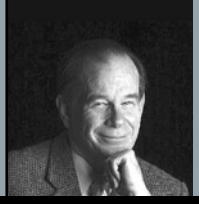


By James J. Demma, LS, Esq

Jim Demma is a Maryland licensed professional land surveyor and has practiced law in both the State of Maryland and the District of Columbia for more than 30 years. His extensive practice has included land use & development, real estate contracts and titles, condominiums, easements, land patents, boundary disputes, and all matters that touch and concern the land.

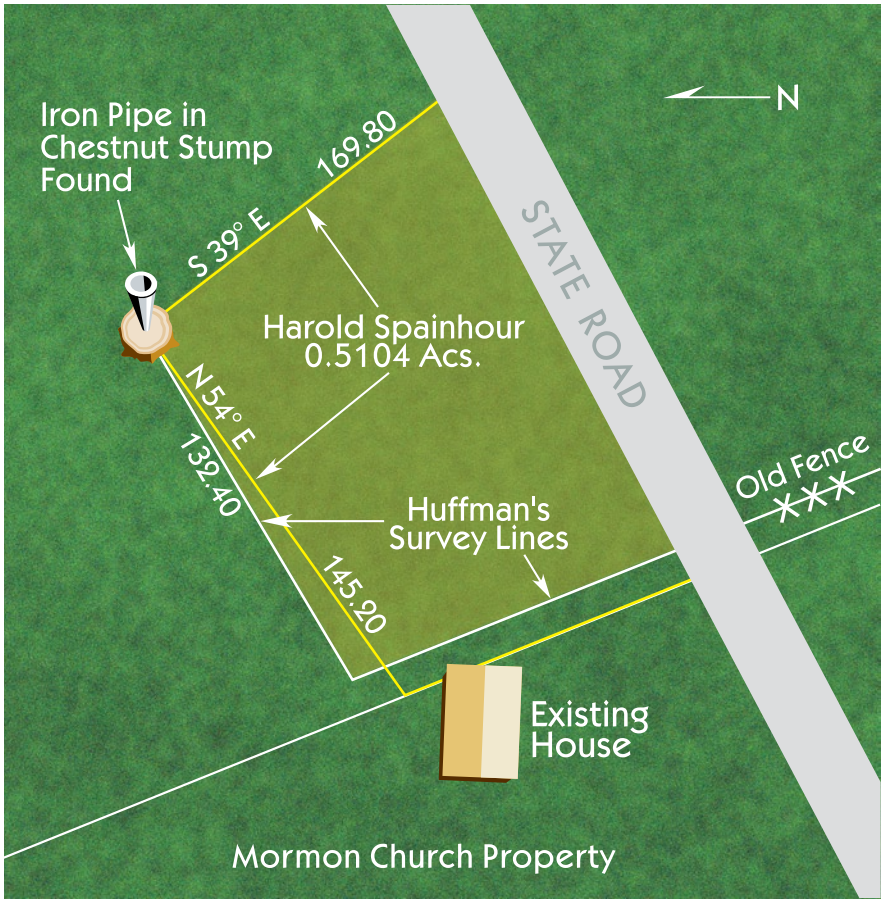
The Rule of Priority and Negligence

Have any of you ever heard of a dispute between a landowner and a surveyor? Or, maybe I should ask, how many times have you ever been involved in such a dispute? One such dispute occurred in the Commonwealth of Virginia in the early 1980's, and resulted in a very interesting reported case cited as *Spainhour v. B. Aubrey Huffman & Assoc.*, 377 S.E. 2d 615 (Va. 1989).

Spainhour, the landowner, contending that a survey was negligently performed by the surveyor, refused to pay the surveyor's fee in full. When the surveyor sued in the general district court for the unpaid balance, the landowner removed the case to the circuit court, denied liability, and *counterclaimed for damages* arising from the surveyor's alleged negligence. At a jury trial, the surveyor prevailed, receiving a verdict for the balance of his fee, and on appeal the controlling issue was whether the surveyor was negligent as a matter of law. I should point out at this time one practical tip, and that is, when suing for a fee, you can expect a counterclaim for negligence. One should always think very hard before initialing a suit against a former client for an unpaid fee.

The basic facts of this case were that a certain one-half acre parcel had been carved out of a larger tract containing approximately 11.1 acres. A house had been erected on a lot west of this parcel, which Spainhour thought was very close to, or encroaching upon, the dividing line between his parcel and the adjoining lot.

A 1907 recorded deed in the chain of title to the 11.1 acre parent tract contained a metes and bounds description which began as follows: *"Beginning at a stone on the ridge near Mormon Church thence N 54 E 8 8/10 poles to a chestnut…"* By 1982, the "stone on a ridge" could not be found. It was conceded by all parties, however, that the other end of the beginning course described in the 1907 deed was monumented. The evidence disclosed that the area had been widely grown with chestnut trees in the early part of the 20th Century, but that all had been killed by the chestnut blight in the 1920s and 1930s. However, several adjoining landowners had, for many years, considered a very large chestnut stump to be the remains of the "chestnut" tree described as the end of the beginning course recited in the 1907 deed. A succession of surveyors working on adjacent tracts over the years accepted the chestnut stump as the monumentation for the corner described in the 1907 deed. One of the earlier surveyors had driven an iron pipe into the stump to fix the exact corner point.



