

CITY BANE OF BOONE *V.* MERSHON *ET AL.*

Circuit Court, S. D. Iowa, C. D.

December 12, 1887.

TRIAL—VERDICT—AMOUNT OF.

In a suit to determine the amount of defendant's indebtedness, the jury found \$1,175.07 due plaintiff. On motion for new trial, the account being complicated, the court ordered a reference, when the finding, after making certain allowances, was \$1,063.86, without interest. *Held*, that effectual justice, was obtained by the verdict.

Motion for New Trial.

City Bank of Boone, plaintiff, sued S. L. Mershon and Bancroft, defendants, to recover an overpayment alleged to have been made by the plaintiff in settling the accounts of the Boone Steel Barb-Wire Company, of which both were creditors, and the plaintiff trustee. Verdict for the plaintiff for \$1,175.07, and motion for new trial by defendants.

E. L. Green and *W. S. Clark*, for plaintiff.

Charles A. Clark, for defendants.

SHIRAS, J. The Boone Steel Barb-Wire Company, being indebted to the City Bank of Boone, and the firm of Mershon & Bancroft, of Chicago, executed to the former a chattel mortgage, and to the latter bills of sale of certain personal property. The three parties finally entered into a written agreement, whereby the bank waived all claim to priority of lien on 140 tons of barbed wire then at the factory of the wire company at Boone, consenting to act as trustee in the premises. The proceeds of sale were to be credited on the indebtedness due Mershon & Bancroft, estimated to be \$8,500, until paid in full. Subsequently the bank made an arrangement with Mershon & Bancroft to undertake the sale of the wire, or a portion of it. The case was tried at the May term, 1887, the main issue being as to the amounts received by Mershon & Bancroft, and the amount of their indebtedness. The jury returned a verdict for plaintiff for \$1,175.07, thus fixing this as the sum which the defendants had received over and above the amounts due them, and which amount they were bound to account to plaintiff for. The defendants moved for a new trial, and on account of the complicated nature of the dealings between the parties, and the necessity for an examination of the books of defendants, the court ordered a reference of certain

named questions to the Honorable John Mitchell, before whom the parties were heard at length, a large amount of evidence being introduced. The referee files his report, in which he finds that there was left in the hands of Mershon & Bancroft the sum of \$1,441.96, for which they are liable; subject, however, to a possible claim on behalf of Mershon & Bancroft for \$378.10, which sum is due them from the barbed-wire company, for losses sustained on wire of special sizes ordered by the wire company, and which Mershon & Bancroft had contracted for, and were obliged to take from the manufacturers. This sum is justly due defendants from the wire company, but it is denied that it can be deducted from the balance in hands of Mershon & Bancroft as against the City Bank of Boone. Giving the defendants the benefit of the sum claimed, and deducting it from the balance of \$1,441.96 which the referee finds was the balance left in hands of Mershon & Bancroft, and there would be left the sum of \$1,063.86, which, with interest added, would not vary greatly from the amount of the verdict; and hence defendants fail to show that the verdict is substantially erroneous. The plaintiff does not move for a new trial, and hence none can be granted, unless it be shown that error prejudicial to the defendant has been committed.

Counsel for both parties claim that there is error or mistake in the amount of the verdict, but totally disagree as to the result thereof. I shall not attempt to discuss the questions presented in argument, attacking the correctness of the findings of the referee. I am satisfied the verdict was fairly rendered, and effectuates justice between the parties, even though the amount thereof might be somewhat lessened or increased on another trial.

Motion for new trial is overruled, and judgment ordered on verdict.