Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sophia Orde and another v. *Alexander Skinner, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered June 22nd*, 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS Appeal is one of several which have come before this Board in suits concerning the estate of the well-known Colonel James Skinner, the construction of his will, and the somewhat peculiar relations of his descendants *inter se*. Colonel Skinner died in 1841, leaving five sons besides other children. His public services had been rewarded by a large altamgha grant of land in the district of Bulandshahar, which lies within the local jurisdiction of the Judge of Meerut, in the North-Western Provinces; and he had also considerable landed and other property at Delhi and other places which are now, for all civil purposes, annexed to the Punjab, and notably an estate called Haryana, in the district of Hissar, of which the chief or sudr station is Hansi. Upon the lands constituting the altamgha he built a fort, and that estate seems to have thereafter acquired, if it did not before possess, the name of Bilaspur. At the time of his death he was resident at Hansi, where the corps of cavalry which he commanded was stationed.

His will bears date the 10th of May 1841.

(J 1949. 125.—1/80 Wt. 8729. E. & S.

The material passages of it are the following:—
" I leave and bequeath the income of my altam-
" gha, zemindari, and thika villages, gardens,
" and houses to my five sons herein named,
" Joseph, James, Hercules, Alexander, and
" Thomas Skinner, to share alike, none of them
" to have the power or option (even if they all
" agree) to sell or divide any landed property of
" the altamgha or zemindari. One of my sons,
" whichever is most fit or whoever I may name
" hereafter, is to manage the whole concern, for
" which trouble he is to get 10 per cent. from
" the whole income; and he is bound to show a
" faithful account current yearly to his brothers.
" Should they like to live together they may live
" at Bilaspur, and build houses with mutual
" consent in the altamgha or zemindari. Should
" my personal property not pay off all my debts,
" they may sell my house at Delhi and my
" garden at Trevillian Gunj; but should the
" personal property pay the debt, the house to be
" rented, and the rent, after paying for the
" yearly repairs, to be divided amongst my five
" sons."

Then follows a clause providing for the event of any of the sons dying under age and without issue, and the next material clause is:
" I will and declare that it is my intention and
" meaning that, in the event of all or any of my
" afore-mentioned sons, Joseph, James, Hercules,
" Alexander, and Thomas Skinner, dying and
" leaving issue or children, the shares of the
" fathers shall devolve on the issue or chil-
" dren, to be by them divided in equal shares."
And in a subsequent part of the will is this clause: "All my trophies and presents given
" by my commanders to be retained by the
" manager of the estate at Bilaspur, as remem-
" brance of me to the survivors of the family."

The Appellants, the Plaintiffs in the suit, are

children of James, one of the sons who are now deceased; and whatever doubts may at one time have been raised as to their title, it has now been conclusively determined, by the decision of this Board in *Barlow* v. *Orde* (13 Moore's Indian Appeals, page 277), that they are entitled in equal moieties to the share and interest of their father under their grandfather's will. The Respondent, Alexander, is one of the surviving sons of the testator, and the present manager of the estate under the terms of the will. There can, therefore, be no doubt that in a suit instituted in the proper *forum* he is accountable to the Plaintiffs for their father's $\frac{1}{5}$th share in the net income of the whole estate.

The suit, which may be taken to be one to enforce this accountability, was instituted in the Court of the Subordinate Judge of Meerut on the 8th of August 1874. It claimed an account from February 1863 to 1874, the whole period of the defendant's management.

The Defendant, by the written statement first filed by him, objected that the Plaintiffs had not observed the provisions of sections 12 and 13 of Act 8th of 1859, which relate to suits for land lying within different jurisdictions, and also that the suit was triable only by a Revenue Court,—objections now admitted to be futile; and on the merits, not disputing his general liability to account, he insisted that the accounts had been settled up to the year 1280 Fusli (1872-3), and that the subsequent accounts were then lying for inspection by the sharers in the estate, in the manager's office, which would remain at Bilaspur from the 2nd of January to the 2nd of February 1875.

