1948 *Present :* **Wijeyewardene A.C.J., Windham J. and Basnayake J.**

WEERASOORIA, Appellant, *and* VANDER POORTEN *et al.*, Respondents

S. C. 121–122—D. C. Colombo 60Z

Debt Conciliation Ordinance—Meaning of term "debtor"—Matter pending before Board—Jurisdiction of District Court to entertain action in respect of it—Ordinance No. 39 of 1941 as amended by Ordinances No. 40 of 1941 and No. 9 of 1943, ss. 14 and 56—Scope of Courts Ordinance, s. 71—Debt—Payment twice over—Court will never order—Costs—Proctor's fees and charges—Can be matter of private contract—Civil Procedure Code, ss. 214 and 215.

An application can be made to the Debt Conciliation Board, under section 14 of the Debt Conciliation Ordinance, only by a debtor who is in debt at the time he makes his application. Where, therefore, a mortgagor made application denying that he owed any money under the mortgage bond and stating that, in fact, a sum of money would be found due to him from the mortgagee on an accounting.

Held, that the Debt Conciliation Board had acted *ultra vires* in entertaining the application of the mortgagor.

Held further : (i) The law will never compel a person *A* to pay a sum of money a second time to *B* when he has already paid it to *C* under the sanction of a court of competent jurisdiction ; but *A*, who seeks to benefit by this principle, must have done all that was incumbent on him to resist the payment to *C*.

(ii) Sections 214 and 215 of the Civil Procedure Code do not prevent a Proctor from entering into an agreement with his client that he should be paid on a different basis and recovering from his client by an action at law all fees due to him in terms of such an agreement. Such an agreement need not be in writing under our law, but the burden will be on the Proctor to establish its reasonableness and equity.

(iii) (*Basnayake J. dissenting*) By virtue of section 71 of the Courts Ordinance a District Court can, with the consent of parties, entertain an action in respect of a matter pending before the Debt Conciliation Board, notwithstanding the provisions of section 56 of the Debt Conciliation Ordinance.

APPEAL from a judgment of the District Court, Colombo. This case was referred to a Bench of three Judges owing to difference of opinion between the two Judges before whom it had been previously listed.

F. A. Hayley, K.C., with *H. V. Perera, K.C.*, *N. K. Choksy, K.C.*, and *I. Misso*, for the 1st defendant, appellant in No. 122 and respondent in No. 121.—The preliminary question which arises in this case is whether the District Court had jurisdiction to entertain this action.

Section 56 of the Debt Conciliation Ordinance, No. 39 of 1941, enacts that " no civil court shall entertain any action in respect of any matter pending before the Board ". This action was instituted on April 12, 1944, and at that date there can be no doubt that the subject-matter of the plaint was pending before the Debt Conciliation Board. The application to the Board by the plaintiff was made on May 27, 1943,

and the Board dismissed that application only on August 1, 1945. Under the provisions of the Ordinance No. 39 of 1941, the Board could have cancelled its order of dismissal within three months of that order. The matter of the application of the plaintiff was pending before the Board up to November 1, 1945. Therefore this action is clearly barred by section 56 of Ordinance No. 39 of 1941.

The District Judge held that objection to jurisdiction must be taken in the answer at the earliest opportunity and, as that has not been done in this case, apparently thought that there has been a waiver of the objection by the first defendant. He therefore rejected the contention of the 1st defendant that the court had no jurisdiction when it was put forward later. But the District Judge is clearly wrong in that respect. In such cases consent or acquiescence cannot confer jurisdiction. A proceeding under the Debt Conciliation Ordinance, No. 39 of 1941, is a sort of limited insolvency proceeding. See *Lawrence v. Wilcock* [1]. See also *The British Wagon Company, Limited v. Gray* [2], *The Queen v. Arundel Rogers and another* [3]. Where a statute specifically ousts jurisdiction it is not possible for parties to confer jurisdiction by consent or acquiescence. See *Norwich Corporation v. Norwich Electric Tramways Company* [4]; *Ledgard v. Bull* [5].

Section 71 of the Courts Ordinance Code cannot help the plaintiff in this case. The finding of the District Judge that section 71 applied to the present case is not correct. It is elementary that the words of a statute must be construed according to the context. In the context the word jurisdiction in section 71 means only the particular jurisdiction of a particular District Court as is contemplated by section 63 of the Courts Ordinance and by section 9 of the Civil Procedure Code. There is a distinction between absolute want of jurisdiction and an irregular assumption of jurisdiction. In the latter case objection must be taken *in limine litis*. Otherwise objection is deemed to be waived. In the former case objection can be taken at any time. See *Malamiar Thamby v. Abdul Cader* [6]; *Jusey Appu v. Ukkurala* [7]; *Fernando v. Fernando* [8]. Counsel also cited *Samsudeen Bhai v. Gunawardane* [9]; *Parangoden v. Ramon et al.* [10]

J. R. V. Ferdinands, with *B. H. Aluwihare*, *P. Navaratnarajah* and *G. T. Samarawickreme*, for the plaintiff, appellant in No. 121 and respondent in No. 122.—In regard to the question of the jurisdiction of the District Court being ousted by section 56 of the Debt Conciliation Ordinance it is submitted that the whole proceedings before the Board were *ultra vires* for the following reasons. Proceedings before the Board are commenced by a debtor going before the Board under section 14 of the Ordinance No. 39 of 1941. "Debtor" has been defined in section 63 of the Ordinance as a person who has created a mortgage or charge over an agricultural property and whose debt in respect of such property exceeds the prescribed amount. In this matter the plaintiff went before

[1] (*1840*) *11 A. and E. 941.*
[2] *L. R.* (*1896*) *1 Q. B. D. 35.*
[3] (*1888*) *57 L. J. Q. B. D. 143.*
[4] (*1906*) *75 L. J. K. B. 636.*
[5] (*1887*) *I. L. R. 9 Allahabad 191.*
[6] (*1838*) *Morgan's Digest 223.*
[7] (*1859*) *3 Lorenz 280.*
[8] (*1859*) *3 Lorenz 247.*
[9] (*1935*) *36 N. L. R. 367.*
[10] (*1936*) *39 N. L. R. 47.*

the Board on the footing that there was no debt due from him on the mortgage or on any other transaction. The Board had therefore no jurisdiction to entertain the application of the plaintiff who was no debtor as required by the Ordinance and consequently all the proceedings before the Board on the plaintiff's application were *ultra vires*. See *Qumar-Ud-Din v. Krishnan Das* [1]. Even if the Board had jurisdiction to entertain plaintiff's application the Board's functions ceased on March 27, 1944, when an order of dismissal should have been made. Proceedings after March 27, 1944, therefore were in any event *ultra vires*. On the question of ouster of jurisdiction of the District Court, it is not a question of absolute want of jurisdiction because the District Court ordinarily has jurisdiction in respect of that subject-matter but is only an irregular exercise of jurisdiction. But such irregularity can be and was cured by the conduct of the 1st defendant and specially by the 1st defendant asking for a hypothecary decree, thus submitting to the jurisdiction of the court. See *Gurdeo Singh v. Chandrikah Singh* [2] ; *Bava v. Thomas* [3]; *Manindra Chandra Nandi v. Secretary of State for India* [4].

