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FEATURE: THE PROPRIETORS: DIVIDING COMMONAGE INTO  
SEVERALTY n1 TENTH ANNUAL VERMONT JUDICIAL HISTORY  
SEMINAR JUNE 29, 2004

n1 The phrase comes from the history of "Franklin," in 2 ABBY MARIA  
HEMENWAY, VERMONT HISTORICAL GAZATEER 219 (1868-1891).

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TEXT:  
[\*29]

Whenever conflicts arise between the state and its municipalities over matters of local control, somebody is bound to remind state officials that the towns created the state, rather than the other way around. The unspoken threat is that what can be done, can be undone. But that is not the way of the world. History shows it is nearly impossible to reverse certain decisions, particularly those affecting property. Zoning cannot touch non-conforming uses. Land can be adversely possessed, and easements created by prescriptive use. Roads, once cut and maintained, remain essentially in place, and valid, even if never formally laid out.

This is the principle of repose at work. Decisions made a long time ago, even when done without respect for law or procedure, become fixed and immutable. There is no undoing them. There comes a point where what has happened cannot be reversed, no matter how good the argument is to change it.

This is the reason towns still rule in Vermont, and remain central to our civic and political life. The territory of each town is essentially as it was from the time of the first charter, with a few exceptions for gores and annexations of parts of other towns. Local government takes care of the

roads, keeps the land records, and elects officials, voting and collecting taxes to pay for most of what it costs to perform these duties, as it has done since government first started in the Green Mountains. Little has changed in the essential structure and organization of towns, since the first time people here exercised the power to govern.

### The First Government

The first government was local. Long before the adoption of a constitution, Vermont was a series of city-states, operating under charters granted by a Governor who had no interest in governing their lives. These governments ruled largely by instinct and deliberation. They were the proprietors, or in some texts, the propriety. The propriety was an early type of public corporation, whose proprietors owned a right or share of a charter. The charter, issued in the name of the English king but by the colonial governor, authorized the improvement of a defined area, often six miles by six miles in size, set among the deep forests of the land west of the Connecticut River. The proprietors were tenants in common of the whole land mass, and had a right to an equal portion of that acreage. The charter was both a deed and organizational document, binding the proprietors together in a common bond of town, lot, and community.

Their first order of business was to divide the land. The proprietors of New Hampshire towns met where the majority of them lived, in Connecticut, Massachusetts, or New York, because the land they owned in the northerly parts of the country was often inaccessible, for lack of roads, and uninhabitable, because of the insecurities of life on the frontier. These first gatherings of proprietors in other states and towns were known as meeting "on the oblong."<sup>n2</sup> Charlotte's proprietors met first in Dutchess County, New York, and later at New Milford, Connecticut, before the Revolution.<sup>n3</sup> Proprietors of Warren met first in Fairlee, then in Hartland, and finally in Warren itself.<sup>n4</sup> The first meeting in town was an event usually memorialized in all town histories where the records are available, as was the name of the first person to fell a tree or break ground for planting.<sup>n5</sup> If the issuance of the charter was conception, the first meeting was a quickening.

<sup>n2</sup> See also the description of the organization of Maidstone. 1 id. at 1026.

<sup>n3</sup> 1 id. at 733-734.

n4 PROPRIETORS' RECORDS, TOWN OF WARREN.

n5 1 HEMENWAY, supra note 1, at 779.

The proprietors elected officers, incurred and paid expenses, and voted land taxes, which if unpaid resulted in forfeiture of the grant, following a tax sale (or vendue). When the population had grown to a sufficient size, town meeting took over the basic functions of government, but the proprietors' duties were not done until the last part of the undivided lands of the town was divided. Holland, for instance, a town chartered by the State of Vermont in 1779, held its first proprietors' meeting in Greensboro in 1795, organized as a town in 1805, but held its last proprietors' meetings in 1850, dealing with undivided land. n6

n6 3 id. at 231-232; 2 STATE PAPERS OF VERMONT 94-96.

The first chartered town in the New Hampshire Grants was Bennington. The charter was issued by Governor Benning Wentworth in 1749. The proprietors first met in Bennington in 1762, the year following the first settlements. n7 But the sixty-two original proprietors had already met in Portsmouth, had the town surveyed, and divided the lots back in 1749. Then they waited until it was safe to head north. Only after the conquest of the French in Canada did the successors of the proprietors make plans to settle the town. n8

n7 1 HEMENWAY, supra note 1, at 137.

n8 3 ZADOCK THOMPSON, HISTORY OF VERMONT 13-14 (1842).

Proprietors' meetings of towns settled before 1776 in the northern parts of the state were suspended during the war, as the settlers fled to safer, southern towns. [\*30] They came back to their homesteads in 1783, after the war ended. This was the case of the entire population of Hinesburgh, for example. n9 Thomas Chittenden and his family moved from Williston to Sunderland for the duration of the war, for the same reason. n10

n9 1 HEMENWAY, supra note 1, at 793.

n10 FRANK SMALLWOOD, THOMAS CHITTENDEN: VERMONT'S FIRST STATESMAN 87, 119 (1997). Chittenden had first seen the Winooski River Valley in the 1760s, while on a military mission to the area, and is purported to have said. "This is a paradise. If I can get title to land here, I will build my house and settle it with my sons around me." *Id.* at 37.

By the end of the century, the map was filled in. All the area of Vermont was included in some kind of town charter, other than the land later discovered as gores. The last town organized as a town in Vermont was Stannard, in 1869, when there were finally enough families in what was formerly Goshen Gore No. 2 to justify recognition by the state. n11 Today the proprietors are forgotten, even though we are ruled by the decisions they made. The principal reason is lack of records.

n11 2 STATE PAPERS OF VERMONT 79-80.

#### Records

What we know of the doings of the proprietors comes from their records, and from contemporaneous accounts of the first residents. But many towns are without such records. Readsboro's records were burned up. n12 The charter and lotting plan of Barnet were reported to have been carried out of United States during the Revolutionary War. n13 The proprietors' records in Hubbardton were stolen. n14 No one in Townshend knew what became of the charter. n15 The proprietors' records of Brandon were burned by the enemy, and the town used the only remaining source, the survey book, to restore its division map. n16 All records of Pittsford for the first ten years were lost. n17 Even today, those records you can find are fragile. Parts of them are worn or broken off. Some town clerks are not aware they have such records, or what they are. n18

n12 1 HEMENWAY, *supra* note 1, at 220.

n13 *Id.* at 276.

n14 3 *id.* at 748.

n15 5 *id.* at 533.

n16 3 id. at 433.

n17 Id. at 940.

n18 There are no proprietors' records in Greensboro and Stannard, for instance, and limited proprietors' records in Barnard.

In later years, the deficiencies of the record led some towns to seek a legislative confirmation of their grants and lots. In 1782, for instance, the General Assembly voted to secure and confirm the lots of Tunbridge, although the charter was lost or destroyed. n19 It allowed voters to confirm the divisions and pitches of Williston in 1799, recognizing that they were not done according to law, and because the papers were lost. n20

n19 "An act to secure to the proprietors of Tunbridge their right in said town, granted by the Governor of New Hampshire," October 23, 1782. 13 STATE PAPERS OF VERMONT 154-155.

n20 "An act authorizing the proprietors and landowners of Williston to confirm and complete the division or pitches of their land," November 4, 1799. 16 STATE PAPERS OF VERMONT 419-420.