After the issues had been settled a further objection to the jurisdiction of the Court was taken. In what precise form it was originally taken does not appear, except by the state-

ment of the then subordinate Judge in his proceeding, at page 265 of the record. That statement is as follows: "Among those pleas "there was one to the effect that, as the head "office of the estate was at Hissar, in the Punjab, "the suit for the rendition of accounts could not "be laid in the Meerut Civil Court. On the date "fixed, the evidence offered by the parties on "that point was received, and after a considera- "tion of the evidence so tendered and received, "my predecessor, Mr. Smith, came to the finding "that, to quote his words, 'the Hansi office is "'apparently a mere depôt for the custody of "'the old accounts and papers relating to the "'estate. The managers appear to be peri- "'patetics, carrying with them their office, and "'transacting the business of the estate from "'wherever they happen to be. A manager "'may choose to store his books wherever he "'pleases; but the founder of the family specified "'Balaspur as the family home, and where all "'insignia of the family are still kept, and "'consequently a suit for settlement of any "'account relating to the general estate must "'fall within the jurisdiction of the Meerut "'Court, under which Bilaspur is included.' "The above decision was come to on the 20th "April 1875; and after the determination of that "and other preliminary points, the accounts of the "estate were examined by a Commissioner ap- "pointed for the purpose, and, when after the "lapse of several months, and at heavy cost to the "Plaintiffs, the examination of the accounts was "nearly over, a petition was filed on the part of "the Defendant, tendering in evidence a copy of "a vernacular proceeding dated 13th October "1860, and a parwanah in original from the "Deputy Commissioner of Hissar, addressed to "Khyali Ram, agent of the Skinner estate, sta- "tioned at Hansi, dated the 16th October 1860,

" and referring to a book in which copies of par-
" wanahs addressed to Khyali Ram were kept,
" and which had been produced in a suit be-
" tween the parties, or at least some of them,
" and contending that, as those documents
" would show that the head office was at Hansi,
" the suit for rendition of accounts could not
" lie in the Civil Court of Meerut."

The petition here referred to is at pages 3 and 4 of the record, and the effect of the final judgment of the then subordinate Judge upon it, on the 27th of March 1876, was to affirm the decision of his predecessor, Mr. Smith, upon this objection to the jurisdiction. The suit accordingly proceeded before him, the accounts taken being, apparently, by force of the Statute of Limitations, limited to the six years immediately preceding the institution of the suit; and on the 27th of June 1876 the Subordinate Judge gave his judgment upon the merits. From this it appears that on the face of the accounts rendered there was due to the Plaintiffs, deducting the payments made on account to them, an admitted balance of Rs. 7,462 2 4; that the Plaintiffs, having been allowed to surcharge and falsify the accounts, had succeeded in raising that balance to the principal sum of Rs. 61,427 11 10, for which, with the further sums allowed for interest and costs, amounting in all to Rs. 94,957 15 10, a decree was passed against the Defendant. From this decree he appealed to the High Court of the North-West Provinces. The first of his grounds of appeal was that, with reference to section 5 of Act 8th of 1859, the Lower Court was wrong in holding that it had jurisdiction to hear the cause. There were 11 other grounds of appeal, some of which it will be necessary to notice hereafter; but the appeal was heard by the High Court upon the first alone, when, holding that the Lower Court had

no jurisdiction to entertain the suit, it reversed the decree and dismissed the suit.

The sole question argued in the first instance before their Lordships was that of jurisdiction; they have already intimated that their opinion upon it is adverse to that of the High Court, and their reasons for that conclusion will now be stated.

It is conceded on both sides that the question turns on the construction to be put upon the 5th section of Act 8 of 1859; and that it lay on the Plaintiff to show that either the cause of action arose, or the Defendant at the time of the commencement of the suit was dwelling, within the limits of the jurisdiction of the Meerut Court, within the meaning of that enactment.

