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1942 *Present :* **Keuneman and Jayetileke JJ.**

SOMASUNDERAM PILLAI *et al. v.* CHARAVANAMUTTU *et al.*

*73—D. C. Colombo, 12,348.*

*Agent—Mortgage by agent professing to act as such—Outside the scope of his authority—Ratification by principal—Validity of mortgage—Inhabitant of Jaffna—Tesawalamai—Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) s. 3.*

Where an agent professing to act in his capacity of agent entered into a mortgage bond on behalf of his principal and where it was open to the latter to repudiate the contract on the ground that the agent was acting outside the scope of his authority,—

*Held,* that ratification of the contract of mortgage by the principal gave validity to the mortgage against himself.

Ratification must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts.

The second defendant is a Jaffna Tamil, whose father was also a Jaffna Tamil born in Jaffna. Second defendant was born in Colombo and educated in Colombo, where his father, who was in Government service, resided ordinarily, although his father had a permanent home in Jaffna. The 2nd defendant visited Jaffna occasionally but he was permanently resident in Colombo after marriage.

*Held,* that the 2nd defendant was not an inhabitant of Jaffna to whom the Tesawalamai applied and that his wife, by virtue of section 3 of the Jaffna Matrimonial Rights and Inheritance Ordinance, was governed by the ordinary law.

THE plaintiffs sued the defendants who are wife and husband on a mortgage bond P 1 dated September 14, 1930, for the recovery of Rs. 14,000 as principal and Rs. 14,000 as accrued interest. The mortgage bond was signed by the first defendant the wife and by her father as the attorney of the second defendant who was in England. The learned District Judge found that out of the sum of Rs. 14,000 alleged to have been paid to the attorney Rs. 8,000 has been given before the date of the bond in respect of the attorney's personal transactions, and that the plaintiffs were aware of this. As regards the sum of Rs. 5,491.75, the District Judge held that it could not be recovered because the plaintiffs had failed to show that this sum was utilised for the benefit of the second defendant. He also held that the bond had not been ratified after second defendant returned to Ceylon. As regards the first defendant the District Judge held that she was governed by the *Tesawalamai* and that the property mortgaged being *thediatetam* property she was not legally empowered to deal with it and that on the personal covenants she was not bound unless she was assisted by the husband. He dismissed the action as against both defendants.

*H. V. Perera, K.C.* (with him *S. J. V. Chelvanayagam*), for the plaintiffs, appellants.—The issue relating to the ratification of his attorney's acts by the second defendant should, on the evidence, have been answered in the affirmative and in plaintiff's favour. Short of an express declaration there is all the evidence necessary to establish ratification by conduct. See Bowstead on Agency, Article 29 ; *In re Tiedemann & Leddermann Fréres*[1], *Lapraik v. Burrows*[2]. The case of *Dodwell & Co. v. John et al.*[3] which was cited in the District Court is not applicable to the facts of this case. There was no collusion between the plaintiff's and the second defendant's agent. *Dodwell & Co. v. John et al.* (*supra*) is discussed in the latter case of *Reckitt v. Barnett, Pembroke & Slater, Ltd.*[4].

With regard to the first defendant it has been held by the District Judge that she is governed by the *Tesawalamai* and would not be personally liable in this case. It cannot be said that she is governed by the *Tesawalamai*. Although before her marriage she was subject to the *Tesawalamai*, on marriage her status became the same as that of her husband, the second defendant. Section 3 of Ordinance No. 1 of 1911 (Cap. 48) would apply. On the evidence it is clear that the general law would be applicable to the second defendant as he was born, brought up, educated, and still resides in Colombo. Though he is a Jaffna Tamil by race he cannot be regarded as an inhabitant of Jaffna. See *Spencer v. Rajaratnam*[5] and *Savundranayagam et al. v. Savundranayagam et al.*[6]. Under the Married Women's Property Ordinance (Cap. 46) the first defendant would be personally liable on the mortgage bond.