F. A. Hayley, K.C., in reply.—The plaintiff went before the Board in respect of two mortgages. As far as the mortgage debts were concerned there is no doubt that the plaintiff was a debtor. Mortgages and mortgage debts cannot be wiped out by unliquidated sums due as fees, &c.. *Bava v. Thomas* (*supra*) is a single judge case and the law is not correctly stated there. The other cases cited on behalf of the plaintiff on this question are not in point.

Cur. adv. vult.

December 17, 1948. WIJEYEWARDENE A.C.J.—

There are two connected appeals—appeal No. 121 by the plaintiff and appeal No. 122 by the first defendant.

The plaintiff is a Proctor and Notary. He practised his profession in Kandy from 1907 to 1916, when he left for Colombo where he has been in active practice up to date.

The plaintiff instituted this action on April 12, 1944, against the defendants as the executors of the last will of Mr. A. J. Vander Poorten (hereinafter referred to as Mr. Vander Poorten) who died in December, 1937. The third defendant died during the pendency of this action.

As executor of the last will of his father, the plaintiff borrowed Rs. 50,000 from Mr. Vander Poorten at 10 per cent. per annum. The plaintiff bound himself personally and as such executor on mortgage bond P 1 of March 21, 1915, and for the repayment of the loan hypothecated a property known as Dangolla Estate belonging to the estate of his father.

On February 18, 1922, the plaintiff executed bond P 2, binding himself personally and as executor aforesaid for the repayment of a sum of Rs. 24,630·50 at 10 per cent. per annum to Henri Vander Poorten (hereinafter referred to as Henri) son of Mr. Vander Poorten. By that bond the plaintiff effected a secondary mortgage over Dangolla Estate.

[1] (*1945*) *32 A. I. R.* (*Lahore*) *223 at 226.*
[2] (*1909*) *36 I. L. R. Calcutta 193.*
[3] (*1945*) *46 N. L. R. 217.*
[4] (*1907*) *34 I. L. R. Calcutta 257 at 282.*

In or about June, 1924, Mr. Vander Poorten entered into possession of Dangolla Estate in pursuance of an arrangement between him and the plaintiff. The possession of that estate was surrendered to the plaintiff on July 10, 1943, by the defendants.

On August 10, 1924, the plaintiff made in favour of Mr. Vander Poorten a promissory note for Rs. 20,037 ·53 payable on demand at 10 per cent. per annum.

The plaintiff acted as Proctor and Notary for Mr. Vander Poorten from about 1916 up to his death. He is still continuing to attend to some legal work which he had undertaken before Mr. Vander Poorten's death.

In the plaint the plaintiff admitted that he was liable to pay—

(*a*) on P 1 Rs. 50,000 as principal and Rs. 145,138 ·88 as interest up to April 10, 1944, and

(*b*) on the promissory note, Rs. 20,037 ·50 as principal and Rs. 35,430 ·16 as interest up to April 10, 1944.

He stated that he was entitled to claim credit in the following sums :—

(*a*) Rs. 32,265 on account of payments made by him to Mr. Vander Poorten from April, 1915, to June, 1924 ;

(*b*) Rs. 120,476 ·64 being the amount of nett income received by Mr. Vander Poorten and the defendants from Dangolla Estate from June, 1924, to April, 1943, together with a sum of Rs. 120,338 ·86 as interest on such income during that period ;

(*c*) Rs. 7,500 as estimated nett income received by the defendants from Dangolla Estate from April, 1943, to July 10, 1943 ;

(*d*) Rs. 90,223 as fees due to him for work done by him as Proctor and Notary.

The plaintiff asked for a cancellation of the bond P 1 and for judgment for Rs. 120,196 ·93.

The first defendant filed answer stating that in addition to the plaintiff's liabilities on the bond P 1 and the promissory note, the plaintiff was liable to pay Mr. Vander Poorten

(*a*) on bond P 2, the principal, Rs. 24,630 ·50, and interest at 10 per cent. as Henri held the bond P 2 and " all the rights, interests, claim and demand thereon as agent of and in trust " for Mr. Vander Poorten, and

(*b*) Rs. 5,953 together with interest at 10 per cent. aggregating to Rs. 8,397 ·01 on account of money belonging to Mr. Vander Poorten recovered by the plaintiff as his Proctor and not paid over to Mr. Vander Poorten. (This account is hereinafter referred to as the Sundry claims account.)

The first defendant pleaded further :

(*a*) that the cash payments made by plaintiff to Mr. Vander Poorten from April, 1915, to June, 1924, in payment of the interest due on the bonds P 1 and P 2 amounted to only Rs. 27,588 ;

(*b*) that the plaintiff was not entitled to claim interest on Rs. 120,476 ·64 —the nett income from Dangolla Estate from June, 1924, to April, 1943—as that income was set off against the debts of the plaintiff ;

(*c*) that the income from Dangolla Estate from April, 1943, to July 10, 1943, was only Rs. 2,993 ·12 ;

(*d*) that the fees due to the plaintiff up to July 31, 1934, were set off in liquidation of the entirety of the plaintiff's liabilities on bond P 2, the promissory note and the sundry claims account ;

(*e*) that the plaintiff's claim for fees prior to April 12, 1941, was prescribed ; and

(*f*) that the plaintiff could not maintain any claim for fees in respect of his services as a Proctor as he had failed to comply with the provisions of section 215 of the Civil Procedure Code.

The first defendant asked for the dismissal of the plaintiff's action and claimed in reconvention judgment for Rs. 60,291 together with interest on Rs. 50,000 at 10 per cent. per annum from April 11, 1944, and a hypothecary decree for that sum in terms of bond P 1.

The second and third defendants filed a separate answer in conflict with the answer of the first defendant. They stated that they were willing to cancel the bond P 1 and moved the Court to make an order " for the accounts between the plaintiff and the estate of the late Mr. A. J. Vander Poorten to be looked into on the footing of the averments contained in (their) answer and that judgment be entered thereafter in terms of the said accounting ".

Their answer contained the following allegation :—

" These defendants state that the transactions between the plaintiff and the said A. J. Vander Poorten were the subject-matter of an inquiry before the Debt Conciliation Board. The Board after looking into the accounts between the parties arrived at the conclusion that the obligations of the plaintiff to the estate of the said A. J. Vander Poorten had been satisfied and that the said estate should pay the plaintiff a sum of Rs. 60,000 which sum the plaintiff refused to accept as insufficient, these two defendants being willing to accept the said conclusion while the first defendant objected thereto."

The plaintiff filed a replication

(*a*) denying that Henri held the bond P 2 as agent of or in trust for Mr. Vander Poorten ;

(*b*) stating that he signed the bond P 2 " without receiving any consideration under pressure from and by reason of the undue influence of the said A. J. Vander Poorten " ;

(*c*) denying that he owed any sum at all to Mr. Vander Poorten on the Sundry claims account.

