

FINDING VERMONT LAWS & REGULATIONS FOR LAND SURVEYORS



VERMONT SOCIETY
of **LAND SURVEYORS**

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1. INTRODUCTION, KNOWING THE LAW

Surveyors must know the law, but we are not in the business of practicing law or providing legal opinions to the client or the public. The following quotations remind the surveyor of his or her legal obligations:

Conclusive Presumptions are those that are irrebuttable, and this, by law, permits no contradiction. A commonly known conclusive presumption is “everyone is presumed to know the law”. (Evidence and Procedures for Boundary Location, 6th Ed., Robillard et al, John Wiley & Sons, Inc., 2011, page 38)

The surveyor’s responsibility is...to apply the law. (Ibid., page 44)

The surveyor is a professional specialist who knows how to read and interpret deed words and how to set monuments in accordance with the words. Understanding and applying correct law (including the laws of evidence) are unquestionably part of a surveyor’s duties and responsibilities. Failure to understand and properly apply this requirement may result in claims of negligence or malpractice (Ibid., page 45)

Jurisdictional standards relating to land surveying consist of laws of evidence and boundary line law. These are as much a part of land surveying as survey standards, if not a greater part. “Vermont Survey Law, 2nd Edition”, page ix.

A surveyor must have knowledge of legal principles and requirements applicable to surveying and land descriptions. A surveyor researches public and private land records ...to compile boundary evidence.¹

In our development and education as land surveyors, we may have taken a single boundary law course to provide an understanding of boundary laws as applied generally in colonial and public lands states. We have seen references to court cases, but were probably not educated as to the meaning of the legal reference. In addition to learned treatises such as “Evidence and Procedures for Boundary Location”², we have our state boundary law reference books which we read from beginning to end in order to pass our land surveying exams. What we seem to be lacking is any formal training or education in finding, researching and reading relevant boundary law. In Connecticut, our land surveying certificate includes a requirement to take a legal paraprofessional course in legal research, where the student learns how to find, read, evaluate and weight legal resources such as court cases and statutes. This basic educational effort can help land surveyors to understand their requirement to “know the law”.

¹ CVR 04-030-130 (2017) Administrative Rules of The Board Of Land Surveyors, Section 2.9(a)

² Robillard et al, “Evidence and Procedures for Boundary Location, 6th Edition”, John Wiley & Sons, Inc., 2011

2. THE LAWS OF EVIDENCE, RULES OF CONSTRUCTION

The law that we find, analyze, weigh and apply on a daily basis when making professional boundary judgments is related to evidence. Is evidence the law? How is it related to the law? When I make a boundary decision, is that application of the laws of evidence a legal decision? In this presentation I am making no attempt to cover all laws related to boundary law. We will focus on finding law that relates to evidence that we find in our daily work. We will attempt to create a hierarchy of how we weigh evidence in a boundary project, normally called the rules of construction. Half of the chapters in our learned treatise “Evidence and Procedures for Boundary Location”³ are directly titled with the word “evidence”. The only legal principle that the VT Board of Land Surveyors means in particular is that related to compiling boundary evidence. Professional judgments on boundary evidence go further than just “compiling” boundary evidence. Boundary evidence is analyzed and weighted as a jury would decide and a judge would rule. Since boundary law is almost entirely a state related subject, then guidance as to boundary evidence must be found in state statutes and state laws primarily. In this section we will attempt to define the terms for the area of law related to boundary evidence, senior right and the boundary rules of construction.

2a. EVIDENCE

The material presented here is taken from Chapter 2 of “Evidence and Procedures for Boundary Location”⁴ unless note otherwise. Surveyors need to know the law, and the part of the law they work with every day is evidence. We are directly held to a legal standard for evaluating the quality of evidence. We are also responsible, under the direction of an attorney at trial, to present our evidence effectively. We will be focusing on the evidence that we work with, and how to evaluate and weigh the evidence as a court would accept.

Rules of evidence have been found in common law, unique to each state legal system. Historically, early rules of evidence were independently developed by the individual judge. In 1975, Federal Rules of Evidence for all federal courts were codified so that rules which were agreed upon were placed in a single document. Most individual states adopted these rules. Most states now have their own rules of evidence for civil and criminal court systems. These rules codify common law where there long has been agreement in the state courts. In Vermont, there is no recognition of the Federal Rules of Evidence. The Vermont Rules of Evidence have been created and maintained by the Vermont Supreme Court. Land surveyors must know and follow this evidentiary code and case law. We will be looking at the Vermont Rules of Evidence to see if there are guidelines important to land surveyors.

In boundary surveys, questions of evidence are a question of fact (most often a greater influence), a question of law, or both. The land surveyor's responsibilities relate to questions of fact, not of law. We will find that evidence needs to be devoted by the attorney to be effectively utilized in court.

³ Idid.

⁴ Robillard, Walter G et al, Evidence and Procedures for Boundary Location, 6th Edition”. John Wiley & Sons, Inc., 2011. Chapter 2.

2a(1). DEFINITIONS OF EVIDENCE

Evidence is the material offered to persuade the jury, which is the trier of facts, that certain events (facts) are true. Surveyors must distinguish fact from evidence.

The fact is there is a corner point on the property, somewhere. Evidence is all the material used to identify, describe, recover, or preserve the point that will influence the trier of facts to determine that the surveyor has in fact located the true corner on the property.

The licensed land surveyor is presumed to understand the rules of evidence (both those rules that are codified and those in case law) and to apply them in boundary retracement. Failure to understand and apply the rules of evidence could result in loss of license or a lawsuit for negligence.

Blackstone's definition of evidence is: "*Evidence* signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on one side or another." For surveyors, evidence is any document, writing, action, thing, verbal statement or other information that is identified to prove the fact in question. Evidence perpetuates the location of corners and boundary lines through monuments, ties, field notes, topography notes, maps, deeds and government documents. Note that the surveyor does not prove the fact from the evidence, that is up to the trial jury.

Vermont has some definitions of evidence that are the law in Vermont. The definition provided by the Vermont Board of Land Surveyors is as follows:

Evidence" means: Information, observations, or objects that may aid the surveyor in locating the position of a boundary⁵.

The Vermont Rules of Evidence, Rule 410 also has a definition of relevant evidence as follows:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Blackstone's definition of evidence is as follows:

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on one side or another.

Blackstone's definition of evidence is really relevant evidence. Surveyors are not interested in irrelevant evidence! For surveyors, relevant evidence is any document, writing, action, thing, verbal statement or other information that is identified to prove the fact in question one way or the other. Material evidence is that which favors the client's side of the court case. Relevant evidence perpetuates the location of corners and boundary lines through monuments, ties, field

⁵ Vermont Administrative Code 04 030 130, Administrative Rules Of The Board Of Land Surveyors, Section 5.3(d)

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notes, topography notes, maps, deeds and government documents. Finally, we have no control over whether the evidence is admissible. That power resides in the judge and jury at trial.

From the above definitions, do we need a definition of evidence, or should we actually be concerned only with relevant evidence? Some other kinds of relevant evidence is given below and is to be found in the Vermont Rules of Evidence:

Judicial notice is evidence in the form of knowledge (words in a dictionary, laws published, scientific principles, well known and commonly accepted facts) is evidence. The judge will determine when to apply judicial notice⁶.

Inference is evidence in the form of a logical conclusion from a set of facts. The Law of Evidence considers the admissibility, effect & relative importance, and weighting of evidence⁷.

2a(2). THE SURVEYORS' ROLE IN EVIDENCE

It is a signal of the primary importance of evidence in our learned treatise on boundary law that the first principle of the first chapter of “Evidence and Procedures for Boundary Location”⁸ concerns relevant evidence, and also defines the relationship between relevant evidence, facts and proof:

PRINCIPLE 1. A surveyor should learn and understand the basic rules of evidence for his/her state as well as The Federal Rules of Evidence. Following prescribed and accepted rules may eliminate personal biases that may be present. The attorney you work with in litigation will have the best understanding of how the rules of evidence apply to your survey product.

PRINCIPLE 6. Evidence is not proof. Evidence leads to facts. Facts are only created by the Jury. Facts plus the laws of evidence lead to proof. For example, a written deed is evidence of ownership, not proof of ownership. Land can be gained by unwritten means. Paper title is evidence only of the claim of ownership and the right of possession.

2a(3). THE CLASSIFICATION OF EVIDENCE

As well described in “Evidence and Procedures for Boundary Location, 6th Edition”, relevant evidence varies in significance, importance, and application. The most important attribute for the surveyor is the ability to recognize the best evidence of that available. Raw recovered evidence is neutral until surveyors draw conclusion based on the rules of evidence. Two surveyors can reach different conclusions from the same raw evidence. Finally, our best evidence may not be the

⁶ Vermont Rules of Evidence, Rule 201

⁷ Ibid., Rule 705 “Disclosure of Facts or Data Underlying Expert Opinion”

⁸ Robillard, *ibid.*, page 18.

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same as the attorney's best evidence. Some different classifications of relevant evidence are listed below:

1. **Indispensible evidence** is necessary to prove a fact; a property conveyance must be in writing. Written proof is required.
2. **Conclusive evidence** cannot be contradicted, for example the contents of a deed. "The surveyor is assumed to know the law" is conclusive evidence
3. **Prima facie evidence** – sufficient for proof of a fact until rebutted by other evidence; if original deed disappears, can use a copy. The law specifies what prima facie evidence is.
4. **Primary evidence** - that which is most certain; written document more certain than oral testimony
5. **Secondary Evidence** - inferior to primary; a document copy is inferior to the original.
6. **Direct evidence** - proves a fact directly without resorting to inference or presumption; "I saw him drive the stake into the ground there".
7. **Circumstantial evidence** - "I saw him drive similar stakes in other places".
8. **Partial evidence** - establishes some detached fact, such as the weather on the day the surveyor worked.
9. **Extrinsic evidence** - derived from sources outside the writings. Unclear deed words may need interpretation by a dictionary.
10. **Corroborative evidence** - supplementary to evidence already given. If used it may also have a negative effect.
11. **Inferred evidence**- logical conclusions from a set of facts (field measurements, COGO).

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Shown below is a table of common types of evidence that a land surveyor collects in order to render a professional boundary opinion:

Evidence Examples	Type of Evidence	Classification of Evidence
Client original deed	Written	Primary, Indispensable
Contents of deed (client)	Written	Indispensable, Conclusive
Town hall deed (client)	Written	Secondary, Prima Facie
Town hall deed (adjoiner)	Written	Secondary, Prima Facie, Extrinsic
Referenced original map (client)	Written	Primary, Conclusive
Recorded map (client)	Written	Secondary, Prima Facie
Recorded map (adjoiner)	Written	Secondary, Prima Facie, Extrinsic
VDOT Map (copy)	Written	Secondary, Prima Facie, Corroborative, Extrinsic
Recorded map (not referenced to client or adjoiner deeds)	Written	Secondary, Corroborative, Extrinsic
Original monument	Real	Primary, Conclusive
VDOT monuments	Real	Primary, Conclusive, Corroborative, Extrinsic
Uncalled-for monuments	Real	Secondary, Extrinsic. Possibly of no weight as evidence
Talking with adjoining while performing fieldwork	Oral or Parole	Direct or Circumstantial
VDOT coordinates	Inferred	Corroborative, Prima Facie, Extrinsic
Field Measurements angle and distance	Inferred	Direct, Corroborative, Extrinsic
Computation by angle and distance (COGO)	Inferred	Corroborative, Extrinsic

Table 1: Classification of Boundary Evidence

2a(4). THE LAW OF EVIDENCE⁹

Surveyors use evidence to assist in locating and proving corners and bounds. Unless correctly evaluated, evidence is worthless. It is the law of evidence that the surveyor relies on, to assign proper weight to evidence. This law varies from state to state. Understanding the significance and value of a piece of evidence is just as important as understanding statutory and common laws pertaining to boundary locations. Of course, the Vermont Rules of Evidence do cover all evidence, but not in any detail, so statutes and case law also contain rules of evidence. It is a well known fact that surveyors and courts can disagree about the value of evidence. Since the surveyor's work can end up in court, surveyors should assign values to the evidence in the same way it will be accepted in court.

2a(5). THE BURDEN OF PROOF FOR EVIDENCE¹⁰

There are not many surveyors who look forward to appearing in court, but sometimes that circumstance is beyond our control. Therefore, in our professional work, we need to evaluate relevant evidence in the light of how it will be received in court. We need to be aware that the effort required to present relevant evidence depends on whether we are working for the plaintiff or the defendant as an expert witness, or defending our work in a negligence case or Vermont Board of Land Surveyors hearing.

The plaintiff (affirmative party) has the burden of proof. A defendant has no obligation to present evidence. Proof is the establishment of that necessary degree of belief in the mind of the trier of fact (judge or jury) as to the facts at issue. The burden of proof consists of the following parts: First, the obligation to produce and second, going forward with the evidence to prove the facts.

1. It is necessary in civil cases to prove by "a preponderance of evidence".
2. In the case of a person claiming adverse possession, acquiescence, or loss of property rights, he or she must present clear and convincing evidence.
3. A survey may be proven by any evidence of facts that are relevant and material, but this evidence may not be admissible. The surveyor is concerned about the relevancy of the evidence, not admissibility.

Courts consider the degrees of evidence, providing legal ranking. Seldom do surveyors rank evidence as to its legal weight. However, any surveyor must do the work necessary to sustain the burden of proof in court.

In civil cases, the "preponderance of evidence", the greater weight of evidence must favor the plaintiff. Preponderance of evidence does not arise from the number of witnesses, but by the ability of one or more witnesses to convince a jury. When evidence is inconclusive, the jury leans toward the witness who best communicates with them.

⁹ Robillard, et al. pages 27-29

¹⁰ Ibid. pages 18 and 19.

