not expressly said by whom an appeal may be preferred; but it may reasonably be assumed that any party to the suit in which a decree is passed may, if dissatisfied with it, appeal from it. S. 577 refers to the judgment in appeal from original decrees, and enacts that it may be for confirming, varying, or reversing "the decree against which the appeal is made," and applies under s. 587 to judgments in appeal from appellate decrees. Hence also it is inferrible that the parties who are allowed to appeal are those who may desire that a decree should be varied or reversed.

In the case before us the plaintiff's suit for pre-emption was dismissed by the lower Courts; and the defendants-appellants here are not desirous that the decree dismissing the suit should be varied or reversed. What they complain of is a finding in the judgments of the lower Courts as to the validity of a sale in respect of which the claim to pre-emption was advanced. The appellate Court could not in disposing of the appeal vary or reverse the decree dismissing the suit so as to make a decree declaratory of the validity of the sale in question. I conclude therefore that neither was the appeal preferred to the lower appellate Court nor is the appeal preferred to this Court admissible.

The finding which is the subject of the appeal is, I conceive, a finding between the plaintiff and the defendants in the suit, and not between the defendant-vendor and the defendants-vendees, who are not now litigating, and would not bar an adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the validity of the sale-deed.

I would accordingly answer the question referred to us in the negative.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Oldfield, and Mr. Justice Straight.

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August 12

HIMMAT SINGH AND OTHERS (PLAINTIFFS) *v.* SEWA RAM (DEFENDANT.)*

Act VIII of 1871 (*Registration Act*), *s.* 17, *cl.* (2)—*Registration—Mortgage—Suit on unregistered bond charging immoveable property.*

The obligor of a bond bearing date the 20th January, 1873, agreed to pay the obligee Rs. 80, together with interest on that amount at the rate of Rs 2 per cent.

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* Second Appeal, No. 97 of 1880, from a decree of G. M. Gardner, Esq., Judge of Agra, dated the 25th June, 1879, reversing a decree of Syed Munir-ud-din, Munsif of Jalesar, dated the 15th April, 1879.

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per month, between the 2nd April, 1874, and the 1st May, 1874, and hypothecated immoveable property as collateral security for such payment. On the 15th February, 1879, the obligee sued the obligor on the bond to recover Rs. 196-8-0, being the principal amount and interest, from the hypothecated property. *Held* by the majority of the Full Bench (STUART, C. J., dissenting), that, for the purpose of registration, the value of the right assigned by the bond to the obligee in the property should be estimated by the amount secured for certain by the hypothecation, and, that amount exceeding Rs. 100, the bond should have been registered.

Per STUART, C. J.—That, for that purpose, the value of that right should be estimated by the principal amount of the bond, and, that amount being under Rs. 100, the bond did not require to be registered. *Nanabin Lakshman* v. *Anant Babaji* (1) and *Narasayya Chetti* v. *Guruvappa Chetti* (2) followed.

Per PEARSON, J., OLDFIELD, J., and STRAIGHT, J.—That a suit on a bond for money charged thereby on immoveable property must, where the bond is not admissible in evidence because it is unregistered, fail.

THE plaintiffs in this suit claimed Rs. 196-8-0 on a bond dated the 20th January, 1873, being Rs. 80, the principal amount of the bond, and Rs. 116-8-0, interest on that amount from the 20th January, 1873, to the 15th February, 1879, the date of suit, at the rate of two rupees per cent. per month. They prayed that the amount claimed might be recovered from the property hypothecated in the bond. The plaintiffs were the legal representatives of the original obligee of the bond. The bond, which was not registered, was in these terms :—"I, Sewa Ram (defendant), son of Balli Singh, do hereby declare that Rs. 80, half of which is Rs. 40, as per detail below, ("Received in cash, Rs. 50: Due on previous account, Rs. 30"), are due by me to Thakur Gajan Singh: I agree and record that I shall pay the said amount with interest at the rate of rupees two per cent. per mensem in the month of Baisakh Sambat 1930 (corresponding with the period between the 2nd April, 1874 and the 1st May, 1874) : that I have pledged and hypothecated my one-fourth share in the *patti* of Madho Singh..... .....until the said amount has been paid : and that I shall not transfer the same to any one else : hence this bond." The Court of first instance gave the plaintiffs a decree. On appeal the defendant contended that the bond required to be registered under Act VIII of 1871, and not being registered was not admissible in evidence. The lower appellate Court held that the bond

(1) I. L. R., 2 Bom., 353. (2) I. L. R., 1 Mad., 378.

required to be registered under s. 17 of that Act, as it operated to create an interest of the value of upwards of Rs. 100 in immoveable property, and being unregistered was not admissible in evidence; and dismissed the suit.

