

Mathers, J.]

MAWHINNEY v. PORTEOUS.

[Sept. 25.

Breach of warranty—Damages—Measure of damages—Evidence to prove liability for commission.

Action to recover the price of a threshing outfit consisting of a new separator and a second-hand engine sold to the defendant. The engine had been warranted to be in first-class repair and in good running order. The trial judge found as a fact that it was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it. The chief question to be decided, therefore, was the amount of damages to be allowed for the breach of warranty. The defendant discovered nearly all of the defects complained of before he started using the machine and the others almost at once after starting; but, instead of proceeding at once to have the missing parts supplied, he continued to operate the machine in its defective condition without complaining to the plaintiff of anything but the friction.

Held, following *Crompton v. Haffner*, 5 O.L.R. 554, that there could be no recovery for damage which might have been prevented by reasonable efforts on the defendant's part. The defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them and cannot recover anything for damages beyond what he would have sustained had he pursued that course. The measure of the defendant's damage is the amount that it would have cost to put the engine in the condition it was warranted to be in plus his loss of profits or from delays during the time that would necessarily elapse before these repairs could be made had he acted promptly after discovering them. Upon these principles, defendant was allowed \$30.00 for cost of necessary repairs and \$50.00 for loss of profits or from delays during such time.

On defendant's default in payment the plaintiff had repossessed and resold the outfit and sought to deduct from the proceeds of the sale the sum of \$250.00 which he said he had had to pay by way of commission on the resale. There was no evidence that the sale had been made through an agent or, if it was, what the proper commission should be.

Held, that the plaintiff had not sufficiently established his right to charge such commission against the defendant and that it should not be allowed to him.

Anderson, for plaintiff. *Hudson and Meighen*, for defendant.