obtained a decree against Thakoor Dass Sing. Luchmeeput held a decree against Shumboonath and another, and in execution of his decree attached their shares in the decree they held against Thakoor Dass. No notice of this attachment was given to the parties, and before the sale in execution of Luchmeeput's decree took place, Thakoor Dass paid the sum due by him to his creditors, who filed a petition in Court, certifying that they had received the money, and the decree was struck off as fully satisfied.

Luchmeeput then applied to the Court to have the rights and interests of his debtors in the decree they held against Thakoor Doss sold in satisfaction of his decree. This was done, and Luchmeeput became the purchaser, and took out execution against Thakoor Doss who pleaded payment. The first Court has treated the decree as a negotiable instrument, and thinks that no notice to the debtor was necessary. The Judge in appeal thinks that it is open to question whether a notice to the debtor is necessary, and whether Sections 236, 237, and 238, are applicable, but he adds that the practice of his Court has been not to issue a separate notice to the parties. He considers also that it was the duty of the debtor Thakoor Dass to have satisfied himself that his creditors were entitled to receive the money before he made any payment to them.

We must first point out to the Judge that no practice of his Court can override the law, and that the sooner any practice in force, which either omits to do what the law requires to be done, or does what the law forbids, be abolished the better. The law, Section 236, Act VIII. of 1859, is perfectly clear, and points out what is the duty of the Court in execution of a decree, when the property sought to be attached consists of debts. The Judge has not fallen into the error of the Sudder Ameen who considered the decree to be a negotiable instrument, and he should therefore have proceeded under the provisions of Section 236 which requires that attachment is to be "made by a written order prohibiting "the creditor from receiving the debts, and "the debtor from making payment thereof to "any person whomsoever, until the further "order of the Court." This has not been done, and till the debtor received this notice, he was bound to pay the amount of his debt to the creditor whose right to receive it had been declared by a decree of Court, and it was no part of the duty of the debtor to make enquiries whether his creditor was or was not entitled to receive the money.

It is urged that the Lower Courts have found payment made by Thakoor Dass to be collusive. There is no distinct finding of collusion, and we certainly see no sufficient grounds for such a conclusion from the conduct of the parties, for we find that one of the decree-holders, whose right in the decree against Thakoor Dass was not attached, joined in the certificate to the Court that the decree had been satisfied.

Objection has also been taken to the order of the Judge permitting the auction-purchaser to take out execution of his share in the decree. It has been ruled by this Court that, though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint decree under Section 207, Act VIII. of 1859, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such order as may be necessary for protecting the interests of other decree-holders. For the reasons given above, we think the orders passed by the Lower Courts are erroneous, and must be reversed. We, therefore, set them aside, and decree this appeal with all costs.

The 3rd January 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Civil Court)—Reversal of order of Criminal Court.

Case No. 1794 of 1866.

Special Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 23rd April 1866, reversing a decision passed by the Moonsiff of Chupra, dated the 25th January 1866.

Bakas Ram Sahoo (Plaintiff), *Appellant,*

versus

Chummun Ram (Defendant), *Respondent.*

Baboo Roopnath Banerjee for Appellant.

Baboo Tarucknath Sein for Respondent.

Where a Magistrate made an order for the removal of a shed as being an obstruction to a thoroughfare under Section 308 of the Code of Criminal Procedure, and the owner of the shed, on disobeying that order, was fined under Section 291 of the Penal Code—HELD that no suit would lie in the Civil Court to establish the owner's right to keep up the shed.

Seton-Karr, J.—WE are of opinion that the decison of the Lower Appellate Court is substantially correct. The plaintiff had

been declared liable to fine under Section 291, Penal Code, for continuing a nuisance after injunction to discontinue it; and there is no doubt that, under Section 308 of the Code of Criminal Procedure, the Magistrate had full power to order an obstruction such as that complained of to be removed.

The plaintiff, having been fined, then brought a suit against the defendant, the original complainant, to try his right to keep up the obstruction, and the Moonsiff decreed the claim, saying that there was no public thoroughfare, but a private one used by the residents of the spot. It is tolerably clear from this, that the road on which the obstruction was raised is a public pathway for the use of the neighbourhood, in the ordinary sense of the term. In our opinion, then, the Moonsiff, as the case was brought, had really no right to entertain the suit at all. Whether, if the suit had been instituted against the Magisterial authorities, and if it had raised the question of a private right to the pathway as vested in the plaintiff, and as distinct from a public right, the suit might not have been cognizable, is another question. But, as the suit was brought, it was liable to dismissal at once.

Seeing, then, no legal grounds to disturb the conclusion at which the Deputy Commissioner has arrived, we dismiss the appeal with costs.

Norman, J.—Bakas Ram Sahoo having erected a thatched shed against a wall of his dwelling-house, one Chummun Ram obtained an order from the Magistrate for its removal, as interfering with and being a nuisance to a thoroughfare under Section 308 of the Code of Criminal Procedure.

Bakas Ram, disobeying the order of the Magistrate, continued the nuisance, and was, consequently, on the complaint of Chummun Ram, convicted under Section 291 of the Penal Code and fined.

Bakas Ram then brought a civil suit against Chummun Ram in the Court of the Moonsiff of Chupra to establish his right to keep up the thatched shed.

The Moonsiff gave the plaintiff a decree, as he says by reversal of the order of the Criminal Court, dated the 10th of October 1865.

His decision was reversed on appeal by the Deputy Commissioner, who held that the Moonsiff had no power to entertain the suit.

The plaintiff now, on special appeal, contends before us that the judgment of the first Court was correct.

We think it clear that no action lies against the defendant Chummun Ram. On his information, the Magistrate made an order for the removal of the shed as an obstruction to the thoroughfare under Section 308, and on the plaintiff disobeying that order, on his information again, the Magistrate fined the now plaintiff for disobedience under Section 291 of the Penal Code.

In making his complaints before the Magistrate, the defendant was simply exercising the right which every subject of Her Majesty possesses of seeking redress for a grievance which he believed himself to have sustained by legal proceedings before a competent tribunal.

As against the plaintiff and in favor of the defendant, the order and conviction are probably conclusive evidence as to the existence of the thoroughfare, and the obligations of the plaintiff in respect thereof. (*See* Rex *versus* St. Pancras, Peake's Cases, 220, 221; The Queen *versus* The Inhabitants of Haughton, 1 Ellis and Blackburn 501.)

Whether, in this particular case, the plaintiff could have appealed from the order and conviction of the Magistrate, appears to me wholly immaterial. If the Legislature has not thought fit to provide an appeal in criminal cases, when the amount of a fine imposed is less than 50 rupees, the absence of a right of appeal does not give the Civil Courts a power to examine the sentence.

It is not necessary to say whether any suit would lie in the Civil Courts by the plaintiff for a declaration that the place in question, though treated by the Magistrate as a thoroughfare, is not so. If any such suit could be maintained, it is clear that the Government, as representing the rights of the public, would be a necessary party.

The case referred to by the Moonsiff, Anund Mohun Khan *versus* Roy Shumbhoonath Chuckerbutty, S. D. A. Rep., 4th May 1858, shews that such an action cannot be sustained against a party in the position of the defendant.

The Moonsiff has not confined himself to trying the case as if the question was one simply as to whether the road was a public or private one, but by going into all sorts of other questions which were disposed of by the proceedings before, the Magistrate has laid himself open to the severe animadversions of the Deputy Commissioner.

We dismiss the appeal, and affirm the decision of the Deputy Commissioner, with costs.