The legislature also took a series of steps to ensure the records of proprietors were secure. In 1789 it enacted a law making the town clerk the proprietors' clerk if the latter was not a resident of town, and ordering that in those cases the incumbent turn over the records to the town clerk. n21 That law was broadened in 1797 to appoint the town clerk as custodian of all proprietors' records, as soon as the proprietorship was dissolved--that is, when all the common land was divided. n22 In 1810, the Assembly directed proprietors who had not met for ten years to convey their records to the town clerk, and made the town clerk proprietor's clerk. n23 In the last legislative act that mentions proprietors, in 1822, the legislature directed that unorganized towns, where proprietors had not met for five years, or had lost their clerk due to death or emigration, must send their records to the county court. n24 By that time, the propriety and the town had effectively merged.

n21 "An act making it the duty of proprietor's clerks to deliver over the records, files & papers, belonging to his office, to the successor in said office," October 27, 1789. 15 STATE PAPERS OF VERMONT 492.

n22 "An act directing proprietors' clerks upon the dissolution of the proprietorship of any town to deliver over the records to the town clerk," November 9, 1797. 16 STATE PAPERS OF VERMONT 216.

n23 "An act in addition to an act, directing the Proprietors' Clerks, upon the dissolution of the proprietorship of any town, to deliver over the records to the town clerk," November 3, 1810. THE LAWS OF VERMONT, OF A PUBLICK AND PERMANENT NATURE: COMING DOWN TO, AND INCLUDING, THE YEAR 1824 [Compilation of 1824] 426.

n24 "An act relating to Proprietors' Records," November 4, 1822. *Id.* at 676.

The New Hampshire charters were assembled and published by Albert Stillman Batchelder, as Volume XXXVI of the State Papers of New Hampshire. An index to the papers of the Surveyors-Generals was published as the first volume of the State Papers of Vermont in 1918, the Vermont charters as the second volume in 1922, and the 101 New York patents to land now called Vermont as Volume VII in 1947. The most comprehensive source of records of proprietors is the five volumes of Abby Maria Hemenway's Vermont [\*31] Historical Gazateer (1868-1891). Her local historians, many of them pastors, physicians, and lawyers, often reprinted the records of the proprietors without comment, as if these yellowed pages were sacred texts, to be presented without elaboration or explanation.

Sometimes the fear of uncertain claims to land was relieved by the loss of records. "Owing to the destruction of [grantees'] records previous to 1778," wrote Rev. Lyman Matthews, in his sketch of Cornwall, "the original assignment of rights cannot be determined with precision." You can almost hear a sigh of relief in that statement. n25

n25 1 HEMENWAY, *supra* note 1, at 23.

Sovereignty Over the Grants

The fact that Vermont could survive for fourteen years from independence to statehood as a separate country from Britain and the colonies still seems like the luckiest break, but one reason for that success was the dispute between the Governors of New Hampshire and New York over the territory that lay between them and the communities that had sprung up in these hills since the end of the Seven Years War.

Long before this dispute heated up, other governments had laid claims, and issued charters, to land in these hills. Land in what would become Ferrisburgh was chartered and deeded by the French and the English, before any colony thought to stick its stakes in that land. It was included in the seigneurie of Monsieur Contrecoeur fils, in 1748, by agents for the King of France, and was part of a military grant to two English officers, prior to the issuance of the Wentworth charter of 1762. n26 The southeastern corner of Vermont, where Vernon is now found, was part of the Squakheag Province, and sold by native Americans to agents of Northfield, Massachusetts, in 1687. In 1736, it was granted by the Massachusetts Provincial Legislature to persons from Billerica for their military service. Wentworth threw it in with the charter for Hinsdale, New Hampshire, in 1753. A New York legislature, by letters patent, changed its limits in 1768, and again in 1772. In 1802, the Vermont General Assembly changed its name from Hinsdale to Vernon. n27

n26 Id. at 32.

n27 5 id. at 274-180; 1 STATE PAPERS OF VERMONT 83.

New Hampshire was set off as a separate colony in 1741. Benning Wentworth was appointed the colony's first Governor. Beginning in 1749 and continuing until 1764, he issued 129 charters to land in the Grants before learning that the King believed New York had a proper title. Later that year New York, through its acting Governor Cadwallader Colden, purposefully ignoring those charters, issued overlapping patents to that same land, amounting to 101 patents, covering approximately 178,000 acres, parts of which were already organized and settled under the New Hampshire charters. The King again intervened, in 1767, and told New York to stop issuing patents. n28

n28 MICHAEL SHERMAN, GENE SESSIONS, P. JEFFREY POTASH, FREEDOM AND UNITY: A HISTORY OF VERMONT 73-82 (2004).

There was bound to be trouble. The advantage went to the grantees of the New Hampshire charters, because they were already here. Peace would not come easily. First the settlers tried the New York courts, but New Hampshire charters were declared inadmissible by the trial judges, leaving settlers with two unpleasant choices--either pay the price for a regrant of the land from New York, if one were available and you could afford it, or resist (as Ethan Allen put it, "retire with the hardy Green Mountain Boys into the desolate caverns of the mountains and wage war with human nature at large.") n29

n29 HILAND HALL, HISTORY OF VERMONT 347-348 (1868), reprinting Ethan Allen's letter to Congress of March 9, 1781.

Although they refused to kneel before any earthly sovereign, settlers relied on the charters issued by Wentworth as the authority for the development of the town.

#### What the Charters Provided

The Wentworth charters established basic requirements for the conduct of government in the towns of the Grants. The charter of Grafton, for example, issued in 1754 to sixty proprietors, imposed the following obligations on the part of the proprietors:

1. Every Grantee his heirs or assigns shall Plant or Cultivate five Acres of Land within the Term of five years for every fifty Acres Contained in his or their Share or Proportion of land in the Said Township and Continue to Improve & Settle the Same by additional Cultivations on Penalty of the forfeiture of his Grant or Share in the Said Township and its Reverting to his Majesty his heirs & Successors to be by him or them Regranted to Such of his Subjects as Shall Effectually Settle & Cultivate the same.
2. All white & other Pine Trees within the Township fit for Masting our Royal Navy be carefully Preserved for that use and none to be Cut or felled without his Majestys Especial Lycence for So doing first had and obtaind upon the Penalty of the forfeiture of the Right of Such Grantee his heirs or Assigns to us our heirs & Successors as well as being Subject to the Penalty of Any Act or Acts of Parliament that now are or hereafter Shall be Enacted.



3. Before any Division of the Said Land be made to and Amongst the Grantees A Tract of Land as near the Center of the Township as the Land will admit of Shall be reserved and marked out for Town Lotts one of which Shall be Allotted to each Grantee of the Contents of one Acre.

4. Yielding & Paying therefor to us our heirs and Successors for the Space of Ten years to be Commenced from the Date hereof the Kent of one Ear of Indian Corn only on the first day of January Annually if Lawfully Demanded the first payment to be made on the first Day of January next Ensueing the Date hereof.

5. Every Proprietor Settler or Inhabitant Shall Yield & Pay unto us our heirs & Successors Yearly and Every year for ever from and after the Expiration of the Ten years from the Date hereof Namely on the first Day of January which will be in the year of our Lord Christ One thousand Seven hundred & Sixty four One Shilling Proclamation Money for every hundred Acres he So Owns Settles or Possesses and so in Proportion for A Greater or Lesser Tract of the Said Land which Money Shall be paid by the Respective Persons above said their heirs or Assigns in our Council Chamber in Portsmouth or to Such Officer or Officers as Shall be Appointed to Receive the Same and this to be in Lieu of all Other Rents. n30

n30 THE NEW HAMPSHIRE GRANTS BEING HEREIN THE TRANSCRIPTS OF CHARTERS 184-187 (Albert Stillman Batchelder ed., 1895).

After the first legislature met, Vermont [\*32] quickly began issuing charters to the remaining land. Those charters were generally shorter than the Wentworth charters, and included fewer conditions. The 1780 charter of Lincoln, for example, sets the following obligations of the proprietors:

1. That each Proprietor in the Township of Lincoln aforesaid, his Heirs or Assigns, shall plant and cultivate Five Acres of Land, and build an House at least Eighteen Feet square, or have one Family settled on each respective Right, within the Term of Four Years, next after the circumstances of the present War will admit of a Settlement with Safety; on penalty of Forfeiture of each respective Right or Share of Land in said Township, not so improved or settled; and the same to revert to the Freemen of this State; to be, by their Representatives, regranted to such persons as shall appear to settle and cultivate the same.

