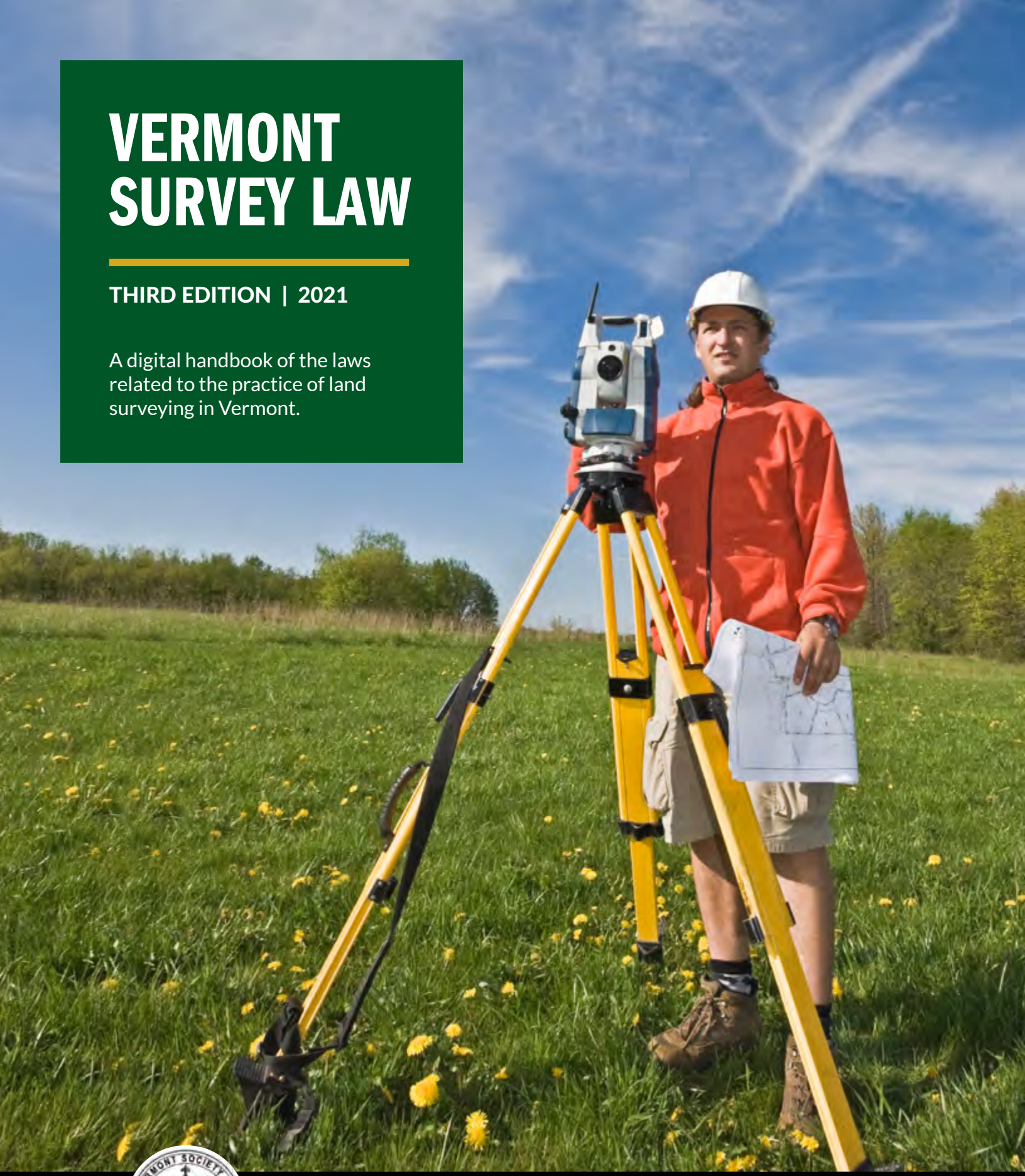
VERMONT SURVEY LAW

THIRD EDITION | 2021

A digital handbook of the laws related to the practice of land surveying in Vermont.



A PUBLICATION OF THE VERMONT SOCIETY OF LAND SURVEYORS

The Vermont Society of Land Surveyors is grateful for the time and expertise of Paul Gillies, Esq., who prepared this update of *Vermont Survey Law*.

The goal of this manual is to provide surveyors with the basic legal knowledge to perform their jobs in a professional and proper manner.

TABLE OF CONTENTS

Click on the listing to jump to the right page.

Click on the listing to jump to the right page.

Click on the listing to jump to the right page.

INTRODUCTION

The Vermont Society of Land Surveyors first published a book of selections from Vermont laws and rules in 1986, with a second edition in 1994, and issued supplements in the several years following. It served its purpose in those early years, providing references to the laws that affect the practice of this profession, but it quickly became outdated, and unmanageable given the need to replace sections as laws changed.

The promise of a third edition has been discussed for several years. This is a digital handbook, organizing the laws directly applicable to the practice of land surveying, in an accessible format, which can be updated regularly as laws change at a minimal effort.

The practice of land surveying is very different today than it was even a generation ago, largely due to changes in technology. The laws have changed more gradually. The premise of this manual is to provide the surveyor with the basic legal knowledge to perform in a professional and proper manner.

Click the underlined text to go to the laws and documents referenced in the manual.

THE VERMONT CONSTITUTION

The Vermont Constitution is Vermont's fundamental law. It may only be amended by the voters, not the Legislature. It is the shortest and least amended of all the states' constitutions, the first to abolish slavery and guarantee compensation for public takings of private land. It has two chapters, the first called the Declaration of the Rights of the Inhabitants of the State of Vermont, which consists of statements of principles covering the basic rights of Vermonters, guarantees individuals may demand of their government. The second is entitled the Plan or Frame of Government, which establishes the powers of the executive, legislative, and judicial branch, among other details of the mechanics of governance.

The Declaration of Rights

Every Vermonter should be familiar with the rights enumerated and guaranteed by the Vermont Constitution. For surveyors, a few articles are particularly relevant. The first Article provides, "**That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety…."** Possessing property is among the natural, inherent, and unalienable rights of Vermonters.

Another is Article 2, which provides:

> **Article 2. [Private property subject to public use; owner to be paid]**
>
> **That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.**

Article 2 is the constitutional basis for condemnation of land and rights-of-way by state and local governments. Statutes including those in Title 19 of the Vermont Statutes Annotated (hereafter V.S.A.) provide the details on warnings, hearings, decisions, and appeals. Other statutes govern takings by utilities. The first great statewide condemnation exercise came with the railroads, later with the building of the Interstate, and the construction of dams for hydro power and utility corridors, like the one constructed through western Vermont recently by Vermont Gas. When property was needed for public purposes before the era of the railroad, when government condemned, it never paid for the land it took, only the improvements. This reflected the ancient English idea that as all land originally belonged to the sovereign, it could take what it needed. Judge John Rowell expressed the same idea. "The theory of the right of eminent domain is that all lands are held mediately or immediately from the state, upon the implied condition that the eminent domain, the superior dominion, remains in the state, authorizing it to take the same for public uses, when necessity requires it, by paying therefor an equivalent in money." *In re Barre Water Co.* (1890).

Article 5 guarantees that "**the people of this State by their legal representatives, have the sole, inherent and exclusive right of governing and regulating the internal police of the same.**" Article 5 is the source of the police power. It has been applied to confiscations of counterfeit coins and spirituous liquors. *Spaulding v. Preston* (1848); *State v. Four Jugs of Intoxicating Liquor* (1886). It has served as the foundation for the regulation of railroads and the environment. *Thorpe v. Rutland & B.R. Co.* (1855); *State v. Morse* (1911). It can preempt claims of unconstitutional taking. *State v. Theriault* (1898). It is among the most powerful of constitutional guarantees, elevating the police power over competing articles in the bill of rights.

The police power is not "a grant derived from or under a written constitution," but is *inherent* in state government. *In re Guerra* (1920). It is so essential that it is "beyond the power of a state to divest itself of its right and duty in respect of the full exercise of this power." *Sabre v. Rutland R.R.* (1913).

Article 6 provides that "**all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and**

servants; and at all times, in a legal way, accountable to them." This article is the constitutional authority for the state's open meeting and access to public records laws.

Plan or Frame of Government

Section 6 of the Plan or Frame of Government lists the powers of the legislature, which include the authority to "**grant charters of incorporation, subject to the provisions of section 69, [and] constitute towns, borroughs, cities and counties….**" Many Vermont towns and all villages have legislative-granted charters, which are available through legislature.vermont.gov in Title 24 Appendix. Section 69 also describes charters, stating that "**No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are to be and remain under the patronage or control of the State; but the General Assembly shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed.**"

Section 62 provides that "**All deeds and conveyances of lands shall be recorded in the Town Clerk's office in their respective towns; and, for want thereof, in the County Clerk's office in the same county.**" Before towns were organized, before there was a town clerk's office, deeds were recorded in the county clerk's office. Originally there was only two counties, Bennington and Unity, respectively on each side of the Green Mountains. New counties were formed from parts of those two. For that reason, you may find early deeds for northern towns on the west side of the mountains in Bennington, Rutland, Addison, or Chittenden counties, depending on the date.

Click the underlined text to go to the laws and documents referenced in the manual.

ACTS OF THE LEGISLATURE

At legislature.vermont.gov the state has provided digital copies of all current laws, organized by title. Legislative journals are available through that site, for sessions back to the 2009-2010 session. Many early Acts and Resolves, and House and Senate Journals, are available through hathitrust, the most effective search engine for locating digital copies of laws, journals, and other essential sources.

The State Archives has all of the Acts and Resolves and journals by year.

The legislative home page provides word-searchable access to the current constitution and statutes, as well as acts and resolves and journals for the last several decades.

Before 1836, when the Vermont Senate was created, the complementary legislative function was a body called the Governor and Council. E.P. Walton edited eight volumes of the records of the Council, and filled each volume to the brim with original records on specific subjects raised during the first 49 years of our history. Each of these is available through Google Books. *Records of the Vermont Governor and Council* is the title of the series.

The State Archives at Middlesex has copies of the drafting records for bills, which can only be accessed with permission from the Legislative Council. Contact the Council at 828-2231 or through its webpage. The Archives also receives minutes of committee meetings, at the end of each legislative session.

The legislative home page provides word-searchable access to the current constitution and statutes, as well as acts and resolves and journals for the last several decades.

The Archives stores copies of bills introduced and not enacted for many sessions, and a complete set of pocket parts from the beginning of the Vermont Statutes Annotated. Sometimes the best source of former

versions of statutes are pocket parts from former years. This occurs when a law that has appeared in a compilation is amended more than once in the interim before the next new volume of the V.S.A.

The Legislative Council can provide digital copies of committee hearings upon request. Twenty years ago the magnetic tapes were transcribed, but that service is no longer available.

The State Papers series has a volume compiling early legislative reports, and the State Archives has prepared a listing of all reports. See *Vermont Legislative Reports: An Index to Reports found in the Journals of the Vermont House and Senate*, State Papers of Vermont XXII (1991).

Daniel B. Carroll wrote *The Unicameral Legislature of Vermont*, which was published in the 1932 *Proceedings of the Vermont Historical Society*, describing the Vermont legislature before the creation of the Vermont Senate, and arguing why that decision was a mistake.

Statutes Relating to Surveying

Surveyors' work is governed principally by some of the thirty-three titles of Vermont Statutes Annotated. The set of green books lines every town clerk's office, but most find the statutes at legislature.vermont.gov. Choosing the "Vermont Laws" button and then "Vermont Statutes Annotated" takes you to the titles, and within the titles are chapters and sections of current Vermont laws.

A Surveyor's Right to Enter Private Property

Section 4 of Title 27 will be of particular interest to surveyors as it guarantees that in "cases wherein the title to lands, tenements, or hereditaments may come in question, or in order to establish boundaries between abutting parcels, a licensed surveyor with the necessary assistants employed by any of the parties to such disputed title, may enter upon such lands or real estate or other lands for the purpose of running doubtful or disputed lines and locating or searching for monuments, establishing temporary monuments and ascertaining and deciding the location of the lines and monuments of a survey, doing as little damage as possible to the owners of such lands."

Removal of Surveying Monuments

In 13 V.S.A. § 3834, "A person who knowingly removes or alters monuments marking the boundary of lands or knowingly defaces, alters, or removes marks upon any tree, post, or stake that is a monument designating a point, course, or line in the boundary of a parcel of land shall be fined $100.00 and shall be civilly liable for the replacement cost and any consequential damages. However, land surveyors in their professional practice may perpetuate such monumentation by adding additional marks, or by remonumenting nonsubstantial monuments or by the placing of new monuments to preserve monuments to be destroyed or made inaccessible."

The prohibition has a long history. Amenhopte III, an Egyptian pharaoh in the fourteenth century B.C.E. ordered, "Remove not the boundary stones of the cornland and change not the position of the measuring tape." This same

rule is found in two places in the Bible. “Remove not the ancient monument which they fathers have set.” Proverbs 22:28. “Thou shalt not remove they neighbor’s landmark, which they of old time have set.” Deuteronomy XIX 14.

Presumed Width of Public Right-of-Way

The law presumes that the right-of-way of each highway and trail shall be three rods wide, otherwise properly recorded. 19 V.S.A. § 702. “Otherwise properly recorded” means a road survey in the town land records describing with metes and bounds the course of a highway or trail. The presumption only works if there is no evidence of a width; it is not valid without having searched the record and found none.

Municipal Lines

Section 1461 of Title 24 provides directions on how to locate and alter municipal boundary lines, including arbitration when the selectboards can’t agree, a survey, and legislative action to alter the line.

Treble Damages for Tree Removal

Section 3602 of Title 13 defines damages for timber removal without permission by a trespasser by the size of the tree measured by stump diameter or DBH ("diameter breast height").

Section 3606(a) provides, "In addition to any other civil liability or criminal penalty allowed by law, if a person cuts down, fells, destroys, removes, injures, damages, or carries away any timber placed or growing for any use or purpose whatsoever, or forest products standing, lying, or growing belonging to another person, without permission from the owner of the timber or forest product, or cuts out, alters, or defaces the mark of a log or other valuable forest product, the party injured may recover of such person, in an action on this statute, treble damages for the value of the timber or forest product, and any damage caused to the land or improvements thereon as a result of such action. The injured party or landowner may rely on an assessment of damages based on the kind, condition, location, and use of the timber or forest product by the injured party or landowner, or alternatively, may elect to rely on the values established under section 3602 of this title." If the one doing the cutting had "good reason to believe that the timber or forest products belonged to him or her, or that he or she had a legal right to perform the acts complained of, the plaintiff shall recover single damages only."

Regulation of Land Surveyors

Land surveyors were first regulated in 1969. The present law is found at 26 V.S.A. § 2501 and following. Scroll to the bottom to "Full Text of Chapter" to see each of the sections of this chapter. Section 2502 lists the definitions that apply to the chapter. "Practice of land surveying" is critical in understanding the extent of a surveyor's powers, and is used principally in determining whether an unlicensed person has violated the law. Section 2503 carries that idea further by defining what unlicensed persons cannot do. Exemptions are included in subsection (b), including "preparation of assessment maps, current use maps, and maps not intended to indicate the legally authoritative location or demarcation of property boundaries or extent where legal rights or interests in any tract of land are or may be affected." Where other professions or trades perform duties incidental to those occupations, these acts are also exempted.

Section 2544 defines the powers of the Board, including the authority to adopt rules relating to the qualifications for licensure and to minimum standards of practice. It also authorizes the Board to conduct disciplinary proceedings, which are also ruled by Chapter 5 of Title 3. The chapter defines what constitutes unprofessional conduct in Section 2598. Sections 2591, 2592, and 2592a described the requirements for licensure. Section 2596 describes the use of the seal and the contents of the mandated certification statement.

To maintain their licenses, land surveyors must complete a maximum of 15 hours of continuing education for each year of renewal, as determined by the board by rule under Section 2601. At present ten hours is required.

Title 3 contains a chapter on professional regulation, which begins with Section 121. These generic rules complement the Title 26 statutes and the rules of the Board, covering unauthorized practice (Section 127), the discipline process (Section 129), and unprofessional conduct (Section 129a). Section 130a describes appeals (first to an appellate officer, then to the Supreme Court). Section 131 describes accessibility and confidentiality of disciplinary matters. Note that only complaints resulting in the filing of disciplinary charges or stipulations or the taking of disciplinary action are made public. Complaints that result in no action remain confidential.

Statute of Frauds

Section 181 of Title 12 (also known as the Statute of Frauds) requires contracts for the sale of lands, tenements, and hereditaments, or of an interest in or concerning them to be in writing to be enforceable. Contracts that will take longer than a year to complete also must be in writing.

Statutes of Limitations

Chapter 23 of Title 12 provides the deadlines for the filing of complaints. Section 501 sets a 15-year period for recovery of lands, and is used in deciding adverse possession and prescriptive use claims. Note that Section 462 exempts lands given, granted, sequestered, or appropriated to a public, pi-

ous, or charitable use, or lands belonging to the State, from adverse takings or claims. Municipal lands, however, are not included in this exemption.

Railroad lands cannot be adversely possessed. 5 V.S.A. § 3425. Civil actions have a limitation of six years after the cause of action accrues. This has been applied to actions to quiet title. 12 V.S.A. § 511. In 1989, in a pair of cases that abandoned the traditional firm deadlines set in legislation, the Supreme Court decided the commencement date for calculating the limitation of civil actions was the date of discovery, not necessarily the date of the act that had previously started the stop clock. For some years the court had resisted adopting a discovery rule, but in *Lillicrap v. Martin* and *University of Vermont v. W.R. Grace and Company*, the Supreme Court finally reversed itself. The period of limitation begins when "the plaintiff has or should have discovered both the injury and the fact that it may have been caused by the defendant's negligence or other breach of duty." *Lillicrap v. Martin*, 156 Vt. 165, 176, 591 A.2d 41, 46 (1989); *University of Vermont v. W.R. Grace and Company*, 152 Vt. 287, 290, 565 A.2d 1354, 1357 (1989).

Section 1604 of Title 12 allows the owner of real or personal property to testify as to its value, an exception to the general rule about expert witnesses.

Highways

Title 19 covers the statutes relating to town and state highways. See "History and Law of Vermont Town Roads."

Survey Plats

Section 1403 of Title 27 describes the legal requirements for survey plats, for recording.

Click the underlined text to go to the laws and documents referenced in the manual.

Marketable Record Title Act

The Marketable Record Title act has been adopted to bring stability and clear authority to property with 40-year unbroken chains of title, wiping away extenuating claims from an earlier time, unless they are renewed on the record. 27 V.S.A. § 601.

Ways of necessity, which are rights-of-way created by the subdivision of land that leaves one part without an express access to a public highway, are also extinguished after 40 years, without a recorded notice of their existence. *Gray v. Treder*, 209 Vt. 210, 204 A.3d 1117 (2018).

The Supreme Court ruled in 2020 that the Marketable Title Act does not apply to easements which are clearly observable on the ground. *Bartlett v. Roberts*, 231 A.3d 171 (2020).

Open Meeting Law; Public Records

Title one also contains the Vermont Open Meeting law and the Access to Public Records law. 1 V.S.A. § 310 and following; 1 V.S.A. § 315 and following. The access law gives rights to prompt review and copying of public records.

Vermont Coordinate System

Section 671 and following establishes the Vermont Coordinate System, deferring to the National Ocean Service/National Geodetic Survey for plane coordinate values. Section 676 provides, "For the purposes of describing the location of any survey station or land boundary corner in the State of Vermont, it shall be considered a complete, legal, and satisfactory description of such location to give the position of such survey station or land boundary corner on the system of plane coordinates as defined in this chapter."

Meridian Lines

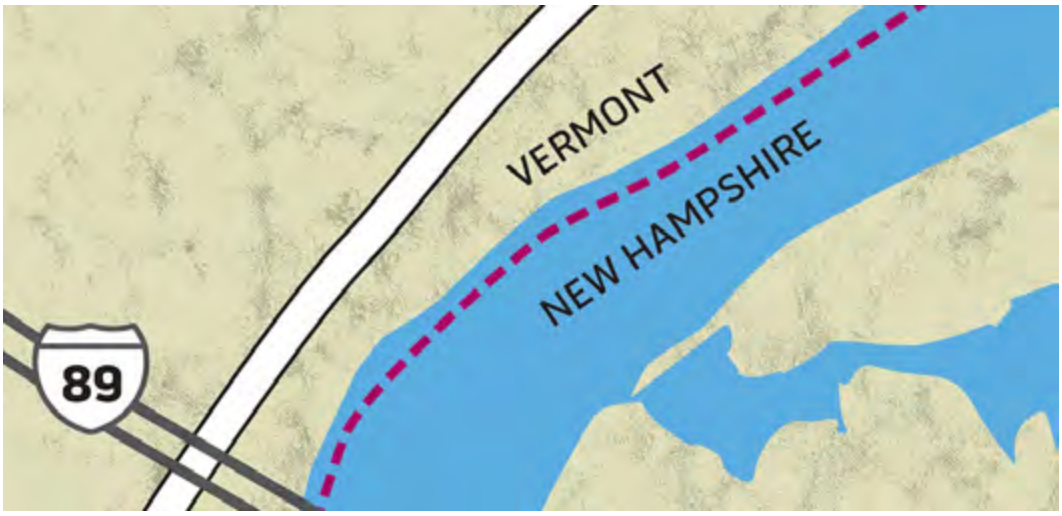
Section 731 and following of Title 3 requires the establishment of meridian lines by suitable stone or iron posts at the extremities of the true meridian line in each town.

Purchase of Vermont Lands by U.S.

Section 552 of Title 3 grants legislative consent to the United States to purchase land in Vermont, but not for flood control purposes.

Perambulation of New Hampshire-Vermont border

Section 611 of Title 3 instructs the Attorney General to perambulate the boundary line between New Hampshire and Vermont, renewing markers and bounds as needed, once every seven years.



State Deeds

All deeds, contracts of sale, leases, and other documents or copies of them conveying land or an interest in land to the State, except transportation rights-of-way, leases, and conveyances are filed in the Office of the Secretary of State. 3 V.S.A. § 103.

The State Administrative Procedure Act

The State Administrative Procedure Act is a generic source for information on adoption of administrative rules and the conduct of disciplinary or other hearings by state boards, including the Board of Land Surveyors. 3 V.S.A. § 800 and following.

State Mapping

The Division of Geology and Mineral Resources within the Agency of Natural Resources is charged with conducting surveys and research on those subjects, including the topography of the State. 10 V.S.A. § 103.

Place Naming

The Board of Libraries is designated state agency to name geographic locations, including mountains, streams, lakes, and ponds, when petitioned by no less than 25 interested persons or a state official. 10 V.S.A. § 151 and following.

Navigable Waters and Shorelands

The State protects navigable waters and shorelands as their trustee. 10 V.S.A. § 1001 and following. The State Water Resources and Shoreland Use Plan guides this effort. The Secretary of Natural Resources has adopted rules regulating the use of public waters.

Act 250

Act 250 regulates the development of large residential and commercial development. 10 V.S.A. § 6001 and following. The Vermont Natural Resources Board has adopted rules governing Act 250.

The laws regulate the creation and authority of land trusts, defining who can acquire rights and interests in real property for purposes of conservation. 10 V.S.A. § 6301 and following.

Cemetery Plats

The law describes the requirements of cemetery plats in Section 5310 of Title 18.

Condemnation

Section 2805 of Title 24 treats the process of condemnation for municipal buildings.

Zoning and Planning

Chapter 117 of Title 24 provides the general law of zoning and subdivisions. Some towns have digital copies of their zoning bylaws and subdivision regulations. Otherwise these are available on paper at the town office.

Septic Systems

The State requires a wastewater system and potable water supply permit for subdivisions of land, new building (including single family dwellings) requiring a septic system and water supply. The Agency of Natural Resources has adopted rules for this permit process.

Stream Easement

A public easement in a stream cannot be lost or abridged by prescription or adverse possession. 25 V.S.A. § 141.

Farm Crossings

The law governing farm crossings, cattle guards, fences, and watercourses is found beginning at Section 3639 of Title 5. When railroads cease operation, the State or municipality shall allow abutting farm operations to use the land over which the rights-of-way pass for agricultural purposes. 5 V.S.A. § 3431.

Poles and Wires

The right to use the public right-of-way for poles and wires is described in 30 V.S.A. § 2502.

Local Ordinances

Many towns have digitized their zoning bylaws and subdivision regulations in their home pages, along with other local ordinances.

Town Charters

Some towns, most villages, and all cities have adopted charters, which are available for review at 24 V.S.A. Appendix.

Town Land, Vital, and Meeting Records

As with zoning and subdivision, some towns have digitized their land records, which are available for a fee from the town. A complete listing of those towns and urls to contact them are found at the Vermont Municipal Clerks' and Treasurers' Association website.

Vital records and town meeting records are available at all town clerks' offices. During the pandemic, there may be limits of time and number of patrons. Call ahead before traveling to the town office. The State Archives includes vital records on microfilm.

Lease Lands Extinguished

In 2012, the General Assembly repealed the laws relating to lease lands. No. 155, 2011 (Adj. Sess.), § 12.

Find a complete listing of towns that have digitized land records at the Vermont Municipal Clerks' and Treasurers' Association website.

OPINIONS OF THE ATTORNEY GENERAL

The Attorney General is the prosecutor, defender, and advisor of the State, its chief law enforcement officer. As advisor, the 24 modern Vermont Attorneys General have written and published hundreds of opinion letters to governors, commissioners, and legislators. Together they reveal the cultural and legal changes that bedeviled and inspired Vermont state government during the last 115 years. They also represent an important source of Vermont constitutional law.

For much of the twentieth century, Vermont Attorneys General published their decisions in a biennial report, beginning at the time the office was reestablished in 1904, but the publication ceased many years before the statute mandating the report was repealed in 2009. The A.G.'s office has a series of three-ring binders indexing the various opinions over the years, and the web page of the office provides links to digital versions of the letters of Bill Sorrell and T.J. Donovan. But those most recent A.G.s have issued significantly fewer public opinions than their predecessors.

Over the years, a few of these opinions have addressed matters of value to the surveying profession. A 1932 Opinion advised the State Highway Department not to pay compensation to landowners when a present road is widened when the widening doesn't exceed the one and one-half rod limit on either side. A.G.O. 165. Another from the same year advised the State Highways Board to use three rods as the width of highways, measured one and one-half rod on each side of the center of the traveled portion of the highway, "unless otherwise informed." A.G.O. No. 170. One more added that where there is a record of a highway being laid out in the records, but the survey cannot be rerun or the location limits determined, the State Highway Board cannot grant a permit for a pole line within the three-rod limit. A.O.G. Nos. 170 and 176.

In 1936, the A.G. told the Board that the law authorizing sales of land to the

federal government does not give the Board the authority to convey other acquired property than that described in the legislation. A.O.G. 475.

A 1938 opinion advised that grants of land abutting public waters pass title only to the water's edge or the low-water mark if there be a definite low-water tide. He explained that "boatable waters" as the term is used in the Vermont Constitution are waters of "common passage," as highways, navigability being the true criterion, to some purpose useful to trade or agriculture. A.G.O. 173. In 1940, the A.G. explained that "metes and bounds" means the boundary line or limit of a tract, which boundary may be pointed out and ascertained by rivers and objects, natural or artificial, which are permanent in character and erection. A.G.O. 363.

The A.G. stated that permission for erection of electric power lines in the public right-of-way of all highways in unorganized towns need to be obtained from the State Highway Board. A.G.O. 155. That same year he urged that highways no longer in use be discontinued using the statutory process and not by use of quit claim deeds. A.G.O. 203. Then in 1960, he explained that there is no obligation of the state or a town to compensation a neighbor for loss of a spring within the limits of a highway right-of-way when necessary for improvements to the road. A.G.O. 55.

In 1966, the A.G. gave his opinion that the State has statutory authority to relinquish a section of a state highway to a town. If it owns only an easement, then only an easement may be conveyed, but only to the holder of the underlying fee of the land. The Auditor of Accounts must first approve the conveyance. A.G.O. 1. The duty to correct errors in official records "so as to make the records conform to the facts without the need to rerecord the instrument," according to a 1968 opinion, but once the office is terminated the former recording officer cannot correct past mistakes. A.G.O. 86.

A 1972 opinion stated that a registered professional engineer must be licensed as a land surveyor in the practice of surveying, whether in conjunction with engineering practice or not, as surveying is not included within the practice of engineering. A.G.O. 311. This strict reading of the land surveyor law has been ameliorated by legislation. Property descriptions in deeds need not be written by a surveyor and need not contain a surveyor's description of boundaries, according to a 1973 opinion. The Attorney

General clarified that a description required in a deed is not a formal survey description. A.G.O. 38.

Copies of these opinions that have been published can be obtained from the State Archives.

What the State's highest-ranking lawyer thinks is not really precedent, in court at least, but the General Assembly certainly listens to what the officer thinks, and governors proceed at their risk in ignoring the advice of the one who will defend their decisions when challenged. Vermont's U.S. District court has acknowledged the opinions are not binding, but are "entitled to weight in determining the legislative intent behind a state statute." *Sprague v. University of Vermont*, 661 F.Supp. 1132, 1138 (1987) (Billings, D.J.). When other sources fail to provide "controlling authority," the opinions take on increased weight, and when exigencies of a particular prosecution or defense require the State's lead attorney to take a position, it's worth exploring whether prior A.G.s might have taken a different position on critical issues.

John Lysobey appeared pro se in a series of cases involving a claim of access to his property on Okemo Mountain 20 years ago, and relied on two opinions of the Attorney General, issued in 1970 and 1987, to buttress his arguments. Justice John Dooley gave them little respect. "The opinions of the Attorney General are, however, merely advisory opinions for the benefit of state officers." They have, he explained, "no binding effect in this Court." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 762 A.2d 1219 (2000).

RULES OF EVIDENCE

The Vermont Rules of Evidence are found through the Vermont Legislature's portal, using the Lexis system. For surveyors, several rules are essential to know. Rule 703 addresses expert opinion testimony:

> **The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.**

The first issue is whether a surveyor is qualified as an expert; the second is whether the surveyor is persuasive. In *voir dire*, you will be asked about your education, experience, and methods and surveys. Prior to trial, you may be asked to provide copies of all notes, correspondence by and from a client or associate, and sit for a deposition where your work will be scrutinized carefully. Rule 705. Rule 501 requires you to be a witness if summoned, disclose all matters, and produce any object or writing. A land surveyor has no constitutional, statutory, or common law privilege. Similarly, communications by and from attorneys with surveyors are usually not privileged, unlike attorney-client protections, but when a surveyor is hired by an attorney, there may be privilege for their communications. V.R.E. 502 .

Sound practice suggests experts are persuasive as long as they are objective. Crossing from land surveying into advocacy for a client's claims is inadvisable for that reason.

When serving as a witness in a bench trial, without a jury, an expert should address the court if possible, not the examining attorney. You should avoid arguing with counsel from the witness stand, although you should remain firm in your opinion, without sounding defensive. In a jury trial, address the jury and not the court. You may bring notes or papers with you to the stand to help refresh memory, but expect that the opposing party will be able to review them. Rule 612. Expect to be cross-examined on your testimony. The judge may also ask questions. Rule 614. It's advisable not to debate the law with counsel or the court. You are there for facts and opinion of facts.

Hearsay is not allowed in testimony. Rule 802. There are exceptions, but the general rule is that an expert can relate what you've learned from others. Conversations with the party-opponent are also allowed. You met in the field, and the landowner said that is his northeast corner. His neighbor, in court, asks what was said. That conversation is not hearsay.

Declarations of deceased persons are hearsay, but when they involve the location of a dividing line between lands of individuals they can be admitted into evidence, provided the deceased person had actual knowledge of the location of the line or peculiar means of knowledge, made at a time when the person had no interest to misrepresent, made while in the immediate vicinity of the line, and pointing it out.[1]

The declarations of two men, both deceased, as to the location of a line separating two lots, made upon or near the line, were admissible, even though they could not be present at trial and both were interested in the land at the time the declarations were made. The court has also admitted minutes of a survey and division of the original proprietor's lot, in the handwriting of the town surveyor, also deceased, in the same manner as an oral declaration of a party would be. This decision is in accord with the hearsay exception presently codified in V.R.E. 804(b)(4)(as to boundaries of land).[2]

A survey prepared by an unlicensed individual who was not yet registered as a land surveyor when the survey was made and without a seal, was properly

1 *Wood v. Willard*, 37 Vt. 377 (1864).
2 *Child v. Kingsbury*, 46 Vt. 47 (1873).

admitted into evidence at one trial. The surveyor could then testify as to his expert opinion, and validate the survey.[3]

One trial court refused to allow a surveyor to testify as to how long wires had been embedded in trees because the judge ruled this was outside the surveyor's knowledge and training.[4]

Surveyors called as experts should insist on preparation by counsel prior to trial. But coaching, while tempting, should be avoided.

3 *Thomas v. Olds*, 150 Vt. 634, 556 A.2d 62 (1988).
4 *Brown v. Whitcomb*, 150 Vt. 106, 550 A.2d 1 (1988).

THE VERMONT BOARD OF LAND SURVEYORS

The statutory regulation of land surveying began in 1969 when Act 364 of the Acts and Resolves of 1967 (Adj. Sess.) took effect, establishing a registration system for the profession. Surveyors who could demonstrate they had practiced land surveying during the previous five years and had completed at least two surveys of separate, non-adjoining tracts, parcels, or lots in Vermont for one or more clients, were grandfathered. Those who had graduated from college with formal instruction in land surveying, completed at least one year of land surveying, and passed a licensing examination would also qualify for registration. Alternately, those who had three years of experience and passed the exam could also obtain a certificate of registration. "An act to add 26 V.S.A. §§ 2501-2503, 2510, 2512-2518, 2538-2540 and to amend 3 V.S.A. § 112(a)(2), relating to land surveyors," *Acts and Resolves Passed by the General Assembly of the State of Vermont*, *Forty-Ninth Biennial Session*, *Adjourned Session 1967* (Montpelier, Vt.: State of Vermont, 1968), 596-604.

Since that time, the chapter on land surveying has been amended frequently. In 1981, the legislature changed the definition of "Land surveying" by clarifying that the preparation of assessment maps was not regulated by the chapter. The act also defined "Assessment map" to mean "a map prepared for the purpose of enabling the listers to appraise the real property they are required to appraise under the provisions of 32 V.S.A. § 4041." "An act to amend 26 V.S.A. § 2501(b) and to add 26 V.S.A. § 2501(3) relating to assessment maps," *Acts and Resolves Passed by the General Assembly of the State of Vermont*, *Fifty-Sixth Biennial Session*, *1981* (Montpelier, Vt.: State of Vermont, 1968), 278.

The laws relating to land surveying were comprehensively revised in 1987. What was formerly a certificate of registration became a license. The definition of "Land surveying" was revised, and the exemptions from licensure restated. The board was reconstituted with seven members, five

licensed surveyors and two public members. The board's authority to adopt rules was strengthened and clarified. Applicants for licensure were then required to complete a minimum of 30 hours of formal instruction in land surveying and 36 months of experience, prior to taking the examination. Those who wanted licenses who had not completed the required number of course hours needed four years of experience before taking the exam. The statute also redefined "unprofessional conduct" to strengthen the board's authority in disciplinary matters. "An act relating to continuing the regulation of land surveyors," *Acts and Resolves Passed by the General Assembly of the State of Vermont, Fifty-Eighth Biennial Session, Adjourned Session 1986* (Montpelier, Vt.: State of Vermont, 1986), 532-546.

In 1990, the legislature replaced the appeals panel, which formerly heard appeals from licensing boards, with an appellate officer, who hears and decides these appeals. 1989, No. 250 (Adj. Sess.), § 3. Repeated failure to follow minimum standards of practice and repeated negligence in the performance of job-related activities were added to the offenses that qualify as unprofessional conduct in 1992. 1991, No. 167 (Adj. Sess.), § 38(c). Continuing education was mandated by law in 1994 not to exceed 15 hours for each year of renewal. 1993, No. 108 (Adj. Sess.), § 11. The conversion of all professional disciplinary procedures from specific chapters in Title 26, including those affecting land surveying, began with legislation enacted in 1998, directing the board to use Section 129a of Title 3 for its authority. 1997, No. 145 (Adj. Sess.), § 47.

The definitions of "licensed land surveyor" and "practice of land surveying" were amended in 2003. 2003, No. 60, § 13. In 2005, the law was amended to eliminate the eight-year limit on serving on the board of land surveyors. 2005, No. 27, § 72. The former details of the disciplinary process were replaced by a general citation to the Vermont Administrative Procedure Act. 2005, No. 148 (Adj. Sess.), § 22. In 2007, the legislature directed that all violations of the chapter on land surveyors be subject to the penalties provided in subsection 127(c) of Title 3. 2007, No. 29, § 36; 2007, No. 163 (Adj. Sess.), § 28. In 2011, the Board's personal interview was eliminated as a condition of licensure. 2011, No. 116, § 30. That same year, by a different act, "Repeated failure to follow minimum standards of practice" was deleted from the list of incidents of unprofessional conduct. 2011, No. 66, § 7.

Rules of the Board of Land Surveyors

The Board's rules are found at administrative-rules-of-the-board-of-land-surveyors.pdf (vermont.gov). The Rules expand on the definition of unprofessional conduct established in state statutes. 26 V.S.A. § 2598 and 3 V.S.A. § 129a. They set educational and experiential requirements for licensure, in consonance with 26 V.S.A. §§ 2592 and 2592a.

Disciplinary Actions of the Board

In 2003, the Board of Land Surveyors reprimanded a surveyor and conditioned his permit due to a survey that failed to meet procedural and technical standards. Deed references were not shown on the survey for the owner or adjoiners, nor were monuments depicted or described, the boundary line was not clearly identified, there was no indication of parole evidence, and the boundary line was depicted as a straight line while field evidence showed it to be bowed. The surveyor accepted a stipulation of settlement that required him to prepare a new survey of the property in proper form, to be approved by the Board. In re Warren Robenstien.

In 2009, the surveyor agreed to stop practicing land surveying on or before July 1, 2009 and voluntarily and permanently surrender his license. In re William Robenstein.

In 2004, the Supreme Court reversed the conviction of a surveyor for unprofessional conduct after concluding that a preparation of a map for a subdivision was not "land surveying," as defined in statute, as it was not drawn for the purpose of conveyance of property. Although the statute was changed after the map was prepared, specifically eliminating the exclusion of "mapping" from surveying activities, that the surveyor expressly notified the public that he hadn't conducted a survey, explaining the basis for the map, and affixing his signature, seal and explanation, as required by 26 V.S.A. § 2596(a) supported reversal. *State v. Brooks*, 177 Vt. 61, 851 A.2d 1096 (2004).

The surveyor had argued he had done what was requested by the client. Justice John Dooley wrote, "His duty as a licensed professional, however, was to tell the client and the town officials what he could and could not do for them, rather than simply do their bidding."

The Supreme Court upheld the Board's decision in 2018 after finding the respondent surveyor failed to file a statement of questions by a filing deadline or order a transcript of the hearing, thereby losing his chance to appeal the decision. It based its decision on a Rule of Appellate Practice. *In re Joyce*, 208 Vt. 226, 197 A.3d 378 (2018).

In 2016, a surveyor's license was condition and an administrative penalty imposed. Warren Robenstien. In 2018, his license was restored, fully and without conditions.

In 2017, another surveyor was required to pay a monetary civil penalty and accept conditions on his license for two years, after a finding that he failed to follow evidentiary leads, failed to engage in appropriate field work, failed to use all available evidence as the basis for his professional opinion, failed to set monuments and marks to perpetuate a corner on the survey, of a defective survey plat that failed to provide a closed geometric figure of a perimeter survey. In re: Richard Joyce. On appeal, the board decision was overturned, the charges dismissed.

In 2019, a surveyor was issued a warning and a monetary civil penalty was imposed. Thomas Wagener.

Unauthorized Practice of Law

A surveyor who, for a fee, drafted deeds, advised parties with respect to certain rights-of-way created in the deeds, and advised parties "as to the type of estate and manner of holding" that would serve to meet their desires and needs, had engaged in the unauthorized practice of law. The practice of law means "furnish[ing] to another advice or service under circumstances which imply the possession and use of legal knowledge and skill."

> **The practice of law includes all advice to clients, and all actions taken for them in matters connected with the law.... Practice of law includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts of which legal rights are secured.... Where the rendering of services for another involves the use of legal knowledge or skill on his [or her] behalf—where legal advice is required and is availed of or rendered in connection with such services—these services necessarily constitute or include the practice of law. *In re Welch*, 123 Vt. 180, 185 A.2d 458 (1962).**

In a trial relating to a boundary dispute, the Supreme Court found that a survey prepared by one who was not a registered land surveyor at the time was admissible. The court found the statute setting standards for surveys that are to be recorded does not govern the admission of such sketches into evidence. *Thomas v. Olds*, 150 Vt. 634, 556 A.2d 62 (1988).

Collecting Fees

After a landowner refused to pay a surveyor for his services, the surveyor sued for compensation, which was awarded by the Small Claims Court. The landowner claimed the surveying was deficient, and had complained to the Board of Registration of Land Surveyors. This was no reason to overturn the award, according to the court, as the work was sufficient and appropriate to justify the charges. The Supreme Court refused to consider the fact of filing a complaint with the Board as within its authority in that type of case. *DiBernardo v. Bianchi*, 146 Vt. 476, 302 A.2d 433 (1978).

ALTA/ACSM LAND TITLE SURVEYS (2020)

Minimum standards for ALTA/NSPS land title surveys were adopted in the fall of 2020, effective on February 23, 2021. The American Land Title Association and the National Society of Professional Surveyors adopted this most recent version of the standards, which define what constitutes acceptable survey to insure title to real property free and clear of survey matters, other than matters disclosed by the survey on the plat.

THE COMMON LAW

Section 211 adopts "[s]o much of the common law of England as is applicable to the local situation and circumstances and is not repugnant to the constitution or laws shall be laws in this State and courts shall take notice thereof and govern themselves according." The common law of England is cited with authority by Vermont courts based on this statute. Vermont has adopted its own common law through 240 years of decisions, which define principles of construction of statutes and establish precedents that govern subsequent cases.

The common law consists of decisions and precedents raised and decided over the centuries in England and during the 240 years the Vermont judiciary has been in existence. Decisions of the Vermont Supreme Court are available through Judicia.com.

The common law created ways of necessity, implied easements, adverse possession, prescriptive rights-of-way, and a host of other laws not codified in statute (or only partially articulated there).

Attachments to this manual address the principal areas of surveying practice, including "Boundary and Easement Law" (Appendix A), "Town Boundary Law" (Appendix B), "The History and Law of Vermont Town Roads" (Appendix C). Thomas Cooley's "The Judicial Functions of Surveyors" (Appendix D).

OTHER RESOURCES

Geographic Information.

The Vermont Geographic Information System provides support for the state's comprehensive strategy for data and mapping standards. 10 V.S.A. § 1461. The website provides rich resources and programs for use by surveyors, planners, and all others.

Fire Insurance Maps

The Vermont Historical Society has digitized copies of the Sanborn maps from as early as 1867. Digital access is limited to members of the Society. A set of originals is also available to review and copy at the Mapping Division of the Agency of Transportation.

Town Highway Maps

The Mapping Division has files on each town, including the current and historic highway maps produced from 1931 to the present.

State and County Maps

The VGIS website provides digitized copies of historic maps of Vermont from a variety of sources.

Hosea Doten produced a map of Windsor County (1856). J. Chace prepared *McClellan's Map of Windsor County, Vermont* (1856). The *Map of Bennington County, Vermont* (1856) was printed by E. Rice and C.E. Harwood. H. F. Walling was responsible for the *Map of Addison County, Vermont* (1857), *Map of Orange County, Vermont* (1858), *Map of the Counties of Franklin and Grand Isle* (1859), *Map of Washington County, Vermont* (1856), among others. There is also *Scott's Map of Rutland County, Vermont* (1854).

F.W. Beers published Vermont county maps a generation later. The Vermont Historical Society Library has copies of these maps.

