to that effect. But there is equally strong evidence to the contrary, and, in the conflict of opinion, it appears to commend itself more to one's understanding than the other. And the better conclusion is that at which the trial Judge arrived. It is true that the Chown Co. were making the article for Burke, but from a sample provided by him, and of course he could make it in the proper form, although he or the person acting for him in applying for the patent failed to describe that form.

There remain the questions as to the alleged failure to manufacture in these two years under sec. 38 of the Patent Act, and as to effect of failure to properly mark the articles as required by sec. 55.

The evidence shews that shortly after obtaining the patent No. 49400, the W. W. Chown Co. commenced to manufacture the comb substantially in the form really intended for the trade, and continued under Burke and the plaintiff to make it until 1903, and they continued to sell what they had manufactured until 1906. In that year, as the result of an action by the plaintiff against the Eclipse Manufacturing Co., that company took from the plaintiff a license to manufacture, and have since continued to manufacture the comb on a royalty paid to the plaintiff.

There seems, therefore, to have been no want of compliance with sec. 38.

As to the other objection, the learned trial Judge points out that the only consequence to the plaintiff of a breach of sec. 55 is a penalty imposed by sec. 69. There is no provision similar to that in the United States, that on any suit for infringement by the party so failing to mark, no damages shall be recovered by the plaintiff except on proof that the defendant was duly notified of the infringement and continued after said notice to make, use, or vend the article so patented. But, even under that enactment, the failure to mark does not affect the right to an injunction but only goes to the question of damages: Goodyear v. Allen, 3 Fish Pat. Cas. 374.

Although it is unimportant in this case, it is a fact that the defendants were duly notified and after notice, and even after the commencement of the action, they made and sold the patented article.

The damages awarded ($20.80) are so trifling as to be of no real importance.

As to the allowance to the plaintiffs of their costs, that, in the circumstances of this case, was a matter wholly within the discretion of the learned trial Judge. But, even if the matter were one proper for review, it must be borne in mind that throughout