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authorize the discharge of a sewage effluent. I, therefore, overrule this contention and hold that the plaintiff has not only alleged but also proved that he had a cause of action in respect of the nuisance that he complained of in his plaint.

The only other point that was argued before me was that the memorandum of costs prepared by the lower appellate court was wrong and that an additional amount of Rs.64 was incorrectly shown therein. This is a matter into which the office of this Court will look into and if there is an obvious clerical mistake made in the preparation of the decree by the lower court, the office will have that mistake rectified when the decree of this Court is prepared.

For the reasons given above this appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
 Rachhpal Singh*

KING-EMPEROR (APPELLANT) v. CHANDEWA PASI
 (COMPLAINANT-RESPONDENT)*

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United Provinces Excise Act (IV of 1910), section 60, clauses (a) and (f)—Distilling of illicit liquor by accused—Chaukidar entering and searching the house not against wishes of accused—Accused admitting guilt—Illegality of chaukidar's entering the house, effect of—Acquittal of accused, if can be sustained.

All provisions as regards the searches of houses and the precautions necessary to be taken before any search is held have been framed with a view to protect the interests of the accused. Where, however, the entry of the chaukidar into the accused's house was not apparently against the wishes of the owner of the house nor was it with the intention to intimidate, annoy or insult the owner in possession of the house but the accused

*Criminal Appeal No. 11 of 1934, against the order of M. Abdul Majid Khan, Magistrate, 1st class, of Unao, dated the 25th of October, 1933.

himself frankly pleaded that he was distilling illicit liquor and he frankly admitted that he was guilty of having committed offences under section 60, clauses (a) and (f) of the United Provinces Excise Act, the question of any alleged illegality committed by the chaukidar in entering the house of the accused has no casual connexion with the question of the guilt or innocence of the accused in respect of the offences under section 60, clauses (a) and (f) of the Excise Act with which he was charged, and the judgment of acquittal passed by the Magistrate being against the weight of evidence on the record and against the plea of guilty made by the accused cannot be sustained. *Kendall v. Hamilton* (1), referred to.

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The Assistant Government Advocate (Mr. H. K. Ghosh), for the Crown.

Mr. *Siraj Husain*, for the accused.

NANAVUTTY and RACHHPAL SINGH, JJ.:—This is an appeal filed on behalf of the local Government under section 417 of the Code of Criminal Procedure against a judgment of Maulvi Abdul Majid Khan, Magistrate of the 1st class at Unao, dated the 25th of October, 1933, acquitting the accused Chandewa Pasi of an offence under sections 60, clauses (a) and (f) of the United Provinces Excise Act (IV of 1910).

The facts out of which this appeal arises are very simple and are briefly as follows:

The accused Chandewa Pasi was distilling illicit liquor inside his house in village Rampur Rai on the night of the 7th of February, 1933. At about 10 p.m. that night Hari chaukidar of village Rampur Rai happened to pass by the house of Chandewa Pasi on his nightly round. He scented the smell of country liquor inside the house of Chandewa Pasi and he at once suspected that illicit liquor was being distilled inside the house. He thereupon got together Seoka Pasi, Kalka Pasi and Manni Singh mukhia of the village. He considered that if he went to the thana to make a report about this illicit distillation, then Chandewa would have an opportunity of making away with the illicit country liquor as well

(1) (1879) L.R., 4 A.C., 504.

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as destroy the instruments for the manufacture of that liquor. He, therefore, boldly went inside the house of Chandewa Pasi and saw a regular oven or *bhatti* dug in the ground and country liquor being actually distilled. He also found 3 chhattacks of illicit country liquor in his house, while the mother of Chandewa Pasi was sitting inside the house and cooking the evening meal. With the help of his companions Hari chaukidar collected all the illicit liquor and the instruments and utensils for the manufacture of the liquor and he brought the accused Chandewa and the latter's mother and all the paraphernalia for making illicit liquor to police station Auras in the district of Unao. There a report was made in the general diary at the thana on the morning of the 8th of February, 1933, at 8 a.m. Chandewa Pasi was prosecuted for offences under section 60, clauses (a) and (f) of the United Provinces Excise Act, and he pleaded guilty to the charge framed against him by the Magistrate. The learned Sub-divisional Magistrate, Mr. Abdul Majid Khan, acquitted the accused Chandewa of offences under section 60, clauses (a) and (f) of the United Provinces Excise Act, although the latter had pleaded guilty to the charge. His sole reason for acquitting the accused was that the chaukidar had no legal authority to make a search of the accused's house and that under section 53 of the United Provinces Excise Act a police officer not below the rank of an officer in charge of a police station or an officer of the Excise Department not below such rank as the local Government may prescribe or the Collector of a district alone had the right to make a search by day or by night of the house of any offender against the Excise Act, and as the chaukidar was not one of the persons authorized to make such a search, that therefore the case for the prosecution failed completely and no offence under the Excise Act could be substantiated against the accused Chandewa.