*N. Nadarajah, K.C.* (with him *E. B. Wickremanayake* and *H. A. Kottagoda*), for the defendants, respondents.—It is essential to an agency by ratification that the agent should not be acting for himself. An agent cannot avail of his position as agent in order to benefit himself ; he does not then act on behalf of his principal—*Eastern Construction Company, Ltd. v. National Trust Company, Ltd. and Schmidt*[7], *Imperial Bank of Canada v. Begley*[8], *Seneviratne v. Seneviratne*[9]. Ratification can be given only in respect of an act done by an agent in excess of his authority and not in violation of his authority. Where the transaction is culpable and involves an element of fraud it cannot be ratified—*In re Tiedemann & Ledermann Fréres*[10], *Dodwell & Co., Ltd. v. John et al.* (*supra*). Where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved—*Marsh v. Joseph*[11].

With regard to the first defendant, her status has to be determined by the domicil of the second defendant at the time of their marriage, and it would not be competent for the husband to change the wife's status by acquiring, without her consent, a different domicil of choice subsequently—*Velupillai v. Sivakamipillai*[12]. It is submitted that at the time of his marriage the second defendant was governed by the

[1] *L. R. (1899) 2 Q. B. D. 66.*
[2] *(1859) 13 Moore,s Rep. (P. C.) 132.*
[3] *(1918) 20 N. L. R. 206.*
[4] *L. R. (1929) A. C. 176.*
[5] *(1913) 16 N. L. R. 321.*
[6] *(1917) 20 N. L. R. 274.*
[7] *L. R. (1914) A. C. 197 at 212–3.*
[8] *(1936) 2 All E. R. 367.*
[9] *(1931) 33 N. L. R. 204.*
[10] *L. R. (1899) 2 Q. B. D. 66 at 75.*
[11] *L. R. (1897) 1 Ch. D. 213 at 247.*
[12] *(1910) 13 N. L. R. 74.*

*Tesawalamai.* His status up to the attainment of majority has to be determined by that of his parents. It cannot be refuted that his father who died when second defendant was 17 was a person to whom the *Tesawalamai* applied. Even after his father's death, the second defendant kept up his connection with Jaffna. And when he married at the age of 24 he selected a bride from Jaffna thus removing all doubt about his intention and right to be governed by the *Tesawalamai.* In the circumstances the finding of the District Judge that the first defendant would not be liable on the bond was correct.

*H. V. Perera, K.C.,* in reply.—There is no evidence that the second defendant's father was subject to *Tesawalamai* or that he had a Jaffna inhabitancy. Further, *Tesawalamai* is not a personal law. There is no rule of law that a minor son's local law should be the local law of the father. The principle enunciated in *Spencer v. Rajaratnam* (*supra*) throws light on the point in question. The artificial rule of domicil cannot be applied in this case. The first defendant is not governed by the *Tesawalamai* as she married a person who was not an inhabitant of Jaffna.

*Cur. adv. vult.*

October 5, 1942. KEUNEMAN J.—

The plaintiffs sued the defendants who are wife and husband in respect of a tertiary mortgage bond P 1 No. 385 dated September 14, 1930, for the principal sum of Rs. 14,000 and accrued interest another Rs. 14,000. The mortgage bond was signed by the first defendant who is the wife, and by Rajasooriya the father-in-law of the second defendant, on behalf of the second defendant (the husband), as attorney under power of attorney P 2, No. 850 dated March 6, 1928. The second defendant was in England at the date of P 1.

The property mortgaged had been sold under an earlier mortgage decree, and the plaintiffs now claim only the money due on the bond and do not ask for a hypothecary decree.