On August 22, 1945, the plaintiff filed an amended plaint. That amended plaint differed from the original plaint only in containing an additional averment that the defendants were liable in law to render a full and true account of all moneys received from or on behalf of the plaintiff.

Before dealing with the facts of the case I shall deal with a question of law that was argued at some length before us. It was contended on behalf of the first defendant that in view of section 56 of the Debt Conciliation Ordinance, No. 39 of 1941, the District Judge should not have entertained the present action, as certain proceedings instituted by the plaintiff under that Ordinance were pending at the time. I give in the next paragraph a brief statement of facts on which this question of law has to be decided.

On May 27, 1943, the plaintiff made an application 1 D 20 to the Debt Conciliation Board referring to his liabilities on bonds P 1 and P 2 and stating that, though the first defendant was making a claim Rs. 183,384·85 nothing was due from him as the debt had been " discharged by payment and appropriation of income of mortgaged premises and set off of remuneration due for professional services ". The preliminary hearing before the Board was on June 14, 1943, when the applicant filed before the Board the document 1 D 19 giving certain details of the transactions between him and Mr. Vander Poorten and stating that " on an accounting . . . . a very large sum will be found to be due to the applicant after the complete satisfaction of the claims against the applicant ". After making various interim orders and holding a number of sittings the Board suggested on February 16, 1944, that the defendants should cancel the " existing bonds " and pay the plaintiff Rs. 60,000. The plaintiff and the first defendant were allowed time till March 6, 1944, to consider the suggestion of the Board. The plaintiff wrote to the Board on February 28, 1944, that he was unable to accept the " recommendation " of the Board. It was, however, decided by the Board on March 6, 1944, to give the parties further time till March 27, 1944, to inform the Board " if they had arrived at a settlement " (*vide* 1 D 50). The parties made no such communication on or before March 27, 1944, and the Board took no action until June 13, 1944, when the Board decided to make no order. On June 22, 1945, the plaintiff moved the Board to enter an order dismissing his application as on March 27, 1944. On August 1, 1945, the Board made an order dismissing the plaintiff's application for conciliation as from August 1, 1945 (*vide* 1 D 49).

The suspension of the jurisdiction of the ordinary Civil Courts is effected by section 56 (*a*) of the Ordinance only if " a matter " is pending before the Conciliation Board. It must necessarily be a matter which the Conciliation Board has jurisdiction to consider. It is section 14 of the Ordinance which empowers a debtor to invite the Board to exercise its jurisdiction. That section states that " a debtor may make an application to the Board to effect a settlement of the debts owed by him to all his secured creditors or any one or more of them ". Now section 63 defines a " debtor " as a person—

(*a*) who *has created* a mortgage or charge over an agricultural property or any part thereof, *and*

(*b*) whose debts in respect of such property *exceed* the prescribed amount.

The words italicized by me show that the legislature contemplated a " debtor " who was in debt at the time he made his application. This

is made clear by the difference in the tenses of the verbs in (*a*) and (*b*) above. When the plaintiff filed his application 1 D 19 he did not admit that he owed any money at that time, and, in fact, he stated that a large sum of money would be found due to him from the defendants on an accounting. The plaintiff cannot, therefore, be regarded as a debtor empowered to make an application under section 14 (1). Nor can his application be regarded as an application under section 14 (2) as under that sub-section only a secured creditor could make an application. Section 37 may, at first sight, appear to be irreconcilable with the view taken by me. I think that section 37 refers to a dispute as to the existence of a debt due to "a creditor" who has been brought into the proceedings through an order of the Board and not to a dispute as to the existence of the debts due to the secured creditor or creditors against whom the application was made. Section 17 (*c*) tends to throw some light on this as that section requires that "every application made by a debtor to the Board shall give particulars of the debt or debts in respect of which relief is sought". The Board, therefore, acted *ultra vires* in entertaining the application of the plaintiff. The Board is a tribunal of special jurisdiction and its powers are strictly limited by the provisions of the Ordinance. Moreover, the effect of section 56 being to interfere with the jurisdiction of the ordinary Civil Courts, that section must be construed strictly. The view I have expressed derives support from the decision in *Qumar-Ud-Din v. Krishnan Das* [1].

In that case Qumar-Ud-Din presented an application to a Debt Conciliation Board against Krishnan Das in whose favour he had executed two mortgage bonds. In the application it was stated that the mortgagee had been receiving the rents of a part of the mortgaged property for a number of years and had been living in another part of the property free of rent and that as a result the entire mortgage debts had been wiped out. He asked for a finding that nothing was due from him but added that if the Board found any sum was due from him, the mortgagee should be ordered to receive payment of such sum by instalments. In the course of their judgment the learned Judges who constituted the Full Bench of the Lahore High Court said—

> "If the applicant states definitely that the entire debt due from him has been wiped out by means of repayments made by him he cannot be regarded as a person who owes a debt. If he adds in his application that if the Board comes to the conclusion that any debt is still due from him instalments may be fixed for the payment of such a debt, it does not make any difference at all. The applicant by asking for instalments does not admit that a debt is due from him."

Even if the Board had jurisdiction to entertain the plaintiff's application, it seems to me that the Board acted *ultra vires* in continuing the proceedings after March 27, 1944. On February 16, 1944, "certain definite terms were suggested by the Board as the basis for a settlement" (*vide* 1 D 50). The plaintiff and the first defendant wanted time to consider the proposed suggestion and the Board allowed them time till March 6, 1944. The plaintiff wrote to the Board on February 28, 1944,

[1] *(1945) 32 A.I.R. (Lahore) 223.*

that he was unable to accept the recommendation of the Board. At the meeting of the Board on March 6, 1944, at which the parties were represented by their Counsel the "parties were asked to inform the Board before 27th instant *if they arrived at a settlement*" (*vide* 1 D 49). When the parties failed to inform the Board on March 27, 1944, that they had reached an amicable settlement, the Board should have dismissed the application under section 32 (2) of the Ordinance.

Moreover, this objection to the jurisdiction of the District Court to entertain the present action was neither pleaded in the answers nor formulated as an issue. It was raised for the first time by the first defendant's Counsel at the close of his address in the District Court. It was contended before us on behalf of the first defendant that we have here an absolute want of jurisdiction and not merely an irregular assumption of jurisdiction and that therefore consent of parties could not give jurisdiction to the District Court to entertain this action. But it has to be noted that the District Court has jurisdiction to entertain an action of this nature and that section 56 of the Debt Conciliation Ordinance enacted merely that the District Court should not entertain such an action if such action was in respect of a matter pending before the Debt Conciliation Board. It is not as if the District Court assumed a jurisdiction which it never possessed. Several English and Indian decisions were cited by both parties. But it does not appear from those decisions that the Judges in those cases had to consider the effect of a provision similar to section 71 of the Courts Ordinance. That section enacts—