Spainhour believed that by beginning at the chestnut stump and running the deed distance, 8 8/10 poles (145.2 feet), along the course called for in the 1907 deed, a surveyor could establish the original location of the "stone on the ridge near Mormon Church," which had marked the beginning point of the 1907 description. That point would then mark the corner common to the half-acre parcel and the adjoining lot.

On a minor note, it was interesting that this Court had the opportunity in a footnote to define the meaning of the word "pole," in surveyors' terms, beyond just a short Black's Law definition, a "pole" being defined in this case as: *a surveyor's unit of measurement one-fourth of a surveyor's, or gunter's chain. Gunter's chain, named for Edmund Gunter (d. 1626), is 66 feet long and consists of 100 links, each 7.92 inches in length. A pole is therefore 16.5 feet in length.*

Spainhour engaged the Appellee surveyor to make a boundary survey and the plat was furnished to Spainhour along with a bill for services in the amount of $2,341.25. Spainhour was, however, dissatisfied with the plat. Although the Appellee surveyor accepted the pipe in the chestnut stump as a monument, his plat ran the line from that pipe toward the adjoining lot 132.40 feet rather than 145.2 feet as called for in the 1907 deed. Spainhour paid $1,100 on the bill, but refused to pay the balance of the bill, which I assume was only $1,241.

Spainhour then engaged another surveyor to survey the same half-acre parcel. The courses and distances that this second surveyor reestablished confirmed, with a reasonable degree of accuracy, that the pipe in the chestnut stump was indeed the corner described in the 1907 description. This second surveyor then ran the distance of 145.2 feet as called for in the 1907 deed, and thereby established the beginning point of the deed, which formed one end of the disputed boundary.

At the trial, the cause of the disagreement between surveyors became apparent. The Appellee surveyor had disregarded the 145.2-foot distance called for in the 1907 deed for two reasons. First, measuring that distance from the pipe in the chestnut stump brought the line to a point which did not agree with the alignment of an old fence (with a bow in it) that he had found, which to him, "showed signs of such antiquity," to which he concluded had been accepted as the boundary line. The second reason for disregarding the 145.2-foot deed distance related to acreage, in that by using that distance, his calculations resulted in a lesser area for the parcel. Therefore, in considering the old fence, and the computed area of the parcel, he calculated the distance to be 132.40 feet, rather than the 145.20 feet called for in the 1907 deed.

There was much testimony at the trial by various surveyors about modern surveyors' techniques, and how surveyors formerly employed the magnetic compass to establish courses, with the result varying from year to year due to changes in magnetic variation. There was also testimony that was interesting to the Appeals Court about how surveyors presently compute their courses and distances in a theoretical horizontal plane, and that *"older measurements were made by survey parties hauling their chains up hill and down dale. The net result is that recent surveys frequently disagree with older surveys of the same property."* How true!

> **"When suing for a fee, you can expect a counterclaim for negligence."**

The main point of this case was whether or not the Appellee surveyor had erred in disregarding a recorded distance, relying rather on an unrecorded fence line as observed in the field, and his dependence on an acreage computation.

As the Appeals Court pointed out, land surveyors, like other professionals, are governed by certain standards, which have ripened into rules of law. One of these rules of law is that in the absence of evidence of contrary intent, a distinct order of preference governs inconsistencies in the description of land, to wit:

1. natural monuments or landmarks;
2. artificial monuments and established lines, marked or surveyed;
3. adjacent boundaries or lines of adjoining tracts;
4. calls for courses and distances;
5. designation of quantity.

This case points out that this foregoing rule is not inflexible, and would not be applied if to do so will frustrate the intent of the parties to the deed. In this Spainhour case, however, there was no evidence of the intent of the parties to the crucial 1907 deed other than its language. Therefore, this rule for the order of preference had to govern in this particular circumstance.

I found another interesting footnote in this case for us surveyors to consider: *When the conflict is between courses and distances, courses should prevail because they were presumably set by the more experienced surveyor using a compass, while the distances were measured by the less experienced chain carriers.*

After it was established by the testimony that the chestnut stump in which a pipe had been set was accepted by all concerned as a natural monument, meeting the criteria of the above rule, the sole question for the surveyor was whether the distance recorded in the 1907 deed should prevail over the inconsistent measurement of acreage. On that point the Appeals Court said that the rule is clear, in that "quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances."

This Virginia Appeals Court concluded that the Appellee surveyor was *negligent as a matter of law* for not following the rule of priorities in boundary control, and that a summary judgment on the issue of liability should be entered against him. I can only assume that this judgment against the surveyor negated his claim for an unpaid bill for services rendered. The practical lesson that I observed from this case – which I have always known – is that before you go off and sue your former client for a fee, whether it is large or small, consider the consequences of receiving back from the defendant, by return service of process, a counterclaim in negligence. You can bet that it will happen. Think about this consequence very hard before you have that law suit for an unpaid fee of yours filed.