There were a very large number of matters of defence raised in the issue, but the greater number of these proved to be untenable. At the trial the learned District Judge found that of the sum of Rs. 14,000 alleged to have been paid to the second defendant's attorney, Rs. 8,000 had been given before the date of the bond P 1 in respect of that attorney's personal transactions, and that the plaintiffs were aware of this. As regards the sum of Rs. 5,491.75 paid at the date of P 1 by three cheques made out in the name of the attorney personally, the District Judge held that even this amount could not be recovered, because the plaintiffs had failed to show that this sum was actually utilised for the benefit of the second defendant. The District Judge also decided against the plaintiffs an issue relating to the ratification of his attorney's acts by the second defendant, after his return to Ceylon, but was not prepared to hold that the plaintiffs colluded with the attorney to defraud the defendants. The action against the second defendant was dismissed. As regards the first defendant, the District Judge held that she was a woman governed by the *Tesawalamai,* and that the property mortgaged was *thediatetam* property. He further held that the first defendant

being a married woman was not legally empowered to deal with *tediatetam* property, or to enter into any contract regarding such property, and that, as regards the personal covenants on the bond, the first defendant had no authority, unless assisted by her husband, to enter into such contract. The action was, therefore, dismissed as against the first defendant also.

From this judgment the plaintiffs appeal, and many interesting questions both of fact and of law have been raised in the appeal. On the evidence, it appears that the defendants were married in June, 1927, at Jaffna. The second defendant in his evidence stated that his father-in-law promised him a dowry of Colombo property worth Rs. 50,000, and Rs. 5,000 in cash in addition to jewellery. At the time there was a talk of the second defendant going to England for the purpose of his education, and the second defendant alleged that he was to be given Rs. 300 a month for his maintenance in England. Presumably this was to be provided by the father-in-law. Shortly after the marriage a piece of bare land—the property mortgaged under P 1—was purchased in the name of the first and the second defendants (see document X No. 198 dated September 20, 1927). The second defendant asserts that the father-in-law gave an undertaking that he would build two houses on this land. In March, 1928, second defendant went to England. The purposes for which the power of attorney was given is explained by the second defendant, as follows :—

> "Before I went to England I gave a power of attorney to my father-in-law. It is a bare land which is in my name and my wife's name, and he was going to build on it. So he wanted a power of attorney. I gave a power of attorney specifically for him to build upon it. There was no raising money. He had no authority to borrow money."

Later in cross-examination second defendant added.

> "There was a bare land, and it was going to be built upon, and he said a power of attorney was necessary to get the building plans passed, and as the land was in my name it was necessary to get someone to act while I was away."

Now it may be observed that there is no corroboration of the story of the promise of the dowry, nor of the subsequent promise to build two houses on the bare land. Even if the second defendant was reluctant to call his father-in-law as a witness, in view of the allegation of fraud against him, it is difficult to understand why the first defendant was not called into the box. There is no mention in the correspondence which has been put in of these alleged promises, and no documentary proof of these promises has been given. It is also difficult to reconcile the oral evidence of the plaintiff with the document P 2, which conveys a specific power to the attorney to sell and dispose of, or to mortgage and hypothecate the immovable property. Further, in view of the fact that one of the owners of the land, viz., the first defendant, remained in Ceylon, and was in a position to sign all building applications, it is difficult to understand why a power of attorney was needed from the second defendant "to get the building plans passed".

I do not find that the District Judge has carefully considered the nature of the evidence given on this point, and find some difficulty myself in accepting this evidence, which in point of fact has no corroboration, and does not appear to be in keeping with the subsequent conduct of the second defendant, which will be dealt with later.

The District Judge appears to have been influenced to some extent by this evidence, and makes a point of the fact that Rajasooriya was not called to contradict this evidence. Here I think the District Judge is wrong. The failure to call Rajasooriya, the second defendant's attorney, tells strongly against the second defendant.

