

**(1918) 05 AHC CK 0026**  
**In the Allahabad High Court**

Lakhpat Rai and Others

APPELLANT

Vs

Sri Kishan Das and Others

RESPONDENT

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**Date of Decision :** 22-05-1918

**Acts Referred:**

**Citation :** AIR 1918 All 24 : (1919) ILR (All) 68 : 48 Ind. Cas. 450

**Hon'ble Judges :** Walsh, J;Piggott, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

Walsh, J.—We have come to the conclusion that this appeal must succeed. There has been a very full discussion, upon somewhat unfamiliar lines in this Court; but we have no doubt as to the proper conclusion which ought to be reached. The appeal is brought by the plaintiffs, the registered patentees of a process of manufacture, the plaintiffs consisting of Lakhpat Rai, Sampat Rai, and Manphul Narain, and carrying on business at No. 14, Mullick Street, Calcutta, against a judgment dismissing their suit brought against the defendants Srikishan Das, Bahal Rai and Bhup Narain, carrying on business at Farrukhabad, for infringement of the patent. One Prag Narain who figures somewhat prominently in the case, is a member of the plaintiffs' firm, but, for reasons best known to the plaintiffs, was not one of the applicants for the patent and is therefore not a necessary party to the suit. The ground upon which the suit was dismissed was a question of fact, namely that the process for which the plaintiffs had obtained their patent had been anticipated and was one of common use in the trade.

2. Speaking for myself, I think it desirable to make one or two general observations. The patent law is a provision made by the Legislature for the encouragement of research, industry and progress. It rewards genuine discoveries by giving them a limited monopoly and thereby seeks to encourage commercial enterprise and development. A patent-suit in which the validity of an alleged discovery is challenged is one in which the courts would seem to have a right to expect candour and honest dealing and genuine assistance in the often

complex and difficult technical question of ascertaining whether the alleged new process is really a good subject matter for a patent. In this case the parties appear to be men of position in their own commercial circle. Each has charged the other with the perpetration or attempted perpetration of a mean and contemptible fraud. There has obviously been a mass of hard swearing which has enormously increased the difficulties of the task thrown upon the Court. We have had to do our best to sift the truth from a mass of untruth. Apart from this aspect of the case, which must seriously have prolonged the litigation, there is even a graver aspect. It is regrettable, and it is a matter to which those who are interested in the industrial development of this country might well direct their attention, that commercial disputes of this kind should be tainted by a mass of palpably dishonest evidence, unfair methods of competition, and conduct which decent people cannot but reprobate. Moreover, the conduct of the case in court, (we are saying nothing about the learned gentlemen who appeared for either party before the Subordinate Judge who gave judgment in Farrukhabad; we refer particularly to some of the incidents when evidence was taken on commission) is characterized by a method of cross-examination in the case of independent and respectable professional witnesses, which is worthy of the worst tradition of the lowest forms of litigation and which is calculated, if indulged in as a practice in the way in which it was indulged in this case, to make our trial courts a terror to self-respecting men and to produce a state of things under which only those will care to come and give evidence who have no character to lose. We may say at once as we are differing from the view of the facts taken by the lower court, that we find very little assistance in the Subordinate Judge's judgment. It consists of a considerable amount of painstaking criticism., some of which is difficult to follow, some of which we find ourselves unable to agree with, while some of the conclusions are so vague or so over-burdened with details that their weight is largely discounted. We, therefore, have to approach the consideration of the mass of conflicting evidence in this case unobscured by the existing decision and to form an independent judgment of our own. In one respect we are not at a very serious disadvantage. It so happens that the majority of the principal witnesses in the case were examined either on commission or by the learned Subordinate Judge's predecessor and were therefore not seen or heard by the learned Judge any more than they have been by us, The controversy arises in this way. About the 23rd of June, 1915, the plaintiffs applied to the Patent Office in Calcutta for a patent, the claim for which and the specification for which is contained in the document before us, Specification No. 2191. The claim related to the manufacture of an ancient and well-known medicinal commodity called banslochan. As a matter of interest we may quote here the chemical description of this article as found in Professor Thompson's Pharmacopoeia.

Percentage composition. Silica (Si O<sub>2</sub> silicon dioxide) .. .. 90.50 Potash (KOH, Potassium hydroxide) .. .. 1.10 Ferric Iron (Peroxide of Iron, F<sub>2</sub> O<sub>3</sub>) .. .. 0.90 Alumina (Aluminium Oxide, Al<sub>2</sub> O<sub>3</sub>) .. .. 0.80 Carbon compounds and foreign matter .. .. 6.70 \_\_\_\_\_ 100.00 \_\_\_\_\_

3. The powder in question, which is manufactured by a calcining process from bamboo, is said to be a medicine for the home, and to possess certain restorative and invigorating qualities for the old as well as for the young, which, if they do not entirely fulfil their promise, may at any rate account for its undoubted popularity. The powder is made from the interior of bamboo which is found in Singapore, by baking or calcining. According to the plaintiffs this process has up to, generally speaking, June, 1915 been carried out by means of iron pans when the commodity is prepared in any substantial quantities. Of course they do not allege, and no sane person could allege, that ordinary earthen-ware pans could not be and indeed were not in fact used from time to time by persons who wanted to prepare a small quantity for their own use without delay; but as a matter of trade use, when the manufacturer is preparing the stuff in any quantity for the market, according to the allegation of the plaintiffs, the ordinary known method was by the use of iron pans in which the stuff was placed for the purpose of being cooked under great heat in a stove. According to them also the effects of the use of iron pans were to produce a rapid and intense heat operating directly upon the material; to make the cost of the stove somewhat greater than if ordinary earthen-ware pans were used, particularly because the tendency of the iron pan was to wear out quickly, and also to produce in the substance itself what has been called a brownish or reddish tint, specimens of which we have seen in bottles which have been exhibited in the case, and which is regarded in the market by, those who know the stuff well, as something which, without being a serious drawback, makes the article inferior to the best standard. According to the plaintiffs also they were constantly worrying and working by experiments of various kinds to arrive at some satisfactory process of heating which would be cheaper and more satisfactory than the old method, and in substance they claim by this patent to have achieved that result by a combination of earthen-ware vessels placed one upon the top of the other in the stove as described and delineated in the specification, which method, they say, has the superior advantages of securing a slower heat, enabling the material to be treated (as it always is treated at some stage and in some form or another) with sulphuric acid at a red heat, of confining the fumes produced by the sulphuric acid within a closed crucible, and of producing a better colour of pure white or bluish white. There is less risk of the brownish or reddish tint manifesting itself, and the production is regarded in the market as superior in appearance and quality and costs less. Another feature, according to their allegation, which distinguishes the new process from the old, is that in the latter stove there was a chimney of greater or less height which carried away the fumes. The specification was ultimately accepted and was published to the world by a formal notice in the Gazette of India of the 16th of October, 1915, in the following terms; "Improvements in the manufacture of a medical preparation, Patent No. 2191," which, we feel bound to say in passing, cannot be regarded as a satisfactory mode of summarizing the real claim which had been accepted by the office.