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Preponderance is not 51%, probably more like 60%. It removes the cause from the realm of speculation. The quality of the evidence, not the quantity, is what counts.

In civil cases where there is a gaining or losing interest in the land and modification of boundaries (adverse possession, acquiescence, and agreements), the weight of the evidence increases to "clear and convincing". This category lies between "preponderance" and "beyond a reasonable doubt". For the property surveyor there is the added burden of providing a solid survey. There must be a search for and recovery of more evidence of a positive nature than a regular case. "Clear and convincing" may rank as 80%.

In criminal cases, the highest weight of evidence is required, "beyond a reasonable doubt". This may rank as 90% preponderance.

It is important for the surveyor to seek and find the relevant evidence the first time. Many so called lost monuments have been recovered in later surveys, which in a court case may permanently render your client with the results of a bad but permanent court decision. One of the major causes of disagreement between surveyors relates to the lack of discovery of all available evidence at the time of the initial survey. One the judge rules in a quiet title case, surveys performed after the fact cannot undo the result.

2a(6). PERSUASIVE AUTHORITY

Attorneys researching a pending trial in court are searching for "mandatory authority" or "primary authority" which is "on point" to force the judge and jury to accept his or her argument. Mandatory authority is current Vermont Statutes and Vermont Supreme Court decisions. These sources of the law must be obeyed if the fact situation fits mandatory law. The situation does not arise as often as the attorney (or land surveyor) would like. Therefore, the attorney performing legal research likely must consider "persuasive authority" or "secondary authority" in making legal arguments that will persuade the jury of his or her client's just cause. Examples of secondary authority are Vermont Superior Court decisions, other states' Supreme Court decisions, US Supreme Court decisions, and learned treatises or law journal articles that are "on point". When it comes to the land surveyor's professional opinion, he or she must be able to support their opinion by citing the law (primary and or secondary), which we are presumed to know.

In the legal arena, learned books that comment on specialized areas of the law are known as expert treatises and are considered "secondary authority", also known as "persuasive authority". The information found in these legal commentaries can be introduced by attorneys trying to convince the judge of the merits of their case. You can use learned treatises in developing your professional boundary opinion and in court testimony. You can also be cross-examined on these learned treatises.

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The following textbooks are used almost exclusively by lawyers and surveyors in researching boundary law:

Clark on Surveying and Boundaries, latest edition Walter G. Robillard, Esq., PLS et al, The Michie Co., Charlottesville, VA¹¹

Evidence and Procedures for Boundary Location, 6th edition, Walter G. Robillard, Donald A. Wilson, PLS et al, John Wiley & Sons, Inc., Hoboken, NJ, 2011¹²

Boundary Control & Legal Principles, 6th edition, Robillard & Wilson, John Wiley & Sons, Inc., Hoboken, NJ, 2009¹³

Definitions of Surveying and Associated Terms, (dictionary), ACSM. 2005¹⁴

Vermont specific or general learned treatises on real estate law. (Consult a Vermont real estate attorney)

We take note of the fact that Walter Robillard, Esq. & PLS and/or Donald Wilson, PLS are listed as the authors of the secondary authorities noted above. Both individuals have been the preeminent professional surveyors with a national knowledge of boundary law for the past 40 years, and have been called as expert witnesses on cases of national importance or great monetary liability. Attorneys practicing real estate law will use these books as secondary authority on surveying questions in court cases. If you as a professional surveyor take exception to what these treatises say, you will need to provide the relevant legal evidence that these authorities are wrong.

2b. SENIOR RIGHTS

Senior rights is a rebuttable presumption that has higher weight as evidence than the junior deed and its contents or monuments. Senior rights do not apply within subdivisions or the public land survey system (PLSS). Those areas deal with discrepancies between record boundaries and original monuments through various forms of prorating. For example, a large parcel in 1913 is sold off over time, and each senior grantee receives the dimensions in his deed. The last piece left is the remainder (junior piece) and gets what is left over, be it more or less than what the junior deed says. When this situation arises it is the responsibility of the land surveyor to uncover the sequence of lot creation to uncover the junior title. Senior Rights is part of Vermont Statute Law, we will discover.

¹¹ *Boundary Control & Legal Principles, 6th Edition*, Robillard & Wilson, John Wiley & Sons, Inc., Hoboken, NJ, 2009, page 80

¹² *Evidence and Procedures for Boundary Location, 6th Edition*, Walter G. Robillard, Donald A. Wilson, PLS et al, John Wiley & Sons, Inc., Hoboken, NJ, 2011, Section 3-16, page 66

¹³ *Clark on Surveying and Boundaries, 7th edition* Walter G. Robillard, Esq., PLS et al, The Michie Co., Charlottesville, VA 2011, page 591

¹⁴ *Definitions of Surveying and Associated Terms*, (dictionary), ACSM. 2005 page 222

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I researched a number of secondary authorities to define the meaning and importance of senior rights. When you or I wish to express an opinion on a boundary law topic, we need to back up our opinion by citing statute or case law, or secondary authorities. What do these books have to say on the topic of senior rights?

Rebuttable presumptions constitute most of the rules of law that control the location of real property. The courts state that the presumption in order of importance of evidence in a resurvey is senior rights, monuments, bearing or distance, and area. Of course, the order of importance of each item can be rebutted by satisfactory proof to the contrary¹⁵.

Senior rights carry more legal weight than an original monument. Remember that land surveyors deal in evidence, juries establish facts from evidence, and only a court decision brings proof. Rebutting these presumptions is not just your opinion in your office. You must follow the presumptions of the law.

Depending on the evidence discovered, a conveyance is classified with respect to the adjoiner as being senior in rights, as being equal or simultaneous in rights, or a being junior in rights. An intent, gathered from the written evidence, cannot alter senior rights¹⁶.

Here the author places greater legal weight on the deed with senior rights than the intent of the adjoiner deed with junior rights. This is a fundamental rule for surveyors to follow in metes and bounds surveys, also called sequential conveyances (separated in time, even if for only 1 minute). In subdivisions, there are simultaneous conveyances; one lot owner does not have any greater right than the adjoiner, for purely internal lots. In subdivisions, you have a metes and bounds situation between the exterior lots of subdivisions and adjoining land that is exterior to the subdivision.

It is the basic premise of common-law principles that when there is a question as to against whom the amount of interest in a deed will be held, that when once that interest is determined, unless there is strong evidence to the contrary, it will be construed against the grantor¹⁷.

It is very interesting that in *Clark on Surveying and Boundaries*, there is no mention of senior rights. We have the same authors, but no mention of a very important element of metes and bounds surveys. The above written statement is at the root of the senior rights as a rebuttable presumption. This statement says that when the grantor sells off a part of his or her land to a grantee, the grantee receives all that was sold as written in the deed. The grantee has senior rights. The grantor gets the remainder, and has junior rights. For example, grantor A has a lot 200' square. He sells a 100'X200' parcel to the grantee B. It is later discovered that grantor A only has a parcel remaining of 95'X200'. Grantee B has senior rights and receives his full frontage. Grantor A has junior rights and receives the remainder.

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The dictionary quoted below provides definitions of surveying terms and is very useful in defining boundary surveying related terms. *Black's Legal Dictionary* provides similar definitions often referred to by attorneys.

*Rights, senior – The rights in a parcel of land, or several parcels, created in sequence with a lapse of time between them. A person conveying part of his or her land to another (senior) person cannot, at a later date, convey the same land to yet another (junior) person. A buyer (senior) has a right to all the land called for in a deed; the seller (junior) owns the remainder*¹⁸.

By reviewing the statements from a number of authoritative texts I can then come up with some guidelines for land surveyors on the meaning and importance of senior rights, as follows:

- Senior rights are more important than original monuments or deeds from junior title.
- Senior rights only apply in metes and bounds retracement surveys, with sequential conveyances, including the exterior lots of subdivisions. In the PLSS, native lands and lands occupied before the PLSS was established (Mexican, Spanish, and French) have senior rights. There can be senior rights within the sections for smaller parcels sold sequentially.
- Senior rights only apply when the grantor sells part of her parcel to the grantee, not in whole parcel conveyances. However, every parcel came from a larger parcel, and can contain ancient senior rights problems not related to the current grantor and grantee. There is no time limit to senior rights, unless adverse possession is a factor.
- The grantee of the parcel is the senior title and gets what is in her deed description
- The grantor of the parcel is the junior title and gets the remainder of the parcel (which can be larger or smaller than what is in the deed).

After compiling my list of elements for senior rights, I think I would provide a more complete explanation of it in each of the secondary authorities. It is a very important component of retracement surveys in metes and bounds states.

So, we are talking about Vermont case law, does Senior Rights apply in Vermont? Vermont has carved out its own interpretation of senior rights in a limited form. There are a number of court cases which address the matter of the grantee getting the benefit of the doubt in a deed intent. The limitation is that this rule only applies if the deed uncertainty does not favor either the grantor nor the grantee, as follows:

[HN5] In construing a deed, the court initially looks at the instrument itself, which is deemed to declare the understanding and intent of the parties. Where the language and intent are clear, a deed will be enforced as the conditions therein state. If the wording of the deed is subject to equally reasonable constructions, it must be construed against the grantor and in favor of the grantee. Merritt v. Merritt, 146 Vt. 246; 500 A.2d 534; 1985 Vt. LEXIS 354

2c. RULES OF CONSTRUCTION

In order to weigh the evidence that the land surveyor uses to prepare a professional boundary opinion, he or she must follow the law of the state, Vermont. Displayed below are the “Rules of Construction” weighting the types of evidence that we find in our boundary survey work, generally. When we look at statute or case law we will focus on this listing of evidence and whether Vermont laws uphold the list below in terms of their weighting.

- **Adverse Possession/Use.** There will be a presentation on adverse possession in Vermont on Friday, September 22, 2017. This rule of construction is higher than all others, so I will see you tomorrow for that presentation.
- **Senior Rights.** This rule is higher than all rules except adverse possession.
- **Intent of the Deed.** The intent of the deed can defeat the deed description, but there are certainly obstacles that must be overcome to meet that effort.
- **Deed Description and referenced deeds and maps.** We need to look at how referenced deeds are weighted in relation to the deed and also how unrecorded or unreferenced maps are weighted.
- **Natural Monuments**
- **Artificial Monuments**
- **Deed distances and directions**
- **Area**
- **Extrinsic, Parol Evidence**
- **Extrinsic, Survey Records, field measurements, coordinates**
- **Extrinsic, Corroborative Evidence (Unrecorded monuments)**

3. VERMONT STATUTE LAWS

The surveyor and the surveying technician wishing to become a licensed professional land surveyor need to be able to access a wealth of legal materials that are readily available if it is known how to access, read and interpret the findings. The Vermont Society of Land Surveyors (VSLs) has researched and published a helpful guide to Vermont laws as they pertain to land surveyors, entitled “Vermont Survey Law”¹⁵. This book was last published in 1994. We need to be able search beyond the confines of this book to make sure that we have up to date and relevant materials to answer our boundary related questions.

We must be able to access and check on state laws relating to:

- Professional Licensing Laws
- Federal Laws and Regulations
- State Statutes and Regulations
- Federal Case Law
- State Case Law

¹⁵ Butts, George F., Norton, Robert L., *Vermont Survey Law, 2nd Edition*, Vermont Society of Land Surveyors, 1994

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Where Do We Start Our Legal Research? Most land and property laws have been left to state laws, regulations and common law under the US Constitution. Present federal laws relating to boundaries are limited to federal land, reservations, public trust waters offshore, navigable rivers, and boundary disputes between states over their borders.

The diagrams shown below in Figures 1 and 2 give the general layout of the 3 branches of federal or state government and their relationship to the laws that apply to boundary determination and applying the law correctly.