2. That all Pine Timber suitable for a Navy, be reserved for the use & Benefit of the Freeman of this State. n31

n31 2 STATE PAPERS OF VERMONT 123-125.

There is no record of any town or proprietor paying Wentworth or any other New Hampshire official the shilling or the ear of corn, nor were there efforts on the part of that state to collect these tributes. The tall pines probably remained untouched for a while, but whether any made it to masthood is unrecorded. Settlers did not forget the reversionary clause, however, predicting the loss of a proprietor's right for failing to clear and cultivate land within the set number of years. Panton proprietors even petitioned the king for an extension in 1766, as their five years was ending. n32 In 1783, the Vermont General Assembly addressed this worry by allowing all towns to restart their reversionary clocks, no matter when they were first chartered. n33 The General Assembly never exercised this power of reversion, although many towns today remain unsettled in some parts.

n32 1 HEMENWAY, supra note 1, at 78.

n33 "An act declaring a time when to begin the settlement of new lands, that has been prevented by the late war between Great Britain and America," October 2, 1783. 13 STATE PAPERS OF VERMONT 219-220.

#### Other Rights or Shares

New Hampshire charters also set aside five hundred acres for Governor Wentworth, and allotted shares of the township to other interests. The 1754 charter of Tomlinson (renamed Grafton in 1792, ends with this paragraph:

His Excellency Benning Wentworth Esq A Tract of Land to Contain five hundred Acres which is to be Accounted Two of the within Shares One whole Share for the Incorporated Society for the Propagation of the Gospel in forreign Pts, One whole Share for the first Settled Minister of the Gospel in Said Town One whole Share for A Glebe for the Ministry of the Church of England as by Law Established. n34

n34 NEW HAMPSHIRE GRANTS, supra note 30.

The public rights in the 1780 Lincoln charter are listed first, ahead of the conditions, and guarantee one Right for the use of a Seminary or Colledge; one Right, for the use of County Grammar Schools in said State; Lands, to the amount of one Right, to be and remain for the purpose of Settlement of a Minister and Ministers of the Gospel in said Township forever; Lands, to the amount of one Right, for the support of the social Worship of GOD in said Township; and Lands, to the amount of one Right, for the use and support of an English School or Schools in said Township. Which said two Rights, for the use of a Seminary or Colledge, and for the use of County Grammar Schools as aforesaid; and the improvements, Rents, Interests, and Profits arising therefrom, shall be under the Controul, Order, Direction and Disposal of the General Assembly of said State forever. And the Proprietors of said Township are hereby authorised and empowered, to locate said two Rights justly and equitably, or quantity for quality, in such parts of said Township, as they or their Committee shall judge will least incommode the General Settlement of said Tract or Township. And the said Proprietors are further empowered to locate the Lands aforesaid amounting to three Rights, assigned for the Settlement of a Minister and Ministers-for their Support-& for the use and Support of English Schools, in such, and in so many places, as they or their Committee shall judge will best accommodate the Inhabitants of said Township, when the same shall be fully settled and improved, laying the same equitably, or quantity for quality. Which said Lands, amounting to the Three Rights last mentioned, when located as aforesaid, shall, together with their Improvements, Rights, Rents, Profits, Dues and Interests, remain unalienably appropriated to the Uses and Purposes for which they are respectively assignd and be under the Charge, Direction, & Disposal of the Inhabitants of said Township forever.

n35

n35 2 STATE PAPERS OF VERMONT 123-125.

The General Assembly attempted to assert authority over the lands dedicated to the Church of England and the Society for the Preservation of the Gospel in Foreign Parts (SPG) in the early nineteenth century, fights that wound up before the United States Supreme Court. Vermont won the first but lost the second. As a result of the New Hampshire and Vermont charters, the University of Vermont owns many acres of land throughout Vermont because of this provision. The first settled minister lots are mostly

in private hands now, and of the remaining public lands most remain in a state of suspended confusion, as the original leases are largely lost and the precise locations of the boundaries of the lots covered by these grants unarticulated in the landscape. n36

n36 See Paul S. Gillies, *Ruminations: The First Settled Minister Lot, VT.* B.J., Winter 2003, at 17.

The charters set only the opening agenda. The rest of it was left to invention. Organization of the town, in practice, required many meetings, agents, officials, moderators, and recorded votes. It required residents to become civilized.

### Meet the Proprietors

Proprietor is a term that begs for better definition. Athens proprietors called themselves the "undertakers, professors and occupants" of the town. n37 The word properly means those who put money together to purchase land by charter in the [\*33] New Hampshire Grants or, after 1778, from Vermont. But as the New Hampshire proprietors rarely set foot on the land, the term also means those who acted in their place after the first settlers arrived. The first proprietors, at home in New York, Connecticut, or Massachusetts, made all the decisions about subdividing the land into lots and cutting roads. Then they sold their shares by deed to others, and those grantees sold to others, and most of the time one of the successive purchasers of the land would act on that impulse and move up there, to settle the land, and he too was regarded as a proprietor, although always in the name that appeared on the plan of division.

n37 5 HEMENWAY, *supra* note 1, at 358.

Walter Durfee, first settler of Benson, purchased the rights of Isaac Clark and John Glover, and he became entitled to act as a proprietor. n38 When he sold his land to another, he described it as the right of Clark or Glover, because their names could be found on the map, not his. Often even the holders of the current title could not make it to meetings, so they could send representatives to stand in the "room" of the proprietor. Moses Belknap voted his brother Simeon's shares in Randolph in 1781, as Simeon was in captivity. n39

n38 3 id. at 406.

n39 2 id. at 1030.

When the Vermont town of Two Heroes was chartered, there were 404 grantees. n40 This was the exception. Usually there were fifty to sixty. Cornwall had sixty-five. Most proprietors were male, but Cornwall's charter also listed several female proprietors. n41 In some towns, one man would accumulate a majority of the shares. Levi Allen owned fifty out of the sixty-seven shares of Georgia. n42 His brother Ira owned most of Burlington at one time. n43 Elias Buel picked up fifty-four proprietors' shares, for £ 5 to £ 20 each, out of the total sixty shares of the town Coventry. n44

n40 Id. at 55.

n41 1 id. at 23.

n42 2 id. at 233.

n43 1 id. at 490.

n44 3 id. at 137.

Colonel John Hazeltine of Townshend put down the names of his neighbors in Upton, Massachusetts, in the application for the charter and then obtained quit claim deeds to their shares, the transferee often learning for the first time at that meeting that he owned land in Vermont. n45 Hazeltine paid one shilling for each of sixteen rights. Many of the rights to Shelburne were held by the Allen brothers using fictitious names. n46

n45 5 id. at 533.

n46 1 id. at 856.

Colonel Ephraim Doolittle of Pittsford used to enjoy telling the story of how he fooled Benning Wentworth. Looking at the survey, and seeing "East Creek," and mistaking it for Otter Creek, Wentworth chose five hundred acres of what he believed to be some of the richest lands in town. Doolittle knew when to remain silent, and laughed all the way home. n47

n47 3 id. at 940.

Land was cheap. Frederick Van de Water, in his study of Vermont in the years prior to the Vermont Declaration of Independence, wrote that "Jonathan Willard bought the shares of many of the grantees of Pawlet at the price of a new hat to each shareholder. He got more of them for a mug of flip apiece." n48 Willard was a grantee of Danby, Dummerston, Westminster, and Mt. Tabor, as well as Pawlet. n49 A man named Field, of Dutchess County, New York, offered to purchase shares of land in Ferrisburgh for each of his four sons. Three accepted; one preferred to take his legacy in the form of a saddle worth \$ 7.50. His brothers each [\*34] received four hundred acres. n50

n48 FREDERIC F. VAN DE WATER, *THE RELUCTANT REPUBLIC: VERMONT 1724-1791*.46 (1941).

n49 HEMENWAY, *supra* note 1, Index, at 953.

n50 1 id. at 33.

The proprietors who settled these towns were not experienced in the arts of government or politics. Consequently, there was disorganization, and disappointing results. Loomis Wells wrote this in his short history of Granby:

I shall perhaps be pardoned if I make some allusions to the reckless manner that the agents of the proprietors did the business entrusted to them. Proprietors' meetings were called very frequently, adjournment piled upon adjournment, committees and agents appointed, schemes started, pursued awhile, then reconsidered and abandoned, roads cut in various directions by committees who would let jobs to each other, so that all could make a rich thing out of it; tax was voted on tax, and land sale followed land sale, until the original proprietors were worn out or became bankrupt; speculators bought up the lands and in turn failed or made assignments to

trustees for the benefit of creditors; the trustees managed dishonestly; rival claimants under different land sales were in convention; Daniel Boardman, of New York city, laid claim to a large quantity of land in Granby, and to perfect his title a suit in chancery was commenced, and in 1814 a decision was made in his favor, which quieted the controversy about title, and to a great extent accounts for the land in Granby being so generally owned by a very few individuals, and mostly by one who claims under the Boardman title. n51

n51 Id. at 992-993.

The Notice

Organization required a meeting, and a meeting required notice.

Rupert April the 4th A.D. 1780

Then the proprietors of Ruport by the apintment of a Warrant as hear mentioned

Varmont

Whaire as aplicashon has ben mayed to me the subscirbor by mour than a sixteenth part of the proprietors of the Tound ship of Ruport in the Countty of Beninton & Stat of Varmont to meat at the dweling house of Jonathan Eastman inholder in sayd Town on the Tursday of Dec. next

1ly To chuse a Moderator

2ly To chuse a Clark

3ly Then and thaire to act on the following artickels first to see if thay Will astablish thaire formour lots & proceedings Relative to laying out land as sum parts Records aire caryd of by the lat prioretorse Clark a noted tory. Secondly to see if thay will lay out a forth Devishon & to do any other bisnis Necessary to be dun att sayd meting.

Timothy Brownson a petishoner

This Warrant was in the publick Nuse papers three Weeks going

Attest Daniel Read proprietors Clark. n52

n52 Id. at 226.

They met to do the business of locating and lotting the town. n53 The charter of Grafton provided, that the first meeting for the Choice of Town officers Agreeable to the Laws of our Said Province Shall be held on the first Tuesday in May next which Meeting shall be Notified by Nathan Chase who is hereby also appointed the Moderator of the Said first Meeting which he is to Notify and Govern Agreeable to the Laws & Customs of our Said Province. n54

n53 Id. at 999.

n54 NEW HAMPSHIRE GRANTS, supra note 30, at 184.

This was all the procedural direction they were given in the charter.

Once the Grants became Vermont, the legislature established rules for notice. Originally, publication was required in the only newspaper serving Vermont, the Connecticut Courant, out of Hartford, but as papers started in Bennington and Windsor, those were added to the list of where proprietors' meetings and vendues were published. n55

n55 "An act in addition to an act regulating proprietors meetings." October 23, 1783. 13 STATE PAPERS OF VERMONT 223-24.

Where the meetings could be held was another matter for legislative involvement. In 1779, the General Assembly required all proprietors' meetings held in town. The same rule applied to vendues, treating those held elsewhere as null and void. n56 This never worked, and in 1787 the legislature ordered all meetings within the state, and all vendues within the



county, to provide some opportunity for proprietors to know about them and attend. n57

n56 "An act regulating proprietor's meetings." February 23, 1779. 12 STATE PAPERS OF VERMONT 122-125.

n57 "An act regulating proprietors meetings," March 9, 1787. 15 STATE PAPERS OF VERMONT 302-306.

At that first meeting, wherever it was held, there was one overriding objective--to get the town surveyed into lots, so that everyone could know what they owned.

### Surveying

The result of all the work of the proprietors was the creation of a plat, showing the town divided into lots, each lot numbered and each number assigned to a share. The results of this division were placed on a chart in the minutes of the proprietors' meetings and when compared with the division map, each lot was accounted for. At this point, once the division was made, the divided land ceased to be held as tenancy in common and became private property, with all its bundles of rights. There were no deeds issued to the proprietors. The map and chart were alone sufficient to convey that real estate. Thereafter, proprietors, or those taking from them, would need to give a deed, of course, but the description of the property conveyed could use a shorthand. No new survey was required. The deed need only state that the property conveyed was Lot 9 in the 7th Range in the First Division given to the right of Richard Smalley, without the need for anything more particular.

Ranges run vertically on the page; lots run horizontally. The "first division" was an allotment of a part of the territory of the town. Most towns had a second and a third division, some as many as five divisions, as different undivided parts of the town were sliced and assigned to each share.

Wentworth ordered surveys of the borders of the town completed before the charter was issued in most cases. After Vermont was created, the Surveyor-General was responsible for the outlines, and often the first division, although there were county surveyors appointed as well. In some cases people with little training did it for the town. The surveying party would carry a chain for measurement and a compass for direction. A chain

is sixty-six feet, and required two men, a fore and hind chainman, to carry and set the instrument, [\*35] plus, if they were lucky, a surveyor who could walk ahead and point them in the right direction.

Years later, people in Granby could still see evidence of the first surveys:

Some of the corners found near the openings have the numbers marked upon the bark of the trees by the side of the spottings, and the spottings are not as old as those back in the woods, and the original corners have the number made on the spottings with a marking iron. But as the range lines only were run by Darling and Bucknam, and the corners were made by measuring on the range lines through the forest and high and steep hills, they are of course almost necessarily more or less incorrect; and as the lines appear to have been run from alternate sides of the town, either singly or in pairs, hence, when a corner rots away, controversy naturally ensues, as there is no apparent rule established or agreed upon to fix the locality of the missing corner. n58

n58 1 HEMENWAY, supra note 1, at 989.

The whole point of the survey of lots was to give settlers an appreciation of what they were getting, but these were not topographical maps, and there would be many disappointments. Occasionally a stream or pond was shown on the map, and a trail, if one existed. James Whitelaw, after surveying lots in Irasburgh, placed a letter on each lot. He used g, m and b, for good land, middling land and bad land. n59

n59 3 id. at 240.

The first surveyors of Bennington allowed a chain for every thirty chains measured, to allow for "swag" (the dipping of the chain between the chainmen) and inadvertently increased the size of the town as surveyed from thirty-six to thirty-nine square miles. n60 Of course that was no problem, as it was the first town. Brunswick was chartered as square, but rhomboid in actual shape after being surveyed. n61 Shelburne was not surveyed using a compass. That is one explanation for the curious triangular shape of the town. n62 Shelburne was to be 23,500 acres by

charter, but when surveyed amounted only to 14,272. To its east, the town of St. George was shortchanged by being the last to be surveyed. The Wentworth charter of 1763 grants its proprietors 23,040 acres (thirty-six square miles), but instead they wound up with only 2,200 acres. n63

n60 *Id.* at 13.

n61 1 *id.* at 961.

n62 *Id.* at 856.

n63 3 THOMPSON, *supra* note 8. at 156.

Henry Lawrence, the historian of St. George, described one encounter between a St. George resident and a man from New York, who presented evidence of three shares of the town, and asked where they might be. He was informed this amounted to ninety acres. The story teller then states, "In those days, I never heard a man swear so. He cursed the 'Yankees' most furiously, and without stopping to make any further inquiries about his lands, returned home, probably to find another buyer as easily duped as himself." n64

n64 1 HEMENWAY, *supra* note 1, at 852.

