

IN THE DISTRICT COURT OF SHERMAN COUNTY, NEBRASKA

**COUNTY OF SHERMAN, NEBRASKA, a
body politic and corporate,
Plaintiff,**

vs.

**DONALD D. GLINSMANN and RACHEL
A. GLINSMANN, husband and wife,
owners; UNITED STATES OF AMERICA,
acting through FARMERS HOME
ADMINISTRATION, by virtue of a real
estate mortgage filed on 10-5-78 in Book
80, Page 389-342 of mortgage records of
Sherman County, Nebraska; ROBIN A.
BOCHART and DENISE M. BOCHART,
husband and wife, in possession of real
estate; RAVENNA BANK, by virtue of a
trust deed filed on 4-16-93 with the
Sherman County Clerk and a trust deed
filed on 3-18-97 with the Sherman County
Clerk; JOHN MINGUS; WEST HALF OF
SECTION 9, TOWNSHIP 14 NORTH,
RANGE 13, WEST OF THE 6TH P.M.,
SHERMAN COUNTY, NEBRASKA, LESS
PARCEL CONVEYED TO THE COUNTY
OF SHERMAN IN THE STATE OF
NEBRASKA, BY WARRANTY DEED
DATED 8-31-73, RECORDED IN BOOK
55 PAGE 396 OF DEED RECORDS OF
SAID COUNTY; and ALL OTHER
PERSONS HAVING OR CLAIMING ANY
INTEREST IN AND TO SAID REAL
ESTATE, REAL NAMES UNKNOWN,
Defendants.**

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**ROBIN A. BOCHART and DENISE M.
BOCHART, husband and wife,
Plaintiffs,**

Cases Nos. 5621 & 5681

DECREE

vs.

DONALD D. GLINSMANN and RACHEL A. GLINSMANN, husband and wife, owners; UNITED STATES OF AMERICA, acting through FARMERS HOME ADMINISTRATION, by virtue of a real estate mortgage filed on 10-5-78 in Book 80, Page 389-342 of mortgage records of Sherman County, Nebraska; COUNTY OF SHERMAN, NEBRASKA, a body politic and corporate; RAVENNA BANK, by virtue of a trust deed filed on 4-16-93 with the Sherman County Clerk and a trust deed filed on 3-18-97 with the Sherman County Clerk; JOHN MINGUS; WEST HALF OF SECTION 9, TOWNSHIP 14 NORTH, RANGE 13, WEST OF THE 6TH P.M., SHERMAN COUNTY, NEBRASKA, LESS PARCEL CONVEYED TO THE COUNTY OF SHERMAN IN THE STATE OF NEBRASKA, BY WARRANTY DEED DATED 8-31-73, RECORDED IN BOOK 55 PAGE 396 OF DEED RECORDS OF SAID COUNTY; and ALL OTHER PERSONS HAVING OR CLAIMING ANY INTEREST IN AND TO SAID REAL ESTATE, REAL NAMES UNKNOWN,
Defendants.

DATE OF TRIAL: March 28, 2001.
DATE OF RENDITION: June 26, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
SUBJECT OF DECREE: Decision on the merits following trial to the court in equity (“second trial” per pretrial order).
APPEARANCES:
For plaintiff (5621): Mark L. Eurek, Sherman County Attorney.

For plaintiffs (5681): Rodney M. Wetovick with plaintiff Robin A. Bochart and without plaintiff Denise M. Bochart.

For defendants:

Glinnsmann: John S. Mingus with defendant Donald D. Glinnsmann and without defendant Rachel A. Glinnsmann.

Bochart (5621): Rodney M. Wetovick with defendant Robin A. Bochart and without defendant Denise M. Bochart.

County (5681): Mark L. Eurek, Sherman County Attorney.

Mingus: John S. Mingus pro se.

United States: Sally Johnson, Assistant United States Attorney.

Ravenna Bank: Larry E. Butler.

SUBJECT OF DECREE: Decision on the merits following trial to the court in equity (“second trial” per pretrial order).

PROCEEDINGS: See Journal Entry on Trial Proceedings filed March 30, 2001.

FINDINGS: The court finds and concludes that:

1. These cases concern the aftermath of *County of Sherman v. Evans*, 252 Neb. 612, 564 N.W.2d 256 (1997). Although that decision represented the second appearance of the case in the Supreme Court, the first Supreme Court opinion has no particular effect upon the analysis in the present cases. See *County of Sherman v. Evans* 247 Neb. 288, 526 N.W.2d 232 (1995). In that case, which was Case No. 5335 in this court, the county sought to foreclose tax sale certificates against the Glinnsmanns. The district court entered a decree. The Glinnsmanns appealed, but did not supersede. Ultimately, the Nebraska Supreme Court determined that tax sale certificates were void, and that both the district court and the Supreme Court lacked subject matter jurisdiction.

2. Of course, the world moved on during the pendency of the appeal. During that time, the property was sold at sheriff’s sale to the Bocharts, and that sale was thereafter confirmed by the district court. After the first confirmation order was declared void by the Supreme Court as a conditional order, the district court again confirmed the sale. The Bocharts took possession and paid the purchase price, which was distributed.

3. In the wake of the second and final Supreme Court ruling, the county commenced Case No. 5621 to foreclose alleged tax liens pertaining to the same years covered by the certificates rejected in *County of Sherman v. Evans*, together with certain subsequent years. There followed a flurry of pleadings, some of which are difficult to decipher. The Bocharts counterclaimed against the county and cross-claimed against the United States, the Glinsmanns and Mingus. The Glinsmanns and Mingus cross-claimed against the Bocharts. Prior to trial, the Bocharts dismissed their counterclaim against the county and their cross-claim against the United States. It does not appear to this court that the Glinsmanns or Mingus ever attempted to actually counterclaim against the county or cross-claim against the United States. Neither of their operative pleadings asserts allegations of any counterclaim against the county nor any allegations of any cross-claim against the United States. They clearly do state a cross-claim against the Bocharts. In any event, the Glinsmanns and Mingus clearly did not pursue any such counterclaim regarding the county or cross-claim regarding the United States at trial, and such claims, if they ever existed, should be dismissed without prejudice for lack of prosecution. Thus, the matters ultimately tried in Case No. 5621 were the Bocharts' cross-claims against the Glinsmanns and Mingus, and the Glinsmanns' and Mingus's cross-claims against the Bocharts.

4. Of course, a preliminary trial was required in Case No. 5621 regarding a statute of limitations defense interposed by the Bocharts to the third cause of action of Mingus's cross-claim. An interlocutory order was entered on March 23, 2001, by this court. Nothing has transpired to affect the determinations made therein, and the court adheres to the determinations made in that interlocutory order, which of course now becomes final. The court does note the subsequent decision of the Nebraska Supreme Court in *Blankenau v. Landess*, 261 Neb. 906, ___ N.W.2d ___ (2001), effectively justifying this court's determination to deny a jury on the statute of limitations matter, finding no issue of fact and determining the question as a matter of law. The Supreme Court observed that the plain language of NEB. REV. STAT. § 25-221 (Cum. Supp. 2000) states that a jury trial on the statute of limitations issue is required only when issues of fact are raised; issues of law are to be determined by the court without a jury. The Supreme Court also reasoned that if there are only conclusions of law asserted on the statute of limitations issue, a separate hearing to address the statute of limitations issue is not required under Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000). While a hearing was necessary to adduce the factual basis of

the statute of limitations issue, the evidence was totally undisputed and raised no issue of fact for determination by a jury.

5. In the midst of the pleading flurry, the Bocharts evidently attempted to simplify and clarify the issues by filing a separate petition in Case No. 5681. There are no counterclaims or cross-claims pleaded in that case. Thus, the only claims for affirmative relief are presented in that case by the Bocharts' operative petition.

6. The two cases were consolidated for trial. The parties generally fall into two camps, for purposes of this decree. On one side there are the Bocharts, generally supported by the county, the United States, and the Ravenna Bank. On the other side there are the Glinsmanns and Mingus.

7. During the trial, various evidence adduced by the parties generally aligned with the Bocharts sought to address the question of whether the tax certificates considered by the Supreme Court in *County of Sherman v. Evans* were affected by the Glinsmanns' bankruptcy proceeding and the effect of any stipulations made during that bankruptcy. Such matters are barred by the decision of the Supreme Court, and this court declines the invitation to relitigate such questions.

8. The purchaser at a judicial sale becomes a party to the action and is bound by the decisions of the court in that action. *Sarpy Cty. v. Wright*, 146 Neb. 193, 19 N.W.2d 146 (1945), *Madison Cty. v. Crippen*, 143 Neb. 474, 10 N.W.2d 260 (1943). The Bocharts are bound by the determinations of the Nebraska Supreme Court in *County of Sherman v. Evans*, which were both decisions on appeal from Case No. 5335 in this court.

9. The decision of the Nebraska Supreme Court that the district court lacked subject matter jurisdiction in Case No. 5335 renders all proceedings held in that case void. For at least 100 years, Nebraska law has adhered to a strict rule of caveat emptor in judicial sales. The maxim of caveat emptor applies with extreme vigor to a purchaser at a judicial sale, and the purchaser is bound by every omission disclosed by the record, down to and including the judgment. *Buchanan v. Edmisten*, 1 Neb. (Unof.) 429, 95 N.W. 620 (1901). The Supreme Court has also stated that the purchaser at a judicial sale is charged with notice of the proceedings leading to the sale. *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 276, 68 N.W. 498 (1896).