The plaintiff appealed to the High Court, contending that the bond did not require registration; and that as the bond had been admitted in evidence by the Court of first instance without objection, and that Court had decided the suit on the merits, the lower appellate Court was not competent to reverse the decision of the Court of first instance on a ground which did not affect the decision of the suit on the merits. The Division Bench before which the appeal came for hearing (PEARSON, J., and OLDFIELD, J.,) referred the case to the Full Bench for decision.

Munshi *Hanuman Prasad*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the respondent.

The following judgments were delivered by the Full Bench:

STUART, C. J.—This case came originally before a Division Bench, consisting of Pearson, J., and Oldfield, J., and they have referred it to the Full Court. The material question to be determined in the case is whether the bond sued on was one in regard to which registration was compulsory or optional. The bond which is dated 20th January, 1873, is in these terms:—(After setting out the bond, the judgment continued): The bond thus secured two principal sums amounting to Rs. 80, with interest at the rate of two rupees per cent. per mensem, all of which the defendant agreed to repay in Baisakh Sambat 1930, or more correctly 1928. But the question we have now to decide is, not what was the whole sum which might be recovered in the month of Baisakh Sambat 1930 or 1928, or any other particular time, but what must be taken to be the value for the purpose of registration, and according to the true intent and meaning of the present Registration Act III of 1877, s. 17, by which it is provided that the documents of the nature of this bond shall be registered, if the property to which they relate is of the value of Rs. 100 and upwards.

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This question appears to have received much consideration by the High Courts of Madras and Bombay; but there has been at the same time what I might almost call a course of decision in this Court, but directly in conflict with rulings of the other two Courts I have named; those Courts holding that nothing but the principal sum acknowledged and secured by the bond ought to be considered as the value within the meaning of the registration law, and that the interest stipulated ought not to be taken into account for that purpose. This Court has, however, in many cases ruled the contrary, holding that at least the interest to be paid within a certain time mentioned in the bond may, for the purpose of determining the question whether the instrument must be registered or not, be taken into account and added to the principal sum, contrary however, to the opinion, as I shall presently show, of Sir Walter Morgan, my predecessor in this Court, and lately the Chief Justice of Madras; and I may add that I myself have always entertained serious doubts on the subject.

After much consideration and study of the present and former Registration Acts and of the rulings to which I have referred, I have come to the conclusion that the *ratio decidendi* hitherto adopted by this Court is wrong, and that the legal principle recognised and applied by the Judges of the High Courts of Madras and Bombay is right. In a recent case before Oldfield, J., and myself, *Basant Lal* v. *Tapeshri Rai* (1), I gave expression to the doubts I entertained of the soundness of the course of decision in this Court, remarking that I had a very strong impression that the reasoning of the Bombay Judges, and particularly of the Chief Justice, was to be preferred. Since giving my judgment in that case I have anxiously considered the law on this subject and the several decisions of the Madras and Bombay Courts and of this Court, and the doubts to which I gave expression in the case referred to have been fully confirmed in my mind; and I am now clearly of opinion that the principle of decision hitherto recognised and applied by this Court has been mistaken, and that we would be well advised in following the Madras and Bombay rulings. There were two cases in particular referred to at the hearing of

(1) See *ante*, p. 1.

this reference, one by the Madras Court—*Narasigga Chetti* v. *Guruvappa Chetti* (1), and the other by the Bombay Court—*Nanabin Lakshman* v. *Anant Babaji* (2). I may notice the Bombay case first as it is the first in point of date. The judgment in that case was delivered by Westropp, C. J., and in the course of his remarks he expressed his dissent from a ruling of this Court (3), by which it was held that the sum secured by the bond there was Rs. 99 *plus* Rs. 6 interest, and it was observed in the judgment of this Court that "this was the least sum that could have been recovered under the instrument." The report of that case does not state the terms of the bond, but I find that it stipulated for the repayment of the principal sum of Rs. 99 with interest at the rate of Rs. 2 per cent. per mensem, and the time of payment is indicated thus: "payment to be made in Sambat 1928." This mention of the time of payment would appear to have been made the foundation for the remark by this Court that the Rs. 99 *plus* Rs. 6 for interest "was the least sum that could be recovered under the instrument." It now appears to me that this observation was altogether mistaken. The Rs. 99 might have been repaid long before, and indeed before any interest had accrued, for the stipulation that the payment was to be made in Sambat 1928 meant nothing more than that that payment was then expected, and if not then made the bond-holder would be entitled to recover. In his remarks on that case Sir Michael Westropp, C. J., explains the principle on which his Court has acted in such cases, and his exposition appears to me so clear and forcible that I quote what he says at length:—"The registration value was there gauged (he is speaking of the ruling of this Court), not by what the mortgagor received from the mortgagee as consideration for granting the alleged mortgage, but by what the Court regarded as the minimum sum which the mortgagee could have recovered under it. In this Court, however, in considering whether a mortgage is of the value of Rs. 100 or upwards, the value of 'the right, title, or interest' created by the mortgage has always been estimated by the amount of the principle money thereby secured: that being assumed to be the sum received by the mortgagor as consideration

(1) I. L. R., 1 Mad., 378
(2) I. L. R., 2 Bom., 353
(3) In *Darshan Singh* v. *Hanwanta*, I. L. R., 1 All., 274.

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for making the grant by way of mortgage, or, so to speak, the purchase-money of the mortgage. When it is necessary to determine whether an instrument, other than a deed of gift, purports or operates to create, &c., any right, title, or interest, of the value of Rs. 100 or upwards, to or in immoveable property, the test of value which we adopt is the consideration stated in the instrument, whether it be one of sale or mortgage, to be given to the grantor, and not either the minimum or maximum, or other benefit which may result from the transaction to the grantee whether he be vendee or mortgagee. There are reported cases in which the High Court of Calcutta [*Rohinee Debia* v. *Shib Chunder Chatterjee* (1)] and this Court [*Vasudev Moreshvar Gunpule* v. *Rama Babaji Dange* (2), *Satra Kamaji* v. *Vishram* (3)] have ruled that the purchase-money mentioned in a deed of sale must be regarded as showing the value of the interest conveyed, for the purpose of determining whether or not the registration is compulsory. The circumstance that there is nothing in the terms of the Registration Acts to impose upon the Courts the duty of instituting any inquiry, as to the actual value of an interest in immoveable property affected by an unregistered instrument, previously to the admission of that instrument in evidence, and the many and great inconveniences and difficulties which would attend upon such an inquiry, are clearly pointed out in the judgments of Ainslie and Loch, JJ., in the first mentioned of those cases. There is naught in those Acts to suggest that there should be one mode of ascertaining the value in the case of deeds of sale, and another for testing the value in the case of a deed of mortgage, or of rent charge, or of annuity, or creating or conveying any other minor interest in, or charge or incumbrance upon, immoveable property. We do not know any good reason for making such a distinction, and can perceive many for refraining from its introduction. If the necessity for registration of a mortgage is to be ascertained, not by the consideration given by the mortgagee for it, but by the actual value of the transaction to the mortgagee, the test would, at the time of making the contract and when the parties would most need to know whether the mortgage must be registered, be wholly impracticable if the

(1) 15 W. R., 553. (2) 11 Bom. H. C. R., 149
(3) I. L. R., 2 Bom., 97.

interest, or profits in lieu of interest, receivable by the mortgagee is to form one of the elements of value. The rate of interest might, of course, and usually would be then fixed, but the amount of it could only be known when the mortgage was redeemed or foreclosed. The time of redemption or foreclosure would depend on the pleasure or convenience of the parties or of one of them. Why should the first three or six months' interest, merely because it is specially noticed in the mortgage, be taken into account more than any subsequent interest receivable by the mortgagee? If the mortgagee be not entitled to interest under the mortgage, and the stipulation be that, in lieu thereof, he is to enter into occupation of the land and to cultivate it, and retain the profits arising from the cultivation, how, at the date of the contract, could the actual value of the mortgage to the mortgagee be ascertained? These are amongst the grounds upon which rests the practice, which has uniformly prevailed here, of estimating the value of a mortgage, as well under Act XVI of 1864, Act XX of 1866, and Act VIII of 1871, by the amount of the principal money lent, and without any regard to the duration of the relation of mortgagor and mortgagee, or to the rate or continuance of the interest payable. Had we put a different construction on s. 13 of Act XVI of 1864, s. 17 of Act XX of 1866 or s. 17 of Act VIII of 1871, we should, we think, have converted those enactments into so many traps for the unwary, which could not have been the intention of the Indian Legislature. The words 'or in future', which occur in the two last-mentioned enactments, have reference, as we think, to estates in remainder or in reversion in immoveable property, or to estates otherwise deferred in enjoyment, and not to interest payable in future on principal moneys lent on the security of immoveable property."

The case decided by the Madras Court—*Narasayya Chetti* v. *Guruvappa Chetti* (1)—is also a singularly clear authority in favour of the same interpretations of the Registration Law. There the bond was for Rs. 95, to be paid "within December, 1873, in default to pay an increased quantity of grain and interest on the cash at the rate of 2¼ per cent. per month." One of the defendants contended

(1) I. L. R., 1 Mad., 378.