> "Whenever any defendant or accused party shall have pleaded in any cause, suit, or action, or in any prosecution brought in any District Court, without pleading to the jurisdiction of such District Court, neither party shall be afterwards entitled to object to the jurisdiction of such Court, but such court shall be taken and held to have jurisdiction over such cause, suit, action, or prosecution:
>
> Provided that where it shall appear in the course of the proceedings that the cause, suit, action, or prosecution was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

It was argued for the first defendant that this section so far as it applied to civil cases should be restricted to actions which have been brought in a particular District Court when the Court having territorial jurisdiction over the actions is another District Court. It was said that, if the section was not given a restrictive interpretation as indicated above, it would be possible for parties to obtain a decree for divorce in a Court of Requests by the defendant acquiescing in the action being entertained by the Commissioner of Requests. That argument however ignores the fact that section 71 is one of the sections in Chapter 6 of the Courts Ordinance dealing with District Courts and does not refer to an action in a Court of Requests. Nor do I think that *Samsudeen Bhai v. Gunawardene* (1935) 37 New Law Reports 367 and *Parangoden v. Raman et al.*

(1936) 39 New Law Reports 47 are helpful in construing section 71, as the decisions in those cases depended on the stringent provisions of section 3 of the Public Servants Liabilities Ordinance.

For the reasons given by me I answer the preliminary question raised by the first defendant's Counsel in favour of the plaintiff.

I shall now proceed to consider the questions that arise between the parties with regard to (i) the secondary bond P2, (ii) the promissory note, (iii) the sundry claims account, and (iv) the fees due to plaintiff up to 1934. I shall then consider the question whether the plaintiff did or did not accept the arrangement of Mr. van der Poorten to set off his claim (iv) against Mr. van der Poorten's claims (i), (ii) and (iii). I may add that the pages referred to in the course of my judgment are the pages as numbered in the typed copy of Judge's brief given to me.

There are two questions regarding the secondary bond P2—

(*a*) What was the extent of the plaintiff's liability on the bond ?
(*b*) To whom was he liable on the bond ?

As regards consideration P2 states—

> " Whereas I the said Obligor as such Executor as aforesaid having no funds to pay a certain portion of the interest payable upon the said Bond No. 1484 (P1) due up to December 31, 1921, to the said Antonie Joseph van der Poorten have requested Henri van der Poorten of Greenwood Galagedera aforesaid to lend and advance to me the said Obligor as such Executor the sum of Rupees Twenty-four thousand six hundred and thirty and cents fifty, for the purpose hereinbefore mentioned ".

It will be noted that P2 does not state that the arrears of interest at that time on P1 amount to Rs. 24,630·50. At the execution of P2, a cheque P24 issued by Henri in favour of the plaintiff and endorsed by the plaintiff was delivered to Mr. van der Poorten. That cheque was never cashed but on receipt of the cheque Mr. van der Poorten made entries in his books—(i) giving plaintiff credit in a sum of Rs. 20,077·98 said to be due from the plaintiff at the date as arrears of interest on P1 and (ii) cancelling an alleged liability of the plaintiff to pay Rs. 4,552·52 on account of a debt of Mr. F. L. Goonewardene. The plaintiff's case, when he was giving evidence in chief, was (i) that the arrears of interest due on P1 at the time of execution of P2 amounted to only Rs. 8,004 (*vide* page 74) and (ii) that he never undertook to pay the debt of Mr. F. L. Goonewardene. According to that contention the only extent of his principal obligation on P2 would be Rs. 8,004 and not Rs. 24,630·50. With regard to the arrears of interest the plaintiff's position was that the interest on P1 up to February 18, 1922 (the date of execution of P2) would amount to Rs. 34,470 approximately at 10 per cent. simple interest and that he paid Mr. van der Poorten various sums aggregating to Rs. 25,815 in part payment of that interest. Even on these facts the arrears of interest at the time of the execution of P2 would be Rs. 8,655 and not Rs. 8,004 as stated by the plaintiff. The books of Mr. van der Poorten show that the plaintiff made payments amounting to Rs. 25,815 but only a sum of Rs. 21,138·20 was credited

on account of interest on P1 and that the balance Rs. 4,676·80 was credited on account of a separate transaction called the Ismail transaction (*vide* P 21). The dispute between the parties on this point was that Mr. van der Poorten acted wrongly and against the clear directions of the plaintiff in appropriating only a sum of Rs. 10,323·20 out of a sum of Rs. 15,000 paid by plaintiff on June 17, 1920, towards the liquidation of interest on P1. Though he took up this position in his evidence-in-chief, he was compelled to admit under cross-examination that he had been "rightly credited in his account with Rs. 10,323·20 as a cash payment instead of Rs. 15,000". (*Vide* page 103). I shall deal in greater detail with the plaintiff's evidence on this point when I consider the question how far I could rely on the unaided memory of the plaintiff as a safe guide in deciding any material question in dispute between the parties. On the evidence, therefore, of the plaintiff which I have referred to, the balance arrears of interest on P1 on February 18, 1922, would be Rs. 13,331·80 (Rs. 8,655 + Rs. 4,676·80) and not Rs. 8,004 as originally stated by him. According to the defendants the balance arrears of interest amounted to Rs. 20,077·98. That difference is due to the fact that Mr. van der Poorten has calculated the interest on P1 up to February 18, 1924, at 10 per cent. compound interest and not at 10 per cent. simple interest as set out in P1. The question we have to consider at this stage is whether in spite of P1 the plaintiff agreed to pay compound interest for the period ending February 18, 1924. Now Mr. van der Poorten's books show unmistakably that he calculated the interest regularly as compound interest when the plaintiff made default in payment of interest on the due dates. It is not denied that the plaintiff received statements of account from time to time (*vide* page 89). In fact he knew that Mr. van der Poorten "got back his investments with compound interest" when the interest was not paid regularly (*vide* page 91). There is nothing to show that at any time before the execution of P2 the plaintiff objected to his being charged compound interest. Above all, there is the fact that the plaintiff executed the bond P2. The plaintiff was at the time a lawyer with a great deal of experience and had then been practising for nearly seventeen years. Apart from his work for other clients his professional work for Mr. van der Poorten was in respect of important matters involving large sums "running into lacs" (*vide* page 82). He was not only a practising lawyer but was a gentleman who was personally dealing in large land transactions involving large sums of money, e.g., purchase and subsequent sale of Weveltalawa Estate (*vide* page 72). The evidence given by him and especially the answers given by him when closely cross-examined show him to be not only very intelligent but one who is not easily ruffled (*vide* for instance pages 91, 92, and 93). It is admitted by him that "a few days must have passed between that date Mr. van der Poorten suggested the secondary bond and the dates of its preparation and actual execution" (*vide* page 85). The Notary attesting the bond was Mr. F. L. Goonewardene a "good friend" of his whom he describes as a "good man" having a "very good reputation" as a lawyer (*vide* page 84). It was not a bond which was drafted in a hurry and submitted for plaintiff's signature. It had been prepared by a well-known Counsel in Colombo, Mr. Advocate Samara-

wickrema, for Mr. Goonewardene (*vide* page 84). When he was asked in cross-examination how in all these circumstances he came to execute bond P2 for a sum much larger than what according to him was due from him, his answer was—

> " In the course of those days (i.e., the days between the suggestion that a bond should be executed and the date of execution) I did not look up my cheque counterfoils to find out how much interest I had paid and how much I was in arrears. I took it for granted that Mr. van der Poorten would not get me to sign a bond for a larger sum than was due. I did not address my mind to the matter. The bond was put before me and I signed ". (*Vide* page 85).