John Everts obtained rights to two charters from Wentworth in 1761. When he reached the designated land, he found it was already chartered to Clarendon and Rutland, so he moved northerly to the lower falls on Otter Creek, and began "laying off his townships south of that place," establishing the limits himself of the town of New Haven from what was left over after older surveys were made and their bounds set. He decided to make his most important corner memorable, so he stuck a cannon, muzzle upwards, into a rock, which formed the corner of New Haven, Middlebury and Salisbury. n65 Over the years, dirt piled up around the cannon, and eventually only an iron bar driven into the barrel was visible.

n65 *Id.* at 69.

Everts' experience was all too common to many early settlers. What was given by charter was often simply wrong, leaving proprietors with less land than they expected. Part of Salem (a township later divided between Derby and Newport) was under Lake Memphramagog. n66 Part of land designated for Panton proprietors was under Lake Champlain, and another part was actually in Addison. n67 By charter, Brunswick was to contain 25,000 acres; in actuality, the land surveyed out at 15,000, because of a misunderstanding about the Connecticut River. n68 Landgrove overlapped Peru. n69 Proprietors of Fair Haven were depressed to learn that part of land they thought was theirs was lost because of a change in the course of the Poultney River. They tried to decide whether to blame nature or a man named Joseph Haskins. n70 Bloomfield proprietors hired a surveyor who laid out the town in lots, rejected his work; hired another, rejected his; and finally settled on the third survey, by James Baker, dividing the township into lots of 112 acres. n71

n66 3 id. at 307.

n67 1 id. at 78.

n68 Id. at 960.

n69 Id. at 197.

n70 3 id. at 677.

n71 1 id. at 950.

Newbury overlapped Bradford, amounting to 23,000 acres, not the 40,000 identified in the charter. n72 Brookfield is small because other towns were laid out first, its own survey delayed because of what the proprietors regarded as the exorbitant fee of £ 480 demanded by the state and the poverty of the settlers. n73 Hubbardton's first survey was "made large," so many original proprietors were denied their full share of what the charter promised. There was some talk of a resurvey, but nothing came of it. n74

n72 2 id. at 808.

n73 Id. at 855; 3 THOMPSON, *supra* note 8, at 34-35.

n74 3 HEMENWAY, supra note 1, at 747.

At the March 31, 1791 proprietors meeting of Sutton, held in St. Johnsbury, the majority voted the following resolution:

Whereas it appears from the Field Book of Survey returned by the Surveyor that by some casualty in running the line that lots Nos. 42, 43.44, 45, 46, 47, 48, and 49 are somewhat less (on an average about ten acres) than the other regular lots and whereas it is uncertain where the error originated and it would be attended by great expense to find and rectify the same and whereas by taking a draft the chance to each proprietor is equal and just, therefore, voted: that the rights be held by each proprietor who shall draw the same according to the present bounds and lines any difference aforesaid Notwithstanding and it is further voted that all other lots and rights be held agreeable to the present corners bounds and lines however they may be more than the common average quantity such allowances being designed to compensate for disadvantages of situation, mountains and other inconveniences which attend them. Passed. n75

n75 Id. at 24.

After the creation of Vermont, the legislature sometimes stepped in. The boundaries of towns in the southwest corner of Bennington County were uncertain enough to cause the General Assembly to order the Surveyor General to perambulate and ascertain the bounds in 1782, at the expense of the proprietors. n76 A dispute over the line between Addison and Panton was resolved in 1785, by conveying about 8,000 acres of Addison to Panton to correct the effects of overzealous surveying and granting. n77

n76 "An act to ascertain the boundaries of the towns therein mentioned," February 26, 1782. 13 STATE PAPERS OF VERMONT 82-83.

n77 "An act establishing a certain agreement made between the proprietors of the towns of Addison and Panton in the County of Addison," October 24, 1785. 14 STATE PAPERS OF VERMONT 37-38.

Inaccuracy due to bad instruments and [\*36] limited visibility was one thing. Sometimes other factors were at work. The assistant surveyor of Johnson figured out a way to improve his situation. Jonathan McConnell "was employed by the proprietors as assistant surveyor, and perhaps governed by the first laws of nature, self preservation," wrote Thomas Waterman, Johnson's first town historian. It was McConnell's happy coincidence "that one tier of lots running north and south, and another running east and west, the intersection of which was at his location, which lot contained over 460 acres" belonged to him. n78

n78 2 HEMENWAY, supra note 1, at 670.

Later generations looked back on the work of the first surveyors, and judged the quality by how often lawsuits erupted over the proper location of lines. Some places were never sued, leaving them to conclude that their surveys were in fine form. "Distributions of the land was so correctly done by the proprietors' committees, that courts have never been called upon to decide more land cases from Townshend than from any town where the land was lotted and drawn for in the usual way," clucked its local historian. n79

n79 5 id. at 529.

There is no comprehensive list of early surveyors. Joseph Blanchard surveyed the first three tiers of towns west of the Connecticut in 1760, including Windsor, for Wentworth. He was a resident of Dunstable, New Hampshire. n80 Deacon Ebenezer Frisbee of Sharon got the contract for surveying Panton in 1762, and with two others worked fifty-three days, creating seventy fifty-acre lots on the lake shore. n81 Ira Allen surveyed lands along the Winooski River for his brothers' land company, and eventually was appointed Surveyor-General of Vermont in 1778. His first duty was to "procure copies of all Charters that ever was made of lands lying in this State in order to know where the vacant lands are . . ." n82

n80 HENRY STEELE WARDNER, THE BIRTHPLACE OF VERMONT 25 (1927).

n81 1 HEMENWAY, supra note 1, at 78.

n82 1 RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL 303 (1873).

James Whitelaw was an immigrant from Scotland, who came to Ryegate in 1773 as a surveyor and representative of the Scotch-American Company of Farmers, a collective of Glasgow natives who sent Whitelaw and others on a tour of America to select a proper site for their new home. Whitelaw recommended the lands in northeastern Vermont, particularly the southern half of the town of Ryegate. He surveyed many northern Vermont towns after that, as a private surveyor and as Surveyor-General, succeeding Ira Allen in 1787, and serving until 1804. After his appointment, he was called "General Whitelaw" for the rest of his life. n83 He maintained a land office in Ryegate for many years. His family donated his papers to the state after his death, and they are now housed at the State Archives.

n83 Thomas Goodville [Goodwillie], Life of General James Whitelaw, VERMONT HISTORICAL SOCIETY PROCEEDINGS, 1905-1906, 103, 112; 2 HEMENWAY, supra note 1, at 780; BERNARD BAILYN, VOYAGES TO THE WEST 604-637 (1988).

Other names are legion--John Johnson, Eben Judd, Joseph Beeman, among others--and their work continues to inform the boundaries of land in all towns. They imposed order on the landscape. They made mistakes, but when they did those mistakes became permanent.

Coming over the ridge, carrying the chain, peering at the compass, they must have been surprised to run into a clearing and a cabin, and a few acres of corn, on land that had not as yet been divided or distributed. Guildhall's first settlers resisted. Proprietors' agents were sent away by what they called "squatter sovereigns," who did not take well to the idea that [\*37] somebody had a claim to the land they had settled. n84

n84 1 HEMENWAY, supra note 1, at 998.

Pitching

People moved to the Grants and began clearing land, without regard to the existence of a charter or any claim to a particular lot. Sometimes they were proprietors, ahead of the pack, anxious to get settled; sometimes they were simply squatters. Settling without a lot was called "pitching." In Brandon, for example, pitching before purchasing a lot was the common experience. The money for the lots was so little, it kept no one from squatting wherever seemed right." n85

n85 3 id. at 429.