10. The Bocharts are charged with knowledge of the state of the record, including the state of the record upon which the Supreme Court determined the absence of subject matter jurisdiction.

a. Under applicable Nebraska precedent, the Bocharts are charged with knowledge that the record considered by the Nebraska Supreme Court in *County of Sherman v. Evans* failed to include the stipulation from bankruptcy court; a stipulation upon which the parties aligned with the Bocharts, including the county, focused considerable attention at trial in the present cases.

b. This rule probably constitutes a legal fiction, in that it is highly unlikely that the Bocharts actually knew or understood any such thing until after the second Supreme Court opinion. The merits of such a rule may be debatable. But that debate is one for the Legislature, not this court.

c. Moreover, this court is bound by the Nebraska Supreme Court precedent holding purchasers responsible for the state of the record. *State v. Nichols*, 8 Neb. App. 654, 600 N.W.2d 484 (1999) (vertical stare decisis applicable).

11. In Case No. 5681, the Bocharts' amended petition asserts two causes of action, the first cause seeking to quiet title to the property in the Bocharts and the second cause seeking to foreclose an equitable lien for the amounts paid and invested by the Bocharts.

12. The first cause of action fails because the Bocharts lack any title to quiet. They could not acquire equitable title by means of the void proceedings in Case No. 5335. Clearly, the Glinsmanns, and later the Glinsmanns and Mingus, held legal title. Because the tax foreclosure proceedings in Case No. 5335 were void for lack of subject matter jurisdiction, the title to the property was never affected by those proceedings.

13. A purchaser at a judicial sale under a judgment void for want of jurisdiction does not acquire a lien for the amount of his bid on the property attempted to be sold. *Buchanan v. Edmisten*, *supra*. The second cause of action seeking foreclosure of an equitable lien fails because Nebraska law does not allow any such equitable lien.

14. The Bocharts' cross-claim against the Glinsmanns and Mingus in Case No. 5621 asserts a cause of action under the Occupying Claimants Act. NEB. REV. STAT. § 76-301 *et seq.* (Reissue 1996). This court concludes that, because the Bocharts are chargeable in law with notice that the

proceedings in Case No. 5335 were void, the Bocharts are not within the class of persons protected by § 76-301. The cause of action thereby fails and must be dismissed.

15. The Glinsmanns' operative cross-claim against the Bocharts in Case No. 5621 asserts two causes of action. The first cause seeks ejectment of the Bocharts from the real estate. The second seeks loss of rents and profits, and damages for improvements allegedly destroyed or damaged by the Bocharts on the property. Mingus's operative cross-claim against the Bocharts in Case No. 5621 asserts three causes of action. The first cause of action seeks a writ of mandamus. The second cause of action seeks ejectment of the Bocharts from the real estate. The third cause of action seeks loss of rents and profits, and damages for improvements allegedly destroyed or damaged by the Bocharts on the property. Thus, the Glinsmanns' first cause of action is substantially the same as Mingus's second cause of action, and their second cause of action is substantially the same as his third cause of action.

16. Mandamus is an action at law and is an extraordinary remedy issued to compel performance of a purely ministerial act or duty imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000). To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.

17. The evidence shows no duty imposed by law on the Bocharts. The law clearly provides a plain and adequate remedy available to Mingus in the ordinary course of the law. Mingus's first cause of action lacks merit and must be dismissed.

18. The other claims of the Glinsmanns and Mingus will be considered together. Because the title to the subject real estate is clearly vested in the Glinsmanns and Mingus, and because the court has rejected the Bocharts' claims to equitable title or to an equitable lien, the defendants Glinsmann and Mingus are entitled to a judgment of ejectment against the Bocharts.

19. The respective cross-claims plead for rents and profits from 1993 to 1998 (Mingus) or from 1993 to date of filing of the operative pleading on February 4, 1999 (Glinsmanns). Under our system

of pleading and practice, and the adversarial process, the issues to be tried must be formed by pleadings. *Hampshire v. Powell*, 10 Neb. App. 148, ___ N.W.2d ___ (2001). Thus, the pleadings limit the claims for rents and profits to 1993 through 1998.

20. This court, by interlocutory order, previously determined that the applicable statute of limitations bars any claims for rents and profits accruing prior to July 27, 1994. The court adopts the interlocutory order by reference and includes the same in this final decree. Thus, the rents and profits issue is further limited to claims accruing on and after July 27, 1994, through 1998. The technical period from January 1, 1999, through February 4, 1999, does not change the applicable amount of damages.

21. The court finds the testimony of defendant Robin Bochart and the independent witnesses called by the defendants Bochart more credible on the issues of rents and profits, and damages.

22. The court assesses the total damages for the loss of rents and profits for the applicable time period recited above in the amount of \$54,000.00. Judgment shall be entered in favor of the defendants Glinsmann and Mingus and against the defendants Bochart in the total sum of \$54,000.00.

23. The court finds that no damages were occasioned to the property by the actions of the Bocharts, although the same did constitute a technical trespass, and indeed, the value of the property was enhanced. The court therefore awards nominal damages of \$1.00 on the claim of the Glinsmanns and Mingus for damages to the real estate.

24. The court makes no determinations regarding the rights of the Bocharts against the county or the United States, or regarding the status of any mortgage liens of the United States against the subject real estate. These matters are outside the scope of the issues presented by the pleadings, after dismissal by the county of its claims and dismissal by the defendants Bochart of their claims against the county and the United States.

25. While this court shares the frustration of the Bocharts and the parties aligned with them, as expressed at trial, particularly during closing arguments, regarding the fairness and justice of the result, this court concludes that its hands are tied by the second Nebraska Supreme Court decision in *County of Sherman v. Evans* and the Nebraska precedent strictly applying the rule of caveat emptor in judicial sales.

26. Certain other interlocutory orders were entered in the course of these proceedings, some of which were rendered moot by subsequent events. All interlocutory orders previously entered herein should be adopted by reference and made final herein, except to the extent of any conflict with the final relief granted herein.

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

1. The operative petition of the plaintiffs Bochart in Case No. 5681 is dismissed with prejudice at plaintiffs' (Bocharts') cost.

2. The cross-claim of the defendants Bochart against the defendants Glinsmann and Mingus in Case No. 5621 is dismissed with prejudice.

3. The first cause of action of the cross-claim of defendant Mingus against the defendants Bochart in Case No. 5621 is dismissed with prejudice.

4. Judgment is hereby entered in favor of the defendants, Donald D. Glinsmann, Rachel A. Glinsmann, and John S. Mingus, and against the defendants, Robin A. Bochart and Denise M. Bochart, on the first cause of action of the cross-claim of defendants Glinsmann and the second cause of action of defendant Mingus in Case No. 5621, determining that the said defendants Glinsmann and Mingus have a legal estate in and are entitled to possession of the real estate legally described as the West Half (W½) of Section 9, Township 14 North, Range 13, West of the 6th P.M. in Sherman County, Nebraska, except a parcel conveyed to the County of Sherman, Nebraska, by warranty deed dated August 31, 1973, recorded in Book 55, Page 396, of the Deed Records of said county, and that the said defendants Bochart unlawfully keep them out of the possession thereof, and that the said defendants Glinsmann and Mingus shall recover possession of the said property and writ of possession shall issue accordingly.

5. Judgment is hereby entered in favor of the defendants, Donald D. Glinsmann, Rachel A. Glinsmann, and John S. Mingus, and against the defendants, Robin A. Bochart and Denise M. Bochart, jointly and severally, on the second cause of action of the cross-claim of defendants Glinsmann and the third cause of action of defendant Mingus in Case No. 5621, for:

a. The total sum of \$54,000.00 for rents and profits on the subject real estate for the period from July 27, 1994, through 1998 (Mingus) and February 4, 1999 (Glinsmanns); and,

b. The total sum of \$1.00 for nominal damages to the subject real estate occasioned by the matters alleged in the respective causes of action.

6. The judgments shall bear interest at the rate of 5.442% per annum from date of entry until paid.

7. Each party shall bear such party's own respective costs in Case No. 5621.

8. All other operative claims for relief, affirmative or negative, of any party to either of the respective cases, not otherwise disposed of herein, are denied.

9. All requests for attorneys' fees, express or implied, are denied.

10. The claims of the plaintiff county in Case No. 5621 against all parties are dismissed without prejudice, pursuant to previous interlocutory order. The claims of the defendants Bochart in Case No. 5621 against the plaintiff county and against the defendant United States are dismissed without prejudice, pursuant to previous interlocutory order.

11. Any claims purported asserted by the defendants Glinsmann and Mingus in Case No. 5621 against the plaintiff county and/or against the defendant United States are dismissed without prejudice for lack of prosecution.

12. The court makes no determinations regarding the rights of the Bocharts against the county or the United States, or regarding the status of any mortgage lien or liens of the United States against the subject real estate.

13. Any interlocutory order or orders previously entered herein are adopted by reference and made final herein, except to the extent of any conflict with the final relief granted herein and in the event of any such conflict the judgments entered herein shall be deemed to supersede any such interlocutory order or orders.

14. This decree shall constitute final judgment and decree. In the event that the court has inadvertently failed to dispose of any claim, counterclaim, or cross-claim, the court expressly determines pursuant to NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000) that there is no just reason for delay and expressly directs the entry of judgment as set forth above.

Signed in chambers at Ainsworth, Nebraska, on June 26, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed
“Decree” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge