

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**AL GRAVES and IRENE F. GRAVES,**  
Plaintiffs,

vs.

**FIRST NATIONAL BANK OF  
AINSWORTH,**  
Defendant.

Case No. 6779

**DECREE ON ACCOUNTING**

**DATE OF TRIAL:** November 22-23, 1999.

**DATE OF DECISION:** December 7, 1999.

**APPEARANCES:**

For plaintiffs: W. Gerald O’Kief with plaintiffs.

For defendant: Thomas O. Ashby, of Baird, Holm, McEachen, Pedersen,  
Hamann & Strasheim, with corporate representatives Denton  
Weichman and Greg Soles.

**SUBJECT OF ORDER:** Decision on the merits following trial to the court in equity on  
action for equitable accounting.

**FINDINGS:** The court finds and concludes that:

1. The court finds generally for the defendant (“the bank”) and against the plaintiffs  
(collectively “Graves”).

2. The bank has accurately and adequately accounted for the Graves’ cattle sold by the bank,  
both from the surrender of possession on or about November 10, 1994, and from the replevy of the  
remaining livestock taken into possession in early May of 1995.

a. The evidence persuades the court that, except for the animals that died before or  
after they came into the bank’s possession, all of the surrendered or replevied cattle were sold at Bassett  
or Burwell.

b. The evidence further persuades the court that the net proceeds of such sales were  
duly applied to the Graves’ indebtedness to the bank and to the expenses allowed in the bankruptcy  
proceeding initiated by the Graves.

3. The evidence weighs against the Graves' contention that more cattle were surrendered to or replevied by the bank than the number for which credit was given.

a. The Graves' allegation relies heavily upon (1) the discrepancy between the loading sheet (Exhibit 2) regarding cattle loaded at the Graves' ranch and the unloading sheet regarding cattle unloaded at the Larry Painter place (Exhibit 13), and (2) Al Graves' ("Al") testimony that some of the cattle were loaded onto a trailer belonging to Denton Weichman instead of the trucks employed for that purpose.

b. Both sheets were prepared on November 10, 1994. The Graves surrendered most of the cattle on that date.

c. Greg Soles' testimony adequately explains the discrepancy regarding the difference in specific counts. The court is persuaded that the count represented by Exhibit 2 is no more reliable than the count represented by Exhibit 13. The circumstances surrounding the counting made an absolutely accurate count less than likely.

d. Al's testimony is essentially uncorroborated, except by the difference between the two sheets. Other witnesses specifically contradict that testimony. The court is persuaded that the bank's witnesses were more credible on the issue of the existence and use of a livestock or horse trailer to move part of the cattle. No witness other than Al testified that a pickup and trailer hauled any animals on November 10. The plaintiffs did not call Ron Andrus, the brand inspector, or any of the truck drivers, who might be expected to remember if livestock remained after all of the loads were hauled by the truckers. While certainly not determinative, the inferences arising from the failure to adduce such evidence provide additional support to the court's credibility determination.

4. The court concludes that the expenses charged to the Graves for the care of the cattle after surrender or replevin were reasonably and necessarily incurred.

a. The Larry Painter expenses were fair and reasonable under the circumstances.

b. The Ferguson expenses were fair and reasonable because of the condition of the cattle at the time the replevied animals were taken into the bank's possession.

(1) The court finds the testimony that the replevied animals were in poor condition more credible than Al's contrary testimony.

(2) Mike Ferguson testified persuasively and fairly.

(3) The presence of the dead animal at the time of the execution of the writ of replevin also speaks loudly to the condition of the livestock at that time.

c. The other expenses incurred for transportation and sale of the livestock also appear to be fair and reasonable.

5. Even if the court had concluded that some of such expenses were not reasonable, the amended and restated stipulation and agreement between the bank and the Graves on November 24, 1994 (Exhibit 18) precludes any such claim in this case by the Graves.

a. That agreement expressly provided for the application of sales proceeds to specific categories of expenses or charges. The agreement did not expressly or impliedly require such charges to be reasonable. The parties are bound by the plain language of the contract which they made.

b. Although application of proceeds to the bank's attorney fees would not have been allowed under state law, such application was expressly permitted by federal law in the Graves' bankruptcy action. That determination by the bankruptcy court, after being affirmed on appeal, became final and binding upon the parties. The Graves cannot use a state court accounting action to collaterally attack the federal court judgment allowing attorney fees to the bank.

6. It does not appear that other expenses of the bank were improperly charged to and deducted from cattle sales proceeds prior to the crediting of such proceeds to the Graves' indebtedness to the bank.

7. Because the court finds that the bank has accurately accounted for the number of cattle surrendered or replevied, the sale of such cattle, the amount and purpose of any expenses charged against the sales proceeds, and the application of the net sales proceeds to the indebtedness and other proper charges, the court necessarily concludes that the Graves are not entitled to relief in the form of a money judgment against the bank.

8. The issue stated by paragraph 6f of the pretrial order was eliminated pursuant to the stipulation of the parties. (Exhibit 31.)

9. The totality of the information required for an accounting was not furnished by the bank to the Graves until after the commencement of this action.

10. To the extent appropriate to do so, the court has already considered and discussed the effect of prior court rulings and of the stipulations and agreements entered into between the parties.

11. The court finds that paragraphs 1 through 7 of the plaintiffs' petition filed on July 2, 1998, are generally true and sustained by the evidence.

12. The court finds that paragraph 8 of the plaintiffs' petition was true and correct as of the date of the filing of the petition, but finds that in the defense of this action the defendant has provided such accounting.

13. The court finds that paragraph 9 of the plaintiff's petition, to the extent that it alleges facts rather than mere belief, is not true, and that the proceeds from the sale of the plaintiffs' real and personal property have been properly applied, after payment of the expenses and fees allowed by the amended and restated stipulation and agreement, to the plaintiffs' indebtedness to the defendant.

14. Accordingly, the plaintiffs' petition should be dismissed with prejudice.

15. The parties should be required to bear their own respective costs and attorney fees.

**DECREE:** IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The plaintiffs' petition is dismissed with prejudice.
2. All taxable costs are taxed to the party or parties incurring such costs.
3. All requests for attorney fees, express or implied, are denied.

Signed and entered on: December 7, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

9 Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Enter judgment on the judgment record.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

: Mail postcard/notice required by § 25-1301.01 within 3 days, with endorsement thereon: "petition dismissed with prejudice, each party to bear own costs and fees."

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

: Note the decision on the trial docket as: 12/7/99 Signed "Decree on Accounting" entered.

Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

**BY THE COURT:**

\_\_\_\_\_  
William B. Cassel  
District Judge