County(s)	Year	Surveyor	Publisher
Rutland	1854	Chace, J., Jr.	Chase & Scott
Windsor	1855/6	Doton, Hosea	n.a.
Bennington	1856	Rice, E. & Harwood, C.E.	Peckham, C.B./H.F. Walling
Windham	1856	Chase, J., Jr.	McClellan, C., & Co.
Addison	1857	Walling, H.F.	Baker, Wm. & Co.
Franklin & Grand Isle	1857	Walling, H.F.	Baker, Tilden &
Chittenden	1857	Walling, H.F.	Baker, Tilden &
Washington	1858	Walling, H.F.	Baker & Tilden
Caledonia	1858	Walling, H.F.	Baker & Tilden
Orange	1858	Walling, H.F.	Baker & Tilden
Orleans, Lamoille & Essex	1859	Walling, H.F.	Loomis & May

Older Topo Maps

The USGS National Geospatial Program provides access to historical topographic maps at its portal.

Lotting Plans

The State Archives has copies of most Vermont towns' lotting plans.

VSARA

The Vermont State Archives and Records Administration includes the records of state government, including the records of the Vermont Surveyor General, surveys, letters, and other documents essential to understanding town boundaries and highways. Contact VSARA by email to request copies or answers at sos.archives@vermont.gov.

Search the Nye Index, and other finding aids, through the website. These include *Vermont Municipalities: An Index to Their Charter and Special Acts* and *Vermont Corporations: An Index to Private Corporations Formed By the Legislature*.

Highway Surveyor's Records

Towns were divided into highway districts in the nineteenth century and highway surveyors elected at town meeting to see that the highways were kept in good and sufficient repair and that taxes of those who chose to work off the bill by road work in the spring and fall were properly credited for the work. Some towns have records of these early surveyors that can be critical in establishing a claim of dedication and acceptance of roads not otherwise properly laid out by survey.

Sources on the Constitution

The documentary sources for the Vermont Constitution are spare but fluorescent. The only first person account of the first constitutional convention in July of 1777 is in Ira Allen's 1798 history *The Natural and Political History of Vermont*.[5] E.P. Walton, who edited and compiled *The Records of the Governor and Council of the State of Vermont* in eight volumes between 1874 and 1881 reproduced many original documents relating to the period from 1770 to 1836, including a section discussing the contributions from the 1776 Pennsylvania Constitution to the 1777

5 Ira Allen, *The Natural and Political History of Vermont*, Ethan and Ira Allen, *Collected Works III*, 50-51.

Vermont Constitution.[6] John N. Schaeffer made "A Comparison of the First Constitutions of Vermont and Pennsylvania," published in *Vermont History* 43:33 (Winter 1975).

The Vermont Council of Censors met every seven years, beginning in 1785, to propose amendments to the constitution, identify laws that violated the constitution, and recommend impeachment where warranted. *The Records of the Council of Censors of the State of Vermont* was published in 1991, and is available on line through the Secretary of State's web page. Its journals and addresses reveal the details of the adoptions of the constitutions of 1777, 1786, and 1793, and other amendments through 1870.

Records of the Vermont Constitutional Conventions have not been compiled. The Journal of the 1793 convention is reproduced in *Proceedings of the Vermont Historical Society* (1921). The journals of the 1826, 1859, and 1870 conventions are available in digital form on the net.

Copies of the first constitutions of each of the states are found in Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C.: Government Printing Office, 1908.

6 E.P. Walton, ed., *Records of the Governor and Council of the State of Vermont* (Montpelier, Vt.: J.& J.M. Poland, 1873), I: 81-103.

Court Records

The State Archives has the original records of the Supreme Court from 1778 onward for many Vermont counties, although some have not been indexed. The briefs of parties to appeals, formerly stored at the State Library, are also now available through the Archives. William Slade's *Vermont State Papers* (1823) contains the first records of the Vermont Supreme Court. *Vermont Reports* begins in 1826, and there are other volumes of early reports, published privately by the judges. These are:

- Aikens, Asa. Reports of Cases. Windsor, Vt.: Simeon Ide, 1827–1828. Volume 1 and Volume 2.
- Brayton, William. Reports of Cases. Middlebury, Vt.: Copeland & Allen, 1821.
- Chipman, Daniel. Reports of Cases. Middlebury, Vt.: I.W. Copeland, 1824–1825.
- Chipman, Nathaniel. Reports and Dissertations. Rutland, Vt.: Anthony Haswell, 1793; 2nd ed. Rutland, Vt.: Tuttle & Co., 1871.
- Tyler, Royall. Vermont Reports. New York: I. Riley, 1809–1810. Volume 1 and Volume 2.

Newspapers

There are several sources of historic newspapers. For a fee, *newspapers.com* provides a search engine to find names and events for many of Vermont's newspapers, new and historic. The Library of Congress digital project "Chronicling America," is another good source, including some newspapers not in the newspapers.com data base.

Not all newspapers are available as yet, so a subscription to newspapers.com will provide additional resources. Vermont newspapers are available at the State Archives, on microfilm.

Town Charters

Volume 1 of the State Papers contains the *Index to the Papers of the Surveyors General*. Volume 2 contains *Charters Granted by the State of Vermont*. For charters of Vermont towns granted by Gov. Benning Wentworth of New Hampshire, see Albert Stillman Batchellor, *The New Hampshire Grants, including Transcripts of the Charters of Townships* (Concord, N.H.: Edward N. Pearson, 1895), which is Vol. XXVI of the State Papers of New Hampshire.

Place Names

Esther Munroe Swift's *Vermont Place Names: Footprints of History* (1977, 1996) is an essential introduction to the names of Vermont towns, counties, mountains, rivers, and other places.

Town Histories

Zadock Thompson's *History*, mentioned above, contains a short description of Vermont towns. Abby Maria Hemenway's *Vermont Historical Gazetteer* is a series of volumes covering all the towns in the counties except Windsor, published between 1867 and 1891. Volume I covers Addison, Bennington, Caledonia, Chittenden, and Essex Counties. Volume II treats Franklin, Grand Isle, Lamoille, and Orange Counties. Volume III includes towns in Orleans and Orange Counties. Number IV is Washington County, plus Swanton, Groton, and Hubbardton. Volume V treats Windham County and the towns of Sutton and Bennington. All are searchable by word, although there is an index to the entire set. Note that Windsor County is not part of the Gazatteer, the manuscript having been lost in a fire.

The towns have produced local histories, many of them digitized.

County histories are also available on the net. These include H.P. Smith and W.S. Rann's *History of Rutland County, Vermont* (1886); Lewis Cass Aldrich and Frank R. Holmes's *History of Windsor County, Vermont* (1891); H.P. Smith's *History of Addison County, Vermont* (1886); W.S. Rann's *History of Chittenden County, Vermont* (1886); Lewis Cass Aldrich's *History of Franklin and Grand Isle Counties* (1891), among others.

Proprietors

Cameron Clifford's *Town Founders: Officials, Entrepreneurs, and Settlers in Early New Hampshire and Vermont 1720-1810* (West Hartford, Vt.: The Clifford Archive, 2019) is a comprehensive study of the practices of the proprietors of land grants in both states, describing how land was originally subdivided and distributed.

Memoirs

Heman Chase wrote *More Than Land: Stories of New England Country Life and Surveying* (Dublin, N.H., William L. Bauban, 1975). This book contains fascinating tales of Chase's life as a surveyor, with ample parts relating to Vermont.

Ira Allen describes his aggressive style of combative surveying in his *Natural and Political History of Vermont* (1798).

The Roman magistrate Cassiodorus discussed why a land surveyor could resolve disputes over boundaries. He wrote, "He is a judge, at any rate of his own skill; his law court is deserted fields. You might think him crazy, seeing him walk along tortuous paths. If he is looking for evidence among rough woodland and thickets, he does not walk like you or me; he chooses his own way; he explains his statements, puts his learning to the proof, decides disputes by his own footsteps, and like a gigantic river takes areas of countryside from some and gives it to others."[7]

Bridges

Robert McCullough wrote *Crossings: A History of Vermont Bridges* (Montpelier and Barre, Vt.: Vermont Agency of Transportation and Vermont Historical Society, 2005). McCullough traces the development of bridges, using materials, plans, and photos collected during his long career with the Agency.

---

7 Benjamin Wardhaugh, *Encounters with Euclid* (Princeton, N.J.: Princeton University Press, 2021), 188.

Compilations of Statutes

- *Laws of the State of Vermont*. Windsor, Vt.: George Hough and Alden Spooner, 1787.
- *Laws of the State of Vermont.* Rutland, Vt.: Josiah Fay, 1797.
- *Laws of the State of Vermont*. 2 vols. Randolph, Vt.: Sereno Wright, 1808.
- *State Papers of Vermont*. Comp., William Slade Jr. Middlebury, Vt.: J. Copeland, 1823.
- *Laws of Vermont*. Comp., William Slade Jr. Windsor, Vt.: Simeon Ide, 1824.
- *Laws of Vermont*. Comp., Daniel P. Thompson. Montpelier, Vt.: Knapp and Jewett, 1835.
- *Revised Statutes of the State of Vermont*. Burlington, Vt.: Chauncey Goodrich, 1840.
- *Compiled Statutes of the State of Vermont*. Comp., Charles L. Williams. Montpelier, Vt.: E.P. Walton & Son, 1851.
- *General Statutes of the State of Vermont*. Montpelier, Vt.: State of Vermont, 1863.
- *Revised Laws of Vermont 1880*. Rutland, Vt.: Tuttle & Co., 1881.
- *Vermont Statutes 1894*. Rutland, Vt.: The Tuttle Company, 1894.
- *Public Statutes of Vermont 1906*. Montpelier, Vt.: Secretary of State, 1907.
- *General Laws of Vermont 1917*. Montpelier, Vt.: Secretary of State, 1918.
- *Public Laws of Vermont 1933*. Montpelier, Vt.: Secretary of State, 1934.
- *Vermont Statutes Annotated*. Various publishers. 1947 to present.

Note: The V.S.A. uses abbreviations for the compilations. "P.L." is for the Public Statutes; "R.L." is the Revised Laws. There is an excellent discussion of the various compilations and their compilers at the beginning of the first volume of the V.S.A.

State Papers and Publications

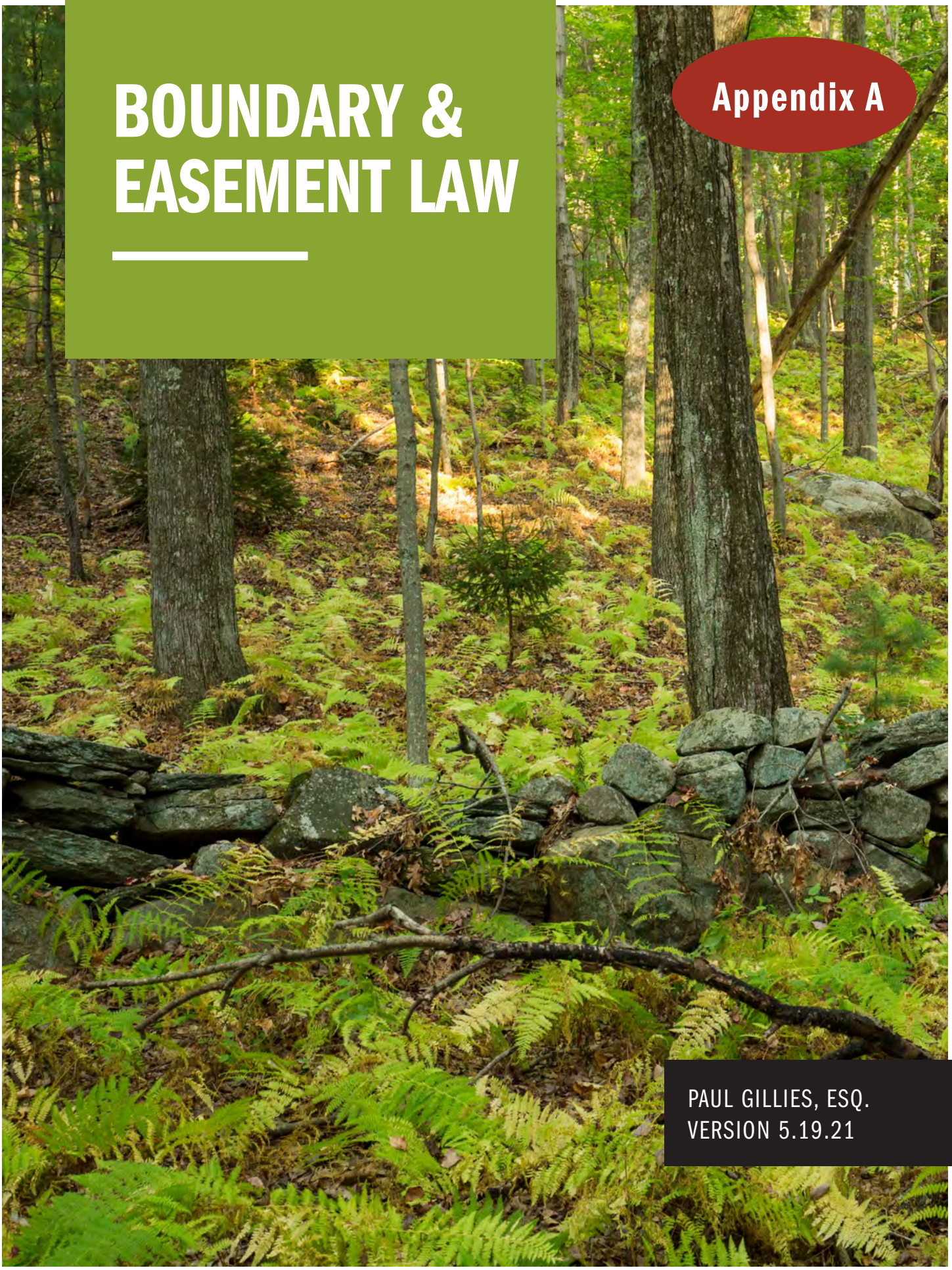
- Volume 1: *Index to the Papers of the Surveyors General*. Ed., Franklin H. Dewart. Rutland, Vt.: Marble City Press, 1918; Montpelier, Vt.: Secretary of State, 1973.
- Volume 2: *Charters Granted by the State of Vermont*. Ed., Franklin H. Dewart. Bellows Falls, Vt.: P.H. Gobie Press, 1922.
- Volume 3: *Journals and Proceedings of the General Assembly of Vermont, 1778–1799*. 8 vols. Bellows Falls, Vt.: The Wyndham Press, 1924–1929, 1970–1978.
- Volume 4: *Reports of Committee to the General Assembly of the State of Vermont, 1778–1801*. Ed., Walter H. Crockett. Montpelier, Vt.: Secretary of State, 1932.
- Volume 5: *Petitions for Grants of Land, 1778–1811*. Ed., Mary Greene Nye. Montpelier, Vt.: Secretary of State, 1939.
- Volume 6: *Sequestration, Confiscation, and Sale of Estates, 1778–1811*. Ed. Mary Greene Nye. Montpelier, Vt.: Secretary of State, 1941.
- Volume 7: *New York Land Patents, 1688–1786*. Ed., Mary Greene Nye. Montpelier, Vt.: Secretary of State, 1941.
- Volume 8: *General Petitions, 1778–1787*. Ed., Edward A. Hoyt. Montpelier, Vt.: Secretary of State, 1952.
- Volume 9: *General Petitions, 1788–1792*. Ed., Edward A. Hoyt. Montpelier, Vt.: Secretary of State, 1955.
- Volume 10: *General Petitions, 1793–1796*. Ed., Allen Soule. Montpelier, Vt.: Secretary of State, 1958.
- Volume 11: *General Petitions, 1797–1799*. Ed., Allen Soule. Montpelier, Vt.: Secretary of State, 1962.
- Volume 12: *Laws of Vermont, 1778–1780, Constitution of 1777*. Ed., Allen Soule. Montpelier, Vt.: Secretary of State, 1964.
- Volume 13: *Laws of Vermont, 1781–1784*. Ed., John A. Williams. Montpelier, Vt.: Secretary of State, 1965.
- Volume 14: *Laws of Vermont, 1785–1791*. Ed., John A. Williams. Montpelier, Vt.: Secretary of State, 1966.

- Volume 15: *Laws of Vermont, 1791–1795*. Ed. John A. Williams. Montpelier, Vt.: Secretary of State, 1967.
- Volume 16: *Laws of Vermont, 1796–1799*. Ed. John A. Williams. Montpelier, Vt.: Secretary of State, 1968.
- Volume 17: *The Public Papers of Thomas Chittenden: 1778–1789, 1790–1797*. Ed., John A. Williams. Montpelier, Vt.: Secretary of State, 1969.
- Volume 18: *A Guide to the Papers of Vermont's Governors*. Comp., Julie P. Cox. Montpelier, Vt.: Secretary of State, 1985.
- Volume 19: *Vermont Municipalities: An Index to their Charters and Special Acts*. Ed. and comp., D. Gregory Sanford. Montpelier, Vt.: Secretary of State, 1986.
- Volume 20: *Vermont Corporations: An Index to Private Corporations Formed by the Legislature*. Ed. and comp., D. Gregory Sanford. Montpelier, Vt.: Secretary of State, 1986.
- Volume 21: *Vermont Elections, 1789–1989*. Comp. and ed., Christie Carter. Montpelier, Vt.: Secretary of State, 1989.
- Volume 22: *Vermont Legislative Reports: An Index to Reports found in the Journals of the Vermont House and Senate*. Montpelier, Vt.: Secretary of State, 1991.

APPENDICES

BOUNDARY & EASEMENT LAW

Appendix A



PAUL GILLIES, ESQ.
VERSION 5.19.21

BOUNDARIES and EASEMENTS

By Paul Gillies, Esq.

When land was plentiful and homesteads and communities were surrounded by wilderness, there were no defined boundaries, and no need for them. Only when people live close enough to each other to compete for property do the lines that separate them become important. Before there were written deeds, people relied on memory to establish boundaries.

A boundary is a line that identifies the limits of our domain, over which we are willing to fight with our neighbor. A boundary is a duality, one part indicating the extent of possession, the other of title; usually the two are coterminous. If all you knew of boundaries was the case law, however, you would come to believe that title and possession rarely occupy the same line, and then almost coincidentally. That's because the hard cases are those that are tried in court and resolved on appeal.

This is particularly true in Vermont, where lot lines seem to be run with far less care and specificity than the parties or more likely their successors hope. You and I understand precisely where the line has been drawn when you are the grantor and I the grantee, but long after we are gone (or sometimes sooner, when our memories fade) all that remains is the deed description and occasionally something on the ground to fight over--a fence, a stake, a pin, a meandering brook, a rock that may or may not have been moved. My heirs and assigns will then level their legal energies against your heirs and assigns and the war will begin, sometimes over a small slice of hilly land that we would otherwise have regarded as surplusage and not worthy of a fight.[1]

The cases come to us through actions of trespass, case, ejectment, covenant, declaratory judgment and claims for treble damages for the cutting of timber. People in extremis, fighting over boundaries, do the most compromising things to each other. They tear down fences, pile dirt on claimed rights of way, and insist that their lawyers fight battles that are obvious losers, demonstrating how deep the current runs when confronting the rights of property. They fight over the smallest parcels--eight inches is the record among the cases reviewed[2]--but what they are actually fighting over is the pride and security of ownership.

The principles espoused in the twelve dozen or more leading cases rendered in the Vermont canon since at least *2 Aiken* (1827) on boundaries are not unique to Vermont, with some rare exceptions. The common law of boundaries has not changed very much in the twelve score years there has been a Vermont, nor eleven more before that, not at least in the rules of construction on what evidence prevails over other evidence in locating a line or in what constitutes adverse possession or other methods of quieting the ragged feelings of crusty neighbors.

The language of boundary law has the odor of must and time, and deserves as much attention as the rules. Consider, for example, the feudal echoes of the basic rule on adverse possession, that "the tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominion and planted his standard of conquest."[3] Looking for help in finding an ill-defined line separating two parcels cut from one

---

[1] When the railroads cut their way across and up Vermont, when condemning land, no compensation was paid for the taking of unimproved land.

[2] *Clement v. Bank of Rutland*, 61 Vt. 298, 17 A. 717 (1889). To be fair, the fight involved a wall of a bank building in Rutland, so even a small parcel such as that could run into money.

[3] See *Montgomery v. Branon*, 129 Vt. 379, 278 A.2d 744 (1971).

not so very long ago, the surveyors celebrate finding a "witness tree," a concept with almost mythological implications.[4] Reeling from the "inept drafting of an amateur deed," the court, with exasperation, concludes that "the point is *adrift*, and without further help from the descriptive wording the reservation would be in danger of failing for uncertainty."[5]

Uncertainty is a troublous state. We may live with it daily in our relations with other people, other businesses, other parties and other nations, but when the uncertainty is related to real property Vermonters go for their law. Boundaries are lines that are not usually drawn on the earth, but on deeds or surveys, which are subject to imprecision and error as often as any writing or drawing. So we stew and fret. So we take desperate steps to protect our domain--blocking off private roads, defoliating the presumed line, threatening "trespassers" with bodily harm or, worse yet, legal action.

All wars are fought over boundaries. All progress is measured by how far boundaries are penetrated. When wars and political movements end, if they ever do, the reestablishment of boundaries seldom brings peace. Peace comes only at great cost, and time doesn't seem to heal those wounds, except where the law decides that enough is enough and orders an end to fighting by rules of finality and repose, when more particular findings on intention are unavailable.

Origins

The intent of the parties is the grail of most surveys and of all court cases dealing with boundaries. The tools used to find this intent are found on the ground and on paper (or mylar), and occasionally in the memories of those who know or knew the land or the people involved.

Originally, according to the ideal, all property can be traced to a common owner. In Vermont this means the claim of the English crown over this part of North America. Although New York granted land earlier in what would become Vermont, it wasn't until 1749 when Benning Wentworth first issued the first charter (Bennington). The 1791 agreement with New York that laid the foundation for Vermont statehood voided all New York claims in favor of the New Hampshire title. There were native American, French and Massachusetts claimants and deeds prior to that time, but to date they have not been recognized in a Vermont court.[6] For whatever was left and not described in a New Hampshire charter, the source of title is all land held in common ownership[7] by the freemen of the State of Vermont, beginning with independence in 1776.[8] From a charter comes the right of ownership, which in early times meant principally the right to market property to others, usually by the sale of divisions of land.

For instance, consider the City of South Burlington, which prior to 1971 was the Town of South Burlington and prior to 1865 was the Town of Burlington and prior to 1763 was undefined land owned by the King of Great Britain. At this point the proprietors held the property in trust, not in their private capacity but in their corporate capacity.[9]

---

[4] *Vermont Shopping Center, Inc. v. Pettengill*, 125 Vt. 145, 211 A.2d 183 (1965).

[5] *Spooner v. Menard*, 124 Vt. 61, 196 A.2d 510 (1963).

[6] Aboriginal title to Vermont land was extinguished by governmental action long ago, according to *State v. Raleigh Eliiott et al.*, 159 Vt. 102, 616 A.2d 210 (1992).

[7] *Armington et al. v. Barnet, Ryegate and Newbury*, 15 Vt. 745 (1843). "All land is, in fee, the property of the sovereignty. Originally it forms a portion of the public domain, until parceled out to private persons, either nature or artificial."

[8] Independence in this context means not *American independence*, but the declared independence of Vermont from the rest of the world, including Great Britain and New York, our twin enemies.

[9] *Capen's Adm'r v. Sheldon, et al.,* 78 Vt. 39 (1906).

The proprietors hired a surveyor to lay out a first division into lots of about 100 acres each, and the first subdivisions of land were made, irrespective of geography or location, by lot, usually from a hat. The divisions were then sold either in their entirety or by reference to the division. Relying on the division was common practice, and precise boundaries were not regarded as important when there was plenty of land. No one would feel uncomfortable conveying land by a deed that described the parcel as the northern half (or part) of Lot 9, Range 13 in the first division. Working out where those lines actually fell on the ground would be somebody else's problem, and it often was.

These divisions are notoriously vague and dangerous, and without the laws on adverse possession and the like, there would still be chaos. The economy of the first two generations to reside here was also threatening to titles, and many times the sheriff and his vendue or tax sale will be represented through collector's deeds found in a thorough title search.

From early on, there were surveys, of course, but by crude instruments that did not always take account of geography. In one case, the court notes an item from the year 1784 that appeared in the papers of the Surveyor General, "That in perambulating or running town lines throughout the State, one thirtieth part be allowed for swag of chain."[10]

Some lines were done by professionals, others by parties with hatchets and compasses and little understanding of the principles of surveying. Some were reduced to maps; others were left to that most unreliable of sources, memory.

The entirety of the records of deeds and other conveyances, now housed in town and county clerks' offices in Vermont (and New Hampshire), represents the infrastructure of land ownership in this state. Through more than 240 years, the Vermont Supreme Court has attempted to resolve the myriad problems that arose over poorly defined and contested boundaries. Not every line is reliable nor every landowner quieted in the peaceable occupation of property. Town tax maps, in their categorical confidence and regular mistakes, belie the reality that Vermont is far from done with disputes and lawsuits over where one person's property ends and another's begins.

Controlling Elements

From the settlement of Vermont has come confusion and trials, and a body of law that establishes basic principles for construction of deeds and boundaries. Before the rules of construction can be applied to a deed, there needs to be something in dispute. If the deed is plain on its face, there is no need for construction.[11] Ambiguity plays an even more important role in the standard of proof. If ambiguity is found, the grantee enjoys the benefit of the doubt. Logically possible, equally balanced possible readings of a deed in dispute are likely to result in a finding of no ambiguity (or at least in one case, that's what the court implied).[12]

The object of any boundary search is to determine the intent of the parties. This comes not from direct testimony, but from the sum of the evidence available, including deeds, ground evidence and sometimes acts of the parties subsequent to the transfer. Construing an instrument

---

[10] *Neill v. Ward*, 103 Vt. 117, 132, 153 A. 219 (1959). The *Neill* case is very long and hard to read, but represents one of the best sources of information about the running of early division lines. The effort to plow through it will be rewarding to the reader interested in early Vermont town development.

[11] *Pine Haven North Shore Ass'n v. Nesti*, 138 Vt. 381, 416 A.2d 147 (1980).

[12] "But it is not enough for ambiguity, in the legal sense required here, that there be possible alternatives. The alternatives must meet a standard of equal application, and since the ambiguity claimed here is latent, it is up to the plaintiff to demonstrance by evidence convincing to the trier this equal application." *Forslund v. Cookman*, 125 Vt. 112, 211 A. 2d 190 (1965).

so as to give effect to every part and from from the parts, to treat it as a harmonious whole (if that is possible), is a familiar refrain in the boundary cases of Vermont.[13]

There is a hierarchy of sources for construction. Perhaps the best way to illustrate this hierarchy is to list them, beginning with the most reliable. Then we'll try to define the exceptions. Natural monuments come first--a cross on a rock, a ledge, a beech tree, a stream. Next come artificial monuments--a pin, a rod, a cairn, a stake, for instance. In a conflict between the two, natural monuments prevail.[14]

Monuments are of less value if they are not set out in the deed. They may be evidence of acquiescence (see below) or helpful in supporting an argument for the "true" line, but they do not have the evidentiary finality that monuments described in a deed have.[15]

Next come metes and bounds descriptions, established by a survey or not, giving directions and distances. In a conflict between monuments and metes and bounds, the former prevail. Metes and bounds vary in quality, with instruments and human capacities. In one case, where the deed inadvisedly used the words, "due west," although one party tried to argue that meant "westerly," explaining that the "surveyor" had simply pointed in the direction of the setting sun late in the afternoon of the day he ran the line, the court held the parties to the literal meaning of "due west."[16]

Metes and bounds, if they are reliable, beat courses and distances. “Courses and distances,” as a term, doesn't include monuments, while metes and bounds obviously does. In the one case that helps define the difference, courses and distances was the term used to describe a deed that conveyed property by referring to the line of adjoining property, while an earlier, more particular deed was more specific in describing the monumented corners of the land. The court held with the earlier deed, not only because of the principle that the particular beats the more general description, but on the familiar theory that where a subsequent grantor attempts to convey more than he owns, he is presumed to convey only what he has rights to convey.[17]

The least reliable standard is quantity. If a deed describes a rectangle, giving the distances and directions of the sides and claims that the land conveyed contains ten acres, and the rectangle contains one acre, only one acre is conveyed. It's like water. It seeks its lowest level. To do otherwise would be to buy the court and society a world of trouble, so it uses what it has, taking the most obvious standard as the most reliable in settling the dispute.

This is not to say that quantity is unimportant. When all else fails, when monuments and courses and distances are unavailing, there are times when quantity actually settles a disputed boundary. Consider the case of a poorly-drafted deed that fails to locate a critical monument. Depending on where the parties intended the missing monument to be located, the claimant might enjoy as much as four acres or as little as one acre of land. The description said, however, that the grantor meant to convey "about two acres, be the same more or less." This gave the court some comfort in locating the missing point. Quantity in this case was essential and had a controlling influence in determining the identity of the premises where other factors were not sufficiently certain.[18]

---

[13] See *Cummings v. Black & Covell*, 65 Vt. 76 (1892).

[14] *Marshall v. Bruce*, 149 Vt. 351, 543 A.2d 263 (1988).

[15] *Barr's Estate v. Guay*, 127 Vt. 374, 250 A.2d 512 (1969).

[16] *Haklits v. Oldenburg*, 124 Vt. 199, 201 A.2d 690 (1964).

[17] *Clement, supra,* 61 Vt. at 303-5.

[18] *Parrow v. Proulx*, 111 Vt. 274, 280, 15 A.2d 835 (1940). See also *Paradis v. Kirby*, 138 Vt. 524, 418 A.2d 863 (1980).

In an earlier case, where acreage was the best evidence the court had to locate the proper perimeter of the parcel, the court was faced with the ambiguous description, "ten feet beyond the brook." Finding a way to satisfy acreage and locate the line ten feet beyond the brook, the court rested on the conclusion that could satisfy both conditions. "The defendants are entitled to that construction among equally reasonable ones which favors them as grantees."[19]

When there is a disparity between the actual and estimated quantity of land which is relied on by mutual mistake, the injured party is entitled to rescission of the contract.[20]

Occasionally a party will offer to prove a line by the use of monuments that are not mentioned expressly in a deed. Monuments, to be effective sources of authority having predominance over lesser methods of measuring property, need to be reliable. When the existence or location of monuments is not proved, courses and distances will govern.[21] When monuments are cited as standards, but the evidence reveals no information suggesting that they were intended to serve as boundaries, they are not reliable.[22] When monuments, cited in a deed, no longer exist, the court will find no comfort in relying on them and will fall back to the next most reliable method of measurement.[23]

Another principle of deed construction is that the particular rules the general. A deed contains a particular description, as well as a reference to a prior deed which purports to grant a larger parcel. The later deed will prevail, as it is the more specific. The grantor is presumed to know what she intended to convey; the more specific she is in the description, the more her intent can be seen on the deed, even if that means that part of the original parcel is *not* conveyed and remains with the heirs of that grantor. Or a deed purports to convey all of the farm whereof a father died seized and possessed at the time of his death (a general description), described particularly by citing certain boundaries that leaves out a third of the farm. Which should prevail, the declared and general intention or the description? The court holds with the specific, believing that there is greater reliability and less likelihood of a mistake to be made when the grantor (or administrator) gets down to details.[24]

When a line cannot be found with any confidence, the use of lines of adjacent lots may be used to determine the location.[25] When a description using a neighbor's lot line is used, but a report or survey described in the deed is more specific, the more specific reference will govern.[26]

People make mistakes. How bad a deed must be before it requires evidence from beyond its four corners depends on the circumstance. If it's possible to find what was intended for conveyance, even though the deed uses "north" when it means "south" in a critical part of the description, the court will substitute the right word to fulfill the intent of the parties to the conveyance. Conjecture will not be indulged in to make a sufficient description doubtful.[27]

---

[19] *Spooner, supra,* 124 Vt. at 63.

[20] *Enequist v. Bemis*, 115 Vt. 209, 55 A.2d 617 (1947); *Darling v. Osborne*, 51 Vt. 148 (1876).

[21] *Neill v. Ward*, 103 Vt. 117, 162, 153 A. 219 (1959). See also, *Thomas v. Olds*, 150 Vt. 634, 637, 556 A.2d 62 (1988).

[22] *Heath v. Dudley*, 148 Vt. 145, 530 A.2d 151 (1987).

[23] *Hadlock v. Poutre*, 139 Vt. 124, 423 A.2d 835 (1980).

[24] *Cummings, supra.*

[25] *J. H. Silsby & Co. v. Kinsley*, 89 Vt. 263, 95 A. 634 (1915

[26] *Clement, supra.*

[27] *State v. Heaphy*, 88 Vt. 428, 92 A. 813 (1915).

Parol evidence (oral testimony) is sometimes helpful, but there is a strict rule that statements of deceased persons regarding boundaries cannot be received in evidence if made after a controversy arises.[28]

The development of a boundary case often involves research that takes the searcher back to the first division of a town. In deeds before 1830, it's common to find references to division lots or portions of them. The court has long held that a reference to a division number "is a description in its legal effect according to the lines of such lot *as surveyed and established* in the original division of the town, and is just as definite, although not so particular, as it would be if the lines were given, and should receive the same construction and have the same legal effect in one case as the other."[29] These lines, according to our court, should be treated as monuments in fixing boundaries. Locating the lines may not be easy, but if they can be located, they will be controlling.

The reason for this is security and finality. Vermonters fought so hard to quiet the titles of ancient settlers, that it has become a canon of legal precedent not to question what is found on the ground, even when the original charter or division map differs from what is located on the surface of the land. An early decision of the Supreme Court explained:

> When the original monuments are found, no testimony can be received to show that the surveyor intended to locate the boundaries elsewhere. Were it otherwise, the boundaries of the whole State might be disturbed. A single error in the allotment of a town might lead to a new allotment throughout; and if ancient landmarks are to be disturbed, upon this principle, there would be no end to the consequences.[30]

In this boundary dispute, the Supreme Court approved the practice of locating a range line by a straight line between two undisputed range line points. Neither of the two surveyors who appeared at trial testified that a snow fence post and an angle iron found were reflective of the location of the line.[31]

In an earlier case, the trial judge decided he knew better than two surveyors where the line was. *Barr v. Guay*, 125 Vt. 1, 209 A.2d 304 (1965). After the trial court rejected the conclusions of the surveyors for the parties and established a third line, the Supreme Court reversed the judge's decision for its lack of precision and failure to determine the exact location of the line between the parties' properties. It remanded to case to the county court and required any determination of the location of the line.

In 1954, the Supreme Court awarded treble damages for a wrongful cutting of timber. It explained the general rule of construction of deeds, stating that "when the particular and general description do not coincide, effect must be given to the particular description, such as expressed by courses and distances, by permanent monuments, by lot and range, and by the adjoining, surrounding lands, under the principle that when the land conveyed is described by clear and well defined metes and bounds, so that the boundaries thereof can be thereby readily determined, such description shall prevail, and settles the boundaries over any general words of description that may have been used in the deed, tending to enlarge or diminish the boundaries." The surveyor in this case chose to disregard the calls described in the deed in favor of acreage to the knowledge of the landowner's agent and surveyor, a practice condemned by the court. *Ripchick v. Pearson*, 116 Vt. 311, 109 A.2d 347 (1954).

---

[28] *Turner v. Bragg*, 113 Vt. 393, 35 A.2d 356 (1944). See also *Vermont Shopping Center, supra.*

[29] *Silsby, supra.*.

[30] *Hull v. Fuller*, 7 Vt. 100, 110 (1835).

[31] *Heath v. Dudley*, 148 Vt. 145, 530 A.2d 161 (1987).

Unwritten Title Transfers

A. Adverse Possession

The Vermont statute on adverse possession is 12 V.S.A. § 501, which provides that "Except as otherwise provided in section 5263 of Title 32, an action for the recovery of lands, or the possession thereof, shall not be maintained, unless commenced within fifteen years after the cause of action first accrues to the plaintiff or those under whom he claims." This alone is not enough, however. There are other statutes that make up our canon of adverse possession. Section 5263 of Title 32, for instance, is a limitation against actions for recovery of lands or their possession maintained against the grantee of lands held through a tax collector's deed that has been duly recorded, as long as there has been continuous and open possession and the taxes have been paid, unless the action is commenced within three years after the cause of action accrues.

It's also clear that adverse possession cannot be extended to "lands given, granted, sequestered, or appropriated to a public, pious or charitable use, or to lands belonging to the state." 12 V.S.A. § 462.[32]

The key characteristics of adverse possesion are the open, notorious, continuous and hostile occupation of property, for which you do not have clear deeded title, which results after a period of fifteen years, although you will probably have to go to court to prove it. A subsequent transfer of the property by the former owner will not undo it, unless of course the new "owner" beats you with an adverse possession or similar claim as well. Each of the characteristics are the subject of case law. Proof begins with a "claim of title."

Suppose a farmer builds a fence, "merely for his own convenience, without regard to the boundary, not knowing where the line is." He sells the farm to one who knows it isn't on the line but keeps it up, repairing it now and again. His neighbor thinks the line is on his side of the true boundary, but does nothing. Their relations are friendly, however, at least until a controversy over the line arises, when a survey is made and the line is found to be sixteen rods north of the fence. But now more than fifteen years have passed since the fence was built, and the court will side with repose. The fence now determines the line.[33]

"But I never *knew* about the adverse possession until after the fifteen years had run," claims the defendant. Won't this defeat the requirement of openness, hostility or notoriety? Apparently not. Notice may be constructive. Unfurling that flag doesn't have to mean mailing the owner a notice or waving it in his face. As long as the occupation is of such a character that would indicate to the former owner that the adverse possessor is exercising it as a matter of right, that's sufficient.[34]

Adverse possession comes from two sources, either by a claim of title or a claim of right. A claim of title might be a defective deed--a deed with no witnesses or a description that fails to cover what the grantee assumed he purchased. A claim of right is based squarely on possession. The two sources differ in the extent of proof required to satisfy the law. Color of title plus possession of a part of a whole parcel for the statutory period results in adverse possesion of the whole; claim of right plus possession of a part of a larger parcel results in adverse possesion of only what has been occupied.[35]

---

[32] There *was* a recent exception to this statutory rule, when the Vermont Supreme Court held that a town had lost property it had seized by tax foreclosure, when the property wasn't being used for public purposes, but I don't see that case as giving us much solace here. *Jarvis v. Gillespie*, 155 Vt. 633, 587 A.2s 981 (1991).

[33] *Brown v. Clark*, 73 Vt. 233, 50 A. 1066 (1901).

[34] *Jangraw v. Mee*, 75 Vt. 211, 213-4 (1904).

[35] *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 559 A.2d 1068 (1989).

Adverse possession may be constructive (actions sufficient to justify a conclusion of possession, without physical occupation), as opposed to actual (physical occupation and use of the land), but the constructive possession must be of a quality to show a dispossession of a constructive possession by the original title owner. Constructive adverse possession is obviously insufficient to overcome actual possession by the title owners. Where the facts prove no occupation by use, but only by the running of a survey line, there is no actual possession and insufficient evidence to interrupt the constructive possession of the owner of deeded title.[36] Nor is payment of taxes an act of possession or evidence of a possessory title, standing alone.[37] What is or isn't enough to constitute possession varies from case to case.

In 2008, the Supreme Court established that by merely mowing of land or parking cars or using the disputed property for a parking lot a party cannot establish title by adverse possession. A land surveyor, as expert witness, had prepared a sketch of the disputed land, which did not meet the legal requirements of a survey or professional measurement standards, and the church argued the court should not have relied on it. The high court found there was no doubt that the surveyor was qualified to give an opinion on the location of the boundaries. V.R.E. 702. It concluded there was no reason the illustration should have been excluded.[38]

The Supreme Court has ruled that survey pins other than the original, destroyed monuments described in the deed do not prevail over courses and distances in determining the dimensions of land conveyed. The surveyor who created the survey had mistakenly assumed a right-of-way of a public highway of three rods, when later research revealed it was a four-rod right-of-way.[39]

B. Acquiescence

Acquiescence is not adverse possession, although it uses common elements. It differs from adverse possession in the lack of hostility. There is still open and continuous use of the property for the fifteen year term, but passive compliance substitutes for any adversariness in occupation. There may even be a contract or agreement that triggers the proof.

A boundary is established by acquiescence when there is "mutual recognition of a given line by the adjoining owners, and such actual continuous possession by one or both to the line" for the statutory period required to establish ownership by adverse possession.[40] To satisfy the standard of acquiescence, you need to show that neighbors knew and agreed where the boundary was (whether they were right or not according to the deed) for the fifteen year period.[41]

There also appears to be a lesser standard of occupation of the land under review.[42] Actual physical occupancy of the whole parcel claimed is not required. The withdrawal of a predecessor from use and possession of the land inside the claimed boundary is sufficient. Where there is no posession by either neighbor, but if both know about and claim land in recognition of the line, the division will be binding on the parties if the fifteen year period has

---

[36] *Silsby, supra,* 89 Vt. at 273-74.

[37] *Tillotson v. Prichard*, 60 Vt. 94, 100 (1887).

[38] *First Congregational Church of Enosburg v. Manley*, 183 Vt. 574, 946 A.2d 830 (2008).

[39] 19 V.S.A. § 702; *Cameron's Run, LLP v. Frohock*, 188 Vt. 610 (2010).

[40] *D'Orazio v. Pashby*, 102 Vt. 480, 487 (1930).

[41] *Heath v. Dudley*, 148 Vt. 145, 148 (1987).

[42] "Indeed, a boundary may be established by acquiescence for an extended period of time even as to lands that are not subject to adverse user." *Brown v. Derway*, 109 Vt. 37, 67, 192 A. 16 (1937).

been satisfied.[43] Where there *is* physical occupancy, as with adverse possession, there is no need for continuous possession. Possession is satisfied in timber land, for instance, by occasional but regular use of the type commonly found in logging operations, although there are period of time during cuttings.[44]

When the express words of conveyances are unavailing, courts will accept evidence of the acts of adjoining landowners in recognizing the location of a boundary line. Acquiescence must be mutual. Concurrence must be clear and definite. Acquiescence in a wrong line alone isn't enough, but continued satisfaction and compliance with a boundary marked on the ground is persuasive evidence.

The proof required to show satisfaction and compliance on the part of the defendant or defendant's predecessor is stricter and more demanding than that required of the plaintiff, since acquiescence may be inferred by implication for one who will benefit from a finding of acquiescence.

Fences play a dominant role in this standard of construction, although they are not always dispositive. When adjoiners build a fence together, however, and maintain it, and for more than fifteen years respect it as the boundary, that is true acquiescence, even if in our wisdom at some future time we can show that the line belongs elsewhere.[45]

Acquiescence, for instance, once failed because the party claiming it could not prove that the actions of the adjoiners demonstrated any intention to recognize a particular line as the boundary. Timber was cut in a remote section for only twelve, not fifteen years, but more compelling was testimony that "Nobody cared in them days" about the boundary.[46]

Mutual recognition, the court has written, is the *sine qua non* of acquiescence. When a landowner has a survey done, dividing his property, and then sells a parcel describing the original range line as the division, a subsequent purchaser cannot argue that the landowner himself acquiesced in that line as the boundary. The surveyed line cannot substitute for the range line if that is the description in the deed. On the other hand, although there cannot be acquiescence without knowledge, "one cannot wilfully shut his eyes to what he might readily and ought to have known . . . ." Where a landowner has no knowledge of timber cutting, for instance, on his property, and would have had no occasion to learn it because of the remoteness of the land, there can be no acquiescence.[47]

How you calculate the fifteen years to show acquiescence is sometimes an issue. In one case a question arose about whether two years at the beginning of the period should be counted. At the beginning of that time the parties had discussed the possibility of a sale and had agreed to have the property surveyed and deeds drawn up and that the neighbor could occupy the land until that was done. Apparently nothing ever happened, but subsequently when the neighbor's successors were arguing for title by acquiescence, his opponents tried to argue that this two year period could not be counted, as it was a period of tenancy. But the court would not go for that argument, regarding the neighbor's possession as sufficient evidence of acquiescent possession to be counted in making up the fifteen years.[48]

---

[43] *Brown v. Edson*, 23 Vt. 435 (1851).
[44] *Amey, supra,* 123 Vt. at 68. *Webb v. Richardson*, 42 Vt. 465 (1869).
[45] *Burton v. Lezell*, 16 Vt. 158 (1844).
[46] *Heath v. Dudley*, 148 Vt. at 149.
[47] *Silsby, supra,* 89 Vt. at 272-73.
[48] *Sheldon v. Perkins*, 37 Vt. 550 (1865).

In *Lakeview Farm, Inc. v. Enman* (1996), two generations of adjoining neighbors, for a period longer than fifteen years, respected a meandering fence and blazed line as the common boundary between two parcels. The Court concluded this evidence would suffice to justify title by acquiescence.

C. Estoppel

Estoppel is a generic legal principle providing that a person's act stops or prevents him or her from saying something different later on, even if what he or she says later is the truth. To be effective, the original words or acts must have a demonstable impact on somebody else sufficient to change the legal position of the person affected by the words or acts.

One way to define it is to see how estoppel works in practice. For instance, we have an action for adverse possession. The Vermont Marble Company claims it has title to a quarry in Pittsford, as a defense to an action of ejectment brought by F. W. Smith. Smith says the Company is estopped from raising the adverse claim. How so? Because, as Smith claims, the Company's claim to the land is based on a series of deeds over a course of twenty-five years, each of which described the conveyance, either expressly or indirectly, as "bounded on the north or northerly by land of D. J. and J. H. Griffith and F. W. Smith." This, says Smith, is an admission on the part of each of the grantors that Smith owned the contested quarry.

Oh no, answers the court. Estoppel is involved here, but not to displace adverse possession. Each successive grantee is estopped by the recital from denying that Smith owned the land in 1890, on the date of the first deed, but not on the date the action was filed. Estoppels, the court reminds us, are mutual and operate only upon and in favor of parties and their privies. The privity here looks forward, and not backward. But let the court speak for itself:

> Suppose the deed from the Smith & Brainerd Marble Company [the first grantee back in 1890] had contained a recital that it or a third person owned the land in question, would the plaintiff be estopped from disputing this assertion? Certainly not. Why? Because he had no relation to that deed, was a stranger to it; and one who is not estopped by a deed can have no benefit therefrom by way of estoppel.[49]

Estoppel arises in other situations in Vermont case law. The seller of property tells the buyer that the fence they have walked prior to the closing is the boundary of the property. This induces the buyer to complete the purchase. Later, the seller points to the deed and claims that the fence was no determinative. Estoppel will serve as an effective defense against this claim.[50]

An essential element of estoppel is reliance by the buyer or grantee on the representations of another. It's an equitable principle, with all the maxims and principles that brings. Its most common usage in boundary law is serve as a shield against a seller's or adjoiner's defense based on the specific description in a deed.

D. Parol Agreement

When a deed is not enough to establish a boundary, the law allows parol or extrinsic evidence to supplement what is known about the conveyance. A parol agreement is not an alternative to a deed; it does not convey property, but it is an aid to construction of a conveyance. It is usually an oral agreement. It is admissible only if agreed upon by the adjoining property owners and with a recognition that there is a need to settle a dispute over the boundary. Agreement alone is nothing; possession must follow to make it work.

---

[49] *Smith v. Vermont Marble Co.,* 99 Vt. 384, 392, 133 A. 355 (1926).

[50] *Louks v. Kenniston*, 50 Vt. 116 (1877).

There must be an actual dispute. Otherwise the statute of frauds will intervene and prevent the proof of such an agreement. Parol agreement rests on the principle of estoppel and acquiescence is usually involved in such cases, although there is no need for a full fifteen year period to allow a parol agreement to settle a boundary dispute.

The *Smith* case discussed and distinguished under "Estoppel" is a good example of parol agreement. By accepting a deed which described the ownership of land as bordering that of Smith, each successive owner in line expressly acknowledged the true owner's title. Citing a New York case, the court said that it is well known that even a single "lisp" of acknowledgement by a defendant is sufficient to serve as an admission of no title in this circumstance. Such an admission interrupts the running of the fifteen year statute of limitations on adverse possession. If any of the sucessor grantees had held on to the property for more than fifteen years, parol agreement would not have helped the plaintiff. The necessary hostility is lost, and so is the argument.

Not that words are required; acts are sufficient. For instance, when a landowner owns a stream and the stream overflows its banks and floods a neighbor's land, and then the first landowner agrees to draw down the water and offer to buy the flowage rights, he admits the ownership of the rights by the other and interrupts the adversity of his use.[51]

A more modern example comes from the Town of Wolcott, where a selectman discovers men cutting timber on what he believes is town land. He orders them to stop, but allows them to pick up what is already cut. In defense, the party responsible for the cutting, making his claim for the land, claims this is an indication of an acknowledgement of his ownership rights to the property. The court is not convinced, falling back on the familiar defense that one selectman cannot bind the board or the town, but giving no credence to the argument in any case.[52]

E. Presumptive Grants

We might debate whether a presumptive grant is an unwritten title transfer, but the principle deserves airing somewhere, so let's put it here. As an illustration, consider a parcel of land in North Jay, Vermont. The University of Vermont has a perfect paper title back to 1844. Carter has a perfect paper title back to 1871. UVM hasn't occupied or physically controlled the property; Carter and his predecessors have been in actual possession since 1871. The reported case is dated 1939. UVM wanted them off.

UVM is a public instrumentality of the State, so no adverse possession claim should succeed against it, as the statute of limitations never tolls, as noted above. Yet the doctrine of presumptive grants is treated as analagous to adverse possession to support a *presumption* of a grant to one in actual possession, even if adverse possession in its classic pose would not work. An earlier case had favored the university after a finding that the corporation had no authority to convey land, but that was the early 1830's. A change in the UVM charter from the 1860's granted the university that authority and here, with Carter, the court found a presumptive grant, based on the four tenets of adverse possession.[53]

Water Boundaries

A. Water Course as Boundary

---

[51] *Willey v. Hunter*, 57 Vt. 479 (1885).

[52] *Town of Wolcott v. Behrend*, 147 Vt. 453, 519 A.2d 1156 (1986).

[53] *University of Vermont v. Carter et ux.,* 110 Vt. 205 (1939).

There are bound to be problems with water boundaries because water changes the land. It recedes and floods; rivers jump banks or shift their courses gradually. Thankfully for this review of Vermont boundary law, Vermont has no tidal waters, so we needn't worry about those cases or principles, not for some years at least. Not that Vermonters don't fight over water boundaries, for access and for water power purposes.

Section 67 of the Vermont Constitution provides that, "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly." "Boatable waters" is unique to Vermont; if you look in legal dictionaries, you'll find only Vermont cases cited for the definition. It's important for our purposes only in helping to define where public and private rights collide.

It was important for the defendants in a 1978 case involving a trespass action to know what "boatable" meant. The defendants claimed that the Vermont Constitution gave them a right to fish up to the high water line, because the waters above the low water line were boatable, even if they were over private property. The court found no trespass as long as the land above the ordinary low water mark was not enclosed.[54] The court went to reiterate a principle of public easements, that when periods of high water continue for sufficient periods of time to make them suitable for highways, such easements arise.

The constitutional protection is also the origin of the Vermont law of public trust. The constitution invests all filled land along lakefronts with a public trust, implanting that duty even into legislative acts purporting to convey fee simple title to such lands, thereby limiting their use to the original public purposes.[55] It also prohibits the legislature from granting individuals the right to control the level of public waters.[56] No one attempting to understand and define private rights to land bounded by water ("boatable water") can afford to ignore the doctrine or the possibility that it could be interpreted in such a way as to limit the extent of private property rights to such land.

In a case from 1983, parties disputed ownership of an island in the Winooski River. The island, because of a change in the course of the river, was now part of the mainland, although clearly identified by the old channel. One party had a deed to the island; the other's deed described its boundary as the river. The trial court held that the island had merged with the adjoining land, and added that in addition to the deed the landowner could satisfy a claim for ownership by adverse possession.[57]

B. Riparian and Littoral Rights

We have rivers and streams, which give rise to "riparian" rights, and lakes and ponds, which give rise to "littoral" rights. Some ponds are artificial, and they have their own rules as compared with natural bodies of water. The fights come over where the boundary line is found and what use can be made of the waters when boundaries are known.

One recent application of water boundary law arose in Castleton in the early 1980's, when an individual needed to show that he owned a minimum of one-eighth of an acre, to justify pre-existing noncorforming lot status for zoning purposes. To succeed he had to prove that he

---

[54] *Cabot v. Thomas*, 147 Vt. 207, 388 A.2d 366 (1978).

[55] *State of Vermont v. Central Vermont Railway, Inc.*, 153 Vt. 337 (1989).

[56] *Hazen v. Perkins*, 92 Vt. 414, 419 (1918).

[57] *Thibault v. Vartuli*, 143 Vt. 178, 465 A.2d 248 (1983).

owned to the center of a canal passing by his house. The court applied the presumption that the line ran to the center of the canal, and the landowner succeeded in asserting his minimum lot.[58] The rule holds that if the landowner's predecessor owned to the center and unless the deed is specific in restricting the title, what's conveyed is the full lot, including that under the water.

Suppose the shoreland owner decides to build a dike, with the intention of later filling in the land behind it and extending his domain? This is land that is regarded as governed by the public trust doctrine, that the filled land belongs to the public. But in at least one case the battle gathered over the question of what precisely was the mean or ordinary low water mark on Lake Champlain. This proof involves a contest of evidence. Should it be an average of the low water marks over a period, in this case a thirty-seven year time frame, excluding years of drought, or should the defendant's argument be adopted and the court find that the ordinary low water mark was the lowest elevation point to which the lake had receded during those years, again excluding drought years. The court gave neither party relief, although it seemed to favor the average or mean test, because the parties had never put forward evidence of any actual present low water mark on the shore of the property of the defendants. Instead, it sent the case back to the county court for further evidence.[59]

Many of the cases arise from fights over dam and flowage rights, where early Vermonters attempted to use water power to grind their grist or cut their logs. In one case a stream was divided by human industry to feed competing mills on opposite banks of the channel. Both mills operated comfortably for some years until one went out of business and for more than fifteen years the closed mill did not claim its share of the water coming down the stream. When a new owner attempted to reopen the mill, the competing mill's owner claimed adverse possession, but the court would not hear of it. The amount of water used by the mill that remained in operation did not increase as a result of the closure of the other, and nothing was gained by the lack of use during the statutory period. A right conveyed by grant such as this could not be lost to non-use, for any length of time, without some conduct on the part of the owner of the servient estate that was adverse to and indefiance of the easement. To make out acquiescence, there would need to be "some unequivocal acts of the owner of the closed mill, "inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it, and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted."[60]

C. Accretion, Avulsion and Erosion.

"Accretion" is the gradual and imperceptible accumulation of land by natural causes, along the banks of a body of water. "Alluvion" appears to be a synonym for accretion, although originally accretion was the act and alluvion the consequence of the act. "Avulsion" is the sudden removal of soil from the land of one owner and its deposit on land of another--a river leaping its banks and forging a new channel during spring runoff, for instance. "Erosion" is the gradual eating away of soil, in our context by water. Where it goes is of no consequence in this context.[61] Erosion on one side of the stream often leads to accretion on the other bank.

---

[58] *Town of Castleton v. Fucci*, 139 Vt. 598, 431 A.2d 486 (1981).

[59] *State v. Cain*, 126 Vt. 463, 236 A.2d 501 (1967).

[60] *Mason v. Horton*, 67 Vt. 266 (1895).

[61] *Erosion* is distinguished from *submergence*, which is when water rises due to the damming of a river or pond, for instance.

Grains of sand add up. In one case a landowner gained five acres of alluvion along the Winooski River where the man down river from her gained eight and a half acres, entirely by accretion.[62] They fought over where the line should be drawn in the alluvion. One argued for a fair and equitable division, but the court simply extended their existing boundary further west to the river.

The general rule is that land lost and land gained due to accretion is a kind of natural conveyance and that title shifts from the one landowner to the other as they happens without the need for deeds or claims of adverse possession or acquiescence. The problem arises when a deed describes the boundary as a pond or stream, which the law assumes grants title to the center by inference if the grantor owns to the center.[63] But centers shift as water changes the land around it, and so the line will shift.

When a person is deeded land to the edge of a pond, and the grantor does not own to the center of the pond, then obviously the extent of land conveyed is limited to the edge. Years pass, and the edge is extended by accretion. Does his line shift or does it remain at the former edge of the pond? The court concludes the line remains where it was originally found. Having no interest in the bed of the pond, the landowner can gain nothing by accretion. If, on the other hand, she owned to the center of a stream and the stream receded, there would be no change in the line (assuming the center held); she would simply have the benefit of more usable shoreline.[64]

Natural changes in the landscape make for interesting cases. Consider the situation of Mr. Eddy, who owns a farm south of Mr. Newton, with one critical line described as "easterly on Otter Creek, and down said creek to a small butternut tree, marked, which is the north east corner of said lot." At the time of conveyance, Otter Creek ran north, but now it makes a big bend easterly of the butternut tree, its course running west. The disputed tract is alluvial land on the southern bank of the Creek. Judge Redfield, writing the opinion of the court, was uncomfortable in the result, but reported that Eddy should get all the alluvion, because the corner near the butternut tree was intended to be a moveable corner, according to a majority of the court.[65]

Although more a case of pure boundary law than waters, the early case of *Hull v. Fuller* puts an interesting cast on a floating line. The deed the defendant depended on conveyed his predecessor a title, land described as:

> Beginning at the N.W. corner of lot no. 21; thence running south 8 degrees west, about sixty rods to the south bank of the river; thence running up said river on the south bank to the first falls; thence continuing to run in such a direction, as to include a mill yard, and the whole of a mill pond, which may be raised by a dam on said falls, to a road that leads to the centre of Enosburgh; thence easterly on said road to the north line of said lot 21; thence N. 82 degrees west, to the place of beginning.

The plaintiff claimed this deed limits the height and eastern boundary of the pond to the road described in the deed. The defendant claimed that the deed allowed the pond to be raised as high as a dam built at the point of rock would raise it, that the road forms the boundary of the land but not the height of the pond. The court agreed with the defendant. The height of the pond was not limited by the deed; the pond might be as high as was reasonably needed for the dam, and once built would establish the height of the pond.[66]

---

[62] *Hubbard v. Manwell*, 60 Vt. 235 (1887).

[63] *Thalweg* is another word used to describe the center line of a stream.

[64] *Holden v. Chandler*, 61 Vt. 291, 18 A. 310 (1889). See also, *Eddy v. St. Mars*, 53 Vt. 462 (1879).

[65] *Newton v. Eddy*, 23 Vt. 319, 324 (1851).

[66] *Hull v. Fuller*, 4 Vt. 199 (1831).

The Law of Private Ways

Private ways may be created expressly, through a deed or agreement; by implication, because a subdivision of land has left one lot land-locked and there is no other way to reach a parcel; by prescription, used without permission for fifteen years; or by the discontinuance of a public highway, which could be called a succeeding easement.

A. Express Easements

Where the intent is clearly to create a right of ingress and egress, but the language of the deed is general, "the owner of the easement is 'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.'"[67] Where a party grants a right-of-way, he is not bound to construct or maintain it.[68] That duty falls on the grantee of an easement. The failure to mention a right-of-way in a deed conveying property to another is no indication of an intention not to convey the easement created earlier in the chain.[69]

Deeded easements may be explicit as to location, incorporating a survey line or described in metes and bounds, or simply provide for a right-of-way without elaboration. They usually run with the land they serve, although rights-of-way may also be granted to third parties, for temporary removal of trees, for example from lands of others. In some cases, parties have claimed the right-of-way was personal to the grantee, and invalid for use by successors, rarely successfully. Easements in gross are not favored by the courts. A deed that does not include words of inheritance ("heirs and assigns") which includes the word "appurtenances" in the habendum is not an easement in gross, but creates an appurtenant easement, and does not limit the authority of the grantee to convey property subject to the easement.[70] If there isn't evidence of a clear intent to limit the use of the right to the grantee, the court will favor appurtenance.[71]

B. Parking

A deed that conveyed a general right-of-way which had historically been used for parking was consistent with the use of the right-of-way as a driveway.[72] In another case, where historic use didn't include parking, only access and a turnaround were authorized.[73]

C. Location

The owner of the servient estate may designate the location of an undefined right-of-way; when that owner fails to act the dominant estate owner may select a suitable route.[74] A way cannot be changed without the mutual consent of the owners of both the dominant and servient

---

[67] *Patch v. Baird*, 140 Vt. 60, 66, 435 A.2d 690, 692 (1981) (quoting *La Fleur v. Zelenko*, 101 Vt. 64, 70, 141 A. 603, 605 (1928)).

[68] *Walker v. Pierce,* 38 Vt. 94 (1865).

[69] *Barrett v. Kunz*, 158 Vt. 604 A.2d 1278 (1992); *Kinney v.* Hooker, 65 Vt. 333, 26 A. 690, 691-692 (1893).

[70] *Rowe v. Lavanway*, 180 Vt. 505, 904 A.2d 78 (2006).

[71] *Sabins v. McAllister*, 116 Vt. 302, 305-6, 76 A.2d 106 (1950).

[72] *Cashin v. Nichols*, unpublished, 2007-355 (2008).

[73] *VTRE Investments, LLC v. Monchilly, Inc*., No. 2019-387 (2020).

[74] *Patch v. Baird*, 140 Vt. 60, 435 A.2d 690 (1981); *LaFleur v. Zelenko*, supra.

estates.[75] The parties may agree to grant or reserve to either or both parties the power to unilaterally relocate the easement.[76]

D. Overburdening

A right-of-way appurtenant to land attaches to every part of it, though the land be subdivided.[77] Uses evolve over time. A right-of-way historically used for horses and cows may be used a century later by motor vehicles as they did not "burden the estate to a greater degree that was contemplated at the time of the grant." The "manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development" if reflects the expectations of the parties who create servitudes of indefinite durations." [78] Appropriate use depends on the easement's original purpose and the scope of its authorized use.[79]

An easement by implication is limited to the use which gave rise to it and can "neither be enlarged because of subsequent necessity nor cut down by a claim that some part of it was not indispensable."[80]

An express easement authorizing "all normal and usual purpose [sic] of vehicular and pedestrian ingress and egress from the parcel" does not include use of the lane for access to a restaurant parking lot, as the subdivision in which the lot was created was intended to be residential.[81] Where a twenty-eight foot wide driveway, "much wider than the traditional driveway," was originally to be used for a church, and was now part of a plan for a residential subdivision, with no restrictions in the deed, the land may be used for that purpose without overburdening the easement.[82]

E. Exclusivity

Unless exclusive use of a lane is specifically expressed in the deed, rights-of-way may be used by both the servient and dominant owners.[83]

F. Abandonment and Extinguishment

Easements can be lost to abandonment or extinguishment. A right- of-way is extinguished by unity of possession.[84] It may be extinguished by ouster. The road might be blocked off, or made impassible, but those acts must be continuous for 15 years, obvious to the dominant landowner, and with that party's acquiescence. The possession must be unequivocal and equivalent to an ouster of the dominant owner.

---

[75] *In re Shantee Point, Inc.*, 174 Vt. 248, 811 A.2d 1243 (2002); *Sargent v. Gagne*, 121 Vt. 1, 12, 147 A.2d 892, 900 (1958).

[76] *Holden v. Pilini*, 124 Vt. 166, 170, 200 A.2d 272, 275 (1964); *Sweeney v. Neel*, 179 Vt. 507, 904 A.2d 1050 (2006).

[77] *Dee v. King*, 77 Vt. 230 (1905).

[78] *Rowe v. Lavanway*, supra.

[79] *Farrell v. Vt. Elec. Power Co*., 193 Vt. 307, 69 A.3d 1111 (2012).

[80] *Read v. Webster*, 95 Vt. 239, 113 A. 814 (1921).

[81] *Post and Beam Equities Group, LLC v. Sunne Village Development Property Owners Association,* 199 Vt. 313, 124 A.3d 454 (2015).

[82] *Roy v. Woodstock Community Trust, Inc.*, 195 Vt. 427, 94 A.3d 530 (2014).

[83] *Folley v. Martin*, unreported, 2020-219 (2021).

[84] *Plimpton v. Converse*, 42 Vt. 712 (1871).

A deeded easement-holder need not make use of the right to maintain the title. "[R]eliance by the owner of the subservient state is not required to establish an abandonment." "The absence of reliance is not fatal to a finding of abandonment." The burden on one claiming abandonment, however, is "a heavy one," requiring evidence of the "acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement for a purpose inconsistent with its future existence." *Nonuser* alone is insufficient.[85]

A private right-of-way remains in place until expressly given up, when it is abandoned or extinguished, or when the dominant and servient estate are merged. A public right-of-way remains in place until formal discontinuance occurs by act of the appropriate legislative body of the municipality. Once a public right-of-way is discontinued, landowners get back full rights to the use of the land.[86] If the boundary line between landowners on either side of a public highway cannot be found, then each are presumed to own to the center of the former right of way.[87]

It's a tricky business. Consider the facts in the *Rogers* case from 1833. Rogers owns property over which there is a proper easement to use it a cart-way. Stephens owns the easement and needs it to reach his buildings. Stephens erects a fence and moves a house into the line of the right of way, onto the Rogers's property, leaving only room enough for a footpath. Was Rogers's failure to bring an action of trespass or ejectment sufficient to justify a conclusion of abandonment? The court says no, since the fifteen year period had not run. If Rogers or his predecessors had moved the house into the right-of-way and Stephens had done nothing, there would have been evidence of abandonment, even if fewer than fifteen years had passed, but not in this case.[88]

The burden of proving abandonment is on the party asserting it. In the *Sabins* case, the party asserting it had to overcome the fact that the defendant's didn't even know there was a right-of-way until shortly before the suit was brought. This could not justify a finding of abandonment, according to the court.[89]

G. Implied Ways

A right-of-way may be reserved, as well as granted, by implication.[90] A landowner might say, "I intended to leave myself a right-of-way to the road on the land I just sold." That's an implied reservation. Or the owner of an otherwise land-locked parcel might say, "the owner intended to leave me a right-of-way." That's an implied grant.

Chief Justice George Powers described the difference between implied grants and implied reservations in *Hawley v. Chaffee* (1915).[91] Ways of necessity are implied grants. Implied reservations are called by various names--quasi-easements, visible servitudes or

---

[85] *Lague, Inc. v. Royea,* 152 Vt. 499, 503, 568 A.2d 357, 359 (1989); *Nelson v. Bacon,* 113 Vt. 161, 172, 32 A.2d 140, 146 (1943). What about this word *nonuser*? It isn't the name for a person who doesn't use something. It isn't a misspelling in the reports and there is no reason to bracket out the final letter. The word means non-use, but the preferred form is nonuser. Most often it's *mere nonuser*. A legal encyclopedia defines it as "the failure to exercise a right, such as a franchise, as a result of which the person have the right might lose it." 37 C.J.S. Franchises § 38.

[86] *Livermore et al. v. Jamaica*, 23 Vt. 361 (1851).

[87] *Dessureau v. Maurice Memorials, Inc.,* 132 Vt. 350, 318 A.2d 652 (1974). *Murray v. Webster*, 123 Vt. 194, 186 A.2d 89 (1962).

[88] *Rogers v. Stephens*, 5 Vt. 215, 217 (1833).

[89] *Sabins, supra,* 116 Vt. at 308-9.

[90] *Dee v. King*, 73 Vt. 375, 50 A. 1109 (1905).

[91] *Hawley v. Chaffee*, 88 Vt. 468, 93 A. 120 (1915).

"easements arising from severance with apparent benefit existing."[92] In *Hawley*, Powers admitted that the two concepts had been confused for years, "a confusion, it must be admitted, from which our own cases have not wholly escaped."

Powers settled the confusion. "The foundation of this rule regarding ways of necessity is said to be a fiction of law, by which a grant or reservation implied, to meet a special emergency, on grounds of public policy, in order that no land be left inaccessible for purposes of cultivation. But the access must be "strictly one of absolute necessity." Powers supported his conclusion with authorities. "The learned authors show, from a most thorough examination and analysis of the cases, that this view has been recognized and acted upon by the courts from a very early period in the record of judicial decisions in England, and also show that the law of the *Civil Code of France* accords therewith."[93]

Recognizing there is no question of public policy with implied reservations, as with ways of necessity, Powers essentially removed implied reservations from the legal canon. Only cases of strict necessity are justified, whatever their names. Powers ruled that "despite some divergence of judicial opinion and consequent uncertainty in the law, strict necessity has come to be the settled rule of implied reservations in England," giving a series of citations to leading English cases.

Judge Royall Tyler defined ways of necessity this way:

> If A. conveys land to B., to which B. can have access only by passing over other land of A., a way of necessity passes by the grant. If A. conveys land to B., leaving other land of A., to which he can have access only by passing over the land granted, a way of necessity is reserved in the grant.[94]

State policy disfavors land-locked property, reflected in the recognition of an implied easement, "implied" as if to say that the parties intended an easement but neglected to put it in the deed.[95] Mere inconvenience, however great, is not sufficient to justify a way of necessity, even though the existing access required the landowner to cross a hill, requiring many turns, and only with very light loads.

An easement by implication requires proof of the use of the land prior to severance, but use is irrelevant to a finding of a way of necessity. A way of necessity has no hostility, and so cannot ripen into a prescriptive easement.[96]

In 1970, Vermont adopted the Marketable Record Title Act, which provides,

> Any person who holds an unbroken chain of title of record to any interest in real estate for 40 years, shall at the end of that period be deemed to have a marketable record title to the interest, subject only to such claims to the interest and such defects of title as are not extinguished or barred under this chapter, and such interests, limitations or encumbrances as are inherent in the provisions and

---

92 Visible servitudes were first recognized in Vermont in *Harwood v. Benton* (1860). Judge James Barrett wrote, "While the owner of a parcel of land could not have an easement in one part in favor of another part thereof, yet, by force of his ownership, he could use it as he pleased and impress it with conditions as he chose, which upon severance could survive." *Harwood v. Benton,* 32 Vt. 724 (1860).

93 *Hawley v. Chaffee*, 93 A. at 123.

94 *Willey v. Thwing*, 68 Vt. 128, 34 A. 428 (1896).

95 *Willey v. Thwing*, 68 Vt. 128 (1896).

96 *Traders, Inc. v. Bartholomew*, 142 Vt. 486, 459 A.2d 974 (1983).

limitations contained in the muniments of which the chain of record title is formed which have been recorded during the 40-year period.[97]

The law grants an exception to this rule when an easement is clearly observable by physical evidence of its use.[98] Otherwise this statute cuts off claims of ways of necessity from before the 40-year period that have not been renewed with a notice of claim.[99]

A way of necessity exists only so long as the necessity which creates it: "if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease."[100]

H. Prescription

Prescription is the application of the principles of adverse possession to the law of rights-of-way. The same basic principles apply--it takes open, notorious, continuous (fifteen years) and hostile possession by use of a way to ripen into a right of the same.[101] Unlike the adverse possession of land, however, the prescriptive claim of a right-of-way may encounter certain special challenges from the owner of the dominant estate, including a showing of privilege or permission, where the owner allows the use of an alley, logging or farm road.[102] A mere allegation that the plaintiff passed over the land in a random fashion, rather than along a defined way, without objection from the owners, misses a critical qualification--a claim of right--that will justify prescription, because there is no showing that it was adverse. The possibility that the use was permissive, without more, appears to be enough to defeat it.[103] A public building, constructed to offer services to customers, is a good example of this. Permission is implied by the design of the structure. A claimant for a prescriptive right-of-way will have an uphill burden.

Another, perhaps obvious difference is the interest claimed. In adverse possession, it's a fee interest; with prescriptive rights of way, the interest is nonpossessory and non-exclusive.[104] The fee owner and others may also use the route.

A prescriptive easement is earned by 15-years of continuous, hostile, open, and notorious use of a road, without the permission of the servient landowner.[105] Strict necessity has nothing to do with it, unlike ways of necessity. The general rule is that open and notorious use will be presumed to be adverse.[106]

"The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of

---

[97] 27 V.S.A. § 601(a).
[98] 27 V.S.A. § 604(a)(6).
[99] *Gray v. Treder*, 209 Vt. 210, 204 A.3d 1117 (2018); 27 V.S.A. § 605.
[100] *Traders, Inc. v. Bartholomew*, 142 Vt. at 493, 459 A.2d at 979.
[101] *Ibid.* See also, *Greenberg v. Hadwen*, 148 Vt. 112, 484 A.2d 916 (1984).

[102] *Plimpton v. Converse*, 44 Vt. 158 (1871).
[103] *Clark v. Paquette*, 66 Vt. 386 (1894).

[104] *Community Feed Store, Inc. v. Northeastern Culvert Corporation*, 151 Vt. 152 (1989).

[105] *N.A.S. Holdings, Inc. v. Pafundi,* 169 Vt. 437, 438, 736 A.2d 780, 782 (1999), *cert. denied,* 528 U.S. 1079, 120 S.Ct. 798, 145 L.Ed.2d 672 (2000); *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 559 A.2d 1068 (1989).
[106] *Barber v. Bailey,* 86 Vt. at 223, 84 A. at 611 (1912).

conquest."[107] Judge H.H. Powers invented that phrase in *Wells v. Austin* (1887), and it has gone around the world as a fit description of the openness and notoriety that is required of adverse possession and its traveling companion prescriptive easement.

The 15-years need not be limited to the years the plaintiff used the land. Tacking the years of prior, continuous use is proper.[108] Once a right-of-way is established by adverse use, it cannot be divested by obtaining a license to use it, although this would be strong evidence that the former use was permissive.[109] To stop the 15-years, and to show a want of acquiescence, you must either institute legal proceedings against the claimant or place obstructions actually preventing the use.[110]

The width of a prescriptive right-of-way is determined by the extent of actual use.[111]

I. Succeeding Ways

After a public highway is discontinued, the landowners whose property was formerly served by the road enjoy a private right-of-way along the same route. This was codified in 2006 in 19 V.S.A. § 717(c), which reads, "A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way."

J. Utilities.

Most title searches today of property that is not the subject of recent development repeat, somewhat defensively, the statement that electric and telephone easements are found "of record" on this parcel, without noting the deed, volume or page of the same, because the references are beyond the forty year marketable title period. If utility easements are found, there are notable for their vagueness and lack of specificity (an easement to erect and maintain lines across the property of . . .).

When one of two co-owners conveyed an easement across land of twenty-five feet in width to an electric company, and then subsequently entered onto the land and constructed a transmission line that took an additional twenty-five feet, the present owners sued for trespass. The company claimed that even though the utility easement was ineffective based on the earlier conveyance, that it had ripened into adverse possession by more than fifteen years of occupation. The court denied the company this conclusion, citing 30 V.S.A. § 2519, which provides that, "Enjoyment of any length of time of the privilege of maintaining a line of telegraph, telephone or electric wires, poles, conduits or other apparatus, upon or over the buildings or lands of other persons, shall not give a right to the continued enjoyment of such easement or raise a presumption of a grant thereof."[112] This statutory bar to the creation of utility easements by prescription is one reason that the forms used by companies are designedly unspecific.

---

[107] *Wells v. Austin*, 59 Vt. 157, 10 A. 405, 409 (1887).
[108] *Hassam v. Safford*, 82 Vt. 444, 74 A. 197 (1909).
[109] *Tracy v. Atherton*, 36 Vt. 503 (1864).
[110] *Dodge v. Stacy*, 39 Vt. 558 (1867).
[111] *Gore v. Blanchard,* 96 Vt. 234, 242, 118 A. 888, 894 (1922)
[112] *Dodge v. Washington Elec. Cooperative, Inc.*, 134 Vt. 320 (1976).

Updated May 19, 2021

TOWN BOUNDARY LAW

Appendix B

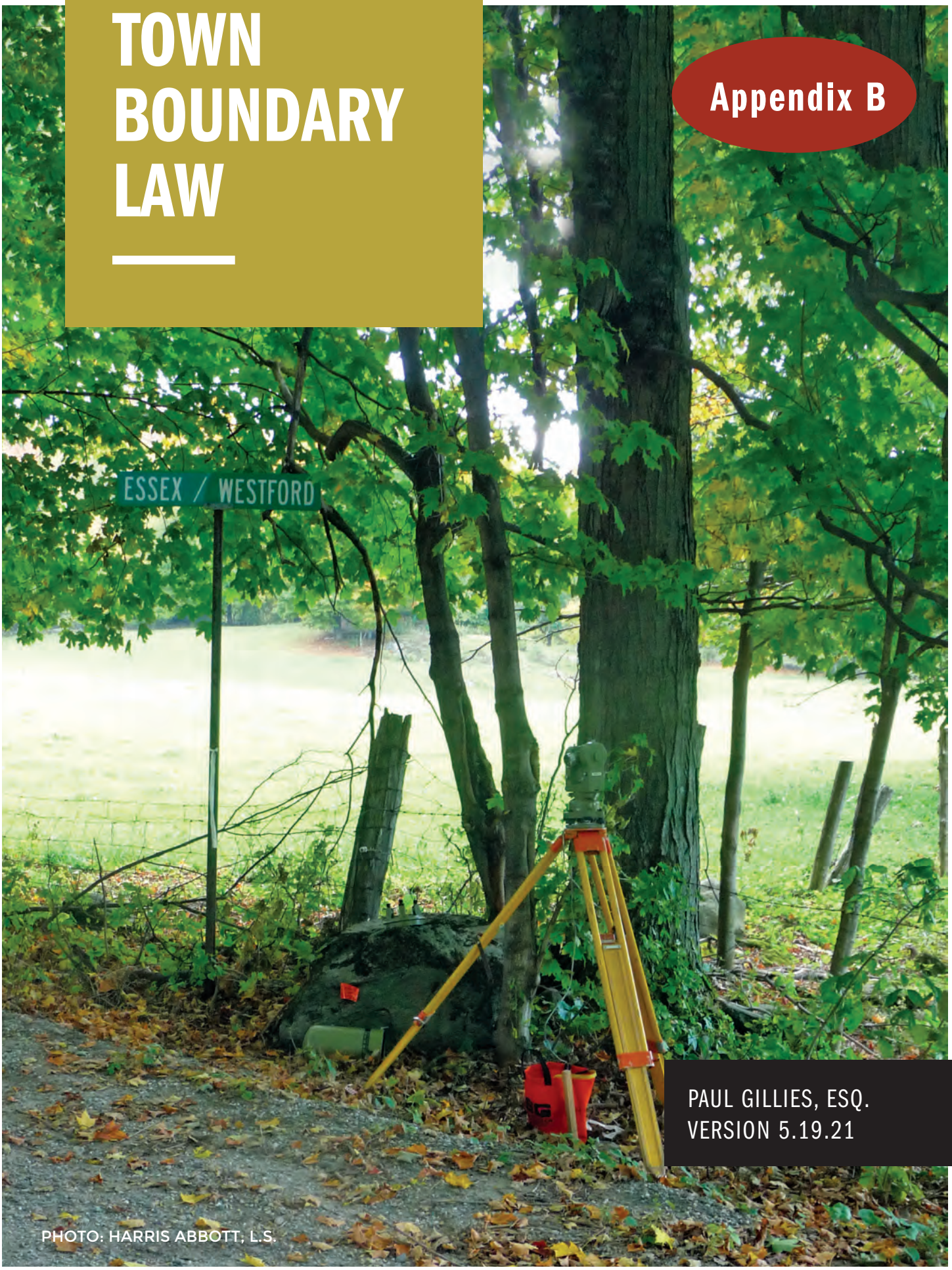


PHOTO: HARRIS ABBOTT, L.S.

PAUL GILLIES, ESQ.
VERSION 5.19.21

TOWN BOUNDARY LAW

By Paul Gillies, Esq.

Introduction.

Knowing your boundaries is essential, whether you are a landowner, select board member, governor, or president. Boundaries separate obligations, divide loyalties, and define identities. They may be determined by geographical features, ethnic and cultural differences, and politics, yet no imaginary line is permanent. People go to war over boundaries, as nations, states, towns, or individuals.

Here our subject is town boundaries. Like all boundaries, town lines establish portions and proportions. They may be marked by blazes on trees and piles of stones at corners, and the traditional green highway signs, like the one that separates Montpelier and Berlin, right through the middle of the Wayside Restaurant. They may depend on the recollections of elderly residents or ancient field books kept in the town vault. Town boundaries count in Vermont, for all sorts of reasons, including taxes and tax rates, judicial jurisdiction, and voter registration. We are born, raised, schooled, married, and die in a town. Candidates are qualified to run for legislative office according to where they live.[1] The lines identify where a town truck raises its plow in the middle of a snowstorm.

This essay is about the law of town lines—how lines were drawn, set on the ground, fought over, and won or lost. The subject is, by definition, historical in nature. Law is like that. It only looks backward.

1. The Challenge. In the beginning there was all this vacant land. It was vacant and unappropriated, meaning that although it was the subject of many competing claims, no one could say precisely who owned it. This land was alternately claimed by the Iroquois, the Mohawks, the French, the British, the Colony of Massachusetts Bay, the Colony of New Hampshire, the Colony and later the State of New York, and finally by its settlers, acting on their own brazen instincts. The settlers won out, and New Hampshire charters prevailed over New York patents as a matter of law.

Governor Wentworth of New Hampshire had been issuing charters to Vermont land since 1749. New Hampshire went out of the charter business in 1764, on the King's

---

[1] Actually, there are two examples where the constitutional rule requiring a house member to be a resident of the town was not followed. One is Noah Smith who, while living in Rutland, was twice elected to the House of Representatives for the town of Johnson. The first time he attended the legislature, the Assembly voted not to sit him, on account of residency, exercising its rights under the Constitution to judge of the elections and qualifications of its members. The following year the people of Johnson again elected Smith, and he was seated. The House could do nothing, as the Constitution explained then (and now) that the body had the power to expel members, "but not for causes known to their constituents antecedent to their election." Vermont Constitution, Chapter II, Section 14. Frank Fish, "Noah Smith" in V *Vermont The Green Mountain State* (1926) 63-64. The other nonresident representative was Gamaliel Painter, originally of Middlebury, from which town he had been elected. When new town lines were run in 1786 it was discovered he actually lived in Salisbury. Salisbury voters did not complain apparently, nor did they object to the "arrival" of Thomas Sawyer, formerly of Leicester, who also changed towns without moving from his home, on account to the running of these new town lines. Leonard Deming, *Catalogue of the Principal Officers of Vermont, 1778-1851* (1851), 20.

order. By the time Vermont declared its independence in January of 1777, Wentworth had chartered 129 towns and six grants, most of southern Vermont and the areas east of Lake Champlain and west of the Connecticut River.[2] After the first Vermont Constitution was adopted in July of 1777, the first legislature met in March of 1778, Vermont began issuing its own charters. Eventually 128 Vermont towns were chartered.[3]

Reasonable people would say it was an impossible challenge: surveying and marking the town lines in remote places, with crude equipment, frozen feet and hands, severe terrain and meager provisions, over a relatively short number of years, in the midst of war, privation, and political uncertainty, as settlers grew restless to know precisely where in Vermont they were to live. It is a wonder that some lines are as sound and reliable today as they were when James Whitelaw laid them out. Many more appear on the topo maps as "indefinite," while others appear confident at first glance and later seem to vary in ways unknown to the charter that established them.

At the heart of the problem was bad science. Whitelaw described gores as "the result of man's frustrating attempt to lay out right-angled plots of land upon a spherical earth's surface."[4] But politics and money were also at fault, as legislators tried to maximize the settlement of Vermont and the receipt of charter fees. Sometimes in their haste they granted more land than there was or the same land more than once.

When Vermont started granting charters, the process took several steps. First there was necessarily a petition, signed by those who wanted to purchase the land from the freemen of the State of Vermont. This was presented to the General Assembly, and if agreeable the Assembly would resolve that a township of land named in the resolution be granted to the company of petitioners, occasionally with some boundaries identified. For instance, on November 3, 1780, the Assembly

> *Resolved* that there be and hereby is granted unto Aaron Stores & sixty eight of his Company whose names are annexed to the said petition a township of land situate and lying in this State being part of the tract called Middlesex bounded as follows viz. as drew on the Charter or plan exhibited by the Surveyor General and marked N° 4 containing six miles square. And the Governor and Council are hereby requested to issue a grant or charter of said tract by the name of RANDOLPH unto the said Stores and Company being sixty eight in number, under such restrictions reservations and for such consideration as they shall judge best.[5]

The legislative role was to grant the township, but the charter was to come, after the Assembly "requested" it and the charter fees were paid, from the Governor and Council. The Surveyor-General acted on instruction of the Governor and Council. It was always his hope that he would be able to survey the lines or at least examine existing surveys before a charter was issued, but this was not always the case.

Before getting to the law, a few introductions are in order.

---

[2] Esther Munroe Swift, *Vermont Place Names* 14. Swift explains that 113 present Vermont towns trace their lineage to Wentworth charters.

[3] Swift, 601.

[4] Swift, 21.

[5] *Journals and Proceedings of the General Assembly of the State of Vermont* 1778-1781, III State Papers of Vermont (I) (Walter H. Crockett, ed., 1924), 149. It's important to recognize that the resolution was not a formal act of the legislature. At this time, the legislature saw a distinction between what it could be by act and by resolution. Clearly more authority was granted to act by resolution at that time as today.

2. The Principal Characters. The principal characters in the law and history of Vermont town boundaries are Ira Allen and James Whitelaw. They are not the only ones, but they are the principals. The earliest surveyor in Vermont may have been Hubbertus Neal, who surveyed the corner of Guildhall for Benning Wentworth in 1762 or 1763.[6]

a. Ira Allen. Before there was a Vermont, before Vermont created the office of Surveyor-General, Ira Allen fulfilled that role. He was regularly employed as a surveyor in Vermont from as early as 1771, where he run the lines of 10,000 acres of land his uncle Heman Allen had purchased in the town of Hubbardton.[7] When he returned from that first adventure, he studied surveying under a master surveyor for one week, which was all the formal schooling in the science he had. As a surveyor for the Onion River Company, with his brothers, he surveyed lands in the Champlain Valley. He was always busy with surveying work, but his work has frustrated many who followed him. Franklin H. Dewart says of him that "he customarily with great delicacy waives all clues as to which of the twenty-odd towns of the Onion River domain has for the nonce attracted his needle."[8]

Ira relates a story in his History of Vermont (1793) about a New York surveyor named Cockburn, who was surveying New York land patent lines in the New Hampshire grants in 1772. "At length Ira Allen discovered his destination, by traversing the wilderness, and Captain Warner and Baker, with a number of men, went in the pursuit; they found and took him in Bolton, near one hundred and thirty miles north of Bennington: great part of this way was in the Wilderness. They broke and destroyed his instruments, and tried him by a court martial; he was found guilty, and banished the district of the grants, on pain of death if he ever returned."[9]

Ira Allen served as the first Vermont Surveyor-General, from 1779 to 1787, and he did well in an office that allowed him to speculate in the land he was surveying. It also cost him dearly. Taking the charter of Woodbridge in return for compensation, as offered by Governor Thomas Chittenden, Allen and Chittenden both lost their public offices (Allen at the time was State Treasurer) at the next election. Eventually a committee of the legislature exonerated him, and discovered the state owed him money, instead of what many people feared. It is difficult to imagine how much attention Ira actually gave to the position, since he was doing so many other jobs during those years, from writing and publishing pamphlets justifying Vermont independence, speculating in land, and serving as State Treasurer, among other preoccupations. Ira Allen's surveying book is in the State Archives. It is entitled, "Ira Allen, His Book, Containing the most Usefull Rules in Surveying, Wrote with my own Hand and Agreable to my Invention." It contains his surveys of Burlington, Essex, New Huntington, Georgia, and Williston, among other work. It is dated "Salisbury, March 23, 1775."[10]

---

[6] *Journals and Proceedings of the General Assembly of the State of Vermont* 1781-1783, III State Papers of Vermont (II) (Walter H. Crockett, ed., 1925), 65.