Continuing his evidence he said—

> " It did not strike me that the arrears of interest was half of the primary bond. I know now that it was not anything like that figure. I cannot recollect what my state of mind at that time was. I was having a strong bout of malaria and I signed this. I will not say any more ". (*Vide* page 86).

He had further stated earlier—

> " We did not discuss what the arrears of interest were ". (*Vide* page 83).

As regards the debt of Rs. 4,552·52 due by Mr. F. L. Goonewardene which is a part of the consideration in bond P2, the plaintiff's position is that he did not take over the debt. There is, as stated above, the fact that the plaintiff signed the bond P2 for Rs. 24,630·50 which included this sum. Mr. van der Poorten himself has made a contemporaneous entry in his books crediting Mr. F. L. Goonewardene with this sum as follows :—

> " By remit. a/c. int. by Mr. D. E. Weerasuriya—Rs. 4,552·50 ".

Mr. van der Poorten who is referred to as " the old gent " in the judgment of the District Judge has, no doubt, been described as a " hard man ". But there has not been the slightest suggestion that he was a dishonest man. No reason has been given why he should have transferred the liability of Mr. F. L. Goonewardene to the plaintiff dishonestly. Of course it is argued for the plaintiff that there was no reason for the plaintiff to take over his debt. But the plaintiff's own evidence shows that he has taken over other persons' debts on other occasions. In the course of the various complicated transactions in which he was personally interested the plaintiff has admittedly signed a promissory note for Rs. 20,037·53 in 1924 " in respect of a friend's liability " (*vide* page 66).

In seeking to explain his action in signing P2 for Rs. 24,630·50 the plaintiff said in examination-in-chief—

> " (*a*) He (Mr. van der Poorten) pressed me to sign that bond on the footing that a large sum of money was due by way of arrears of interest. At that time my payments of interest had not been regular and I thought it wise not to refuse to sign the bond ". (*Vide* page 63.)

(*b*) " As far as I can remember the secondary bond was not taken seriously by me . . . . I gave a secondary bond for arrears of interest. I had to accept his dictation in the matter . . . . I did not refuse to sign the bond . . . . as he would have sold me up ". (*Vide* page 64.)

(*c*) " I signed the bond for Rs. 24,630 at his request to placate the old gentleman (Mr. van der Poorten) as he was insisting on having a second bond ". (*Vide* page 74.)

(*d*) " There was no force or compulsion. I signed it voluntarily because I thought it was the wisest thing to do ". (*Vide* page 86.)

I am unable to assent to the finding of the District Judge that the evidence of the plaintiff raises a strong presumption of fraud against Mr. van der Poorten. I have no hesitation in holding that the plaintiff was well aware of the contents of the bond P2 before he signed it. There was nothing extraordinary in his holding himself answerable for Mr. F. L. Goonewardene's debt. He had received account particulars showing that he was being charged compound interest. He knew that other debtors were paying compound interest. The additional amount he had to pay on account of compound interest was something like Rs. 6,500 over a period of seven years. He was " doing a considerable amount of work " for Mr. van der Poorten at the time, involving large sums of money. (*Vide* page 74.) He expected to earn a substantial sum as fees by attesting bonds and appearing for him in the many land suits of Mr. van der Poorten. (*Vide* page 75.) A large number of persons were seeking his assistance in raising loans and paying him for it, as he was in touch with Mr. van der Poorten who was prepared to lend considerable sums of money (e.g., Tanketiya transaction referred to later). He was able to get what he called accommodation loans of large sums from Mr. van der Poorten for his own dealings in land and thereby make large profits. (*Vide* page 72.) With all these advantages accruing to him in having Mr. van der Poorten as a client he chose to acquiesce in the practice of Mr. van der Poorten—well known to him—of charging compound interest from debtors who failed to pay interest regularly. He knew that Mr. van der Poorten could not easily break away from him, as he was Mr. van der Poorten's lawyer in many complicated and protracted law suits. He felt that as time went he would get Mr. van der Poorten more and more under his influence and that at a final settlement he would be able to get terms very favourable to him. Many passages in his evidence show this—

(*a*) " I always thought I could come to some arrangement with him with regard to a fair settlement of these matters ". (*Vide* page 64.)

(*b*) " I signed the bond fully well knowing that I and Mr. van der Poorten can settle the account later on a correct footing ". (*Vide* page 75).

In fact, the plaintiff formed a correct estimate of his influence over Mr. van der Poorten as will be seen when I proceed to discuss the adjustment of Mr. van der Poorten's claims on the bond P2, promissory note and the sundry claims account.

The plaintiff's evidence on this point could be tested in another way. After 1924, he got several statements of accounts from Mr. van der Poorten showing his liability on bond P2 (*vide* page 89 and 1D6 of April 26, 1930). He never wrote to Mr. van der Poorten challenging the correctness of the liability. He failed to do this even after 1929, when according to him all his liabilities to Mr. van der Poorten had been discharged. He did not question Mr. van der Poorten even on occasions when he was " very good " (*vide* page 86). He did not question his " good friend " Mr. F. L. Goonewardene why he was made to sign a bond for Rs. 24,630·50. (*Vide* page 86).

I am of opinion that by bond P2 the plaintiff assumed liability for the sum of Rs. 24,630·50 with a full knowledge of all the facts and without being in any way induced to do so by any undue influence on the part of Mr. van der Poorten.

The second point that has to be considered regarding the bond P2 is whether Henri held the bond in trust for and as agent of Mr. van der Poorten. In support of the plaintiff's contention that Henri was, in fact, the real mortgagee we have—

(*a*) the bond P2 which mentions Henri as the mortgagee ;
(*b*) the statements of account P52 and P53 prepared in 1923 and 1926, respectively, giving Henri as the creditor ; and
(*c*) the letter 1D17 of 1932.

As against these, there is a volume of evidence showing that the parties concerned, including the plaintiff, regarded Mr. van der Poorten as the actual mortgagee.

