

his supposed wrongs in so violent a manner, and should take the consequences without complaint. Indeed, all things considered, the court is inclined to think that the plaintiff got off quite as well as he could have reasonably expected. Upon the facts stated under oath by the plaintiff, if the jury were to find a verdict in his favor the court would not permit it to stand. For the reasons thus briefly stated, the court will sustain the motion, and instruct the jury to find for the defendant.

IRVINE v. ANGUS et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1899.)

No. 488.

On Petition for Rehearing. For former opinion, see 93 Fed. 629.

George W. Towle, Jr., for plaintiff in error.

Pierson & Mitchell and Garrett W. McEnerney, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. We are satisfied with the general views announced in our former opinion, and with the conclusion there reached, except in one particular, and that relates to the amount of the judgment which the circuit court should be directed to enter in favor of the plaintiff in error. The bill of exceptions recites that:

"It was admitted by defendants that the assessments mentioned in the complaint were, each and all, duly levied upon the shares of stock therein mentioned by said corporation, the Morgan Mining Company; * * * that each of said assessments was paid by Irvine from his own funds at the last moment that the same could be paid before the said shares would otherwise have been lawfully offered for sale."

In our former opinion we inadvertently assumed that the aggregate amount of the assessments so paid by Irvine was \$15,190.06; that being the amount named in the prayer of the complaint, and for which judgment was demanded against the defendants in error. In the petition for rehearing our attention has been called to the fact that this amount is in excess of the aggregate of the sums alleged in the body of the complaint to have been paid by Irvine on account of such assessments, and therefore in excess of the amount admitted by the defendants in error to have been paid by him. This error, however, can be corrected by a modification of our former judgment, without granting the petition for a rehearing. The petition for a rehearing will therefore be denied, and our former judgment will be modified so as to read as follows: The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of \$11,527.80, with legal interest thereon from May 21, 1884, and costs.

ROSS, Circuit Judge (dissenting). I am unable to agree to the disposition of this case now made by the court. In the opinion heretofore delivered, we have treated the case as an action at law. In such a case there must be, as a basis for a judgment, a verdict of a jury, or, in the event a jury be waived by the parties, findings of fact by the court, unless there be an agreed statement of facts entered into by the parties in lieu of such findings. In the present case the court below made findings of fact, which this court held erroneous in an essential particular. The logical and necessary result of such holding is, in my opinion, the reversal of the judgment, and the remanding of the case to the court below for a new trial. I do not think this court is justified in looking to admissions made during the progress of the trial, embodied in the bill of exceptions, as a basis upon which to order judgment,—especially where, as here, those admissions are contradicted by the findings of fact made by the court below. I am therefore of opinion that the judgment should be reversed, and the cause remanded to the court below for a new trial.

HANSON v. SMITH et al.

(Circuit Court of Appeals, Ninth Circuit. May 2, 1899.)

No. 471.

1. PLEADING—VARIANCE.

Where plaintiff in an action for damages counts on the loss of profit on a sale of property which he alleges he had made, but was prevented from consummating by reason of defendants' breach of a contract to sell him the property, and in compliance with an order of court files a bill of particulars, setting out the name of the person to whom he had made the sale, and its terms, he is not entitled to introduce evidence of a different sale to another person.

2. CONTRACTS—BREACH—FORFEITURE OF OPTION.

Plaintiff, who had secured from defendants an option to purchase from them an interest in certain mining claims at the expiration of nine months, agreeing to prosecute development work on the claims meantime, expending a certain sum, and that, if work ceased thereon for 30 days, the option should be forfeited, hired two of the defendants to work on the claims. Shortly after they had commenced work, and while he was indebted to them for wages, he left them with a small amount of supplies, promising to return in three weeks. He did not return, or send them either money or supplies, and they heard nothing from him for about three months. A month after he left, they suspended work, and, after the expiration of 30 days, declared the option forfeited. *Held*, that their action was justified.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

The plaintiff in error brought an action against the defendants in error for damages for breach of an option to purchase certain mining property. The complaint alleged: That on August 24, 1895, the defendants in the action, in consideration of the sum of \$1, gave to the plaintiff therein, under their hands and seals, a written option to purchase a three-fourths interest in the Shylock and the Hamlet mineral claims, situate near Mark creek, in British Columbia, for the sum of \$12,000, to be paid on June 1, 1896. The instrument contained the stipulation that: "The party of the second part [the plaintiff] take possession of and commence developing said mining claims, and continue work thereon during the life of this agreement, which said work is to be paid for by