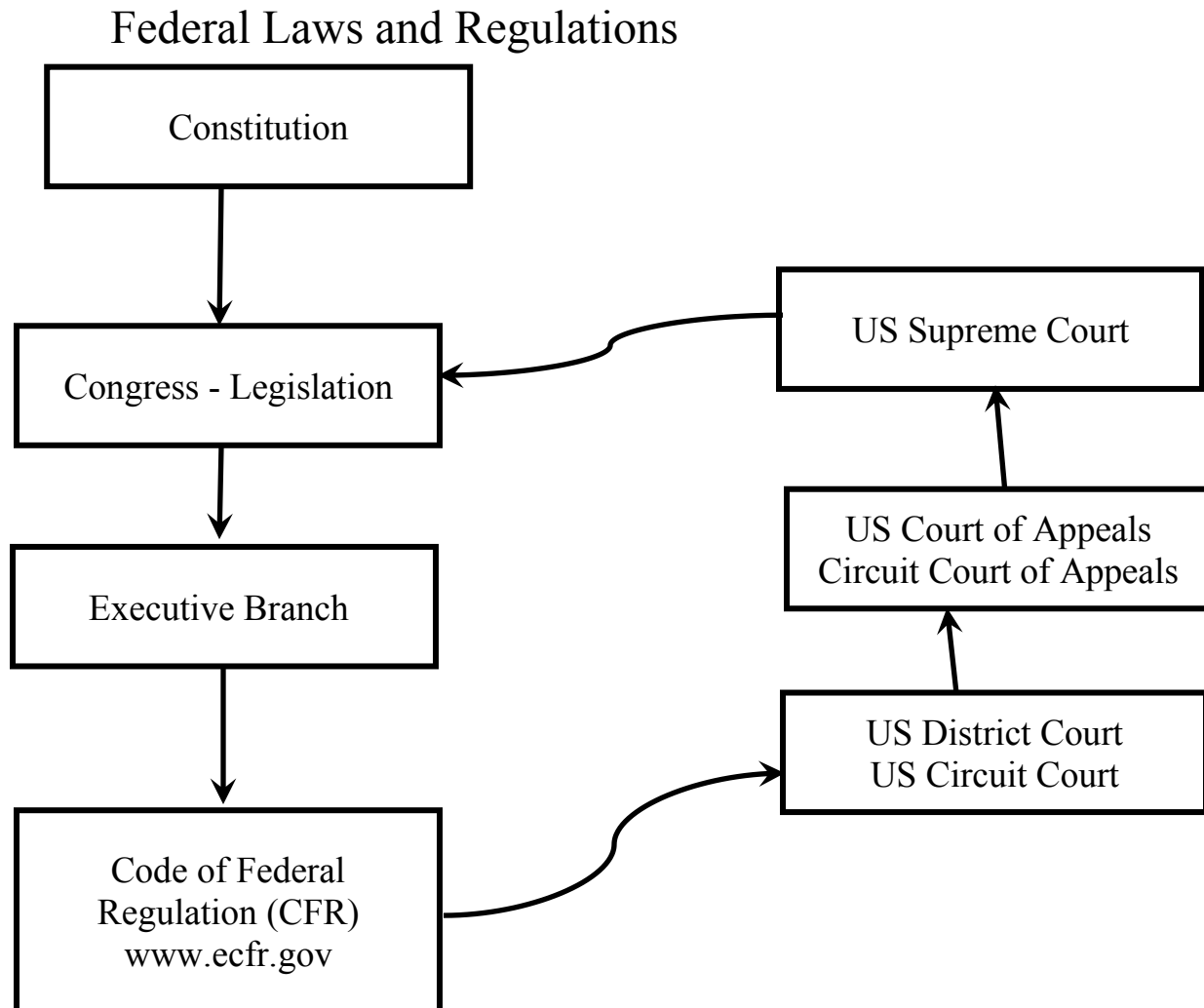


Figure 1: Federal institutions involved with creating and enforcing federal laws

In our political science class in high school or college we learned how the US Congress passes laws that are valid under the constitution and signed by the President. The Executive branch of government then provides details to the legislation and through a process creates regulations that are found in the Code of Federal Regulations (CFR). These regulations can be searched and read in the web portal called “e-CFR” which is found at www.ecfr.gov. Because we have very little

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in the way of federally related land boundaries in Vermont, this booklet will focus almost exclusively on Vermont laws and regulations. Corps of Engineer permit regulations in navigable waters are based on the Code of Federal Regulations, for example.

Because the federal government has the power to regulate navigable waters through the US Army Corps of Engineers (USACOE), they have established federal laws in title 21 to define and determine navigability, as shown below:

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.¹⁶

In Vermont, the US Army Corps of Engineers (USACOE) New England District has defined navigable waters as “Lake Champlain, Lake Memphremagog, many rivers (!)”¹⁷ Both the USACOE and the Bureau of Land Management have issued guidelines for surveyors to assist in determining the ordinary high water mark (OHWM). This is a legal boundary for regulation purposes that must be defined under Federal Law. The water boundary itself is defined under Vermont state laws.

¹⁶ Title 33, Part 329, §329.4 of the Code of Federal Regulations (CFR) defines navigable waters.

¹⁷ “USACOE, “What Are the Limits of the Corps Jurisdiction?”, USACOE New England District Pamphlet, http://www.nae.usace.army.mil/Portals/74/docs/regulatory/JurisdictionalLimits/Jurisdictional_Limits_Brochure.pdf

Vermont State Laws and Regulations

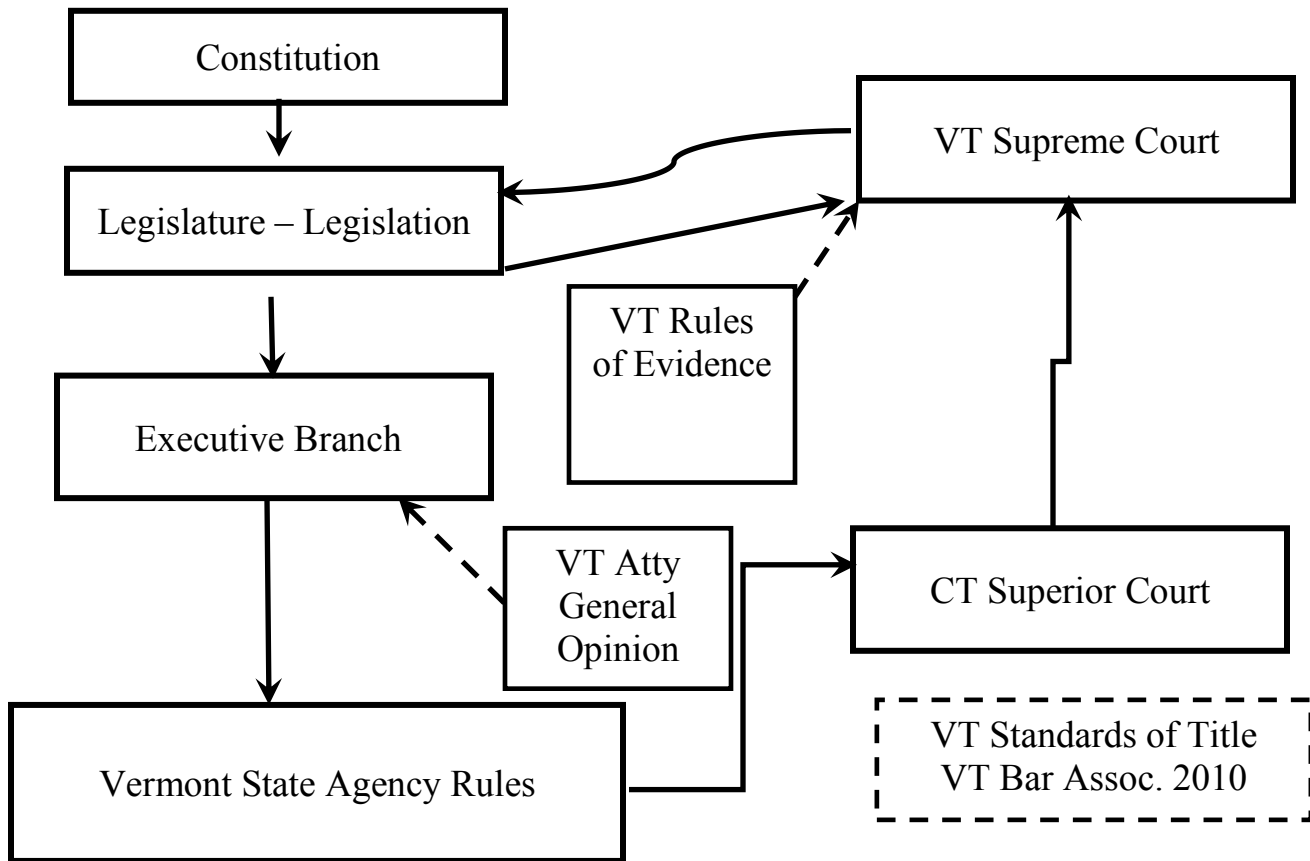


Figure 2: Vermont State laws and rules related to land surveying

All laws not reserved to the federal government under the US Constitution fall to the states to create laws to enforce, through a process like the federal government. The Vermont State Constitution dates to 1793. The legislature passes legislation that is hopefully constitutional, and is signed into law by the Governor. The legislation becomes part of the Vermont Statutes (<http://legislature.vermont.gov/statutes/search>), and is further defined in detail under the Vermont State Rules (<http://www.lexisnexis.com/hottopics/codeofvtrules/>) or individual state agency websites.

Any Vermont citizen who believes that state legislation is unconstitutional or believes that state regulations violate state statutes can bring a case to court. The first court of trial is the Vermont Superior Court (probably the Civil Division, there are others). If the trial results are not to the plaintiffs' or defendants' satisfaction, the case can be appealed to the Vermont Supreme Court, the highest (and only) court of appeal in the state. Many times, the Vermont Supreme Court provides details and interpretations to existing state laws that inform the land surveyor of interpretations of the law that were unclear in the published statute or regulation. If the Courts

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rule that a statute is unconstitutional, then the statute becomes void. The legislature can choose to rewrite the law so that it is in conformity with the state constitution.

The “Vermont Rules of Evidence” have been published and are available on line. These are considered one of a set of rules of the court developed and maintained by the VT Supreme Court. The Rules of Evidence are created to codify long agreed upon common law precedents so that they do not need to be cited over and over again as court cases.

The Vermont Attorney General periodically issues formal and informal legal opinions on legal topics of interest to the legislature and others.

An additional source of boundary related information that can be of interest to land surveyors are the “Vermont Standards of Title”¹⁸ authored by the Vermont Bar Association (VBA) under the authority of Vermont statute 27 V.S.A. §601 named “Marketable Record Title”. The VBA book “Vermont Standards of Title” contain a number of detailed answers to questions on when attorneys can pass title. There are some areas of interest to land surveyors who want to “know the law”. The VBA book is available online for download as an Adobe PDF file.

3a. FINDING VERMONT STATUTE LAW

Vermont, like all other states, has two sources of law. The first source of law is statutory law, which is created by the state legislature. The second source of law is called common law or case law, which is created through the decisions of the Vermont court system over time. Why are these laws important? As land surveyors, we are obligated to perform our work as a judge would rule acceptable under the law. We are also presumed to know the law when we produce a survey for a client. Therefore, Vermont law is important to us; we need to be able to find, read and understand the laws relevant to our land surveying work. There is no single source for this information. We remember, always, that we are not attorneys, and must not provide legal advice to our clients or the public.

Which source of law is most important to the land surveyor? Existing statutory law holds over case law, but is subordinate to the state constitution. The Vermont Supreme Court could rule a statute unconstitutional, and the Vermont General Assembly would have to revise the statutory law. Most (but not all) boundary related laws found in state laws and state statutes rather than the state constitution. We will look at state statutes first, based on “Vermont Boundary Law”¹⁹, to see what guidance it can provide in answering questions on boundary rules of construction in Vermont. However the selected statutes that are cited here will be inserted from the latest published statutes on line.

¹⁸ (<https://www.vtbar.org/UserFiles/files/For%20Attorneys/titlestandards.pdf>)

¹⁹ Butts, Ibid.

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Under Vermont Statutes, statute law takes priority over common law as noted below:

1 V.S.A. § 271. Common law adopted. So 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 accordingly.

Why do we need to look at common law for answers to boundary related issues? First, there may not be a state statute on the boundary related issue we are researching. An example of this is the relative weighting of monuments versus courses and distances. There is no state statute on this subject, so we must research the common-law court decisions on the subject²⁰. Second, there may be a statute relating to a boundary law issue as well as common-law that serves to clarify elements of the statutory law. VSA 27 §604²¹ contains the statutory language for the relationship between marketable title and adverse possession. But there is no definition of adverse possession. “Vermont Boundary Laws” contains many case references²² related to adverse possession, addressing all of the elements of adverse possession in many different situations. These court rulings are not meant to overrule the state statute but to explain how the statute is to be enforced in many different circumstances. However, there are situations where the court cases in “Vermont Boundary law” have been superseded by state statute or later Vermont Supreme Court rulings and no longer have value as current common law. Attorneys have the proper professional training and expertise to evaluate the laws from both sources to successfully present a case in which you are an expert witness or a defendant.

3a(1). VERMONT GENERAL STATUTES ANNOTATED, IN PRINT

The Vermont Statutes Annotated have traditionally been printed in hard copy books and found in libraries, state law libraries and law offices in Vermont. The statutes are organized into 33 Titles based on general subject groupings. The Vermont Statutes Annotated are now easily located on line.²³ There is still a question as to whether the printed statutes annotated contain a reference to court cases which impact particular statutes. This information is missing from the on line versions. Within the chapters are uniquely identified Sections that contain the actual text of the statute. The Section is sufficiently and completely identified by its Title and number. For example, Vermont Statute Annotated 27 V.S.A. §141 is found in Title 27 Properties, Section 141. The VSLs book “Vermont Boundary Law” is organized by Title and Section. There is a descriptive index by title and section with titles.

3a(2) GENERAL STATUTES ON LINE

This is now the computer age, and transparency in government dictates that rules and regulations be placed where the citizens of the state can access and study them as needed.

²⁰ Ibid.

²¹ <http://legislature.vermont.gov/statutes/section/27/005/00604>

²² Butts, Ibid.

²³ <http://www.lexisnexis.com/hottopics/vtstatutesconstctrules/>

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The location of these Vermont Statutes Annotated is found on the Vermont General Assembly Website <http://legislature.vermont.gov/statutes/>. On this website there is a blue panel on the top ribbon labeled “Vermont Laws”. Within that location, you can search the latest statutes by “Search”, or browse “Vermont Statutes at Lexis/Nexis”, as shown in Figure 3.

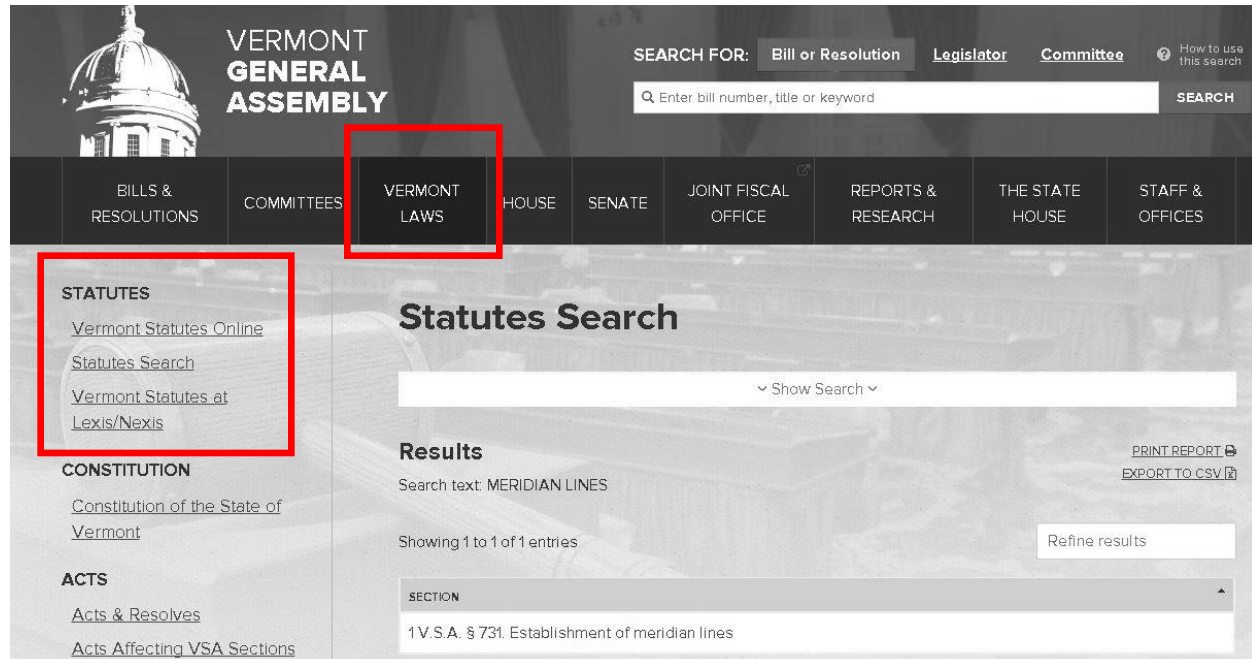


Figure 3: Vermont General Assembly Portal

In figures 4 and 5, searching by name “27 V.S.A. 141” from the book “Vermont Boundary Laws” reference returns the statute requested. The search was not successful without the quotation marks. Searching by text “acknowledgement” we find 14 results. Looking under the 14 results, the statute I wanted was not returned. The computer search returns the up to date language of the statute, which might have changed since the last “Vermont Boundary Law” booklet updates were published in 1998.

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STATUTES
[Vermont Statutes Online](#)
Statutes Search >
[Vermont Statutes at Lexis/Nexis](#)

CONSTITUTION
[Constitution of the State of Vermont](#)

ACTS
[Acts & Resolves](#)

Statutes Search

Search words
"27 V.S.A. 141"

Title (optional)

How to use this search

SEARCH

Figure 4: Vermont Statutes “Search” Proper Format for Statute Search

The Vermont Statutes Online

Title 27 : Property

Chapter 003 : Estates Of Homestead

Subchapter 002 : Conveyance Of Homestead

(Cite as: 27 V.S.A. § 141)

§ 141. Execution and acknowledgment of conveyance

(a) A homestead or an interest therein shall not be conveyed by the by way of mortgage for the purchase money thereof given at the time or husband joins in the execution and acknowledgment of such conveyance an interest therein, not so made and acknowledged, shall be inoperative homestead provided for in this chapter.

(b) When a mortgagee takes an accruing mortgage, the only debt to become a lien upon the property described therein shall be the debt existing at the time of its execution, and any subsequent direct indebtedness of the mortgagee; provided, that when the mortgage includes a homestead, husband of the mortgagor to the creation of such subsequent direct indebtedness

Figure 5: Vermont Statutes Search Results, text plus “cite as”.

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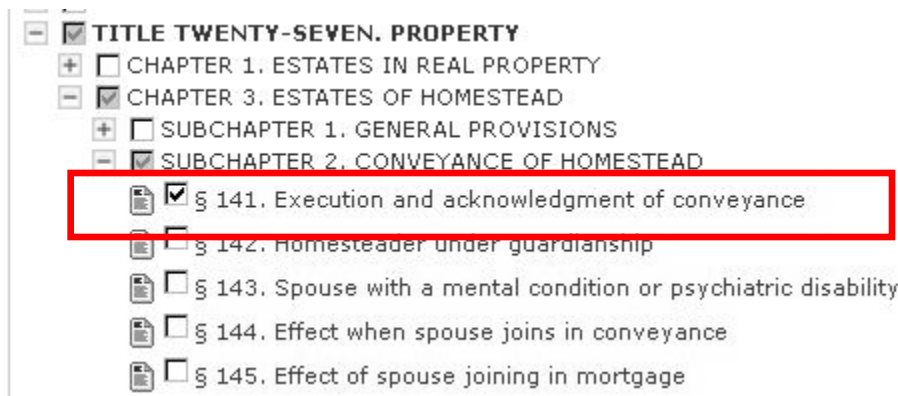


Figure 6: Vermont Statutes at Lexis/Lexis Results

If you know the name of the statute you can also “browse” the statutes by Title 27 “Property” Chapter 3 “Estates of Homestead” (that’s helpful!) and Subchapter 2 “Conveyance of Homestead”. When you open the text of the statute 27 V.S.A. §141, you will see the same text as in the search method. You can also select a Title and search within it just with the section number, which worked well.

3a(3). VERMONT STATUTES OF INTEREST

There are several state statutes in the VSLs “Vermont Survey Law” Book that are of interest to practicing land surveyors and technicians studying for the state portion of the Professional Surveyor (PS) examination. These are arranged under topics of the rules of construction previously listed.

- **Adverse Possession/Use.**

12 V.S.A. 501. Recovery of lands. 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. HISTORY: Amended, 1959, No. 218, § 6.

12 V.S.A. 502. Entry into houses or lands. A person having right or title of entry into houses or lands shall not enter after fifteen years from the time such right of entry accrues.

12 V.S.A. § 503 (2017) Covenant of seisin. Actions brought on a covenant of seisin in a deed of conveyance of land, shall be brought within fifteen years after the cause of actions accrues, and not after.

[Note: *Covenant of seisin refers to the title of a property, and is the principal and superior covenant to covenant for quiet enjoyment*²⁴.]

²⁴ <https://definitions.uslegal.com/c/covenant-of-seisin/>

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12 V.S.A. 504. Covenant of warranty. An action founded on covenant of warranty in a deed of land shall be brought only within eight years after a final decision against the title of the covenantor in such deed.

[Note: Definition of Covenant of Warranty. *It is an assurance by the covenantor that the covenantee, his/her heirs, and assigns can enjoy the estate conveyed without interruption by virtue of a paramount title, they cannot by force of a paramount title, be evicted from the land or be deprived of its possession, and that s/he will defend and protect the covenantee against the lawful claims of all persons thereafter asserted. It is a covenant to defend not merely the possession, but the land and the estate in it*²⁵.]

12 V.S.A. 505. Covenants other than warranty or seisin. An action founded on covenant, contained in a deed of lands, other than the covenants of warranty and seisin, shall be brought within eight years after the cause of action accrues, and not after.

27 V.S.A. 541. Deeds of lands held adversely. Deeds, leases and other conveyances of lands, duly executed, acknowledged and recorded, shall have the effect to convey such title therein as the grantor or lessor may have, notwithstanding any actual possession thereof by any other person claiming the same.

- **Senior Rights.**

1 V.S.A. §118. Grantor; grantee. "Grantor" may include every person by or from whom an estate or interest in land is passed in or by a deed. "Grantee" may include every person to whom such estate or interest passes.

27 V.S.A. §301. Manner of conveying. Conveyance of land or of an estate or interest therein may be made by deed executed by a person having authority to convey the same, or by his or her attorney, and acknowledged and recorded as provided in this chapter.

[Note: signature of grantee not required.]

27 V.S.A. 302. Effect of oral conveyance. Estates or interests in lands, created or conveyed without an instrument in writing shall have the effect of estates at will only. An estate or interest in lands shall not be assigned, granted, or surrendered unless by operation of law or by a writing signed by the grantor or his or her attorney.

- **Intent of the Deed.**

- **Deed Description and referenced deeds and maps.**

27 V.S.A. § 1401 Acceptance of survey plats; definition

(a) Each town clerk shall accept survey plats for filing and maintain files and indices to

²⁵ <https://definitions.uslegal.com/c/covenant-of-warranty/>

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files of survey plats in accordance with this chapter.

(b) For purposes of this chapter, "survey plat" shall mean a map or plan drawn to scale of one or more parcels, tracts or subdivisions of land, showing, but not limited to, boundaries, corners, markers, monuments, easements, and other rights.

27 V.S.A. § 341. Requirements generally; recording

(a) Deeds and other conveyances of lands, or of an estate or interest therein, shall be signed by the party granting the same and acknowledged by the grantor before a town clerk, notary public, master, county clerk, or judge or register of probate and recorded at length in the clerk's office of the town in which such lands lie. Such acknowledgement before a notary public shall be valid without an official seal being affixed to his or her signature.

(b) A deed or other conveyance of land which includes a reference to a survey prepared or revised after July 1, 1988 may be recorded only if it is accompanied by the survey to which it refers, or cites the volume and page in the land records showing where the survey has previously been recorded.

HISTORY: Amended 1967, No. 231 (Adj. Sess.), § 1, eff. Jan. 24, 1968; 1973, No. 249 (Adj. Sess.), § 84, eff. April 9, 1974; 1987, No. 220 (Adj. Sess.); 1993, No. 174 (Adj. Sess.), § 1; 1997, No. 86 (Adj. Sess.), § 1; 2003, No. 150 (Adj. Sess.), § 5; 2017, No. 24, § 3, eff. May 4, 2017.

- **Natural Monuments**
- **Artificial Monuments**
- **Deed distances and directions**
- **Area**
- **Parol Evidence**
- **Survey Records, field measurements, coordinates**
- **Unrecorded monuments**
- **Other**

12 V.S.A. § 1643. Expert witness. An expert witness may be asked to state his opinion based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which this opinion is based. On direct or cross-examination, such expert witness may be required to specify the data on which his opinion is based.

27 V.S.A. § 602. Unbroken chain; conditions and suspension.

(a) A person shall be deemed to hold an unbroken chain of title to an interest in real estate for purposes of this subchapter when the official public records disclose:

(1) A conveyance not less than 40 years in the past, properly executed and recorded according to law, which purports to create such interest in such person with nothing appearing of record during the 40-year period purporting to divest the person of the purported interest; or

(2) A conveyance not less than 40 years in the past, executed and recorded according to

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law, which purports to create such interest in some other person and other conveyances or events of record by which the purported interest has become vested in the person first referred to, with nothing appearing of record during the 40-year period purporting to divest the person first referred to of such interest.

(b) No absence, incapacity, disability, or lack of knowledge of any kind on the part of any person shall suspend the running of the 40-year period.

(c) For purposes of this section, "conveyance" means any deed, lease, decree, or other written instrument proper on its face to transfer title to an interest in real estate under the laws of this state, and also includes the transfer of an interest in real estate by inheritance or descent occasioned by death

3b. VERMONT STATE AGENCY RULES ON LINE

Under the authority of the Vermont Statutes Annotated, state agencies can write regulations in greater detail than is contained in the statutes, under the authority given in the state statutes. A full set of these regulations is now available on the internet from the state legislative website at <http://www.lexisnexis.com/hottopics/codeofvtrules/>. Individual agencies may have their regulations posted on the web. An example of the browse sheet at the web location is given in Figure 7, and extracted below:

BOARDCODE OF VERMONT RULES
Copyright (c) 2017 Matthew Bender & Company, Inc.
A member of the LexisNexis Group.
All rights reserved.
**** This document is current through July 18, 2017 ****
AGENCY 04. SECRETARY OF STATE
SUB-AGENCY 030. OFFICE OF PROFESSIONAL REGULATION
CHAPTER 130. ADMINISTRATIVE RULES OF THE BOARD OF LAND SURVEYORS
Go to the Vermont Administrative Code Archive Directory
CVR 04-030-130 (2017)
04 030 130. ADMINISTRATIVE RULES OF THE BOARD OF LAND SURVEYORS
Section 2.9 Experience.

The Board has determined the following areas to be most relevant to the current practice of the surveying profession. Although not all-inclusive, they will be used as a measure of experience, objectives, and goals to be accomplished through work experience.

(a) Research: A surveyor must have knowledge of legal principles and requirements applicable to surveying and land descriptions. A surveyor researches public and private land records (e.g., municipal clerks' land records and probate court records); federal, state, county, and municipal sources, and records of other surveyors to compile boundary evidence...

Section 5.3 (d) "Evidence" means: Information, observations, or objects that may aid the surveyor in locating the position of a boundary.

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www.lexisnexis.com/hottopics/codeofvtrules/

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- + ☐ AGENCY 01. GOVERNOR
- + ☐ AGENCY 03. OFFICE OF THE STATE TREASURER
- ☒ AGENCY 04. SECRETARY OF STATE
 - + ☐ SUB-AGENCY 000. GENERAL
 - + ☐ SUB-AGENCY 010. ELECTIONS DIVISION
 - + ☐ SUB-AGENCY 020. CORPORATIONS DIVISION
 - ☒ SUB-AGENCY 030. OFFICE OF PROFESSIONAL REGULATION
 - + ☐ CHAPTER 001. LICENSING FEE RULE
 - + ☐ CHAPTER 002. APPEALS PANEL
 - + ☐ CHAPTER 003. ADMINISTRATIVE RULES FOR PROCEDURES FOR PRELIMINARY SUNR
 - + ☐ CHAPTER 004. ADMINISTRATIVE RULES FOR PROCEDURES TO ENFORCE CHILD SUP OF PROFESSIONAL LICENSES
 - + ☐ CHAPTER 005. ADMINISTRATIVE RULES OF PRACTICE
 - + ☐ CHAPTER 006. ADMINISTRATIVE RULES FOR RESPIRATORY CARE PRACTITIONERS
 - + ☐ CHAPTER 007. ADMINISTRATIVE RULES FOR PROPERTY INSPECTORS
 - + ☐ CHAPTER 008. ADMINISTRATIVE RULES FOR CERTIFIED APPRENTICE ADDICTION PI ALCOHOL AND DRUG ABUSE ...
 - + ☐ CHAPTER 010. ADMINISTRATIVE RULES FOR THE BOARD OF PUBLIC ACCOUNTANCY
 - + ☐ CHAPTER 020. RULES OF THE BOARD OF ARCHITECTS
 - + ☐ CHAPTER 030. ADMINISTRATIVE RULES; BOARD OF BARBERS AND COSMETOLOGIS
 - + ☐ CHAPTER 040. BOXING CONTROL BOARD RULES
 - + ☐ CHAPTER 050. BOARD OF CHIROPRACTIC ADMINISTRATIVE RULES
 - + ☐ CHAPTER 070. ADMINISTRATIVE RULES FOR SOCIAL WORKERS
 - + ☐ CHAPTER 080. RULES OF THE BOARD OF DENTAL EXAMINERS
 - + ☐ CHAPTER 090. ADMINISTRATIVE RULES RELATING TO THE DIETITIAN ADVISORY CC
 - + ☐ CHAPTER 100. RULES RELATING TO PROFESSIONAL ENGINEERING
 - + ☐ CHAPTER 110. RULES OF THE BOARD OF FUNERAL SERVICE
 - + ☐ CHAPTER 111. ADMINISTRATIVE RULES FOR THE OPERATIONS OF CREMATORY ESTA
 - + ☐ CHAPTER 120. RULES FOR HEARING AID DISPENSERS
 - ☒ CHAPTER 130. ADMINISTRATIVE RULES OF THE BOARD OF LAND SURVEYORS
 - ☒ 04 030 130. ADMINISTRATIVE RULES OF THE BOARD OF LAND SURVEYORS
 - ☒ CHAPTER 131. CODE OF ETHICS - BOARD OF LAND SURVEYORS
 - ☒ 04-030-131 Code of Ethics - Board of Land Surveyors

Figure 7: Location of Board of Land Surveyor Administrative Rules

3c. THE VERMONT RULES OF EVIDENCE

The Vermont Rules of Evidence have traditionally been found in common-law, which is case law. The courts would look for precedence set in previous court decisions as it related to admissibility, effect and relative importance of the evidence produced. Because a number of evidentiary rules have long been accepted by the courts, an effort has been made to codify the court accepted rules into a separate set of published rules that will be accepted by all participants in legal proceedings. These rules are written under the authority of the Vermont Supreme Court and used by attorneys and judges, not necessarily surveyors. Many of the rules that apply to surveyors are focused on courtroom testimony. However, several of the rules of evidence apply to the work we do and should guide us in how we conduct our surveying research and work. The following comments and excerpts are from the Vermont Code of Evidence, effective August 1, 2015 which is available on line²⁶, in the same location as Vermont Statutes on lexis/Nexis

Remember that the Vermont Rules of Evidence were created by the Vermont court for attorneys to use in their professional courtroom work in order to introduce relevant, material and admissible evidence. As professional land surveyors, we are obligated to know the law and act accordingly, but we are not practicing law. The land surveyor collects and evaluates relevant and material evidence. It is up to the attorney to introduce admissible evidence under the Vermont Rules of Evidence or common law precedent. There is pertinent guidance on how expert witnesses are utilized in a court case. There is no relevant rule that directly applies to the boundary rules of construction. Rules 101 to 402 below concern the definition of relevant evidence, and the presumptions applied to the evidence. Rules 702 to 705 concern the expert testimony of a professional land surveyor. Rules 802 to 803 relate to the exceptions to the hearsay rule, which affects the evidence that we use and analyze. Rule 902 explains when evidence can be produced without any supporting testimony. Certified copies of documents and notarized documents are mentioned. Rules 1001, 1003 and 1005 concern the definition of original and copies of documents, recordings, photographs and computer data. In the types of evidence noted, evidence needs to be relevant and produced from a chain of custody. Below are listed the rules of construction and any Vermont Rules of Evidence that apply.

Rule 201. Judicial Notice of Adjudicative Facts

- (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

²⁶ <http://www.lexisnexis.com/hottopics/vtstatutesconstctrules/>

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Rule 301. Presumptions in Civil Cases

(a) Effect. In civil actions and proceedings, except as otherwise provided by law, a presumption imposes on the party against whom it operates the burden of producing evidence sufficient to support a finding that the presumed fact does not exist, but a presumption does not shift to such party the burden of persuading the trier of fact that the presumed fact does not exist.

(b) Prima facie evidence. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.

(c) Submission to the jury and instructions.

(1) If the evidence of the basic fact is such that no reasonable juror could find the nonexistence of that fact and if the party against whom the presumption operates has not met the production burden imposed on him by subdivision (a) of this rule, the court shall direct the jury to find the existence of the presumed fact.

(2) If the evidence of the basic fact is sufficient to support a finding of the existence of that fact and if the party against whom the presumption operates has not met his production burden, the court shall submit the question of the existence of the basic fact to the jury and shall direct the jury to find the existence of the presumed fact if it finds the existence of the basic fact.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute or by these rules or by other rules prescribed by the Supreme Court. Evidence which is not relevant is not admissible.

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Factual Bases of Opinion Testimony by Experts

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.

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Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12) or a statute or rule permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence 20 years or more whose authenticity is established.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and

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reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. (A) A document purporting to bear the signature in his official capacity of an officer or employee of the State of Vermont, or of any political subdivision, department, or agency thereof. (B) A document purporting to bear the signature in his official capacity of an officer or employee of any other entity included in paragraph (1) hereof, if accompanied by a certificate under oath of such person that he acts in that capacity or if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or

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similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

3d. VERMONT ATTORNEY GENERAL OPINIONS

The Vermont Attorney General periodically issues formal and informal legal opinions on legal topics of interest to the legislature and others. All Attorney General Opinions starting from the year 2000 are available online²⁷.

Our office prepares perhaps a half dozen formal legal opinions per year on a variety of topics, usually when a state agency or the Legislature has requested an opinion and where it seems likely that a formal written document might help resolve a major dispute or uncertainty in the law. Due to budget limitations, the Office no longer publishes these opinions in book form, as was done many years ago. However, the state law library still retains the volumes of bound opinions from the early 1970s and before.

The Attorney General Opinions that have been made available on line do not cover any topics of interest to real estate or boundary law. The opinions given in the "Vermont Boundary law" book are therefore up to date on topics of interest to land surveyors. Two opinions that apply to boundary rules of construction are as follows:

1940 OPINION OF THE ATTORNEY GENERAL NO. 363

*"Metes and Bounds" means boundary line or limit of a tract, which boundary may be pointed out and ascertained by rivers and objects, either natural or artificial, which are permanent in character and erection, and so situated with reference to tract to be described that they may be conveniently used for the purpose of indicating its extent.*²⁸

²⁷ <http://ago.vermont.gov/focus/help-faqs/access-attorney-general-opinion.php>

²⁸ Buttes, *ibid.* page 222.

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1973 OPINION OF THE ATTORNEY GENERAL NO. 38

This opinion basically says that the writing of deed descriptions is not restricted to professional land surveyors. There is no state statute that addresses deed restrictions. It also states *there is a large body of law and custom to demonstrate that a survey description is not an essential element of a deed. For example, a description in a deed may contain nothing more than the lot number designated in the original town survey (Neill v. Ward, 103 VT 117), or a recorded subdivision plan (D'Orazio v. Pashby, 102 VT 480). Another common practice is to refer back to descriptions found in previous deeds relating to the same property.*²⁹

3e. VERMONT STANDARDS OF TITLE

Standards of title are created in states to address long agreed upon acceptable standards for attorneys to rely on in order to pass title in land transactions. These standards are accepted by the courts of the State of Vermont. Standards of title, like surveying standards established by the Board of Land Surveyors, create a minimum standard for professional practice. Violations of standards can lead to negligence suits against the professional. Real estate attorneys are concerned with title to the land, land surveyors are concerned with location of the title on the land. Since we read deed descriptions as a necessary part of land research and arriving at the professional boundary opinion, there are some important title standards that affect how we read deeds and their descriptions.

The first version of the Vermont Standards of Title was adopted by the Vermont Bar Association in 1999. The latest version I found on line was from September, 2010³⁰. These standards cover a wide range of complex title issues for individuals, heirs and corporations. The attorney is bound to follow Vermont Marketable Title Act (27 V.S.A. § 601 et seq as well as the Vermont Standards of title. The attorney is responsible for researching all the complexities of title for his or her client. We are focusing only on some basic rules that might affect how we view the deeds we are researching.

STANDARD 1.3 DEFINITION OF MARKETABLE TITLE

A marketable title is one that may be freely made the subject of resale. *Krulee v. Huyck & Sons*, 121 VT 304 (1959) A marketable title is one that allows an owner to hold the land free from the probable claim of another. It is a title which would allow the holder of the land if he or she wanted to sell, to transfer a title which is reasonably free from doubt. A title is marketable when its validity cannot be said to involve a question of fact and is good as a matter of law. *First National Bank v. Laperle*, 117 VT 144, 157 (1952).

STANDARD 2.1 PERIOD OF SEARCH

A Title Search covering a period to an instrument recorded at least 40 years is sufficient for a title purview of the Marketable Record Title Act (27 V.S.A., Ch 5), provided that the basis thereof is a deed, a deed under some governmental authority, a probate proceeding in which the property is reasonably identified or described, a

²⁹ Ibid. pages 223-224

³⁰ <https://www.vtbar.org/UserFiles/files/For%20Attorneys/titlestandards.pdf>

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mortgage deed subsequently foreclosed, or any other instrument which shows of record reasonable probability of title and possession thereunder, provided further, that none of the title instruments within that period actually searched discloses any title defects or outstanding interests in third parties, in which case, the search should be extended beyond the 40-year period in order to determine the existence and validity of such defects or interests at the time of the search.

Comment 1. Quit Claim deeds have been commonly used as an instrument of conveyance throughout the history of conveyancing in Vermont, and therefore may serve as the root deed of a search. Nevertheless, the title examiner should be aware that a Quit Claim deed is also used as an instrument of release and does not therefore necessarily purport to convey any interest whatsoever. The examiner should be conscious of the circumstances surrounding the Quit Claim deed apparent from the records and must understand that it may be appropriate to continue the search to an earlier deed if the circumstances warrant.

STANDARD 2.2 THE CONCEPT OF THE CHAIN OF TITLE AND ITS RELATIONSHIP TO THE RULE OF RECORD NOTICE AND THE SCOPE OF THE TITLE SEARCHER'S OBLIGATION

The "Chain of Title" concept is a principle of common law, developed to protect subsequent parties from being charged with constructive notice of the contents of those recorded instruments which a title searcher would not be expected to discover by the customary search of the general grantor-grantee indices and other appropriate indices and diligent inquiry of the Town Clerk as to matters left for recording, but not indexed. Notwithstanding the holding of Haner v. Bruce (146 Vt. 262), it is not reasonable or customary to examine the indices of the individual record books, where a general index is maintained. This concept limits the duties and liability of a title examiner, to a search of those documents which appear not only in the appropriate land record indices, but also in the chain of title to the particular parcel being searched. A subsequent party in the chain of title will not be charged with notice of an instrument which is outside the chain of title.

Comment 6. Where an owner divides a tract of land, and, in conveying one portion of it, creates in favor of that grantee an easement or other right or interest over the portion retained, subsequent purchasers of such retained portion are charged with constructive notice of the existence of such easement or other right or interest, because the first recorded deed, even though conveying other land, is in the chain of title to the common grantor's remaining land. Therefore, the lack of actual notice or knowledge on the part of the subsequent purchaser to the existence of the easement or the fact that the deed stated that remaining property was free and clear of all encumbrances, are all immaterial.

Comment 7. Because of these rules, the concept of chain of title and the corresponding duty of a title examiner, are not limited to transactions which involve the same land in which an interest is then being acquired but can and do extend to those transactions of the same grantor but involving other land.

Comment 8. There is an additional circumstance which the title examiner must consider. It is derived from the rule of law announced in the line of cases that includes Clearwater Realty Company v. Bouchard, 146 Vt. 359 (1985), Crabbe & Sweeney v. Veve

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Associates, 150 Vt. 53 (1988), and Lalonde v. Renaud, 157 Vt. 281 (1989) and the applicable provisions of the Vermont Marketable Title Act. The rule of law in the Clearwater line of cases may be stated concisely as -- rights of way, easements, and the designation of areas as common space on a recorded plan used as the basis of the description in connection with the conveyance of one or more of the lots shown on the plan vests rights in the grantee and the grantee's successors in title rights in those areas designated on the plan as rights of way, easements, and common space. In deciding the Clearwater line of cases, the issue of the provisions of the Marketable Title Act has not arisen. The provisions of 27 V.S.A. 604 exempt easements granted, reserved or retained in a deed from the provisions of the Marketable Title Act that would otherwise extinguish such rights, and therefore the rights of way shown on very old plans that are outside the chain of title may still be encumbrances on the title.

STANDARD 2.3 EFFECT OF THE RECORDING OF INSTRUMENTS CLAIMING AN INTEREST IN REAL ESTATE

When an instrument is recorded which claims an interest in real estate and the claim is one which is authorized by law, then the examiner is on inquiry notice to determine the basis of the claim and the impact of the claim on the title to the interest being searched. If, however, the claim is one not authorized by law, then the recorded notice of the claim is not effective to encumber title to the property in which the interest is claimed.

Comment 1. Certain claims by strangers to the chain of title are authorized by law such as a notice of claim under 27 V.S.A. 605, mechanics liens (9 V.S.A. Chap. 51); judgment liens (12 V.S.A. Chap. 113); pre-judgment attachments (12 V.S.A. Chap. 123 and V.R. Civ. P. 4.1); and, a claim of adverse possession documented in the land records.

STANDARD 2.5 PRIORITY OF CONVEYANCES

Vermont is a "notice" state. Delivery of a deed, a mortgage or other conveyance of land in fee simple or for term of life, or a lease for more than one year to a grantee who has no notice of a prior conveyance to another, establishes priority in the grantee without notice. The instrument constitutes constructive notice as of the time it is recorded.

Comment 1. Vermont is a pure "notice" state, not a "race-notice" state, because a claimant does not have to record to perfect a claim, nor win a race to the land records in addition to giving notice nor even record at all, to have good title. Hemingway v. Shatney, 152 Vt. 600, 603-4 (1989). Under Hemingway, Vermont's core recording provision 27 V.S.A. §342 is merely a means, albeit a powerful one, of giving constructive notice, and so establishing priority, of one's claim against the world.

STANDARD 2.6 TIME WHEN A CONVEYANCE IS CONSIDERED AS PROPERLY "RECORDED"

An instrument is considered to be recorded and effective against subsequent parties from the time it is delivered to the town clerk, even though there is (1) a delay in the transcribing or indexing; (2) a complete failure to transcribe or index; or (3) an error by the town clerk in the transcribing or indexing of the same.

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Comment 1. The duties of a town clerk in reference to the recording of instruments affecting the title to real estate are set forth in Title 24 § 1154, § 1159, and § 1161. However, the proper recording of such an instrument by the town clerk is constructive notice notwithstanding clerical errors attributable by the town clerk in indexing the instrument in the town land records. Haner v. Bruce, 146 Vt. 262, 264. The indices which the town clerk is required to maintain are not part of the record, and thus the complete failure to index a recorded instrument does not invalidate the recording.

Comment 2. As a matter of good practice, a title examiner should conduct a follow-up search to verify recording of instruments previously delivered for recording.

STANDARD 4.1 LIMITATIONS ON THE USE BY GRANTOR OF CORRECTIVE DEEDS

A grantor who has conveyed by an effective, unambiguous deed cannot, by executing a subsequent deed, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise diminish the grant of the prior deed, even though the corrective deed purports to correct or modify the prior deed. Recording of a deed that violates this standard will not impair the marketability of the title established by the prior deed.

Comment 1. A grantor may not undo or qualify an otherwise valid conveyance in order to correct or modify the prior valid conveyance unilaterally. To effect any change of the type described in this standard, the original grantee or his or her successor should convey back to the grantor of the prior deed and the grantor of the prior deed should then execute a corrective deed effecting the change which should then be recorded.

STANDARD 7.1 GRANTEES

An instrument will not operate as a conveyance of the legal title to an interest in land unless it designates an individual or entity authorized by statute as grantee who is (a) in existence and (b) has the capacity to take and hold the legal title to land at the time of the conveyance. A deed will not pass the legal title if the grantee is: (1) designated in the alternate, (2) unborn, (3) a deceased person or (4) any other entity not in existence.

Comment 2. If a deed does not pass legal title to the purported grantee or grantees, the legal title remains in the grantor.

STANDARD 8.1 NAME VARIANCES

It should be manifest from the face of the document that the grantor is the same as the grantee in the instrument conveying title to the grantor. Generally, this means that the name of the grantor will be the same as the prior grantee; or, a subsequent deed contains a recital that the grantor in such deed and the grantee in a prior deed are the same person. Notwithstanding, a greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the land records which raise reasonable doubt as to the identity of the parties.

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STANDARD 9.1 EXECUTION AND ACKNOWLEDGMENT

Deeds and other conveyances of an interest in lands must be signed by the party or parties granting the interest, acknowledged by the grantor, as provided by statute, and recorded in the clerk's office of the town in which such lands are located.

Comment 1. The requirements for execution and acknowledgment are set forth in 27 V.S.A § 341 and 342.

STANDARD 11.1 DELIVERY

Delivery of instruments which are witnessed, acknowledged and recorded in accordance with Vermont law, is presumed in all cases. Specifically, delay in recording, with or without record evidence of the intervening death of the grantor, does not of itself rebut the presumption.

Comment 1. A transfer of title to real estate, by deed, requires a delivery of the deed. The fact of execution of the deed does not suffice to transfer title; and recording of the deed is not necessary to transfer title, only to give notice of the transfer to third parties. A potential problem arises in that, unlike execution, which requires the presence of a witness and notary, or recording, which requires the Town Clerk, delivery may take place in private, with only the parties present. Furthermore, the delivery of the deed must be with the intent to make a present transfer, rather than in any sort of escrow, loan, fraud on creditors or spouses, etc. Delivery is, therefore, far more difficult of proof than either execution or recording, even though it is the fact crucial to the transfer. In an attempt to avoid that difficulty of proof especially in the absence of the original parties, Vermont law provides that a presumption of delivery of the deed arises when a deed is properly executed and recorded. This presumption may fly in the face of facts; for instance, a seller might execute his deed and hold it pending receipt of payment, and the "buyer" might steal the executed deed and record it without the consent of the seller. The presumption is not, therefore, conclusive.

CONCLUSION OF STATUTORY LAW

The list of statutes related to boundary law in the VSLS “Vermont Boundary Law” book may not be complete, due to changes since 2000. It is always a good idea to search the Vermont Statutes for the latest version of pertinent laws in Vermont. Also you can search the statutes by key words to find statutes covering a topic. Using the VSLS “Vermont Boundary Law” book, you can search for the unique section numbers found in the book directly. If a boundary law issue cannot be resolved in the Vermont General Statutes, or the other repositories of rules and standards, then common law must be researched to try to find guidance on that issue, which is the second part of the VSLS “Vermont Boundary Law” book, and the second part of this presentation.

4. VERMONT CASE LAW

Where the Vermont Statutes are silent, or do not clearly answer the circumstances of a boundary law question, the land surveyor must research the court cases related to the subject to find guidance³¹. Essentially, this is the *law of precedent*³² and the courts follow the doctrine of *stare decisis*³³.

The court cases published generally, and particularly in the VSLs book “Vermont Boundary Law” are appellate cases. This means that the court cases are a product of an appeal process mentioned earlier, from the Vermont Superior Court (trial court) to the Vermont Supreme Court. Arguments at the appellate level are appeals over the law, not arguments over the facts. The trial court has broad discretion in applying the law to the facts, and facts are seldom allowed for reconsideration at the appellate level. Since Vermont Superior Court Cases are not published, indexed and analyzed in book form or on the internet, the facts of trial court cases on appeal may not be easily reviewed in any detail by land surveyors except as they touch on the legal dispute being appealed.

We, as land surveyors, know that our responsibility is to find and weigh evidence to express a boundary opinion in a manner that a judge and jury would uphold. There is always the chance we will be an expert witness testifying about our work or defending our work, under the guidance of an attorney. It is up to the judge or jury to accept our evidence and opinion as a fact, and render a decision applying the law to the facts in the case. We weigh the laws and rules of construction, learned from state law, state case law, and our boundary law textbooks, to express a boundary opinion. We will need to research and understand the appellate case law to find necessary boundary law standards that the courts have found acceptable.

A significant portion of the VSLs “Vermont Boundary Law” book consists of short descriptions of the outcome of state court cases related to boundary law in Vermont. How did these court cases and not others find their way into this boundary law reference? In the forward to the second addition it states “while an effort was made to include all items of interest, some items have been omitted due to the imperfect judgment of the compilers.”³⁴ There might be problems with indexing the cases by subject or keyword. Since the VSLs “Vermont Boundary Law” book was published in 1994, updated to 1998; it is missing any recent case law that might have overturned or modified the rulings found in the book. There have been 171 decisions related to “boundary” and 15 related to “monument” since January 1, 2000. There have been 231 Vermont Superior Court rulings related to “boundary” and 12 related to “monument” during that same time period. Finally, legal references utilized to collect the case abstracts are considered a secondary source of legal information. The information found should be considered general in nature and the land surveyor should avoid making rules of law based solely on

³¹ Ahlstrom, DA, JD, “Legal Research”, *Legal Topics in Boundary Surveying, A Compendium*, ACSM, 1990, pages 89-94

³² Ibid., page 94, A previously decided case which is recognized as authority for the disposition of future cases. Griffins, *Law Dictionary*, 78 (1975).

³³ Ibid., page 94, To stand by that which was decided. Courts are “slow to interfere with principles announced in former decisions...even though they would decide otherwise were the question a new one. Grifis, *Law Dictionary*, (1975)

³⁴ Butts, Ibid. page ix

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encyclopedia research³⁵. The land surveyor must be able to find and study actual court cases. The “Vermont Boundary Law” book provides a citation at the bottom of each case summary, such as “Neill v. Ward, 103 VT 117 (1930)”³⁶. In the next section, we will learn how to understand the terminology of the court cases reference in order to find the court case.

4a. FINDING VERMONT CASE LAW ³⁷

Under the system of published hard copy court decision reference books, court cases are compiled in the national Reporter system, for which there are 7 regional reporters of appellate cases. The *Atlantic Reporter* (cited as A., A.2d, A.3d) reports appellate decisions from Vermont as well as 8 other Northeastern states except New York. Each case is given a title which is generally “plaintiff v. defendant”. The court case is placed in a volume and starts at a page. In the legal case “CAMERCON’S RUN, LLP v. Roberta FROHOCK and Todd Buick, 9 A.3d 664 (2010), 2010 VT 60”, the court case would be found in the *Atlantic Reporter Third Edition*, Volume 9, page 664. The court case is also to be found in Volume 2010, page 60 of the *Vermont Reports*³⁸. Cases are published in chronological order, which makes it difficult to directly open the *Reporter* and search for something. Research by subject matter takes place using a *Digest*, which provides subject indexed court cases for research by subject. In printed form the *Atlantic Digest* includes Vermont and surrounding states. Attorneys have these resources in their office; they can also be found in the state law libraries at every state courthouse³⁹.

4b. RESEARCHING CASE LAW ON LINE IN VERMONT

In the era of the internet, legal research is now commonly performed using two legal research products, *Westlaw*⁴⁰ and *Lexis/Nexis*⁴¹. These software products are costly to purchase and maintain, but required for legal research for a law firm. As a registered student at the University of Vermont you can access *Lexis/Nexis* and *Westlaw* free through the university library on their website by signing in using your email ID and password. I am not seeing these resources offered through the state library or community college libraries. All Vermont courts have a law library which is open to all. These law libraries all have *Westlaw* and/or *Lexis/Nexis* and the law library staff can show you how to find a case in the software. We will perform a piece of research using this product. There is a free internet resource source that can retrieve court cases and citations, although it is not authoritative, called “Google Scholar”. A link to this website is located in the VSLS web page in “research-resources”. This site appears to go back only as far as volume 117 of Vermont Supreme Court Opinions. Finally, there is a free site called “Ravel Law” which is a partnership with Harvard law School and contains all Vermont Supreme Court cases from 1826.

³⁵ Ibid., page 89.

³⁶ Butts, *ibid.* page 186

³⁷ <http://libguides.vermontlaw.edu/vermontlawguide/vermontcourtdecisions> (excellent resource for all Vermont law)

³⁸ *Vermont Reports*. St. Albans, VT: J.Spooner, (1829-)

³⁹ <http://www.jud.ct.gov/lawlib/staff.htm>, for locations, hours generally 9am-5pm.

⁴⁰ Web2.westlaw.com

⁴¹ www.lexisnexis.com

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In the VSLS “Vermont Boundary Law” book, the case “Barr v. Guay 125 VT 112” is found on page 198 as follows:

*Markings on the ground which are not set out in the deed are not controlling as to the location of the boundaries. Markings on the ground which are not set out in the deed may have some evidential effect to establish acquiescence in a particular line. A boundary fixed by the court where the location of such line is disputed must be so definitive that it can be located on the ground with precision.*⁴²

This court case is listed in the VSLS “Vermont Boundary Law book” in chronological order with no subject heading apparent. The book index lists subject references for both statute law and case law. For page 198, in which 125 VT 112 resides, the following subjects are found:

- Adverse Possession 60 entries
- Boundaries 60 entries
- Deeds 60 entries
- Easements 60 entries
- Encumbrance 11 entries
- Evidence 21 entries
- Monuments 33 entries
- Rules of Construction 25 entries

Since there are 6 cases listed on page 198 it is hard to pin down the subject matter of a particular case. Having found this case in our VSLS “Vermont Boundary Law” Book, we want to find out the details of the case which might provide us some background on a survey we are working on. Google has a special search function for court cases called “Google Scholar”, which you can use for free. Let us search for the case “Barr v. Guay, 125 VT 1 (1965)

⁴² Butts, *ibid.* page 198

4b(1). RESEARCHING CASE LAW USING “GOOGLE SCHOLAR”



Figure 8: Open Google Scholar; check the circle for case law, there is an advance search option (not shown) which allows the search of Vermonts. <Search>

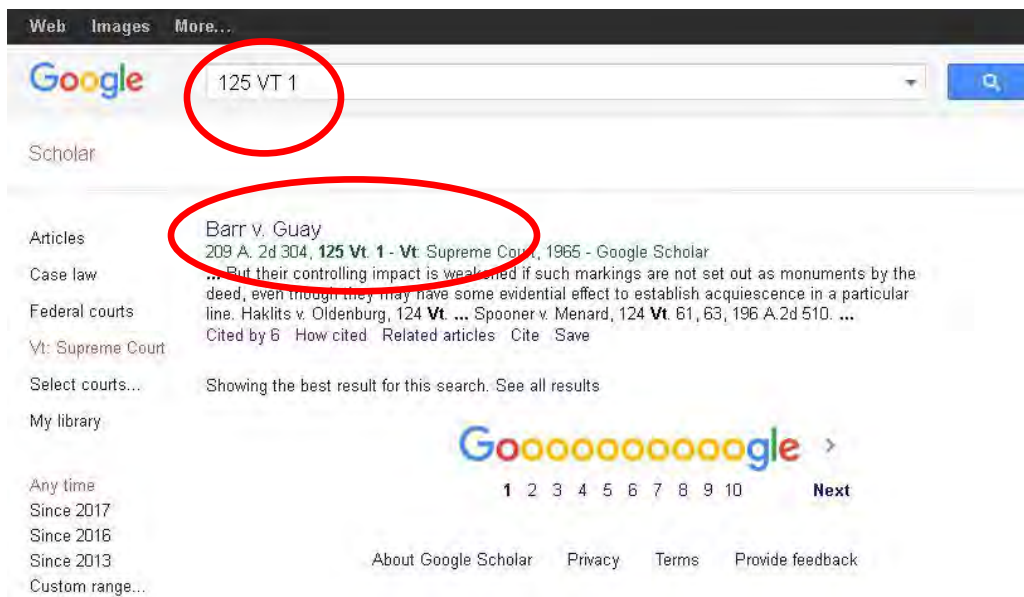


Figure 9: The court case is found, advanced search boxes for citation details and official citation language that can be copy pasted appear for further searching and filtering of responses.

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The descriptive language in the VSLs “Vermont Boundary Law” book does not explain that the trial court’s attempt to fix a boundary line failed. The Vermont Supreme Court remanded the case back to the trial court. For the court to fix a division line it must satisfy two criteria: the line must be “justifiable at law under the evidence and so definite it can be located on the ground with precision”. The given printed quotation concerned the second criteria, but the court actually failed under the first criteria. Like the two surveyors who spoke for the plaintiff and defendant, and whose professional opinions were thrown out by the court, the trial judge did not base his division line on legally acceptable evidence. This might be a “senior rights” conveyance case, by the way, and senior rights is not in the subject index. The lesson we can take from this case as land surveyors is to follow the two criteria spelled out for the trial judge to follow

Web Images More...

Barr v. Guay, 209 A. 2d 304 - Vt: Supreme Court 1965

Read How cited Search

How this document has been cited

- “To that end there must be a remand for further findings, with the taking of additional evidence, if necessary, so that a decree may be drawn setting forth with certainty the bounds of defendants' lot.”
- in *Montgomery v. Branon*, 1965
- “An owner who sells a parcel of land at one time and at a later time sells an adjoining parcel, can, of course, include in the later conveyance only what he has not already conveyed.”
- in *Hadlock v. Poutre*, 1980
- “Regardless of the descriptions and boundaries that may be described in the deed from King to Pettengill, the grantor, King's, power to convey was confined to what he then owned.”
- in *Vermont Shopping Center, Inc. v. Pettengill*, 1965
- “Although the findings contain strong inferences that the boundary is found to be where the plaintiffs claim it to be, its location on the ground is never set out.”
- in *Fox v. Lakin*, 1970

Figure 10: You can click on “citations” to see who cited the court case and “how cited” for what reasons. You can open and read the court case that cited your court case. What is lacking is any professional determination that the cite was positive (setting precedent) or negative (indicating bad law in the case).

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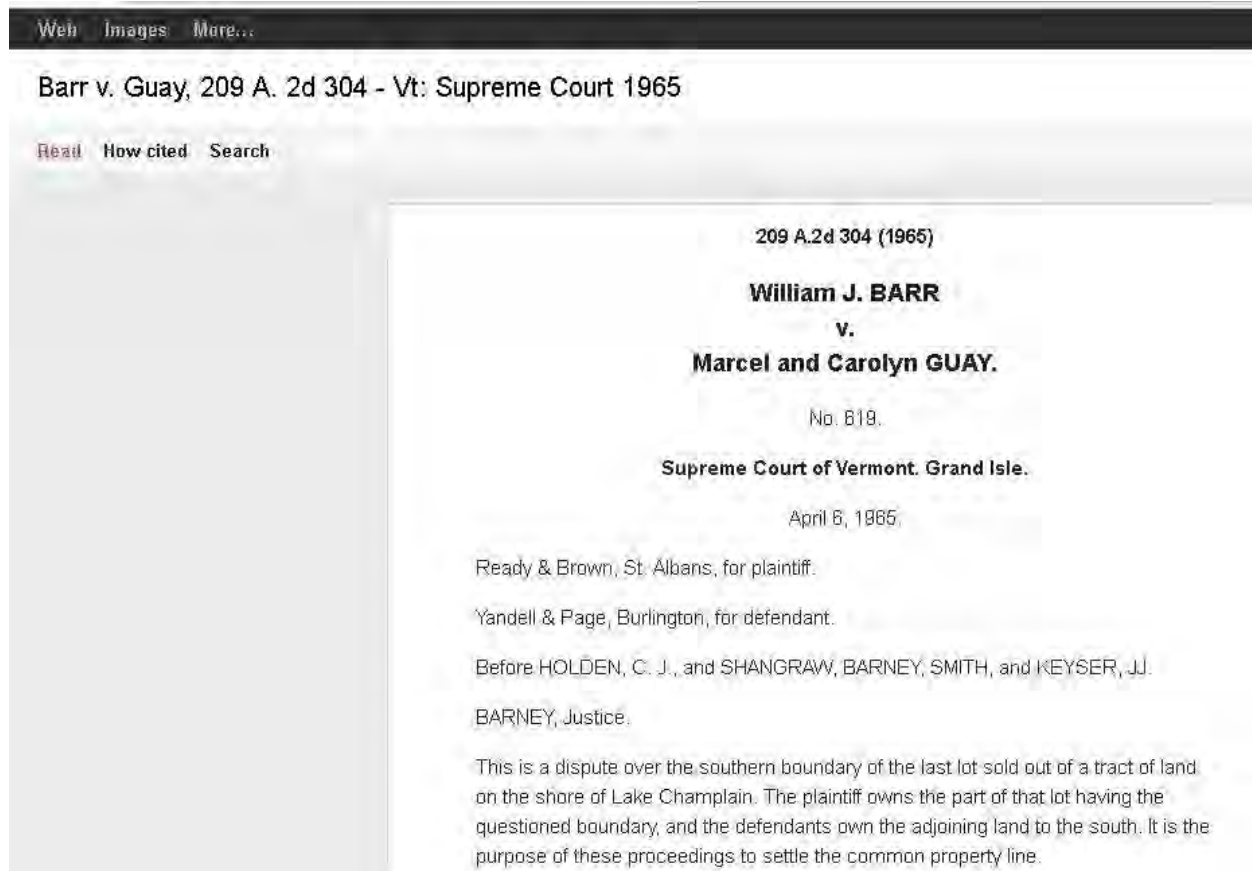


Figure 11. You can open and read the entire court case you are interested in. another drawback here is that there is no analysis of the key points of law to focus on. You will notice that the court case is also known by 209 A.2d 304 (1965) and 125 VT 1 is not shown on the face of the court case. You can search on either reporter identifier or the name BARR v. GUAY and find the court case.

Google Scholar provides more details on any case you find in the VSLS “Vermont Boundary Law” book, a complete trial description, the proper case citation and a listing of other court case with short descriptions of the reason for the citation. However, Google Scholar is not a true legal research tool. Google Scholar does not extract out and highlight the legal points made during the trial. It also does not evaluate the citations as positive or negative in effect. Negative citations can indicate that the case you are reading is not good law, it has not been upheld in later cases. Finally, it is not authoritative. Google is not going to stand by your conclusions of what it offers on this case. Another shortcoming of Google Scholar is that I was only able to retrieve Vermont cases back to volume 118 of the “Vermont Reporter”. Cases before 1954 were not locatable.

4b(2). RESEARCHING CASE LAW USING “LEXIS/NEXIS”

Lexis/Nexis and *Westlaw* are proprietary computer software products which lawyers purchase to conduct legal research. It provides authoritative legal information in indexing court cases for key words, highlighting and explaining the key points of law involved in the case, “Shepardizing” the court decision for all legal citations by other courts subsequent to this case, and flagging positive and negative citations. The academic version of this software is available in the Vermont State Library system or the University of Vermont Library. You may only be able to use it in the library proper. We will take a case from our VSLs “Vermont Boundary Law” book and use *Lexis/Nexis* (the academic version) to find out what additional information can be found.

Note: It appears that the full legal analysis of court cases in *Lexis/Nexis* is only available for court cases after 1944.

We will research the court case “Ripchick v. Pearsons, 109 A.2d 347, 118 VT 311. This case is found in the VSLs “Vermont Boundary Law” book on page 1193. As a side note, when I searched for this case using the above book I could not find the case with “118 VT 311”. It was only when I searched by name did I find the court case as “118 VT 311”. When referring to a case it is best to use the case name, the *Atlantic Reporter* reference and the *Vermont Reporter* reference. This way if there is a mistake in one or two references you will still be able to find the case. Some quotes from “Vermont Boundary law” on page 193 are as follows:

The intention of the parties as gathered from the language used when applied to the premises, controls in giving construction to what is conveyed in the deed... When boundaries designate the land with certainty, such boundaries control the quantity although stated incorrectly in the deed.

We will follow the steps below to access various elements of this court case.

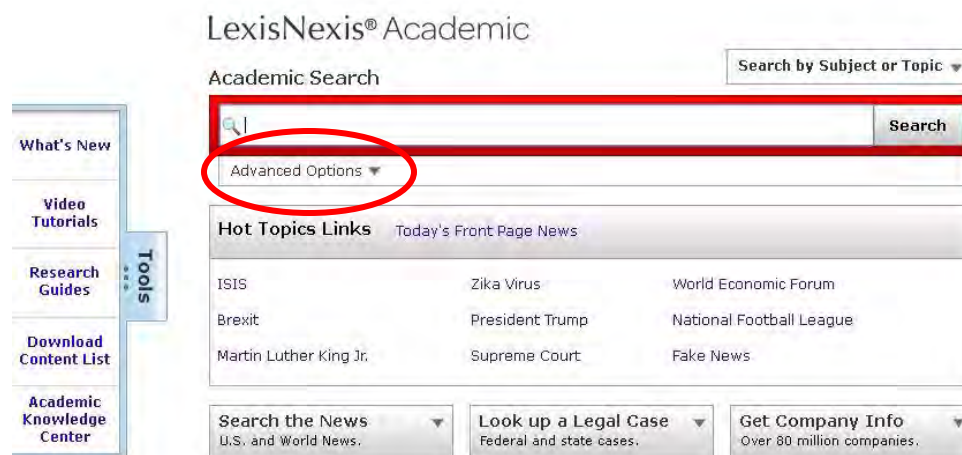


Figure 12 Step 1: Access *Lexis/Nexis* in your library. Open “Advanced Options”

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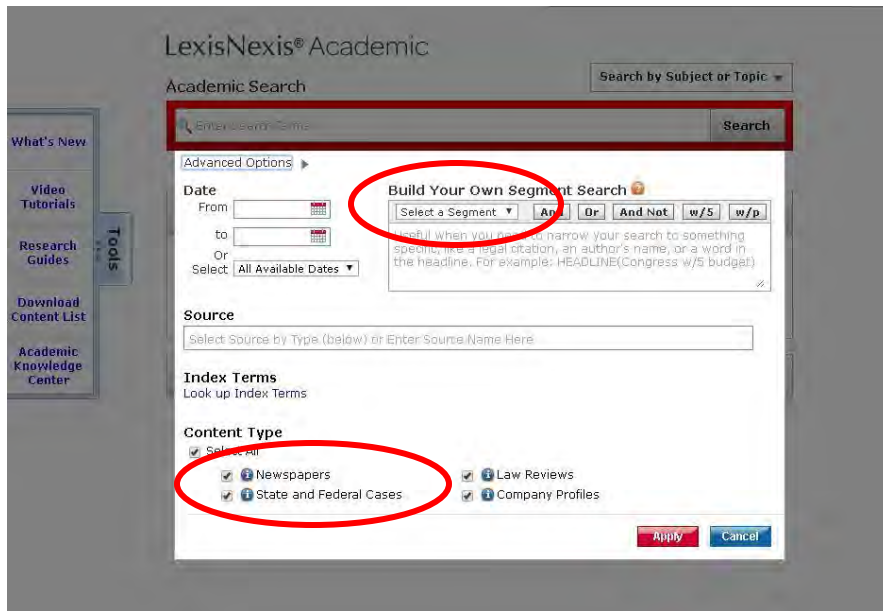


Figure 13 Step 2: Under “Content Type” ✓ box for “State and Federal Cases”, turn off the others. Then “Select a Segment” and choose “CITES”

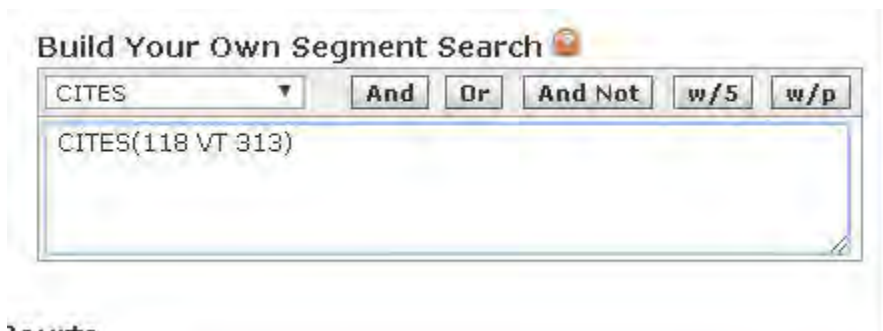


Figure 14 Step 3: Place your court citation between the parentheses and <Apply>

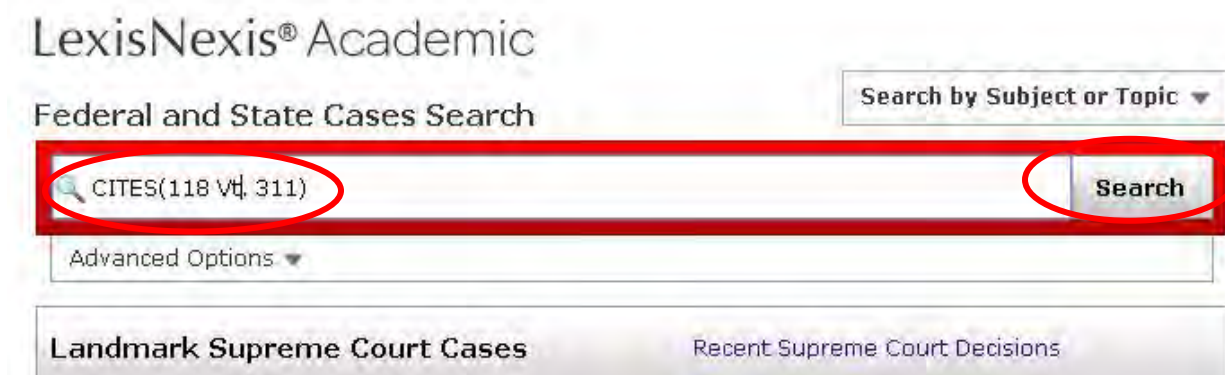


Figure 15 Step 4: Your CITE is now in the search box, select <Search>. Note that you can also look up a case by citation or name in the lower box, but it returns too many choices. Case formats found acceptable “118 Vt. 311”, “118 VT. 311” and “118 VT 311”.