Their Lordships will first consider whether the Defendant was subject to the jurisdiction of the Court by reason of his dwelling within its local limits. Some evidence was given on this point, and the conclusion of the High Court upon it is thus expressed: "It is admitted that Alexander "Skinner, at the time the suit was brought, "was actually residing at Mussuri, in the district "of Saharanpur. He has there a private house, "in which he resides during the whole of the "hot weather, and during the cold he travels "through the estate, sometimes putting up at "Hansi, sometimes at Delhi, and sometimes at "Bilaspur, in one of the houses which have "been maintained at the expense of the estate." One of the witnesses, indeed, went so far as to affirm that the Defendant's sole permanent residence on the plains was at Hansi; but the High Court has not acted on that evidence, which their Lordships think is untrustworthy. It is not contended that the proper *forum* for the trial of this suit for account was at Saharunpur, by reason of the Defendant's residence, at the time

of its commencement, at the hill station of Mussuri. Such residence was obviously more or less of a temporary character, like that of a man in this country who lives in a house of his own at a watering-place during a portion of the year. And if the Defendant can be said to have had any permanent dwelling-place on the plains and within the ambit of the Skinner estate, he would not the less dwell there, according to the proper and legal construction of the word, because for health or pleasure he was passing the hot season on the hills when the plaint was filed. The question then is, did he not "dwell" at Bilaspur within the meaning of the section?

He was not a mere manager, though in this suit he is accountable in that character. He was one of the five original sharers in the estate, and as such he was one of the proprietors of the fort and residence at Bilaspur. Their Lordships cannot doubt on the evidence that there was a place of residence there, and are of opinion that the clauses in the will which have been cited show that the testator and founder of the family contemplated that it might be the principal place of residence of his family. He undoubtedly treated it as the place in which the honourable memorials of himself and his services were to be permanently preserved. Again, their Lordships think it is sufficiently shown upon the evidence that an establishment of some kind was kept there, and that the Defendant himself, though travelling for the most part during the cold weather about the estate, occasionally resided there, as he had an unquestionable right to do, for periods of time more or less considerable. In his own notice of the 13th October 1874, he called upon the other sharers to come and examine the accounts in the manager's office, which "would remain

" at Bilaspur from 2nd January to 2nd Fe-
" bruary." A man, however, may have more than one dwelling-place; and it is, unnecessary to consider whether the Defendant may not have also such a dwelling-place at Hansi as would subject him to the jurisdiction of the Courts of the Punjab. It is sufficient to decide, as their Lordships do decide, that the Defendant so dwelt at Bilaspur as to make himself subject to the jurisdiction of the Meerut Court in this suit.

This being so, it is unnecessary to consider whether he is also subject to the jurisdiction of that Court by reason of the cause of action having arisen within the local limits of that jurisdiction, a question which upon this record presents some difficulty.

Their Lordships, however, deem it right to say that they cannot agree with the High Court in its conclusion that the sharers had recognised a particular office for the general business, that office being the one at Hansi; and that accordingly the cause of action must be taken to have arisen in the district of Hansi, and in the division of Delhi. They think that, on the contrary, no particular place for rendering the accounts has been fixed either by contract or practice, and that the evidence, confirmed by the Defendant's own written statement, shows that they were rendered and examined at different times in different places, including Delhi and Bilaspur, Hansi being shown to be, as Mr. Smith found, only the repository of the older and settled accounts.

It follows from their Lordships' decision on this question of jurisdiction, that the decree of the High Court cannot stand. It seemed, however, to them that the Defendant was entitled to have the other objections to the decree of the Lower Court which had been taken by his grounds of appeal, argued and determined; and

that it would be most convenient to have them, if possible, determined here. Counsel have accordingly been heard upon such of them as have not been abandoned; and their Lordships have now to decide whether, in respect of any of them, there is any sound reason for reversing or varying the decree of the Lower Court.

These objections are comprised in the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh of the grounds of appeal.

