There was an earlier patent, number 49400, granted to F. H. Burke on the 5th July, 1895, intended to cover the same invention as that covered by the patent to the plaintiff. It was not kept on foot, and some of the questions in issue in this action were based upon the specifications and claim upon which it was granted.

Although in their statement of defence the defendants denied that they infringed the plaintiff's patent, the evidence at the trial established that the defendants manufactured and sold a curry-comb which was an exact copy of that manufactured under the plaintiff's patent, and it was not disputed that, assuming the validity of that patent, there had been an infringement.

But the defendants attacked the validity of the patent, and put forward a number of objections, all of which were determined adversely to them by the trial Judge.

The appeal was heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

G. Lynch-Staunton, K.C., for the defendants.

D. W. Dumble, K.C., and A. W. Anglin, K.C., for the plaintiff.

Moss, C.J.O.:—It is to be borne in mind that, although the production of the patent and proof of the specifications were probably sufficient to cast upon the defendants the onus of establishing the defences of want of novelty and utility (see sec. 34 of the Patent Act; Amory v. Brown, L. R. 8 Eq. 663; Harris v. Rothwell, 4 Rep. Pat. Cas. 225, 229; Young v. White, 23 L. J. Ch. 190, 196; Ward v. Hill, 18 Rep. Pat. Cas. 481); the plaintiff's case was not allowed to rest there. Evidence in support of the novelty and utility of the patented article and of the idea originating with Burke was adduced. Against this was evidence adduced by the defendants.

These issues were questions of fact to be determined by the learned trial Judge upon the whole evidence.

It is true that before an appellate Court the findings upon facts of a Judge of first instance are not conclusive, and that they are not more so in this case than in any other. The duty of examining the evidence and weighing the conclusions reached by the trial Judge upon it is not to be ignored by the appellate Court. But in endeavouring to balance the testimony and to give the findings their proper value it is important to remember upon which side lies the burden of proof. A man is not to be deprived of the benefit of his labour, skill, and ingenuity, and the results of the