4. We now turn to certain other dates. On a date in July, 1915, by a coincidence

which can only be described as remarkable, one Maharaj Narain paid a visit to Calcutta. This Maharaj Narain, who gave evidence in the case for the defendants, although not a member of the defendants' firm, was their general attorney and apparently their moving spirit. We think that the object of this visit has not been satisfactorily explained. Maharaj Narain's reasons for it are two-fold. He says he was desirous to make arrangements or to ascertain how arrangements could be made for securing the raw materials of bamboo from Singapore, and also to take lessons from one Munna Lal in the construction of the stove which was in common use for the manufacture of banslochan. A railway journey from Farrukhabad to Calcutta strikes us as a somewhat expensive mode of communication by post with Singapore. And if, as the defendant's case is, it be the fact that the plaintiffs' process of manufacture was well-known throughout India, and particularly in Farrukhabad, and all that was necessary was for somebody on the spot to show the workmen in Farrukhabad how to build a stove, we do not see why it was necessary to go to Calcutta at all. The process of imparting the knowledge which Munna Lal possessed to the mind of Maharaj Narain appears to have occupied a considerable period. Although the visit took place in July it is not suggested that the defendants began to build until September of the same year. The nature of the construction of the stove is such that the time occupied by instructing a competent workman how to make it and in fact producing one complete from top to bottom could not possibly amount to more than a week. Whether the course of lessons was more troublesome than had been anticipated or whether there was an unexpected delay in obtaining the raw materials from Singapore we do not know, but the next date which is important is the 18th of December, 1915, when the defendants wrote to, a customer in Delhi in these terms, "Our compliments to you. We have started factory for manufacturing banslochan. All kinds of goods are in stock. The rates will be given below, please note them. The rates have fallen down on account of the opening of our factory; so you should send for goods from us, in order that you may derive benefit and our factory may receive help from you. We shall send goods of a very superior quality. Please send for a small quantity of goods as sample and see them. What more to add." And then follows a list of rates, to which we shall refer hereafter. It is hardly to be wondered at, having regard to the terms of that letter and to the fact that it is common ground that the process of manufacture referred to in that letter was precisely the same as the plaintiffs' patented process of manufacture, that the defendants have not seriously challenged the plaintiffs' contention that the plaintiffs' process of manufacture, if new, is certainly an improvement. The defendants have not attempted to explain in any way consistent with the ordinary conduct of honest business men the sudden enthusiasm, worked up, one may say, almost to white heat, which they displayed for the manufacture of banslochan between June and December, 1915, but, having regard to the fact that the rates per seer set out in their letter were a very substantial reduction upon the price then being charged by the plaintiffs, and that the plaintiffs were admittedly practically in sole possession of the market, we have not the slightest doubt that on the 18th of December when

that letter was written and further back even, when they determined to enter the market for the sale of this commodity, they know perfectly well that, whether it was a genuine discovery or not, the plaintiffs were coming upon the market with an alleged improved method of manufacturing this commodity which was likely to be a commercial success and that they had made up their minds by fair means or by foul to share the profits which they anticipated the plaintiffs were going to make if their invention were accepted by the public. On the 26th of January, 1916, an even more striking document came into existence. A telegram, was sent to the defendants from Calcutta by another Maharaj Narain who appears upon the stage for a moment and subsequently is seen no more in connection with this case. The plaintiffs by an application made in the course of the suit not unnaturally showed considerable curiosity about this telegram and no doubt also as to what this Maharaj Narain was doing in Calcutta. That curiosity has never been satisfied as the defendants have not put this Maharaj Narain in the box. All we know about him is that he belongs to a younger generation, that he is son of Bahal Rai, one of the defendants, and that he wired to the defendants in the following terms. "Lakhpat Rai doing registry of banslochan, come immediately." It is to be observed that that telegram alleges, and it is quite possible that the plaintiffs themselves have alleged sometime or another, that this patent gave them the sole right of manufacture and sale of the commodity itself. It does not refer to the process. It is quite clear, however, that Maharaj Narain, the general attorney of the defendants, to whom it was sent, and who, that is to say, Maharaj Narain in Farrukhabad, undoubtedly received and dealt with the telegram, knew quite well that the telegram referred to a process and not merely to the commodity. What exactly he did except a visit to Cawnpore to consult somebody is not quite clear. But on the 27th of January he sent a telegram to the Controller of Patents, Calcutta, in the following terms: "Application for patent process manufacture of bamboo camphor tendered by Lakhpat Rai, Sampat Rai or other party is for a process used by ourselves and several manufacturers, are forwarding representation." Two observations arise upon that document. Maharaj Narain would have us believe that the telegram which he had received from his namesake was the only information which he had upon the subject at all. We find it impossible to believe this statement. The telegram to the Controller of Patents shows that he knew perfectly well that the application dealt with the process of manufacture, no reference to which had been made in the telegram received from Calcutta, but, more than that, he alleged in the telegram sent within 24 hours of the news which he had received from Calcutta that the process for which application had been made was the same as that with which he was so familiar. It is impossible that he could have become aware of that fact, even if it were a fact, by means of the telegram from Calcutta. We are satisfied on these materials alone that the telegram was a disingenuous document sent expressly for some purpose of the defendants' own and that the conduct of Maharaj Narain and his perfectly hopeless attempts to get out of the difficulty are only evidence of the guilty conscience of a dishonest man. It does not, however, rest there. The telegram was followed up by a letter

