Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Badri Parshad v. *Babu Murlidhur and others, from the High Court of Judicature for the North-Western Provinces at Allahabad; delivered November 27th*, 1879.

Present:

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

THIS is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and assignees of the mortgagee's interest. The mortgage deed between the original parties was dated 16th January 1852. It was a mortgage of what was called the malikana interest of certain talookdars; the amount of that malikana being, during the pendency of the then settlement, a fixed and known sum. The mortgage deed contained this stipulation: "We hereby make a "written agreement that the said mortgagee "having taken possession of the mortgaged "villages, with all the powers enjoyed by us, may "on his own authority collect the jama fixed by "the Government from the villages of the Ilaka, "and himself pay the revenue to the Govern-"ment, instalment after instalment, according to "the usage in the Parganah; that he may bring "to his own use the income of the malikana due "to us, crediting every harvest Rs. 1,656 per "year as interest on the amount of consideration "on this mortgage, at the rate of one per cent. "per mensem, and take the remainder, Rs. 565, "the surplus of the malikana, as his own collec-

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" tion fee and pay of the agent and peons " employed for making collections in the villages; " that is, he may credit the income of the mali- " kana to the payment of two items—one, the " interest on the mortgage amount, and the other " the expenses incurred in making collections in " the villages; for we have agreed that the " amount of interest of the mortgage considera- " tion, and the expenses of making collections in " the villages, should be equal to (or cover) the " malikana profits, and we have no longer any " right to claim a rendition of the account of " mesne profits accruing during the time of the " mortgagee's possession."

The principal question raised by the present Appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the Plaintiff of his statutory right, under the 9th and 10th sections of Regulation 34 of 1803, to call upon the Defendants to render the account mentioned in those two sections. A preliminary question however arises as to the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made, the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to 12 per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts

between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the Appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th section says:—"Nothing in this Regulation being "intended to alter the terms of contract settled "between the parties in the transactions to "which it refers (illegal interest excepted), the "several provisions in it are to be construed "accordingly; and any question of right between "the parties is to be regularly brought before "and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bonâ fide* agreed to be allowed to the mortgagees

for the expense and risk of collecting; and which, being only about 5¾ per cent., was certainly neither exorbitant nor unusual. Having so found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the Defendants to file accounts would be to increase the costs of suit, which must ultimately fall on the Plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this Appeal with costs.