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BETWEEN :

THE B. MANISCHEWITZ COMPANY... PLAINTIFF;

AND

HARRY GULA, TRADING UNDER THE  
 FIRM NAME AND STYLE OF HARRY  
 GULA'S TASTY MATZO BAKERY } DEFENDANTS.  
 AND THE SAID HARRY GULA..... }

*Practice—Costs—General Rules and Orders of the Exchequer Court—  
 Item 58 of Tariff A.*

*Held:* That Item 58 of Tariff "A" in the appendix to the General Rules and Orders of the Exchequer Court is applicable only to actions in which the sole relief given is the payment of a stated sum by way of damages or otherwise, and not when the relief given is other than, or in addition to, such payment.

MOTION to have a taxation of costs by the Registrar reviewed by the Court.

The motion was heard before the Honourable Mr. Justice O'Connor in chambers.

*Jack Rudner and A. H. Lieff* for the motion;

*C. F. Scott contra.*

O'CONNOR J. now (February 28, 1947) delivered the following judgment:

This was an action for infringement of a word mark and passing off in which the Court found that the defendants had infringed the word mark of the plaintiff and had passed off their goods as the goods of the plaintiff. The usual injunction was granted and damages in the form of \$200 awarded the plaintiff.

In taxing the costs the Registrar deducted one-third of the amount of the fees under Item 58 of Tariff "A" in the appendix to the General Rules and Orders of the Exchequer Court, which is as follows:

"Item 58. In actions in which the amount recovered is under \$500, a deduction of one-third of the amount of the fees (other than disbursements) shall be made by the taxing officer, unless otherwise ordered by the Court or a Judge."

The plaintiff applies to review the taxation in respect of this item. The question is whether the item is applicable in view of the fact that the plaintiff has recovered relief other than, or in addition to, the damages of \$200.

The item applies to actions in contract and tort where the sole relief given is the payment of a stated sum of money by way of damages or otherwise.

It is equally clear, however, that the item does not apply to an action in which the relief given is other than the payment of a sum of money by way of damages or otherwise. In an action for an infringement of a trade mark where no damages were awarded, the item could have no application.

The question is, therefore, whether or not the item is applicable to an action in which relief is given in addition to the payment of a stated sum of money by way of damages.

The purpose of the rule is clear. It is to reduce the costs in those actions which are not of sufficient size and importance to justify full costs according to the tariff.

In actions in contract and tort what is recovered is the payment of a stated sum of money by way of damages or otherwise, and the amount of such sum in such cases is a fair criterion of the size and importance of the case.

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That is not a proper criterion in actions relating to patent and trade mark matters. The chief issue in these actions is whether or not there has been an infringement and what the plaintiff recovers or fails to recover is a declaration of an infringement and an injunction. The question of damages is distinctly a secondary matter and the amount of the damages awarded is not the slightest criterion as to the size or importance of the action. Damages are awarded on factors such as the length of time of the infringement, volume, etc., and the amount of damages therefore, does not indicate the value of the patent or trade mark rights established in the action.

To determine the importance of an action relating to trade marks or patents by the amount of damages awarded would be unreasonable.

I come to the conclusion that the item is applicable only to actions in which the sole relief given is the payment of a stated sum by way of damages or otherwise, and that the item is not applicable where the relief given is other than, or in addition to, such payment.

The plaintiff is, therefore, entitled to the amount of fees taxed by the Registrar at \$670 without the deduction of one-third.

There will be no costs of the application.

*Judgment accordingly.*