[7] Robert E. Shalhope, *Bennington and the Green Mountain Boys: The Emergence of Liberal Democracy in Vermont, 1760-1850* (1996), 49.

[8] *Index to the Papers of the Surveyors*-General, I State Papers of Vermont (Franklin H. Dewart, ed., 1918) 7.

[9] III *Ethan and Ira Allen: Collected Works* (J. Kevin Graffagnino, ed., 1992), 23.

[10] I State Papers 16.

b. James Whitelaw. James Whitelaw is the major figure in the history of town boundaries, even as Ira is remembered for being the first Surveyor-General. More Vermont towns were surveyed by Whitelaw than any other person. He was born in 1748 in New Mills, Scotland, and came to America in 1773 as part of the Scots-American Company of Farmers, after thorough training as a surveyor. The Company purchased land in Ryegate, and Whitelaw was one of the first settlers. His first surveys were done in Ryegate, on behalf of the Company. He served as town clerk for several years. His surveying skills were in high demand, and in 1783 Ira Allen appointed him his assistant.[11] He took over after Ira's term ended in scandal, and was annually reelected Surveyor-General until 1804.[12]

Whitelaw was a tall and hardy man. He was 6'10". Although he often spent weeks in the wilderness living without shelter, he seldom wore gloves or mittens, even in the coldest weather.[13] His surveying compass and other instruments, along with his papers, are part of the collections of the Vermont Historical Society. Whitelaw had ordered this compass to be made for him in Scotland.

One of the fringe benefits of being the first official government surveyor in an area is giving names. Whitelaw named Caledonia County, the Clyde River, and Echo Pond in Charleston.[14] He also had an opportunity to speculate in land. He was a proprietor of Ryegate, Cabot, Plainfield (St. Andrews), Cambridge, Waterville, and Groton.[15] His assistants included William Coit and James Savage, who along with Whitelaw were granted land in exchange for services as surveyors. His biographer Thomas Goodwillie wrote of Whitelaw, "He was uniformly very exact and prompt in performing his work."[16] Whitelaw maintained his land office in Ryegate, where he also kept all the records he had assembled as Surveyor-General and Deputy.

One letter from James Whitelaw to Ira Allen survives, dated July 2, 1784. In it, Whitelaw describes his work laying out a road in the northern part of the state:

> . . . With respect to the road from Missisque to St Johns we set out from Mr. Metcalfs house and followed the road leading down to the meadows about ½ mile and Just beyond a bridge marked a tree pretty well and steered N 5 or 6° W about 8 or 9 miles when we heard drums beat at St. Johns which by that means we found to be about N.W. which course we steered about 3 miles and struck into the upper end of Col: Hazzens clear land Just opposite St. Johns fort. As I have no Minutes of the Survey cannot be positive that the above is the exact course and as we did not measure we only guessed at the distance and computed the distance from Mr. Metcalfs to the provision line 6 miles from thence to Brochet river 6 miles and from thence to St. Johns about 12 miles . . . .[17]

c. Others. After Whitelaw was done, Joseph Beeman became Surveyor-General (1805-1812). Then came John Johnson (1813-1816), Caleb Hendee, Jr. (1817-1820), Joseph Beman (1821), Alden Partridge (1822-23), Calvin Weller [Waller?] (1823-1828), Isaac Cushman (1829), John A. Pratt (1830), Isaac Cushman (1831), and finally John

---

[11] Swift, 457.
[12] Thomas Goodville [Goodwillie], "Life of General James Whitelaw," *Vermont Historical Society Proceedings, 1905-1906*, 103, 112.
[13] Goodville, 113-116.
[14] Switt, 115, 337, and 345.
[15] Swift, 36, 41, 86, 110, 221.
[16] Goodville, 117.
[17] *Ethan Allen and His Kin: Correspondence, 1772-1819* (John Duffy, ed., 1998), 149-150.

Johnson (1832-38). The office was abolished in 1838, even as requests for new surveys continued to be made to the General Assembly.

Others served as deputy or assistant to the Surveyors-General during the years 1779-1838, and should not be forgotten. They include Ebenezer Judd, who recorded much of the material in the Papers of the Surveyors-General.[18]

Governor Samuel C. Crafts is remembered fondly for making a set of plans, which are respected as beautiful and scholarly.[19] The name of Franklin H. Dewart, who not only produced the first volume of the State Papers series, but who did a series of town maps during the early years of this century, should be added to this list, as should Virgil McCarty, for his diligent work on county boundaries.[20]

There are others to remember. Henry Stevens, the antiquarian book collector from Barnet, was alone responsible for saving more early records than anyone else. His collections of surveyors-general records were first offered to Vermont in 1870 and then, after Vermont would not agree to the price, to the State Library of New York. They were finally returned to Vermont on May 15, 1902, due to the good work of Hiram Huse.[21]

The Rev. Samuel Williams has a place in this story. Williams, the author of the first history of Vermont (1794),[22] appears briefly on the stage to answer the call of the legislature in 1804 to find the true location of the 45th parallel. The Treaty of Ghent (1783) following the end of the Revolutionary War had established the line legally and no one disputed that. But Governor Isaac Tichenor and others believed the line had been surveyed in error by Valentine and Collins in 1774 and that the actual line was north of that line, meaning that Vermont had 17 or more townships than believed. Williams hired a Newport blacksmith to construct a quadrant and he set out along the line. To the legislature's delight, Williams confirmed the veracity of the rumor about the international boundary. He was wrong. Subsequent surveys revealed a slight confusion, but nothing that dramatic. The northern line of Vermont was finally settled by the Webster-Ashburton Treaty of 1842.

3. Narrative of the Law of Town Lines. The 1777 Vermont Constitution does not mention the office of Surveyor-General. The first constitutional reference to the office, which remains a part of the Vermont Constitution today almost 160 years after the office was officially abolished, came in the 1786 Constitution. Today's Chapter II, Section 54 provides: "No person in this State shall be capable of holding or exercising more than one of the following offices at the same time: Governor, Lieutenant-Governor, Justice of the Supreme Court, Treasurer of the State, member of the Senate, member of the House of Representatives, Surveyor-General, or Sheriff." So far no one has violated this rule.

The law of town lines is really a series of legislative acts, beginning in 1779 and continuing to the present. It takes the form of statutes directing how lines should be run, including the science, art, and licensing of land surveying, and the laws of recording.

---

[18] I State Papers 8.
[19] Id.
[20] McCarty's work can be found in the Vermont Historical Society library.
[21] I State Papers 5-6.
[22] Samuel Williams, *The Natural and Civil History of Vermont* (1794).

This is the legislative record. In the next section is the judicial record. Here also are petitions to the legislature by people unhappy with the location of their town lines.

a. During the Tenure of Ira Allen. Ira Allen was first elected Surveyor-General on June 4, 1779.[23] At the time of his election, the authority of the office was undefined, but the next fall the Assembly appointed a committee to draw up a bill to describe the office and duty of the Surveyor-General. The bill explained the duty "to form a general map or maps of this State for the use of this State according to a resolve of the General Assembly at their Session in June last and that it be done at the cost of this State." It allowed the Surveyor-General to deputize "one or more meet person or persons" to help him lay out lands, run lines, and ascertain boundaries upon oath. The Surveyor-General was not expected to survey every line himself. He had the authority to "examine all surveys and plans that shall be made by any of his deputies, or any previous survey or plan that has been made by any approved surveyor to obtain grants of land within said State, and approve or disapprove of said survey as it may appear to said Surveyor-General to comport with the true intent and meaning of the General Assembly. . . ." The Surveyor-General was also to stand ready to lay out any line as ordered the Assembly.[24] In early years, the Assembly did a good deal of its business by resolution, rather than by formal act. Although later amendments of the law directing the Surveyor-General in his duties would be acts, this first one became *law* when the Assembly *resolved* to accept it.

The Assembly then resolved on October 23, 1779 to direct the Surveyor-General to advertise in the public papers for all Charters of land that have been granted by either of the States of the Massachusetts Bay, New Hampshire or New York to be recorded in his office at the expense of this State.[25] This was the first of many attempts by the legislature to ensure that all of the basic evidence of the existence of Vermont towns was preserved. The process is still continuing, as new information is being rediscovered every year. These acts always came with a deadline, after which former charter lines would be dissolved, but these were mostly empty threats. No one wanted to move that quickly to work out the equities and law of boundaries. There was too much at stake.

The previous February, the Assembly had begun work on the challenge of ensuring good title by the surveying and marking of reliable town and division lines by enacting a law authorizing the appointment of county surveyors. These officials were elected by the Assembly. They were responsible "for laying out of lands, and for the running of the bounds of lands already laid out, according to their original grants, as need shall require; and for the running of lines, and other services proper for a surveyor to do; who shall be sufficiently skilled in the surveyor's art, and be furnished with instruments suitable and sufficient for that service."[26] The act provided that county surveyors would not be guilty of trespass while running a random line to find the certain and true course across the property of others. But surveyors could only enjoy this exemption for work done during March, April, October or November. The law also provided a fine if anyone attempted to interfere with the county surveyor's work or should attempt to change the lines run. The penalty was five pounds.

---

[23] III State Papers (I) 71.
[24] III State Papers (I) 86-87.
[25] III State Papers (I) 88.
[26] *Laws of Vermont 1778-1780*, XII State Papers (Allen Soule, ed., 1964) 80-81.

Timothy Andrus petitioned the Assembly in the fall of 1779 on behalf of the proprietors of the towns of Guildhall and Granby, complaining of encroachment by other towns and asking that the Surveyor-General survey their lines, reminding the Assembly that those towns were the first to be chartered in this area.[27] His petition, the first of many to follow asking for legislative assistance in settling intertown disputes, was granted and a committee of five appointed to arrange for the survey of Guildhall, Granby and either other towns "under the direction of the Surveyor-General."[28]

The following year, the legislature took the first steps toward the creation of a plan of the state. The first mention in any legislation of this plan comes on March 16, 1780.[29] James Whitelaw would complete the project with the publication of his Map of Vermont in 1796.

Petitions were received during the early spring of 1780 calling for the Surveyor-General to survey land of the town of Royalton. In October of 1779, proprietors of Clarendon asked the legislature to make certain the lines that separated them from Wallingford and Tinmouth, to address the "uneasiness" of the inhabitants who "fear Great Dificculty will arise . . . ."[30] In response, the Assembly adopted a resolution on town charters. It agreed that the "conveniency, quality, and situation of the lands" would be considered in any grant and that no charter would be issued "until a plan thereof be laid before this House by the Surveyor General or such plan or plans as have been previous to their beings laid before the Assembly been properly approved by the Surveyor General and duly certified."[31] The confusion of town lines throughout Vermont was just beginning to become known.

On November 3, 1780, the Assembly addressed the problem of the lack of responsiveness to their call for charters. Ira Allen had advertised, as instructed, in three different ads, for grants and charters and "sundry persons have neglected" to do it. A deadline was established of May 1, 1781. If the Surveyor-General did not get the charters by then, the lands would be regarded as "vacant lands, so long as any town line may be established on any such town or towns for want of such Charter, as also so far as any grant from this State will interfere with any such town or towns." The law excepted charters that were burnt or lost, but required evidence of these disasters to be given to Ira by May 1st.[32]

On November 4, Ira Allen made his report to the legislature on what he had received. He reported that it was "impracticable at this time, to grant the prayer of each petition, partly for want of proper Surveys, and partly . . . for want of unappropriated lands [in] this State to make such grants." As early as the end of 1780, they were running out of land in Vermont. Ira listed all the grants he had found, and this was published in the journal of the House. [33] Three days later, the General Assembly granted charters to twenty-four towns--Brookfield, Vershire, Hardwick, Waterford, Groton, Cambridge, Warren, Eden, Salem, Roxbury, Northfield, Pittsfield, Hancock, Concord, Starksboro,

---

[27] *General Petitions 1778-1787*, VIII State Papers of Vermont (Edward A. Hoyt, ed., 1952) 19.
[28] III State Papers (I) 92-93.
[29] "An Act Authorizing and Directing the Surveyor General to make a plan of this state." XII State Papers 192-93. Following the title appear the words, "This act is omitted from the original volume."
[30] VIII State Papers of Vermont 23.
[31] III State Papers (I) 83.
[32] III State Papers (I) 150-151.
[33] III State Papers (I) 153-56.

Lincoln, Wardsboro, East Haven, Westmore, Sheffield, Granville, Braintree, Elmore and Wolcott.[34] No other day in Vermont's history exceeds that record of chartering.

On February 15, 1781, a committee was appointed at the beginning of the session to "wait on the Surveyor General and see whether there is any land that can be granted with safety this Session." In its report on February 22, the committee reported there was a gore of land adjoining Readsboro and another next to Wallingford.[35]

The following day, the proprietors of Royalton were discharged from further payment of granting fees, on account of the hardships they had suffered as result of the Indian raid on that town.[36] This is the first instance of legislative largesse to a Vermont town.

The seeds of Ira Allen's fall from grace as Surveyor-General were planted on February 23, 1780. The Assembly resolved to grant Ira "so much lands as may in the opinion of the Governor and Council be equal to the balance that may be then his due in such place or places as the Surveyor General may return a survey Bill (in good form) and the Governor and Council are requested to make out a Charter or Charters under such regulations, reservations and restrictions as they may judge proper not exceeding the quantity of two townships six miles square each."[37] Thomas Chittenden and Ira Allen were both to lose their public offices in 1787 as a result of Chittenden's issuing a grant for the town of Woodbridge [later rechartered as Jay] without the approval of the Council.

The following spring, the legislature directed the Surveyor-General to locate a grant to Abel Thompson of 24,000 acres adjoining towns of Middlebury, Salisbury and Leicester.[38] Later that year the legislature received the petition of William Barton, asking that a committee be appointed to confer with the Surveyor-General and report their opinion on where he might be given land. The committee reported that Barton should have a township of land contiguous to Lake Memphremagog, and the Surveyor-General directed to make out a survey "as soon as may be upon the unappropriate lands," and the Governor and Council was to issue him a charter.[39] A Vermont grant was finally issued to Barton and company in 1789, after James Whitelaw completed running the lines in 1787.[40] The town of Barton does not have lake frontage.

That year the Surveyor-General asked the legislature to hold off granting any more towns until "lines can be properly ascertained," excepting the towns of Woodbridge and Newport.[41]

By petition dated January 14, 1782, the proprietors of Dorset asked for a resolution of a dispute with Manchester, "and especially between those persons in each town, whose land lays Contiguous to said line—n consequence of which, many of your petitioners are involved in very unhappy circumstances; not being able to ascertain their boundary lines; and thereby wholly prevented from giving, or receiving conveyances of the land adjoining said line—beside a train of evils which arise from a supposed intrusion

[34] III State Papers (I) 173-78.
[35] III State Papers (I) 198, 207-208.
[36] III State Papers (I) 199.
[37] III State Papers (I) 210.
[38] III State Papers (I) 228.
[39] III State Papers (II) 17, 25.
[40] I State Papers 34.
[41] III State Papers (II) 32-33.

by the inhabitants of each town, upon each others property—".[42] No area of Vermont it seems was immune from conflicts over town lines.

In 1782, the Assembly appointed a committee to "arrange the most necessary business" and among its priorities was "That the Surveyor Gen'l be called upon to lay before the House a survey of the State, as far as he has obtained it, as also a plan of all the townships granted and the vacant lands ungranted."[43] During that term, the Assembly received a letter from the Surveyor-General asking direction on how to make out the bounds of Cambridge and Fletcher. The Assembly resolved that the bounds "be ascertained agreeable to the petitions for said townships . . . and the Surveyor-General is hereby directed to Govern himself accordingly."[44] Here again the legislature acted by resolution, rather than by involving the Governor and Council.

A dispute arose over the south-easterly location of Guildhall that threatened the boundary of Lunenburgh in early 1782. The line, according to the report of a legislative committee, should be as Surveyor-General found it.[45] That session Londonderry Gore was identified.[46] The Surveyor-General was ordered to "perambulate and ascertain the Boundaries of the" towns of Bennington, Shaftsbury, Arlington, Sandgate, Ruport, Pawlet, Sunderland, Manchester and Dorset."[47]

When the legislature convened in October of 1782, it began by asking the familiar question of the Surveyor-General, whether there were any vacant lands to be granted.[48] On the heels of this prayer, it also enacted the first law for the regulation and establishment of town lines. Again the General Assembly ordered that all charters or attested copies of them be sent to the Surveyor General's office for recording before February 1, 1783. The penalty was forfeiture of the grant. Certain rules were laid out. The Surveyor General was "directed to proceed as soon as may be after the rising of the next Session of the Assembly to perambulate the Lines of the towns of this State, by himself or Deputies." They were to begin where the respective Charters began: to run the lines he could find and run new lines where the old lines where needed. On his maps, the legislature directed that partial lines be in black ink and the lines as specified in the charters in red ink. "And in case any town should be in fringed on, by the establishment of such Lines by the neglect of not sending in their Charters as aforesaid, they shall have no right of Action, at Law or otherwise, for the recovery of their Property, lost by the Establishment of Town Lines, as aforesaid but are hereby forever debarred therefrom; and this Act shall be given in Evidence."[49]

A few days later, the Assembly resolved to suspend the Surveyor-General "for the time being drawing bounds for any towns granted by this State where he may judge they cannot be drawn with that exactness which ought to be both for the interest of the State & grantees." The Assembly directed All to "regulate the surveys adjacent to the upper Cohoos (Coos) towns and lay the lines in that vicinity . . . ." Where grants were found to overlap one another (other than Coos), he was to return to the legislature for adjustment

---

[42] VIII State Papers 52.
[43] III State Papers (II) 46-47.
[44] III State Papers (II) 51.
[45] III State Papers (II) 65.
[46] III State Papers (II) 76.
[47] *Laws of Vermont 17881-1784*, XIII State Papers (John A. Williams, ed., 1965) 82-83.
[48] III State Papers (II) 128.
[49] XIII State Papers 151, 152.

and direction he drew bounds for any such towns." Furthermore, "[t]hat as a general instruction the Surveyor-General be directed to comport as near as may be to the tenor of the respective grants laying the towns in as good shape as the situation of the lands will admit observing the priority of grants."[50]

The 1782 act relating to town lines was enlarged on February 24, 1783. This act established the wages of the Surveyor-General, deputies, chainmen, line markers, and pack bearers. The general and deputies would make twelve shillings a day, chainmen five, line markers four, and pack bearers six. The fees were paid by the town, and apportioned between towns. If survey fees were not paid within 30 days, in gold or silver, then the Secretary of the Council would make out an execution against the town, with the sheriff advertising in the Vermont newspapers, three weeks successively, and sale at public vendue followed of so much undivided land as needed. If there were insufficient undivided lands to raise the fees, then the law directed the sheriff to sell so much land as was allotted to each right to pay their equal proportion.[51] This act first provided that one-thirtieth part of each measurement "be allowed for Swag of Chain" and that "proper Allowance be also made for the Variation of the Compass, and that proper Allowance be made for the Altitude, so as to make Horizontal Lines."[52]

At the 1783 legislative session, the Assembly resolved to include among its priorities for the term, "That proper measures be taken to compleat the Survey of this State."[53] The Assembly also learned for the first time that a gore had been discovered between Sharon and Strafford during that session. It passed a law for qualifying chainmen. They didn't need any qualifications, but they would have to take an oath of office: "You AB and CD being desired to assist [Ira Allen] Surveyor in carrying the Chain, do swear by the everliving God, that you will faithfully assist the said Surveyor in his Service: and that you will keep a true Account of all Lines or Measures by you taken, agreeable to said Surveyor's Direction, and the same give up to said Surveryor, at his Desire; according to your best Skill and Ability—So help you God."[54]

The proprietors of Cabot petitioned the General Assembly during that session to resolve what they believed was the encroachment of Lyndon. The problem was explained this way in the petition:

> . . . . Col Arnold Had obtained a moving Grant, and on being Informed that this Town Lay Adjoining North of Those in which he had an [Agency?]—Waited on His Excellency—(*a Considerable Number of the Council Present*), in Company with Capt Jesse Leavenworth, Aggent for one half of the Town of Cabot. To know the truth of that *Report*—but was Informed in that official Manner That Col Arnold, had Liberty to move his Grant, East or North, on unappropriated Lands, *but by No Means* to move South to the Injure of any other Grant . . . .[55]

No action was taken on this request, after the legislature learned that Lyndon had never been informed of the dispute.

---

[50] III State Papers (II) 148, 149.
[51] XIII State Papers 179-180.
[52] XIII State Papers 181.
[53] III State Papers (II) 190, 191.
[54] XIII State Papers 223.
[55] VIII State Papers 89.

In March of 1784, the Assembly resolved that the general employ chainmen, line markers, pack bearers, "by the month in the cheapest manner."[56] Gone were the minimum daily fees of a few years before.

The law governing town lines from 1782 and 1783 was amended again on March 9, 1784 to give the town tax collector the duty of selling lands of original proprietors to raise money on undivided lands, in order to pay surveying fees.[57] On October 29, 1784, another amendment allowed the Surveyor-General and his Deputies to hire chainmen and other assistants "as Cheap as may be by the month," authorizing payment for those who furnished necessary subsistence to surveying parties, through the Governor and Council. It also adjured the general to keep fair records of expenses.[58] This act is unusual as it is the first instance of the state taxing towns for roads and bridges, in this case roads in the "northern part of this state" where there were no no roads. This act was criticized by the 1786 Council of Censors because it was "calculated for the emolument of individuals, by arbitrarily taking and disposing of property of others, rather than for the true interest of the community at large," and because the law appears to usurp a judicial function of determining the right of property. In 1787, a new law authorized select boards to lay out roads and to provide compensation for the taking of land for highways, which quickly became the principal mechanism for road work in Vermont.[59]

That October, the Assembly also called on the Surveyor-General to return the surveys he may have completed.[60] This continued the long fight to assemble all the charters and surveys of Vermont towns in a single place.

On May 27, 1785, inhabitants of Panton complained that they had lost nearly two-thirds of their town when Addison was created, and asked for part of Ferrisburgh in exchange, claiming that Ferrisburgh was larger than it needed to be. Nothing ever came of this idea.[61] By a petition filed on June 2, 1785, Silas Williams and Elias Stevens, agents for Royalton, complained that they were suffering as a consequence of a change in the town line. The same day inhabitants of Bethel made the same complaint. In fact the wording is nearly identical. Both towns wanted their former lines restored. No action came of the complaint.[62]

On June 3, 1785, the legislature restated its call to the Surveyor-General to return surveys he had completed.[63] It also heard from Randolph proprietors on June 13, 1785 yearning for restoration of their former town lines, despite the new survey. Their petition was quickly dismissed by the Assembly.[64] That term it received a petition from Dartmouth College asking for a grant of vacant land.[65] The Assembly then directed the Surveyor-General to survey a tract of 23,000 for the college, "if that quantity of ungranted Land, proper for cultivation, can be found in one Parcel; or otherwise survey

---

[56] *Journals and Proceedings of the State of Vermont 1784-1787*, III State Papers (III) (Walter H. Crockett, ed., 1928) 45.
[57] "An Act in Addition to two several Acts therein mentioned," XIII State Papers 260-61.
[58] XIII State Papers 281.
[59] *Records of the Council of Censors* (Paul Gillies and Gregory Sanford, eds., 1991) 35, 76-77.
[60] III State Papers (III) 74.
[61] VIII State Papers 124-125.
[62] VIII State Papers 108-110, 115.
[63] III State Papers (III) 119.
[64] VIII State Papers 135.
[65] III State Papers (III) 141.

the like quantities, in different Parcels, under the direction, and to the approbation, of the President of the Institution."[66] The charter of the town of Wheelock to Dartmouth College and Moor's Charity School followed.[67].

Rochester proprietors asked for the return of their old town lines in a petition signed by Dudley Chase on October 6, 1785. Bethel had been moved one mile eastward by the Surveyor-General's new surveys and this "disconcerts the allotments of lands made in their township, obstructs their settlements and lays a foundation for endless suits at law and controversies with their neighbors—That a removal of the lines renders it uncertain where to find the township, and the proprietors cannot therefore go on to fulfill the conditions of the Charter in the midst of those confusions which arise from a removal of the lines . . . ." While taken seriously at first, this petition was eventually dismissed, like so many others before and after it.[68]

By petition dated February 19, 1787, people of Winhall requested that the legislature annex them the gore recently discovered on their eastern border. The gore had already been granted to Londonderry.[69]

In March of 1787, the Surveyor-General reported that the "towns of Hungerford, Smithfield & Fairfield cannot be surveyed according to charter." He told the Assembly that it was impossible to survey Fairfield because it was "so situated & lies in such shape that it is impossible to survey the adjacent unappropriated lands into townships of convenient form unless the proprietors of those townships will reduce the same to better shape."[70]

In October of 1787, the legislature learned that Salisbury and Leicester claimed the same land. Leicester claimed priority of charter, Salisbury the sanction of the state survey. The petition from inhabitants of both towns described the harm:

> Lawsuits Commenced for trespass riots &c <we you Petitioners have a Sence of our destressed and Diagreeable Situation which Gives us courage to and we hereby> In which situation we cannot ascertain our Juresdition consequently cannot raise money to defray our Public or Privat charges Militia afairs under the same Perdikerment Children with out Schools, and Highways unrepared &c . . . .[71]

They wanted relief. Would the legislature order the Surveyor-General to run a new line? The committee appointed to review the petition suggested the petitioners agree among themselves on the town line, and the petition was dismissed.

Ira Allen resigned as Surveyor-General on October 13, 1787.[72] In his final report to the legislature, he explained that the lines of Fairfield, Smithfield and Hungerford were in disorder.[73] There was trouble on the other side of the state as well. "In consequence of the Legislature giving wrong bounds of Topsham, the lines of Topsham Orange &

---

[66] *Laws of Vermont 1785-1791*, XIV State Papers of Vermont (John A. Williams, ed., 1966) 5.
[67] I State Papers 161.
[68] VIII State Papers 163-64.
[69] VIII State Papers 183.
[70] III State Papers (III) 312
[71] VIII State Papers 374-375.
[72] *Journals and Proceedings of the State of Vermont*, III State Papers (IV) (Walter H. Crockett, ed., 1924) 8
[73] Proprietors of Enosburgh and Berkshire petitioned the legislature on October 22, 1787, claiming the lines of Hungerford, Smithfield and Fairfield were so confused that they "have long been prevented from making settlement." A petition from inhabitants of Hungerford echoed the frustration. VIII State Papers 367-368, 371.

Wildersburgh will need alteration—several grants have been made in vague terms and the grantees have requested bounds to contain more lands than has where the grants were explicitly made which has been refused and the charters were not issued . . . ."[74]

During his last years as Surveyor-General, Ira Allen was frequently frustrated by the Assembly's practice of granting charters before their boundaries had been surveyed. This led frequently to confusion and conflict when settlers arrived to start their new lives on land already occupied by others, each claiming a valid title from the State of Vermont. One of these conflicts was the "Brownington-Johnson" controversy. The full story is best told by Virgil McCarty, in a 1947 article in *Vermont Quarterly*, but the heart of the problem was poor mapping compounded by miscommunication between the General Assembly and the Surveyor-General. One map suggests the complexity of the situation. See Figure 1.[75] The trouble was mostly sorted out in 1790 and 1792, but the story is a good illustration of the science and politics of land grants in early Vermont.

b. During the Tenure of James Whitelaw. On October 23, 1787, James Whitelaw was chosen Vermont's second Surveyor-General. A few days earlier Whitelaw, along with William Coit and James Savage, his assistants, petitioned the legislature for lands as payment for their running of town lines.[76] Specie was scarce in Vermont, as was gold and silver. The economy used goods and services as the medium of exchange. That state surveyors would earn land instead of money for their work was simple and practical. Their prayers were answered in 1788, when they were given Coits Gore, a 10,000 acre parcel in present-day Waterville and other land in what is now Plainfield.[77]

In March of 1789, Jacob Bayley reported to the Assembly for the committee appointed to "enquire what grants & charters of land have been made by this state":

> Your Comt find that 91 townships of land & 12 gores have been granted 64 townships & gores have been chartered as appears from the list from the Secretarys office & those crossed on the list of charters are surveyed—The greatest part or all of said gores are within the surveys made by the Surveyor-General & the New Hampshire Grants within the lines of Vermont—Your Comt are of opinion that no charters ought to issue only for those grants already surveyed and restricted to certain bounds or pitches made agreeable to their grants. . . ." and suggests altering Smithfield, Hungerford, and Fairfield lines to bring them into proper shape . . . keep Whitelaw's surveys as they are in the north east part of this state . . . survey other northerly lands, advertising in Vermont Journal & Gazette.[78]

A new act directing the Surveyor-General in his office and duty was adopted October 28, 1789. The Surveyor-General was directed to complete the survey of town lines in the northern parts of the State, and to return a chart or plan to the Governor,

---

[74] III State Papers (IV) 22.
[75] Virgil McCarty, "Boundary Controversy: The Brownington-Johnson Problem," *Vermont Quarterly* 15 (July 1947), 157-176.
[76] III State Papers (IV) 26.
[77] *Charters Granted by the State of Vermont*, II State Papers of Vermont (Franklin H. Dewart, ed., 1922) 221, 281; Swift, 291.
[78] III State Papers (III) 330-331

Council, and General Assembly.[79] His pay was to be nine shillings a day (compared to twelve shillings a day when Ira Allen was Surveyor-General).

Many acres of Vermont had been sold at vendue during the past several years for back taxes or as a result of Vermont's Tory and Yorker confiscation policy. To ensure that no one could rely on charters or grants for title to the land sold at these auctions, by the new Surveyor-General law of 1789, all previous acts relating to the establishment of town lines were repealed.[80] To ensure the vendues were respected, the Assembly voted, "That no survey bill, or record of survey, of any land, surveyed and laid out by authority of the aforesaid acts, of land sold at vendue by direction of the aforesaid acts, shall be received in any Court of record in this State, as evidence of a title."[81] But it extended the grace period for redemption of these lands for an additional year.

On October 29, 1789, the legislature appointed commissioners to settle with Ira Allen and James Whitelaw. Nothing more would be paid to Ira Allen while the audit was conducted. The committee was directed to adjust his "accounts upon principles of equity, agreeable to the several laws and restrictions of Council and Assembly in force at the time said Allen sustained the office of Surveyor-General, computing interest on either side as shall appear to them equitable." [82]

The Surveyor-General finally produced his "chart of the state" on January 13, 1791. The legislative committee reported:

> . . . that they find an interference of the township of Derby and Salem, of 5710 acres; they also find 10645 acres of land situated between the townships of Lewis and Warren; [Warrens Gore] 3936 acres east of Hoplins's grant 10118 acres adjoining Kellysburgh 8744 acres lies between Ripton and Kingston; [Granville] also a trad west of Duncansburgh [Newport] and east of Carthage [Jay] and Westfield, continaing 23040 acres; being 56,523 acres in the whole which has never been granted by this state.[83]

The problem with Fairfield was straightened out in 1792. Smithfield was divided into Bakersfield and Fairfield, Hungerford was renamed Sheldon, and part of Fairfield was given to Bakersfield.[84] There were five gores, including four in Essex County, granted to various individuals in 1791. Five of them were granted to Samuel Avery.

A gore is defined in the dictionary as a "triangular tract of land, esp. one lying between larger division." Vermont had as many as 32 gores. They represent the failures of early surveys or charters, but no one was sad when a new gore was found. In 1791, Vermont was hungry for land and anxious to solidify town lines statewide. Where unknown territory was found, there was a zeal to grant it to settlers and annex it to a town. What was given could be taken away. Consider Jackson's Gore as an example. First identified and granted to Abraham Jackson and his associates, it was first annexed to Wallingford and then in 1792 incorporated into Mt. Holly.[85] New gores continued to be discovered and granted through the next decade, but the map was coming together.

---

[79] XIV State Papers 499-500

[80] The legislation repealed the acts of October 22, 1782, February 24, 1783, March 8, 1784, and October 29, 1784.

[81] XIV State Papers 500.

[82] XIV State Papers 508-13.

[83] III State Papers (IV) 229, 236.

[84] I State Papers 69, 133-134.

[85] I State Papers 87.

Proprietors of New Haven petitioned the General Assembly in October of 1793, asking that they be authorized to tax their inhabitants to pay for new surveys to straighten out problems with missing boundary markers and irregular measurements. They also asked for permission to pitch undivided lands in the town.[86] Their prayers were answered in 1796, when the legislature agreed.[87]

On October 31, 1793, the General Assembly concluded that "it is absolutely necessary, as well for the good as the dignity of this State, That some proper method be adopted to furnish a map thereof." New emphasis was placed on getting plans to the Surveyor-General, with a new deadline of March 1, 1794. There would be a three pound fine for further neglect.[88] Getting all towns to act proved a continuing problem.[89]

New laws governing the validity of survey bills were adopted on October 21, 1795. From that time forward, no survey bill was "good and valid in law, unless the same is recorded in the town clerk's office of the town in which such survey is made."[90]

The following year, William Coit, Whitelaw's assistant, came to the legislature, looking for a grant. A committee appointed to investigate the availability of unappropriated land reported, "they have conferred with the Surveyor-General of this state and have heard Mr. Coit on the subject of the within resolution, and from any inquiry cannot ascertain that there is any vacant land, as represented in said resolution, and in their opinion it is not eligible for the Legislature at present to take any measures respecting the same."[91]

James Whitelaw published "A Correct Map of the State of Vermont" in 1796. This is most important. Facsimiles are available at the front of Volume XVI of the State Papers. It shows Vermont as essentially chartered, with a few gores and uncertain areas properly marked. The map would change after 1796, notably with the creation of Washington (originally Jefferson) and Lamoille Counties, but most town lines were set by that date.

A new fee system was enacted on October 26, 1798. The Surveyor-General's fees were set at $1.50 per day, which was the same for state representatives and council members. Travel fees were six cents per mile, each way.[92] By comparison, county surveyors got $1.00 a day.

The new compilation of Vermont states was enacted on October 30, 1797, entitled Laws of Vermont 1797. Chapter LIII of that compilation is entitled, "An Act directing the appointment of a surveyor general and county surveyors, and regulating their office and duty." It was not much different from previous acts, although in the new law the Surveyor-General was authorized to go onto lands between the first day of October and the last day of April, without trespass.[93] From that time forward, county courts would

---

[86] *General Petitions 1793*-1796, X State Papers of Vermont (Allen Soule, ed., 1958) 39-40.
[87] *Journals and Proceedings of the General Assembly of the State of Vermont 1795-1796,* III State Papers (VII) (John A. Williams, ed., 1973) 354.
[88] *Laws of Vermont 1791-1795,* XV State Papers of Vermont (John A. Williams, ed., 1967) 209-10.
[89] *Journals and Proceedings of the General Assembly of the State of Vermont 1791-1792*, III State Papers of Vermont (V) (John A. Williams, ed., 1970) 47, fn. 1.
[90] XV State Papers 381.
[91] III State Papers of Vermont (VII) 328.
[92] *Laws of Vermont 1796-1799*, XVI State Papers (John A. Williams, ed., 1968) 245.
[93] XVI State Papers 490-93.

appoint county surveyors. The work of the Surveyor-General and county surveyors would also be recognized as prima facie evidence in Vermont courts of law.

Petitions for new surveys continued to be received by the Assembly throughout the years. Thomas Hodgkins, on behalf of the proprietors of Pittsfield, asked for a new survey in 1799. He was rebuffed.[94] The latest was presented in 1997, when Rutland and West Rutland asked the legislature for funds to monument the line that separates them. They were granted their request, and in 1998 the line was finally established and monumented.

c. Beyond Whitelaw, to the Present. The office of Surveyor-General, along with that of the county surveyors, was abolished in 1838, and the instruments of the office directed to be delivered to the Secretary of State.[95] These were engineering instruments purchased by the state for him in 1826.[96] In 1824, the legislature had ordered all charters in the Surveyor-General's possession to be turned over to the Secretary of State.

In 1870, the General Assembly enacted a chapter on town lines.[97] Today it appears as 24 V.S.A. §§ 1461-1464, and provides that disagreements over town lines by select boards of adjoining towns may be resolved by petitioning the superior court. The court then appoints commissioners to locate the line, following a hearing and a site walk. The commissioners make their report to the court, and the court renders "such judgment theron as seems just." The decision is recorded in the land records and line is set. This law contains only one reference to settling such disputes: "In the absence of a clearly definable charter line boundaries acquiesced in by the towns involved for one hundred years or more shall be deemed to be the charter line." 24 V.S.A. § 1462.

An effort to set out and establish true meridian lines in Vermont towns was established in 1886.[98] The governor is obliged to appoint persons to see that select boards "erect suitable stone or iron posts at the extremities of such meridian line, setting the same firmly in the ground, the north post to be marked with the letter M, and the south post with the initial letter or letters of such town or city." A written description of the location of the marker is to be recorded in the town records. The pay is $8.00 a day. 1 V.S.A. §§ 731-732.

An index to the Papers of the Surveyors-General was funded in 1902.[99] The work of Franklin H. Dewart was finally published in 1918.[100]

In 1908, the legislature enacted a law now codified at 2 V.S.A. § 17. It requires newspaper publication of notice for the change of any town or county lines or the creation of a new town, and prohibits voting on any such change in boundaries until the notice has been given.[101]

---

[94] *General Petitions 1797-1799*, XI State Papers of Vermont (Allen Soule, ed., 1962) 428-429.
[95] 1838, No. 25.
[96] I State Papers 144.
[97] 1870, No. 38.
[98] 1886, No. 83.
[99] 1902, No. 162.
[100] *Index to the Papers of the Surveyors-General*, I State Papers (Franklin H. Dewart, ed., 1918).
[101] 1908, No. 6.

The Vermont Coordinate System began in 1945, adopting systems of coordinates for "defining and stating the horizontal positions or locations of points on the surface of the earth within the state of Vermont." Today it is codified at 1 V.S.A. §§ 671-679.

The first laws regulating land surveyors were enacted in 1967.[102] The same year the first Vermont laws defining what constitutes a proper plat for recording purposes were adopted.[103] They are now codified at 27 V.S.A. § 1403.

In 1984, the legislature recognized a new gore of approximately 300 acres, lying between Bakersfield, Montgomery, and Enosburg. It was named Perley's Gore, after the well-respected representative from Enosburg Merrill Perley, and in 1986 it was divided among the three towns.

The present law was adopted in 2006. The former process for resolving town line disputes has been changed to an arbitration process, if towns cannot agree on the lines. Arbitration is final. 24 V.S.A. § 1461. If lines must be altered in accord with the arbitration decision, a survey is required, the cost shared by the involved municipalities, and an act of legislation is required to formalize the change. The legislature may appropriate funds to pay for monumentation for at least the points on the lines where the lines change directions. If more monumentation is required, the towns can pay for it.

4. The Cases.

The movement for Vermont independence had no official starting date or event. There must have been dozens or hundreds of encounters between good people thinking they owned land others had settled, each claiming a proper grant. Many of these necessarily ended up in court. The first trial has not been forgotten.

Ethan Allen presented official copies of New Hampshire charters to the New York Supreme Court in Albany as evidence in a suit tried in June of 1770, and the copies were refused as irrelevant. Ira Allen reported the reaction of our greatest hero, Ethan Allen:

> Thus a precedent was established to annihilate all the titles of land held under New Hampshire Grants, west of Connecticut river. Mr. Ingersoll [Vermont's lawyer] and Mr. Allen retired from the court, and in the evening Messrs. Kemp, Banyar, and Duance, lawyers and land speculators of New York, called on Mr. Allen, and among other conversatio, Mr. Kemp, the King's attorney, observed to Mr. Allen, *that the people settled on the New Hampshire Grants should be advised to make the best terms possible with their landlords, for might often prevailed against right:* Mr. Allen answered, *The Gods of the valleys are not Gods of the hills;* Mr. Kemp asked for an explanation, Mr. Allen replied, *that if he would accompany him to Bennington, the phrase should be explained.*[104]

The majority of early cases before 1824 are unreported. One 1799 trial is recalled in a petition for a new trial filed with the General Assembly by Samuel Avery (of the many Avery's Gores). Avery explained that he had obtained a grant of 1,380 acres south of Grafton in 1791. Soon after, he wrote, Amos Hale moved onto that land and refused to move. The trial was held at Newfane before the Vermont Supreme Court, which at that

[102] 1967, No. 364 (Adj. Sess.), eff. Jan. 1, 1969.
[103] 1969, No. 235 (Adj. Sess.).
[104] III Ethan and Ira Allen: Collected Works 15-16.

time was a trial court as well as an appellate court. Avery lost and tried to persuade the legislature to give him another trial. Avery explained,

> Your petitioner would remark to Your Honours that he has been at the Expense of making an actual Survey beginning at the Massachusett line and perambulating the Liens of Halifax Marlborough New Fane Townsend Athens & Johnson's Gore and is abundantly able to Show could he be admitted to a new tryal that there is sufficient Land to satisfy his Grant without inerfering with Either of the before mentioned towns. He would further remark that no less than [four?] Surveyers have been employed at different times and have all disagreed . . . .[105]

Avery's petition was dismissed and no new trial held, but the petition illustrates the extent to which he was willing to go to prove his title.

The line between Rockingham and Grafton was the cause of a lawsuit that ended in 1853. The fight began over a road, which plaintiffs agreed to build at $1.50 per rod. The highway was laid out along the western line of Rockingham, but occasionally crossed the line into Grafton. Plaintiffs showed that for nearly the whole distance of the highway there was a stone wall serving as a wall fence between farms in the two towns and had been recognized by the owners of those farms as the town line. The defendant Town of Rockingham, seeking to limit its costs in paying for the road, offered a survey, based on the charter lines, showing that the stone wall was not the town line. The question presented to the jury was whether the line had been recognized for twenty years. If so, they were directly to hold Rockingham liable for the cost of the road east of the wall. The Vermont Supreme Court disagreed, reversed the decision and awarded the town a new trial. It explained:

> The line of the town, is not to be settled in that way. If the charge had been, that the towns had recognized the wall as the line of the towns for a period of twenty years, it would have been well enough; but the acts of adjoining owners cannot in law bind the towns . . . .[106]

In 1889, the Court faced a new question—who gets the swag? The law originally enacted in 1783 had allowed one chain in every thirty measured for the deflection of the chain in passing various obstacles. A dispute arose over the old line of Philadelphia (later annexed to Chittenden and Goshen). The defendant asked for a charge to the jury that "each proprietor and his grantees would be entitled to the land so allotted, notwithstanding it overran in width the surveyor's description." The jury were told that before they applied that rule they needed to be satisfied that the lots were run that way and that a deviation was made by the surveyors. Since the jury was unconvinced, it held for plaintiff. The Supreme Court found no error, and affirmed the jury decision.[107] It did not take a position on the swag charge. It preferred to avoid the question altogether.

The first true reported case of a town suing another over its common boundary came in 1889, when the Somerset/Glastonbury line was questioned. A commission had been appointed by the superior court. At its hearing, over the objections of counsel for Glastenbury, two witnesses were allowed to testify about "declarations of persons deceased relating to a certain tradition concerning the location of the line in dispute." The committee reported its decision in Somerset's favor, explaining that the hearsay was

---

[105] XI State Papers 367.
[106] *Smith v. Town of Rockingham*, 25 Vt. 645, 647 (1853).
[107] *Walker v. Collins*, 61 Vt. 542 (1889).

not considered in arriving at its decision. That was enough for the Supreme Court. The hearsay objection was put aside, and the commissioners' decision upheld.[108] The case is also remembered for the proposition that a town cannot object to the process after the report of the commission is submitted; the time for objection is at the time the commission is empowered to act.

Timber cutting frequently involves questions about town lines, as one logger harvests trees outside property lines defined by town boundaries. The action is trespass and the penalty is treble damages. In 1891, 180,125 feet of spruce and fir timber brought $450.31. Three times that was the amount of the damage claimed by the plaintiff. He alleged the logger had cut beyond defendant's boundaries, crossing the town line onto the plaintiff's land. The cutting outside the lines was done without defendant's knowledge or negligence. The Supreme Court agreed defendant was not then liable for the damage, leaving the plaintiff no choice but to proceed against the logger.[109]

Two years later the Court handled another dispute over who owned trees in an area of disputed land lying on the boundary between Wallingford and Mt. Tabor. The question was whether a field book could be admitted as an "ancient record," one of the exceptions to the hearsay rule. The field book contained early surveys of the town of Wallingford. The former town clerk testified that it had been in the town office for as long as he was there. The Court agreed the field book should have been admitted, explaining:

> The case comes exactly within the familiar maxim as expounded by Lord Bacon: "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur." "'Ambiguitas latens' is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." Bac. Max. 25. Among other things, it purports to be a field book of ancient date, showing the survey of certain divisions of lots in Wallingford. It came into possession of the present town clerk of Wallingford, as town clerk, with the other books of record of the town, "a large number of years ago." Several deeds of land in Wallingford, executed as early as A. D. 1845, introduced in evidence, referred to a field book. The genuineness of a document of this kind, on its face purporting to be sufficiently ancient, is shown prima facie by proof that it comes from the proper custody.[110]

The town of Glover sued to enjoin county commissioners from assessing it for repairs to a bridge it believed was not Glover's responsibility, in a case reported in 1898. Everybody admitted that the bridge was in Greensboro, but it was near the border of Glover. The Court held that the bridge should be regarded as if it were on the line. "It serves the same practical purposes, and deflects from the exact line, no doubt, for the purpose of procuring a better road at less expense. The expenses of repairs may be apportioned, not necessarily in equal proportions, but as the commissioners deem just."[111] Town line law takes a little twisting when it comes to highways and bridges near town lines, when both towns are benefited by the road. The statutes treat these roads as the joint responsibility of both towns. The reason is simply the overriding purpose of roads,

---

[108] *Town of Somerset v. Town of Glastenbury*, 61 Vt. 449 (1889).
[109] *Benton v. Beattie*, 63 Vt. 186 (1891).
[110] *Aldrich v. Griffith*, 66 Vt. 390 (1893).
[111] *Town of Glover v. Carpenter*, 70 Vt. 278 (1898).

which is to serve the traveling public, not the more narrow interests of towns. It is for this reason that the law does not acknowledge the authority of one select board to discontinue a highway passing through or near a town line unless the select board of the neighboring town follows the same procedure.[112]

Franklin H. Dewart made an early appearance as a private surveyor in the trial of an 1899 case involving a town line. The reported case describes his background. "Before the excluded question was put to him, he had testified that he was a graduate of Harvard University and the Lawrence Scientific School, had taught surveying and trigonometry for fourteen years, and had been a practical, operating surveyor since 1880." Dewart was asked whether he could tell the age of certain markings on trees in a contested area of land. "I can tell some things. I can't tell the precise age," he replied. After he testified that he had examined the trees for this purpose, he gave his opinion about the age of the marks, and his answer became the subject of an objection that was one argument against the verdict when the case reached the Vermont Supreme Court.

The surveyor's judgment was on the line. Defendant's counsel argued that "the witness had not testified that he had ever counted or attempted to count the rings upon a tree, or that he had any knowledge how to determine the age or marks upon trees, or that he knew of any method by which the age of a mark upon a tree could be determined, and no evidence had been offered tending to show that the witness had any skill in this particular." Dewart had testified that he had used a magnifying glass every week day for 10 or 15 years, and that he had examined and counted rings on wood to determine age.[113] Should that evidence be allowed? The Court's explanation follows:

> It is argued that the age of a tree cannot be told by counting the rings in its grain, and the case of Patterson v. McCausland, 3 Bland, 69, is cited. However ingenious and learned the reasoning of the court in that case may be, it fails to convince us that mankind has lived under an hallucination in that respect for centuries. Almost every one acquainted with the subject treats it as true that the age of a tree can be approximately told by counting the concentric layers in its grain, one of which, as a general rule, is made annually. Even the tree itself in "The Talking Oak" of the late poet laureate, Tennyson, voices the popular belief when it says: "That though I circle in my grain Five hundred rings of years."
>
> It is further urged that the counting of rings in a block of wood is not the work of an expert, but that the jury, having the block before them, were as competent to determine the number of rings as any other person. We hold otherwise. Such experience and familiarity with matters of this kind as is had by woodsmen and surveyors constitute peculiar knowledge, and give a person special skill in determining the age of wood or trees; and, if a person has special skill upon a subject, he may be called as an expert.[114]

The Searsburg/Woodford line was at stake in a 1904 case. Commissioners were appointed by the county court and found an ancient line of marked trees, about 100 rods east of the charter line. Searsburg argued that for so long a time "that no witness could recollect otherwise, the parties hereto and their inhabitants have recognized said last-mentioned line as the town line, and that in Searsburg the allotments of the town were

---

[112] See 19 V.S.A. § 794.

[113] We see Mr. Dewart a second time as a witness in a 1913 case involving a former gore originally a part of Bolton that was given to Waterbury in 1851. *Randall v. Moody*, 87 Vt. 68 (1913).

[114] *Baker v. Sherman,* 71 Vt. 439 (1899).

made to said line, and that Woodford had maintained the highways to said line, and placed all the land west of it in her grand list, and collected taxes thereon, and that the deeds of conveyance of lands between said lines had been recorded in the town clerk's office in Woodford, and that said easterly line had been recognized in all ways as the true town line, and had never been questioned by Searsburg in any legal proceeding until this petition was brought." The issue that was left unsettled in the case of *Walker v. Collins*, 61 Vt. 542 (1889), discussed above, was finally before the Court. Was the town line where the charter described it or where the towns had believed it to be?

> It seems clear that the statute contemplates that the charter line is the one to be located and established; not necessarily absolutely and precisely according to the charter, which might in some cases be quite impracticable, and, perhaps, impossible, but as nearly according to the charter as it reasonably can be.[115]

The Court went beyond the statute to the Vermont Constitution in its reasoning. Since the constitution gives the legislature to sole and non-delegable authority to create towns, "[a]ny substantial change of the charter boundaries of towns would necessarily enlarge or diminish their municipal jurisdiction, and to that extent would constitute an amendment of their charters." In the end, the charter, not the line of marked trees respected as the town line for so long, prevailed.

Commissioners appointed to locate the true line between Morgan and Brighton concluded they had found two blazed spruce stubs, both long dead, that were "undoubtedly, in their opinion, of the age of marking done by Surveyor General James Whitelaw" from his survey of 1788. The statute at the time required such reports to be filed with the Supreme Court. Finding no objection from either town, the Court ordered the commissioners to mark the line and make a record of it in each town, dividing the expense between both towns.[116]

Jericho and Underhill fought over the line separating them in the late 1920s, and that fight has left two reported decisions of the Supreme Court. Early on, Jericho questioned whether Underhill even had authority to bring a petition to the courts, pointing to a defect in the wording of the article in the Underhill town meeting warning supporting Underhill's involvement in the case. The voters had agreed to "resurvey" the line, while the statute says the process is to "locate" the line. The Court disagreed with Jericho, explaining that the "word 'resurvey' as used in the vote taken obviously means to locate the calls in whatever deeds, charters, grants, or surveys are material and relevant to the matter in dispute. Consequently, we have jurisdiction."[117]

By the time of the second decision, two years later, Jericho had lost the fight and was now fighting over having to pay the entire cost of the proceeding. Jericho believed it was being punished for losing. Jericho had remained adamant that the line it understood as the charter line should be recognized, and apparently given little in any effort to compromise. Underhill argued Jericho should pay for the costs of the commissioners' work, based on sound principles of equity and common practice awarding the substantially-prevailing party the advantage. The Court agreed, and gave the full bill to Jericho to pay.[118] In explaining itself, the Court restated the holding of the *Searsbury*

---

[115] *Town of Searsburg v. Town of Woodford,* 76 Vt. 370 (1904).
[116] *Town of Morgan v. Town of Brighton*, 95 Vt. 506 (1922).
[117] *Town of Underhill v. Town of Jericho*, 141 Vt. 41 (1928).
[118] *Town of Underhill v. Town of Jericho*, 102 Vt. 367 (1930).

case discussed above, that "while the statute contemplates that the charter line is the one to be located and established, it is not necessarily absolutely and precisely according to the charter, which might in some cases be quite impracticable, and perhaps impossible, but as nearly according to the charter as it reasonably may be."

A question of who owned the timber cut on a disputed parcel arose again in 1930, in a case involving division lines in the town of Moretown. At stake was a field book prepared by surveyor Abel Knapp. Plaintiff claimed the charter prevailed over the field book, and should have preemptive authority. The Court found the field book as an extension of the charter, and favored the defendant's view of the line as more specific and of greater reliability. The case is important principally for the view it presents of the work of the surveyor, in this case Franklin H. Dewart.

Defendant called a 70-year-old man named Julius Converse, who had always lived in Moretown and had owned the disputed lot until five years before the controversy. His father had shown him the corners, including a hollow stump with a stake in it as the southeast corner. When he went to view the land the Saturday before he testified, Converse found the stump gone. He testified that he "was present at this old stump in 1925 when Mr. Dewart started his survey around some lots from it. He went with Dewart through two lots, but Dewart's compass must have varied, because he was about 2 rods from the stump when he came back." In the end the Court found Converse's testimony authoritative. It explained, "All lands are supposed to be actually surveyed, and, where a deed describes a lot by its number according to a plan, the intent is to convey the land according to that actual survey. Consequently, if marked lines and marked corners are found, courses and distances must yield to them."[119]

How the commission appointed by the county court should act is the subject of a case involving the town lines of Brookline and Newfane from 1966. The chair of the commission was unsatisfied with the evidence presented at the hearing, and undertook to locate better evidence in the field and the town offices. For this the commission's judgment was reversed, as he had stepped outside the bounds of judicial discretion, in effect making himself an unsworn witness. He should have made the parties bring him the evidence he needed.[120] The hearing should have been conducted as a trial, with proper recognition of the methods courts use to find facts and reach conclusions.

The case also provides an interesting discussion of the familiar question of acquiescence. The Court had already explained in two or three prior cases that what mattered was the charter line. Here the towns of Putney, Brookline and Newfane had all agreed to a line in writing in 1829, but the commission refused to admit it, since there was no legislative authority for such agreements prior to 1870. All three towns had recognized and respected the 1829-established line, but the Supreme Court found that evidence unavailing. It is the charter that prevails. "But this is not to say that where the true division is uncertain or obscure, historic observance of a boundary marked upon the ground, coupled with acquiescence long endured is without probative value to indicate where the charter line might be found. As with private line disputes, acquiescence alone can have no prescriptive effect nor transfer any territory. But it may have evidentiary value in the search for the location of the true boundary."

---

[119] *Neill v. Ward*, 103 Vt. 117 (1930).
[120] *Town of Brookline v. Town of Newfane*, 126 Vt. 179 (1966).

The town line separating Putney and Brookline was the subject of litigation that ended in 1967. Ten years earlier there had been a similar contest that ended with a stipulation on where the line should be located. This time around, a new select board member objected, complaining that the stipulation agreed to a line that was inconsistent with the charter line. The Court dismissed the action on grounds of finality. It explained that charter lines sometimes cannot always be located with precision on the ground, leaving select boards and court to located the boundary "as nearly according to the charter as it reasonably can be." There would be no new hearing. The earlier decision would stand.[121]

The relationship of zoning and town lines arose in a 1972 case involving the town of Waterford. An applicant for a zoning permit had purchased a plot of land without ascertaining the town line, although it knew its land was in two towns. One side of the line was zoning residential, the other industrial. After construction began, the company discovered it was building in Waterford by mistake. It asked for a variance, claiming the location of the town line was outside of its control and that the hardship was not created by itself. The Supreme Court did not buy the argument. This was no "unnecessary hardship," as the variance statute used the term. The company was at fault, and must live with the consequences.[122]

Town lines can even play a role in criminal cases. A 1981 case involving a charge of attempted rape turned on where the crime took place. Was it in one county or another? Had it been across the line, another prosecutor would have had jurisdiction and the charges might have been wrong enough to justify dismissal of the case.[123] As it turns out, the case did not turn on this issue, as the defendant generally denied the charge, but in another case the line might be an essential question.

In another timber cutting case in 1986, the town of Wolcott claimed a logger had cut over the line of Craftsbury into Wolcott town forest. The line was in doubt, argued the defendant, given discrepancies between deed descriptions, field evidence and maps of the town line. The Court found that "the Craftsbury-Wolcott Town line is marked in the field by old blazes, old fences, stone markers and other physical evidence in the field. The line has long been established in the field and conforms to deed records." The defendant offered local, state and U.S.G.S. maps showing the line in a more northerly direction and the deed to the land in question, which was of little help ("the gore lands between lot number 68 and the town line.") The plaintiff offered two licensed land surveyors. Admitting there was evidence supporting both points of view, the Supreme Court sided with the trial court, after stating that its authority on the facts is limited to reviewing if there is substantial evidence supporting the findings of the court below.[124] The lack of any ground evidence sunk the defendants' case. "In these circumstances the lines and monuments actually marked and recognized on the ground in the distant past will constitute the survey."

The State denied a business directional sign to the Peel Gallery of Fine Arts in part on the basis of an administrative rule that provided, "Official business directional signs shall be located in the same town as the business, service or point of interest to

---

[121] *Town of Putney v. Town of Brookline*, 126 Vt. 194 (1967).
[122] *L. M. Pike & Son, Inc. v. Town of Waterford*, 130 Vt. 432 (1972).
[123] *State v. Young*, 139 Vt. 535 (1981).
[124] *Town of Wolcott v. Behrend*, 147 Vt. 453 (1986).

which the sign directs attention." The Supreme Court avoided the rule. Locations of signs are to be chosen based on traffic safety, convenience of the public, and scenic views. "The existence of a town line bears no reasonable or logical relationship to any of these factors. Rule 14(a), therefore, is not authorized by the statute, and the Council has exceeded its statutory authority in the promulgation of the rule."[125]

The 1992 legislative reapportionment was challenged in court and generally upheld by the Vermont Supreme Court. The decision is important in recognizing the central role played by town lines in identifying legislative districts. Defending the legislative decision to cross county lines in forming senatorial districts, Justice Dooley wrote, "County lines are of limited significance to house districts because of the very limited county government in Vermont. Where the county line follows a geographical boundary, the breach of the county line is significant because of the geographical boundary, not necessarily because of the county line. More significant are town lines, and this district crosses none of these. It is impossible in a rural state with a large number of towns to follow town lines without crossing county lines."[126]

In 1926, when the Addison selectboard purported to discontinue a portion of an early road built by order of the General Assembly in 1798, the board held one hearing in town. In the mid-1990s, neighbors objected to the development of the land next to the "discontinued" portion of the highway, and the superior court agreed. The highway, in its mind, was no more. On appeal, the landowners questioned the validity of the discontinuance. The Vermont Supreme Court agreed with them and reversed the lower court, reaffirming the principle that discontinuance, being a statutory process, must be done precisely or it will not be respected. In 1926, the law provided that the supreme court, not the select board, had the power to discontinue highways running between towns. The 1926 "discontinuance" was done wrong; the road remains a public highway.[127] This decision precipitated the old roads crisis in Vermont, by focusing on the need to understand the history of roads. Today, the ruling has been superseded by statute, in 19 V.S.A. § 717.

5. Sources. The basic kit for beginning the study of town boundaries is the State Papers of Vermont series. Volume One is the Index to the Papers of the Surveyor-General. Franklin H. Dewart was its editor. It was published in 1918, pursuant to No. 162, Acts of 1902, "An Act Relating to the Preservation of the Surveyor's-General's Papers." Volume Two are the Vermont charters. Then come the journals for the various years through 1799, then petitions to the General Assembly, and the laws enacted each year from 1778 to 1799**.**

The charters of Vermont towns chartered by New Hampshire are found in Albert S. Batchelder's *The New Hampshire Grants*, which is Volume 26 of the *New Hampshire Provincial and State Papers* (1895).

Esther Munroe Swift should be awarded the Vermont version of the Nobel Prize for Research for her extraordinary work, *Vermont Place Names* (1977, 1996 (second printing)). It provides great detail on the way towns were cobbed together out of the wilderness and provides leads to the use of land through the town over its history.

---

[125] *In re Peel Gallery of Fine Arts*, 149 Vt. 348 (1988).
[126] *In re Reapportionment of Towns of Hartland, et al.*, 160 Vt. 9 (1993).
[127] *In re Ruth Bill*, No. 97-203 (1998).

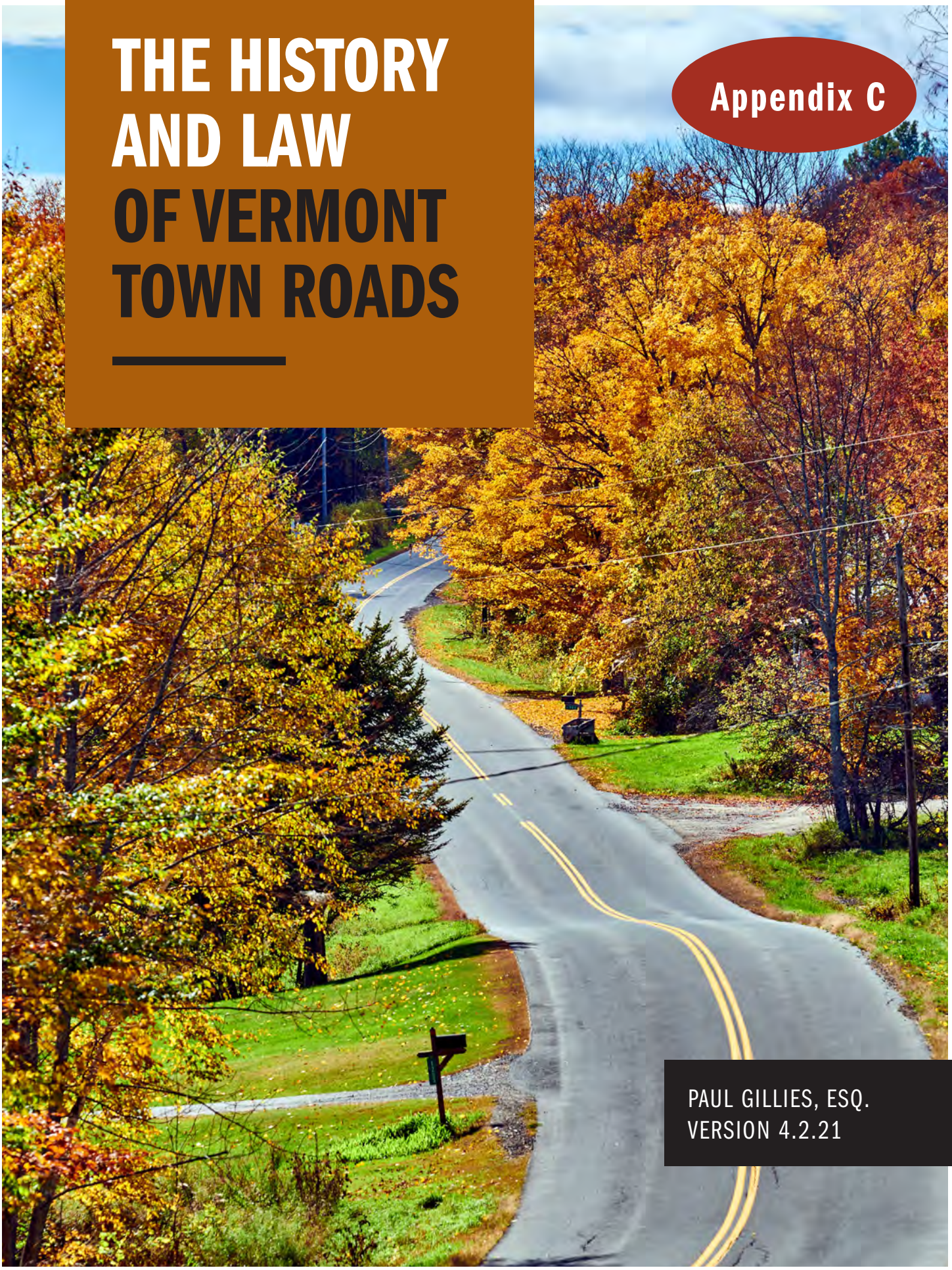
Books alone will not suffice. You must also come to Middlesex, to the State Archives to view the papers of the Surveyors-General that are recorded there, and to the Vermont Historical Society, for James Whitelaw's papers. You must also go to the town clerk. Town records, of course, are essential sources. Plot plans, proprietors' records, field books, road layouts, town meeting records, and deeds are basic to learning the answers, or at least to gathering the evidence, of what has come before.

Perhaps the most important source is your patience and diligence. Town line work is highly demanding. Hours and days may be needed to glean the smallest fact, and in the end there will be many unanswered questions. But then there is the occasional revelation, when everything comes together, to balance out the distress such questions have caused. Line after line, the work of Ira Allen and James Whitelaw is still being completed.

Updated May 5, 2021

THE HISTORY AND LAW OF VERMONT TOWN ROADS

Appendix C



PAUL GILLIES, ESQ.
VERSION 4.2.21

THE HISTORY AND LAW OF VERMONT TOWN ROADS

(4.2.21 version)

1. Introduction

In the beginning there was the landscape, crushed and folded and drained. The valleys and the mountains and the waters determined how people moved on that landscape, by foot or horse or canoe, for thousands of years. Animal paths became foot paths for human traffic, and horses. When settlers arrived, the paths grew into trails, which became town roads.

The road network is a town's history carved in dirt and gravel. There is no more permanent monument to the first settlers. Buildings collapse, are abandoned or replaced. Landscapes change from open to wooded in a few years. But highways rarely change. They may stray from their original beds, as sharp corners get rounded and wet spots are avoided, but they leave deep creases on the face of the town.

Until something happens, we take roads for granted. When a bridge goes out, a stretch of gravel road is swept away in a flood, the snow accumulates in high drifts, when the roadbed is deep with mud or ribbed for our jostling pleasure, only then do we think about these ribbons of public property. In law, they are called public easements or public rights-of-way.

Other than schools, the most important function of local government is maintenance of highways. There are 30 to 50 miles of town roads in most Vermont towns, a portion of which are regularly maintained in all seasons, and another portion that remain essentially untouched by the road crew. It takes about four hours to clean the snow off roads in our town, with two trucks and the grader. If the storm is continuing, the boys will knock off for an hour, and then go back to it. Their journeys take them to the four corners of the town, up steep hills and down dark valleys, past the remote homes and those in the village. They need tire chains for the steepest going, and sometimes they have to back up the hill, so that the sand can help the tires grip the road when it's very icy. In the spring, dirt roads are scraped and graveled, waterbars revamped, guardrails straightened, and culverts and swales demucked.

Maintenance is just the beginning of road law challenges. Occasionally, but regularly, selectboards are faced with the dizzying need to change the status of a road. Those who have now built new homes on a Class 4 highway want it reclassified, and maintained at public expense throughout the year. The board is wondering why it should maintain private driveways that once served multiple residences. An old highway, recently discovered, runs right through the site for a new house, and everyone agrees it should be rerouted and reclassified a trail. An old bridge needs reconstruction, and temporary and permanent easements are needed to fix it properly. In these instances, the selectboard is required by law to follow a particular process, beginning with a proper notice and leading to a site visit, hearing, written decision, and award of damages, if necessary.

How these decisions are made depends on the facts of each case, but the law is uniform and knowable. Most of it is in Title 19, in the chapters dealing with town roads. Some of it is in case law, the collected decisions of the Vermont Supreme Court. Some of it has yet to be determined.

The law is not all you need. The vault in the Clerk's office contains a set of historical records of town highways all the way back to the beginning. The official town highway map is posted on the wall of the office, and represents the selectboard's best judgment on what roads are public. If town records are complete, there are such maps for each year back to 1931, when the

state first mandated them. Other maps are valuable too, such as Beers Atlas or earlier county maps, in locating home sites of earlier residents.[1] Knowing everything you can about the history of a road before any action is taken is essential.

Disputes will continue as long as roads run and towns grow. How they are resolved depends on the character of the parties involved. Somebody's feelings are going to be hurt in the process. It's destiny. If this guide does its job, the process will be dignified and fair.

2. History of Vermont Road Law.

In highway law, history counts. The validity of something done long ago often depends on whether it was done properly under the law of the time the act was done. To know whether a public highway has been properly discontinued, for instance, you must first determine when and how it was laid out, and then whether the discontinuance followed the right process.

Whether a highway was properly laid out, altered or discontinued is the critical fact that settles disputes over the boundaries and ownership of roads. While acquiescence or repose is a principle that carries some weight in this process, it is not enough to dispense with the historical record. History in this business is always present, and the errors and omissions of long-dead officials seldom forgiven or forgotten.

What follows is a tracing of Vermont highway law from 1777 to the present, to identify significant legislative and judicial trends and highlight the leading cases that have an impact on the search for answers about a highway. The primary sources are the acts and resolves of the Vermont General Assembly and the reports of the Vermont Supreme Court.[2]

Where a public highway once carried travelers to market, there may now be only parallel stone walls or no evidence of a roadway at all. The court tells us that the public highway, if never

---

[1] The Agency of Transportation has digitized all of the historic town highway map, starting with the 1931 series, by town and city, at the Online Map Center. http://vtransmaps.vermont.gov/mapsftp/current.asp.

[2] References to legislative acts are found in the laws of particular years and in the regular compilations of statutes every decade or so. A footnote to "No. 7 (1822)" refers to the act with that number in the Laws of 1822. Early volumes of laws used "Chapter" instead of "No." Until 1851, the legislature described amendments of existing law by referring to the act passed in a previous year, as in "Chapter 13. An Act, in amendment of an act, entitled, 'An act reducing into one, the several acts, for laying out, making, repairing and clearing highways,'" Laws of 1821, 82. The "Act, reducing into one the several acts, for laying out, making, repairing and clearing highways," was passed in 1797, as part of the second compilation of Vermont law; the 1821 amendment uses the 1797 as the basis for the amendment. After 1851, the practice changed to permit the act to refer to the most recent compilation of laws. For instance, No. 18 of the Laws of 1869 was entitled, "An act in addition to Section seventy-nine of Chapter twenty-four of the General Statutes, entitled 'Of Laying Out Highways and Bridges.'" Most of the acts and resolves and journals of the General Assembly are available through the search engines of hathitrust.com, among other sources of Vermont law.

There have been fifteen official compilations of Vermont statutes. It is important to understand the abbreviations used in order to locate the origins and changes to particular laws. The revisions of 1787, 1797, 1807, 1824 and 1834 are all described with an "R.," followed by the year and a page number. The compilations that follow 1834 and their abbreviations are as follows: Revised Statutes (1840) (R.S.); Compiled Statutes (1851) (C.S.); General Statutes (1863) (G.S.); General Statutes, 2d Ed. (1870) (also G.S.); Revised Laws (1880) (R.L.); Vermont Statutes (1894) (V.S.); Public Statutes (1906) (P.S.); General Laws (1917) (G.L.); Public Laws (1933) (P.L.); and Vermont Statutes Annotated (1947) (V.S.A.). Not all "compilations" are merely collections of statutes to date; occasionally they contain comprehensive revisions of the laws in existence at the time the compilation was adopted. The 1824 revision is useful in tracing the development the statutory law before that date, as it is organized by collecting the various acts adopted from 1797 to 1824 in chronological order.

discontinued or "thrown up on paper," is still there. Like the law, the public right-of-way is never lost to abandonment or disuse. Although both are sometimes hard to find, their authority continues unabated long after those who made and used them are gone.[4]

2.1 First Roads, First Laws, 1749-1799

Long before there was a Vermont, there were Indian trails, and paths created by lonely men with a hatchet and a compass,[5] roads created by formal vote of the proprietors of towns, and military roads. The first town highways were mandated by town charters. Charters did not lay out highways, but they provided the authority for proprietors and towns to create highways, often without the need for compensation. The charter of Berlin, for instance, provides that the grant is to be divided into 70 shares, "containing by Admeasurement 23040 Acres, which Tract is to contain Six Miles square, and no more; out of which an Allowance is to be made for High Ways and unimprovable Lands by Rocks, Ponds, Mountains and Survey thereof...."[6] The first division lot in Berlin amounted to 103 acres, 100 for settlement and three unspecified acres reserved for highways that could be laid out without formal "taking" of any private property, since those acres were never actually granted to the proprietor. Few complained. Usually landowners welcomed a highway across their lands because the highway increased the value of the land. The first Vermont law having an impact on highways was the Vermont Constitution of 1777. Article 2d of Chapter I provided, "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." This was the first written constitutional guarantee in the history of government that just compensation would necessarily be paid for the taking of private property for public use. It remains today the foundation of all laws on eminent domain.[7]

The first statute on highways was enacted in 1778. As seen through its 1779 successor, its principal feature was a highway tax, imposed by the state directly on each male person sixteen to sixty, who would be required to work at least four days a year on town roads, at a rate of eighteen shillings a day. Refusing or neglecting to work your share could result in a thirty shilling fine per day. It also provided a mechanism for determining the value of damages, when selectmen had laid out a highway across a person's property. Three to five freeholders would appraise the damage. The 1779 law ordered all towns to conduct a formal survey of all highways and to keep good

[4] "Law says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is the Law."
W.H. Auden, "Law like Love" (1940).

[5] See James Wilbur, *Ira Allen* (Boston and New York: Houghton Mifflin Company, 1928) Vol. I, 34-5.

[6] Albert S. Batchellor, ed., *The New Hampshire Grants* (Concord: Edward S. Pearson, 1895), 35. For charters issued by the State of Vermont, see *Charters Granted by the State of Vermont, State Papers of Vermont* II, ed. Franklin H. Dewart (Montpelier: Secretary of State, 1922).

[7] In 1793, the words, "any particular man's" were replaced with "any person's" property, signifying an early recognition of the rights of property owned by all people, regardless of sex.

records.[3] Towns could elect one or more highway surveyors (*savairs*, in the original spelling in one town's records) at town meeting to oversee the working off of the tax. Selectmen had the clear authority to lay out public--and private--highways, in these years.[4] The law on highway maintenance changed over the years, increasing the rate of the tax and the day rate of compensation, until its abolishment in 1892.

In 1781, highways were for the first time to be laid out after a mandatory survey, "by the Compass," and all highways previously laid out were to be so surveyed within two years, or "shall not be deemed lawful." Furthermore,

> [A]ll Highways that have been laid out within any of the towns of this State, either by the Selectmen, or by a Committee appointed for that Purpose, who have returned a Bill setting forth where such Highway began, and the General Course of such Highway, by such and such Monuments, and through such and such Lands, which are well known by the Inhabitants in the town, and accepted by the Town, and put upon Record in the Town-C1erk's Office; which Highway hath been cleared out and repaired by the town, and improved as a public Highway for the space of six Months, shall be deemed a lawful Highway….[5]

This was the first recognition of dedication and acceptance in Vermont highway law history. There was a concern for definition and precision in highways, even at this early stage of Vermont law. While towns were not always regular in following the laws of Vermont, the impact of this 1781 1aw was cumulative. Over the course of years, towns learned that straightening out the historical and ground record of their highways was of value even beyond the fact that the law required it. This 1781 law also provided that no damages were to be paid when highways were laid out over undivided land or where allowance land existed.[6]

Up to this point, it is not uncommon to find highway layouts that describe the road running from one settler's house to another settler's barn, without any courses or distances. In 1782, the legislature changed that, ordering highways to be "surveyed by Chain and Compass and a Survey thereof made out, entered and recorded in the town Clerk's office of the town where such road lies, ascertaining the Breadth, Course and Distance of such road." No damages were to be paid for highways laid out over land granted with allowances by the charter, but the land under the highway was to be set over to the owner of the lot in lieu of damages. Three freeholders could petition to have a highway laid out, and if selectmen refused an appeal could be taken to the local Justice of the Peace or a member of the Governor and Council.[7]

The legislature was deeply involved in highway affairs at this early stage of Vermont history. In 1778, the General Assembly resolved to make a new road from Bennington to

---

[3] "An Act for Laying Out and Altering Highways," (February 24, 1779) *Laws of Vermont 1778-1780, State Papers of Vermont* XII ed., Allen Soule (Montpelier: Secretary of State, 1964), 867. [Hereafter, XII State Papers].

[4] "[W]here a new highway, or common road from town to town, or place to place, shall be found necessary, and where old highways with more conveniency may be turned or altered, that upon any person or persons making application, the selectmen of each town respectively, be, and are hereby impowered by themselves or others whom they shall appoint, to layout or cause to be laid out such roads, and likewise private ways for such town only as shall be thought necessary, so as no damage is done to any particular person in his land or property, without due recompence be made by the town, as the selectmen and the parties interested may agree. . . ." Id.

[5] "An Act to Settle and Establish All Highways that are Laid Out in this State," *Laws of Vermont 1785-1791, State Papers of Vermont* XIV, ed. John A. Williams (Montpelier: Secretary of State, 1965), 11-12.

[6] Undivided or common land is land of the town, covered by the charter but not yet defined or allocated to any person. Allowance land is land reserved by the proprietors to use in bartering for roads across private land, sometimes shown on lotting plans separating quadrants of lots, not necessarily to be used as highways, but to offset land taken for roads that followed the terrain.

[7] "An Act Directing the Laying of Highways," XIII *State Papers* 129-130.

Wilmington, because of the "badness" of the existing road.[8] In 1782, legislation ordered the selectmen of Pownal to repair the "dug way, by the side of the Hoosick River, on the great road leading to Williamstown [Massachusetts], that is much out of repair, so that the traveling public is almost stopped," by the following June 1, on penalty of fifteen pounds fine.[9] In 1783, the legislature authorized a lottery to build bridges over the Black and Williams River in Rockingham, on the road from Westminster to Windsor.[10] In 1784, it overruled the Assistant Judge of Bennington County who had allowed damages of 360 pounds to a freeholder whose land had been taken for a highway by the selectmen of Shaftsbury, because allowance lands on the freeholder's grant were not considered in the award of damages.[11] The law provided ample authority to selectmen to lay out public highways within the town, but highways that crossed town lines, linking towns to markets, became the province of the legislature to direct.

In 1787, county courts were given authority to lay out highways when selectmen refused or neglected to do so, on application of three or more freeholders. The court appointed three indifferent freeholders from the adjoining towns, "who shall view the premises, and if they shall find it necessary for the better accommodation of the Public, as well as individuals, to layout a new road, or to turn or alter one already laid out . . . ," then the county court would lay out the road and order the board of selectmen to pay damages for any taking.[12] The road may have been laid out by the county, but it became a town highway for purposes of construction, repair and maintenance from that point on. The power to discontinue that same highway was not lodged with the selectmen.

After a rewrite of the law on highways in 1792, following statehood, selectmen were empowered to divide the town into districts for the purposes of highway repair, appointing highway surveyors for each district, and with the power to alter the district boundaries from time to time. Voters could change district lines at town meeting. The highway surveyor could now order out residents to clear snow from the highways or work on roads and bridges in emergency situations, over and above the tax they paid during the regular seasons. The surveyor had to keep regular accounts of the work performed and make returns of these records to the selectmen of the work done and the taxes paid. The law also dealt with those who would seek to enclose highways without permission by providing selectmen with powers to direct the taking down of barriers on penalty of having the town do it and charge the landowner for the cost.[13] Even today, some people have a hard time recognizing public rights crossing private property.

The various laws relating to highways were at last brought together in a single act in March of 1797, when a new compilation of Vermont laws was adopted by the General Assembly. The laws were amended as well. Towns were made liable for all damages caused by the insufficiency of the highways and bridges. The county courts became responsible for working out the allocation of the costs of repairing a bridge between two towns. The law provided a $30 penalty for wantonly "damnifying" a highway by taking away plank, posts, timber or rocks or digging pits for gravel or

---

[8] XII *State Papers* 31.
[9] "An Act Directing the Selectmen of the Town of Pownal to Mend a Certain Piece of Road in said Town," XIII *State Papers* 84.
[10] "An Act Granting a Lottery for the Purpose of Building Bridges over Black River and William's River," XIII *State Papers* 192-193.
[11] "An Act to Set Aside and Render Null and Void in Law a Certain Order Therein Mentioned," XIII *State Papers* 24849.
[12] "An Act Directing the Laying Out of Highways," Laws of Vermont 1785-*1791*, XIV *State Papers* 325-327.
[13] "An Act for Mending and Repairing Highways," *Laws of Vermont 1791-1795*, XV *State Papers* 115-116 (ed. John A. Williams (Montpelier: Secretary of State, 1967)).

clay in the roadbed.[14] The rules on laying out highways, adopted prior to that time, remained in force in the new compilation.

2.2 Turnpikes and Early Town Roads; Road Law to 1831

Vermont's first turnpike was chartered by the General Assembly in 1796 and ran from Bennington to Wilmington. The roadbed was already established. Dozens of other turnpike companies were formed over the next several decades. Elijah Paine started the Paine Turnpike in 1799, running along the established public highways of the towns of Berlin, Williamstown, Northfield and Brookfield, with a right-of-way of not less than sixty feet and a traveled portion of eighteen feet. Paine erected three turnpike gates for the collection of tolls, which amounted to five cents for every man with a horse, and on up to a high of thirty-one cents, three mills for a four-wheeled pleasure carriage drawn by two horses.[15] Paine was in financial trouble by 1820 and the legislature turned the highway back to the towns as public highways.[16]

The law authorizing selectmen to "set over" allowance lands in lieu of damages to landowners was amended in 1800 to permit the town to give title to old roads or highways adjoining or running through that person's land, "when there shall not be such allowance lands," instead of money damages. While this is the first clear authority of towns to "shut up and discontinue" roads, it was not a general authority, since it was linked directly to the compensation for taking land through the laying out or alteration of highways.[17]

The three-rod right of way was first established by a statutory change in 1806. Three or more freeholders were also given the right to petition the selectmen to "extend any public roads already laid out, to the width of three rods, or more if they see fit." That same year the legislature authorized twenty landowners to join in a petition to the selectmen to build a bridge within a town. It also set a one year deadline for selectmen to open a highway laid out by the legislature or the county courts, as some towns thought they had an option on whether to follow the direction of these other authorities.[18]

In 1808, Vermont law was amended to require all highways to be laid out by road and degrees. The law formerly used the terms "chain and compass."

The first statutory recognition of a town's authority to discontinue highways came with the amendments of 1813. Roads laid out by the county court or the legislature could only be discontinued by the entity that laid them out, however. The first law on pent roads was also adopted that year. It required the written permission of the selectmen to lay out or discontinue these roads to be recorded with the town clerk, and allowed selectmen the power to enlarge or restrict the number of gates and bars, "as to them shall appear reasonable."[19]

---

[14] *Revision of 1797*, 347-50.
[15] "An Act Granting the Right of Making a Turnpike Road from Brookfield to Onion River to Elijah Paine, His Heirs and Assigns," *Laws of Vermont 1796-1799*, XVI *State Papers* 364-367 (ed. John A. Williams (Montpelier: Secretary of State, 1968)).
[16] Paul Hodge of the Agency of Transportation compiled copies of all turnpike and toll road charters.
[17] "An Act, in addition to an act, 'An Act reducing into one the several acts for laying out, making, repairing and clearing highways,'" *Laws of 1800*, 15.
[18] "An Act, in addition to an act, entitled 'an act reducing into one the several acts for laying out, making, repairing and clearing highways,'" Chapter 67 (1806), 85-88.
[19] No. CXXII, (1813), 165.

The earliest reported Vermont Supreme Court case on highways, *Fisher v. Beeker,* was published in 1816. Commissioners appointed to lay out a turnpike road had set over an old road to be discontinued, but the discontinuance and setting over to the adjacent landowner were not part of the record. If the action is not in writing, wrote the court, then the setting over is irregular and void. Parol (oral) evidence is insufficient to prove it.[20]

The amendments of 1820 required selectmen to record a certificate in the town clerk's office showing the opening of every public highway. Freeholders unhappy with the damages awarded them by selectmen for laying out or altering a public highway were allowed to appeal to a Justice of the Peace in an adjoining town, who would appoint three disinterested freeholders to assess the damage. If damages awarded were in excess of $40, then the county courts had jurisdiction.[21] That same year the legislature first authorized county courts to lay out highways in or through two or more towns, where formerly only the legislature could exercise this power. A petition signed by seven freeholders could be presented to the county court, whose judges would then appoint committees to lay out or alter the roads. Petitioners would serve selectmen in the affected towns with a citation to appear and express their opinions on the proposal. After the county roads were laid out and constructed, the selectmen became responsible for opening (with a certificate) and maintenance of those highways. In the same act, highways in or through two or more counties became the responsibility of the supreme court.[22]

Towns failing or neglecting to open highways laid out by the courts or the legislature within the timeline set for opening were liable for indictment by the grand jury of the county, starting in 1821. The fine the towns paid went toward the construction of the roads.[23]

In 1822, the law governing the laying out of highways by the courts or legislature required that the committees appointed to lay out the roads consist of persons from towns other than the ones through which the highways would run. This reflects a growing appreciation for the adversarial relationship between the towns and the courts or the legislature. That year the law also provided that selectmen might layout cross-roads or lanes of a width of less than three rods, "any law or usage to the contrary notwithstanding."[24]

The power to lay out a highway on the line between two towns was amended in 1824 to allow selectmen to make the decision, without the imposition of the county court. The legislature

---

[20] *Fisher v. Beeker*, Brayton 75 (1816). References to Vermont cases follow a standard format after 1829, the year of the first volume of Vermont Reports. In that volume the case of *Noyes v. Town of Morristown* is reported. Its citation is 1 Vt. 353 (1828), showing the volume (I), the page the case begins (353) and the year the Vermont Supreme Court handed down the opinion (1828).

Before Volume I of Vermont Reports, there were seven volumes of cases published, six of them privately by the judges themselves and one (Daniel Chipman's 1824 volume) by order of the General Assembly. These are: Nathaniel Chipman, *Reports and Dissertations* (Rutland: Anthony Haswell, 1793) Part I; Second Edition (Rutland: TuttIe & Co., 1871); Royall Tyler, *Vermont Reports* (New York: I. Riley, 1809, 1810), 2 vols.; William Brayton, *Reports of Cases* (Middlebury: Copeland & Allen, 1821); Daniel Chipman, ed., *Reports of Cases* (Middlebury: I. W. Copeland, 18245), 2 vols. in one; Asa Aikens, *Reports of Cases* (Windsor: Simeon Ide, 1827-8), 2 vols. For several early cases, see also William Slade, Jr., ed., *Vermont State Papers* (Middlebury: I. W. Copeland, 1823), 548-556. Professor Samuel Hand and Jeffrey Potash compiled and microfilmed early Vermont Supreme Court cases in 1979, now available at the Division of Public Records, Middlesex, Vermont. See "Litigious Vermonters, Court Records to 1825," Occasional Paper #2, Center for Research on Vermont (1979).

[21] No. 6, (1820), 20-22.

[22] Chapter 7 (1820), 22.

[23] No. 12 (1821), 82.

[24] No. 14 (1821), 18.

also authorized committees appointed by the county court or supreme court to lay out highways on the line between towns when expedient, giving the committees the power to allocate the costs of construction and maintenance among or between the towns. No highway could be laid out by the courts, however, unless application had first been made to the selectmen of such towns and the petition had been refused.[25] The tug of war between court power and town power was moving back toward the towns.

