A LEGAL DECISION OF GREAT VALUE.

A LEGAL decision of great importance to all publishers and advertisers has just been rendered in Toronto in the Court of Appeal. The point chiefly involved is one that often presents itself: namely, can an advertiser be forced to pay for his advertising if the publisher has not been able, literally and absolutely, to fulfil all the terms of the contract, as to position, etc.? The decision reached, after the case had been carried through several stages by appeal to the highest court in Ontario, is that the advertiser must pay "whatever the work done was worth."

The action which has resulted in this decision was one entered by the Toronto Type Foundry Co, Limited, owning The Toronto Newspaper Union, who issue a list of ready-prints used by a large number of Canadian newspapers, against The J. C. Ayer Co., the well-known patent medicine company, for payment of an advertising account. The contract between the two parties, dated November 3, 1897, reads as follows:

We hereby agree for the sum of $1,200, payable quarterly, to insert in the 150 or more papers comprised in Toronto list and Hamilton list of Toronto Newspaper Union the advertisements of J. C. Ayer Co., of Lowell, Mass., during the ensuing 14 months (omitting July and August), according to plates and copy furnished by them, the space and insertions to be as specified below, viz.:

One advertisement to average eight 8) inches (single or double column form) each week, 52 times in each paper, each insertion to be at top of page with pure reading wholly alongside and underneath, or at bottom of page following and alongside pure reading. To be first advertisement on page.

We will bear expense of shipment one way, and supply 80 per cent complete copies of every issue of each paper, balance half prints, to J. C. Ayer Co., Lowell, Mass., for checking purposes, during continuance of this contract, and before rendering bills for same, provided Customs regulations between the two countries will permit. Otherwise we will have papers supplied by publishers direct, so far as possible, and afford access to our files at Toronto for the balance, assuming one-half the expense involved in checking files at Toronto.

TORONTO NEWSPAPER UNION.
Accepted for J. C. AYER CO.,
By L. E. Pullen, Advertising Manager.
November 3, 1897.

At the preliminary trial of the action Official Referee and Registrar Cartwright rendered judgment in favor of the plaintiffs. The Ayer Co. then appealed Chief Justice Meredith, of the Court of Common Pleas, after a hearing, dismissed the appeal. The Ayer Co. then appealed to the highest court, the Court of Appeal, where the case was argued before the full court, the Hon. Justices Osler, Maclennan, Moss and Lister sitting. They unanimously dismissed the appeal with costs. From the unanimity with which the courts have sustained Mr. Cartwright's judgment, its terms are entitled to careful consideration, and are, therefore, given here in full. After quoting the above agreement, Mr. Cartwright said:

"The provision as to sending 80 per cent. complete copies of every issue of each paper and the balance half prints to the J. C. Ayer Co., Lowell, Mass., was never carried out. It was argued by counsel for the defendants that this provision was a condition precedent, going to the root of the contract. If this contention can be supported, then, no doubt, the plaintiffs could not recover, unless the performance was waived by the defendants. It seems possible, however, that the principle laid down in Bettini vs. Gye, Law Reports 1 Q.B.D., pages 183-188, at page 188 by Blackburn, Justice, following Graves vs. Legg, 9 Ex. 716 (judgment of Parke, B.), would apply here, and that this sending of the papers might be held not to be such a condition that a breach of it would render the performance of the rest of the contract by the plaintiffs a thing different in substance from what the defendants stipulated for. However that might be, in this case the plaintiffs represented to the defendants that this sending of the papers to Lowell would be very onerous and troublesome, and I find on the evidence that the defendants agreed to waive and did waive this provision; for it is not denied that they appointed an agent to check the papers in Toronto, and that such agent did the work, and that the defendants paid the plaintiffs for the advertising furnished by them during the first three months on the basis of that agent's report. It was further argued by counsel for the defendants that under the contract here the plaintiffs could not recover, admitting, as they do, that they have not exactly fulfilled the same. The plaintiffs' counsel contended that under the facts of the case the plaintiffs could recover the last three months on the same basis as the defendants had already paid them for the advertising done in the first three months, and he specially relied on a case in our own courts to which I will refer presently, and which is not in its facts unlike the case under consideration. The law on this point is to be found in "Smith's Leading Cases," 10th English edition, 1896, in the notes to the case of Cutter vs. Powell. I cite from that work as follows, page 23: 'The general rule being that while the special contract remained unperformed no action of indebitatus assumpsit could be brought for anything done under it. We now come to the exceptions from that rule, and the first of them is that referred to by Park, J., in Reed vs. Rand, 10 B. and C., 438. It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of that contract. In such a case the party cannot recover remuneration stipulated for in the contract, because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labor, it would be unjust to allow him to retain that without paying anything. The law, therefore, implies a promise on his part to pay such remuneration as the benefit conferred upon him is reasonably worth, and to recover that quantum of remuneration an action of indebitatus assumpsit was maintainable.' This is conceived to be a just expression of the rule of law which still prevails. At page 32. 'It must be further observed that where a special contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited liable to pay for it. It must be shown that he has taken the benefit of the part performance under circumstances