

## APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1896.  
March 9.

KRISHNA RAMAYA NAIK AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3 AND 4), APPELLANTS, v. VASUDEV VENKATESH PAI AND OTHERS\* (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 1, 5 AND 6), RESPONDENTS.\*

VASUDEV VENKATESH PAI (ORIGINAL PLAINTIFF), APPELLANT, v. MHASTI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.†

*Hindu law—Joint family—Manager—Loan—Family purposes—Evidence—Debt\* contracted for family purposes—Evidence required where there has been a series of transactions—Decree—Mortgage bond in satisfaction of decree—Sanction of mortgage by Court—Civil Procedure Code (Act XIV of 1882), Sec. 257A.*

Although there is no presumption that moneys borrowed by the manager of a Hindu family are borrowed for family purposes, and a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, it is not incumbent on the plaintiff to show, in respect of each item in a long series of borrowings, the particular purpose for which it was borrowed. It will be sufficient for him to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which each sum has been borrowed.

Where mortgage bonds were passed for debts due on decrees, and the execution of the bonds (which had been sanctioned by the Court) and the amounts for which they were passed were certified to the Court, and the Court recorded the adjustment without objection, and the decrees by reason of such certified and recorded adjustment became incapable of execution,

*Held*, that sufficient had been done by the Court to satisfy the requirements of section 257A of the Civil Procedure Code (Act XIV of 1882), although no formal sanction had been recorded.

APPEAL from the decision of Ráo Bahádur R. R. Gangolli, First Class Subordinate Judge of Kárwár, and second appeal from the decision of E. H. Moscardi, Acting District Judge of Kánara, amending the decree of Ráo Sáheb H. S. Phadnis, Second Class Subordinate Judge of Kumta.

\* Appeal No. 101 of 1895.

† Second Appeal, No. 595 of 1894.

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The plaintiff's father Venkatesh Pai for many years was in the habit of lending money to the defendant's family. The ancestor of the defendant's family was one Thanna Naik, the elder, who had two sons, *viz.* Ramaya and Ballyappa. In the year 1845, Thanna Naik was the eldest male member in Ramaya's branch of the family. Ballyappa, however, was alive and he as well as Thanna Naik acted as manager of the joint family. Between 1845 and 1856 there were seven bonds executed to the plaintiff, all of which were duly satisfied. Some of these bonds were signed by Thanna Naik and Ballyappa, some by Ballyappa alone, and some by Thanna Naik alone. In 1857 or 1858 Ballyappa died and Thanna Naik became sole manager of the family. He passed a series of bonds in favour of the plaintiff from the year 1858 to 1873. These bonds were expressed to be for moneys borrowed "for my necessities."

In 1873 two bonds, one for Rs. 1,000 and one for Rs. 2,000, were passed by Thanna Naik to the plaintiff, consolidating the earlier bonds which had been given by him for sums borrowed for family purposes.

In 1878 the plaintiff obtained decrees upon these two bonds, one for Rs. 1,473-12-0 and costs Rs. 154-3-4 and one for Rs. 2,431 and costs Rs. 230-9-11.

In execution of these decrees, some of the joint family property was attached, whereupon Thanna Naik applied for and obtained the permission of the Court to mortgage it, and on 14th July, 1880, he executed two mortgage bonds in favour of the plaintiff. In each bond it was recited that Thanna Naik's borrowings had been for the use of the family. In them the amounts due under the above decrees were ascertained and stated and other loans were mentioned, and the total sum due to the plaintiff was stated to be Rs. 4,803-1-4. The two mortgage bonds were given to secure this sum. One was for Rs. 3,800 payable in nineteen instalments of Rs. 200 each. The other was for Rs. 1,000 payable in four months.

On obtaining these mortgage bonds the plaintiff passed a receipt to the Court for payment of the two decrees. It was duly recorded by the Court and the legal proceedings thus terminated.

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In 1886 the plaintiff sued (Suit No. 560 of 1886 ; Second Appeal No. 595 of 1894) the defendants, who were the son, the brother and the nephews of Thanna Naik, upon the aforesaid bond for Rs. 1,000 to recover the said sum and Rs. 377-8-0 as interest, alleging that in executing the second bond Thanna Naik was acting as manager and that the joint family was liable.

Defendant No. 2, who was Thanna Naik's brother, denied his liability. He alleged that Thanna Naik was not the manager of the family and that the bond was passed in satisfaction of judgment-debts of Thanna Naik alone. He further contended that the bond being an agreement to give time for the satisfaction of a judgment-debt, and not having been sanctioned by the Court, was void under section 257 A of the Civil Procedure Code (Act XIV of 1882).

The lower appellate Court held that Thanna Naik was the manager of the joint family and that the greater portion and not all of the debts had been incurred for family purposes. He, therefore, passed a decree for the former part against all the defendants payable within six months, and in default of payment directed a sale of the mortgaged property ; and, in respect of the latter part of the debt, directed that the same should be recovered by attachment and sale of Thanna Naik's interest in the property in the hands of his son (defendant No. 1).

The plaintiff filed a second appeal to the High Court (No. 595 of 1894).

While the above proceedings were pending, the plaintiff filed another suit against the defendants (son, brother and nephew) of Thanna Naik upon the other mortgage bond of the 14th July, 1880, for Rs. 3,800 together with Rs. 4,118-4-0 interest. The brother of Thanna Naik pleaded the same defence as in the former suit. The lower Court passed a decree for the plaintiff.

The brother and nephews of Thanna Naik (defendants Nos. 2, 3 and 4) appealed to the High Court (No. 101 of 1895).

*Macpherson* (with *Shamrav Vitthal* and *Narayan G. Chandavar-kar*) appeared for the appellants (defendants Nos. 2, 3, and 4).

*Inverarity* (with *Ghanasham N. Nadkarni*) appeared for the respondents (plaintiffs, &c.)

In Second Appeal No. 595 of 1894:

*Ghanasham N. Nadkarni* appeared for the appellant (plaintiff).

• *Dattatraya A. Idgunji* appeared for respondent No. 1 (defendant No. 1).

*Narayan G. Chandavarkar* appeared for respondent No. 2 (defendant No. 2).

*Macpherson* :—The question is whether the debts in dispute were incurred by Thanna Naik for family purposes. If they were incurred for his private purposes the suit against us must fail. The burden of proving that the debt was a family debt lies on the plaintiff. Under the Hindu law there is no presumption that a debt was contracted for family purposes—*Soiru v. Narayanrao*<sup>(1)</sup>. The oral as well as the documentary evidence in the case shows that the debt was not contracted for family purposes. (Evidence referred to.)

Another question also arises under section 257A of the Civil Procedure Code. The bonds in dispute were passed in adjustment of decrees, and they stipulate for the payment of larger amounts than the amounts of the decrees. The bonds were, no doubt, certified to the Court, but the sanction of the Court was not obtained for the larger sum. The bonds are, therefore, void.

*Inverarity* :—So far as the law is concerned, the Judge has looked at the case from a right point of view. There is no evidence in the case to show that the amounts borrowed from us by Thanna Naik on several occasions were ever used by him for his private purposes. Our family has been the *súvkar* of defendants' family for many years. The dealings began in 1845. Ballyappa and Thanna Naik used to pass bonds to us. Subsequent to Ballyappa's death Thanna Naik alone executed the bonds. Another important circumstance is that no one has come forward to resist our claim except defendant No. 2.

The bond was passed for a larger sum than that of the decree. But the bond accounts for the excess amount. One hundred

(1) I. L. R., 13 Bom., 520.

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rupees were taken for the marriage of defendant No. 2 and two hundred rupees were taken for the payment of assessment. The bond was not a fraudulent arrangement between us and Thanna Naik. The whole of the money was borrowed for the purposes of the family. Under the circumstances of the case, Thanna Naik had a right to bind all defendants even without their consent.