This trend is also seen in the 1825 law authorizing selectmen to contest facts in the county committee's report or impeach the fairness of the committee. In order for the selectmen to prepare for their day in court, the report had to be deposited with the court at least fifteen days before the session began or the matter would have to be heard in the next term of the court. The legislature also recognized the right of the supreme court to discontinue any road established by its order and repealed the law authorizing the setting over of allowance lands or old roads in lieu of' money damages for highway takings.[26] This was the end of allowance lands as a subject of public taking or as a substitute for compensation in the taking of land, with one exception. Codified as 19 V.S.A. § 810, present law provides, "When a lot of land remains entire, as originally divided among the proprietors of a town, and is owned by one person, or jointly, to which a quantity of land was allowed for the use of highways more than has been taken up by highways already laid out, and a highway is laid through the lot, the allowance land may be taken into consideration in estimating the damages sustained by the owner." By "entire," the law means whole proprietors' lots, as set in the lotting plan.[27]

The year 1827 brought a radical, albeit short-lived change in the way highways were laid out in Vermont. A committee of five persons per county, called county road commissioners, was appointed by the legislature each year to receive all petitions to lay out roads and bridges in one or between two or more towns. They made personal inspections and issued final and conclusive orders on highways. They recorded their orders with town clerks and made orders for the time of highway openings. They could order repairs of bridges or roads upon petition of seven freeholders and penalize towns for neglecting the orders of the county road commissioners.[28] Two years later the legislature reaffirmed selectmen's responsibilities for the maintenance of all highways and authorized selectmen to appeal the decision of the road commissioners to county court. The law, as it had after 1824, provided that no petition could "be accepted by the road commissioners" unless the selectmen had first seen and rejected it.[29] The experiment ended in 1831, when the 1827 and 1830 laws were repealed, reinstating the law in place before they were adopted.[30] Thus ended the movement to make counties political subdivisions with broad administrative powers in Vermont.

The following year the legislature first gave the courts the latitude to direct selectmen to open different parts of a highway on different timetables, rather than all at one time. The county court could discontinue highways laid out by the county road commissioners between 1827 and

[25] No. 29 (1824), 29-30.
[26] No. 11 (1825), 22-23.
[27] Lotting plans are now available for most towns at the State Archives web page. https://www.sec.state.vt.us/archivesrecords/state-archives/find-records/maps-and-plans.aspx.
[28] No. 17 (1827), 13-15.
[29] No. 12 (1830), 8-19.
[30] No. 4 (1831), 7-8.

1831, and county clerks were appointed ex officio clerks of the county road commissioners in order to complete their records.[31]

2.3 Road Law from 1831 to 1892.

In 1831, the Vermont Supreme Court first applied the statute requiring a certificate showing the opening of a highway. The county road commissioners had laid out the road in 1828, but had not recorded any certificate of the opening. The farmer over whose land the highway would pass erected fences across the highway. When a traveler tore those fences down the farmer sued for trespass and won. Without a certificate there was no public highway. The case describes the circumstances that led to the adoption of the county road commissioner system, highlighting the fight between selectmen and the county court in laying out highways across town lines. "When a road is laid through the lands of one of our citizens," wrote the court, "it is necessary that he should be enabled to know when his dominion over the soil ceases, when he is no longer at liberty to keep it enclosed; and on the other hand every individual in community should be able to ascertain when a road becomes a public highway, so that he has an undoubted right to travel thereon. . . ."[32]

A highway laid out by the county court in 1799 in the town of Manchester over an established roadway was discontinued by the court in 1825. The highway as laid out passed over the lands of Samuel Pettibone, who in 1786 had conveyed part of his land to Amos Chipman, "bounding him, on the west, by the east line of said highway." Upon discontinuance the successor in title to Chipman, one William Puldy, was given one half of the highway. Pettibone's heirs objected, and the Supreme Court found that this was a mistake. The county court had awarded private land to an individual without compensation. Pettibone's heirs should have received the entire roadway. The case is interesting in what it has to say about the interests of landowners over which a highway passes:

> By the establishment of an ordinary highway, the public acquires but an easement in the land; the right of making, repairing and using the highways, as an open passage or thoroughfare. Subject to this right the owner of the soil retains, and may exercise all his rights of property therein. He may take from it stone, timber, and the like, which are not wanted for the support of the highway. And he may vindicate his qualified right of possession by action of trespass or ejectment, against those who attempt to appropriate the land to any other than this public purpose. From these principles it regularly follows, that when the highway is discontinued, the land becomes discharged of this servitude, and the owner is restored to his former and absolute right.[33]

In 1834, the legislature authorized grand juries to indict towns that failed to build or repair bridges so ordered by the courts or the legislature. Damages would complete the necessary work. That same year the law was changed to allow twenty freeholders to petition selectmen to build a bridge before May and, if selectmen had failed to do so within six months, to petition the county court to appoint commissioners to do so.[34] Selectmen were allowed to petition the county court in 1835 for an extension of the time to lay out and build a road or bridge, providing they gave notice of their petition to the selectmen of other, affected towns. The committee appointed by the county

---

[31] Nos. 8, 9, 10 (1832), 6-7.
[32] *Patchen v. Morrison*, 3 Vt. 590 (1831).
[33] *Pettibone v. Purdy*, 7 Vt. 514 (1832).
[34] Nos. 11, 14 (1834), 9-11.

court had to consider whether other towns would benefit from the building of a bridge and apportion costs accordingly.[35]

A second case arising from the era of the county road commissioners reached the Vermont Supreme Court in 1836. The selectmen of Shrewsbury had attempted to discontinue a highway laid out by the county road commissioners. The issue was the effect of the 1831 repeal of that law. The Court was short and to the point in concluding that "[t]he selectmen have no authority to discontinue roads laid out by the road commissioners, a committee of the legislature, or a committee appointed by the supreme or county court."[36]

By the 1830s the age of turnpikes was coming to an end. In 1839, the legislature provided a legal mechanism by which the corporations could sell their stock to the towns through which the highway passed. That same year the courts were authorized to take the real estate of turnpike companies for public highways, upon payment of damages.[37]

The *Compiled Statutes of the State of Vermont* was adopted by the General Assembly in 1839. The compilation included the first authority to resurvey town highways. If a survey had not been properly recorded or its record preserved, or if the terminations and boundaries could not be ascertained, the selectmen of a town now had the power to make a resurvey and have it recorded. Recognizing that mistakes had occurred, however, the legislature provided that fences and buildings erected and continued for more than fifteen years within the highway right-of-way could not be removed or the enclosed lands taken for the highway without compensation.[38]

The first law authorizing appeals from selectmen's decisions relating to highways to the courts was adopted in 1839.[39] That same year, the law on maintenance of highways was amended to require three-quarters of the work of male residents be done in the spring. Recovery of damages for those suffering loss as a result of the insufficiency of a highway or bridge was limited to those driving carriages of 10,000 pounds or less, and there were other rules designed to protect the roadbed and bridges. Selectmen were authorized to establish tolls and appoint persons to run ferries over any river, creek, pond or lake.[40]

In a Vermont Supreme Court decision that year, the court explained that, "In petitions to discontinue roads, laid out by committees appointed by this court, the practice of the court is to appoint the same committee that laid out the road to attend to the question of discontinuance."[41] In 1840, the court took a town to task for failing to maintain winter roads. The main path of a road was blocked by snow drifts. After four to six weeks, travelers went around, along a ditch on the side of the road. When the plaintiff tried to get around the drift in a sleigh, the sleigh tipped over, and plaintiff was injured. He sued the town for damages. The Court affirmed a verdict for plaintiff, holding that the facts showed that the road was "insufficient and out of repair" and the town was guilty of the "most gross neglect" for not clearing the road.[47]

---

[35] Nos. 17 & 19 (1835), 17-19.
[36] State v. Shrewsbury, 8 Vt. 223 (1836).
[37] No. 8 (1839), 16-17; C.S., 189.
[38] C.S., Title X, Chapter XX, Sections 8 & 9, 125.
[39] R.S. 20, § 26.
[40] R.S., 123-44.
[41] Livingston v. Towns of Jerico [sic] and Underhil1, 11 Vt. 96
(1839). [47] Green v. Town of Danby, 12 Vt. 338, 341 (1840), [48] No. 10
(1842), 18-19.

Selectmen were first authorized to discontinue highways laid out by a committee of the legislature beginning in 1842, although if the highway extended into another town or county only the courts could exercise this power.[48]

The first notable case from Vermont to reach the U.S. Supreme Court was decided in 1848 and involved the condemnation of the West River Bridge between Brattleboro and Dummerston in 1843. The court authorized selectmen to condemn bridges (and impliedly toll roads) from private corporations for compensation, notwithstanding charters guaranteeing exclusive rights to cross the river for a number of years.[42]

Beginning in 1845, towns could purchase turnpikes and continue to collect tolls on these highways for a period of up to five years, until reimbursed for the purchase of the stock. Highways near the town line could be laid out only by the selectmen of both towns or the county court, "on account of the position of the line or nature of the soil over which it may be laid," with the costs of construction and maintenance apportioned accordingly.[43]

A new mechanism for reviewing the equity of court orders to lay out, build or repair roads was adopted in 1847. Selectmen could apply to the courts for relief. Courts would appoint three commissioners, not inhabitants of the subject town, to examine and reapportion, if necessary, the costs of road takings and alterations, giving due consideration to the special benefits accruing to other towns. This introduced the concept of "excessive burden" to Vermont highway law.[44]

In a case decided by the Vermont Supreme Court in 1849, Carlos Baxter, the owner of a large tract of woodland, pasturage and tillage in the village of Burlington, sued the Winooski Turnpike Company for damages sustained by him due to the "gross neglect" of the company to maintain the turnpike. He claimed that his horses, wagons, oxen and carts, "were mired, and were driven into ruts, sloughs and holes and over stones and rocks in said road, and were thereby greatly injured and destroyed." The county court had awarded Baxter nothing for his loss and the Supreme Court agreed. "To enable a person to maintain a private action for the erection of a public nuisance, he must have sustained some damage more peculiar to himself than to others, in addition to the inconvenience common to all. . . ."[45] The case is important for two reasons. It shows the condition of the highways at mid-century and it underscores the basic rule of highway takings that damages must be specific to the individual in order to justify recovery. If you suffer what everyone suffers, you do not suffer at all. That is why there are no damages when highways are reclassified as trails or when former Class 3 highways are reduced to Class 4.[46]

A landowner sued a town for trespass for maintaining a highway that had been laid out, constructed and used for eight or ten years. He had acquiesced to the public use and had even accepted damages for the taking, but later decided the highway wasn't laid out properly because of a lack of a certificate of the opening of the highway. Too late, answered the court. The farmer had treated it as a legal highway, and that was enough to justify holding against him.[47]

Beginning in 1850, towns could vote to have the highway tax paid entirely in money, assuming they had elected a road commissioner. Road commissioners replaced highway surveyors

---

[42] *The West River Bridge Company v. Dix et al.*, 47 U.S. 507 (1848).
[43] Nos. 21, 22 & 23 (1845), 13-15.
[44] No. 27 (1847), 22-23.
[45] *Baxter v. Winooski Turnpike Co*., 22 Vt. 114 (1849).
[46] *Perrin v. Town of Berlin*, 138 Vt. 306, 307 (1980).
[47] *Felch v. Gilman et al*., 22 Vt. 38 (1849).

and the old district system was abolished, if towns chose to approve the change.[48] That same year the law allowed selectmen to change the location of a bridge or highway swept away or destroyed by flood in order to avoid obstructions. New land taken for the relocation could be taken, if compensation was paid, and the former site of the bridge or highway discontinued.[49]

A Worcester farmer, whose property was crossed by a circuitous public highway, plowed up and cultivated a portion of the highway he believed was discontinued after the town selectmen straightened the road. Unfortunately, the selectmen had never made a record of the straightening of the highway (called an alteration). When the new road became muddy, a traveler tore down the fence and traveled through the field, damaging the crops, along the old roadbed. The court held the highway was properly altered, that by the act of opening the new highway the old road was discontinued. "The fact of the alteration being made, and the straightened road being opened, in fact, for travel, under the direction of the selectmen, made it a public highway, to all intents, by acquiescence of the authority of the town, who have the control and are liable for the sufficiency of the highways, within their limits."[50]

Montpelier paid damages to a traveler in 1858 for the town's failure to cut a road of adequate width through a snow drift.[51]

After 1858, selectmen were required by law to erect posts for fastening horses near the gates and bars of pent roads. They were also obliged to provide at least one watering trough by the roadside in each highway district, but could not spend more than five dollars on each for these troughs. The per diem labor tax was still the principal source of revenue for highways; landowners could pay in money, of course, rather than in work, but by working it off they could enjoy a twenty-five percent discount. Selectmen could decide where the work would be done. In 1858, the law declared that no landowner could gain possession of any land within a highway right-of-way merely by possession.[52] In 1860, a town could vote to provide lampposts and lamps on its streets.[53]

A landowner erected a fence where he believed the right-of-way of the highway ended, and the town tore it down, claiming a six-rod right-of-way for the highway. The public had used and occupied a four-rod right-of-way for more than fifteen years. The town had formally laid out the highway as six rods, but used only four. When the dispute reached the Vermont Supreme Court in 1860, the court gave no weight to the argument of the town that the land in front of the landowner's dwelling had been dedicated to the public because it had not been fenced. The law previous to 1839, according to the court, required all improved land to be fenced along the highway right-of-way. But this was 1860, and the court found it reasonable to assume that the lack of such fencing in earlier years did not mean the land had been dedicated to the public. What the public had used was the important part. Possession and use for even less than fifteen years might be enough to justify dedication, if other evidence supported an intent to dedicate the land. The extent of the use determines the legal right to possess that land by a town by adverse possession, or a highway form of it.[54] The case is anomalous, given the usual high regard the courts have to surveyed roads.

---

[48] C.S., 160-84.
[49] No. 31 (1850), 24.
[50] *Closson v. Hamblet*, 27 Vt. 728 (1855).
[51] *Barton v. Town of Montpelier*, 30 Vt. 650, 653 (1858).
[52] No. 23 (1858), 28-29.
[53] G.S., 171-212.
[54] *Morse v. Ranno et al*., 32 Vt. 600 (1860).

Roads gradually improved in condition. The legislature authorized surveyors to take materials within the highway right of way to assist in building or repairing highways beginning in 1866, without additional compensation. Selectmen could erect fences to prevent snowdrifts after 1868, and the following year could legally order hills graded and surfaces graveled. The removal of loose stones in the roadbed was targeted for special attention by the legislature after 1870, apparently to avoid slippage, and selectmen could be fined $5 for failing to remove them. That same year towns were first given the authority to purchase the franchise of bridge companies, although the town was specifically prohibited from collecting tolls. Towns were also allowed to discontinue county roads that had not been used for more than one year.[55] In 1874, the legislature established a process for draining low or swamp lands, giving selectmen the authority to apportion damages among affected landowners.[56]

Beginning in 1880, towns were required by law to levy a tax of twenty-five cents on the dollar of the grand list for highway purposes and could decide that it be collected entirely in money, as opposed to labor. These towns would then elect street commissioners, replacing the highway surveyors, and the tax collector would collect the tax. After 1880, a town was not liable for damage caused by the insufficiency of its highways, although the town was still responsible for damages from bridges (and later culverts).[57]

The law governing width of highways in villages and cities was amended in 1884, authorizing roads used to connect with existing highways to be less than three rods. Towns were not to be assessed for maintaining a highway in another town, beginning that year, except for highways on or near the line.[58]

In 1886, selectmen were given authority to lay out, establish and construct ditches, drains or watercourses across lands of individuals for the purpose of drainage. Landowners had to be compensated, but special benefits of the drainage could be considered in the award. That year selectmen were given authority to apply to the county if the town's highway tax was more than an average of $1.50 on a dollar of the grand list for an average of five years. The legislature also redefined alteration by including the raising or lowering of the road bed more than three feet as a taking of property. In such cases, the landowner was entitled to notice, a hearing and damages. Damages were also first available for resurveys as well as for laying out or altering highways in 1886.[59]

In an 1890 case, the Court helped define when a resurvey is authorized. A Sheldon highway had never been surveyed. The selectmen "resurveyed" in and found that the line ran directly through a store. When their actions were challenged, the court declared the resurvey void. In order to be resurveyed, a highway must first have been surveyed. With none existing the selectmen had no jurisdiction.[60] Their only choice was to lay out a new highway.

2.4 Centralization.

[55] Nos. 53 (1870), 93-94d.
[56] 1874, No. 18.
[57] Compare *Revision of 1797*, Ch. XXVI, § 13 with *Revised Laws*, §§ 3125-3144..
[58] Nos. 16 & 18 (1884), 17, 18-20.
[59] Nos. II, 13 & 15 (1886), 8, 10, II.
[60] *Trudeau v. Town of Sheldon*, 62 Vt. 198 (1890).

A highway tax payable in labor had been a feature of Vermont law since 1778, but in 1884 the system was abolished.[61] In 1892 the highway tax was raised to twenty cents on the dollar, up from fifteen cents in 1884. That year the legislature imposed a state five cent highway tax on every town and city grand list, to be collected by the state treasurer and reapportioned and repaid to the several towns on the basis of highway mileage. This law also required selectmen to file an annual report with the state, swearing to information on the mileage of all highways in the town. The state highway money came with strings--it couldn't be used for bridges; it was for permanent repairs of main thoroughfares. If unspent, it could be held over until the following year if needed. The office of road commissioner was created in 1892, an elected position authorized to superintend the expenditure of the highway taxes. Road commissioners in each county were required to meet in May and August annually to "consider such matters as the state commission may present to their attention and the best methods of general road work."

In 1894, the Vermont Supreme Court ruled that under existing Vermont law a town could not lay out a lane unless it connected existing highways.[62] Two years later, the legislature responded, authorizing lanes less than three rods in width that connected with public highways only at one end. The first requirement for a public hearing before the board of selectmen prior to discontinuance of a public highway became law in 1896, along with the right to review before the county court, in the same manner as for the laying out of highways. Towns assessed for bridges or highways in another town were given authority to petition the County court to vacate these assessments.[63]

A state highway commission had been created in 1892, and while it lasted only until 1896, direct state involvement in highways was established. In 1898, the legislature created the position of state highway commissioner, to oversee the payment of the state highway tax and ensure that highways were constructed and repaired in accord with state standards. The first automobile regulations came in 1902, the first licenses in 1904.[64]

In 1901, the Supreme Court invalidated a provision of a city charter authorizing condemnation for the lack of any provision for judicial review.[65] There was no longer any question whether the business of highways was quasi-judicial.

Selectmen were first authorized to lay out temporary roads for the removal of lumber in 1904, with the right to award damages to landowners and discontinue those highways when necessary.[66]

In 1906, Vermont gave surveyors the right to enter private property to conduct their work, as long as they did as little damage as possible, redefining the laws of trespass. That same year the law first required towns to place stone or iron monuments marking the boundaries of the highways. Timetables were established for selectmen's decisions on laying out, altering or discontinuing highways. The law requiring towns to compensate persons who had erected buildings or fences within the right-of-way for more than fifteen years was repealed in 1906.[67]

---

[61] Laws of 1884, No. 12, § 1, 3.
[62] *Bridgman et al. v. Hardwick*, 67 Vt. 137, 31 A. 33 (1894).
[63] Nos. 68, 69 (1896), 56.
[64] V.S. §§ 598-639.
[65] *Stearns, et al., v. The City of Barre*, 73 Vt. 281, 291 (1901).
[66] No. 65 (1880), 68-69.
[67] P.S., Chapter 170, 744-766.

Towns were required to appropriate a sum of not less than one-fifth of the grand list annually for the repair of highways, on top of the state tax.[68]

Four years later, the Vermont Supreme Court decided whether there was a public highway in front of the old Union Station in White River Junction. At stake was whether the state and the town had to pay for a subway to eliminate a grade crossing. The railroads first maintained that a public highway had been laid out in 1863 across an area now covered by tracks. The survey included this description: "Thence south 69 deg. east, 7 rods and 10 links to the track of the Central Vermont Railroad. Said survey being the northerly line of said highway three rods in width southerly from the said northerly line." The railroads argued that this description established the track as a monument and that the principle that courses and distances are governed by fixed monuments should apply. The court disagreed, finding that the track was no monument, that "track" in the survey actually meant "railroad right-of-way." The court gave great weight to the 1849 law that prohibited laying out a public highway across a railroad at grade.

The railroad next argued that, even if the area in front of the Union Station was not a formally laid out public highway that it had been established by dedication and acceptance. The court found dedication in the manner by which the railroad treated the property, allowing the public to travel over it, but no acceptance without proof that the town had maintained that section of road. There was no specific evidence of an unequivocal act of the town, and "[p]eople cannot by going where they will lay out highways at their will. The adoption of a dedicated way as a highway must be evidenced by acts of the proper town authorities, and mere use by the public is not enough."

The railroad's final argument was a shot in the dark. It argued that even if the highway was not laid out legally either by a statutory process or dedication and acceptance that it constituted a road in fact. The court spent little time with this, excusing it with the comment that "we know no such thing as a highway which nobody is bound to repair."[69]

In 1917, the court extended its policy on dedication and acceptance. This time the highway was a former town highway discontinued in 1878. The public never recognized the discontinuance and continued to use the highway as it had before. When the present owners of the land over which the new highway passed sued to enjoin the public from using it, the court agreed. As the town had neither repaired nor recognized the old road, there was no acceptance and no right-of-way created.[77]

The state gave its support to the federal aid system in 1917, providing for federal funds to assist in the construction of rural post roads.[70]

A neighbor claimed his use of a private right over a discontinued town highway in Danville created a highway by prescription, but as the town never maintained the old road, the Supreme Court in *Way & Way v. Fellows* (1917) denied him relief.[71]

After the selectmen of the town of Barton petitioned the county court to discontinue a highway between two towns, the Vermont Supreme Court in 1918 discovered that seven freeholders had not petitioned the county court as the statute required. The court dismissed the petition and the appeal. "The procedure to be followed in laying out or discontinuing a highway

---

[68] P.S.,767.
[69] *Bacon et al. v. Boston & Maine R.R. et al*., 83 Vt. 421, 76 A. 128 (1910).
[70] G.L., 768.
[71] *Way & Way v. Fellows*, 91 Vt. 326, 100 A. 682 (1917).

is wholly statutory and the method prescribed must be substantially complied with or the proceedings will be void."[72]

That same year the Vermont Supreme Court decided a resurvey case involving the town of Berkshire. Berkshire had given no notice to abutting landowners in the belief that the resurvey would simply establish existing terminations and boundaries, but the description of the resurvey used the words, "the foregoing resurvey follows and approximates the original survey as nearly as the line can be determined." This did not set well with the court; it was too indefinite and uncertain to give rise to a finding of fact that no new land was taken in the resurvey. The resurvey was void, according to the court. Without notice to the abutters, the selectmen did not have jurisdiction to proceed with the resurvey.[73]

The legislature first granted selectmen the right to lay out trails, or alter highways into trails, in 1921.[74]

The Vermont Supreme Court decided *Gore v. Blanchard* in 1922. People had been using land to reach a pond for fishing and ice-cutting without ever asking permission of the owner for many years. The town had done nothing to improve the road, but here the court could not find even dedication on the part of the landowner:

> [N]o presumption arises where, as in the instant case, it merely appears that some of the inhabitants of a certain locality, even with the knowledge of the land owner, traveled over a small, worthless strip of unculltivated, unenclosed land for the purpose of getting ice in the winter, and occasionally for the purpose of fishing. Such use did not damage or inconvenience the land owner, and to have opposed it would have been regarded as unneighborly and churlish. There is no claim that ordinary travel ever passed over this way, except the plaintiff, ever claimed to use it as a matter of public right. .."[75]

2.5 The Federal Presence.

In 1931, the legislature first required town selectmen to file with the town clerk a list of all highways laid out and all discontinued during the year, on or before May 15 of each year. The first town highway maps stem from this era. "Highways that are not traveled shall be treated as discontinued under this chapter."[76] This language was found not to mean what it says, in the 1998 Vermont Supreme Court decision entitled *In re Bill*.[77]

The state finally gave up its state highway tax in 1931, when the income tax was adopted for Vermont taxpayers. The state highway system was also created in 1931 and the executive branch of state government first given the authority to lay out highways. That same year selectmen were first authorized by law to have the road surface treated with bituminous material or to be treated with a dust layer.[78]

In 1944, the Vermont Supreme Court decided that pent roads could be laid out by dedication and acceptance. The pent road in controversy had never been laid out by the town. The defendant left the gate open a number of times. He found "it was difficult to avoid soiling his

---

[72] *Barton v. Sutton*, 93 Vt. 102, 106 A. 583 (1919).
[73] *Town of Berkshire v. Nelson & Hall Co.*, 92 Vt. 440, 105 A. 28 (1918).
[74] No. 21 (1921), 106.
[75] Gore v. Blanchard, 96 Vt. 234, 118 A. 888 (1922).
[76] 1931, No. 86.
[77] In re Bill, 168 Vt. 439, 440 (1998).
[78] No. 61 (1931), 97.

shoes when he got out of his automobile to open and close the gate, and that the cattle impeded his passage." He defied the requirements of the law on pent roads because he wanted "to see what the law was going to do about it." Following a jury trial, he was fined $5 for each of ten separate infractions. The pent road, according to the court, was a public highway, since both gates and road had been in existence for 50 years, the gate had been kept in repair at the expense of the town and the road worked by it. The fact that it came to a dead end did not change its character.[79]

Both dedication and acceptance were found to exist by the court in its 1947 decision in *Springfield v. Newton*, long regarded as the leading dedication and acceptance case. At issue was a bridge, the only access to one man's property, serving no other property but his. To avoid flood damage the village of Springfield built a retaining wall, which supported one end of the bridge abutment. The bridge was repaired more than once by the town. About twenty-five cars a day crossed the bridge, only to turn around after discovering they made the wrong choice. The owners never tried to stop this practice, which had extended for more than thirty years. The court could find no written evidence of an intent on the part of the selectmen to maintain the bridge, and decided it was not a public highway bridge, but wrote that if a written authorization for repairs could be found this would constitute strong evidence of acceptance.[80] The law at the time required a road commissioner to receive written authorization from selectmen (not, as here, a single selectman) before proceeding with bridge repairs. The lack of this order was enough to conclude there was no acceptance.

In 1954, the court ruled that landowners retain the fee of the soil embraced within the limits of a public right-of-way, with full right of its enjoyment in any manner not inconsistent with the enjoyment of the easement by the public. The public has "no right to the trees or herbage growing upon the land, or to the stone and minerals under the soil. These are as much the property of the owner of the freehold as before."[81]

The law on discontinuance was clarified in 1956 after a dispute arose relating to land formerly used for Route 302 in Montpelier, near the Berlin town line. A curve had been eliminated and the land no longer used for the highway was left in an uncertain state. The City of Montpelier owned the land under the highway in fee. The issue was whether, once the land was no longer used for highway purposes, the title reverted to the predecessor in title. The deed settled the controversy. If it had included the words, "for the use of a highway," reversion would have occurred by the relocation of the highway, but lacking those words the court interpreted the deed as a conveyance of an absolute grant. The city's interest was not an easement but a fee.[82]

In 1957, the laws relating to highways were substantially rewritten by the addition of laws giving the state full authority to lay out the Interstate system and purchase the land under the land outright. In 1957, as part of a comprehensive rewrite of the highway statute, the Legislature repealed the special funding authorization for winter maintenance of state aid highways and allowed towns to use their normal state aid funding to cover up to half the cost of such maintenance.[83]

The rule that statutory methods of laying out, alteration and discontinuance are to be strictly followed to be effective was underscored in 1958 when the efforts of Manchester

---

[79] *Judd v. Challoux*, 114 Vt. 1, 39 A.2d 357 (1944).
[80] *Springfield v. Newton*, 115 Vt. 39, 50 A.2d 805 (1947).
[81] *Abell v. Central Vermont Railway*, 118 Vt. 189, 191, 102 A.2d 847 (1954).
[82] *Montpelier v. Bennett*, 119 Vt. 228, 125 A.2d 779 (1956).
[83] See 1957, No. 250, §§ 18, 48.

selectmen were voided by the Vermont Supreme Court. The selectmen had altered a highway into a trail, although the highway passed through three towns, and selectmen in other towns did the same at about the same time. Under the law at the time, the selectmen did not have jurisdiction to alter this highway.[84] Only the county court could make that decision.

That same year the city of Montpelier began condemnation proceedings to lay out a public highway over a subdivision road. In the midst of that proceeding the city claimed that the landowner had dedicated the land to the public by a series of acts it offered as proof, including the landowner's running of public sewer and water lines down its private street. The Vermont Supreme Court had no patience for this argument. "To permit the municipality to claim title in the public way it seeks to condemn deprives the proceedings of all foundation. It would render the judicial condemnation proceedings nothing but a sham."[85]

The legal presumption that a landowner adjoining a highway owns to the center line of the highway was tested in 1962 when a dispute arose over a discontinued section of highway in the Town of Barre. Defendants owned a house but no lot, erected on the former right-of-way. Plans to move the house were delayed, and after discontinuance the owners claimed a right to remain, based on their continued occupancy. This was no taking by prescription, according to the court. The defendants took no interest in the property as a result. "We recognize that the administration of town affair, particularly in regard to highways is seldom conducted by officials skilled in the law. To impose on selectmen the burden of exhaustively searching the land and probate records to determine the precise status of the title to the fee of an abandoned highway would defeat the result which the statute sought to achieve, namely, to provide a practical and expedient means of settling the title and confirming the legal presumption which already prevails."[86]

In 1963, the Vermont Supreme Court held that when a highway is reduced to a trail, the three rod width is not presumed. A mere footpath might suffice, and even then might be occupied by abutting landowners if the selectmen agree.[87]

The width of highways is often a source of legal conflict between adjoining neighbors. In 1965, the court heard the case of a wooden stairway that led from the site of the highway to Nelson Pond in Calais. The highway had been laid out in 1852 with a three-rod right-of-way. An expert witness testified that the road had moved one rod west of the present traveled highway, while other experts said that it was "an impossibility to accurately re-survey a highway laid out and surveyed more than one hundred years previously." The court decided to use the highway as presently traveled, rather than trying to invent something out of a history it couldn't reconstruct, relying on the law that authorized selectmen to "use and control for highway purposes one and one-half rods each side of the traveled portion thereof when termination and boundaries cannot be ascertained."[88]

Before 1974, there were public roads and trails. In 1973 the legislature established the classification system. Thereafter, we would need to know whether a road was Class 3 or Class 4 in order to understand how it should be treated. The transformation was quiet. The law did not mandate hearings; selectmen simply decided which highways should receive maintenance in all seasons, making them Class 3 highways. The remaining roads would be Class 4, and maintained

---

[84] *Petition of Mattison and Bentley*, 120 Vt. 465, 144 A.2d 778 (1958).
[85] *Demers v. Montpelier*, 120 Vt. 380, 141 A.2d 676 (1958).
[86] *Murray v. Webster*, 123 Vt. 194, 199-200, 186 A.2d 89 (1962).
[87] *Whitcomb v. Springfield*, 123 Vt. 395, 189 A.2d 550 (1963).
[88] *Savard v. George and Bolles*, 125 Vt. 250.214 A.2d 76 (1965).

according to the "public good, necessity, and convenience of the inhabitants of the town."[89] The town highway map became a critical tool in determining the responsibility of towns to maintain particular highways.

A 1975 decision of the Vermont Supreme Court held that, when a landowner can show that the traveled portion of a highway has moved, the presumption that the selectmen can control one and one-half rods on either side of the present traveled way is lost when applied to the hunt for the proper width of a highway.[90] This decision was overturned by *Town of Ludlow v. Watson* (1990), when the Court recognized a change in the statute.

The following year the Vermont Supreme Court rebuffed a landowner who was attempting to prove that a road was a public highway in the City of Barre. The landowner's arguments that discontinuance did not have to be done by official act when the original taking is by condemnation were rejected by the court. [91] In another case, the court ruled that no matter how long utility lines had been erected, they could not qualify for adverse possession against the rights of landowners.[99]

In 1977, the court had another opportunity to discuss dedication and acceptance, this time relating to highways. Distinguishing *Springfield v. Newton*, which involved a bridge, the court found no written authorization necessary to prove acceptance on the part of a town. Acceptance may be inferred from the behavior of town officials alone.[92]

A landowner from Benson attempted to show that a highway the town alleged was discontinued was still open because the highway continued into the town of Hubbardton. The only evidence he had was a copy of an unofficial 1869 Beers Atlas for the area. This source was not enough, according to the court, in 1983, to prove the existence of a highway.[93] There must be better evidence than that to prove a public highway.

2.6 The Modern Era: 1986 to the Present.

Title 19 was recodified in 1986, changing the basic law substantially for the first time in nearly a century.[94] Among the changes was a new version of the law on the presumption of the right-of-way when a highway has demonstrably wandered over time. Before 1986 the law provided that when terminations and boundaries cannot be ascertained, the selectmen may use and control one and one-half rods on either side of the traveled portion. The new version provides that, "A roadway width of one and one-half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined." The court recognized a change in policy in the new wording. The phrase "existing traveled way" makes clear that the statutory width arises in relation to the existing traveled way rather than in relation to the traveled way as it was originally established. This language change removed the requirement that the traveled portion of the road remain unchanged during its existence. Rather, the new version of the statute recognizes the inevitable fact that the precise location of roadways shifts

---

[89] No. 63 (1973), 102-113.
[90] *Town of Dorset v. Fausett*, 133 Vt. 476, 346 A.2d 200 (1975).
[91] *Capital Candy Co. v. Savard*, 135 Vt. 14, 369 A.2d 1363 (1976).
[92] *Gardner v. Town of Ludlow*, 135 Vt. 87, 369 A.2d 1382 (1977).
[93] *Traders, Inc. v. Batholomew*, 142 Vt. 486, 459 A.2d 974 (1983).
[94] No. 269 (1986), 847-931.

over time. Thus, the presumption of a three-rod road applies whether or not the traveled portion has changed over time.[95]

The Vermont Supreme Court ruled in *Pidgeon v. Vt. State Transportation Board* (1987) that even when a landowner has constructed structures within a public right-of-way and the town or state has allowed the property to remain dormant, title does not shift by adverse possession to the landowner.[96] There must be some official act to discontinue a highway.

In 1990, in the case of *Town of Ludlow v. Watson,* the court revisited the issue of the need for a certificate for opening a highway. Two highways were involved, laid out in 1816 and 1817 respectively, but not opened until after 1820, but with no record of a certificate on file. The court refused to treat the highways as defective. The regularity of an official act--laying out the highways--which is dependent upon some coexisting or preexisting act or fact creates a presumption in favor of the act or existence of this fact. The court linked the laying out in 1816 and 1817 with the lack of a record and found a presumption that the highway was opened prior in 1820.[97]

The following year the court affirmed reclassification of a Charleston highway in spite of selectmen's objections. The court found the Class 4 highway in contention served residents in need of full-season maintenance, and changed it to Class 3.[98] Shortly thereafter, the legislature added new language to 19 V.S.A. § 310, eliminating the difference between Class 3 and 4 town highways, for purposes of reclassification, on the condition of the road or the degree of maintenance it receives.

The court denied an attempt to claim damages for negligent design of highways in the Town of Colchester in 1997, after agreeing that the traditional governmental/ proprietary distinctions for calculating municipal liability for negligence remain viable in Vermont law.[99] As highway design is governmental, there would be no liability.

Essex Town residents complained to the selectboard about the condition of their road. The board held a meeting and denied their request for improvements, and residents appealed to the county road commissioners. Before the commissioners could be appointed, the superior court dismissed the case, concluding that the town had responded within 72 hours after receiving the complaint, and acted on it, by denying it, leaving residents no right to appeal. The superior court took a hard line on 19 V.S.A. § 971, saying that an appeal to the county road commissioners was only ripe if the town *failed to act* within 72 hours. The supreme court reversed this decision in 1998 and remanded the case to the commissioners, to reconsider the request to improve the highway.[100]

In 1998, the Supreme Court issued its decision entitled *In re Bill.* It involved a road laid out in New Haven from Weybridge to Vergennes in 1812. The selectmen held a hearing and issued a decision discontinuing that road in 1926, and the town had treated that portion of the highway as thrown up ever since. A landowner argued successfully that the discontinuance was invalid, as the neighboring towns would have to hold hearings and agree with New Haven for the process to be valid. The Court refused to consider the 1931 act discontinuing all untraveled

---

[95] *Town of Ludlow v. Watson*, 153 Vt. 437, 571 A.2d 67 (1990).
[96] *Pidgeon v. Vermont State Transportation Board*, 147 Vt. 578, 581 (1987).
[97] *Kelly v. Town of Barnard*, 155 Vt. 296, 583 A.2d 614 (1990).
[98] *Hansen v. Town of Charleston*, 157 Vt. 329, 335, 597 A.2d 321, 324 (1991).
[99] *Hillersby v. Town of Colchester*, 167 Vt. 270, 706 A.2d 446 (1997).
[100] *Villeneuve v. Town of Essex,* 167 Vt. 618, 713 A.2d 815 (1998).

Vermont town roads as a defense.[101] *In re Bill* inspired a change in the law, now codified as 19 V.S.A. § 717(b), that now provides:

> A town or county highway that has not been kept passable for use by the general public for motorized travel at the expense of the municipality for a period of 30 or more consecutive years following a final determination to discontinue the highway shall be presumed to have been effectively discontinued. This presumption of discontinuance may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as a highway. The presumption of discontinuance shall not be rebutted by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the highway as if it were a public right-of-way.

In 1999, the Supreme Court issued its opinion in *Sagar v. Warren Selectboard*. Over the strong dissent of the Chief Justice, the court concluded that Warren must plow Lincoln Gap Road in the winter, because it is a Class 2 highway.[102] This led directly to a legislative correction, authorizing towns to avoid winter plowing on Class 2 and 3 highways, if they followed a process requiring the adoption of town ordinance and a public vote on the issue, now codified in 19 V.S.A. §§ 302 & 310. There was another process for continuing no winter maintenance for Class 3 highways never previously plowed added by this change in the law.

That same year, the court concluded that a bridge in Derby did not have to be repaired when the residents could not prove dedication and acceptance, even though the town had performed some emergency repairs on the bridge. It was solely for the benefit of a single landowner, and without a showing of any public use, the court could find neither necessity nor public good in making the repairs, even if it had been shown to be a Class 4 bridge.[103]

There is a highway on the side of Okemo Mountain that has triggered more highway wisdom from the Court than any other Vermont road in recent years. It has engendered two important decisions of the Vermont Supreme Court.[104] Each deserves a careful review.

The landowner wanted access to his property throughout the year, although the state and the ski area closed it in the winter, as it crossed a ski trail. In *Okemo* I, the Court agreed that it was a public road, and that closing it in the winter was a violation of the owner's common law right of access, a taking without just compensation, in violation of Article II of the Vermont Constitution.

The more important of the pair, however, is *Okemo* II, where the Court recognized a common law right of access in land served by a discontinued town highway.

> Under the common law, property owners have a right to access abutting public roads. The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access. Although we have never detailed the specifics of these rights, our decisions have recognized them.
>
> Under this doctrine, when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law, and when a public road is discontinued or abandoned, the abutting landowner retains the private right of access. The

---

[101] *In re Bill*, 168 Vt. 439 (1998).
[102] *Sagar v. Warren Selectboard*, 170 Vt. 167, 744 A.2d 422 (1999).
[103] *Smith v. Town of Derby*, 170 Vt. 553, 742 A.2d 757 (1999).
[104] *Okemo Mountain, Inc. v. Town of Ludlow*, 164 Vt. 447, 671 A.2d 1263 (1995) [Okemo I]; *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 762 A.2d 1219 (2000) [Okemo II].

> right of access has two requirements: (1) the person claiming the right must own land that *abuts* the road, and (2) the road must be a *public* road.

This ruling is now codified as 19 V.S.A. § 717(c).

In *Okemo II,* the Court rejected an order requiring this public road to be opened in the winter, and ordered damages to be paid to the landowner in lieu of injunctive relief.

The legislature addressed the issue of certificates of opening in 2000, enacting what is codified as 19 V.S.A. § 717(a): "The lack of a certificate of completion of a highway shall not alone constitute conclusive evidence that a highway is not public."

In 2002, Calais landowners' Class 4 highway washed out, and the selectboard refused to rebuild it. On appeal, the County Road Commissioners reversed the selectboard, ordering the road bed reconstructed. When the case reached the Supreme Court, the tide turned in the Town's favor.[105] How much maintenance Class 4 highways receive is a decision expressly reserved for the selectboard, according to the court. The policy of deferring to the judgment of the board is now the law of Vermont, with only one exception. Only in cases of outright discrimination or arbitrariness will the Court intercede.[106]

Okemo III was decided in 2004. In a surprise reversal of its earlier ruling, the Court concluded that the landowner was not entitled to any damages against the State of Vermont for what it admitted was a taking of a property interest.[107]

In 2003, the Supreme Court issued its decision in a Georgia road case, voiding a town's reclassification of a highway into a trail due to an ineffective description.[108] This conflict led to a second trial and Supreme Court decision, holding the town through its selectmen liable for substantial damages for violating the landowner's civil rights under Article 7 of the Vermont Constitution and causing him anguish and inconvenience for years of effort attempting to gain access to his property.[109] The selectboard was biased against him, and that action proved costly to the town's insurer.

After neighbors challenged a town's maintenance of a highway running along the southern shore of Lake Champlain, the Vermont Supreme Court ruled that dedication and acceptance stops when neighbors object to the work, in 2006, in *Town of South Hero v. Wood*.[110]

In 2006, the legislature addressed ancient roads through an act relating to "unidentified corridors," given the name, Act 178. This law made substantive changes to the common law of highways, including a process for identifying and settling questions relating to highways that were properly laid out by road survey or dedication and acceptance, that do not appear on the July 1, 2009 highway map, and are no clearly observable on the ground. That act also affirmed the validity of discontinuances, however imperfectly accomplished, if 30 years had passed since the hearing.[111]

---

[105] *Town of Calais v. County Road Commissioners,* 173 Vt. 620 (2002).
[106] *Couture v. Selectmen of Berkshire*, 121 Vt. 359, 364-65, 159 A.2d 78, 82 (1960).
[107] *Department of Forests, Parks & Recreation v. Town of Ludlow*, 2004 WL 2415883 (Vt.), 2004 VT 104.
[108] *In re Town Highway No. 20*, 175 Vt. 626, 834 A.2d 17 (2003).
[109] *In re Town Highway No. 20*, 191 Vt. 231 (2012).
[110] *Town of S. Hero v. Wood*, 2006 VT 28, 898 A.2d 756 (2006).
[111] The act amended 19 V.S.A. § 717(b) to read, "(b) A town or county highway that has not been kept passable for use by the general public for motorized travel at the expense of the municipality for a period of 30 or more consecutive years following a final determination to discontinue the highway shall be presumed to have been effectively discontinued. This presumption of discontinuance may be rebutted by evidence that manifests a clear intent by the municipality or county and the public to consider or use the way as a highway. The presumption of discontinuance shall not be rebutted

That same year the Supreme Court ruled that the area covered by a public right-of-way cannot be considered in the calculation of a minimum lot size in zoning, in *In re Bailey* (2006).[121]

The high court ruled that proof of a town highway is the burden of the Town, in *McAdams v. Town of Barnard* (2007). It held for the landowner in a dispute over the existence of a town road, where the town had refused to rule on whether there were *any* town roads over the property, after acknowledging that its original claim was without a basis.[112]

The Supreme Court found that the Public Service Board lacked authority over a dispute involving proposed utility lines over a public highway in *In re Doolittle Mountain Lots, Inc.* (2007).[113]

The Town of Holland's effort to prune trees along a town highway was delayed when the Vermont Supreme Court ruled the hearing before the town selectboard at which the town tree warden appeared was invalid to count as a tree warden hearing, as the official had not warned it as his own. In *Hamilton v. Town of Holland* (2007), an award of attorney's fees against the town was struck, as was the landowner's claim for compensation for the taking of trees within the public right-of-way after he planted his replacements outside the town's easement.[114]

A three-judge panel decision in *Thompson v. Ryan* (2007) supported the trial court's limitation on the use of a discontinued town highway to logging and hunting, denying the plaintiff's claim that he was entitled to full use of the resulting private right-of-way, treating "reasonable and convenient" to be satisfied with the limits on use.[115]

A dispute over the location of a town highway, one rod in width, was resolved on appeal to the Vermont Supreme Court in *Oppenheimer v. Martin* (2008), glossing the term "farm" to mean the farm's boundary, not the farm structures, as a monument in the description of the highway.

The Town of Bethel succeeded in proving the existence of a town road over the objections of the landowner in *Town of Bethel v. Welford* (2009), although the survey was deficient in some aspects and there was no ground evidence of a road for much of the road's surveyed distance.