In Highgate, in 1804, the proprietors voted to "quiet the rights" of the actual settlers, which at that time numbered forty or fifty people, confirming their rights to the land they had settled. n86 In Hyde Park, existing settlers' lots were exempted from the draft, a simple gesture of peace and gratitude to those who came before. n87

n86 2 id. at 258.

n87 Id. at 632.

Sometimes settlement was all the landowners had as a basis of title. Because of a long and expensive series of suits involving a fight between French, New York, and Vermont titles to land, the Honorable R.H. Smalley regarded all of the rights in the town of Alburgh as established by prescription, which explains that town's lack of public rights. n88 The local historian of Hubbardton reports that most of its titles failed, when tested in the courts. n89 Mt. Tabor's titles are mostly traceable to pitches and vendues. n90

n88 Id. at 492.

n89 3 id. at 748.

n90 Id. at 867.

As towns matured, pitching also became the method for allocating lots in parts of town that had yet to be divided. The General Assembly in 1783



enacted a law giving proprietors the right to "grant to any one or more of the Proprietors, Liberty to pitch and lay out for themselves, on their right or rights, such quantity of Lands on the undivided Lands of such town, as they shall judge reasonable and best . . ." n91 The process in Manchester, for example, in 1789, for the fifth division, was by pitching. "The choice was determined by chance, and each proprietor, in his order, allowed one day to select and lay his lot under the superintendence of a committee." n92 This was the common practice. It was a kind of civilized land rush, each proprietor having a day, chosen at random, to pitch a lot among the undivided lines.

n91 "An act in addition to an act regulating proprietors meetings," October 23, 1783. 13 STATE PAPERS OF VERMONT 223-24.

n92 1 HEMENWAY, supra note 1, at 199.

The first division, and usually the second, however, were chosen by the traditional box and draft method, or other inventions of the proprietors. n93

n93 3 id. at 377.

#### How to Divide a Town

The charter only mentioned the first meeting, but it was at the second or third meeting where the land was divided, after receiving a copy of the survey. How to do it was not established by law, but some remembered how it was done in other states, and eventually the procedure became established. Most important was the principle of equality. The first Vermont law regulating proprietors' meetings, adopted in 1779, insisted that "every proprietor shall be allowed to vote in proportion to his interest in such propriety." It prohibited anyone from appearing through a power of attorney beyond one share. It declared that all votes and proceedings would be valid, "provided no proprietor shall be curtailed in the quantity of his land. n94

n94 "An act regulating proprietor's meetings," February 23, 1779. 12 STATE PAPERS OF VERMONT 122-125.

On November 8, 1786, Fairfax proprietors voted, "That the lots be numbered, and placed in a box, and each proprietor should then draw a ballot, and the number upon his ballot should be the number of his lot." n95

n95 2 HEMENWAY, supra note 1, at 167.

In 1787, the General Assembly enacted a comprehensive law governing proprietors' meetings, and ordered that the process be done this way: . . . The Clerk shall cut as many small square pieces of paper as there are proprietors (including the public rights), and shall number them, and put them into a box, and shake them, and some disinterested person shall draw them out as the Clerk shall call the Proprietors names, beginning at the first name in the charter, and so on until all be drawn, and the Clerk shall affix each number to the proprietors name who drew it . . . n96

n96 "An act regulating proprietors meetings," March 9, 1787. 15 STATE PAPERS OF VERMONT 302-306.

When Rockingham was surveyed, the proprietors voted that those who moved on to the land first had the first choice. n97 The proprietors of Salem limited this to the first six settlers. n98 Sometimes the proprietors lost confidence in the plan. In Granby, the proprietors adopted, and then, after seeing what had been done, voided their first division, on account of bad surveying. Several months later, they reinstated the original division, promising to rectify whatever mistake had taken place. n99

n97 5 HEMENWAY, supra note 1, at 496.

n98 3 id. at 307.

n99 1 id. at 989.

Although one-sixteenth of the proprietors were authorized to warn a meeting, there was no quorum requirement for the meeting itself. In 1801, at the first proprietors' meeting of Glover, only Ralph Parker and Heman

Allen showed up, but that did not prevent them from ordering up a survey. After Whitelaw had finished the survey, a proprietors' meeting was held to draw the numbers and read the proprietors' names. n100

n100 3 id. at 240.

At an August 28, 1783, meeting of the proprietors of Cambridge, they voted unanimously that if any one or more of the proprietors be dissatisfied with his or their lot, he or they shall, and hereby have, liberty to fling up his lot as undivided land, and make a pitch in any of the undivided lands in said town, which pitch is to lie in the same form and contained the same number of acres; and to run parallel with those already laid out--not leaving any between said lots and the town line, less than one hundred and twenty rods: Provided they pitch within eight months after the surveyor-general shall assure their lines of Cambridge aforesaid. n101

Burlington proprietors voted to give liberty to proprietors to pitch and lay out at their own cost "one hundred acres on one whole right of share that they own in said town, said lots to be laid out not less than seventy rods wide, exclusive of what hath already been granted to be laid in said town." n102

n101 2 id. at 596.

n102 1 id. at 489.

In 1794, the General Assembly addressed the question of how to prevent owners of a majority of shares from obstructing the division of the town. The act provided a right to petition the Supreme Court, who would appoint three able and indifferent commissioners to survey and provide for the process of division, to protect the minority shareholders. n103

n103 "An act in addition to an act entitled, "An act regulating proprietors' meetings," passed March 9th, 1787." October 29, 1794. 15 STATE PAPERS OF VERMONT 320-323.

It is unclear precisely how proprietors could meet, long after the original division, and make binding decisions on undivided lands, when the lots had begun to be subdivided. Was an individual share divisible for purposes of voting? The records of late proprietors' meetings, where they [\*38] exist, do not say. It is an intriguing idea. Suppose in your town a new gore is found today. Each original hundred acre lot now has dozens of owners, who together are entitled to one vote. Moderator, I call the question.

In Guildford, even after statehood, "one principle of the charter was still adhered to, none but proprietors, or those who held under them, had a right to rule or vote in their meetings." n104

n104 5 HEMENWAY, supra note 1, at [5] (this number appears at the end of the volume, suggesting a printer's error).

#### What They Divided

The division map for Barnet was accepted at a meeting of the proprietors held in 1785. The surveyor James Whitelaw entered the names of the proprietors on the lots they were voted. Each proprietor was allowed 336 acres, three 100-acre lots and a lot of the remainder of the land. Although the charter ordered that each proprietor be allowed a one-acre lot near the center of the town, this was ignored. n105 Danville's division consisted of seventy-three rights of 500 acres each, plus seventeen settlers' rights and public rights. n106

n105 1 id. at 277.

n106 Id. at 313.

The first division was usually the most important land, the lots that were most valuable for farming. The division sometimes gave each proprietor a share of good and bad land. In Brunswick, for instance, proprietors enjoyed full-sized lots of 115 acres, plus a river lot of eight acres, in 1788. n107 Chittenden's proprietors each took a share of the Great Meadow, as well as lots in other parts of the town drawn at random. n108 In Maidstone, proprietors received equal amounts of intervale and upland acres. n109

n107 Id. at 961.

n108 3 id. at 551.

n109 1 id. at 1027.

In making the fifth division, the proprietors of Fairfield sliced a large cedar swamp into four-acre lots, one for each share. "The object of this division that each proprietor might have his share of cedar and pine for fencing, immense quantities of which have been taken from it annually in the time of sledding, the swamp being impassable at any other time." n110

n110 2 id. at 191.

How they dreamed. On a "rocky hill," in the southwestern part of Fairfield, they laid out city lots. This "innascent" city was never developed, however, according to local historian Colonel Samuel Perley. n111 There were seventy one-acre city lots surveyed and granted in Panton, in 1766, out of the undivided lands, but a century later it all made a nice sheep pasture. n112 So with the town lots of Ryegate, which remained a city of faith, rather than a reality. n113

n111 Id. at 192.

n112 1 id. at 79.

n113 Id. at 379.

