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the sanction of the Governor in Council, would, by section 11, cl. 3, acquire the force of law. Whether sanctioned or not by the Government, it retained its inherent defect.

Scadding v. *Lorant* [1], where the Queen's Bench quashed a poor rate, is a good illustration of the strictness with which the Court requires the machinery provided by the Act to be complied with. It was said, indeed, that although such a provision as to notice might, under ordinary circumstances, be material, it ought not to be so regarded in the Act of 1873, which gives power, by section 10, to the president and vice-president to overrule the majority of the commissioners. This was not done on the present occasion; but in any case it would be impossible, we think, to hold that such power could be legally exercised until the provisions of the Act had been complied with for determining the wishes of the majority. However, two of the absent commissioners were present at the special meeting on the 2nd April, and took no objection to the resolution. But the business to be transacted at that meeting was not the question whether a tax should be imposed, but the classification of houses, and the fixing the amount of rate, in execution of the resolution come to at the previous meeting. We must, therefore, hold that the tax was illegally imposed, and that the plaintiff's suit was not barred. Defendants to pay plaintiff his costs of this reference.

(1) 13 Q. B., 687.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

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June 29.

KASHINATH MORSHETH, APPLICANT, *v.* RAMCHANDRA GOPINATH, OPPONENT.*

Res judicata—Attachment, application to remove—Removal of attachment unknown to applicant—Failure of application—Second attachment—Second application to remove—New cause of action.

The plaintiff, mortgagee in possession of certain property, applied for the removal of an attachment placed on it by the defendant in execution of a decree against a third party. In default of payment of court fees by the defendant the attachment was removed, but in ignorance of this fact the plaintiff's application was proceeded with, and ultimately rejected. The plaintiff then brought a suit

* Extraordinary Civil Application, No. 71 of 1882.

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for a declaration of his right, but it was dismissed, on the ground that the attachment had already been removed. Subsequently the defendant placed a second attachment on the property, which the plaintiff again applied to remove. The defendant contended that the plaintiff's application was barred by the proceedings on the first attachment.

Held that the decision on the plaintiff's first application having no object existing on which to operate, the attachment having then been removed, it could not properly be regarded as *res judicata* at all, since no one was seriously interested in having it decided in a different way; and that supposing submission to that decision on the part of the plaintiff for a certain time could have given it a final effect, there had, as a matter of fact, been no such submission, the plaintiff having done all that was incumbent on him to get the summary inquiry and orders replaced by a formal trial and judgment; and that there was nothing, therefore, in these proceedings disentitling the defendant to oppose the second attachment.

Held, also, that the second attachment, after the first had been removed, was a new and distinct act, giving rise to a new cause of action, or complaint, to the plaintiff, on which, in any case, he was entitled to a fresh enquiry and decision.

THIS was an application for the exercise of the Court's extraordinary jurisdiction and for the reversal of the order of Ráv Saheb Atmárám Jamnádás, Subordinate Judge of Sátára.

One Ramchandra obtained a decree against one Raja, and in execution thereof attached a house and a piece of land as the property of his judgment-debtor. The applicant applied for the removal of the attachment, alleging that Raja was not the owner of the property, but one Salu, who had mortgaged the same to him with possession. During the pendency of this application the attachment was removed in consequence of the decree-holder Ramchandra's default in paying certain court fees; but in ignorance of this fact the inquiry proceeded, and the application was rejected on the 9th of December, 1880. The applicant, Kashinath, next instituted a suit against Ramchandra for a declaration of a right to the possession which he held. The fact of the removal of the attachment then becoming known, the Court dismissed the suit. The decree-holder, Ramchandra, however, again attached the property, and the applicant made a second application for the removal of the second attachment.

The Subordinate Judge held that the matter was *res judicata*, under the circumstances, and dismissed the application. Hence the present application for the exercise of the High Court's extraordinary jurisdiction.

Ghanashám Nilkánth Nádkarni for the applicant obtained a rule.

Hon. Rav Saheb *V. N. Mandlik*, for the opponent, showed cause.

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The following authorities were referred to :—*Mungul Parshad Dichit* v. *Grija Kant Lahiri Chowdhry* (1), and *Basáppábin Maláppá Aki* v. *Dundaya bin Shivlingaya*(2).

WEST, J.—It appears that when the Subordinate Judge originally disposed of Kashinath's claim to raise Ramchandra's attachment, there was, in fact, no attachment subsisting. The attachment had already been withdrawn by the Court on account of Ramchandra's having failed to pay some court fees. There was thus no object existing on which the adjudication could operate. A decision under such circumstances, which must of necessity be void of any effect, could not properly be regarded as *res judicata* at all. As it could have no real operation, it was as a mere scene in a play, which no one would be seriously interested in having performed in a different way. For *res judicata* to operate there must be an identity of the cause of action proposed for adjudication in a later suit with the cause disposed of in an earlier one ; and this is impossible when in the earlier one there was no really existing cause at all (3).

Kashinath, however, did bring a suit to establish his right and that of his mortgagor, which, in his decision on the application to raise the attachment, the Subordinate Judge had pronounced against. His suit was dismissed, because, as the attachment had been raised, there was nothing to affect the right to possession which Kashinath asserted. Then Ramchandra attached the property a second time. Kashinath again sought to raise the attachment, and the Subordinate Judge declined to entertain this application, on the ground that, by the former order, Kashinath's right had been denied, and that the matter was *res judicata*. Now, a provisional order which grows into a permanent one when steps are not taken, or, being taken, fail to displace it within a certain time, becomes, no doubt, *res judicata*, after the lapse of that time, just as where an appeal is not made in the absence of an express provision to the contrary. But here the applicant sought to get the provisional order displaced by a formal suit and decree. The suit was dismissed because the matter of dispute had already been given up to the applicant. Thus he was prevented from getting

(1) L. R., 8 I. A., 123. (2) I. L. R., 2 Bom , 540.
(3) See Savigny Syst., sec. 300, and App. XVII.

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the adjudication he sought by an act of the opposite party constituting, at any rate for the purposes of that suit, an admission of the right he proposed to establish. There was no submission to the order such as to give it a final effect, nor any decree in a suit confirming it. As the formal inquiry and adjudication were prevented, the earlier determination was not *res judicata* against him who did all that was incumbent on him to get the summary inquiry and order replaced by a formal trial and judgment. It is as though an investigation had been stopped midway.

The second attachment by the judgment-creditor, Ramchandra, after the first had been removed, was a new and distinct act, giving rise to a new cause of action, or complaint, to Kashinath, on which he was entitled to a fresh inquiry and decision. All that could be taken as settled by the previous litigation was that Kashinath had no ground of complaint against Ramchandra, because Ramchandra was not then interfering with Kashinath's possession.

For these reasons we make the rule absolute for an inquiry into his claim, with costs.

Rule made absolute.

INSOLVENCY.

Before Mr. Justice Scott.

In re HANSRAJ MALJI AND NARANDAS DAYAL, INSOLVENTS; DEWAR & Co., OPPOSING CREDITORS.

1883 *August* 1.

Indian Insolvent Act (Stat. 11 & 12 Vict., C., 21)—Infant trader—Withdrawal of petition by infant—Rule 22, Rules and Orders, Bombay.

An infant who has traded, but has made no express representation that he is of full age, is not liable to become bankrupt; and although he has filed his petition for the benefit of the Indian Insolvent Act and his schedule, he should be allowed, on proof of his infancy, to withdraw from the proceedings, under the wide powers in this respect given to the Court by Rule 22 of the Rules and Orders, Bombay. *Ex parte Jones* followed (1).

THE insolvents filed a joint petition for their discharge under section 47 of 11 and 12 Vict., c. 21, on the 24th of August, 1882, and also their schedule on the following day. In their petition they described themselves as Hindus lately carrying on business as merchants, commission agents, and mukadams in partnership under the style and firm of "Lakhmidas Narandas" in Bombay.

(1) L. R., 18 Ch. D., 109.