Landowners proved that no town highway crossed their land in *Austin v. Town of Middlesex* (2009). Although a survey existed in the town road book, it was signed only by the surveyor, and there was no evidence of any official town action to adopt the survey. The Court defined the necessary steps to lay out a town highway in 1833 to include the survey, selectboard action to adopt the same, and a certificate of opening.[116]

Over the objections of neighbors, landowners proved the existence of a town highway in Royalton in *Benson v. Hodgdon* (2010) by sufficient evidence of a survey, even though a portion of the road as constructed fell outside of the surveyed track of the road.[117]

Landowners who sued the State of Vermont for damages to their lands and buildings by snow removal, after the highway was widened, were denied recovery in 2010, in *Ondovchik*

---

by evidence that shows isolated acts of maintenance, unless other evidence exists that shows a clear intent by the municipality or county to consider or use the highway as if it were a public right-of-way." [121] *In re Bailey*, unreported (No. 2006-192).

[112] *McAdams v. Town of Barnard*, 182 Vt. 259 (2007).

[113] *In re Doolittle Lots, Inc*., 182 Vt. 617 (2007).

[114] *Hamilton v. Town of Holland*, 183 Vt. 247 (2007).

[115] *Thompson v. Ryan,* No. 2006-286 (February 2007).

[116] *Austin v. Town of Middlesex*, 186 Vt. 629 (2009).

[117] *Benson v. Hodgdon*, 187 Vt. 607 (2010).

Family Ltd. Partnership v. Agency of Transportation.[118] The decision overruled *Timms v. State* (1981). The State would not liable for takings involving road repair or maintenance.

The Windsor Superior Court rejected claims of slander of title by a landowner denied access to her land in a subdivision by a neighbor when she could not prove malice or reckless disregard for the truth, in *Sullivan v. Speer* (2010). It also turned down her claim for tortious interference with her right to travel, because there was no contract involved.[119]

In *Hellinger Family Limited Partnership v. Barnard* (2010), the Windsor Superior Court denied a motion for summary judgment brought by the landowner as premature, as there was contested evidence as to its validity. Although the case was resolved by settlement, the 2010 decision contains a discussion of the availability of equitable estoppel in highway cases.[120]

The road between Bridgewater and Barnard was not a public highway, the Windsor Superior Court decided in *Joyce v. Stevens* (2010), for lack of a survey or evidence of any dedication and acceptance where it reaches Barnard. The evidence did show Barnard discontinuing the highway, among other circumstantial evidence, which was insufficient to overcome the requirements of the statutes and common law for laying out a highway. Such a claim "simply proves too much, and it would be absurd in the extreme to conclude that the ultimate legal consequence of these discontinuances, 150 years later, was to *create* rather than *discontinue* a road."[121]

Neighbors failed to prove a town highway existed on their land, denying other landowners access to adjoining property, in *Merritt v. Daiello* (2010). Evidence of discontinuance was not enough to justify that what was discontinued was a town highway. Evidence from a century earlier that the selectboard had surveyed the road, without evidence of official approval or adoption was insufficient proof, relying on *Austin v. Town of Middlesex* (2009).

The Town of Windham sued landowners to halt an ongoing overflow from their pond onto a town highway, and after they failed to act after an injunction was issued were fined over $10,000.[122]

In *Ketchum v. Town of Dorset* (2013), the Vermont Supreme Court rejected the argument that reclassification is an "alteration" under the statutes, and therefore is an on the record review before the trial court, with no commissioners involved.[123] The proper appeal is by Rule 75, as an appeal from reclassification is not authorized specifically in statute.

The Town of Underhill's decision to reclassify a road from a Class 3 and Class 4 to a legal trail was affirmed by the Vermont Supreme Court in 2013, in *Demarest v. Underhill*. Landowners claimed the wrong procedures were being followed, that this constituted an alteration, which by statute could be appealed to a three-member commission. The high court noted the *Ketcham* decision, and affirmed the decision of the trial court.[124] The decision reaffirmed the broad discretion of the selectboard, and ruled there was no requirement for a town to bring a road up to Class 3 conditions prior to reclassifying it as a trail.

---

[118] *Ondovchik Family Ltd. v. Agency of Transportation*, 189 Vt. 556 (2010).
[119] *Sullivan v. Steer*, 2010 WL 2259026, No. 32-1-08 Wrcv (April 8, 2010).
[120] "Opinion and Order re: Summary Judgment," *Hellinger Family Limited Partnership v. Barnard,* Docket No. 119-3-10 Wncr (2010).
[121] "Decision re: Summary Judgment," *Joyce v. Stevens*, Docket No. 265-11-05 Wncv (April 30, 2010).
[122] *Town of Windham v. Reese*, unreported (November 9, 2011).
[123] *Ketcham v. Town of Dorset*, 190 Vt. 507 (2013).
[124] *Demarest v. Town of Underhill*, 2013 VT 72.

In *Giberti v. Bethel* (2014), the Windsor Superior Court concluded that 19 V.S.A. § 717(a) "applies retrospectively, but does not relieve the [Town] of showing through other evidence what the certificate would have shown. Accordingly, in order to prevail on summary judgment, the [Town] must show that the Bethel selectmen, in or around 1828, surveyed the 1828 road, laid it out, and actually constructed it as it pertains to the Plaintiffs' property. Conversely, in order for the Plaintiffs to prevail on summary judgment, they must show that the [Town] cannot prove one of these elements."[125]

The Windsor Superior Court ruled that a road without a survey in Stockbridge was not a public highway by dedication and acceptance in *Wayne v. Stockbridge* (2014), based on evidence that public use of the road was permissive, consistent with private ownership. The road had appeared on various official town maps as a pent road and had never been maintained by the town, which had not erected any signs indicating it was a public highway. The court found acceptance, but not dedication. The town had not met its burden of proof.[126]

The Orleans Superior Court ruled in *Wigan v. Randall* (2015) that parties claiming a private right-of-way succeeding the discontinuance of a highway need not prove they owned the land at the time of discontinuance nor that their predecessors in interest solely accessed the land upon that road. It confirmed that a lack of reasonably practical access is sufficient.[127]

A dispute over a road in Rockingham ended when the Supreme Court ruled that part of it was not a public highway, for lack of any survey, and that a local discontinuance followed by a reinstatement in 1842-1843 did not suffice to substitute for an original laying out.[128]

The Supreme Court affirmed a decision of the Addison Superior Court that found Sabin Homestead Road an existing town highway and public road in *Granville v. Loprete* (2017). There was a survey and a formal act of the selectboard, but no certificate of opening. The court held that no certificate was required nor was the town obliged to prove that it once existed and cannot now be located. It based its decision on 19 V.S.A. § 717(a). Section 302, which requires all town highways to be shown on the town highway map as of July 1, 2015, was not determinative of the road's status, even though it was enacted after Section 717.[129]

The Vermont Transportation Board in 2017 granted a cross motion for summary judgment filed by the Agency of Transportation in *Town of Barnard v. Vermont Agency of Transportation*, and upheld the Agency's determination to drop Charles French Road from the mileage certificate and town highway map. Barnard had not provided documentation of the legal establishment of the highway, but challenged the Agency's authority to remove a road from the official map, claiming that the town's decision should overcome that of the Agency.[130]

Two cases decided in 2020 answered a question many had raised in earlier cases. The Supreme Court held that Act 178 (the unidentified corridor law) did not discontinue highways that are clearly observable, even if they were not on the official town map on July 1, 2015. It ruled

---

[125] "Opinion and Order re: Parties' Cross Motions for Summary Judgment," *Giberti v. Town of Bethel*, Docket No. 196-3-08 Wrcv (November 6, 2014).

[126] "Findings of Fact, Conclusions of Law, and Order," *Wayne v. Stockbridge*, Docket No 483-8-10 Wrcv (May 16, 2014).

[127] "Decision: Cross-Motions for Summary Judgment," *Wigan v. Randall*, Docket No. 33-1-14 Cacv (January 30, 2015).

[128] *Kirkland v. Kolodziej*, 199 Vt. 606, 128 A.3d 407 (2015).

[129] *Town of Granville. v. Loprete*, 206 Vt. 21, 178 A.3d 1013 (2017).

[130] "Decision and Order," *Town of Barnard v. Vermont Agency of Transportation*, TB-455 (October 24, 2017).

that laying out a highway by the statutory process creates a highway; actual construction is unnecessary. It also explained that the Marketable Title Act does not state that failure to record notice of an interest, lien, or claim against real property extinguishes easements which are clearly observable on the ground. 27 V.S.A. § 604(a)(6).[131]

*

The history of Vermont's laws on highways is, of course, not over, not by a long shot. Each year the law changes, and the courts interpret the laws that are in place in new ways. Nothing remains the same for long. The law of the past, however, remains our basic source in determining whether highways have been laid out, altered or discontinued properly. That, if nothing more, must give us some confidence in the value of history and the permanency of former law.

A road crosses a ski trail on Okemo Mountain. A town insists landowners take down fences to widen a highway. A road washes out in Calais. A town starts finding old roads where nobody knew they ran in 200 years. These are heady times for the road law enthusiast, a kind of Golden Age, where fundamental decisions are being made on a regular basis. At present, local control is in the ascendancy. But as more of Vermont feels development pressure, as formerly remote sections of town are opened up to housing, the tension to resist changes in the highway system can only increase, and new policies emerge to fit exigent circumstances.

[131] *Doncaster v. Hane*, 229 A.3d 1026 (2020); *Bartlett v. Roberts*, 231 A.3d 171 (2020).

3. THE LAW OF VERMONT TOWN ROADS

> [A] highway may be as important to accommodate farms, unoccupied as dwelling places, as if they were so occupied. The owners must in some fair way have access to them for themselves and their cattle, summer and winter. And the reason no dwelling houses are built, or occupied, on many lands, is the want of highways. It surely requires no labored argument, to expose the absurdity of requiring a man to cross a mountain with his produce, or bargain with a crusty neighbor, as he best can, or commit a trespass, every time he enters on his own land, by crossing that of others,--which it seems to me must be the result, if one may not ask a highway, merely to accommodate his land. How can he build a house, if he should choose to, unless have some convenient road to his land?
>
> Judge Isaac Redfield, in *Paine v. Leicester* (1849).[132]

3.1 Introduction

The law of highways is principally found in Title 19 and the various decisions of the Vermont Supreme Court, interpreting those statutes and common law principles of highway. At the heart of all highway law is the constitutional principle of taking.

3.1.1 Public taking.

The taking of property for the use of highways is an invasion of the rights of private property, an imposition of the greater rights of the public over those of individuals. "All land is, in fee, the property of the sovereignty. Originally it forms a portion of the public domain, until parceled out to private persons, either natural or artificial."[133]

When all land was wilderness, there was no taking. Before independence, there was no constitution, but there was an inherent right to take property for public purposes and consequent duty to pay for the taking. The Vermont Supreme Court has stated that "the right of eminent domain is an attribute of sovereignty, and existed before the adoption of the constitution, and would continue to exist independently of it if not mentioned in it."[134]

When the first Vermont Constitution was adopted in 1777, the founders used the Pennsylvania Constitution as a model. Among the provisions unique to Vermont was Article 2nd, dealing with the public use of private property. This Article guarantees, "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."

Deciding when there is a taking, whether the taking is necessary, and what damages are entailed, are basic questions in highway decisions.

Not every exercise of authority over private property is the exercise of eminent domain. For instance, when the trustees of the Village of Wells River, to avoid damage to the highway from high water, burned the mill and its contents and blew up and destroyed the dam, the Vermont Supreme Court concluded that this was not a taking, and that no compensation was owed the

---

[132] *Paine v. Leicester*, 22 Vt. 44, 49-50 (1849).
[133] *Armington et al. v. Barnet, Ryegate and Newbury*, 15 Vt. 745, 751 (1843).
[134] *Stearns, et al., v. The City of Barre*, 73 Vt. 281, 291 (1901).

owner of the mill and the dam. This was the police power at work—averting imminent public injury--and the Village was exempt from liability.[135] In drier times, if the Village wanted to condemn the mill for a public purpose, such as a highway or municipal building, damages would necessarily be available to the owners, because the constitution and the statute require it.

There is no taking with the appropriate exercise of the police power, in emergencies such as that flood or every day of the year, or through the power to enact and enforce zoning and other land use controls. Rezoning land to limit the number of lots or the use of property in non-compensable. The best definition of taking comes from the Vermont Supreme Court. "Any permanent occupation of private property for public use and exclusion of the owner from its beneficial use, regardless of how title is left, must be by the exercise of the right of eminent domain, and must be compensated for, unless it can be referred to some other governmental power, as the police power. The subjection of land to an easement of the character of a highway is a taking as much as though the absolute title passed."[136] The court and the legislature in their own ways have determined that a taking is involved whenever a highway is laid out or altered, whenever snow fences are laid down to prevent snowdrifts in the road, whenever a highway grade is raised more than three feet, or even when poor highway drainage forces water to damage private property. Even the laying out of temporary logging roads is a taking, requiring notice, survey and hearing, damages, and the rest.[137]

There is no dispute about whether the laying out of a highway is a taking. Discontinuance is not a taking. No compensation need be paid to those with property no longer served by a public road, after the highway is thrown up. The widening of a highway from one to two lanes may be a taking; at least the law requires formal notice, site visit, hearing and written decision before a road is that seriously altered. Normal maintenance is not.

3.1.2 An easement for a public right-of-way.

What is taken, when private property is burdened with a public right-of-way? According to the court, the "taking of land for a highway does not divest the owner of his title in fee. The public acquire only an easement; and the right of the owner to use, occupy and control the land in any manner, which is not inconsistent with the public enjoyment of the easement, still remains."[138] Think of the right of way as a metaphor--the conceptual equivalent of a three-rod swath of fabric laid over private property, eliminating the possibility of trespass and authorizing the reasonable use of the land by the town, acting on behalf of the public.

There is always a question of how much land ought to be taken in laying out a highway, and whether materials necessary for working the road, including gravel, may also be taken. "Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain. Land for the public ways, timber, stone and gravel with which to make or improve the public ways, buildings standing in the way of contemplated public improvements are liable to be thus appropriated."[139]

---

[135] *Aitken v. Village of Wells River*, 70 Vt. 308, 313 (1898).
[136] *Sanborn, et al. v. Village of Enosburg Falls*, 87 Vt. 479, 484 (1913).
[137] 19 V.S.A. § 958.
[138] *Livermore et al. v. Jamaica*, 23 Vt. 361, 364-5 (1851).
[139] *LaFarrier v. Hardy et al*., 66 Vt. 200, 206 (1894).

There is, however, an "implied limitation upon the power, that the public will take only so much land or estate therein as is necessary for their public purposes."[140] But a town may take gravel, earth or other material needed to repair or build highways that are located within the bounds of the highway right-of-way, whether it is to be used in that location or on some other town highway.[141]

> No doubt the fee of the land remains in the landowner; and he may maintain trespass, subject to such rights, as are acquired under the easement, which the public get. The public have simply a right of way, and the powers and privileges incident to that right. We think digging the soil and using the timber and other materials, found within the limits of the highway, in a reasonable manner, for the purpose of making and repairing the road, or bridges, are incident to the easement.[142]

After getting the permission of the highway surveyor, Mrs. Drew cut the grass growing in the highway over the land of Cole, "that her children might go and come from school in the highway, without getting their clothes wet." She fed the grass to her horse. When the owner of the land under the highway complained, the court held that the grass, when cut, was the property of Cole. "The right to take the herbage, or emblements, is about all that is left to the owner of soil burdened with the easement of a public highway." Mrs. Drew was ordered to convey to Cole an equivalent in grass as she had taken.[143]

The court explained, "Taking land for a highway gives the public nothing more than a right of way in the land. Such right of way gives the public no right to the trees or herbage growing upon the land, or to the stone and materials under the soil. These are as much the property of the owner of the freehold as before."[144] The trees cut down during the widening of a highway belong to the landowner, and not the town. It is always best to mention this to the landowner at the beginning of a road construction or maintenance project.

With federal projects, the fee, not just an easement, is the preferred purchase. Today, in practice, there is no significant difference in the appraisal of property taken as a fee or as a rightof-way. The same rule applies when the owner of land under a public right-of-way is the subject of a new taking of the underlying fee. In such cases, damages are nominal.

3.1.3 Dedication and acceptance.

There are two methods of laying out the public right-of way. One is statutory condemnation. The other is dedication and acceptance.

The earliest Vermont case on highways involved a challenge to the establishment of a square in the old village of St. Albans. This was the first time that the Court recognized dedication and acceptance. "Without deciding what length of time is necessary to create a right in the public, we think we may safely say, that where the public have had the use and enjoyment of a way for fifteen years, or more, they have acquired a right, which cannot be disturbed."[145]

The general rules on dedication and acceptance were established in 1947. "A dedication of a road as a highway is the setting apart of the land for public use, and may be either express or

---

[140] *Hill v. Western Vermont R.R. Co. et al*., 32 Vt. 68, 76 (1859).
[141] 19 V.S.A. § 916.
[142] *Slocum v. Catlin et al*., 22 Vt. 38, 41-2 (1849).
[143] *Cole v. Drew and wife*, 44 Vt. 49, 53 (1871).
[144] Id.
[145] *State v. Wilkinson*, 2 Vt. 481, 486 (1829).

implied from the acts of the owner. It need not be evidenced by any writing or by any form of words, but may be shown by evidence of the owner's conduct, provided his intention, which is the essential element, clearly appears."[146] The owner acquiesces to the public right of way over his or her property, dedicating his or her rights to the land, by not preventing maintenance of the road and travel by the public or by deed or agreement.

There must also be acceptance. The highway must be accepted and adopted by the proper town authorities, "from evidence that the town acting through the proper officials has voluntarily assumed the burden of maintaining the road and keeping it in repair, and where it is found that labor or money has been expended and repairs made thereon the conclusion is justified that the town has recognized the public character of the road and that it is a highway."[147]

No acceptance is shown, however, merely by the use of a highway by the public. Some act of the town recognizing it as a highway must be shown.[148] A verbal instruction, given by a selectman to a road commissioner, is not sufficient, but a written authorization for repairs (an order) would be. For the purpose of dedication and acceptance, a highway includes a bridge.[149]

The principle of dedication and acceptance does not, however, work in reverse. A landowner cannot occupy land within the highway right of way for 15 years and then claim that the right of way has been taken by adverse possession. "A right or interest within the limits of a highway shall not be acquired by anyone by possession or occupation."[150]

3.1.4 Statutory condemnation.

There are two ways to start the process of changing the status of highways. One is by petition, filed by landowners or voters; the other, by the motion of the selectboard. The procedure is the same, regardless of how the process begins. The statute explains,

> Persons who are either voters or landowners, and whose number is at least five percent of the voters, in a town, desiring to have a highway laid out, altered, reclassified, or discontinued, may apply by petition in writing to the selectmen for that purpose. The selectmen may also initiate these proceedings on their own motion.[151]

The petitioners asking for this review do not need to be the same petitioners who asked for the highway to be laid out.[152]

Where the petition is defective, but the selectboard has acted on it, the court may still find that a highway has been laid out. "The statute that [landowners or voters of a town] may petition to have a highway laid out, altered, or discontinued, was designed to afford a mode of compelling action by the selectmen; but they may act without a petition, or upon an improper one, and have their action good, for their action is the vital thing, however induced."[153] The general rule, however, is that defects in the procedure of laying out a highway are fatal to the process.

In some towns, developers offer quit claim deeds to roads, if they are turned into Class 3 highways. Towns will insist on having the road built to Class 3 standards, before considering the

---

[146] *Springfield v. Newton*, 115 Vt. 39, 45 (1947).
[147] Id.
[148] *Tower v. Rutland*, 56 Vt. 28, 32 (1884).
[149] See 1 V.S.A. § 119.
[150] 19 V.S.A. § 1102.
[151] 19 V.S.A. § 708(a).
[152] *Moore et al. v. Chester*, 45 Vt. 503, 505 (1873).
[153] *Brock v. Town of Barnet*, 57 Vt. 172, 177 (1884).

acceptance of such deeds. Before such roads can become public highways, the full laying out process ought to be followed. Without it, there is no forum for the public to participate in the process.

3.1.5 Town highways as public highways.

Town highways are not a purely local matter. "[I]t is plain from the provisions of the statute, and from the entire course of usage and sentiment on the subject, that, as between towns, the matter of highways is one of mutual comity, the inhabitants of each town having in all other towns the same free and full right to use and enjoy the highways as the inhabitants of such other towns have. In this way the duty imposed on each town respectively, is compensated and counterbalanced in respect to other towns, by the fruits of the equal duty proffered to the inhabitants of each town by every other town in the state."[154]

Selectboards do not act purely in the interest of those who live in town, but for all of the traveling public, even those from New York. "The town or its inhabitants have no more interest in the highways within its limits, than any other citizens. The public highways throughout the state are of general concern, and, as such, must of necessity be perpetually under the control of the Legislature, unless granted to individuals or private corporations."[155]

3.1.6 State relations.

In 1892, the State first allocated five percent of the state highway tax to the towns on the basis of road mileage. In 1898, the office of state highway commissioner was created and given supervision of state road funds, although town highway commissioners were still authorized to expend the money. In 1912, this changed, and the state highway money had to be spent under the direct supervision of the state highway commissioner and his assistants.[156] The state's role in transportation matters has grown ever since, as a result of federal money, the growing practice of paving roads, floods, and the need for uniform standards of construction and maintenance. There is money, but the legislature has never entirely relieved the towns from the cost and responsibility of constructing and maintaining class 3 and 4 town highways and bridges.

A closer look reveals that town officials, in making decisions, spending money and doing work on roads, aren't *town* officials at all. "[S]electmen, in laying out highways, are engaged in a public and governmental undertaking, and are in a real sense officers of the State." But that does not mean they are entirely free from liability. "[I]n this work they are in just as true a sense the agents of the town in the matter of engaging surveyors, buying materials, and employing help to construct the road. As long as they act within the scope of their authority in these matters, they bind the town by their contracts."[157]

3.2 How statutory condemnation works.

Proper procedure is everything. The statute provides special standards for notice, site inspection, hearing, survey, notice to landowners to vacate the land, the opening of a highway,

---

[154] Id.
[155] *Panton Turnpike Co. v. Bishop*, 11 Vt. 198 (1839).
[156] *Stalbird et ux. v. Town of Washington*, 106 Vt. 213, 216-7 (1934).
[157] Id. at 21.

alternate methods of assessing damage, and judicial appeal. Following the statute to the letter should be easy, where the law is clear. The basic law is found in 19 V.S.A. §§ 701-750.

3.2.1 Notice.

After receiving a petition or deciding on the board's own motion to lay out, alter, reclassify or discontinue a highway,

> [t]he selectmen shall promptly appoint a time and date both for examining the premises and hearing the persons interested, and give thirty days' notice to the petitioners, and to persons owning or interested in lands through which the highway may pass or abut, of the time when they will inspect the site and receive testimony. They shall also give notice to any municipal planning commission in the town, post a copy of the notice in the office of the town clerk, and cause a notice to be published in a local newspaper of general circulation in the area not less than ten days before the time set for the hearing. The notice shall be given by certified mail sent to the official residence of the person(s) required to be notified.[158]

The statutes define "interested person" or "person interested in lands" as "a person who has a legal interest of record in the property affected." This includes all those with land abutting the highway, land served by the highway, mortgagees and owners of rights-of-way, among others.[159] All must receive certified mail notices of the action to be taken, at least 30 days before the hearing. Here is a model notice:

Notice of Hearing
On Laying Out a Highway
Selectboard, Chipman, Vermont

The Selectboard of the Town of Chipman hereby give notice to the persons named below as owners or persons interested in lands and rights that may be affected by a decision of said selectboard, acting on a petition to lay out a town highway.

The petition asks that highways within the Green River Subdivision be laid out as third class town highways. The board and any member of the public will meet at the gatehouse of the Green River Subdivision at 10:00 a.m. on Saturday, November 26, 2014 for a site inspection of the highways to be laid out, and then meet at the town offices at approximately 11:00 a.m. to conduct a hearing on the question of laying out the highways.

As required by law, notice of this site inspection and hearing is being provided by certified mail to each of persons owning or interested in lands through which the highways pass, listed below, as well as the municipal planning commission. A copy is to be posted in the office of the Town Clerk, and published in the Barre-Montpelier Times-Argus, a local newspaper of general circulation in the area, not less than 10 days before the time set for the hearing.

If the Selectboard determines that the public good, necessity and convenience of the inhabitants of the town require the laying out of these highways, the Board will reconvene a meeting at 10:00 a.m. on Saturday, January 3, 2014, at the town office, for the purpose of assessing damages to be paid to persons owning and interested in the lands to be taken for these highways.

The petition and other pertinent information relating to the proposed highways are available for public inspection and copying in the office of the Town Clerk of the Town of Chipman during

---

[158] 19 V.S.A. § 709.
[159] 19 V.S.A. § 701(6).

business hours. A survey showing the subdivision roads is also available for review and copying at the town office.

The following persons have been notified of the public hearing: ..... [fill in].

Signature of selectboard member giving notice

As with all actions of the selectboard, the decision to begin the process of laying out a highway, or any of the other options, including reclassification, alteration and discontinuance, must be made at a duly-warned regular or special meeting of the board, by motion and vote, and with the action recorded in the minutes of the meeting.

3.2.2 Site inspection and hearing.

The open meeting law requires that the hearing conducted by the selectboard be open to the public.[160] The board may deliberate in private, following the hearing.[161] According to the open meeting law, the site inspection may be conducted without the attendance of the public, although this is inadvisable in highway hearings. As the statute on laying out highways requires public notice of the time of the inspection, the public should be allowed to attend.[162] It would be rude and impolitic to try to prevent anyone from attending the inspection. Certainly the parties— petitioners, those interested in the question of whether to lay out, alter, reclassify or discontinue a road—must be included.

The inspection is not the time for people to start giving evidence about the proposed action. Selectboard members in particular ought to ask anyone who is making arguments or giving evidence to hold those thoughts until the hearing begins.

In order to memorialize what the board saw at the inspection, the chair or other member ought to describe the route, condition of the highway right-of-way and traveled way, the persons who attended, and any other information on which the board may later rely in making the decision, in words. Although tape recording the session is not mandated, keeping a good record of the hearing is essential and highly recommended. The description of the site visit also needs to be included in the written decision of the board.

A notary (such as the town clerk) should swear in all witnesses, including any town official who intends to testify. The oath asks, "Do you solemnly swear that the evidence you shall give, relative to the cause now under consideration, shall be the whole truth and nothing but the truth? So help you God."[163]

If any members of the selectboard have an interest in the lands affected by the proposed action, they should step down from the board for this matter. This recusal extends to a member of the selectboard who is related by blood or marriage to anyone interested in the action who is a first cousin or closer.[164]

If the matter is brought before the selectmen by petitioners, as the hearing opens, let them go first, after being sworn, to explain why they think the highway ought to be laid out (or altered, reclassified or discontinued). Hear from each of the landowners and persons interested in the

---

[160] 1 V.S.A. § 312(a).
[161] 1 V.S.A. § 312(e).
[162] 1 V.S.A. § 312(g); 19 V.S.A. § 709.
[163] 12 V.S.A. § 5810.
[164] 12 V.S.A. § 61.

highway. The road commissioner of the town may be a useful witness, on the subject of the cost of laying out and maintaining the highway. The treasurer may be useful in relating the amount of taxes generated by the land along the proposed highway. And if the question is whether to reclassify a highway from class 4 to class 3, members of the planning commission or the zoning administrator may be useful in testifying on the relation between the proposal and the bylaws and town plan.[165]

Board members are judges in this situation, and ought not to give evidence themselves, or be sworn to do so. Remaining alert to what is said is critical, but they should only ask questions, not give their own opinions. The board should treat this as a decision that can only be made after all the evidence is weighed and considered, and not give any indication of the outcome of the hearing until the written decision is issued.

What about others who want to testify? The statute does not give them a formal role as parties to a hearing to lay out, alter, reclassify or discontinue a highway, but to ignore them completely would be too severe. After all, they will be bearing the cost of maintaining the highway until it is laid out or denied the opportunity to use the road if it is discontinued. With a criterion involving the "convenience of the inhabitants of the municipality" to deal with, boards ought to take testimony from anyone who has anything to offer, not just interested persons, as a way of building a record to support their findings on this question.

The standard for deciding to lay out, or not to lay out, a highway, is the board's judgment that the "public good, necessity and convenience of the inhabitants of the municipality require" the laying out, alteration or reclassification.[166] It should be on everybody's mind throughout the process, stated aloud at the hearing and included in the written decision that follows.

3.2.3 Necessity

The only one of the three terms that is defined in statute is "necessity." The statutory definition is found in 19 V.S.A. § 501(1):

> (1) "Necessity" means a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning party. Necessity includes a reasonable need for the highway project in general as well as a reasonable need to take a particular property and to take it to the extent proposed. In determining necessity, consideration shall be given to the:
>
> (A) adequacy of other property and locations;
>
> (B) quantity, kind, and extent of cultivated and agricultural land which may be taken or rendered unfit for use, immediately and over the long term, by the proposed taking;
>
> (C) effect upon home and homestead rights and the convenience of the owner of the land;
>
> (D) effect of the highway upon the scenic and recreational values of the highway;
>
> (E) need to accommodate present and future utility installations within the highway corridor;
>
> (F) need to mitigate the environmental impacts of highway construction; and (G) effect upon town grand lists and revenues.

---

[165] 19 V.S.A. § 708.
[166] 19 V.S.A. § 710.

This does not mean "an imperative, indispensable or absolute necessity but only that the taking be reasonably necessary to the accomplishment of the end in view under the particular circumstances."[167] In one case, the court, reviewing the actions of a selectboard, found that evidence that "the roads would aid in fire protection, that the town tax revenues would increase without an undue burden in the cost of maintaining the highways, that they would connect two present dead-end town roads so that traffic could flow east and west on one town road and that they would permit more efficient and economic maintenance, particularly during the winter plowing seasons," sufficient to uphold a decision to lay out a highway.[168]

3.2.4 Survey.

No highway should be laid out without a survey. The law explains,

> When selectmen accept, lay out, or alter a highway, as provided in this chapter, they shall cause a survey to be made in accordance with the provisions of section 33 of this title and shall mark each termination of the survey by a permanent monument or boundary or refer the termination or survey by course and distance, to some neighboring permanent monument. The survey shall describe the highway and the right-of-way by courses, distances and width, and shall describe the monuments and boundaries.[169]

The board must also monument the newly laid out or altered road on the ground.[170] As the court explained back in 1861, "The town is entitled to have the limits of the highway defined with such certainty that its officers or servants may have the means of knowing how far they may work the highway without incurring any hazard of becoming trespassers."[171]

A survey is not required for discontinuance, as long as there is a written description of what has been discontinued.

3.2.5 The decision.

The board has 60 days to make a decision. The decision needs to be in writing, and once issued it has to be recorded in the town records. "Recorded" does not mean just filed. It ought to be bound in an official book, either with the land records or in some separate volume of official town proceedings. Here is a model decision:

Decision and Order of the Selectmen
Of the Town of Chipman
For the Laying Out of Public Highways in the Green River Subdivision

At 10:00 a.m. on November 26, 2019, the Selectboard held a site inspection and at 11:15 a.m. convened a hearing for the purpose of taking testimony of interested persons and others on whether the public good, necessity and convenience of the inhabitants of the municipality require the highways in the Green River Subdivision to be laid out as class 3 highways in the Town of Chipman.

During the site inspection, the board and others walked the highways, inspected the drainage and curbing, and viewed the curb cut to Green River Street. [List those who attended the site visit and those who participated in the hearing.]

---

[167] *Cersosimo v. Town of Townshend*, 139 Vt. 594, 597 (1981).
[168] Id.
[169] 19 V.S.A. § 704.
[170] 19 V.S.A. § 710.
[171] *State v. The Town of Leicester*, 33 Vt. 653, 655 (1861).

During the course of the hearing, the following exhibits were introduced by the petitioners: (1) a copy of a survey of the Green River Subdivision, by Peter Marker, R.L.S. # 1111, dated 7-3-88; (2) a spec sheet on the construction of the subject highways, prepared by the architect for the subdivision; (3) a letter from the engineer for the Wilderness Construction Co., the builder of the highways, explaining how the construction was handled; and (4) a copy of the town's ordinance on new highways.

Based on the evidence and exhibits presented at the hearing, the board makes the following findings and decision:

1. There are 1.7 miles of highways within the Green River Subdivision. The right of way proposed to be taken is owned by the Green River Subdivision Association, which consists of the owners of all the lots within the Subdivision.
2. These same highways have been constructed in accord with the town's ordinance on new highways to Class 3 standards.
3. The estimated cost of maintaining these highways, including plowing, is $6,000 per year.
4. The State highway fund pays the town of Chipman $**** per mile for class 3 highways, which for the 1.7 miles would amount to $**** in this calendar year.
5. The laying out of the highway will aid in providing fire protection services to residents, in maintenance of sewer and water systems, including drainage, and give the town better access to lands beyond the Subdivision.
6. There are an estimated 40 trips per day on the highways of the Green River Subdivision by residents and other users of the highway.
7. The public good, necessity and convenience of the inhabitants of the municipality require that the 1.7 miles of highways in the Green River Subdivision ought to be laid out as public highways.

Based on the preceding findings, the Chipman Board of Selectmen orders that the Green River Subdivision highways are Class 3 public highways of the Town of Chipman, with a three rod right of way, as described on the survey provided by the Association.

Based on evidence presented at the hearing, the Board also finds that the persons owning or interested in the lands to be taken are not entitled to any damages from this taking, since the laying out of the public right of way is over an existing private highway.

The benefit to the landowners of having the highway maintained and plowed balances any residual damages related to the laying out.

The landowners affected by this order shall have a period of six months from the date of this order to remove all buildings, fences, timber and wood from the area now covered by the public right-of-way, after which the town shall assume control of the land over which it passes, for purposes of highways.

Signatures, Selectboard

Appeal Rights

Any person interested in this decision to lay out new Class 3 highways or who objects to the decision on compensation may appeal this decision to the Superior Court of this county within 30 days of the decision, in writing. V.R.C.P. 75; 19 V.S.A. § 740.

3.2.6 Damages.

When the selectmen determine that a person, through whose land the highway passes or abuts, is entitled to damages, the town shall pay or tender to him or her, damages as the selectmen determine reasonable before the highway is opened.[172] Determining damages is no easy part of the laying out process. The court has defined "just compensation" as "reimbursement of the fair market value of the property taken, plus the damage suffered by the remainder. Hard and fast rules are not encouraged, however, given the degree of difference between different properties and situations."[173]

There are three methods of determining fair market value of property taken--the cost approach, the income approach, and the market data approach. These methods ought to be used independently of each other. The market data approach is the traditional method. The market data approach uses "sales of property of comparable value in the same general locality" to determine the fair market value of the property taken.[174] The proper market value is "the difference between the value of the entire tract before the taking and its value thereafter."[174]

If data on market value is unavailable, then the cost approach may be used. The income approach, involving the capitalization of net income, has been used and accepted by courts as a method of valuation, in cases where "the yield of a business is lessened or destroyed as a result of the taking of the land upon which the business is situated." The court has concluded that a "business may be inextricably related and connected with the land where it is located so that an appropriation of the land means an appropriation of the business. More often, however, this is not the case and an appropriation of the land has but a limited effect on the business." [175] The statutory definition of "damages" is found in 19 V.S.A. § 501(2):

> Damages resulting from the taking or use of property under the provisions of this chapter shall be the value for the most reasonable use of the property or right in the property, and of the business on the property, and the direct and proximate decrease in the value of the remaining property or right in the property and the business on the property. The added value, if any, to the remaining property or right in the property which accrues directly to the owner of the property as a result of the taking or use, as distinguished from the general public benefit, shall be considered in the determination of damages.

Vermont is unusual in allowing "business loss" as a factor in considering damages. The court has said that, "[t]he first step in calculating business loss involves proving the value of the business as a whole. . . . Whether business loss may exist is determined by subtracting the highest-and-best-use value of the land taken from the value of the business thereon as a whole."[176]

In estimating the damages sustained by a person owning or interested in lands, by reason of laying out or altering a highway, the benefits which the person may receive shall be taken into consideration.[177] When the alleged benefits, however, are based on advantages shared by all landowners--such as the increase in the value of an owner's timber and wood, because of the

---

[172] 19 V.S.A. § 712.
[173] *Crawford v. Highway Board*, 130 Vt. 18, 24 (1971).
[174] *Rome v. State Highway Board*, 121 Vt. 253, 255-6 (1959).
[174] *Essex Storage Electric Co. v. Victory Lumber Co*., 93 Vt. 437, 448 (1919).
[175] *Record v. State Highway Board*, 121 Vt. 230, 237 (1959).
[176] *Sharp v. Transportation Board*, 141 Vt. 480, 487-8 (1982).
[177] 19 V.S.A. § 811.

access provided by the highway, or the rise in value of real estate resulting from the building--the benefits may not be considered.[178] The benefits must be direct and peculiar to the property retained.

Braintree laid out a public highway over the private road built by George Prince. The commissioners appointed to assess the damage concluded that Prince should be awarded $300, calculating into the equation Prince's costs in building the highway. The Court disagreed and concluded that the $300 was not warranted, since Prince "sustained no greater injury in consequence of his private road being adopted as a highway than he would have sustained had there been no private road and the commissioners had laid a highway over the route."[179] In a later case, landowners complained that the relocation of a highway caused them a loss of business, but the court explained,

> In diverting traffic from in front of [a landowner's] buildings to the new route there is no invasion of their rights nor is there any legal injury to the land remaining. Access to their buildings remains unchanged. The buildings and lands about them will remain exactly as before establishment of the new route except that travel past the buildings will doubtless be diminished. But the State owes no duty to the [landowners] in regard to sending public travel past their door. Our trunk line highways are built and maintained to meet public necessity and convenience in travel and not for the enhancement of property of occasional landowners along the route. Benefits which come and go with changing currents of public travel are not matters in which any individual has any vested right against the judgment of those public officials whose duty it is to build and maintain those highways.[180]

If the effect of the taking is to enhance the value of property, there may still be a need for compensation. In 1958, the court ruled that, "The fact that the remaining lots increased in value because of the new public way does not preclude the plaintiffs from compensation as a matter of right. . . . General advantages shared by the claimant with other property owners, occasioned by the general rise in property values, cannot be assessed against the plaintiffs. Allowance of set off for general benefits would exact contribution from the claimant for equal benefits enjoyed by his neighbors without charge."[181]

Where the rights condemned have no market value, because they are not subject to frequent trade in the market, evidence of cost may be considered.[182] The cost does not fix the compensation, however. "If the evidence [the plaintiff] presents concerning the land reflects both the value of the land and the business on it, as it almost inevitably does in the case of farm land, for instance, then, to compensate the landowner for his business loss, that is, farm income as well as the land, is to give him double compensation."[183]

Mineral deposits, including sand and gravel, cannot be ignored, but such "deposits cannot be made the subject of a separate evaluation, apart from the land where it is contained, and added to the market value of the land as additional compensation for the taking."[184] The farm as an entire unit should be considered. "Buildings and other improvements which add to the value of the land in its most reasonable use will contribute to the total market value of the property taken. By the same token, a structural improvement might add little or nothing to value of the condemned

---

[178] *Adams v. Railroad Companies*, 57 Vt. 239, 250 (1884).
[179] *Prince et al. v. Town of Braintree*, 64 Vt. 540, 543 (1892).
[180] *Nelson et ux. v. State Highway Board*, 110 Vt. 44, 53-4 (1938).
[181] *Demers v. Montpelier*, 120 Vt. 380, 388 (1958).
[182] Id. at 389.
[183] *Penna v. State Highway Board*, 122 Vt. 290, 293 (1961).
[184] *Farr v. State Highway Board*, 123 Vt. 334, 337 (1963).

property unless it is of such nature and character that it is adapted to some potential or prospective use from which the land derives its principal worth…. And while material to the market value, the independent replacement or construction costs are not recoverable as such."[185] Frustration of the owner's plans for future development of the frontage is equally noncompensable.[186] No damages are available when a public highway is reduced to the status of a trail by the statutory method.[187] This is because the right to require maintenance or repair is a right held in common by all the citizens and taxpayers of the state, and not just landowners.

No damages are available for the taking of personal property--cattle, farm machinery, dairy equipment, etc.--independent of business loss, except as it may be a fixture attached to the real estate.[188]

Board members should not try to calculate the value of land taken on their own. Expert testimony is needed, either in the form of a licensed appraiser or the listers of the town, who are trained to calculate valuation, based on the sales of other properties. The income method, discussed above, is particularly in need of such assistance. The cost method, mentioned earlier, also benefits from experts, or at least documentation of comparable (or actual) costs.

Just as the decision on the laying out or alteration is appealable to superior court, so is a decision on damages. In this case, the appeal is to the Civil Division of the Superior Court, for the appointment of commissioners to review and confirm or reverse the selectboard's decision.[189]

3.2.7 Vacating land and opening the highway.

Once a highway is laid out or altered, the board needs to order the landowner to remove whatever buildings, fences, timber, wood or trees from the public right-of-way. This should be included in the board's decision. The law gives landowners six months after formal notice to complete the removal. If landowners appeal the compensation, the work can still proceed.[190] After the time for vacating the land passes, the selectmen may take possession, unless there is an appeal to the superior court on the question of the necessity of laying out or alteration. If there is an appeal solely on damages, the town may remove obstructions, and open the lands for working and travel, if the damages have been paid.[191]

The law formerly required a certificate of opening, but that was eliminated in the year 2000. In fact, the law now explains, "The lack of a certificate of completion of a highway shall not alone constitute conclusive evidence that a highway is not public." 19 V.S.A. § 717(a). In 2017, the Supreme Court confirmed this, stating that failure to produce a certificate of completion does not preclude proof of the legal existence of a town highway.[192]

---

[185] *Smith v. State Highway Board*, 125 Vt. 54, 56-7 (1965).
[186] *Children's Home v. State Highway Board*, 125 Vt. 93 (1965).
[187] *Perrin v. Town of Berlin*, 138 Vt. 306, 307 (1980).
[188] *Sharp v. Transportation Board*, 141 Vt. 480, 484-5 (1982).
[189] 19 V.S.A. § 726.
[190] 19 V.S.A. § 713.
[191] 19 V.S.A. §§ 714.
[192] *Town of Granville v. Loprete*, 206 Vt. 21, 178 A.3d 101 (2017).

3.2.8 Appeals. When landowners or petitioners disagree with the board's decision on the laying out or alteration, or on the assessment of damages, there is a right to appeal. There are two options. There is an appeal to superior court, which is the most common route. There is also arbitration.

In arbitration, if the damages offered by the selectmen are unacceptable to the property owner, or interested person, the selectmen with the consent of the other party, may agree to refer the question of damages to one or more disinterested persons mutually selected, whose award shall be final. The reference or award, and the proceedings used in settling the damages, shall be included in the proceedings of the selectmen returned to the town clerk for recording.[193]

If this fails, the matter may be taken to a superior court judge for the appointment of commissioners to appraise the damages. The petition does not delay the opening of the highway.[194] This petition must be made within 60 days after the highway is opened for travel, or within a year for persons who did not receive notice of the selectmen's hearing.[195]

The most commonly used appeal is to the superior court. For decisions on laying out and altering highways, there is a statutory appeal route. Section 740 states:

> When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectmen, objects to the necessity of taking the land, or is dissatisfied with the laying out, altering or resurveying of the highway, or with the compensation for damages, he or she may apply by petition in writing to the superior court in the same county, or in either county when the highway or bridge is in two counties, following the procedures of chapter 5 of [Title 19]. Any number of aggrieved persons may join in the petition. The petition shall be brought within twenty days after the order of the selectmen on the highway is recorded. If the appeal is taken from the appraisal of damages only, the selectmen may proceed with the work as though no appeal had been taken. Each of the petitioners shall be entitled to a trial by jury on the question of damages. Further appeal may be taken to the supreme court.

The court may appoint commissioners--three disinterested landowners--as commissioners to inquire into the questions raised on appeal.