The fifth, which is the first of those which have been argued, is perhaps the most important. It is, in terms, that the Lower Court is wrong in holding that the Defendant is not entitled to charge commission upon the gross income of the estate.

The question between the parties was, whether the 10 per cent. commission to which the Defendant was unquestionably entitled was to be calculated upon the gross collections, or upon some larger collections, or, as the Judge has found, and as the Plaintiffs contend, upon the net income of the estate, being the fund which, subject to that commission, was divisible amongst the co-sharers.

The judgment of the Subordinate Judge (which, their Lordships have no hesitation in saying, is an extremely careful and well-considered one) has decided that point in favour of the Plaintiffs. He has considered the question with reference both to the construction of the will, and to the practice which has prevailed, with more or less variation, during the time of the present and the former managers.

Their Lordships think that, if the question is clear one way or the other upon the construction of the will, that construction should prevail, whatever variations there may have been in practice; and they are of opinion that the construction for which the Plaintiffs

contend is the true one. The clause which has already been read deals with the income of the altamgha zemindary and the rest of the estate as one fund. The testator gives that income to his five sons, there named, to share alike. It is obvious, therefore, that the word "income," as used in that passage, means the divisible fund. It was a fund to arise from the net returns from the different estates, on some of which were indigo factories, which were in the nature of trading concerns. An increased profit on one estate might be met by a loss on another; but the profits and losses were all to enter into one account, the balance of which was to constitute the divisible income or fund.

Then that portion of the clause which relates to the manager is as follows:—"One of my sons, "whichever is most fitted or whoever I may "name hereafter, is to manage the whole con-"cern,"—that is, the whole of the estates, —whatever was to contribute to the divisible fund,—"for which trouble he is to get 10 per "cent. from the whole income, and he is bound "to show a faithful account current yearly to "his brothers." Their Lordships think there are no grounds for construing the word "income" in this passage in a sense different from that in which it is used in the other; and that there is nothing to support the contention that the manager was entitled to charge commission upon each sum which came to his hands from each separate estate or source of income; still less to charge it upon the nominal rents payable by the tenants or cultivators, irrespective of the costs of collection. They are of opinion that the only way to make the whole will consistent is to hold that the commission was to be calculated upon the net fund divisible among the five sharers. Therefore, upon this item their Lordships agree entirely with the finding of the Subordinate Judge.

The sixth ground of appeal related to the disallowance of certain sums amounting in all to Rs. 24,147,53, being expenses incurred by the manager which the Judge held he was not entitled to charge against the Plaintiffs, as representatives of one of the co-sharers. The defence of the items impeached which was set up by the Defendant was that the expenses in question, or the major part of them, consisted of the cost of the establishment kept up for the purposes of the estate, the user of which was incident to his office of manager. But the learned Judge has found upon the evidence that the Defendant entirely failed to make out that defence, as a matter of fact; and that the greater part of those expenses would never have been incurred but for his choosing, for his own convenience and enjoyment, to reside during the greater portion of the year at the hill station of Mussuri.

Their Lordships, therefore, think there is no ground for interfering with the learned Judge's disallowance of these items.

The seventh and eighth grounds of appeal relate to the house at Delhi. The first of them objects to the disallowance of a large sum of money as expenses improperly incurred, so far as the estate was concerned, in repairing, altering, and furnishing that house. The house was the well-known house of the testator at Delhi. In his will he directs that, if it should be necessary for the purposes of paying his debts, the house should be sold; but if it were not sold, it should be let on account of the estate. Upon the evidence it would seem that up to the time of the Mutiny the house was neither sold nor let, but, by the common consent of the co-sharers, was kept up more or less for their common benefit as a mansion at Delhi. After the Mutiny, during which it had