which it is necessary to examine very carefully having regard to the statements about it made by Maharaj Narain when he was very naturally asked in cross-examination to explain its language. It is dated the 27th of January, 1916; from Farrukhabad. It is signed "Sri Kishan Das by the pen of Maharaj Narain." It is, however, said on behalf of the defendants respondents at the Bar before us, I think it was not very clearly said at the trial, to have been written by a scribe for Maharaj Narain when Maharaj Narain was in Cawnpore. It is in the following terms: "We are informed that Lakhpat Rai Sampat Rai, of 14 Mullick Street, Calcutta, have applied for permission to patent a process for the manufacture of bamboo camphor (banslochan). We have the honour to state that the same process has been in use by us for some time past and others have been using it for a still longer period, The object of this applicant is apparently to place obstacles in the way of our doing business, and although in our opinion there is nothing patentable in the process we deem it necessary to record the fact that the process which the applicants propose to patent is not new (so far the letter merely repeats what had been said in the telegram and then follow these significant words) "and is in common use by a number of manufacturers in this district." The defendants' case at the trial, as we shall have occasion to point out in a moment, was that this process of manufacture had been adopted for the most part by firms in Calcutta for many years, although they had during the last decade been driven out of the market by the plaintiffs. Maharaj Narain was, therefore, asked to explain the language used in this letter. He first said: "I wrote in the letter to the patent office that the said process for preparing banslochan was used by a number of manufacturers in the district because two factories were then using that process and several other factories in this district had formerly used that process." Now there can be no mistake about that sentence. He was confronted with the letter which he had written, and he was asked by the cross-examiner perfectly naturally and fairly: "To what were you referring?" And he pledges himself on a critical question in the dispute to the fact, although not a tittle of evidence has been called to support it, that in the district, that is to say, in Farrukhabad, because the writer was at Farrukhabad, there were two factories using that process and several other factories in the district had formerly used it. He could have had no doubt whatever as to the purport and meaning of the question which was put to him and as to the meaning of the answer which he gave. He was then reminded indirectly that his case at the trial was that it was mainly in use in Calcutta and the cross-examiner put this question: "Can you state any reason why you did not mention about Calcutta in it?" He answered: "I did not mention any place, but simply told him that several manufacturers used that process, and I cannot say what he understood that he mentioned the words in this district." So that after swearing point blank that he used the words "in this district" with special reference to factories which were really in his mind, and realizing the difficulty that he got himself into having regard to the real facts which he was able to prove, he recanted and threw the blame on to the Babu to whom he was dictating the letter. We have dwelt upon this incident in the case because it is only by such tests (they are specially valuable where you get a

contemporaneous document under the hand of a witness which he cannot deny) fairly applied by a proper cross-examination that you can test the witnesses in a case of acute conflict of verbal testimony and see where the pinch comes. We have come to the conclusion that the conduct of Maharaj Narain with regard to the statements which he made in the documents themselves and the hopeless attempt to get out of the difficulty in which he found himself when challenged on oath in the witness box, show that he was a dishonest witness, that he was labouring under a guilty conscience and that there is no explanation of his conduct except upon the hypothesis which the plaintiffs allege that he was the moving spirit in an attempt to steal and purloin the plaintiffs' process from them by unfair means.

5. Shortly after this incident and the telegram of protest to the Controller of Patents, it being too late for the defendants to challenge the registration of the patent, they continued the manufacture which, it is admitted, is practically the same process as the plaintiffs' and thereby forced the plaintiffs to bring this suit. The plaintiffs ask for an injunction and for damages. The defendants, while alleging generally that the alleged invention is not really a good subject-matter for a patent, for example, they say in paragraph 6 of their defence that it was the original form of stove in common use for a long time in India, raise a somewhat broader issue of fact on which the trial in the court below and much of the discussion before us has really turned, namely they have committed themselves to this somewhat startling proposition that not only other traders mostly in Calcutta, but even the plaintiffs themselves, have all along manufactured banslochan by this method which the plaintiffs now seek to patent, that it is really the only method known to the trade, that it is incapable of improvement, and that the plaintiffs have themselves, been doing business by this method for some 12 or 13 years, and that they really were endeavouring to impose upon the Controller of Patents and the general public, not a thing in which they believed as a new discovery but a thing which they knew was well known to others as well as to themselves and was an attempt to defraud the general public. Now that, as we have said, was a startling proposition which one would naturally require to be clearly and definitely established in fact. The defendants alleged in their answers to the interrogatories served upon them in the course of the suit by the plaintiffs the names of the firms relied upon by them as being those commonly using this process of manufacture:

1. Hulasi Rai, Calcutta.
2. Hanuman Sahai Rameshar, Calcutta.
3. Bhagwan Das Munna Lal, Calcutta.
4. Prag Narain, Calcutta. (Now one of the plaintiffs' firm).
5. Lakhpat Rai Chhote Lal, Calcutta. (The plaintiffs' firm).
6. Silchand Sadh, Calcutta.

7. Juggi Lal, Bania, Farrukhabad.

8. Mathura Das Sat Narain, Cawnpore.

6. Omitting from this list the two now connected with the plaintiffs' firm, these persons appear to have ceased business altogether for periods varying from 40 years to 15. It is not suggested that any of them has manufactured banslochan during the last 14 years. Two of them, or representatives of two of them, appeared in the box. All of them were admittedly failures in business. At the trial Munna Lal, one of them, was called and he spoke of three, two of whom are additions to the list which I have read, namely, Karim Bakhsh and Gappu Lal, But, inasmuch as neither of them appeared in person at the trial, no further reference need be made to their business. Reference will have to be made to the two witnesses, Munna Lal and Rameshwar, in a moment. But the striking fact, and it is common ground between the parties in this case, is that the plaintiffs by ordinary competition, and, if the defendants' case is to be believed, by the use of precisely the same process that the defendants themselves have been using and everybody else in the trade has been using, have succeeded during the last 12 or 13 years in securing a paramount position in the trade. All their rivals have been beaten out of the field, and it is not suggested that during that period of 12 or 13 years the plaintiffs have enjoyed any superior advantage over their competitors, and the theory is that; in spite of that fact and although they have successfully carried on their business during that period almost unrivalled by the well-known process which was open to everybody, they none the less thought it necessary, so far as we can see, for no possible object either of gain or of anything else, to invent a story which could have been exposed and blown to pieces in five minutes by honest evidence, namely, that all this time they have been adopting a totally different method, that they have been experimenting in new methods and only just discovered and therefore went to the expense and trouble of obtaining a patent for this ancient method which was known to all. We think that that theory has hopelessly broken down upon the evidence and that it is a hypothesis which would require overwhelming evidence for any court to accept as the real truth.