The matter is handled differently in different courts. Some hold trials, where the questions are reheard before a judge, or jury in the case of damage challenges. In other cases, where a jury trial is not requested, the matter may be submitted on motion, if there are no material facts in contention. Once the court has rendered its decision ordering that a highway be laid out or altered, the Court fixes the time for its opening.[196] A copy of the decision must be recorded in the town clerk's office.[197]

There is another appeal route for petitioners, displeased with a selectboard's inaction on a petition to lay out, alter, or discontinue a highway, to superior court. Five percent of voters or landowners may petition the superior court for a hearing on the question.[198]

An appeal to the Vermont Supreme Court is a purely appellate matter, without evidentiary hearings. Oral argument is available upon request before the court.

---

[193] 19 V.S.A. § 725.
[194] 19 V.S.A. § 726.
[195] 19 V.S.A. § 727. The process is laid out in 19 V.S.A. §§ 728-733.
[196] 19 V.S.A. § 765.
[197] 19 V.S.A. § 705.
[198] 19 V.S.A. § 750.

The process for appealing selectboard decisions on reclassifications and discontinuances is not as straightforward. Section 740 does not include specific authority for such appeals, so they are available under Rule 75 of the Vermont Rules of Civil Procedure. Service of such an appeal is different from the simple notice allowed in appeals of laying out and alteration of highways. With Rule 75 the appeal must be served as a complaint, and failure to file properly may result in dismissal. The standard for overturning decisions of the selectboard on reclassifications and discontinuances is very steep. Proof that there are other highways similar to yours with better maintenance or a different classification or less traffic is insufficient to qualify for reversal of the selectboard's decision. Discrimination appears to be the sole remaining argument in favor of reversal, and even then the evidentiary bar is very high. In 1976, the court ordered reclassification after hearing a report about what one of the selectmen had said at the hearing. "The record strongly suggests that personal elements may well have influenced a decision which should be one of policy, with a quoted statement by one selectman that they wanted no more teachers living in far corners of the town. One of the petitioners is a college teacher."[199] Good reason to watch what you say at any hearing.

3.2.9 The federal law on condemnation.

All projects that involve the use of federal funds must follow the federal Uniform Relocation and Real Property Acquisition Act of 1973, as amended.[200] This law, by which the federal authority is transferred to the Vermont Agency of Transportation, requires compliance with standards of fairness whenever land is condemned, and federal funds will be used for the construction or payment of damages. As most bridge work and road construction money is federal, these basic standards apply:

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:
>
> **(1)** The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
>
> **(2)** Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.
>
> **(3)** Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head

[199] *Gilbert v. Town of Brookfield*, 134 Vt. 251, 253 (1976).
[200] 42 U.S.C.A. §§ 4601

of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 3114(a) to (d) of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a shortterm occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

(10)A person whose real property is being acquired in accordance with this subchapter may, after the person has been fully informed of his right to receive just compensation for such property, donate such property, and part thereof, any interest therein, or any compensation paid therefor to a Federal agency, as such person shall determine.[201]

3.3 Classification and maintenance.

The system of classification of town highways dates from 1974. Prior to this, towns were obliged to maintain all town highways.[202] From 1974 until 2002, the law required all-season maintenance of all Class 1, 2 and 3 highways. Class 4 roads were always treated differently. Then the Vermont Supreme Court decided *Sagar v. Town of Warren Selectboard* in 1999, and the old distinctions were lost.[203] The legislature reacted. Now a town may choose not to plow a Class 2 or

[201] 42 U.S.C.A. § 4651.
[202] See 19 V.S.A. § 14 (1957).
[203] *Sagar v. Warren Selectboard*, 170 Vt. 167 (1999).

3 highway in winter months, as long as it is willing to accept a proportionately-smaller amount of state highway aid for maintenance and follows certain procedures. For Class 3 highways that had never been plowed before 2001, the town needs to post a notice that the lack of winter maintenance will continue.[204]

The majority of collisions on interest between towns and landowners arise from decisions relating to classification and maintenance. Everyone who resides on a town road believes that paying taxes ought to justify access throughout the year to their property, but not all highways receive equal maintenance. The decision on how much maintenance a road receives depends on the discretion of the selectboard, and under present law the board's decision always gets the benefit of the doubt. The *Sagar* case proved to be a trigger for this new age of deference to local authority, particularly after *Town of Calais v. County Road Commissioners* (2002). There the court affirmed the selectboard's decision not to rebuild a Class 4 road after it washed out, even though it prevented the landowner from reaching his homestead.[205]

Not all highways are alike, or need to be treated alike. "A class 4 highway need not be reclassified to class 3 merely because there exists within a town one or more class 3 highways with characteristics similar to the class 4 highway." In making that decision, selectboards may consider "whether the increased traffic and development potential likely to result from the reclassification is desirable or is in accordance with the town plan."[206]

3.3.1. Class 4 highways.

Class 4 highways are all highways other than Class 1, 2 and 3 highways. The statutory obligation to maintain them is vague, described as "to the extent required by the necessity of the town, the public good and the convenience of the inhabitants of the town…."[207] Some are plowed; most are not. Some are regularly maintained; others get a grader visit once a year, unless there are washouts. Selectboards know they need to be consistent in decisions relating to maintenance, particularly maintenance in winter. Decisions not to plow invite dissent and lawsuits.

Towns are not liable for damages to automobiles due to highway design or maintenance of highways, but bridges and culverts, on maintained Class 3 and 4 highways, when improperly maintained, can be the subject of liability to the town.[208] Safety ought to be the first concern, above budgets, above personnel problems.

3.3.2. Trails.

"Trail" means a public right-of-way which is not a highway and which:

(A) previously was a designated town highway having the same width as the designated town highway, or a lesser width if so designated; or

---

[204] No. 154 (1999, Adj.Sess.), § 30; 19 V.S.A. § 310(d), which provides, "For class 2 and 3 highways that have routinely not been plowed and made negotiable prior to July 1, 2000, the process requirements of subdivision 302(a)(3)(B) of this title and subsection (a) of this section shall not be required. A property owner adversely affected by this subsection may request the selectboard to plow and make negotiable a class 2 or 3 town highway. However, a property owner aggrieved by a decision of the selectboard may appeal to the transportation board pursuant to subdivision 5(d)(8) of this title."

[205] *Town of Calais v. County Road Commissioners*, 173 Vt. 620 (2002).

[206] 19 V.S.A. § 708(b).

[207] 19 V.S.A. § 310(b).

[208] 19 V.S.A. §§ 302(a)(5) & 985.

> (B) a new public right-of-way laid out as a trail by the selectmen for the purpose of providing access to abutting properties or for recreational use. Nothing in this section shall be deemed to independently authorize the condemnation of land for recreational purposes or to affect the authority of selectmen to reasonably regulate the uses of recreational trails.[209]

Trails require no maintenance whatsoever. As the statute explains, "Trails [are] not . . . considered highways and the town shall not be responsible for any maintenance including culverts and bridges."[210]

The right-of-way for each highway and trail is a presumed three rods wide unless there are records to show otherwise.[211] The width of trails laid out after July 1, 1967 is as the selectboard designates. Those trails created from previously-existing highways prior to that date retain the same width of right-of-way as it had as a highway, although not more than three rods.[212]

3.3.3. Pent Roads.

Originally the statute called them "private roads," but it was clear that the landowner could not forbid anyone from using the highway, once it had been surveyed.[213] Today a pent road includes "any town highway which, by written allowance of the selectmen, is enclosed and occupied by the adjoining land owner with unlocked stiles, gates and bars in such places as the selectmen designate."[214]

The powers of the selectmen include "granting permission to enclose pent roads and trails by the owner of the land during any part of the year, by erecting stiles, unlocked gates and bars in the places designated and to make regulations governing the use of pent roads and trails and to establish penalties not to exceed $50.00 for noncompliance. Permission shall be in writing and recorded in the town clerk's office."[215]

3.3.4. Highways between two towns.

"The selectmen of two adjoining towns may, by agreement, lay out, reclassify, or discontinue a highway on the line between the towns, or erect a bridge over a stream between the towns, if a majority of the selectmen of each town assent."[216]

The laying out process works in almost the same way as a laying out within a town. Selectmen of one town may be petitioned by five percent of the voters or landowners of the two towns.[217] The two boards then meet together for the hearing.[218] Expenses are apportioned by agreement among the selectmen.[219]

---

[209] 19 V.S.A. § 310(8).
[210] 19 V.S.A. § 302(a)(5).
[211] Just not knowing, without having investigated, whether there is a record containing the width of a highway, cannot satisfy this statute.
[212] 19 V.S.A. § 702.
[213] *Warren v. Bunnell*, 11 Vt. 600 (1839).
[214] 19 V.S.A. § 301(4).
[215] 19 V.S.A. § 304(a)(5).
[216] 19 V.S.A. § 790.
[217] 19 V.S.A. § 792.
[218] 19 V.S.A. § 793.
[219] 19 V.S.A. § 791.

If the highway passes from one town to another (or more), selectboards from each involved town must follow the steps laid out above for highways within a single town. Selectboards from two or more towns may hold joint hearings, although the ultimate vote and decision should be made separately by each selectboard. If the various boards all agree, fine; if the various boards disagree, then the question may be appealed to the superior court, where the court may appoint disinterested commissioners and review their final decree.[220]

When selectboards decide to discontinue highways between two towns, they may choose to designate the highways as trails. The law requires boards to notify the Commissioner of Forests, Parks and Recreation whenever such roads are being discontinued, and the Commissioner may designate the discontinued highway as a trail.[221]

When a highway crosses or is near the line between two towns, one town may reclassify or discontinue the highway without the consent of the other town, provided notice is given to the other town before the hearing on discontinuance.[222]

3.3.5 Resurvey.

The statute law authorizes towns to resurvey roads, if the selectboard discovers the original survey was improperly recorded or its record not preserved, or if the original right-of-way is lost.[222] But the statute is an invitation to a lawsuit, if the town fails to follow the same process it would use for laying out a highway, that is, notice, site visit, hearing and written decision. If the board has evidence to support a conclusion that no new land of any resident is taken during the resurvey, perhaps no compensation need be paid the landowner, but a full due process ought to be accorded every resurvey.

3.3.6 Alterations; Widening.

The formal process of laying out a highway must also be followed whenever a highway is altered. Alteration is defined in the law as "a major physical change in the highway such as a change in width from a single lane to two lanes."[223] No one has as yet plumbed the sensitivity of this definition, but a reasonable argument could be made that a decision to pave a gravel road might also qualify as an alteration.

The widening of the public right-of-way also requires the full process, and a likely award of compensation to those whose lands are taken in the exercise.[224]

3.3.7 Regrading; raising the road bed.

The law requires notice and an opportunity for a hearing, a finding of necessity and damages, whenever the highway road bed is cut down or raised in front of a dwelling house or other building adjacent to the highway more that three feet.[225] Damages are not available, statutorily or constitutionally, according to the Court, when less than three feet are involved, since

---

[220] 19 V.S.A. § 771.
[221] 19 V.S.A. § 775.
[222] 19 V.S.A. § 794(c).
[222] 19 V.S.A. § 33.
[223] 19 V.S.A. § 701(2).
[224] 19 V.S.A. § 703.
[225] 19 V.S.A. § 924.

the damages "are to be treated as having been taken into consideration in fixing the compensation allowed to abutting owners upon the original laying out of the highway."[226]

However, if the three-foot threshold is reached over a period of time, as consequences of repairs by successive road commissioners or selectmen, no taking occurs. "[O]ne ordinary repair cannot be added to another ordinary repair and make the result an alteration under the statute; and . . . in order to establish liability in such a case, it must be shown that the change or changes complained of were made at one time, or according to a fixed plan."[227]

Note that the procedure to be following for determining damages for changes in grade is not the same as that for laying out highways, although the two processes are not very different. For damage awards, use the provisions of 19 V.S.A. § 923, which in turn requires using the appeal procedures of Chapter 5 of Title 19. This same process is used for notice, site inspection, determining need, awarding damages and appeals when "the selectmen determine that a highway is liable to be obstructed by snowdrifts" and decide that fences adjoining the highway ought to be laid down or decide that snow fences ought to be built or maintained to prevent snowdrift obstructions to the highway.[228]

3.3.8 Water Damage.

Sluices, drains, and water bars constructed within the limits of the highway to protect the highway, which in turn weaken the culverts and bridges, subject the municipality to damages for injuries suffered due to the culvert or bridge.[229] But there is no liability for injuries caused as a result of sluices, drains, and water bars constructed to protect the highway, when water settles on the top of the road.

A town's failure to unclog a culvert, from which the flow of a natural stream has been diverted, is a taking, and subject to compensation. But water accumulating on the surface of a highway is not.[230] "[T]he corporate duty to build and keep in repair their highways imposes upon towns certain obligations very like those existing between the owners of adjoining lands. . . . Such town must build the road, keep it in repair, if it is obstructed, open it, and if it is injured or destroyed by any person, they are the party entitled to redress and compensation."[231]

After the State's salting of Route 114 in Island Pond made a well unfit for use, the court held this was a taking, and compensable, independent of any need to show negligence. Sovereign immunity does not protect the State from liability for this taking.[232]

3.3.9. Access and use permits.

A curb cut needs a town permit. Any work within the public right-of-way requires a permit, granted by the selectboard, with such conditions as the board believes are reasonable. The one rule is that a town cannot deny some access to each parcel of land.[233] Some towns grant these permits by

---

[226] *Fairbanks, et al. v. Town of Rockingham*, 75 Vt. 221, 224 (1903).
[227] *Hoyt & Hoyt v. Village of North Troy*, 93 Vt. 8, 9 (1918).
[228] 19 V.S.A. §§ 925-928.
[229] 19 V.S.A. § 985.
[230] *Sargent v. Town of Cornwall*, 130 Vt. 323, 327 (1972).
[231] *Haynes v. Burlington*, 38 Vt. 350, 359-60 (1865).
[232] *Timms v. State*, 139 Vt. 342, 345 (1981).
[233] 19 V.S.A. § 1111.

noting action in the minutes of the meeting, but the best practice is a written application from the landowner, specifying precisely what is intended. A town may even insist on a bond to cover the cost of restoration, if the landowner fails to perform.

4. Ancient Roads

In 2006, the General Assembly tackled the issue of ancient roads. Committees took testimony from title companies, snowmobile clubs, selectboards, and private citizens on the dilemma caused by the discovery of unexpected town highways in Barnard and Chittenden, among other towns, and the litigation that was inspired by landowners seeking clear title and towns trying to protect newly-discovered public rights-of-way. The problem is, but for a handful of towns, no one knows for certain the basic facts of the laying out, alteration, and width of any town highway.

The resulting legislation was entitled, "An Act relating to Unidentified Corridors." An unidentified highway is a road that does not appear on the official town highway map on July 1, 2009 as a highway or a trail, is not clearly observable on the ground, and yet has been officially laid out by a prior selectboard or taken by dedication and acceptance by the town by proof of maintenance.[234]

No unidentified corridor (UC) exists after July 1, 2015.[235] "Clearly observable" is a title standard, recognized in *Traders, Inc. v. Bartholomew* (1983) by the Vermont Supreme Court as sufficient to overcome extinguishment by operation of law by the Vermont Marketable Title Act.[236] In that case, a road was "clearly observable" by physical evidence of its use, including photographs, testimony of witnesses, and disturbance of the ground. Parallel stone walls are also important monuments in locating highways.

Any highway not clearly observable that is later discovered will have to be laid out anew, as the law will regard those roads as discontinued.

4.1 First steps (researching ancient roads)

Assembling the evidence is the first step in the process of identifying ancient roads. Town road records are sometimes kept together in a road book or road survey book, but in most towns they are scattered throughout the early town meeting record books, among the meeting minutes and vital records, and in the land records. A thorough review of every book in the vault to locate these road records is an essential first step, starting with the first records of the town (which may be proprietors' records, as some proprietors laid out early roads even before the town was settled) and proceeding to the present day.

Make photocopies of everything vital you find. Mark each copy with the volume and page number so you can locate them again, and don't skimp on photocopying. Use the 11" x 14" paper if you can, even if the page is smaller than that, and change the machine's controls to darken copies to enhance readability of a faded page. If no good copy can be made, then copy out the record by hand, including everything that's written on the page.

Then organize these records chronologically. Roads naturally run from other roads, so knowing that a particular road exists before the road you are tracing is laid out is important

---

[234] No. 178 (2006).
[235] 19 V.S.A. § 302(a)(6)-(7).
[236] *Traders, Inc. v. Bartholomew*, 142 Vt. 486 (1983).

information for your search. Surveys are not always kept in order of their adoption, and they become separated from the copies of the petitions of landowners who have requested them.

4.2 Maps

The next most important sources of information are maps. The earliest map of Vermont is by the New York Surveyor General Claude Joseph Sauvier. It includes an extensive road network through many vacant areas, linking the first settlements. There are later statewide maps, but the earliest town maps are from the mid to late 1850's, published by Wallings, McClellan, or Doten or others. These are available for viewing and copying at the Vermont Historical Society Library in Barre or on CD from oldmaps.com at a modest price. The cds are invaluable for zooming in on particular roads, for the names of the landowners at each turn in the road. There are also the Beers Atlas maps of Vermont towns, by county, published in the late 1860s and 1870s, which are generally available at libraries and in some town clerk's offices (check out the maps hanging on the walls). These are also available through oldmaps.com. There are county gazetteers with maps as well. The names of residents are printed on these maps, the very names that appear in the road records of each respective era.

Early topo maps are available on the net at http://docs.unh.edu/towns/VermontTownList.htm and through the VGIS website. Sometimes searching these maps can give you a look at whether the land would support a road in this place, although you will be surprised where some early roads were laid out. Some were used by exclusively by people, horses and maybe oxen, without even a wagon track.

A copy of the town lotting plan is a vital resource of information about early roads. This is one of the earliest records of the town, and shows the town cut into squares, often listing the first, second, third, and other divisions of the town. The numbers of each box, identified by lot, range, and division number, as well as the name of the original proprietor granted the lot, are often used as starting or ending points of roads in early surveys. Look on the walls of the town clerk's office, or in the earliest records of the town—the proprietors' records—for this plan. The State Archives website provides most town lotting plans.

Get a copy of the tax map of the town, and a straight edge ruler. Comparing the lotting plan with the tax map, you can connect lines of current parcels and learn the lot and range numbers of the original lots. Early deeds describe such lots as "drawn to the right of Enoch Bisbee," and add, "Lot 4 in the seventh range in the second division." Sometimes only one of these directions is present in the record.

Town proprietors, those who paid for the charter, did not often subdivide the entire town into lots at first. Several years might pass before they got around to the rest of it. A second, third or even fourth division is not uncommon, as undivided lands were parceled out to the proprietors or their successors in equal shares.

In this example, proprietor Enoch Bisbee drew the fourth lot in the seventh range in the second division as his share. Chances are, even if he never stepped foot in town, his name is likely to be repeated in deeds as late as 1850, especially if the original lots remain intact. The lotting plan links you to the landowner; the landowner links you to the road survey, as petitioner or by direct reference in the survey.

4.3 Vendues

You can become frustrated trying to find who lived where in town when a highway was originally laid out. There are important clues in vendue records. These are found in the land records or the town meeting records, and recite the results of levies on land for delinquent taxes, usually state property taxes. Vendue records appear as charts. These charts are organized by the names and numbers of the original proprietors. In the next columns over, you learn the amount of land assessed, the tax, and the name of the person who paid the property or purchased it for the delinquent taxes. The person paying the tax may be the present owner, the occupier of land with an uncertain title, or perhaps the next owner, as a result of the tax sale. With luck, you may see three or more of these sets of records, from 1784 to as late as 1820, and by comparing the charts you can connect the original grantee with his successors in title.

4.4 Local history

Read every scrap of local history you can find, starting with the town history. Review the description of the town in Abby Maria Hemenway's *Vermont Historical Gazetteer,* which is available at most libraries; the county histories; anything ever written about the town in the journal *Vermont History* (published by the Vermont Historical Society); diaries, town meeting minutes, whatever you can find. Read Esther Munro Swift's *Vermont Place Names* for the origin of the names of brooks, lakes, mountains, and settled areas of town. The best place to find these materials is the Vermont History Center in Barre. A day spent collecting materials is a necessary prerequisite to this study.

Keep track of the locations of the early school district lines, and the highway districts. Before the 1890's, there were usually a dozen or more of each in every town of both types of districts, and they are sometimes mentioned in the road surveys.

The object of this part of your search is to learn all you can about the first settlers and those who came after them, to connect a lot or cellar hole with a name that may appear on the early maps. This is historical detective work, and you should look for every clue you can find that can help in refining your search. Names of the early settlers, and their families, and later settlers, are available in vital records (births, marriages, deaths), deeds, town histories, and town meeting records. Learning the cast of characters and keeping them straight can save you hours.

4.5 The Road Survey

Road surveys list courses and distances. Let's look at one survey closely. It tells us this is a road laid out on November 1, 1793, beginning at Charles Read's dwelling house, thence "N 34° E 30 rods," the first of 25 different descriptions that follow, terminating at Joseph Baker's northeast corner. It tells us it was laid out three rods wide, and lists the selectmen and the surveyor who performed the work.

The early surveyor held a compass in his hand, put the needle on north, and sighted the direction between his position, holding one end of the chain, and the man holding the other end of it, usually the full length of the chain, which was four rods (66 feet) in length. Later surveyors had compasses mounted on poles or tripods, with leveling bubbles. It was rough work in deep forest and every season but the coldest months of the year.

The direction "N 34° E" is 34 degrees east of the north arrow. Today degrees are measured more precisely, but minutes and seconds are rare in these early records. Sometimes in early records

you will see a one-half (½) degree added to a number, but early surveyors were usually content to stay with whole degrees.

The distance "30 rods" is 495 feet. A rod is 16.5 feet. The chain they carried was four rods long. A chain contained 100 links of about 7.92" each. Converting rods or chains into feet makes sense in order to compare lengths of road in the survey with lengths on the most recent highway maps that use miles or feet, but thinking in rods, and knowing how to convert rods to portions of a mile is also useful.

Be wary of degrees. Magnetic north is not the same year to year. It moves because of changes in the earth's magnetic field. Expect to deal with adjustments. North may change, but the footprint will remain the same.

Earlier surveyors used a system of notation that is sometimes frustrating. They did not trust large-numbered degrees, so they would write "E 3° S," putting east ahead of south. To be consistent, and make this fit on your mapping program, you may need to convert this to "S 87° E," exchanging the position of south and east and changing the degree by subtracting the number from 90° to make the correction.

Making a list of the names of those residents mentioned in the road surveys is useful in connecting roads to others. After you are underway, you will know where Charles Read's house stood, where Joseph Baker's northeast corner lay. When Read's or Baker's name comes up again, you have a valuable reference point.

This is the heavy lifting part of the job. You may be entering data on three or four hundred roads before you are done. As each is plotted, however, you will begin to "read" the footprint sufficiently to connect the survey with a particular area in town, or a track in the woods. By connecting roads to other roads you will begin to recreate the road network, building it up from the beginning, and creating an authoritative record of the town's highways.

4.6 Plotting

The footprint of a road is the easiest way of linking road surveys with existing roads, or roads that appear in the older maps. There are programs available at low or no cost that draw that footprint as you enter the courses and distances information from the survey, including applications for a smart phone. There is a charge for some of the programs.

Watch the scale when printing out these footprints, as it ought to match the scale of the base map you'll be using to display your discoveries. Sometimes it help to print these lines on mylar paper, and slide the image around to fit a particular road on the map or space between two maps. Comparing the route with your topo map may also be helpful.

It is inspiring how accurate most of these early road surveys are, when compared with existing roads. Make sure you attach the mapped version of the highway to the road survey for later reference. Never forget we are dealing with a road network. First came main stems, then arms and legs, out to the more remote parts of the town. By cellar holes alone, you can tell that much of the landscape that is now only used for forestry was once developed. If there was a farm, there was likely a public road.

4.7 Deeds

In conducting an ancient road search, deeds are critical resources. They link the property to the landowner at the time a road is laid out, altered, or discontinued. There is not time, however, to do a complete title search on every landowner throughout the town's history. Your use of deeds

should be used as locational devices. If the road runs from Deacon Joshua Pike's barn to Hiram Butler's pasture, open the land records index and find what Pike and Butler owned the year the road was laid out.

This is going to be tedious, but productive. Deacon Pike was both a grantee and later a grantor of this property. The index lists names alphabetically for each category. Write down all the references, and look for the homestead. This is likely the first major purchase, as opposed to small pieces he might have bought or lots he owned as speculation. It is also likely the last piece he sells, or is cut up by his estate after his death. What you want to know is where he lived, based on what he owned, in the year the road first legally went by his barn.

Just to keep the words straight: a grantor conveys property to a grantee, with warranty deeds. Transferors quitclaim their rights to transferees. Mortgagors convey property on condition of repaying a loan to mortgagees (think banks, or in early Vermont the wealthy landowner who served that function). Some early deeds are conditional warranty deeds, providing that the conveyance will be complete only upon payment of the debt.

Grantees are likely to be mortgagors: they buy property, and give a mortgage to the seller to buy it on time, just like today, except before mid-19th century there were usually no banks. Beware of the conditional deed, which reads like a warranty deed but includes a repayment plan, thereby merging what today are three documents—the deed, mortgage, and note.

The deeds in Deacon Pike's deed might not say where he lived, but if you trace his grantor's title back a generation or two you will likely find a reference to a lot and range number, or the name of the original proprietor.

4.8 Linking the sources

You have plotted the road survey's courses and distances, and printed it to the scale of a base map. The best base map is probably the large size town highway map, showing the current roads and trails. Ideally, you can superimpose the lotting plan onto this map, using the tax map as a standard for testing your conclusions. Write down the lot numbers and proprietors' names on each lot.

Place the names of the various owners of the lots you have found for different periods at the location of their homestead, and provide annotations on the origin and alteration of all roads. Keeping track of the petitioners also helps. Chances are good if they signed the petition, their property was going to be reached by the road.

Comparing the footprints you have printed out to the lines on the town highway map should reward you with immediate results.

This becomes a process of elimination. As each present road is identified and marked on the map, what remain are anomalies. Some of these may be highways that have been discontinued by formal decision of the selectboard. There may be roads that have no history.

4.9 Getting onto the map

Once a town has identified a UC a road that has been omitted from the official town highway map, or those that are newly laid out or altered, it must follow a special procedure before submitting the request to the AOT for a decision on whether to include it on the official map.

Surveys are not required by the state. If AOT officials are convinced that there is a legal road, the highway will be added to the official map, for possible conversion into a highway or trail, or discontinuance.

If AOT denies the selectboard's request, the town can appeal that decision to the Transportation Board.[243] That decision is appealable to the Vermont Supreme Court. Individual landowners directly affected by the UC may appeal to the board and the court, without the need for a petition signed by five percent of the voters.[244]

4.11 What remains

Battles over what constitutes a town highway did not end on July 1, 2015. The new law did not address highways that are in fact clearly observable, were properly laid out, and were not on the official highway map. These highways were not discontinued in 2015. No town will ever be entirely free of road disputes, as those affirming the existence of a highway laid out by dedication and acceptance or road survey, not on the map, argue you can see evidence of the road right here.

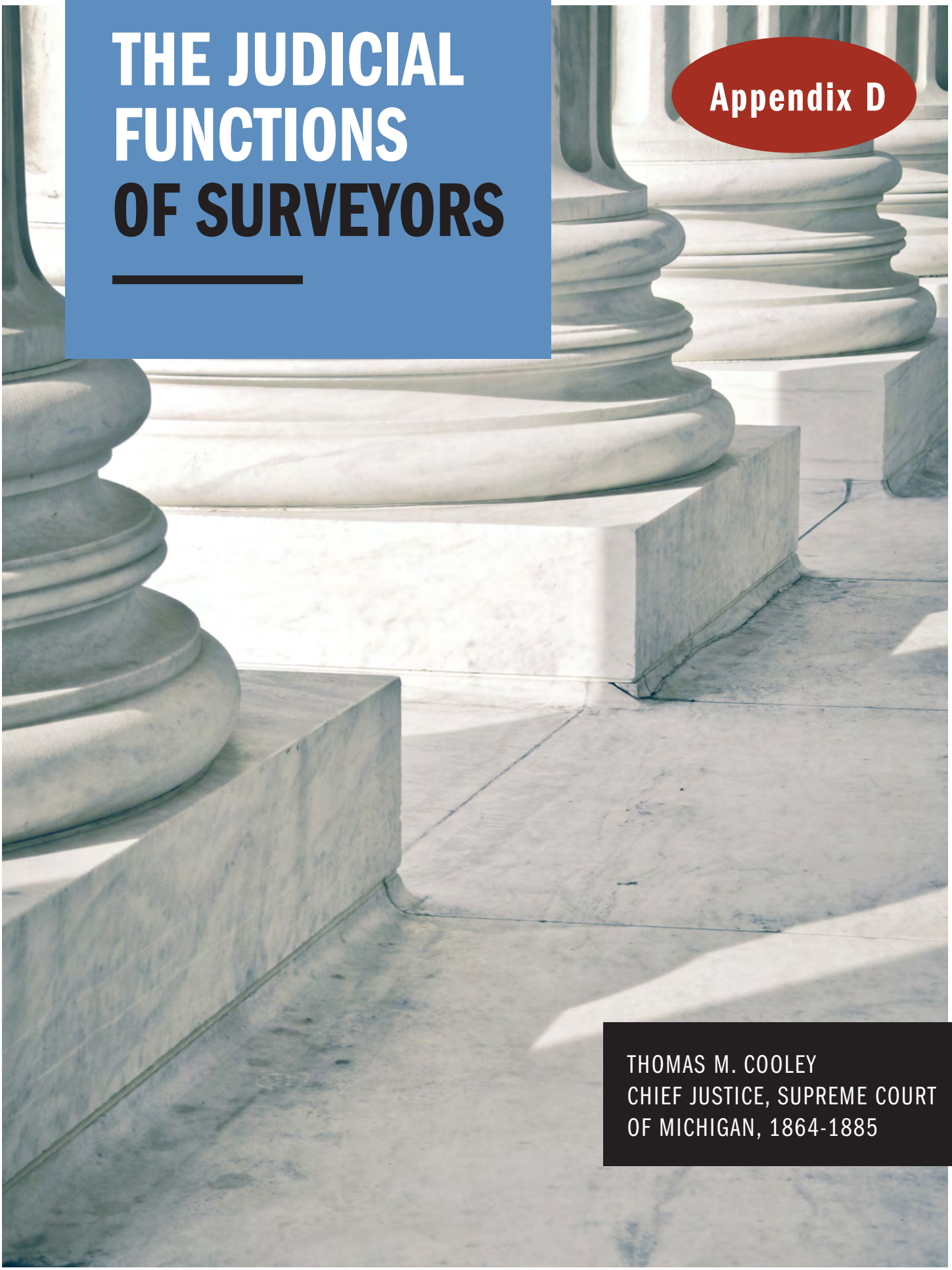
The regular disagreements over the location, width, and classification of town highways will also continue unabated by the new law, except those fights will be fewer, given the hard work the town has done in researching its road network.

The law is never finished either. Every year the legislature makes changes to Title 19, and the courts continue to enlarge the canvas of doctrines that make up the jurisprudence of Vermont town roads. This is just a beginning.

Paul Gillies, 4/2/2021

THE JUDICIAL FUNCTIONS OF SURVEYORS

Appendix D



THOMAS M. COOLEY
CHIEF JUSTICE, SUPREME COURT
OF MICHIGAN, 1864-1885

Editor's Note: Justice Cooley's essay on the Judicial Functions of Surveyors has been reprinted in many publications over the years. Should a surveyor be guided only by the deed in retracing boundaries, or should consideration be given to lines of possession? This subject has been long debated. Although some of the ideas presented in this essay may benefit today's surveyors, this reprint is being provided only as a historical note of interest and its publication in this manual does not constitute an endorsement by ASPLS.

The Judicial Functions of Surveyors

By Thomas M. Cooley
Chief Justice, Supreme Court of Michigan, 1864-1885

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan, all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan of subdivision was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth, unfortunately, is that the lines were very carelessly run, the monuments inaccurately placed; and, as the record witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record, by the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should become dear. The fact probably is that town surveys are quite as inaccurate as those made under authority of the general government.

RECOVERING LOST CORNERS

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corner and quarter stakes now remain.

The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one half-quarter section 90 acres and the one adjoining, 70; for parties buy, or are supposed to buy, in reference to these monuments, and are entitled to what is within their lines, and no more, be it more or less. While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes.

When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor. It is by no means uncommon that we find men whose theoretical education is thought to make them experts, who think that when the monuments are gone the only thing to be done is to place new monuments where the old ones should have been, and would have been if place correctly. This is a serious mistake. The problem is now the same that it was before: to ascertain by the best lights of which the case admits, where the original lines were. The mistake above alluded to is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we shall refer is not what is commonly supposed.

An act passed in 1869 (*Compiled Laws, 593*) amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows:

> Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.
>
> Third. Any extinct quarter-section corner, except on fractional lines, must be reestablished equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line.

The corners thus determined, the surveyors are required to perpetuate by noting bearing trees when timber is near.

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be "at the intersection of two right lines joining the nearest known points on the original section lines east and west and

north and south of it," it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

EXTINCT CORNERS

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as against an adverse claimant, but theoretically the right remains; and it remains as a potential fact so long as he can present better evidence than any other person. And it may often happen that notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will
be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection: One, the sense of physical disappearance; the other, the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that, if a man loses his deed, he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent:

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to "establish" corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and Federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made govern, because the land was bought in reference to them; and any legislation, whether State or Federal, that should have the effect to change these, would be inoperative, because of the disturbance to vested rights.

4. In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence and give full opportunity for a hearing. No arbitrary rules of survey or of evidence can be laid down whereby it can be adjudged.

THE FACTS OF POSSESSION

The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to

trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the State statute, disregard all evidences of occupation and claim of title and plunge whole neighborhoods into quarrels and litigation by assuming to "establish" corners at points with which the previous occupation cannot harmonize. It is often the case that, where one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit, when the people concerned do not question them, not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare that a supposed boundary line long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. (*Stewart v. Carleton, 31 Mich. Reports, 270; Diehl v. Zanger, 39 Mich. Reports, 601*.) And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession most often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; or a surveyor settling in the town may take some central point as the point of departure in his surveys and, assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor, that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say 1 foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding some one disposed to do so. We shall then have a lawsuit; and with what result?

FIXING LINES BY ACQUIESCENCE

It is common error that lines do not become fixed by acquiescence in a less time than 20 years. In fact, by statute, road lines may become conclusively fixed in 10 years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, all concerned have cultivated and claimed up to it. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of any considerable time. The litigant, therefore, who is in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course, nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments" which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule. It is not long since, that in one of the leading cities of the State, an attempt was made to move houses 2 or 3 rods into the street, on the ground that a survey under which the street had been located for many years had been found on a more recent survey to be erroneous.

THE DUTY OF THE SURVEYOR

From the foregoing, it will appear that the duty of the surveyor where boundaries are in dispute must be varied by the circumstances.

1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant. By monuments, in the case of government surveys, we mean of course, the corner and quarter stakes. Blazed lines or marked trees on the lines are not monuments; they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found.

2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. The surveyor, on the other hand, must inquire into all the facts, giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon parties

concerned, and, second, that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.

It is always possible, when corners are extinct, that the surveyor may usefully act as a mediator between parties and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgment, cannot, on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing, but this is not absolutely indispensable if they are carried into effect without.

MEANDER LINES

The subject of meander lines is taken up with some reluctance because it is believed the general rules are familiar. Nevertheless, it is often found that surveyors misapprehend them, or err in their application; and as other interesting topics are somewhat connected with this, a little time devoted to it will probably not be altogether lost. These are lines traced along the shores of lakes, ponds, and considerable rivers, as the measures of quantity when sections are made fractional by such waters. These have determined the price to be paid when government lands were bought, and perhaps the impression still lingers in some minds that the meander lines are boundary lines, and that all in front of them remains unsold. Of course this is erroneous. There was never any doubt that, except on the large navigable rivers, the boundary of the owners of the banks is the middle line of the river; and while some courts have held that this was the rule on all fresh-water streams, large and small, others have held to the doctrine that the title to the bed of the stream below low-water mark is in the State, while conceding to the owners of the banks all riparian rights. The practical difference is not very important. In this State, the rule that the centerline is the boundary line is applied to all our great rivers, including the Detroit, varied somewhat by the circumstance of there being a distinct channel for navigation, in some cases, with the stream in the main shallow, and also sometime by the existence of islands.

The troublesome questions for surveyors present themselves when the boundary line between two contiguous estates is to be continued from the meander line to the centerline of the river. Of course, the original survey supposes that each purchaser of land on the stream has a water front of the length shown by the field notes; and it is presumable that he bought this particular land because of that fact. In many cases it now happens that the meander line is left some distance from the shore by the gradual change of course of the stream, or diminution of the flow of water. Now the dividing line between two government subdivisions might strike the meander line at right angles, or obliquely; and, in some cases, if it were continued in the same direction to the centerline of the river, might cut off from the water one of the subdivisions entirely, or at least cut it off from any privilege of navigation or other valuable use of the water, while the other might have a water line crossing it at right angles to its side lines. The effect might be that, of two government subdivisions of equal size and cost, one would be of great value as water-front property, and the other comparatively valueless. A rule which would produce this result would not be just, and it has not been recognized in law.

Nevertheless it is not easy to determine what ought to be the correct rule for every case. If the river has a straight course, or one nearly so, every man's equities will be preserved by this rule: Extend the line of division between the two parcels from the meander line to the centerline of the river, as nearly as possible at right angles to the general course of the river at that point. This will preserve to each man the water front which the field notes indicated, except as changes in the water may have affected it, and the only inconvenience will be that the division line between different subdivisions is likely to be more or less deflected where it strikes the meander line.

This is the legal rule, and is not limited to government surveys, but applies as well to water lots which appear as such on town plats (*Bay City Gas Light Co. v. The Industrial Works, 28 Mich. Reports, 182.*) It often happens, therefore, that the lines of city lots bounded on navigable streams are deflected as they strike the bank, or the line where the bank was when the town was first laid out.

IRREGULAR WATERCOURSES

When the stream is very crooked, and especially if there are short bends, so that the foregoing rule is incapable of strict application, it is sometimes very difficult to determine what shall be done; and in many cases the surveyor may be under the necessity of working out a rule for himself. Of course his action cannot be conclusive; but if he adopts one that follows, as nearly as the circumstances will admit, the general rule above indicated, so as to divide as near as may be the bed of the stream among the adjoining owners in proportion to their lines upon the shore, his division, being that of an expert, made upon the ground, and with all available lights, is likely to be adopted as law for the case. Judicial decisions, into which the surveyor would find it prudent to look under such circumstances, will throw light upon his duties and may constitute a sufficient guide when peculiar cases arise. Each riparian lot owner ought to have a line on the legal boundary, namely, the centerline of the stream, proportioned to the length of his line on the shore, and the problem in each case is how this is to be given him. Alluvion--when a river imperceptibly changes its course--will be apportioned by the same rules.

The existence of islands in a stream when the middle line constitutes a boundary, will not affect the apportionment unless the islands were surveyed out as government subdivisions in the original measurement. Wherever that was the case, the purchaser of the island divides the bed of the stream on each side with the owner of the bank, and his rights also extend above and below the solid ground, and are limited by the peculiarities of the bed and the channel. If an island was not surveyed as a government subdivision previous to the sale of the bank, it is, of course, impossible to do this for the purposes of government sale afterward, for the reason that the rights of the bank owners are fixed by their purchase; when making that, they have a right to understand that all land between the meander lines, not separately surveyed and sold, will pass with the shore in the government sale and, having this right, anything which their purchase would include under it cannot afterward be taken from them. It is believed, however, that the Federal courts would not recognize the applicability of this rule to large navigable rivers, such as those uniting the Great Lakes.

On all the little lakes of the State which are mere expansions near their mouths of the rivers passing though them--such as the Muskegon, Pere Marquette, and Manistee--the same rule of bed ownership has been judicially applied that is applied to the rivers themselves; and the division lines are extended under the water in the same way. (*Rice V. Ruddiman, 10 Mich., 125.*)

If such a lake were circular, the lines would converge to the center; if oblong or irregular, there might be a line in the middle on which they would terminate whose course would bear some relation to that of the shore. But it can seldom be important to follow the division line very far under the water, since all private rights are subject to the public rights of navigation and other use, and any private use of the lands inconsistent with these would be a nuisance, and punishable as such. It is sometimes important, however, to run the lines out for considerable distance in order to determine where one may lawfully moor vessels or rafts for the winter or cut ice. The ice crop that forms over a man's land of course belongs to him. (*Lorman v. Benson, 8 Mich., 18; People's Ice Co. v. Steamer Excelsior, recently decided.*)

MEANDER LINES AND RIPARIAN RIGHTS

What is said above will show how unfounded is the notion, which is sometimes advanced, that a riparian proprietor on a meandered river may lawfully raise the water in a stream without liability to the proprietors above, provided he does not raise it so that it overflows the meander line. The real fact is that the meander line has nothing to do with such a case, and an action will lie whenever he sets back the water upon the proprietor above, whether the overflow be below the meander lines or above them.

As regards the lakes and ponds of the State, one may easily raise questions, some of which are easily answered, and some not:

1. To whom belongs the land under these bodies of water, where they are not mere expansions of a stream flowing through them?

2. What public rights exist in them?

3. If there are islands in them which were not surveyed out and sold by the United States, can this be done now?

Others will be suggested by the answers given to these.

It seems obvious that the rules of private ownership which are applied to rivers cannot be applied to the great lakes. Perhaps it should be held that the boundary is at low water mark, but improvements beyond this would only become unlawful when they became nuisances. Islands in the great lakes would belong to the United States until sold, and might be surveyed and measured for sale at any time. The right to take fish in the lakes, or to cut ice, is public like the right of navigation, but is to be exercised in such manner as not to interfere with the rights of shore owners. But so far as these public rights can be the subject of ownership, they belong to the State, not to the United States, and so, it is believed, does the bed of a lake also. (*Pollord v. Hagan, 3 Howard's U.S. Reports.*) But such rights are generally considered proper subjects of sale, but like the right to make use of the public highways, they are held by the State in trust for all the people.

What is said of the large lakes may perhaps be said also of the interior lakes of the State, such, for example, as Houghton, Higgins, Cheboygan, Burt's Mullet, Whitmore, and many others. But there are many little lakes or ponds which are gradually disappearing, and the shore proprietorship advances *pari passu* as the waters recede. If these are of any considerable size--

say, even a mile across--there may be questions of conflicting rights which no adjudication hitherto made could settle. Let any surveyor, for example, take the case of a pond of irregular form, occupying a square mile or more of territory, and undertake to determine the rights of the shore proprietors to its bed when it shall totally disappear, and he will find he is in the midst of problems such as probably he has never grappled with or reflected upon before. But the general rules for the extension of shore lines, which have already been laid down, should govern such cases, or at least should serve as guides in their settlement.

Where a pond is so small as to be included within the lines of a private purchase from the government, it is not believed the public have any rights in it whatever. Where it is not so included, it is believed they have rights of fishery, rights to take ice and water, and rights of navigation for business and pleasure. This is the common belief, and probably the just one. Shore rights must not be so exercised as to disturb these, and the States may pass all proper laws for their protection. It would be easy with suitable legislation to preserve these little bodies of water as permanent places of resort for the pleasure and recreation of the people, and there ought to be such legislation.

If the State should be recognized as owner of the beds of these small lakes and ponds, it would not be owner for the purpose of selling. It would be owner only as trustee for the public use; and a sale would be inconsistent with the right of the bank owners to make use of the water in its natural condition in connection with their estates. Some of them might be made salable lands by draining; but the State could not drain, even for this purpose, against the will of the shore owners, unless their rights were appropriated and paid for.

Upon many questions that might arise between the State as owner of the bed of a little lake and the shore owners, it would be presumptuous to express an opinion now, and fortunately the occasion does not require it.

QUASI-JUDICIAL CAPACITY OF SURVEYORS

I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgment. Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions. What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.

*** * * * * * * * ***