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that the debt thus calculated was more than Rs. 100, and the bond not being registered was not receivable in evidence. This objection was disallowed both by the Munsif and District Judge. In appeal to the High Court, Morgan, C. J., delivered the following judgment:—"It is not too much to say of laws like the Registration and Stamp laws that, unless some simple and definite rule explains in what cases documents must be registered and stamped, the greatest confusion and hardship may arise. In the case of the stamp laws both in England and here it is settled that it is the *sum itself* and not interest, accretions, and so forth, 'that must guide the sum actually due at the time of taking the security, and not any sum to become due in future for the use of the money.'—*Pruessing* v. *Ing* (1). This is the convenient rule, and the language of the Stamp Acts makes it clear. The Registration Act may by its terms cause more difficulty. The words '*present or future, vested or contingent*,' to my mind, point, not to *the value* or its ascertainment, but to the right or interest in the land which is to be created as a security. The security may be one that will arise in future. The person giving it may have in the land no present vested right. If the charge or interest created is of a value less than Rs. 100, registration is needless. No doubt in many cases, as in this case, the land cannot be freed and restored to the proprietor until various increments and the principal sums are paid; but for registration purposes a future contingent value is useless. The act of registering must be done at once, but it is impossible beforehand to say what charge may ultimately have to be borne. The value of the present interest should determine. We might perhaps distinguish the decisions, but if possible it is more convenient in such a matter to have a broad rule.

Kindersley, J., agreed with the Chief Justice, and for very excellent reasons. He said: "In the present case the value secured payable at the periods appointed does not amount to Rs. 100, but in default of payment a fine in grain and interest became payable at certain rates. The amount of such fine would depend on the amount of the crop, and it was impossible at the time of execution to say how much, if anything, would become due on this account or on account of interest. I therefore agree that those uncertain

(1) 4 B. and Ald., 204.

amounts ought not to be considered in calculating for the purposes of the Registration Act the amount secured by the instrument."

The deliberate and candid consideration which I have given to these views, even if we had nothing else to go upon, has affected my mind so strongly that I feel unable either to resist them or the reasoning by which they were arrived at. But I have further to observe that the mere mention in the bond of time or date for repayment, and for interest in the meantime, is simply an arrangement for the convenience of both parties, and is not of the essence of the contract; the legal meaning being that payment may be made at any date within the time mentioned, and when that expired, then the bond-holder would have a right to sue. In favor of this view the Madras case, and especially the reasoning of Kindersley, J., specially applies. On this subject too it is not irrelevant to refer to s. 9 of the General Stamp Act XVIII of 1869, by which it is provided that interest payable under any instrument shall not have the effect of increasing the duty chargeable on such instrument. The same law is enacted by s. 23 of the present Stamp Act I of 1879, the principal sum being the sole test under these Stamp Acts; and why there should be a different estimate when the value is to be reckoned for the purpose of registration it is not easy to understand. And there is another consideration which s. 17 of the Registration Act has suggested to me, and it is this, that the value of the interest "to create, declare, assign, limit, or *extinguish*," must be one and the same under all those conditions; in other words, that the right created, declared, assigned, or limited, is intended to be the same extent and value as that *extinguished*, and in registering an instrument which extinguishes a right you cannot, from the very nature of the case, be supposed at the time of registration to enlarge the right, title, or interest, so *extinguished*, by such an addition to the principal sum as that of interest or other increment. And this must therefore be the measure of the limit for the purpose of registration, when the right is one created, declared, or assigned, for it is obvious that such a right in measure and extent must be the same as that extinguished, and not one more favored as to value. Thus the value on all grounds for the purpose of registration must, according to the true meaning of the Registration Act,

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be considered to be the principal sum and nothing else. Then there is the argument of *convenience* in favour of the Madras and Bombay rulings, and which finds so large a place in the Madras case to which I have referred, and the reasonableness of which I think cannot be disputed, Sir W. Morgan, C. J., resting his judgment almost solely upon it. On such a subject indeed as the value of the right or interest referred to in s. 17, parties holding such instruments should not be troubled with any doubts or difficulties respecting the terms of the instrument, or with calculations as to interest, and the principal sum relating to the right created, &c., or extinguished can be the only certain criterion. To say the least, the law latterly laid down by this Court must be allowed to be doubtful, and that being so, the argument on the score of convenience ought to prevail. Therefore, while regretting I can no longer maintain the rulings of this Court on the question raised by this reference, I am bound to give expression to the conscientious conviction I have formed, and to answer this reference by expressing my opinion that the bond which was the subject of the suit did not require registration and ought to have been received in evidence.