Dissatisfied with this judgment of acquittal the local Government has filed this appeal.

We have heard the learned Counsel for the accused as well as the learned Assistant Government advocate on behalf of the Crown. In our opinion the reason given by the learned Deputy Magistrate for acquitting the accused is wholly unsound, and not tenable in law. Section 251 and the following sections of the Code of Criminal Procedure lay down the procedure to be observed by a Magistrate in the trial of warrant cases. Section 252 of the Code of Criminal Procedure states that when the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. Section 253 goes on to state that if, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. Section 254 states that if, when such evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter (Chapter XXI of the Code of Criminal Procedure), which such Magistrate is competent to try, and which in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused. Section 255 enjoins that the charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make and if the accused pleads guilty the Magistrate shall record the plea and may in his discretion convict him thereon.

The learned Sub-Divisional Magistrate in the present case not only examined the prosecution witnesses and the accused in respect of the charge but he also framed a charge sheet to which the accused pleaded guilty. If in the opinion of the Magistrate there was no case made out against the accused Chandewa Pasi because of the alleged

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illegal search of the accused's house by Hari chaukidar, then he ought not to have framed the charge sheet against the accused but should have under section 253 of the Code of Criminal Procedure discharged the accused for reasons to be recorded by him.

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Apart, however, from this mistake made by the learned Deputy Magistrate we are of opinion that in the present case there was no question of any search having been conducted by Hari chaukidar or of any breach of the provisions of section 53 of the United Provinces Excise Act by Hari chaukidar. All provisions as regards the searches of houses and the precautions necessary to be taken before any search is held have been framed with a view to protect the interests of the accused. In the present case, however, Chandewa Pasi did not consider the intrusion of Hari chaukidar into his house as tantamount to criminal trespass. The entry of the chaukidar into the accused's house was not apparently against the wishes of the owner of the house nor was it with the intention to intimidate, annoy or insult the owner in possession of the house. The accused himself frankly pleaded that he was distilling illicit liquor for the purpose of using it as medicine for his own use and he frankly admitted that he was guilty of having committed offences under section 60, clauses (a) and (f) of the United Provinces Excise Act. The question of any alleged illegality committed by Hari chaukidar in entering the house of Chandewa has no casual connexion with the question of the guilt or innocence of Chandewa Pasi in respect of the offences under the Excise Act with which he was charged. In this connexion we cannot do better than quote a few pregnant observations made by Lord PENZANCE in *Kendall v. Hamilton* (1):

“In this state of things I confess I am unwilling that your Lordships should confer the high sanction of this, the ultimate court of appeal, upon a rule of procedure which, without affecting to assert any

(1) (1879) L.R., 4 A.C., 504 (525).

just rights on the part of the Defendant, denies the aid of the law to enforce those of the Plaintiff. Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve."

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These remarks apply with full force to the frame of mind of the learned trying Magistrate, who has looked upon the rules framed in respect of house-searches as being too sacrosanct for words and as overriding the claims of common sense and of justice. In our opinion the judgment of acquittal passed by the learned trial Magistrate was against the weight of evidence on the record and against the plea of guilty made by the accused and cannot be sustained.

We accordingly allow this appeal, set aside the order of acquittal passed by the trial Magistrate against Chanduwa Pasi and convict him of offences under clauses (a) and (f) of section 60 of the United Provinces Excise Act, and taking into consideration all the circumstances of the case and the fact that the accused has been in the jail lock-up for several weeks now, sentence him for each offence under section 60 of the United Provinces Excise Act to undergo one month's rigorous imprisonment, the sentences to run concurrently.

Appeal allowed.

MISCELLANEOUS CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

RANI HAZOOR ARA BEGAM (APPLICANT) v. DEPUTY
COMMISSIONER OF GONDA (OPPOSITE-PARTY)*

1934
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*Criminal Procedure Code (Act V of 1898), section 491(1)(b)—
Lady not allowed to see anybody she wants to see—No*

*Criminal Miscellaneous Application No. 41 of 1934, under section 491, Criminal Procedure Code, for issue of the writ of *habeas-corpus*.