In some towns, the proprietors reserved land within the individual lots for highways, to avoid having to pay damages or hear complaints about the future needs of the town. In Hyde Park, each lot was two hundred acres in size, ten acres of which would be reserved for highways. n114 In Lyndon, each proprietor took 329 acres, charged with 9 1/7 acres of that land for highways. n115 These allowance lands saved towns money until 1825, when the legislature repealed the practice for good. n116

n114 2 id. at 632.

n115 1 id. at 339.

n116 Laws of 1825, No. 11, 22-23. After 1825. if a town wanted to lay out a road, compensation was required for the taking.

The principle of "quantity for quality" was a characteristic of the Hardwick town charter. As the Vermont Supreme Court explained, in *Trustees of Caledonia County Grammar School v. Kent* (1912), when the proprietors laid out lands for the county grammar school in Hardwick they were "empowered to locate said two rights 'justly and equitably, or quantity for quality,' in such parts of the town as they or their committee should judge would least incommode the settlement of the town." n117 The grammar school lot was not good land, so more acres were assigned to it. There was no comparable leveling or equalizing process for private property, but the idea was to ensure that public rights were not diminished by the practice of division.

n117 *Trustees of Caledonia County Grammar School v. Howard & Kent*, 84 Vt. 1, 5 (1910).

Once land was divided, a few were anxious for settlement, but the town would only work as a community if it could grow and develop. For this reason towns began to invent ways of attracting proprietors and others.

### Incentives to Settle

Randolph proprietors voted an additional forty acres to any settled proprietor. n118 Each settler of Concord was entitled to one hundred acres, whether they were proprietors or not. n119 In Granville, the first woman who settled in the town with her family was entitled to one lot of one hundred acres. n120 The first settler of Ripton, Ebenezer Coller, cuts his way through the dense forests under the belief that the first child born there would get a share of the town. Imagine the face of his poor wife when she learned it was a rural myth. As Samuel Damon put it, in his history of the town, "But rumor was groundless and she was landless." n121

n118 2 HEMENWAY, supra note 1, at 1029.

n119 1 id. at 967.

n120 Id. at 39.

n121 Id. at 85.

John Wilson contracted with the proprietors of Whiting to bring fifteen settlers to town within one year, to be compensated in land. But he never made good on his promise, and never settled there himself. n122 In 1764, Arlington proprietors put money on the table, awarding the first settled £10 and reducing the incentive proportionately until the tenth settler, who was entitled to 10s. n123

n122 Id. at 116.

n123 Id. at 122.

The first settlers of Lemington had to carry their wheat twenty-five miles to the nearest mill. n124 Because of the long distances to travel, over footpaths, to have corn and grain ground at a mill, many towns voted to give the first miller a full share. This practice was sanctioned by the General Assembly in 1783, as long as there was a condition that these saw or grist mills would be built within a set time, and the quantity of land given did not exceed 200 acres. n125 Floods were the mills' greatest threat. But there was treachery too. Mr. Taft, who had taken land in Westfield on a promise to build and operate a mill, having constructed the mill, burned it down when it failed to make a profit, leaving everybody feeling sad and bitter. n126

n124 Id. at 1015.

n125 "An act in addition to an act regulating proprietors meetings." October 23, 1783. 13 STATE PAPERS OF VERMONT 223-24.

n126 3 HEMENWAY, supra note 1, at 344.

The proprietors took responsibility for the welfare of the town. They acted where a need arose, to protect their investments. They did not look to the laws of New Hampshire for authority to act. They did what they thought was necessary.

### Beyond Surveying

Randolph proprietors voted to hire a preacher. n127 Bennington and Rutland voted to build churches. n128 Burlington proprietors hired Ethan Allen to cut the road from Castleton to the town. n129 They created a committee of safety in Danby in 1776, to protect the town from invasion. n130 In Calais, at a 1786 proprietors' meeting, they voted to bring their proceedings under the laws of Vermont. n131

n127 2 id. at 1030.

n128 3 id. at 1017.

n129 1 id. at 488. Allen failed to fulfill the terms of the contract and was not paid for his work.

n130 3 id. at 582.

n131 4 id. at 131.

Rather than leave undivided lands to waste, in 1779 the General Assembly authorized proprietors to "grant liberty for the cutting and felling of any tree or trees, or carrying away timber, wood, or underwood, growing or lying on their common or undivided lands." n132

n132 "An act for the punishing of trespasses in divers cases, and directing proceedings therein," February 1779. 12 STATE PAPERS OF VERMONT 98.

Paying for the surveying, early roads, and other amenities required the imposition of taxes. In 1783, the General Assembly authorized the Surveyor-General, if necessary, to conduct vendues of undivided land to pay for the perambulation [\*39] and running of lot lines, when proprietors could not pay for those services. n133



n133 "An act in addition to an act entitled 'An act for the regulation and establishment of town lines," February 24, 1783. 13 STATE PAPERS OF VERMONT 179-181.

In *Underhill ex dem. Underhill v. Smith* (1791), Chipman discussed how a proprietor's tax collector goes about his business. He must perform all pre-requisites, which stand as conditions precedent to his right of selling; such as, giving all previous notices required, and in the precise manner required by law. Otherwise the land owner cannot be considered as delinquent, and shall not forfeit his right. The legal consequence of a deviation by a collector, from the line of proceeding pointed out by statute, is, to invalidate his sales, if made; and he shall be answerable to his vendee. n134

n134 *Underhill ex dem. Underhill v. Smith. N. Chip. 81* (1791).

Hinesburgh proprietors were taxed \$ 4 per right for surveying the second division. n135 Montpelier proprietors voted and paid high and frequent taxes in the years leading up to its organization as a town and even after that, to pay the expenses of surveying, and lands were sold to pay for it when the tax was not paid. n136

n135 1 HEMENWAY, *supra* note 1, at 794.

n136 4 *id.* at 265.

A tax sale, or vendue, was more than just a way of raising money for expenses. It was a way of cleansing the land of the missing rights and starting over. It rid the town of foreign claims, from proprietors and their successors who had never shown up, and it freed settlers who could buy it cheaply to expand their holdings at low rates. Ira Allen bought forty-nine shares of Coventry at a vendue, when their owners could not pay the half penny tax on the land. After that, the local history explains that the whole town was sold for \$ 4.80 at auction to Jabez Fitch of Vergennes. Most titles in that town originate in the line of Fitch. n137

n137 3 id. at 137.

The General Assembly regulated the practice after Vermont was formed. In 1785, the legislature required all vendues to be held in Vermont, where previously the law had required them to be conducted within the county where the delinquent land was located, and ordered that the collector be an inhabitant of Vermont. n138 Two years later, the Assembly required that all vendues be public, and held between sunrise and sunset, in order to be valid, but gave a one year redemption period to all landowners who were in captivity or "beyond the sea. n139 That same act recognized the problem of what to do with land that had been improved, by clearing and buildings. Paying the back taxes would not suffice. The displaced settler would first be paid for those improvements.

n138 "An act in addition to an act regulating proprietors meetings," October 27, 1785. 14 STATE PAPERS OF VERMONT 58.

n139 "An act regulating proprietors meetings," March 9, 1787. 15 STATE PAPERS OF VERMONT 302-306.