7. Turning to the oral evidence, which it is necessary to examine in this case with the preface which we have already made, namely, that there is on the written evidence and on the admitted facts serious reason for doubting the honesty of the defendants' case, a very strong attack was made by the Hon<sup>ble</sup> Pandit Moti Lal Nehru for the respondents upon the plaintiffs for not, as he put it, going into the box. We think this comment is really not justified. They did go into the box in the true sense of the word. The District Judge, who originally was intended to try this case himself called Maharaj Narain for the defendants on the one side and Manphul Narain, one of the plaintiffs, on the other side. Manphul Narain gave his statement to the learned Judge describing in general language the present process, saying that in the old stove an iron tray had been used; that the present stove is closed above the trays while the other was not so; that in the old stove

there used to be a chimney while in the new there is no chimney; that under the old stove the working had been going on in his factory in Calcutta for many years; that he had never seen an earthen bowl being used in any other factory until they decided to use it, and, as far as he knew, for 13 or 14 years nobody in Calcutta had been manufacturing this stuff at all. We do not know what more the plaintiffs could say than this witness said, unless they were cross-examined in detail either by the court or by the other party. A sort of argument was suggested that Mr. Remfry who conducted the case for the plaintiffs in the court below, ought to have put the man into the box again. We cannot see the slightest reason why he should have done this. The witness had given a general account of his case consistent with the independent witnesses who were subsequently called to support it, and if the defendants thought that they could get anything out of this particular witness of whom they now make a grievance as not having been called at all, nothing was easier than for them to apply to the learned Judge at the trial to recall him for cross-examination. It is idle to suggest that the provision in the Code which enables a Judge to call one of the parties and put him on oath, does not make the witness just as much a witness and make the evidence just as relevant as if he is called by his own representative. And why in the world when he has given satisfactory evidence his legal representative should go through the ceremony of putting him into the box again for examination-in-chief, we cannot understand. But there is nothing in the point, even if there were any technical grievance which could be founded upon it, because Prag Narain, although not a plaintiff, is to all intents and purposes the same as a plaintiff; and he gave evidence at considerable length and his story was much to the same effect. He had obviously been working on his own account and had in 1911, joined the present plaintiffs in partnership. He described in detail the present form of manufacture and the old form of manufacture. He explained that the acid was mixed formerly with the dry banslochan and that the mixture was put into the stove. He said that acid was used before putting banslochan into the stove, apparently referring to the process of washing before baking. He described the chimney which was formerly in use. He described how for the last 18 months they had ceased to use iron pans, and had used earthenware pans or kholis in their place. He said that the inventors were Lakhpat Rai, Sampat Rai and Manphul Narain, giving the three names of the plaintiffs, excluding himself, which may mean that they all individually took part, or may mean nothing, namely, that they were merely the owners and that some body in their employ had lighted upon the idea. The only question is whether it was a real discovery, and he described the advantages of the new process in these terms: "The new invention therein is this, three kholis, a handi and another handi to cover it and a gamla with a hole to cover it over which another handi is placed. This is the new invention, No stove of this kind was made before. Besides the above, there are four bricks inside the stove on which the three kholis rest and three bricks above to keep the gamla and the fact that fire affects kholis and handis from all sides. Besides this there is no new invention, By doing away with the chimney the benefit is that the fumes of acid formerly used to escape, but

now they materially affect the material and thoroughly clean it. This is the new invention in it." And he mentioned by the way that Dr. Hossack, whom we shall have to refer to in a moment, came and saw the process when iron-pans were used, that he remained standing below the platform and asked a few questions for a space of five minutes, that they showed him how they mixed the acid into the crude banslochan kept outside the stove by pushing it in with a ladle and that no acid was used in his presence when the stuff became red hot. He also said that Dr. Hossack must have been in error or must have been misunderstood when he was reported as saying that the acid was thrown into the stuff, as it never was. In connection with the evidence of this witness and of the conflict, if any, between him and Dr. Hossack, it is not unimportant to refer to the evidence of Mr. Briggs, commonly called Bugs in the book. He was called by the plaintiffs and was examined on commission and described himself as an analytical consulting chemist. He seems to have had good training in England and to have worked under a gentleman of experience in India, since 1898. He was not a witness to any fact, but merely an expert upon the new process. Assuming the facts to be as alleged by the plaintiffs, he said that he thought the new stove was better. He had been shown what was alleged to be the old process and therefore he believed the pans in it to be of iron, and upon that hypothesis he said that the new stove was better on account of its slow heat whereas the old stove being of iron must be a fast heat. He had never seen a stove like the plaintiff's before. But it does not appear that he had been in the way of seeing these stoves one way or the other in the past. But his opinion was that the effect of adding sulphuric acid to cold material would not be nearly so satisfactory as at a red heat, while on the other hand an attempt to add it at a white heat would be to lead to too rapid an evaporation, which might be dangerous, and in the former stove which he saw it would be impracticable. He said it was not an ordinary accepted theory that sulphuric acid should be added at a red heat. And he suggested that the iron pan, (it was only a belief on his part, but it is not without significance in its bearing upon the rest of the evidence), probably was the reason of the reddish or brownish appearance of banslochan which had been seen and objected to in the past, his theory being that the acid acting upon the iron pan when hot would produce what he described as ferrous sulphate. He said that the furnace may be called a furnace on the reverberatory principle, and he made also this important statement. Having seen the stove which was alleged to be new and the stove which was alleged to be old, he said the stoves did resemble one another in outward appearance, although one was made of iron pans and the other of earthen vessels. The importance of that is (it is plain upon the evidence, even if it is not plain to one's own intelligence) that you can only discover whether iron pans or earthen pans are used inside by some kind of physical or ocular test and that you cannot possibly discover it by the naked eye when the place inside is a burning furnace. The next witness relied upon by the plaintiffs is Dr. Sandal. Dr. Sandal was a subordinate official in the Health Department in Calcutta, a kind of Inspector of nuisances, whose business it was to go round and visit factories under his superior officer, and he was subordinate

