STATE OF OHIO) IN THE COURT OF APPEALS,
) SS. NINTH JUDICIAL DISTRICT.
SUMMIT COUNTY)

James W. Brown,
Plaintiff in Error

v.

Arthur W. Heintz,
Defendant in Error

No. 507.

O P I N I O N

November 11, 1921.

ERROR TO THE COURT OF COMMON PLEAS

SCHNEE, GRIMM & THOMAS,
Attorneys for Plaintiff in Error.

HARRY G. REAM and C. W. CHORPENING,
Attorneys for Defendant in Error.

PER CURIAM:

This is an action for a real estate commission prosecuted in the Summit County Common Pleas Court by the plaintiff below, Arthur W. Heintz, against James W. Brown.

Heintz claimed that Brown employed him to find a purchaser for a certain property owned by the defendant and agreed to pay him therefor a commission of three per cent on the sale price.

The answer was a general denial, and upon the trial a verdict was returned in favor of the plaintiff for approximately half of the amount sued for.

The first error complained of by the plaintiff in error grows out of the remarks made by the trial judge when he overruled a motion of the defendant to direct a verdict in his favor at the conclusion of the opening statment of counsel for plaintiff. This motion was made upon the theory that the petition alleged an express contract and that the statement was based upon an implied contract. In our view of the petition, plaintiff could show either an express or an implied contract, and the court was right when he overruled the motion. If the remarks were prejudicial, which we do not think they were, the record does not disclose that the court's attention was challenged to any alleged misstatements and no exception was taken or saved by the defendant to them.

The remarks made by the trial judge when he overruled the motion above referred to could not in any view of the case be considered as an instruction to the jury, and from a reading of the general charge we feel that the court fully and fairly stated the law applicable to the case.

The requests to charge before argument which were submitted to the judge and refused were very properly refused, as they did not present a fair statement of the law of the case. The first simply propounded an abstract proposition of law and the second request was clearly a misstatement of the law.

A further assignment of error complained of as ground

for requiring the reversal of this judgment was that the jury only returned a verdict for approximately one-half of the amount claimed in the petition, and that under the pleadings and the evidence the verdict should have been either for the entire amount sued upon or nothing.

We have carefully and fully read the bill of exceptions and we are unanimously of the opinion that the jury would have been fully warranted in rendering a verdict for the plaintiff for the full amount sued for in the petition, as we feel that plaintiff proved his right to such a verdict by a preponderance of the evidence. The jury in this case having been warranted in returning a verdict for the plaintiff for twice the amount they did, the defendant cannot complain of an error which was plainly in his favor.

Not finding any errors in the record prejudicial to the rights of the plaintiff in error, we affirm the judgment of the court below.

WASHBURN, P.J., TREASH, J., and PARDEE, J., concur in judgment.