

allowance of counsel fee of \$125 at the trial. He applied item 153 of the tariff, "fee with brief at trial." The defendants submitted that there was only an assessment of damages, and that item 152, "fee with brief on assessment, \$10," applied.

J. G. Gauld, Hamilton, for defendants.

W. A. H. Duff, Hamilton, for plaintiff.

FALCONBRIDGE, C.J.:—The action was one for damages for personal injuries. The defendants entered no appearance and filed no statement of defence. Notice of assessment was served by posting up. Both plaintiff and defendants issued commissions and took evidence thereunder in the State of New York. Defendants also obtained an order in Chambers for the examination of the plaintiff by medical practitioners. The case came on for trial (or assessment) at the Hamilton assizes. It was spoken to on one day and stood over until the next. The case was reached at 5 p.m., when the trial was begun, and continued until 7 p.m., when it was adjourned until 9.30 the next morning, and lasted from that time until 2 p.m. There was a verdict for plaintiff for \$7,500, from which the defendants appealed to the Court of Appeal and were unsuccessful in the appeal.

It would be a manifest hardship that under these circumstances the allowance for counsel fee should be limited to \$10, but it may be that item 152 is the only one applicable.

However, I think (though with diffidence) that the following considerations may prevail to sustain the taxing officer's judgment: there was no interlocutory judgment in the case, and there was no admission upon the record of the liability of the defendants; on the opening of the case counsel for defendants admitted that they did not intend to contest liability, and the only matter tried out was the quantum of damages. *Gath v. Howarth*, [1884] W. N. 99, is not in point, as there interlocutory judgment had been signed.

I think, in view of all the special circumstances of this case, it may be treated as a trial and not an assessment, and plaintiff's appeal will therefore be dismissed. There will be no costs of this appeal.