It is clear from the evidence of the second defendant himself that Rajasooriya, the father-in-law and attorney, had remitted to England about Rs. 300 a month from March, 1928, for a period of two and a half years, and had also spent money on building two houses on the land in question. The first of these houses was completed shortly before the end of 1930, and the other was built thereafter. The exact cost of these buildings has not been proved; but I think, on the evidence, it is clear that a sum exceeding Rs. 14,000 has been expended by Rajasooriya on the second defendant. The allegation of the second defendant appears to be that this expenditure was in consequence of the verbal agreement concerning dowry and maintenance made by Rajasooriya, and that accordingly all the borrowings of Rajasooriya were on his personal account, and not as attorney.

I do not think it is necessary to decide this point, for it is possible to come to a conclusion with regard to the borrowings on the recorded evidence. Somasunderam, one of the partners of the plaintiffs' firm, has given evidence, and stated that the sum of Rs. 8,000 had been paid to Rajasooriya prior to the signing of the mortgage bond P 1, and a balance of Rs. 5,491.75 at the execution of P 1. As regards the item of Rs. 8,000, Somasunderam said that he himself and the other partners lent money to Rajasooriya out of the funds of the firm. The transactions were entered in the firm's books, which had now been destroyed in a fire in 1939. These transactions were on promissory notes, and sometimes on cheques. He added that he was aware of the fact that Rajasooriya was the attorney of the second defendant, and that he had read the power of attorney, but did not say when he obtained that knowledge. It is I think of the utmost significance that Somasunderam, who must have been aware of the capacity in which Rajasooriya borrowed, never suggested that Rajasooriya obtained the amounts as attorney of the second defendant, or signed the promissory notes and cheques in that capacity. On the contrary the whole tenor of his evidence is in accordance with the view that these were personal borrowings by Rajasooriya. Somasunderam himself thought the other partners of the firm would raise objections to these transactions, and wanted some kind of security. I think he was not careful as to the form of security he obtained, and when Rajasooriya offered this mortgage in his capacity of attorney, Somasunderam readily accepted it, and even paid the balance sum of Rs. 5,000 odd to obtain it.

In the circumstances I think the learned Judge was justified in his finding that the sum of Rs. 8,000 represented personal borrowings by

Rajasooriya from the plaintiffs' firm, and that the plaintiffs' firm had notice of that fact. The plaintiffs were also aware of the fact that Rajasooriya gave the security P 1 as attorney of the second defendant, in order to cover that amount. I do not, however, agree with the District Judge's finding that it was incumbent on the plaintiffs to prove that the balance sum of Rs. 5,491.75 paid at the date of the execution of P 1 was actually utilized for the benefit of the second defendant.

One other issue remains to be dealt with, viz., whether the second defendant by his conduct after his return from England in December. 1930, ratified the act of Rajasooriya in executing P 1 (issue 21). The history of this issue is interesting. The second defendant raised against the plaintiffs an issue of estoppel based on an alleged discharge by Somasunderam of the liability created by the bond P 1. The learned Judge quite rightly held on the evidence given that the estoppel was not established, but in the course of his evidence the second defendant spoke to a number of facts on which the issue of ratification was subsequently based.

These facts are as follows:—Rajasooriya in virtue of his power of attorney P 2 purported to create a primary and a secondary mortgage in favour of Mr. Johnstone. The property mortgaged was the particular premises in respect of which the plaintiffs subsequently obtained the tertiary bond P 1. The second defendant stated that he came to know of these transactions with Mr. Johnstone about 7 or 8 months after his return to Ceylon in December, 1930, and asked Mr. Johnstone for particulars. He also appears to have obtained a copy of the power of attorney P 2, in order to study the wording of that power (see letter P 9 dated June 24, 1931, and the earlier letter P 10 of April 24, 1931). Sometime about the end of 1934 or the beginning of 1935 Mr. Johnstone filed action, and second defendant filed answer, but at the same time tried to raise money in order to pay Mr. Johnstone off. In this connection encumbrances were searched, and second defendant says that he then discovered the existence of the tertiary bond in favour of the plaintiffs. In March, 1935, Somasunderam got in touch with the second defendant. In this connection, the second defendant stated,

> "I told him that till recently I was quite unaware of these transactions. Somasunderam said he knew all the circumstances of these transactions. He went into some detail. He told me not to blame Mr. Rajasooriya. It was he, he said, who induced him to give this cover to save his face to his partners. Somasunderam pressed Mr. Rajasooriya for a mortgage. Because the partners were forcing him, he had to induce Mr. Rajasooriya to give this mortgage."