Section 257A of the Civil Procedure Code is not applicable. There were two decrees and the principal amount of each decree carried interest which was calculated up to the date of the bond. But the bond being an instalment bond, further interest was stopped until default was made in the payment of an instalment. Therefore, the bond provided for the payment of a sum smaller than the amount that would have actually become due under the decree, while section 257A contemplates payment in excess of the amount of the decree. Even supposing that section 257A is applicable, then we submit that we have sufficiently complied with its provisions, because the adjustment was certified to the Court and we got its permission for the bond. The permission is tantamount to sanction. What was necessary was to certify the adjustment and we had done it. The bond is, therefore, not void—*Jhabar Mahomed v. Modan Sonahar*<sup>(1)</sup>; *Hukum Chand v. Taharunnessa*<sup>(2)</sup>; *Sellamayyan v. Muthan*<sup>(3)</sup>; *Juji v. Annai*<sup>(4)</sup>.

*Macpherson*, in reply.

FARRAN, C. J.:—The able and careful argument which has been addressed to us by counsel for the appellant in this case has failed to convince us that the conclusion which the Subordinate Judge has arrived at upon the facts is incorrect. It will be, therefore, sufficient if we state broadly the grounds upon which our judgment is based without entering upon minute details.

The suit is upon a bond (Exhibit 224) for Rs. 3,800 passed by one Thanna Naik, deceased, in favour of the father of the plaintiff. The subject of contest is whether it was given for family debts so as to bind the defendants collaterally related to Thanna Naik. His son, the defendant Mhasti, has not appeared

(1) I. L. R., 11 Cal., 671.

(2) I. L. R., 16 Cal., 504.

(3) I. L. R., 12 Mad., 61.

(4) I. L. R., 17 Mad., 382.

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to dispute it, nor have the defendants Nos. 5 and 6, his somewhat distant cousins. The defendants Nos. 2, 3 and 4 respectively, the brother of Thanna Naik and his nephews, resist the plaintiffs' claim. We may for the sake of brevity refer to them as the defendants.

It is not now disputed that the family to which Thanna Naik belonged was joint in estate and continued so until 1882. The defendants originally alleged an earlier partition, but it was found against them by the Subordinate Judge upon such conclusive grounds that their counsel in appeal has felt himself unable to contest the finding. Two other Courts in a suit arising out of a bond, passed by Thanna Naik at the same time as that now sued upon, have also arrived at the same conclusion. We, upon the same grounds as the Subordinate Judge, consider the union to be an established fact and deal with the case upon that basis.

The ancestor of the family was one Thanna Naik the elder. He had two sons Ramaya and Ballyappa. The evidence in the case goes back to the year 1845. At that time Thanna Naik the younger was the eldest male member in Ramaya's branch of the family. Ballyappa, the brother of Ramaya, was alive. He was blind, but notwithstanding his blindness, he as well as Thanna acted as a manager of the joint family. Between 1845 and 1856 there is a series of bonds in favour of the plaintiff's father, Venkatesh Pai (Exhibits 181, 185, 186, 187, 188, 182 and 183), which were all satisfied. Some of these were signed by Thanna Naik and Ballyappa jointly; some by Ballyappa alone, and some by Thanna Naik alone. The joint signatures to some of the bonds and the mutual connection between others show that they all formed one connected series; and their terms and the fact that the two family managers of different branches joined in raising the loans establish with a considerable degree of certainty that the bonds were executed for family purposes. This was indeed practically conceded in argument. The bonds show that the family was in the habit of borrowing money in comparatively small sums to meet family exigencies; and that it was not usually convenient to pay the sums so borrowed is proved by the execution of the instalment bond, Exhibit 182, and by the sum

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of Rs. 350 being borrowed on the same day (the 14th November, 1855) to pay the first instalment due under Exhibit 182. Ballyappa died shortly after this time in 1857 or 1858. The evidence shows that Thanna Naik then became the sole manager of the family. He passed a series of bonds in favour of the plaintiff's father ranging from the year 1858 to the year 1873 (Exhibits 178, 179, 181, 180, 177, 176, 174 and 173). The case hinges on the determination of the question whether these bonds were given for debts contracted by Thanna Naik for family or his own private purposes.

The bonds in this series, when not renewed bonds, for the most are expressed to have been passed to recover money borrowed "for my necessities." This change of phraseology has been much relied on by counsel for the appellant. It does not, when all the circumstances are taken into consideration, appear to us to necessarily indicate a change in the nature of the borrowings.

Coincident in point of time with the use of this expression the management had devolved upon Thanna Naik alone. This affords a reason for a change of language. The mention of "necessities" in the bonds indicates, we think, in the mind of the lender an intention to charge some one other than the borrower himself. It may be that the idea was to charge his son, but the other circumstances to which we now refer appear rather to negative that idea.

It is improbable that a family which had been regularly borrowing until 1855, and which in that year was involved in debt, should have suddenly ceased the practice altogether and needed no more advances coincidentally with a time when its manager began to borrow on his own account. The terms of the bonds, Exhibits 178, 179, 181 and of the endorsement on Exhibits 182 and 177 show that the parties to these instruments treated the new series beginning in 1858 as a mere continuation of the old series ending about that time. There is nothing indeed to distinguish the two series except the change of language which may be otherwise accounted for. The accounts were all adjusted on 9th November, 1861, when a bond for Rs. 3,000 was given for the consolidated debt (Exhibit 177).

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Again, Exhibit 176, which is a bond for Rs. 1,650 borrowed for "the cloth trade," which is shown to be a family business, amalgamates that sum with the previous borrowings consolidated in Exhibit 177. This does not, of course, show that the previous borrowings were for family purposes, but it proves that the parties dealt with the whole account on the same footing, not distinguishing the money borrowed "for my necessity" from those which must have been borrowed for family purposes. The whole series ultimately culminated in the bonds, Exhibits 173 and 174, passed in 1873 for Rs. 1,000 and Rs. 2,000 respectively.

We think, therefore, that the whole series of bonds from 1845 to 1873 must be treated, notwithstanding the change of language in 1858, as one series, and that the fact that the earlier items in that series were borrowed for family purposes affords some inference that the whole series stands on the same footing.

Admitting, as laid down in *Soiru v. Narayanrao*<sup>1</sup>, that there is no presumption that moneys borrowed by a manager are borrowed for family purposes, and that a plaintiff seeking to make the family property liable must prove that the loans were contracted for the family, we do not consider that it is incumbent on the plaintiff to show, in respect of each item in a long series of borrowings, the particular purpose for which it was borrowed. If it were, it would be impossible for a Hindu saukár keeping a running account with the manager of a family to succeed in proving his account against the family. It will, we apprehend, be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt in the mind of the Court that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which each sum has been borrowed. This is the view adopted by the Subordinate Judge and it is in our opinion the correct one.



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Now it is clear that the family expenses and necessities down to 1858 were not met by their current income.

The oral evidence given for the plaintiffs is not of a conclusive character. The witnesses are Narayan Bab Shenvi (Exhibit 33) Pursaya Bharmaya (Exhibit 46), Krishna Bab Shanbhog (Exhibit 49), Narayan Nagappa (Exhibit 52), Divapayya Thanlapayya (Exhibit 54) and Timapa Govind (Exhibit 121), who, however, establish that during the management of Thanna Naik a new family house was built at considerable expense, the Ghasni land of the family was improved, and two or three marriages were performed, and that a family trade in betel-nuts and cloth was carried on. Lachmayya Devar Shanbhog (Exhibit 122) says that he knows that money was advanced by the plaintiff's father to Thanna Naik on several occasions for the payment of assessment or family purposes including the cloth trade. There is no evidence on the other side to show that the moneys, which formed the consideration for the consolidating bonds (Exhibits 173 and 174), were borrowed for the private purposes of Thanna Naik. It was suggested that they may have been borrowed for the prostitute Jayu with whom Thanna Naik appears to have consorted, but there does not appear to be any real basis for that suggestion. The case really made by the defendants and their witnesses was that there had been a separation between Thanna Naik and the rest of the family, which, as we have said, is quite untenable. The evidence, we think, gives rise to an exceedingly strong inference or presumption that the bonds, Exhibits 173 and 174, were passed to consolidate earlier bonds given to secure sums borrowed by Thanna Naik for family purposes.

We proceed to consider the subsequent occurrences in the lifetime of Thanna Naik. He died about 1881. Nothing had been paid in respect of the bonds in 1878, and in that year the plaintiff's father Venkatesh Pai filed two suits (being Suits Nos. 373 and 374 of 1878) upon them against Thanna Naik alone, and on the 10th December, 1878, he obtained decrees in these suits (Exhibits 220 and 212): that in Suit No. 373 of 1878 was for Rs. 1,473-12-0 and costs Rs. 154-3-4, with interest on the principal sum at the rate of 9 per cent per annum: that in Suit

No. 374 of 1878 was for Rs. 2,431 and costs Rs. 230-9-11 and interest on the principal amount at 6 per cent. per annum.

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In execution of these decrees, Venkatesh Pai attached some property belonging to the joint family. On the 17th April, 1880, Krishna Ramaya made an application (Exhibit 103) to raise the attachment, alleging that he and Thanna Naik and Subraya were joint owners of the attached property which was the self-acquisition of Ramaya, their father, and that the decree was against the defendant Thanna Naik alone, and that he (the applicant) was not liable, nor was his share. A similar application (Exhibit 104) was made by the other brother Subraya. Thanna Naik was arrested in execution of the decrees. On the 30th June, 1880, Thanna Naik, stating that Venkatesh Pai's attachment and that the auction sale of the property would deprive his family of support and that he had requested the plaintiff and had resolved to mortgage it with instalments, applied for permission to do so (Exhibit 158). This was granted the same day, Venkatesh Pai consenting (Exhibit 161). Similar applications were made in both suits. On the 3rd of July an order was passed upon the attachment application of Krishna Ramaya as follows:—"Plaintiff has given up the attachment. Therefore there is no occasion for this application. The application is struck off" (Exhibit 103). A similar order was passed upon the application of Subraya, which was also struck off, but with costs (Exhibit 104).

On the 14th July, 1880, Thanna Naik executed two mortgage bonds in favour of Venkatesh Pai. In each of these bonds it is recited that the borrowings of Thanna Naik had been for the use of the family. In them the accounts under the decrees are made up, the interest being calculated, and from the total amount Rs. 200 already paid by a transfer are deducted. To the balance Rs. 100, said to be borrowed for the expenses of the marriage of Krishna, and Rs. 200, said to be borrowed to pay assessment, are added and the total Rs. 4,803-1-4 is arrived at. Rs. 3-1-4 are given up. The mortgage bonds are passed to secure the balance. One is for Rs. 3,800 payable in 19 instalments of Rs. 200 each. In default of payment of the instalments this whole was made payable with interest at 9 per cent. per annum (Exhibit 224).

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The other bond is for Rs. 1,000 payable in four months with interest at the rate of 6 per cent. per annum. The same lands are again mortgaged to secure payment of this sum (Exhibit 170). Both mortgages are without possession.

On obtaining these mortgages, Venkatesh Pai on the same day passed a receipt to the Court for payment of the two decrees. It mentioned the fact of the mortgages and their amount and was recorded by the Court (Exhibit 159). The legal proceedings thus came to an end. By the appellants we are asked to regard these two mortgages (Exhibits 224 and 170) as frauds by Thanna Naik on his brothers Krishna and Subraya. Ballyappa's branch of the family does not appear to have taken any part in the matter; possibly they were not interested in the attached lands, as Krishna's application asserts that the lands were self-acquired by Ramaya. If we come, as we have done, to the conclusion that there is a strong presumption that the earlier bonds passed by Thanna Naik were for family purposes, there is no foundation for attributing any fraud to Thanna Naik in the transaction. If there was, in fact, no fraud there is no reason for believing that the younger brothers were not fully aware of what was being done by their elder brother Thanna Naik. Subraya was living with Thanna Naik, and the marriage of Krishna had just been arranged for by Thanna. It is difficult to believe that they did not, in fact, know of it. If they were prosecuting their attachment applications it is almost incredible that they were not made aware of the application of Thanna Naik to the Court to mortgage the attached lands, seeing that it was the granting of that application which put an end to the attachment and made their own applications unnecessary. It is asked why in that case they did not join in the mortgages. Venkatesh is dead and the reasons for their not doing so can only be conjectural. The inveterate practice of Venkatesh to deal only with the managing member of the family may possibly account for it. Even after its date, bonds continued to be passed by Thanna alone. See Exhibits 165 to 169 and 241, which are the decrees passed against the whole family upon bonds signed in this manner between 1882 and 1884. On the whole we have come to the conclusion that the mortgages

are sufficiently proved to have been given for family purposes and that they are binding upon the family.

