

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**KEITH BARTHEL and DOROTHY
BARTHEL, husband and wife,**
Plaintiffs,

vs.

**GENE LIERMANN and ERNA
LIERMANN, husband and wife,**
Defendants.

Case No. 20274

**MODIFICATION OF
INTERLOCUTORY
DECREE**

DATE OF HEARINGS: (1) September 2, 1999, and,
(2) November 4, 1999.

DATE OF DECISION: (both) November 29, 1999.

APPEARANCES:

For plaintiffs: (both) Richard E. Gee with plaintiffs.
For defendants: (1) James G. Kube with defendants.
(2) James G. Kube without defendants.

SUBJECT OF ORDER: (1) defendants' motion for order nunc pro tunc;
(2) defendants' motion to modify the Court's interlocutory
decree within term.

FINDINGS: The court finds and concludes that:

1. On February 25, 1999, this court entered an interlocutory decree regarding all causes of action except the plaintiffs' first cause of action.

a. The first cause of action was severed for a separate trial and such trial held in abeyance pending federal administrative proceedings. That cause of action remains in abeyance for later trial.

b. The relief granted or denied by the interlocutory decree, as modified by this modification decree, constitutes interlocutory relief and does not constitute a final order because of the continuing pendency of the first cause of action.

c. In order to assure that the interlocutory decree, as modified, shall become final upon appropriate order, the court will reaffirm that no voluntary dismissal by the plaintiffs of the first cause of action shall become effective except upon motion and order of the court.

2. The defendants' motion for order nunc pro tunc actually constitutes a motion to modify the interlocutory decree.

a. The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which, through inadvertence or mistake, was not truly recorded. *Andersen v. American Family Mut. Ins. Co.*, 249 Neb. 169, 542 N.W.2d 703 (1996).

b. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. *Id.*

c. The true purpose of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made so that it will truly record the action really had, but which, through some inadvertence or mistake, has not been truly recorded. *Id.*

d. Therefore, the court considers the motion as a motion to modify the interlocutory decree.

3. The order which the court modifies was entered in the same term of court as this order. Rule 8-2 of the Rules of the District Court of the Eighth Judicial District. Consequently, Nebraska law clearly confers jurisdiction upon this court to modify its own decree. NEB. REV. STAT. § 25-2001 (Reissue 1995); *Andersen v. American Family Mut. Ins. Co.*, *supra*. However, under the circumstances in the present case, because the decree was entered only as an interlocutory decree, and as temporary relief pending adjudication of the first cause of action, the same result would have applied had the term expired prior to entry of this order. NEB. REV. STAT. § 25-705(6) (1998 Cum. Supp.).

4. Both of the defendants' motions essentially concern the relief granted regarding the plaintiffs' fourth cause of action. The court has determined that the motions have merit and should be granted to the extent set forth herein and otherwise denied.

5. The court stated most of the controlling principles of law in the interlocutory decree and will not restate them herein.

6. The defendants' second motion to modify may be read to address the court's findings regarding the failure of the defendants' counterclaim to ownership of the "triangle." To that extent, the motion lacks merit. The court's findings regarding the counterclaim, whether based upon adverse possession or acquiescence, were correct.

7. Paragraph 10c of the "Findings" section of the interlocutory decree correctly noted that the plaintiffs had requested ascertainment and establishment of boundaries under § 34-301 in their reply to the defendants' counterclaim. However, the court incorrectly found that the plaintiffs were entitled to such relief.

a. A party claiming relief under § 34-301 bears the burden of proving where the boundary line should be. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987).

b. In *State v. Jarchow*, 219 Neb. 88, 90-92, 362 N.W.2d 19, ___ (1985) (emphasis in original), the Nebraska Supreme Court recognized certain rules or procedures applicable to such actions:

Neb. Rev. Stat. § 23-1908 (Reissue 1983) provides in pertinent part as follows:

The boundaries of the public lands established by the duly appointed government surveyors, when approved by the Surveyor General and accepted by the government, are . . . held and considered as the true corners . . . and the restoration of lines and corners of said surveys and the division of sections into their legal subdivisions shall be in accordance with the laws of the United States, [and] the circular of instructions of the United States Department of the Interior, Bureau of Land Management, on the restoration of lost and obliterated section corners and quarter corners

Both parties agree that exhibit 6, which is Chapter V: *Restoration of Lost or Obliterated Corners*, of the Manual of Instructions for the Survey of the Public Lands of the United States 1973, contains the instructions which must be followed in a case such as this.

At this point it is necessary to set forth several applicable rules, which have been paraphrased from the manual.

5-1

In restoring the lines of a survey, the purpose is not to correct the original survey, but to determine where the corner was established in the beginning.

5-5

An existent corner is one whose position can be located by an acceptable supplemental survey record, physical evidence, or *testimony* of one or more witnesses who have a dependable knowledge of the original location.

5-9

An obliterated corner's location may be recovered if proven beyond a reasonable doubt by acts and testimony of interested landowners. A position that depends upon the use of collateral evidence can be accepted only as duly supported through relation to known corners, natural objects, or *unquestionable testimony*.

5-10

A corner is not considered lost if its position can be recovered satisfactorily by means of the testimony and acts of witnesses having *positive knowledge* of the *precise* location of the original monument.

5-11

Where the testimony of individuals is utilized, such evidence must be tested by relating it to known original corners and other calls of the original field notes. The surveyor must show in the report of survey the weight given testimonial evidence, demonstrating that the witness was duly qualified and had firsthand knowledge and whose testimony was not based on hearsay or personal opinion. The testimony should stand an appropriate test of its bona fide character, and it must be sufficiently accurate for what is required in normal surveying practice.

