the case from *Fulton's Rep* 401, the manager of the family lived at the house. None of the cases cited on the other side carry the point further than that a "constructive inhabitancy" was consequent on the acts of the parties.

[70] (a) Morton Sup. Crt. Rep. 181.

[71] (a) Fulton's Rep. 401. (b) Morton's Rep. 172.

It is contended here, that the circumstances proved are such as show, that the defendant never acted so as to make this a residence, and thereby raise a constructive inhabitancy.

Mr. *Clarke* replied.

SIR L. PEEL, C. J. We think the jurisdiction is made out in this case. It appears to have been the settled law of Court, even in Mr. Spankie's time, that having a share in a family dwelling house in Calcutta, was a ground of jurisdiction on the principle of constructive inhabitancy, even in the case of a party, who had never been actually in Calcutta at all. And his opinion (printed in the *Appendix to Morton's Rep.* p. 393) refers to the cases of infants, as well as adults. Indeed it is not easy to understand on what principle it can be argued, that the question is affected by the circumstance of the defendant being under a disability or in a state of pupilage. The Court of Wards must be taken to act according to the Regulations; and they show that the Court is merely in **[73]** the position of a committee or manager of the estates of those who become their Wards. The legal estate and interest remain unchanged. It is not easy to understand Chief Justice Ryan's doubts in relation to *Hurrynauth Roy's* case, and he appears to have misunderstood the extent of Mr. Advocate General Spankie's doubts, and the ground on which that learned counsel advised an appeal in that case. The only decision at all apparently opposed to the current of authorities is the case of *Toomsook Roy* v. *Nawab of Moorshedabad.* Perhaps that decision may be explained by supposing that, under the circumstances, the Court considered the Mooktear as a sort of Steward of the Nawab, and in the position of a *tenant* of the Calcutta house, and that no constructive residency therefore could be ascribed to the defendant. In any other view, the decision is at variance with the current of authorities, and indeed with some decisions of Chief Justice Ryan himself. If this Court was in error in adopting the doctrine of constructive jurisdiction originally, that error can now be set right only by the Privy Council. At all events, the Court must be consistent in its decisions. Either the doctrine of constructive jurisdiction must be abandoned altogether, or else carried out in all its results. This Court cannot sanction one law for Nawabs and Rajahs, and another for ordinary suitors. The plea must be overruled; but, as some of the *dicta* cited certainly appear to have thrown doubts upon the question, the Court will not give costs.

Plea overruled, without costs.