There is a curious failure at this point on the part of the second defendant to specify the all-important details mentioned by Somasunderam.

According to the second defendant, Somasunderam wished him to get in touch with the primary mortgagee and to try and get easy terms of settlement. Second defendant did so, and later informed Somasunderam that Mr. Johnstone was willing to take over the front house and half the land in full settlement of the claim on the primary and secondary mortgages, which amounted to Rs. 11,000. Somasunderam replied that

the arrangement was not satisfactory, and suggested other terms. Subsequently the second defendant and Somasunderam went to Urugala to see Mr. Johnstone, who suggested certain terms. Somasunderam made a counter offer, which was not accepted by Mr. Johnstone, who wanted the full amount of his principal.

Second defendant further stated that on the way back Somasunderam told him to regard the whole matter as closed, and to agree to settle Mr. Johnstone's bond by paying the whole amount of the principal, and taking over the property in full settlement of his own claim, but that Somasunderam still hoped to get better terms from Mr. Johnstone. The learned District Judge was not prepared to hold that Somasunderam had agreed to discharge the second defendant. The evidence disclosed a very active effort on the part of the second defendant to settle the claims both of Mr. Johnstone and of the plaintiffs by surrendering the whole of the mortgaged property.

Second defendant was questioned as regards his acceptance or repudiation of the bond P1, *e.g.*

"Q. You did not dispute this bond which had been executed ?

A. That question did not arise because Somasunderam said not to blame Mr. Rajasooriya, that he induced Mr. Rajasooriya. He never raised the question of payment."

Later second defendant said,

"The question as to whether I was liable on the bond did not arise and was not discussed at all."

and again,

"The question of my liability to Somasunderam's partners did not arise at all. The discussion centered round settling Mr. Johnstone."

Second defendant further added that he did not tell Somasunderam that he was prepared to pay him, nor did he admit liability.

I cannot but regard these answers as unsatisfactory or evasive. It is clear that the second defendant never genuinely repudiated Mr. Johnstone's claim, but on the contrary he subsequently consented to judgment, and so accepted the action of his attorney, Rajasooriya, with respect to the Johnstone mortgage. In the case of Mr. Johnstone also, if second defendant's evidence is true, Rajasooriya had acted outside the scope of his authority as attorney, and I think all the evidence points to the fact that the second defendant accepted liability both with respect to the claim of Mr. Johnstone, and also of the plaintiffs, and merely tried to get the best terms he could. It is not possible to accept the view that the question of liability was held in suspense.

Mr. Nadarajah stressed in this connection a letter written by the second defendant to Somasunderam. (D 4 of the 29th of July, 1935) in which the following passage appears :—

"You did this" (*i.e.*, agreed to a settlement) "as you were fully aware of the circumstances that we did not benefit from these transactions that Mr. Rajasooriya put us into and that we were going

> to lose even our dowry property. We were ready to agree to this as we did not want any further bother and worry and were ready to give up this property so that we may have peace."

On this passage is based the argument that the second defendant really repudiated the claim of the plaintiffs on P 1, but for the sake of peace was willing to give up the dowry property by way of a compromise. This appears to be the view taken by the District Judge. But on an examination of this letter, I do not think that view can be maintained. The only two facts which the second defendant alleged that Somasunderam was "fully aware of" were (1) the fact that the defendants did not benefit from Rajasooriya's transactions and (2) the fact that the defendants were going to lose their dowry property. These are arguments which may well be addressed by a debtor to a creditor, to persuade the creditor not to claim his full pound of flesh. There is not the slightest suggestion that the claim of the creditor was untenable, and the whole letter shows that the debtor accepted the claims of his creditor, and was merely negotiating in order to obtain the most favourable terms for himself.