Though the bond was in the name of Henri, no consideration passed from him. Henri's cheque P24 in favour of the plaintiff and endorsed by the latter and given to Mr. van der Poorten remains uncashed up to date. That cheque was probably handed before the Notary in order to enable the Notary to make his statement in the attestation clause that the consideration was paid in his presence by a cheque. It seems to me that for some reason or other Mr. van der Poorten was advised to have this bond written in the name of Henri. But Henri does not appear to have taken any part in the negotiations for the bond or interested himself in anyway about the execution of the bond. The plaintiff says, " there was no talk between me and Henri van der Poorten in regard to this transaction at any time prior to its execution " (*vide* page 85) and that Henri " did not figure in the matter " (*vide* page 75). So far as the plaintiff remembers Henri was not present at the time of the execution of P2 (*vide* page 85). Though he says he made payments amounting to Rs. 4,250 to Henri in payment of bond P2 (*vide* pages 64, 73 and 74), yet in this case he asks that he should be credited with that sum as against his liabilities to Mr. van der Poorten (*vide* para 4 of the plaint and page 96). The following account particulars all refer to Mr. van der Poorten as the creditor on the bond P2 :—1D1 and 1D3 of 1929, 1D6 of 1930, 1D8 (B) of 1931. When he received these account particulars the plaintiff did not write to Mr. van der Poorten that the claim on P2 should be deleted from Mr. van der Poorten's claim against him (*vide* pages 94 and 95). In reply to 1D17 mentioned by me earlier

the plaintiff wrote 1D18 to Mr. van der Poorten and in that letter he said—

> "Henri is fortunate in getting advances from you on the security of the secondary mortgage over Dangolla. You have forgotten that this secondary mortgage was taken by you in Henri's name for interest due to you on the primary mortgage".

When he was cross-examined about this letter, the plaintiff's reply was not at all helpful (*vide* page 92). Even when he went before the Debt Conciliation Board the plaintiff stated unambiguously in paragraph 1 of 1D19 that he was asking "for a settlement of the claims of the late Mr. A. J. van der Poorten and his executors in respect of the mortgage bond 1484 (P1) dated March 26, 1915, for Rs. 50,000 and 2276 (P2) dated February 18, 1922, for Rs. 24,630·50".

Mr. van der Poorten's books show that the last item credited to the plaintiff in respect of his liability on P2 was in 1931. The bond would therefore have been prescribed in 1941. If Henri regarded himself as the mortgagee it is strange that Henri did not sue all these years on the bond.

If the plaintiff regarded Henri as the mortgagee on P2 he should have mentioned the name of Henri in his application to the Debt Conciliation Board as required by section 17 (*c*) of the Debt Conciliation Ordinance. The plaintiff did not do so and so far as plaintiff remembers Henri made no claim against him before the Board.

I find that on bond P2 the plaintiff was liable to the estate of Mr. van der Poorten and he became liable for the full sum of Rs. 24,630·50 mentioned in P2.

Whilst arguing that the plaintiff's indebtedness on P2 was to Henri and not to Mr. van der Poorten, the plaintiff's Counsel put forward as an irrefutable proposition of law that, even if this Court held that the plaintiff's creditor on P2 was Mr. van der Poorten, the plaintiff could be compelled by Henri to pay again the debt on P2 to him, as Henri was not a party to this action. I think it more correct to regard it as a startling proposition. In this case the plaintiff has done all he could to prevent credit being given to Mr. van der Poorten on P 2. If in spite of these efforts this Court decides that the debt on P2 was due to Mr. van der Poorten, no Court of Law will hold the plaintiff answerable for the debt a second time to Henri. As Bonser C.J. remarked in *Mohamadu v. Ibrahim*[1]—

> "No authority is needed to establish the proposition that the law will never compel a person to pay a sum of money a second time which he has already paid under the sanction of a Court of competent jurisdiction; but the person seeking to benefit by this principle must have done all that was incumbent on him to resist the payment". (See also *Appuhamy v. Tinanhamy*[2]).

As regards the claim on the promissory note the plaintiff does not dispute his liability for Rs. 20,037·53 and interest at 9 per cent. on the note made on August 19, 1924. Nothing was paid by the plaintiff

[1] *(1895) 2 N. L. R. 36.* [2] *(1919) 6 C. W. R. 33.*

on that note. The plaintiff admitted his liability on that note in paragraph 16 (*b*) of the plaint.

[His Lordship then discussed the sundry claims account, and continued :—]

I shall now consider the question of fees. The plaintiff's claim for fees is in respect of work done by him—

(*a*) as a Proctor in connection with actions in Court ;

(*b*) as a Proctor in some other matters ; and

(*c*) as a Notary in attesting deeds, &c.

Sections 214 and 215 of the Civil Procedure Code deal with claims by a Proctor for fees due to him in respect of actions in Court and enact—

Section 214 : "All bills of costs, whether between party and party or between Proctor and client, shall be taxed by the Registrar or Secretary or Chief Clerk of the Court, as the case may be, according to the rates specified in the Second Schedule ; and if either party is dissatisfied with this taxation, the matter in dispute shall be referred to the Court for its decision, and the decision of the Court in review of taxation of costs shall (except when it is the decision of the Supreme Court) be liable to an appeal to the Supreme Court ".

Section 215 : "No Proctor shall commence or maintain any action for the recovery of any fees, charges or disbursements at law until the expiration of one month or more after he shall have delivered unto the party charged therewith, or left with him at his dwelling house or last known place of abode, a bill of such fees, charges and disbursements subscribed by such Proctor. And after such delivery or service thereof, either the Proctor or party charged therewith may obtain an appointment from the taxing officer for the taxation thereof ; and if either party shall fail to attend, and the taxing officer is satisfied that such party has received due notice of the appointment, the taxation shall proceed in his absence ".

Those sections, however, do not prevent a Proctor from entering into an agreement with his client that he should be paid on a different basis and recovering from his client by an action at law all fees due to him in terms of such an agreement. Such an agreement need not be in writing under our law but the burden will be on the Proctor concerned to establish its reasonableness and equity in view of the fact that a Proctor occupies a position of active confidence in relation to his clients (*vide Cantlay v. Tonks* [1] and *In re two Proctors* [2] and Evidence Ordinance, Section 111).

The fees chargeable for notarial work are those specified in the Third Schedule to the Notaries Ordinance. Section 36 of the Ordinance makes it competent for a Notary to charge higher fees on the basis of an agreement between him and the client, but the section enacts that such an agreement will not be enforceable in a Court of law unless it is in writing and signed by the parties.

[1] (*1915*) *1 C. W. R. 141.* [2] (*1935*) *37 N. L. R. 352.*

[His Lordship then discussed the question of fees due to the plaintiff and, after holding that Mr. van der Poorten made a settlement in July, 1934, with the full knowledge of the plaintiff and that the plaintiff accepted that adjustment, continued :—]

For the reasons given by me I have considered the indebtedness of the plaintiff on the following basis :—

(*a*) The principal due by the plaintiff on P1 was Rs. 50,000 on February 18, 1922 ;

(*b*) The defendants could claim only simple interest on P1.

(*c*) The plaintiff should be given credit for cash payments made by him after February 18, 1922. The total income from Dangolla Estate up to February 28, 1927, and part of the income thereafter up to February 28, 1931 (as appropriated by Mr. Vander Poorten) and the total incomes after February 28, 1931, should be set apart yearly against the indebtedness on P 1. To these must be added the various items mentioned in P 51 N.

(*d*) The plaintiff should be given credit in a sum of Rs. 16,951·50 for fees as at the time of the institution of the action.

I find on calculation (see annexed sheet A*) that the plaintiff's indebtedness to the defendants at the time he filed the plaint was Rs. 17,412·28.