In the suit filed upon the bond for Rs. 1,000 the District Judge of Kánara has, upon a review of the evidence differing from the Subordinate Judge of Kumta, come to a different conclusion except as to the bond for Rs. 1,650 (Exhibit 176). His judgment is the subject of Second Appeal No. 595 of 1894. We must accept his finding, though it does not accord with our own view, as it is not open to us to deal with it upon the facts in second appeal. The arguments urged upon us by the appellants do not disclose any errors of law on the part of the District Judge which would warrant our interference with his decision upon the facts.

It remains to consider the objections to the mortgages founded upon the provisions of section 257A of the Civil Procedure Code which are common to both appeals. The adjustment of the decree by the bonds having been certified to the Court, no difficulty arises on that score, nor could any arise since the alteration in the wording of section 258 of the Civil Procedure Code—*Swamirao v. Kashinath*<sup>(1)</sup>. The provisions of section 257A occasion some difficulty. A long series of decisions in this Court has interpreted the section as applicable to agreements which operate to extinguish the original decree. They are all (except *Vishnu v. Hur Patel*<sup>(2)</sup>) mentioned in *Swamirao v. Kashinath* (*supra*) and are not dissented from in *Bank of Bengal v. Vyabhoy Gangji*<sup>(3)</sup>, though in the former of these cases, Sargent, C.J., speaks somewhat hesitatingly as to their binding force since the Legislature has declared its purpose by the alteration made in the 258th section of the Civil Procedure Code. The Calcutta High Court, on the other hand, in *Jhabar Mahomed v. Modan Sonahar*<sup>(4)</sup> after a consideration of the Bombay authorities has, agreeing with the Allahabad High Court, held that the provisions of section 257A are only intended to prevent any binding agreement between judgment-debtors and judgment-creditors for extending the time for enforcing decrees by execution without consideration and without the sanction of the Court, a

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(1) I. L. R., 15 Bom., 419.

(3) I. L. R., 16 Bom., 618.

(2) I. L. R., 12 Bom., 499.

(4) I. L. R., 11 Calc., 671.

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ruling which would equally apply to agreements falling within the 2nd clause of the section and which has been so applied in *Hukum Chand v. Taharunnessa Bibi*<sup>(1)</sup>. These rulings have been followed in the Madras High Court—*Sellamayyan v. Muthan*<sup>(2)</sup> and *Juji v. Annai*<sup>(3)</sup>. There is thus a consensus of opinion in all the other High Courts that the Legislature in framing the Code of Civil Procedure did not intend to effect, and did not, therefore, effect any change in the substantive law relating to the consideration for agreements, an opinion which by the alteration of section 258 the Legislature would seem to countenance. When it again comes before this Court it may be proper to refer it for consideration to a Full Bench. The question is of the highest importance, and it is one upon which it is desirable that there should be uniformity in the law.

In the present case as the execution of the mortgages (which had been sanctioned by the Court) and the amounts for which they were passed, which in the aggregate exceeded the amount of the decrees, were certified to the Court, and the Court recorded the adjustment without objection, and as the decrees by reason of such certified and recorded adjustment have become incapable of execution, we think, as held by the lower Courts, that sufficient has been done by the Court to satisfy the requirements of section 257A. The bonds are so eminently reasonable that the recording of a formal sanction was possibly deemed unnecessary. We, for the reasons which we have given, confirm both decrees with costs.

*Decrees confirmed.*

(1) I. L. R., 16 Cal., 504.

(2) I. L. R., 12 Mad., 61.

(3) I. L. R., 17 Mad., 382.