been looted and greatly injured, the estate received from the Government, by way of compensation in respect of it, a sum of Rs. 18,000. That sum they seem to have agreed, not to lay out upon the house, but to divide as part of the profits of the estate. The house, however, must have been put into some sort of tenantable repair, since it was let first as a mess house, and afterwards as a hotel for several years. The Defendant then saw fit to put an end to the lease of the keepers of the hotel, and to lay out a very considerable sum of money upon the house in repairs, alterations, and furnishing; and from that time he appears to have occupied it, whenever he was at Delhi, more as his own residence than as anything common to the family at large. At all events, no authority whatever has been shown for the very considerable expenditure incurred upon it, as before mentioned. In these circumstances the Judge below has allowed all that was expended upon necessary repairs, and has disallowed the considerable sums spent in excess of that, treating them as having been laid out by the Defendant on his own account. He has also disallowed whatever expenses of the establishment are attributable to the private purposes of the Defendant, as contrasted with the establishment which would necessarily be kept up in the house to protect and preserve it whilst unlet. In that allowance, and that disallowance, their Lordships think he was right.

But then the question is raised by the eighth ground of appeal whether he is right in charging the Defendant with an occupation rent of the house, as if it had been let to him. Their Lordships think that this is consistent with the will, which directs that the house, if not sold, should be let, as was done for a considerable period, and with the justice of the case.

There is nothing in the will which gives the manager the power of taking this house out of the general estate, in order to occupy it as his own exclusive residence.

They are therefore not disposed to allow this objection.

The objections raised by the ninth and tenth grounds of appeal have not been pressed.

The objection, however, to the amount decreed on account of interest, which is raised by the 11th ground of appeal, has been strongly pressed. That interest should be allowed, to some amount, their Lordships have no doubt. The suit is for an account of what is due to the Plaintiffs in respect of their share. The Defendant has to account for all his receipts on account of the estate, and has a right to set up by way of discharge whatever he can properly claim under that head.

It appears that when the suit was instituted a very large sum was due from him to the Plaintiffs, even upon his own mode of stating the accounts. After the suit was instituted he paid into Court a considerable sum, and reduced the admitted debt to Rs. 7,000 odd; but if he has during all this time kept the Plaintiff out of her share, he ought, upon every ground of justice and equity, to pay some interest upon it; and if the admitted debt would carry interest, so the sum of Rs. 61,000, to which that debt has been swollen by the disallowance of items of discharge improperly claimed, ought also to carry interest.

Their Lordships can make no distinction between the claim for commission and the other sums which have been disallowed.

The Defendant was bound to know how his commission was to be calculated.

But then it is contended that the rate of interest allowed is excessive.

What the Judge has done has been to give 12 per cent. interest up to the date of the suit, to give 12 per cent. interest on the principal amount from the date of the institution of the suit up to the date of the decree, and to direct that the decree, when compounded of the principal, interest, and costs, should carry interest only at six per cent. It has been argued that the Court rate of interest is now six per cent.; and that the interest decreed should have been calculated throughout at that rate. The only rule or enactment regulating the conduct of the Judge in respect of the allowance of interest to which their Lordships have been referred is the 10th section of the Act of 1861, which says, "When the suit is "for a sum of money due to the Plaintiff, "the Court may, in the decree, order "interest at such rate as the Court may "think proper to be paid on the principal sum, "adjudged from the date of the suit to the "date of the decree, in addition to any interest "adjudged on such principal sum for any period "prior to the date of the suit; with further "interest on the aggregate sum so adjudged, "and on the costs of the suit from the date "of the decree to the date of payment." Of course, the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest.

Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shown that there has been any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice, indeed, of giving upon the aggregate sum decreed for principal, interest, and costs, interest at only six per cent., does

seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decree, and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, express or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, viz., 12 per cent. Hence their Lordships are of opinion that the Judge, in calculating the interest as he has done, has done nothing which he was not entitled to do.

It seems, therefore, to their Lordships that, the objections argued having all failed, they must humbly advise Her Majesty to reverse the decree of the High Court, and to confirm the decree of the Subordinate Judge, with the costs incurred in the High Court; and that the Plaintiffs are also entitled to the costs of this Appeal.