In this connection I think the evidence of Somasunderam is to be accepted, viz., that the second defendant never disputed his liability on the mortgage bond P 1, and only took steps to induce his creditors to reduce the amount of their claims and for that purpose arranged a meeting between Mr. Johnstone and Somasunderam.

There is further evidence that this was the attitude of the second defendant. At one stage, Somasunderam says that the second defendant informed him, that he had arranged a loan from the Church of England. and wanted the claims of the creditors to be within the amount of the loan. The second defendant also promised that when he obtained the loan, he would settle the plaintiffs' claim. The second defendant himself stated that in 1934 he was in negotiation with the trustees of the Church of England, and that the trustees wanted certain things done, and those steps were taken, and added,

> "If I raised the money from the trustees of the Church of England, I was prepared to pay. I told Somasunderam I was having negotiations."

In my opinion the evidence of Somasunderam is substantially true, and throws a vivid light upon the attitude of the second defendant.

In my opinion, the second defendant not only did not repudiate the claim of the plaintiffs but in substance accepted the claim, and actively tried to arrange a settlement of the claim, on the footing that the claim was good. It is significant that all the second defendant has to say about his relations with Rajasooriya after his return to Ceylon, is as follows :—

> "I took the matter up with my father-in-law. I asked him why he had borrowed this money. I protested. After the discussions with my father-in-law my relations were strained from that point up to now."

There is no suggestion that second defendant taxed Rajasooriya with having given cover by mortgage bond P 1 for his personal transactions,

nor any repudiation of the right of Rajasooriya to execute the bond P 1 and the Johnstone bonds. The only point the second defendant appeared to have raised was that he had received no advantage from the bonds.

The doctrine of ratification has been explained by Tindal C.J. in *Wilson v. Tuman*[1] as follows :—

> "That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his *previous* authority."

This has been accepted by Lord Macnaghton in the House of Lords in *Keighley, Maxsted & Co. v. Durant*[2] where it was held that the doctrine of ratification was not applicable where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

In the present case, it is clear that Rajasooriya, at the time he executed the bond P 1, purported to act as the agent of the second defendant. It was, therefore, open to the second defendant to ratify the contract made.

I do not think the principles enunciated in *John v. Dodwell & Co. Ltd.*[3]; *Reckitt v. Barnett, Pembroke and Slater*[4]; and *Imperial Bank of Canada v. Begley*[5] are applicable. In these cases the question was whether property which was held by an agent in a fiduciary capacity, and which was transferred by him in payment of his personal obligations to another, who received it with full knowledge of all the circumstances continued to remain impressed with that fiduciary character in the hands of the recipient. Very different considerations apply to such cases. In the present case the question relates to a contract of mortgage, entered into by the agent, professing to act in his capacity of agent. It was open to the principal to repudiate the contract, on the ground that the agent was to the knowledge of the mortgagees acting outside the scope of his authority as agent, and for his personal benefit. But it was also open to the principal, if he so desired, to ratify the contract of mortgage, and so give validity to the contract as against himself.

One further point was raised by Mr. Nadarajah, viz., that where the agent had acted fraudulently and for his own personal benefit, no question of ratification on the part of the principal arose. It may be noted that the learned District Judge held that there was no fraud or collusion on the part of the plaintiffs, and no reason was urged before us, why that finding should be reversed. I think the point taken by Mr. Nadarajah

[1] *(1843) 6 M. & G. 242.*
[2] *(1901) A. C. 246.*
[3] *(1918) A. C. 563 : 20 N. L. R. 206.*
[4] *(1929) A. C. 176.*
[5] *(1936) 2., All England Law Reports, p. 367.*

cannot be supported. I may cite in this connection the dictum of Channell J. in *Tiedemann and Ledermann Freres*[1].