PEARSON, J. (OLDFIELD, J., concurring).—This is a suit for recovery of the amount due under a bond, dated 20th January, 1873, from the property therein hypothecated. By the terms of the bond the defendant agreed to pay the sum of Rs. 80, then owed by him, with interest at two per cent. per mensem, at the end of fifteen months. The first Court decreed the claim. The lower appellate Court reversed its decision on the ground that the bond, being unregistered, is inadmissible in evidence.

The questions raised by the appeal are (i) whether the registration of the bond was compulsory, and (ii) whether, after it had been admitted in evidence by the first Court, the lower appellate Court was competent, on the ground of its inadmissibility, to reverse the first Court's decree.

For the determination of the first question it is necessary to decide whether the bond purports or operates to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of one hundred rupees and upwards to or in immoveable property.

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The bond, if it does not expressly purport, at least operates to assign the executant's right, title, and interest in the property hypothecated to the creditor until payment of Rs. 80 with interest at the rate of two per cent. per mensem. The amount due on the date on which payment was claimable was in excess of Rs. 100. The value of the right assigned may be fairly estimated at the amount secured for certain by the hypothecation. The registration of the bond was therefore obligatory. In this view of the matter, it is unnecessary to discuss particularly the terms "in present or in future" and "vested or contingent," further than to remark that the latter words plainly refer to the nature of the right created, declared, assigned, limited, or extinguished by the instrument, while the former refer to the time of its operation; and that in the present case the right assigned was a vested right, and that the assignment was made on the date of the bond in suit.

For the determination of the second question it is necessary to decide whether the ground on which the lower appellate Court reversed the first Court's decree did or did not affect the decision of the suit on the merits. The contention of the appellant implies that, even if the bond be rejected as inadmissible in evidence, the decree of the first Court could have been maintained. But that contention cannot succeed. The suit is brought on the basis of the bond, and in the absence of the bond must fail. We would dismiss the appeal with costs.

STRAIGHT, J.—In answer to this reference, I would say that the bond in question appears to me to be an instrument creating and declaring the right, title, and interest of a mortgagee in immoveable property of the value of Rs. 100 and upwards. Though the principal sum recited in it is only Rs. 80, its terms virtually amount to a promise certain to pay Rs. 105 on the 1st May, 1874, and until that date, or default in payment made thereon, the obligee could make no demand. So far therefore as he was concerned, the hypothecation was intended to secure Rs. 80 principal, and Rs. 25 interest; and he, at the time of the execution of the bond, acquired the right, title, and interest of a mortgagee in immoveable property of the value of Rs. 100 and upwards, that is, actually and for certain to the extent of Rs. 105, and prospectively for so much

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more as might become due and payable by the obligor after the 1st May, 1874, by subsequent default. For the purposes of the obligee the bond could only be evidence of a transaction affecting property to the extent of Rs. 105, because his right to enforce lien was suspended until that amount had become due from the obligor. Meanwhile the obligor must be taken to have charged his immoveable property with the sum of Rs. 105, and thus to have created in the obligee the right, title, and interest of a mortgagee of the value of Rs. 100 and upwards. In short, looking at the bond itself, as evidencing the intention of the parties, the conclusion appears to me irresistible, that the transaction between them, so far as it related to the creation of a charge on immoveable property, was of a character that required the document recording it to be registered. Upon the other question I would say that, as the suit was brought upon the bond, and the bond is inadmissible in evidence for want of registration, the plaintiff's claim entirely failed, and the lower appellate Court rightly so held.

Appeal dismissed.

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August 12.

CIVIL JURISDICTION.

Before Mr. Justice Oldfield and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF NASIR KHAN (DEFENDANT) *v.* KARAMAT KHAN (PLAINTIFF).*

Suit for Fruit upon Trees—Suit for compensation for the wrongful taking of Fruit upon Trees—Immoveable Property—Moveable Property—Suit cognizable in Small Cause Court—Act XI of 1865 (*Mufassil Small Cause Courts*), *s.* 6—*Act III of* 1877 (*Registration Act*), *s.* 3.

When the damage or demand does not exceed in amount or value the sum of five hundred rupees, a suit for the fruit upon trees, or damages in lieu thereof, is a suit cognizable in a Mufassil Court of Small Cause, the fruit upon trees not being immoveable property, but being moveable property, within the meaning of s. 6 of Act XI of 1865.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. It appeared

* Application No. 50B. of 1880, under s. 622 of Act X of 1877, for revision of an order of H. A. Harrison, Esq., Judge of Farukhabad, dated the 30th March, 1880.