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APPEAL AND ERROR-RIGHT OF DEFENDANT TO NEW TRIAL WHERE PLAINTIFF IS ENTITLED TO ALL OR NONE AND VERDICT IS INTERMEDIATE

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RECENT DECISIONS

APPEAL AND ERROR—RIGHT OF DEFENDANT TO NEW TRIAL WHERE PLAINTIFF IS ENTITLED TO ALL OR NONE AND VERDICT IS INTERMEDIATE—
In an action on an express contract, plaintiff sued for \$1750, representing the agreed 5 per cent commission on the sale of real estate. Defendant denied the validity of the contract, and there was no issue as to the amount of liability if liability existed. The instruction to the jury was that plaintiff was entitled to 5 per cent commission if entitled to recover. The jury returned a verdict for \$875, half the amount claimed. Defendant's motion for a new trial was denied. *Held*, although the verdict was unauthorized as to plaintiff, there was no error as to defendant and he cannot complain of the jury's failure to award plaintiff the full amount to which he was entitled. *Johns v. League, Duvall & Powell*, (Ga. 1947) 45 S.E. (2d) 211.

There is some authority¹ squarely supporting the principal case, but the clear weight of authority appears to be otherwise. Most of the cases seemingly supporting the view expressed in this case are clearly distinguishable on their facts and disclose situations where the damages were uncertain and unliquidated.² Where plaintiff's damages are fixed by contract and the jury awards a fraction of the amount claimed in disregard of the court's instructions, it being conceded plaintiff is entitled to a new trial, why cannot defendant complain? Certainly a verdict of this sort is open to serious suspicion, and a large number of courts have held that the award of intermediate damages in such a case clearly indicates a compromise by the jury, which taints the whole verdict and requires a new trial on all issues in the case.³ Clearly, the issue of the defendant's liability is not squarely determined by a compromise verdict.⁴ Many courts have upheld defendant's right to a new trial even in cases where damages were not entirely certain but where, because there was no dispute as to the amount of damages and no evidence to support an intermediate and uncommonly low award, the court believed the verdict must have been a compromise.⁵ Some courts have employed

¹ *Wright v. Griffey*, 44 Ill. App. 115 (1892). Cf. *Benedict v. Michigan Beef & Provision Co.*, 115 Mich. 527, 73 N.W. 802 (1898), holding that the court will indulge in all presumptions in favor of the validity of verdicts and will be slow to yield to the inference of compromise.

² See, for example, *Cormier v. Martin Lumber Co.*, 98 Wash. 463, 167 P. 1105 (1917); *Kelley v. Peoples*, 192 Mo. App. 435, 182 S.W. 809 (1915); *Fischer v. Holmes*, 123 Ind. 525, 24 N.E. 377 (1889).

³ *Riley v. Tsagarakis*, 53 R.I. 261, 165 A. 780 (1933); *Holcombe v. Reynolds*, 200 Ala. 190, 75 S. 938 (1917); *Feldman v. Levy*, 56 Misc. 563, 106 N.Y.S. 1092 (1907); *Dunn v. Blue Grass Realty Co.*, 163 Ky. 384, 173 S. W. 1122 (1915); *Alden v. Sacramento Fruit Lands Co.*, 137 Minn. 161, 163 N.W. 133 (1917).

⁴ Cases cited, note 3. See also, *Bigelow v. Garwitz*, 61 Hun. 624, 15 N.Y.S. 940 (1891).

⁵ *Turner v. Great Northern Ry. Co.*, 67 N.D. 347, 272 N.W. 489 (1937), where uncontradicted evidence showed damages of \$32,585.02, verdict for \$10,000 held a compromise. *Stalter v. Schuyler*, (N.J. 1947) 51 A. (2d) 213, where counsel stipulated damages to plaintiff were \$432.12, verdict for \$300 held a compro-

different reasoning in reaching the same result. Thus, it has been held that the verdict is incorrect because contrary to law.⁶ These courts have upheld defendant's right to a new trial for the reason that, while the verdict might have been for more than the jury found, yet defendant is injured because the jurors might not have found for plaintiff at all had they felt bound to award him the full damages claimed.⁷ Other courts have said: that the verdict is incorrect because contrary to the evidence, and have upheld defendant's right to a new trial on the ground that the verdict is really no more for the plaintiff than against him; that had the jury believed plaintiff's evidence, they were bound to award him full damages. The award of intermediate damages, it is said, indicates that the jury did not believe plaintiff fully established his case, and in this situation an award of any recovery to plaintiff is unjust to defendant.⁸

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mise. See 98 A.L.R. 944 (1935), for cases where smallness of damages awarded indicates compromise verdict.

⁶ The theory here is that when damages are certain, the instruction of the court as to the amount of damages is an instruction on the law. The leading case is *Stetson v. Stindt*, (C.C.A. 3d, 1922) 279 F. 209, where plaintiff sued on a promissory note for \$56,990.70 and verdict was for \$27,439, new trial awarded defendant. See also, *TouVelle v. Farm Bureau Co-Op Exchange*, 112 Ore. 476, 229 P. 83 (1924); *Kundred v. Bitler*, 93 Ind. App. 691, 177 N.E. 345 (1931); *Metropolitan Life Ins. Co. v. Ray*, 28 Ala. App. 357, 184 S. 282 (1938); 3 AM. JUR., Appeal & Error, § 1145. 23 A.L.R. 305 (1923).

⁷ Cases cited, note 6. In *Stetson v. Stindt*, (C.C.A. 3d, 1922) 279 F. 209 at 211, the court said: "He [Defendant] was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court. That liability might be for more than the jury found; yet it might be for nothing. What his liability is, the jury refused to say; but said something else, which, under the law and on the facts, was simply untrue. . . ."

⁸ *Metz v. Campbell Printing-Press Co.*, 11 Misc. 284, 32 N.Y.S. 155 (1895); *Bressler v. McVey*, 82 Kan. 341, 108 P. 97 (1910). See also, 2 THOMPSON, TRIALS, 2d ed., § 2606 (1912).

Some courts have held that where the verdict should be for all or none, an intermediate verdict should not be accepted by the trial court in the first instance. *Hines v. Royce*, 127 Mo. App. 718, 106 S.W. 1091 (1908); *Chandler v. Hines*, 135 Wis. 43, 115 N.W. 339 (1908), holding that the trial court did not err in sending the jury back to reach a correct verdict on the amount of damages.