"Next, it was said that he could not validly ratify or adopt the contracts because, although they purported to be made in his name, they were not really his contracts, being made by Vilmar on his own account, though in Tiedemann's name, with some fraudulent intent. That, however, in our view makes no difference, because in making the contracts Vilmar assumed to act on behalf of a principal, Tiedemann. Under those circumstances we think that the contracts could be validly ratified by the person in whose name they purported to be made, even although they were in fact made without his actual authority, and although Vilmar had in his mind some fraudulent intent."

The further comment of Channell J. viz. :

"It is not found that Tiedemann was guilty of any fraud. If there was such a finding, the question would be altogether different :"

has no application to the facts of the present case.

One last question remains for determination. In dealing with the question of ratification Lord Atkinson states in *Eastern Construction Co., Ltd. v. National Trust Co., Ltd. and Schmidt*[2],

"Ratification must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts."

In *Marsh v. Joseph*[3] Lord Russel of Killowen set out the matter as follows :—

"Where the supposed ratification relates to acts as to which there is no pretence of any *a priori* authority, as in this case, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were."

Assuming that these principles apply to this case, I think it is clear that the alleged acts of ratification were done after the second defendant had full knowledge of all the facts. Was there a clear and unequivocal adoption of those acts? I hold that the evidence I have already detailed establishes clear and unequivocal adoption by the second defendant of Rajasooriya's mortgages, including the mortgage to the plaintiffs and a clear assumption of responsibility by the second defendant as regards the amounts due on those mortgages. Not only has there been acquiescence by the second defendant in the claims of Mr. Johnstone and the plaintiffs (vide *Lapraik v. Burrows*[4]), but also positive acts on the part of the second defendant, which show that he had assumed the liability.

I hold that the District Judge was wrong in dismissing plaintiffs' action against the second defendant, and set the judgment aside and enter judgment for the plaintiffs as prayed for against the second defendant.

[1] *(1899) 2 Q. B. D. 70.*
[2] *(1914) A. C. 213.*
[3] *(1897) 1 C. H. D. 247.*
[4] *15 E. R. 50 : 13 Moore 152.*

The action against the first defendant raises entirely different considerations. The first defendant was a signatory to the bond P 1, and apart from the finding of the District Judge that she was governed by the *Tesawalamai,* and accordingly had no authority to contract, the first defendant would be liable on the bond P 1. The main question argued was that she was not a person governed by the *Tesawalamai,* but was a person governed by the general law of Ceylon.

It is not in dispute that before her marriage the first defendant was a person subject to the *Tesawalamai.* But the question arose whether by virtue of Ordinance No. 1 of 1911 (now Cap. 48), there had been a change in her status. Section 3 of Cap. 48 provides that "whenever a woman to whom the *Tesawalamai* applies marries a man to whom the *Tesawalamai* does not apply, she shall not during the subsistence of the marriage be subject to the *Tesawalamai.*" The appellants' Counsel argued that at the time of the marriage the second defendant (the husband) was not a person to whom the *Tesawalamai* applied.