at one time undoubtedly to the witness whom we shall refer to in a moment, Dr. Hossack. He gave a detailed account, which it is not necessary to recite, of the old system worked by the plaintiffs as he remembered it, and, if his evidence is believed, the truth of this dispute would clearly be on the side of the plaintiffs, A most violent attack, and in our opinion an entirely unjustifiable attack, was made upon this witness, and for certain reasons which are material to other parts of the case we propose to examine it in some detail. It is quite true that the witness was not a man of the highest academic qualifications and that he had bought, as other people have bought, an American degree, The curious feature of the impertinent and virulent attack upon his intellectual and academical qualification apart altogether from his personal character, was the fact that when he was asked a question as to whether the stove now used by the plaintiffs was an improvement an objection was raised by the legal gentleman who subsequently cross-examined him about his intellectual qualifications, on the ground that he was not called as an expert, so that while the defendants objected to his answering a question as an expert they delivered a cold-blooded and deliberate attack upon his educational qualifications. As a matter of fact he did not profess to be an expert in the real sense of the word, and his answer, when he was allowed to give it, shows what was uppermost in his mind, namely his duties as an inspector of nuisances. He said: "the present that I have seen is far better and no nuisance is created either to the inmates of the house or to the neighbours and the material now is whiter and better than before." It is due to this gentleman to say that he was in the employment of the Municipal Corporation of Calcutta for about 25 years and that he retired after that period owing to ill-health with a pension. He was challenged with the opinion of his superior officer and he answered as only an honest witness could do, that he did not think that Dr. Hossack was ever at the factory for any great length of time, but what ever he (Dr. Hossack) said h e had seen he (the witness) could say nothing. He (the witness) was only there to speak to what he had seen. Having failed by throwing every sort of mud at this witness for a considerable time to make the slightest impression upon his evidence, the defendants then embarked upon a new and more desperate form of attack. They deliberately accused this witness, not in the presence, be it observed, of the court trying the case, but in the presence of a Commissioner of having offered to sell his evidence to them for Rs. 500, and they did this by the production in person of the two persons to whom the offer was supposed to have been made. Their names were Kunji Lal and Gappu Lal. It is impossible for us to shut our eyes to the fact that Gappu Lal is the name of the petitioner in an original suit, which has been connected with this appeal and which has been heard by us, although judgment has been reserved, in which he, Gappu Lal, seeks to revoke this very patent, and that Gappu Lal and Kunji Lal, these two men, have given evidence before us in that suit testifying to their personal knowledge of the old process by which banslochan was manufactured. Mr. Moti Lal, for the respondents, contended, when we asked him why these two men to whom Dr. Sandal is alleged to have offered to sell his evidence were not called, that the law did not permit him to

put them into the box but that by another section of the Evidence Act he was bound by the answer of the witness. If that view is correct, Dr. Sandal's evidence stands untainted and untouched by the attack upon him. But it is impossible for us not to ask ourselves the question why, if these two men were in a position to give evidence before us in another suit, one of them being actually the petitioner and alleged manufacturer and seller of the substance (banslochan), who alleges that he has suffered a grievance through this patent and could testify to the fact that one of the principal witnesses called by the plaintiffs had made an offer to them to sell his evidence to the defendants, they were not called as witnesses in this suit. To that question there has been no attempt of any kind to make any answer. The learned Judge undoubtedly rejected the evidence of Dr. Sandal. We are unable quite to understand the ground on which the learned Judge refused to treat him as an honest witness. It is true that Dr. Sandal admitted that he went for his own examination before the Commissioner on a date other than that on which he was really summoned having reason to believe that he would be wanted on that date, and the learned Judge accepts the explanation in his judgment, but nonetheless he comes to the conclusion that this matter which is satisfactorily explained coupled with the negotiations about the purchase of his evidence makes the matter suspicious. The view of the learned Judge is that the evidence of a witness should be rejected if only he is asked questions sufficiently offensive to arouse suspicion as to his character. We cannot agree that this is a sufficient reason, and we see none for throwing over Dr. Sandal's evidence. It may be that Sanitary Inspectors are not always absolutely reliable, but they must be shown, and not presumed, to be untrustworthy.

8. The next witness relied upon by the plaintiffs was Dr. Mitter. Here again we have been ourselves unable to accept the somewhat hypercriticism to which this gentleman's evidence has been subjected by the lower court. There does not seem to be anything extra-ordinary in Dr. Mitter's story that he being a doctor on a ship between Singapore and Calcutta made the acquaintance of one of the plaintiffs whose business was in both places and who was travelling backwards and forwards and as the result of this friendship he went to stay with the plaintiffs and had medically treated one of them and was wandering about their premises and became acquainted with the manufacture which was going on and out of which they were making their living. And why a doctor should not, assuming that he was there and interested himself on a holiday in the manufacture of the article by which his friends were making a livelihood, take the opportunity of looking into the stove out of curiosity and satisfying himself whether it contained an iron pan or earthenware pan we do not quite see. However, the learned Judge seems to find something so uncommon in it that he regards it as not true at all, and in the course of his judgment he has come to the conclusion that none of the details of Dr. Mitter's story can be accepted. Being apparently dissatisfied in his own mind with that criticism, he finally came to the conclusion that Dr. Mitter was not there at all. But we think that there is

no material on which we can treat Dr. Mitter otherwise than as an honest witness who was desirous of giving the best assistance he could from his recollection. And again, if Dr. Mitter's evidence is believed, the fact that the plaintiffs were using iron pans in the stove is clearly established. On the whole we think that the plaintiffs have made out a satisfactory case; that there is no reason for disbelieving the five witnesses to whom we have referred; that upon their evidence it is established that iron pans were formerly used, that the earthenware pans were new; that the present combination is an improvement and that it has the advantages claimed for it. We have, however, to consider further how far the defendants' evidence makes a serious inroad upon this evidence. The defendants called a quantity of evidence. We have already given sufficient reason for distrusting the evidence of Maharaj Narain. The main features which the defendants otherwise rely upon are the evidence of Dr. Hossack, undoubtedly a scientific witness of high standing and respectability, Manna Lal who is alleged to have been in the trade, and to have taught Maharaj Narain, and further a contemporaneous report made by one Mr. Kundu, a subordinate in the Health Department and a kind of inspector of nuisances subordinate to Dr. Hossack. We think that, giving full weight to Dr. Hossack's evidence, it really comes to very little. He was palpably an honest witness who frankly said that he was very hazy, and the more pressed he was upon details, the more he explained that his recollection was really a hazy one. It is but natural that a busy man like Dr. Hossack with important avocations should forget what he had seen long before, to which at the time he attached no importance, and in which he had no concern; and when reminded about it should come to court; with a very hazy recollection of it. Whereas the case of a man like Dr. Mitter is quite different. Although he had no concern in the matter, being a friend of the plaintiffs he might very naturally spend his leisure time in looking into their stove; but Dr. Hossack was a busy man engaged in his profession, and therefore the plaintiffs' case may be perfectly true and everything that Dr. Hossack said may be perfectly honest, whereas it is impossible for the defendants' case to be true without convicting Dr. Sandal and Dr. Mitter of flagrant and deliberate perjury. This in itself is a reason for preferring the plaintiff's story, supported as it is by witnesses who relate facts which could only be wilfully untrue, if untrue at all; whereas in so doing we do not cast the slightest discredit upon Dr. Hossack's testimony. We do not think that he was really prepared to commit himself upon the question whether the interior of the stove was iron or not. It is plain from Dr. Brigg's evidence that he could not have examined it for himself at any rate with his eye, and he does not profess to have used any other means, and it is quite clear from the report which he made on the 14th of October, 1909, that the process of calcining the bamboo camphor, in what he called a retort, with an addition of sulphuric acid occasionally, was being carried on in a stove which had a chimney--a fact wholly inconsistent with the defendants' case. In our opinion the evidence relied upon of Dr. Kundu who is represented only by his report ought really as a matter of law to be rejected. Dr. Kundu's report is alleged to be a public document u/s 35 of the Evidence Act. We

think that it does not come within this category at all, certainly not for the purpose of proving a fact immaterial to the matter in respect of which he was making his report. But, how ever that may be, Dr. Kundu is alive and available and was twice summoned by the defendants. The plaintiffs properly objected to the report. Their objection was overruled. They contend in one of their grounds of appeal that this report ought to have been rejected. We agree that it ought. On the other hand, it has been referred to by both sides in the court below and before us, and even if it was improperly admitted, we think that it would make no difference to our decision. It refers to the addition of strong sulphuric acid at a white heat, it refers also to the existence of a chimney, and although it does describe the stove as a "native reverberatory furnace," which, according to the best understanding of that expression, is inconsistent with the method of iron pans, which the plaintiffs say they were using. We are not satisfied that a gentleman who thinks that a high chimney is useful for diminishing the amount of heat generated in a stove, is a gentleman whom a priori we can accept as fully acquainted with the technical meaning of the term "reverberatory furnace." The witness Rameshar does not appeal to us as a satisfactory witness. He said he worked this process according to the plaintiff's method for 20 years. If he did, he made an astonishing mess of it. He has not attempted to work it during the last 20 years. He became the owner of the factory, in which it was alleged he had formerly worked, by a deed of gift from his former employer, the result of which was that the concern was wound up within a year. He frankly says that there is nobody now to be found in Calcutta who might have seen the stove which he had at that time, and when he was asked about the books relating to his business he made the astounding statement that a Muhammadan gentleman who lived in a bungalow wrote out the books, but he is not now to be found. Another witness relied upon was a man named Ram Kumar, who was a broker. If he is like most brokers, he interests himself more in the commission to be earned from a manufactured article of this kind than in the process by which it is brought into existence. He has not been at work since 1904. He says that somebody or his clerk has been receiving profits for him, but he does not know how much. He admits having been hard hit by the plaintiffs who have been selling this stuff without an agent, and really all that he says is that he never saw iron pans, but did see broken earthenware pans about the place where manufacture was going on, and that when he did see them he "sat down and talked." Nor can we attach much greater weight to the evidence of the gentleman, Gobind Singh, who visited Calcutta and stayed with the plaintiffs. His opportunity for seeing the internal construction of this stove was, according to his first impression, from a window some fifteen yards away where he was sleeping. When pressed he thought he got a better view of it from the enclosure where he went to relieve nature. This gentleman is under the impression that Howrah bridge is a kind of kachha bridge of "pipas" covered with straw and mud; and if that is the best account he can give of it after visiting Calcutta (we take judicial notice of the fact that Howrah bridge is at times not unlike London bridge in the middle of the day), if that is the best this gentleman can make of his impression of Howrah

bridge, we do not think that any importance can be attached to his recollection of the internal construction of the stove. Dr. Srivasta v a" s evidence really consisted of no more than the recitation of what he had read in the journals, "Indian Forester" and "The Commercial Products of India," We may say that the court below was mistaken in thinking that there was any legal ground for the admission of this witness's information of literature on the subject which was otherwise inadmissible; but it really contributes nothing to the case. The witnesses Chhedu and Sheoraj Narain, one of whom apparently is an old servant of the plaintiffs and the other, a relation of Manphul Narain, one of the plaintiffs, is not on very friendly terms with them, sufficiently create doubt with regard to their power of observation in respect of the material drawn out from the fire. They say it was drawn out fifteen minutes after its treatment with the acid, whereas Munna Lal says the interval is two or three minutes.

