

decided **guidance:** case examinations

Discovering a Plat on the Ground

The case of *Dittrich v. Ubl* 216 Minn. 396 was presented to the Minnesota Supreme Court (the Supreme Court) in 1944. The lower Court found that the defendant's barn was in trespass and ruled in favor of the plaintiff. The defendant appealed the case and the Supreme Court overturned that ruling. Here's the skinny: In 1937 Ubl sold Dittrich one (Lot 13) of two adjoining lots that he had owned for a number of years. Fences were in place thirty and forty years before the sale. They marked the north and south limits of both lots. Apparently there was no fence between the Ubl lots. Ubl's barn was built in 1899 near the line between both lots but wholly on Lot 12. Long story short, the plaintiff thought that Ubl's barn was over the line by two and a half feet. The Supreme Court summed it up like this *"Plaintiff bases his claim upon a private survey of his lot made in 1941, the results of which made such encroachment appear. Defendant relies upon the actual location of lot 13 upon the ground as determined "according to the plat" of the city of New Ulm provided for in the plaintiff's deed."*

It is just me or does anyone else smell a deed staker in the wood pile?

Okay let's get something out of the way first. I like the defense in this case. Ubl might have countered by demonstrating the non-sense of inadvertently conveying a barn that he intended to keep. He also might have folded in an adverse possession counter claim to keep the land under the barn. Perhaps evidence of acquiescence might have persuaded a court as well. God only knows, so I'll refrain from practicing law outside of confines of the barbershop. I admire this defense because it represents



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Confooseus say if your survey is creating a problem that did not exist between neighbors, perhaps your survey is the problem.

everything near and dear to the retrace-ment surveyor. Our function is to retrace the actual location of a lot on the ground according to the plat. The Supreme Court seemed to have little trouble uniting the evidence of platting which in this case includes the paper record, physical marks, reliable references, and testimony. Let's break this evidence down.

The Supreme Court starts by admitting there is no mistake or ambiguity in the deed. Nor is there a conflict between distances and monuments of the recorded plat. The problem is which starting point(s) and survey is correct. The Supreme Court

starts right with the words of recorded plat. *"Monuments for surveys are set in the center of Broadway and Center Streets and corner of Outlot Number...and Garden and Front Streets."* A black dot is shown on the plat at the intersection of Broadway and Center and a monument was "ascertainable" at the time of the case. The other two monuments were indefinite at the time. The Supreme Court also observes that *"measuring the distances from the plat the defendant's lot is located on the ground where he claims it to be, and there is no trespass by virtue of the barn encroaching 2.5 feet upon the plaintiff's lot."*

The monument at Broadway and Center was not original but a faithful replacement in the same position of the original monument described on the plat. The Supreme Court employed extrinsic aids to “show the actual location of the original monument.” Testimony from a witness (the City Engineer) identified local building corners with ties from the original monument and testified that the original position could be definitely and accurately replaced. The plaintiff’s 1941 survey was based on a different monument (Behnke) held by common report over 40 years or so. “Despite its use for many years, its origin is not shown. It is not traceable to the original plat. It does not appear to be a replacement of an original monument designated on the plat.”

The plaintiff hung his hat on the Behnke monument being reliably based on the street improvements laid out by the city. There is a legal foundation for that train of thought referenced as 4 R.C.L., Boundaries, §37 but the Supreme Court drop kicked that armadillo right out of the court room. The Supreme Courts words, not mine, “This is not a situation where there is an absence of other controlling calls or landmarks which can be ascertained, but on the contrary, the record shows a definite monument directly traceable to the one described on the original plat itself.” The Supreme Court took a good look at the Behnke corner noting that “One must indulge in speculation in order to connect it with the plat.” There was evidence of longevity, common report, and reliance which, as we know can be worthy evidence. I think the point here is that the Behnke corner is inferior to the Broadway/Center point, especially since it puts the shoe on the wrong foot to the tune of two and a half feet. “The fact that there was some slight discrepancy in measurements does not assist the plaintiff.” Pulling from *Flynn v. Glenn* we read “... and no subsequent survey can unsettle such lines...” which becomes a reality in this case. The Supreme Court really went “all Norman Schwarzkopf” on the plaintiff’s claim that “a determination in the defendant’s favor will upset the boundaries of numerous lots in the city...”. I can’t help but wonder if that offends a Court as if to say “Oh, you missed a spot”. Maybe it just seems like a childish threat to me or a lack of faith in the Court’s cognizance. Regardless the Supreme Court succinctly replied “...our only concern here is whether defendant has committed a trespass

by the encroachment of his barn 2.5 feet upon the plaintiff’s lot”. Well, that killed the conversation before dessert was served.

Lastly, the Supreme Court takes a look at the old fences. The Supreme Court felt that this indicated “that the intentions of the parties was governed by the location of the lots on the ground as designated on the plat and that the parties placed a practical construction upon the location of the lots in accordance with the measurements of the plat.” Simply stated, the 1941 survey was not part of the 1937 grant and is inconsistent with the original intentions. Here’s why. 1.) The deed is okay and calls out the plat. 2.) The fences were reliably in place on their respective lot lines and fit the plat measurements. 3.) The fences fit the platted measurements to the P.O.B. at the Broadway monument. 4.) The Broadway monument was corroborated as being reliably at the original spot called on the plat. 5.) The landowners “doings” genuinely fit the bundle of evidence representing the original plat. I score this evidentiary death match as five to zip in favor of the defendant. The decision of the 1941 survey to hold some other evidence that creates a conflict is simply foolish and the Supreme Court didn’t buy it!

Other Observations— Some Retracement Bullets

- Think within the original survey when retracing.
- Why would anyone conclude that evidence creating a problem is better than evidence that fits? I mean if the egg stinks it might just be rotten, right?
- You must concede that any new monument you set was not part of the original plat or conveyance.
- Nobody has had the opportunity to rely on that new monument for anything, ever, throughout all of history.

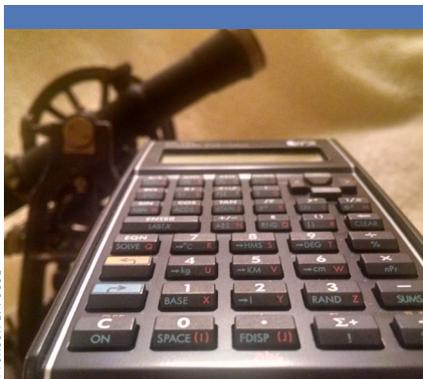
- You should feel uneasy about setting new corners and conversely find some relief in replacing, up-grading, tagging originals, and memorializing occupation.
- We are well served to isolate and re-think any abrasive results.
- Exhaust the most direct evidence first when proving or disproving an opinion.
- A retracement survey is done after the facts of platting, conveying, occupation, and improving land. It is NOT the same creature as an original subdivision plat or deed.
- Metaphorically think of platting and conveying as truly handling land and the retracement survey as simply taking a picture of land after it’s been handled.

Parting Thoughts

There are some great references in this case as for further reading. Don’t be that guy that “indulges in speculation” when forming an opinion. I quote “when two surveys disagree, the correct one cannot be determined by still another survey. It follows that resurveys are of very little use in such a case as this, except to confuse it.” Your retracement function is to maintain the stability of boundaries by harmonizing the remaining original evidence of those boundaries.

Note: A Word doc of this case is available at www.amerisurv.com/docs/Dittrich_Ubl.docx

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