5-13

The surveyor's work is technical in character, and such surveyor is not qualified to act judicially upon the equities or inequities that may appear.

THE RESTORATION OF LOST CORNERS

5-20

A lost corner is a point of a survey that cannot be determined *beyond a reasonable doubt* from *acceptable* evidence or testimony concerning the original position, and whose location can be restored only by reference to one or more interdependent corners.

5-21

The rules for restoration of lost corners should not be employed until all original and collateral evidence has been developed. The surveyor will then turn to proportionate measurement, which is always employed to relocate a lost corner unless outweighed by *conclusive* evidence of the original survey.

5-24

Proportionate measurement is one that gives equal weight to all parts of the line. The excess or deficiency between two existent corners is so distributed that the amount given to each interval bears the same proportion to the whole difference as the record length of the interval bears to the whole record distance. After the proportionate difference is added to or subtracted from the record length of each interval, the sum of the several parts will equal the new measurement of the whole distance.

c. Reexamination of the original evidence, as well as the evidence adduced by both parties at the time of the hearings on the current motions, persuades the court that the evidence fails to show the location of the true boundary. Because the party seeking relief under § 34-301 bears the burden of presenting such evidence, the court should have found that the plaintiffs were not entitled to such relief locating the true boundary.

d. Therefore, the second sentence of paragraph 10c of the findings will be modified to state: “The plaintiffs have failed to adduce evidence sufficient to grant such relief as to the location of the true boundary.”

8. For the same reasons, paragraph 12 of the “Order” section of the interlocutory decree must be amended to strike all of the original paragraph 12 and to substitute therefor the language set forth in the “Order” section of this modification of interlocutory decree.

9. The defendants’ argument also persuades the court that the matter of the location of the fence north of the north point of the “triangle” was not placed in issue by the pleadings, and the court erred in purporting to grant relief regarding the location of the fence north of the “triangle.” Even the plaintiffs’ answer to the defendants’ second amended counterclaim prays “for a right under Neb. Rev. Stat. § 34-301 *to that portion of the property east of the triangle.*”

10. Consequently, paragraph 13 of the “Order” section of the interlocutory decree must be amended to strike all of the original paragraph 13 and to substitute therefor the language set forth in the “Order” section of this modification of interlocutory decree.

11. For the same reasons, the relief in paragraph 14 of the “Order” section of the interlocutory decree must be limited to the issues raised by the pleadings. The language set forth in the “Order” section of this modification decree is necessary and proper to accomplish such correction.

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

1. The defendants’ motion for order nunc pro tunc, construed as a motion to modify interlocutory decree, and the defendants’ motion to modify the court’s interlocutory decree within term are respectively granted to the extent of the relief set forth below and are otherwise denied.

2. The interlocutory decree, as modified herein, is interlocutory in character and does not constitute a final order. However, the interlocutory decree, as modified, shall be enforceable as a temporary order during the pendency of the plaintiffs' first cause of action, and the parties are ordered to comply with the modified interlocutory decree until further order. No voluntary dismissal by the plaintiffs of the first cause of action shall become effective except upon motion of the plaintiffs and order of the court.

3. The second sentence of paragraph 10c of the "Findings" section of the interlocutory decree is hereby modified to state: "The plaintiffs have failed to adduce evidence sufficient to grant such relief as to the location of the true boundary."

4. Paragraph 12 of the "Order" section of the interlocutory decree is hereby modified to strike all of the original paragraph 12 and to substitute therefor the following:

12. The "triangle," to the extent that the same is located within the Southwest Quarter of the Northeast Quarter (SW¹/₄NE¹/₄) of Section 5, Township 25 North, Range 15, West of the 6th P.M. in Holt County, Nebraska, constitutes the property of and belongs to the plaintiffs, and not to the defendants. To the extent that the fence now adjoining the triangle encroaches upon the plaintiffs' property in said SW¹/₄NE¹/₄ of said Section 5, the plaintiffs shall be entitled to remove the same and replace such division fence upon the true boundary between the plaintiffs' property and the defendants' property. The evidence adduced at trial is not sufficient to determine the true boundary line between the respective parcels.

5. Paragraph 13 of the "Order" section of the interlocutory decree is hereby modified to strike all of the original paragraph 13 and to substitute therefor the following:

13. The plaintiffs shall be entitled, at their own expense, to carry into effect the removal of the encroaching fence line upon the portion of the triangle located in the SW¹/₄NE¹/₄ of Section 5 and replacement thereof upon the true boundary line between the SW¹/₄NE¹/₄ and the SE¹/₄NE¹/₄ of Section 5, and the defendants are restraining and enjoined from interfering with the replacement of such fence line adjoining the triangle to the true boundary line.

6. Paragraph 14 of the "Order" section of the interlocutory decree is hereby modified to strike all of the original paragraph 14 and to substitute therefor the following:

14. The defendants and each of them, their agents and employees, and all persons claiming under them, or acting under the direction or authority of them, or either of them, are perpetually enjoined and restrained from interfering with or causing damage to the portion of the plaintiffs' real estate in the Southwest Quarter of the Northeast

Quarter (SW¹/₄NE¹/₄) of said Section 5 east of surveyed fence line creating the northwest side of the "triangle" referred to by the parties in this case.

7. Except as expressly modified herein, all other provisions of the interlocutory decree entered on February 25, 1999, remain in full force and effect.

Entered: November 29, 1999.

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 _____, 19____ by _____.

: Note the decision on the trial docket as: 11/29/99 Signed "Modification of Interlocutory Decree" entered.

Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge