the will, Rs. 25,000 is given to each daughter, the whole to be placed in the hands of the Executors to their credit, with a condition attached, which each daughter must fulfil for herself—and Sridoorga never having, during her life-time, fulfilled the condition, her share never became vested. As to the interest, I also think, that is payable from the time the legacy vested.

Mr. *Justice Seton* concurred.

PLEA SIDE.

NUSSEERWONJEE RUTTONJEE *v.* TARRONJEE RUTTONJEE.

(1847. *April* 5. *Monday.*)

Capias ad resp. Arrest Bail rules 3 and 6 Sheriff's duty.

A writ of *cap. ad resp.* requiring a Defendant to put in special Bail within eight days, must be executed within Calcutta or 10 miles thereof.

If a Defendant at the time of issuing the writ be within those limits, and subsequently depart thereout, so that he cannot be arrested, the Sheriff must apply for further instructions.

A RULE had been obtained, calling upon the Plaintiff to show cause, why the writ of *capias ad respondendum* **[68]** issued in the cause, should not be set aside; or why the Defendant should not be discharged from the custody of the Sheriff, upon filing common bail.

Mr. *Dickens* showed cause. The writ in question was regularly obtained upon the usual affidavit, and the arrest under it was perfectly regular. The only ground advanced for the purpose of setting it aside, is that of the Defendant having been arrested at *Moulmein*, and brought thence to Calcutta. It is immaterial to consider where the Defendant might have been at the time of the arrest; the real question is, where was he at the time of plaint filed and writ issued. He was then in Calcutta, but having, immediately afterwards embarked and sailed to Moulmein, the Sheriff followed, and, as was his duty, arrested him there.

Mr. *Morton* in support of the rule. The motion is in the alternative, either to set aside the writ, or to discharge the Defendant upon filing common bail. Although the writ itself may have been perfectly regular, yet it is manifest, that the arrest under it, was an abuse of the process of the Court. The form of the writ itself shows, that the Judge who issued it, intended that it should be executed in Calcutta, or within a certain distance of that place. The Sheriff is required to take the Defendant, if he should be found in the provinces, districts, or countries of Bengal, Behar, or Orissa, or in any of the Factories, districts, or places annexed to the Presidency of Fort William, and to keep him safely until he should have put in bail, or made deposit according to law; at the same time the Defendant is required to take notice that within eight days after execution, he is to cause special bail to be put in for him to the action. From the tenor of this notice it is clear, that the writ was to have been executed in Calcutta or its neighbourhood; for by the 3rd and 6th **[69]** Bail rules—only eight days are allowed for perfecting special bail, where

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