Poverty, disease, hunger, cold, and the threats from animals, hostile troops, and other governments added up to a pretty heavy burden for the first settlers. Life was hard. Frozen in winter. Starved out. Crops failed. Irasburgh proprietors granted the easterly half of Lot No. 108 to Caleb Leach for his privations endured by his family as the first settler. n140 Strange things happened. Lewis Smerrage was living on a lot near the Connecticut River in 1805, when the easterly side of a mountain above him slid down and filled a nearby pond, forcing the water out and onto his fields. n141 Returning from work on the first road through Brighton, Timothy Hinman saturated his moccasins, and feared that his feet would freeze. The day had been warm, and the snow was melting. That night he spent with his feet in the Nullhegan river, which was warmer than leaving them out in the air. In the morning he put his snowshoes on and made it home without further incident. n142 Bears would visit the cabin. Wolves would threaten the cattle.

n140 3 HEMENWAY, supra note 1, at 243.

n141 1 Id. at 1015.

n142 Id. at 953. The isolation led some into strange ways. One of the first settlers of Bradford. Benoni Wright decided to live in a cave on the highest point of land. His religion got the better of him. and he let his beard grow to a great length, and [kept] a strict fast of 40 days and nights in the wilderness, devoting the time to meditation and fervent prayer. When about to retire he prepared himself with a leathern girdle with a buckle at one end and forty progressive holes in the other, designing to gird himself, day by day, one degree closer as his size should diminish. Later, convinced he would die. he began to haunt the settlements along the river, scavenging for food. His abode is still known as Wright's cave. 2 id. at 814.

There were other predators in the woods. Among the most feared were landjobbers. These were men who purchased the shares or lots of the original proprietors, often for a small tribute. Their purpose was not settlement, but land speculation. What they could not sell, they would use to exact compensation from those who had settled the land. n143

n143 3 id. at 580.

Before statehood, before independence, there was always the insecurity of the New Hampshire charters to worry about, from New Yorkers asserting superior patents to the same land. Some towns sought assurances, in the form of new confirmatory grants to their land from New York.

### Regrants

In the history of Lowell there is a story of the divorce of Joseph and Olive Bancroft, two of the first settlers. One morning, he said, "Olive, I am going off to leave you." Her answer was just as direct: "Agreed, Jo, you and I are two." n144 Would that the separation of New Hampshire and New York charters had been as easy. When the first settlers arrived, they knew just how tenuous land titles were, just like the rest of their lives, particularly before the competing claims of New Hampshire and New York were resolved. In 1764, after the King nodded toward New York as the proper ruler of the New Hampshire Grants, some towns turned to New York for protection.

n144 Id. at 277.

New York was granting patents to land already granted by New Hampshire and divided and settled by families under those charters. To avoid this, New York officials were willing to issue a new charter, confirming the New Hampshire titles, for an annual fee, to be paid to officials in Albany. Eighteen towns eventually obtained confirmatory grants from New York. n145 They were Chester, Brattleborough, Hertford (later, Hartland), Putney, Corinth, Newbury, Westminster, Windsor, Weatherfield, New Fane, Reading, Springfield, Woodstock, Cavendish, Saltash (Plymouth), Ryegate, Stratton, and Topsham. Regrants began with a long series of whereas clauses, underscoring the invalidity of Wentworth's pretense in claiming the land under the jurisdiction of New Hampshire, then went on to confirm the grantees in their lots, reserving all gold and silver mines and pine trees fit as masts, to New York, and levying an annual tax (Scotage) on each hundred acres in the town. Maidstone proprietors were charged four shillings per right or share per year for their regrant. n146 The high fees were the only reason that some residents of Stockbridge grew restless enough to dream of independence after refusing to apply for a regrant. n147 The same was said of residents of Vernon. n148

n145 7 STATE PAPERS OF VERMONT 3-15.

n146 1 HEMEMWAY, supra note 1, at 1026.

n147 Id. at 124.

n148 5 id. at 314.

At least one court decision has upheld the validity of a New York patent in Vermont. In *Jacob ex dem. Paine & Morris v. Smead* (1791), Chief Judge Nathaniel Chipman favored the New York title over a rival claim, although he did not suppress his feelings about the grantor:

The Governour of N. York, and the authority of that Province, were guilty of the highest oppression and injustice toward the Newhampshire grantees. They held the titles derived through the Governour of Newhampshire to be void. They were able to enforce this opinion by violent laws, and by the arbitrary decisions of their courts--In consequence of these measures, [\*40] they extorted large sums of money from the Newhampshire grantees

and settlers, for what they called, a confirmation. This was practised upon the proprietors of Windsor. It is insisted, that the injustice of this demand ought to invalidate the Newyork grant. It is, wholly, a new doctrine, that the greatness, or, if you will, the enormity of the consideration given, should invalidate a grant. If it be not a legal reason, it is, certainly, a favorable argument for the grantees, in support of their grant. n149

n149 Jacob ex dem. Paine & Morris v. Smead, N. Chip. 99, 1 D. Chip. 56(1791).

No one has accused towns with regrants of disloyalty to Vermont. After all, there was no Vermont at that time. Those towns that obtained confirmatory charters were just being prudent. They had no idea how it would all turn out, and they had a right to protect what they had worked to develop. They were trying to protect their homes.

### The Legacy of the Proprietors

Today the proprietors are remembered in town histories, in names of hills and roads, and on the face of the land. Their work is done. The precise details of what they did to divide the town will be the subject of dozens of inquiries, investigations and law suits in the years to come. How they did it continues to matter.

In 1797, Chief Judge Nathaniel Chipman ruled that the 1761 charter of Castleton was void, as no division of the town had been made under it, in *Everts v. Brown* (1797). Finding an adverse title in the proprietors under this New Hampshire grant, the Court ruled that the right of the proprietors remained a part of an undivided whole, held as tenants in common with all other proprietors, and could not be conveyed by one proprietor. n150 In *Neill v. Ward* (1930), the plaintiff claimed treble damages for the taking of trees on land he claimed to own in Moretown. The question turned on the proper boundary line between Lots 59 and 60 in the first division. The Court found that the lot lines were more generous than the town plan and field book provided. A resurvey was done, and adopted by the proprietors, but they did this act at an adjourned meeting, without warning that they were to take this action. When the field book was offered as evidence. Justice Laforrest Thompson, writing for the Court, found it lacking in authority. n151

n150 Everts v. Brown. 1 D. Chip. 96, 1 Am.Dec. 699 (1797).

n151 Neill v. Ward. 103 Vt. 117, 130-131 (1930).

The proprietors set the lines, from which all other lines were drawn. Once the lines were set, they became monuments. So said the Vermont Supreme Court, in *Silsby & Co. v. Kinsley* (1915):

It is a well-known fact that the original proprietors of townships usually had them laid out into lots which they and their successors have been accustomed to sell by number without more particular description. Described thus, the lot lines, if surveyed and marked upon the ground, serve as monuments in fixing the boundaries. n152

n152 *Silsby & Co. v. Kinsley*, 89 Vt. 263, 269, 95 A. 634, 635 (1915).

The legacy of the proprietors are these monuments, as indistinct as they may be for us today, that continue to define the landscape. Any aerial view, any tax map, shows where the lines were drawn. Just connect the lines, and the entire division map comes to life. The land cannot hide its history.

Afterthought

Rockingham's historian says, "The original proprietors wished for perfect equality in dividing the town lands, and they had agreed to be satisfied with such lots as fell to them in the drawing. Selfishness was not so rampant in the hearts of the people then as it is now. Their sense of mutual dependence on each other for safety begat a sentiment of common interest in the general prosperity and welfare of the community. The settlers came together as one family and decided that each member should share equally the privileges of their joint enterprise." n153

n153 5 HEMENWAY, *supra* note 1, at 496.

Each member of this community of lawyers, surveyors, engineers, planners and zoners, listers, and all who own land in Vermont has more

than an academic or historical interest in knowing where those division lines run today. We really should arrange to have the division maps of all towns compiled, and made generally available before we lose them to age and neglect. That would be a fitting tribute to the proprietors, but it would also be a rich gift to the rest of us. We are not so free of uncertainty about land titles to sleep easy with what we have. Repose is one thing, but the struggle is never over.