should be given by such executor or administrator, as the case may be. But in the present case the learned Judge is of opinion that the probate granted to the appellant in 1899 should not be revoked; and we do not see under what authority he could have directed that the executrix should now give security, which he did not at the time of the grant of the probate direct to be given. Upon these grounds, we set aside the order of the District Judge complained against. Each party should bear his own costs in both the Courts.

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31 C. 688=8 C. W. N. 663.

Appeal allowed.

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31 C. 691 (=8 C. W. N. 538=1 Cr. L. J. 453.)

[691] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Ameer Ali, Mr. Justice Brett.

MOHINI MOHAN CHOWDHRY *v.* HARENDRA CHANDRA CHOWDHRY.*
[21st March, 1904.]

Wrongful restraint—Right of way, interference with—Order to remove obstruction, legality of—Indian Penal Code (Act XLV of 1860), s. $\frac{341}{114}$—Criminal Procedure Code (Act V of 1898), s. 522.

Held by the Full Bench (Ameer Ali, J and Brett, J. dissenting), that a Magistrate, while convicting an accused under sections $\frac{341}{114}$ of the Penal Code for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, has no jurisdiction to order that the hut or other means of obstruction should be removed.

Debendra Chandra Chowdhry v. *Mohini Mohan Chowdhry* (1) overruled.

Held further by the Full Bench, that, whereas in this case criminal force had been used by the accused to the complainant when the latter objected to the obstruction, which interfered with his right of way over a path, and this constituted the offence of wrongful restraint, of which offence the accused had been convicted, an order for the removal of the obstruction could be passed under s. 522 of the Criminal Procedure Code.

[**Ref.** 45 I. C. 276=4 Pat. L. W. 329=19 Cr. L. J. 516; 61 I. C. 57=2 Lah. 63=22 Cr. L. J. 329; **Foll.** 2 Pat. L. T. 120.]

THE accused Mohini Mohan Chowdhry, and the complainant Harendra Chandra Chowdhry, were relations and neighbours. To the east of their homesteads, there was a tank, and a pathway, which was the *ijmali* property of both parties, ran over the west bank of it. This pathway had been in existence for a long time and had been used by the males and females of both sides. A portion of this pathway was excavated by the accused, who also erected a hut on it, leaving a space between the hut and the building on the other side of the pathway, so narrow, that a person could not pass through except with the greatest difficulty. **[692]** The complainant objected to the obstruction to the path, whereupon he was chased and assaulted by the accused. The accused Mohini Mohan Chowdhry and others were convicted on the 23rd June 1903 by the Honorary Magistrate of Munshigunge under s. 341 read with s. 114 of the Penal Code and fined. The Magistrate also ordered the hut to be removed and the excavation to be filled up.

The accused appealed to the District Magistrate of Dacca, who on

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* Reference to Full Bench in Criminal Motion No. 775 of 1903.

(1) (1901) 5 C. W. N. 432.

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the 10th August 1903, dismissed their appeal and declined to interfere with the order for the removal of the obstruction.

The accused obtained a Rule from the High Court Calling upon the District Magistrate and the opposite party to show cause, why this order should not be set aside as made without jurisdiction. Upon the Rule coming on for hearing, the Judges composing the Criminal Bench of the High Court (Ghose and Stephen, JJ.) being of opinion that the Magistrate while convicting and sentencing a person under s. 341 of the Penal Code, could not make an order outside the scope of that section, that the obstruction caused by the accused should be removed, and doubting the correctness of the decision come to in the case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (1) referred the matter to a Full Bench on the 26th January, 1904.

The Order of Reference was as follows:—

The petitioners before us have been convicted of an offence under sections $\frac{341}{114}$ of the Indian Penal Code, in that they abetted the obstruction of a pathway by the erection of a hut and the excavation of earth, and thus wrongfully restrained the complainant from passing over the pathway. They were sentenced to a fine, and an order was made that they should remove the hut and fill up the excavation. And upon an application made to this Court, a Divisional Bench granted a Rule calling upon the District Magistrate and the opposite party, to show cause why this order should not be set aside as made without jurisdiction.

Looking at section 341 of the Indian Penal Code, it would appear that the only order which a Magistrate is authorised to make under that section, where an offence is proved, is that the accused do undergo a sentence either of imprisonment, or fine, or both; but there is apparently nothing in that section, nor is there any provision in the Code of Criminal Procedure which empowers the Magistrate to make an order of the character, which has been made in this case. It is perhaps desirable that in the event of an offence like the one committed by the accused being proved, the Magistrate should have the authority of removing the obstruction [693] caused, in the same manner as a Magistrate is empowered, under section 522 of the Code to restore a party to the possession of immoveable property, when the accused is convicted of an offence attended by criminal force, and when it appears that by such force the person in possession was dispossessed. But as the law stands, we do not see how a Magistrate, while convicting and sentencing a person under section 341 of the Indian Penal Code, can make an order, outside the scope of that section, that the obstruction caused by the accused must be removed, nor are we prepared to hold, as it seems to have been laid down in the case of *Debendra Chandra Chowdhry* v *Mohini Mohan Chowdhry* (1) that the order in question is the natural result of the conviction of the accused—and that the Magistrate is competent to make it.

As we disagree with the ruling in the case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (1) already referred to, we think it necessary to refer the following question to the Full Bench.

Can a Magistrate, while convicting an accused under sections $\frac{341}{114}$ of the Indian Penal Code, for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, order that the hut or other means of obstruction should be removed ?

Babu *Harendra Narain Mitter* for the petitioner. The Magistrate has no jurisdiction under ss. $\frac{341}{114}$ of the Penal Code to order the demolition of the hut. He cannot make an order outside the scope of those sections. In the case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (1) their Lordships held that the order directing the accused to remove the obstruction was a natural consequence, a corollary of the previous conviction of the accused. That decision is no doubt against me. But with all due respect to the learned Judges I submit that the law therein

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laid down is not correct. The Criminal Procedure Code, s. 133, gives a Magistrate power to remove obstructions, when erected in a public way, river or place. Chapter XLIII of the Code also gives the Court power to dispose of property moveable and immoveable in certain cases. Apart from the powers given by the Code to a Court, it has, I submit, no inherent power to make an order of this description. S. 522 of the Criminal Procedure Code does not apply in this case as the offence was not one, of which criminal force is a necessary ingredient, nor was there any dispossession within the meaning of that section. *Ram Chandra Boral* v. *Jityandria* (1).

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[694] Mr. *S. C. Gupta* for the Crown. I submit the Magistrate had power to make the order in question, and I rely on the case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (2). The order could also have been made under s. 522 of the Criminal Procedure Code. The path was immoveable property and criminal force was used by the accused when he dispossessed the complainant of it. When the obstruction was raised the complainant went and objected. He was immediately driven away and assaulted by the accused. S. 522 of the Code refers to the conviction of an offence attended by criminal force. There is nothing in that section to suggest that the offence committed must be one of which criminal force is a necessary ingredient.

Babu *Hari Charan Sarkhal* for the opposite party. The natural result of the conviction under s. 341 of the Penal Code was that the accused was directed not to interfere with the complainant, by further stopping him from proceeding along the path. The order to remove the obstruction was therefore the natural consequence of the conviction. The Court, I submit, had an inherent right to make the order. The case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (2) supports my contention. The order could also have been made under s. 522 of the Criminal Procedure Code. The complainant was dispossessed of the path by the obstruction caused by the erection of the hut and when he went to object he was assulted by the accused. The present offence is in all respects a nuisance. In England nuisances are punishable by fine and imprisonment, but as the removal of the nuisance is usually the chief end of the indictment, the Court was given power to adapt the judgment to the nature of the case. And when the nuisance was one, which existed at the time of the judgment, the accused might be ordered by the judgment to remove it. Russell on Crimes, sixth edition, p. 758.

MACLEAN, C. J. The question submitted to us is this :—" Can a Magistrate, while convicting an accused under sections $\frac{341}{114}$ of the Indian Penal Code, for wrongfully restraining a person **[695]** by the erection of a hut or by any similar act of obstruction, order that the hut or other means of obstrction should be removed ?" In my opinion, the Magistrate has no jurisdiction, under the sections referred to, to make such an order, and I say this with all respect to the authority cited. No such power is vested in the Magistrate either under the Penal Code or under the Code of Criminal Procedure, and, in the absence of such statutory power, I fail to see how the order could properly have been made. I wish I could have arrived at a different conclusion as expediency and common sense point in that direction. But having regard to the facts found in this case, and to the terms of section 522 of

(1) (1897) I. L. R. 25 Cal. 434. (2) (1901) 5 C. W. N. 432.

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FULL BENCH.

31 C. 691=8 C. W. N. 538=1 Cr. L. J. 463.

the Code of Criminal Procedure, the order may be supported. I see no reason for putting a narrow construction upon that section. Here the offence was attended by criminal force, and as the complainant was dispossessed by reason of the obstruction complained of, the case appears to me to fall within the section. The order then of the Magistrate may be sustained on this ground. It is true that this point has not been referred to us, as it was not raised before the Referring Bench : but I can see no reason, as it has been argued before us, and all the facts are before us, why we should not express our opinion upon it.

PRINSEP, J. I also agree that the order for the removal of the hut is not one which the Court is competent to pass, within the powers conferred upon it by the Court of Criminal Procedure. The matters in which a consequential or incidental order may be passed, in addition to a conviction, are expressly set out in the Code of Criminal Procedure; and, in my opinion, the powers of a Court are limited to those. The order in this case, however, could be passed under section 522 of the Code of Criminal Procedure, inasmuch as on the finding of the Appellate Court, criminal force was used when the complainant and others objected to the obstruction, which constitutes the offence of wrongful restraint, the offence of which the petitioners have been convicted. That offence was therefore "attended by criminal force" within the terms of section 522. I am aware that there are cases in which it has been held that the offence, for which the [696] conviction has been had, must be one of which criminal force is an ingredient. But I am not prepared to take such a contracted view of the terms of that section. The law says that the offence must be *attended by criminal force*, not that criminal force must necessarily form a portion of the offence. The order, therefore, should be maintained as though made under s. 522.

GHOSE, J. I agree in the judgment that has been delivered by my Lord.

On the question that has been referred to the Full Bench, my views were fully expressed in the reference that was made to the Full Bench; and I adhere to those views.

AMEER ALI, J. I do not see any reason to Modify or alter the opinion which I, sitting with my learned brother Pratt, J. expressed in the case of *Debendra Chandra Chowdhry* v. *Mohini Mohan Chowdhry* (1). In my opinion, the Criminal Court has an inherent power to make an order for giving proper and sufficient effect to the result consequent upon and issuing out of a conviction of this nature. In my judgment, a contrary view regarding the jurisdiction of the Court will lead to great mischief and harassment of parties complaining of offences of this class.

It is admitted that such a power is not only desirable but most expedient in the furtherance of justice, but it is said that this is a case of omission,—the Legislature having omitted to give such a power to the Criminal Courts. The law, it seems to me, cannot provide for every possible contingency and must leave something to the discretion of those, who have to administer it.

As I have given my reasons sufficiently in the case to which I have referred, I do not wish to go over the same ground. I think that the order complained against is a corollary to the previous conviction of the accused under s. 341 and further, that upon the facts of this parti-

(1) (1901) 5 C. W. N. 432.

cular case, it could have been made also under section 522 of the Code of Criminal Procedure.

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[697] BRETT, J. I agree with my Lord the Chief Justice that the order can be supported as one falling under section 522 of the Code of Criminal Procedure. I, however, agree with Mr. Justice Ameer Ali that the Magistrate had an inherent power to pass the order, on the conviction under section 341 of the Indian Penal Code, irrespective of his powers under section 522 of the Criminal Procedure Code.

31 C. 691=8 C. W. N. 538=1 CR. L. J. 453.

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31 C. 698.

[698] APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Stevens.

HAYES v. HARENDRA NARAIN.*

[11th January, 1904.]

Hindu law—Widow, alienation by—Putni lease—Legal necessity—Consent of reversioner—Delegation, by reversioner, of his power to consent, to his executor.

The power reposed in the reversioner of validating an invalid alienation by a Hindu widow, is one which he is not competent to delegate to his executor.

An alienation made by a Hindu widow without legal necessity is not void, but only voidable, and may be validated by the consent of the reversioner.

Modhu Sudan Singh v. *Rooke* (1) followed.

SECOND APPEAL by the defendants, G. S. Hayes and others.

The plaintiff, Harendra Narain, executor to the estate of one Prohlad Singh, deceased, was substituted as sole plaintiff in the present suit, which was instituted for a declaration that one Mussummut Sibbati, deceased, had no right to grant a *putni* lease of 3 pies 5 krants of the zemindari right in Pergunnah Powakhali, Towzi No. 30, District Purneah, to one Dharam Chand Lal, the predecessor in interest of the defendants executors, G. S. Hayes and others, and for cancellation of the said lease and recovery of possession of the property.

It appears that the zemindari was owned by one Mahesh Lal Singh, who died childless, leaving the said Mussummut Sibbati as his widow. Prohlad Singh was the paternal uncle of Mahesh Lal, and his reversionary heir. On the 3rd June 1896, Mussummut Sibbati granted a *putni* lease, at the annual *jama* of Rs. 163-12 annas, without the assent of the reversioner. Sibbati died in [699] January 1898. Prohlad died in November 1898, leaving a will dated the 9th November 1898, the second paragraph of which ran as follows:

"That I am heir to 3 pies 5 krants of the zemindari share in Pergunnah Powakhali, forming the right of Babu Mahesh Lal Singh, deceased. Mussummut Sibbati, widow of the said Babu, who had legally no right to let out the same in *putni*, has made *putni* settlement with Babu Dharam Chand Lal, zemindar. The consideration covered by the *putni* aforesaid is still due by him. If the said Babu should pay the said consideration to the said *Mutwali*, the said *Mutwali* shall be entitled to approve of and accept the *putni pottah* executed by Mussummut Sibbati. In case of non-payment of the consideration, he should bring a suit for cancellation of the *putni pottah* in the Court."

Appeal from Appellate Decree No. 1760 of 1901, against the decree of W. H. Lee, District Judge of Purneah, dated the 29th of May 1901, reversing the decree of Sasi Bhusan Chatterjee, Subordinate Judge of that district, dated the 17th of July 1900.

(1) (1897) I. L. R. 25 Cal. 1; L. R. 24 I. A. 164.