9. So much for the defendants' witnesses, as a whole, many of whom no doubt were doing their honest best to give an account of what they saw. This brings us to the consideration of Munna Lal and this is the evidence which from the defendants' side, causes us more difficulty than anything else in the case. He tells a story which on the face of it is clear and not open to much criticism, and it has been accepted by the learned Judge, who, by the bye, it should be observed, did not see him as he was examined on commission. We think, however, that his connection with Maharaj Narain and with the defendants is very close, and that he is, if the expression may be used, tarred with the Maharaj Narain brush. We cannot accept as satisfactory, as we have already said, the story of Maharaj Narain's visit to Calcutta in July merely to take lessons from this witness, and one sentence in his cross-examination casts doubt upon the whole of his story. He committed himself to the positive statement that the plaintiffs had been using this process in Calcutta to his knowledge for 12 or 13 years. We have come to the conclusion that this is not the fact. It therefore follows that Munna Lal, when he made that statement, stated that which he knew to be untrue. We have been much pressed, as the learned Judge in the court below was impressed, by the contents of this man's books. We have seen them. They are not in a character, although my brother, Mr. Justice Piggott, was able to read some of the figures, which was familiar either to the Commissioner who examined the witness or to the counsel who examined and cross-examined him or to most of us in this Court. Without going in detail through the extracts which have been laid before us it is true to say that they are not entries which by their sequence or by the way in which they occur amongst the other entries in the books absolutely recommend themselves. They do require some explanation, but the witness was not cross-examined upon this basis. He was not asked to explain them, and therefore no explanation was forthcoming, and we are not prepared to say that they are untrustworthy in the sense that they do not represent actual contemporaneous entries; but after all they come to very little. It is true that he intended the court to believe that the kholis and other earthenware articles, entered in these books as expenses connected with the stove, did relate to

similar earthenware pans to those in the plaintiffs' stove and were used in connection with what we have described as the plaintiffs' process of manufacture and were bought and entered in the books for that purpose. But the entries are anything but clear or convincing upon that point, for example in one place kholi or covering is entered at Rs. 4-14-3 in another three kholis are entered at Rs. 2-4 in another kholis are entered at Re. 1-8 and in another three kholis are entered at Re. 1-7, two handis at Rs. 3-9. These are not large or expensive or out of the way articles. They can be bought anywhere in the bazar according to measurement and therefore we ought not to be hypercritical about entries of this kind, but on the other hand, it is obvious from the prices which we have mentioned that the sizes of these kholis were not all the same, and it is sufficient to say that while the entries are not inconsistent with the purchase of earthenware vessels such as are necessary for a stove like the plaintiffs' they are equally consistent with the ordinary use by persons interested in the manufacture of the article, of earthenware pans for mixing it or washing it, and having regard to the other evidence regarded as a whole and Manna Lal's close association with Maharaj Narain, whom we unhesitatingly hold to be a dishonest witness, we do not think that either he or his books are sufficient to destroy the case which the plaintiffs have established. For these reasons we have come to the conclusion that the plaintiffs' case is true, that iron pans were used and that they themselves by experiment have discovered the better use by combination of the earthenware pans.

10. We find that the essential features of the process patented by the plaintiffs are the treatment of the substance at a red heat, with sulphuric acid inside a closed crucible or, retort, made entirely of earthenware. The advantages are: (a) No iron or or other metal being used in the composition of the crucible, there is no danger of any deleterious action on the part of the fumes of the acid upon the metal aforesaid; (b) the retort or crucible is entirely closed from the time when the acid is added until the process of calcination is complete; this does away with the necessity of a chimney communicating with the retort by means of which the fumes of the acid used to be carried off, The action of the acid on the crude material under these conditions appears to be more thorough and satisfactory while the possible nuisance from the escaping fumes of the acid is done away with. We think this combination as embodied in the plaintiffs' specification is new, that no one ever worked it out before, that it effects a useful purpose in reaching the point of heat at which the treatment of sulphuric acid can be most effectively applied and in eliminating the brownish tint or iron matter from the material, so as to produce a purer colour and a better quality.

11. The question of law which has been vigorously argued therefore arises; whether this has been properly claimed by the plain tiffs in this specification as a good subject-matter. The specification must be read as a whole and the claim interpreted by the body of the specification.

12. There seems to have been some difficulty in deciding in many cases of

improvements how far the law casts upon the applicant the obligation of making it clear to the public or to the workman of ordinary intelligence in the trade which portion of the combination is new and which is old. We do not think anything is to be gained by discussing at length the interesting series of authorities to which we were referred by counsel on either side. We propose to apply the principle as laid down in *Harrison v. The Anderston Foundry Company* (1876) L.R.1 A.C. 574, to this case, which we hold to be one "of a new combination of admittedly old materials." The principle is enunciated in the following terms. The Lord Chancellor at page 578 says: "If there is a patent for a combination, the combination itself is, ex necessitate, the novelty; and the combination is also the merit if it be a merit, which remains to be proved by evidence." Lord Hatherley while delivering his judgment in the same case says at page 583: "Well, my Lords, that being the case, the Judges extended, as it appears to me, with great respect, the doctrine of *Foxwell v. Bostock* (1864) 4 De G.J. & S. 298, in their application of it to this case. It was there held--and that, I think, was all that was held--that it is not competent to a man to take a well-known existing machine and, having made some small improvement, to place that before the public and say: "I have made a better machine. There is the sewing machine invented by so and so; I have improved upon that. That is mine; it is a much better machine than his" That will not do: You must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was adopted, I think by Lord Justice James in another case, it will not do, if you have invented grid-iron pendulum, to say, "I have invented a better clock than any body else" not telling the public what you have done to make it better than any other clock which is known. That principle was laid down in *Foxwell v. Bostock* (1864) 4 De G.J. & S 298, and I do not think that any thing further was intended to be determined in that case. It could not have been meant in that case to say that where that happens, which may well happen, that a person, arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement, produces an improved effect by his new arrangement, that new arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well-known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well-known; but if he says: "I take all these well-known parts, and I adjust them in a manner totally different from that in which they have ever before been adjusted, I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect, and it is this, that they have not been properly arranged; I have therefore re-considered the whole matter, and put all these several parts together in a mode in which they never were before arranged, and have produced an improved effect by so doing." I apprehend it is competent to that man so to do, and that it would be perfectly impossible for him to say what is new and what is old, because ex concessis it is all old, nobody ever before used it in the manner in which he has used it." His Lordship further says, at page 586: "That, my Lords, is what it

appears to me the patentees have done by the claims which are contained at the end of the patent: "Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited letters patent, is-- First, the construction and arrangement of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally." That seems to me to be the one great claim for the whole. They say--We cannot tell you that this part or that part or the other part is in itself a new engine or a new-machine, but we tell you that our combination of all those parts into a complete machine, affecting both the shuttle box moving apparatus and the pattern apparatus, is a new combination and we claim to be capable of carrying that out in an improved manner under the specification in our letters patent." And Lord Penzanoe in the same case, at page 590 says: "Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? In other words, to point out everything that in the several parts or the subordinate combinations of them might be old and had been previously used? I cannot think that they were, or that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom, it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention, and the limits within which that which he claims as a novelty is confined, he is not bound, as it seems to me, to go further and specify how it is, and why it is, that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements."

13. Applying the principles laid down in that case, we think the specification in this case satisfies the legal requirements so far as the claim for combination and construction of the stove even of old materials is concerned. A difficulty has been raised with regard to the first part of the claim where the patentees state that they claim in the preparation of the said substance the treatment of the same when red hot with an acid. We have purposely refrained from referring in detail to the evidence with regard to the use of acid. We think it clearly establishes what the plaintiffs have not seriously denied, that in some form or another, and at some stage or another in the process of manufacture, acid has always been used for purifying the material. And there seemed at one time a difficulty with regard to this claim, namely, as to whether it was not either too wide, or too vague, or in itself old. Mr. Remfry, for the appellants, accepted the principle relied upon by Mr. Moti Lal Nehru for the respondents, in the case of *Brunton v. Hawkes* (1821) 4 Barn 541, where it was held that a patent which consisted of more than one claim would be bad if it definitely and independently claimed something which was shown itself to be bad for want of novelty. But after all the attack

made upon this part of the plaintiffs' claim raises an issue of fact, first, what is "red heat" whether it is understood and recognized as describing a particular stage in the process of heating which all members of the trade know, and whether, assuming that to be the fact, it was in common use, that is to say, whether the application of sulphuric acid at that particular moment known and accepted by the trade as accurately described by the words "red heat" was in itself an old, process of manufacture. We think that Mr. Remfry was well founded when he met this case by saying that there really was no dispute about that part of the case as a fact in the court below and that if the defendants wanted to raise the question that "red heat" was not understood in the trade, or that being understood, it was too vague and uncertain and too wide a margin of variation to be capable of a claim, that was a matter which ought to be dealt with above all things by evidence which could inform the mind of the court. The defendants, so far from adopting this attitude towards this part of the claim, accepted it, and embraced it, and said that they had always done it themselves, and that it was so well-known that it was accepted generally through the trade, and that nobody had any doubt what it meant. Having taken that attitude it does not lie in their mouth here and now to contend that it is impossible to say what is meant by the words "red heat." Therefore we must hold that it is established that the treatment of sulphuric acid at "red heat" which is a defined stage in the process of heating, is well-known to the trade and perfectly intelligible and also new, as nobody in the case suggests that there was any defined or ascertained stage at which it was always done, It is to be borne in mind, and perhaps it is desirable that we should make it once more perfectly clear, that it is quite immaterial what one or more members of the plaintiffs' firm may have said about the rights which the patent really gives them. What they think about it cannot enlarge the rights which are actually conferred by the patent; and the patent does not confer upon the plaintiffs either the sole right to manufacture and sell the substance itself or even the sole right to apply sulphuric acid at red heat so that nobody may use, it. What people cannot do is to manufacture an oven or stove substantially as described and illustrated in the specification for drying, heating, roasting and calcining the said substance, and to use such construction for the purpose of applying sulphuric acid in the process of preparing and heating the substance to a red heat in the stove. That is what the plaintiffs claim as patentees. That is what we think, the plaintiffs have established, and that is what they have a right to patent, Mr. Remfry referred us to the case of *Plimpton v. Spiller* (1877) L.R. 6 Ch. D. 412. The passage which particularly seems applicable to this case is at page 428 in the judgment of Lord Justice James: "It appears to me that in doing that he (His Lordship refers to *Plimpton's* claim) is claiming, not a distinct and substantive invention, but he is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly."

14. We think that language applies to this case. A suggestion was made by Mr. Remfry in the course of his argument that if there was any difficulty in this

connection it was possible even at this stage for the plaintiffs to withdraw this claim (1) and apply for an amendment. In answer to this we have no hesitation in saying that in our opinion the authorities he quoted are not applicable, and cannot be applicable to an application made at the eleventh hour in a court of appeal by an unsuccessful litigant in the court below who made no application in that court, and who is actually suing for infringement. The plaintiffs are entitled to an injunction substantially in the form referred to in Seton on Decrees at page 549 restraining, the defendants, or their servants or agents, or any of them from building, constructing, selling, using, or in any way dealing with a stove manufactured in accordance with the plaintiffs' patent, and that the plaintiffs are entitled to a certificate u/s 32 of the Act. With regard to damages, the matter is not free from difficulty. We have already expressed our view of the defendants' conduct. We think it is clear that they went out of their way to purloin, if they could, the advantages of the discovery which the plaintiffs had made. On the other hand, no satisfactory case for damages was made out in the court below; for one reason because the plaintiffs failed to establish their right, and for another reason because the learned Judge seemed to think that the profit made by the defendants was the sole criterion. That can hardly be a sound view having regard to the fact that the defendants, deliberately tried to undersell the plaintiffs, and quoted prices below market price. On the other hand, Mr. Remfry when challenged in this Court to make out a case proceeded to claim damages, or rather to frame his claim upon the evidence in the case, as if he was entitled to damages as enjoying the monopoly for the sole sale of the article itself, which is not the case. We think the evidence before us does not enable us to come to a conclusion on the question of the actual damages suffered by the plaintiffs, and that in any event having regard to the early stage in which the plaintiffs quite properly brought their suit, the amount involved does not make it worth while to award anything more than nominal damages. We therefore hold the plaintiffs entitled to the nominal damages of one rupee. We decree the injunction and grant a certificate and one rupee damages. We think under the circumstances the plaintiffs are entitled to their full costs which will include fees calculated on the higher scale on the subject-matter of Rs. 4,000, with the exception of so much of the court-fee as was paid in respect of the sum of Rs. 25,000 claimed under the head of damages; that much the plaintiffs must bear themselves.

Piggott J.

15. I concur.