The second defendant was born in 1903 and married in 1927, after the Ordinance of 1924 relating to Married Women's Property (now Cap. 46). The evidence bearing on this point of the status of the second defendant has all been supplied by the second defendant. According to him, he was a Jaffna Tamil by race and his father was also a Jaffna Tamil, born within the province of Jaffna. The second defendant was born in Colombo, where his parents have lived for many years—his father having come to Colombo for the purposes of his business. Since the date of his birth, the second defendant resided in Colombo, and was educated at St. Thomas' and Wesley Colleges in that city. The second defendant's father was in Government Service, and resided ordinarily in Colombo where he was stationed, and for his holidays he used to go to Jaffna, where he and his wife had certain shares in ancestral property. There is no evidence that the second defendant ever visited Jaffna before the death of his father. Second defendant's mother had visited Jaffna several times, since the birth of the second defendant, but last visited Jaffna in 1918, two years before her husband's death. Second defendant's father died in 1920, when second defendant was about 17 years old, and a student at Wesley College. Since that date second defendant has visited Jaffna occasionally for short periods—6 weeks or 2 months, sometimes only for a few days, but he has paid holiday visits to other places as well, such as Kandy and Nuwara Eliya, which are not in the Northern Province. Second defendant was not running a house in Jaffna, nor did his mother, or his brother, but second defendant had inherited shares in a house in Jaffna from his father—that house was in the occupation of his father's brother. The second defendant was married in Jaffna in 1927, and stayed there for 6 weeks or 2 months on that occasion. The mother of the second defendant had resided in Colombo since the death of her husband, and had no residence elsewhere. Finally, in his re-examination, the second defendant said :

> "I am living in Colombo myself. That is for the purpose of practising my profession. I am now permanently settled in Colombo."

The question that arises on this evidence is whether the second defendant is "a Malabar inhabitant of the province of Jaffna". As the *Tesawalamai* is a custom in derogation of the common law, any person who alleges that it is applicable to him must affirmatively establish the fact, *Spencer v. Rajaratnam* (*supra*). In this case the second defendant has established that he is by descent a Jaffna Tamil, but that in itself is insufficient. He must further prove he was at the crucial date an inhabitant of Jaffna. I agree that the material date for the purposes of this case is the date of his marriage, viz., the year 1927. It was contended on his behalf that his father was an inhabitant of Jaffna, and that he had not, by virtue of his residence in Colombo for the purposes of business, lost his Jaffna inhabitancy. It was further contended that when the second defendant was born, he must be regarded, by virtue of his father's inhabitancy of Jaffna, as having a Jaffna inhabitancy also. It was argued that principles akin to those of domicil of origin must be attributed to him. But I think the argument based on the analogous doctrine of domicil cannot be carried to this extent. The fact that his father was an inhabitant of Jaffna may well be a fact that has to be considered, but I think it is not correct to apply any artificial rules in such a case drawn from the law relating to domicil. Each case must depend on its own facts, and on the amount of evidence led to prove the inhabitancy. This appears to be the rule laid down in *Spencer v. Rajaratnam* (*supra*).

The facts in this case relating to the second defendant are as follows :— He was born in Colombo, and lived in Colombo up to his father's death, and since then also, except for occasional visits to Jaffna, either for his holidays or on business. There can be no question that he is now a permanent resident of Colombo, and in point of fact, even in 1927, he could not be said to have any residence elsewhere than in Colombo. Up to that date, apart from the application of any rule of law, he could in no sense be regarded as having his permanent home in Jaffna. As against this, we must set the fact that his father had a permanent home in Jaffna, and cannot be regarded as having abandoned Jaffna as his permanent home. There is also the fact that the second defendant married in Jaffna, but in spite of his marriage there is no evidence of any intention to settle there. In fact he returned to Colombo in about two months, and has resided in Colombo, except during the period when he was away in England for the purpose of his studies. He owns some shares in Jaffna property, derived from his father, but there is nothing to show that he obtains any income from that property. I think this evidence is insufficient to displace the presumption that he is governed by the ordinary law of the land, or to impose upon him a set of customs applicable only to the inhabitants of the Jaffna province.

I think the learned Judge erred in holding that the second defendant was an inhabitant of Jaffna. The status of the second defendant will determine that of his wife, the first defendant. I hold that the first defendant was not governed by the law of *Tesawalamai*, and that under the ordinary law, she was competent to enter into the contract of mortgage, and into the personal covenants in the bond. I set aside the

order dismissing the action against the first defendant, and enter judgment against her also as prayed for.

The plaintiffs succeed against both defendants, and are entitled to costs against them, both in appeal and in the Court below.

JAYETILEKE J.—I agree.

*Appeal allowed.*