I set aside the decree entered in the District Court and I direct the District Judge to enter a hypothecary decree on bond P 1 in favour of the defendants for Rs. 17,412·28 together with interest at 10 per cent. from the date of action to the date of decree and interest thereafter at 5 per cent. less half costs in the District Court which I award to the plaintiff.

There will be no order as to the costs here.

As I apprehend some delay in delivering the judgment of this Court I wish to add that I completed this judgment on August 18, 1948.

WINDHAM J.—I agree.

BASNAYAKE J.—

The plaintiff is a proctor and the defendants are the executors of the estate of one A. J. Vander Poorten.

By bond No. 1484 dated March 26, 1915 (hereinafter referred to as P 1), the plaintiff mortgaged to the deceased A. J. Vander Poorten, as security for a loan of Rs. 50,000 with interest at ten per centum per annum, a plantation known as Dangolle Estate in extent about 200 acres planted in rubber and coconut. The present action in respect of the mortgage bond P 1 and fees claimed by the plaintiff as the deceased's proctor, was instituted on April 12, 1944. The relief claimed by the plaintiff is stated in the prayer of his plaint thus :

" (*a*) That the Court do order the defendants as executors as aforesaid to cancel and discharge the said bond 1484 dated March 26, 1915,

* Not reproduced in this report.—Ed.

and to deliver the said bond and the title deeds and other documents of the said property called Dangolle to the plaintiff, or in the alternative

(*b*) That the Court do declare the said bond cancelled and discharged and order the defendants as such executors to deliver the said bond and the title deeds and documents to the plaintiff.

(*c*) That the Court do order the defendants as executors of the said A. J. Vander Poorten to pay to the plaintiff from the estate of the said A. J. Vander Poorten the said balance sum of Rs. 120,196·93 with interest thereon at the legal rate of nine per cent. per annum from the date hereof till payment in full,

or in the alternative the Court do order the defendants to file a full and true account of all moneys lent, all moneys received and/or collected, and all credits given and that an account be taken of same after the plaintiff has surcharged and falsified same and that the plaintiff be awarded such sum as the Court may deem just and proper under the circumstances."

The first defendant resisted the plaintiff's action and claimed in reconvention the sum of Rs. 60,291 with interest at 10 per cent. per annum on Rs. 50,000 from April 11, 1944, to date of decree. The second and third defendants did not contest the action although they filed an answer in which they asked that an order be made by the Court for the accounts between the plaintiff and the late A. J. Vander Poorten to be looked into on the footing of the allegations in their answer and that judgment be entered thereafter in terms of the said accounting. They also referred to certain proceedings before the Debt Conciliation Board and expressed their willingness to abide by the conclusion of the Board that the obligations of the plaintiff to the late A. J. Vander Poorten had been satisfied and that his executors should pay the plaintiff a sum of Rs. 60,000, which sum the plaintiff refused to accept.

The learned District Judge entered judgment for the plaintiff as prayed for in paragraphs (*a*) and (*b*) of his prayer and for Rs. 42,508·51 plus the surplus income from Dangolle after a certain date with legal interest thereon till payment in full. The first defendant's claim in reconvention was dismissed and, as the second and third defendants took no part in the contest, he alone was ordered to pay costs. The plaintiff and the first defendant have both appealed against the judgment.

Apart from the arguments on the questions of fact learned counsel for the first defendant contended that the plaintiff's action was not maintainable in view of section 56 of the Debt Conciliation Ordinance, No. 39 of 1941, as amended by Ordinances No. 40 of 1941 and No. 9 of 1943, (hereinafter referred to as the Ordinance). That section reads :

"No civil court shall entertain—

(*a*) any action in respect of—

(i) any matter pending before the Board ; or

(ii) the validity of any procedure before the Board or the legality of any settlement ;

(*b*) any application to execute a decree, the execution of which is suspended under section 55. "

The first question that arises for decision on the above submission of counsel is whether the plaintiff's action is in respect of any matter pending before the Debt Conciliation Board at the time of its institution.

In May, 1943, the plaintiff made his application to the Board under section 14 of the Ordinance. The particulars of that application are as follows :—

Name of Applicant ..	D. E. Weerasooria.
Date of Receipt of Application ..	May 27, 1943.
Name and Address of Creditor ..	Executors of A. J. Vander Poorten, deceased, original creditor (who lent Rs. 50,000 only on bond dated March 26, 1915), Joseph Vander Poorten of 10, de Kretser Place, Colombo, Benjamin Vander Poorten of Galagedera, George Bemalmans of Wattarantenne, Katugastota.
Amount due on date of Application : Principal : Interest :	Nothing due. Debt discharged by payment and appropriation of income of mortgaged premises and set off of remuneration due for professional services of debtor, but claim made of Rs. 183,384·85 on account of principal and interest.
Nature of Property, e.g., agricultural, building, &c., and interest hypothecated	Coconut and rubber estate in bearing. 140 acres in coconut and 60 acres in rubber, with bungalow, cooly lines, factory, machinery, &c., cattle, &c.
Rate of Interest per annum ..	Ten in bond but compound interest charged.
Extent, Boundaries and Situation of Property	200 acres situated at Helamada in Gandolahapattu, Beligal Korale in four Korales in Kegalla District.
No. and Date of Mortgage Bond and Name of attesting Notary	Primary Bond No. 1484 dated March 26, 1915, attested by F. L. Goonewardene of Kandy, N.P. Secondary Bond No. 2276 dated February 18, 1922, attested by the same Notary.

After taking the steps prescribed by sections 23 and 24 of the Ordinance, the Board on June 21, 1943, acting under section 25 noticed the creditors,

who submitted a statement setting out the particulars of the debt owed to them by the debtor. Their claim, omitting all details, is as follows :

	Rs.	*c.*
On account of Primary Mortgage of Dangolle Estate, No. 1484 dated March 26, 1915	124,093	36
On account of Secondary Mortgage of Dangolle Estate, No. 2276 dated February 18, 1922	54,874	76
Due on promissory note dated August 19, 1924 ..	53,902	41
Claim in respect of moneys recovered by the debtor as Proctor of the deceased and retained in his hands ..	15,260	08
Credit in a sum of Rs. 70,108·52. Of this sum Rs. 65,108·52 is income of Dangolle Estate and Rs. 5,000 fees for professional services.		

The Board thereafter heard the application under section 28 of the Ordinance. The hearing lasted a number of days, both the debtor and the creditors being represented by counsel. At the conclusion of the hearing the following decision was recorded ;—

"The Board decided that the executors should cancel and discharge the existing bonds and pay the applicant a sum of Rs. 60,000 in full and final settlement of the applicant's claim against the Estate of the late Mr. Vander Poorten.

"Mr. Amarasekera stated that his client would accept the decision of the Board. Mr. Choksy and the applicant asked for time to consider the decision of the Board and were allowed time till March 6, 1944, to inform the Board of their decision."

On February 28, 1944, the applicant wrote (P 56) to the Chairman of the Debt Conciliation Board making certain counter proposals and informing the Board of his inability to accept the decision of the Board. On March 6, 1944, the parties were given further time till March 27, 1944, to see whether a settlement could be reached. Although up to June 13, 1944, no settlement had been possible the Board decided to leave the matter open without making an order. On June 22, 1945, the applicant made an application to the Board asking that this application be dismissed as on March 27, 1944. The Board gave its decision on August 1, 1945, and expressly declined to make its order effective as from March 27, 1944, *nunc pro tunc*. In the concluding paragraph of its order (1 D 50) the Board says :

"Nevertheless, we regret that the absence of a formal entry of a formal order in this matter should in any way prejudice the validity of the institution of the applicant's action in a Court of Law, and if we had the power we should have unhesitatingly been disposed to allow the applicant's present application ; however this may be, the fact remains that the final order had not been entered designedly and is not on any account attributable to a delay or omission on the part of this Board or any of its officers. The spirit in which the work of this Board is carried out necessitates the opportunity for a settlement being kept open as long as the parties desire it, while this period can be immediately determined the moment the parties jointly desire its

termination. The parties have not jointly desired a determining order being made and the Board cannot therefore see its way to allow this application. But as stress has now been brought to bear in regard to a termination of these proceedings and much time has lapsed since the parties agreed to inform us of a settlement if arrived at, the Board at this stage enters an order dismissing the original application.

The application of Mr. D. E. Weerasooria is hereby dismissed."

It is clear from the order of the Board that the plaintiff's application was pending before the Board on the date he instituted this action. The District Court is prohibited by section 56 of the Ordinance from entertaining any action in respect of any matter pending before the Board. The language of the prohibition is absolute. The District Court therefore had no power to entertain the present action. The objection to the trial of this action by the District Court was not raised till a late stage in the proceedings. The learned District Judge, while expressing the view that if the objection had been taken in the answer he might have upheld it, accepts the contention of the plaintiff's counsel that section 71 of the Courts Ordinance is a bar to the matter being raised at the stage at which it was. He says : " I must hold that this objection of Mr. Choksy's comes too late as I do not think that this action was brought with previous knowledge of the want of jurisdiction of this Court especially having regard to the plaintiff's letter to the Debt Conciliation Board (P 56)."

Section 71 of the Courts Ordinance reads :

" Whenever any defendant or accused party shall have pleaded in any cause, suit, or action, or in any prosecution brought in any District Court, without pleading to the jurisdiction of such District Court, neither party shall be afterwards entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such cause, suit, action, or prosecution.

" Provided that where it shall appear in the course of the proceedings that the cause, suit, action, or prosecution was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void."

That section deals with both civil and criminal proceedings. For the purposes of this case it is sufficient to consider section 71 of the Courts Ordinance in relation to civil proceedings. Section 45 of the Civil Procedure Code requires that every plaint shall contain a statement of facts setting out the jurisdiction of the court to try and determine the claim in respect of which the action is brought, and section 76 requires the defendant, if he intends to dispute the averment in the plaint as to the jurisdiction of the court, to do so by a separate and distinct plea, expressly traversing such averment. Now in order to ascertain the jurisdiction that has to be averred and pleaded, one must turn to the section or sections which confer jurisdiction. They are to be found

in Chapter VI of the Courts Ordinance, section 63 of which alone need be quoted here. It reads :

> " Every District Court shall have cognizance of and full power to hear and determine all pleas, suits, and actions in which a party defendant shall be resident within the district in which any such suit or action shall be brought, or in which the cause of action shall have arisen within such district, or where the land in respect of which the action is brought lies, or is situate wholly or partly, within such district."

Under our law each District Court has its own territorial limits which are prescribed in the Schedule to the Courts Ordinance. Section 63 empowers every District Court to hear and determine all actions—

(*a*) in which a party defendant shall be resident within the district in which any action is brought, or
(*b*) in which the cause of action shall have arisen, or
(*c*) where the land in respect of which the action is brought lies.

Section 9 of the Civil Procedure Code, while repeating the above matters which give a District Court jurisdiction, adds another to the list by providing that an action may be brought in the District Court within whose limits the contract sought to be enforced was made. An examination of section 45 of the Civil Procedure Code to my mind reveals that the averment as to jurisdiction in the plaint must be founded on any one or more of the above matters. The averment which a defendant is required by section 76 of the Civil Procedure Code to traverse where he disputes the statement as to jurisdiction can in this context refer only to the averment under section 45. In the instant case the plaintiff has averred that the first defendant resides within the limits of the jurisdiction of the District Court of Colombo. That averment the first defendant admits. There is therefore no dispute on the ground of territorial jurisdiction. Questions as to monetary jurisdiction do not arise as the District Court is entitled to entertain an action regardless of the value of the claim.

The words " whenever any defendant . . . . shall have pleaded in any cause, suit, or action, ... brought in any District Court, without pleading to the jurisdiction of such District Court ", to my mind, suggest that the pleading to the jurisdiction contemplated in section 71 of the Courts Ordinance is the denial of the averment made by the plaintiff under section 45 of the Civil Procedure Code which the defendant must under section 76 of that Code expressly traverse. Although the word " jurisdiction " by itself is a word of wide import, its meaning is limited by the context. Section 71 cannot be regarded as authorising a court to ignore the provisions of a positive enactment prohibiting it from entertaining an action in certain circumstances. Proceedings taken in contravention of a statutory prohibition are a nullity and cannot result in an effective decree even with consent of parties. For if by consent or waiver the parties to a dispute can overcome the prohibition, they will be able to negative by agreement the express intention of the Legislature.

The reported decisions [1] of this Court do not deal with a case such as the one now before me. The whole scheme of the Debt Conciliation Ordinance is that the courts are deprived of the right to try matters which are ordinarily within their competence while such matters are pending before the Debt Conciliation Board. The prohibition in section 56 has been imposed in such sweeping terms in order to make the scheme of the Ordinance effective. Otherwise a party who anticipates that the Board will not award all he has asked for will be able to resort to the courts while the dispute is still pending before the Board and thereby thwart the aim and object of the Ordinance.

Apart from that, where a court has no power to entertain a suit, no action or inaction upon the part of parties can invest the court with jurisdiction, nor can acquiescence of parties at the initial stage of this action affect the express prohibition of the Legislature. As was observed by Lord Watson in the case of *Ledgard v. Bull* [2] : " When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him." I am therefore of opinion that the contention of counsel for the first defendant is entitled to succeed. His appeal is allowed and the plaintiff's action is rejected with costs.

In this view of the matter it is unnecessary to discuss the other questions arising on these appeals.

The appeal of the plaintiff will accordingly stand dismissed.

Decree varied.

[1] *The King v. Silva, (1911) 14 N. L. R. 336.*
The King v. Fernando et al., (1905) 8 N. L. R. 354.
Don Simon v. Mendris Kumaralinga, (1908) 2 Leader Law Reports 69.
Jusey Appoo v. Ukkurala and another, (1859) 3 Lorensz 280.
Malemiar Tamby v. Abdul Cader, (1838) Morgan's Digest, 223.

[2] *13 L. R. I. A. 134 at 145.*