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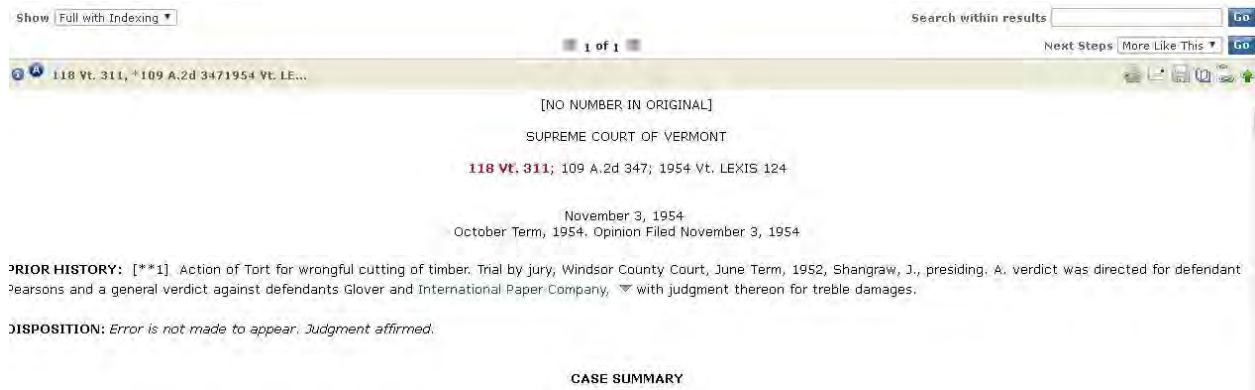


Figure 16 Step 5: The search finds the case and calls up the transcript. We need to find the legal highlights of the case and check on its subsequent citation history.

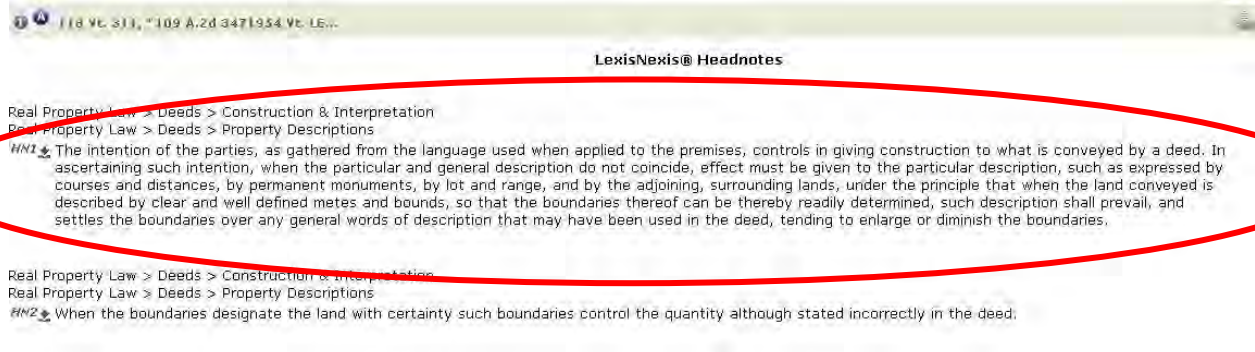


Figure 17 Step 6: Note the outcome of the case, core terms (key words) and “HN1” on the left side. This is one of a series of “Headnotes” that discuss the important legal points established in the case. Note that HN1 pretty much corresponds to the relevant in “Vermont Boundary Law”.

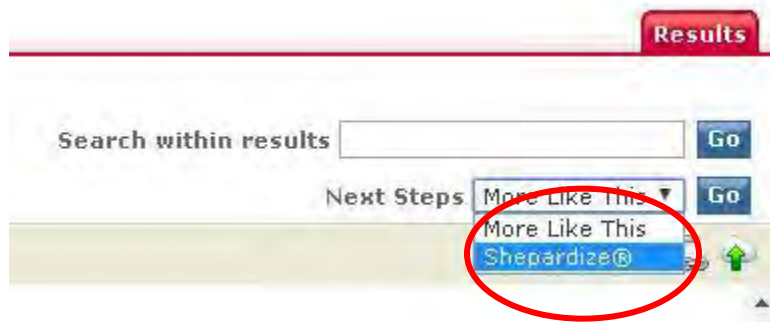


Figure 18 Step 7: We want to “Shepardize” the court case to see if it was subsequently cited positively by or negatively by later courts. On the upper right side in the second blue search box you can toggle “Shepardize”. <Go> to perform that analysis.

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1-7 of 7 Total Cites

Ripchick v. Pearsons, 1954 Vt. LEXIS 124

Ripchick v. Pearsons, 118 Vt. 311, 109 A.2d 347, 1954 Vt. LEXIS 124 (1954)

SHEPARD'S SUMMARY [Hide Summary](#)

Unrestricted Shepard's Summary

A No subsequent appellate history. Prior history available.

Citing References:

Citing Decisions:	Citing decisions with no analysis assigned (5)
Other Sources:	Statutes (1)

LexisNexis Headnotes: HN1 (1), HN3 (3), HN4 (2)

[Show full text of headnotes](#)

Figure 19 Step 8: The results of “Shepardizing” show no subsequent additional cites. The blue letter is the indication that this case and its decisions are the “law of the land” at this time.

Ripchick v. Pearsons, 1954 Vt. LEXIS 124

VT STAT. ANN. tit. 13 SEC. 360B

Signal: **A** Citing references with analysis is available

Citation: **1954 Vt. LEXIS 124**

Trail: **F** General Search - VT State Cases, ... > /./ > Document (1/1) > *Shepardize*® 1:

Location: 1 - 7 of 7 Total Cites

Date/Time: August 31 2017 13:51:39

*** Signal Legend:**

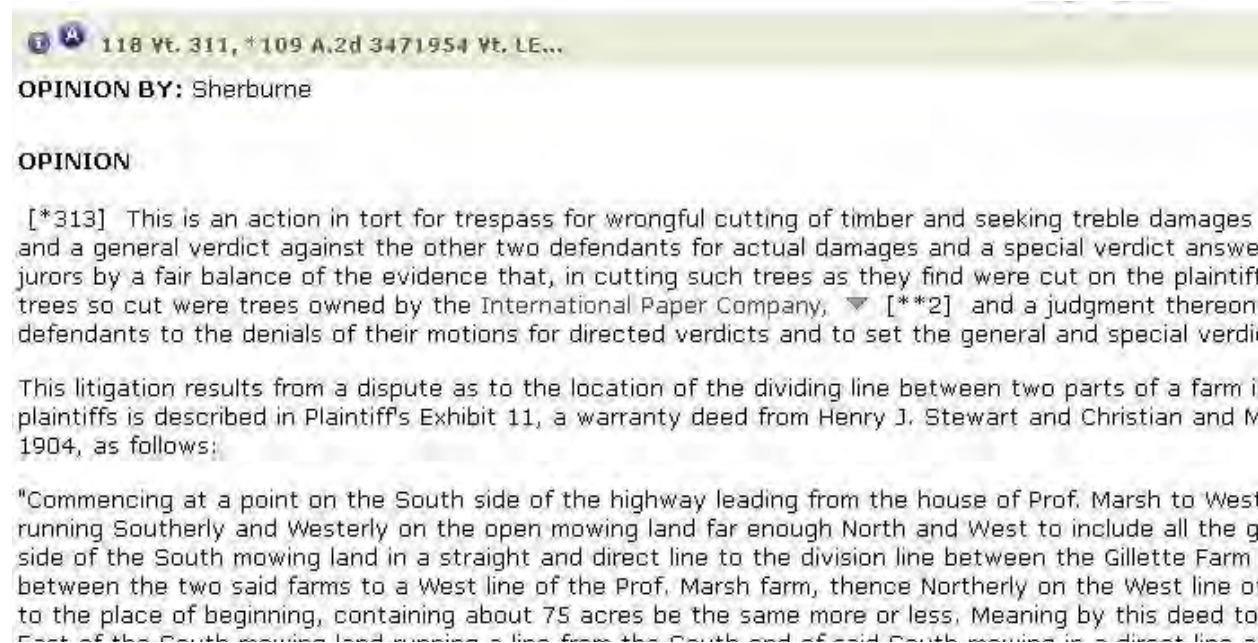
- Warning: Negative treatment is indicated
- Questioned: Validity is questioned by citing references
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing references with analysis is available
- Citation information is available

* Click any *Shepard's* editorial treatment code (e.g., distinguished, questioned) to view its definition.

Figure 20 Step 9: Shepard's analysis Signal Legend. You don't want to rely on red and yellow symbols without further research. This is a big improvement over Google Scholar, a list of citations is not much help unless they can be evaluated for quality.

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Of course, the court records and decision, as well as links to subsequent citations as well as citations within the court case are linked and available to be retrieved and studied by selecting the case reference. Some selections from the case are noted below:



118 Vt. 311, *109 A.2d 347 1954 Vt. LE...

OPINION BY: Sherburne

OPINION

[*313] This is an action in tort for trespass for wrongful cutting of timber and seeking treble damages and a general verdict against the other two defendants for actual damages and a special verdict answered by a fair balance of the evidence that, in cutting such trees as they find were cut on the plaintiff trees so cut were trees owned by the International Paper Company, [*2] and a judgment thereon defendants to the denials of their motions for directed verdicts and to set the general and special verdicts.

This litigation results from a dispute as to the location of the dividing line between two parts of a farm in plaintiffs is described in Plaintiff's Exhibit 11, a warranty deed from Henry J. Stewart and Christian and M 1904, as follows:

"Commencing at a point on the South side of the highway leading from the house of Prof. Marsh to West running Southerly and Westerly on the open mowing land far enough North and West to include all the g side of the South mowing land in a straight and direct line to the division line between the Gillette Farm between the two said farms to a West line of the Prof. Marsh farm, thence Northerly on the West line of to the place of beginning, containing about 75 acres be the same more or less. Meaning by this deed to East of the South mowing land running a line from the South end of said South mowing in a direct line a

Figure 20: Court Proceedings

[3] ^{HN2} When the boundaries designate the land with certainty such boundaries control the quantity although stated incorrectly in the deed. 646, 5 A. 753. Thus, if a man grant to another his meadows in D and S containing ten acres, and they in fact contain twenty, all shall pass. 86

Laying aside the matter of acreage, the defendants have not questioned that a line drawn from "O" through "P" and "T", "P" -- "T" represents a point in the division line "D" -- "G" 30 feet easterly of "D" answers the call in Plaintiffs' Exhibit 11 reading, [*11] "thence southerly on the East and direct line to the division line between the Gillette farm (so-called) and the North McDonald farm." The only question raised is that the line can be found to show the point where the line hits the division line "D" -- "G". As we have seen, the evidence viewed most favorably to the plaintiffs east side of the south meadow. It follows that because a straight line through "P" and "T" hits the division line between the so-called Gillette a point is almost, if not quite, as sure to mark the corner as if marked by a monument. It is agreed that the jury in arriving at their verdict found boundary of plaintiffs' land. Since no claim or argument has been advanced that the other provisions in Plaintiffs' Exhibit 11 commencing with the

Figure 20: Court Opinion.

In view of the facts, [1] that defendants' surveyor, Dwinell, chose to disregard the calls in Plaintiffs' Exhibit 11 relative to straight and direct lines in favor of acreage to the knowledge of Wood, the agent and surveyor of the defendant Paper Company; [2] of the dispute as to the location of the south mowing land and that the location claimed by the plaintiffs was walled-in; [3] that Dwinell and Merritt testified to things told them by Thomas Powers in such a way that either Powers gave them contradictory locations of the south mowing or either Dwinell or Merritt gave false testimony; [4] that the spruce growing southwesterly of the line claimed by the defendants had grown between 1904 and 1951 to such size as to be tempting to the defendants; [5] and of the telephone conversation [*21] between defendant Glover and Merritt; [6] and of the fair inferences possible to be drawn from all these facts, it cannot be said that the jury failed to act reasonably in answering the special verdict in the negative.

Figure 21: Footnotes

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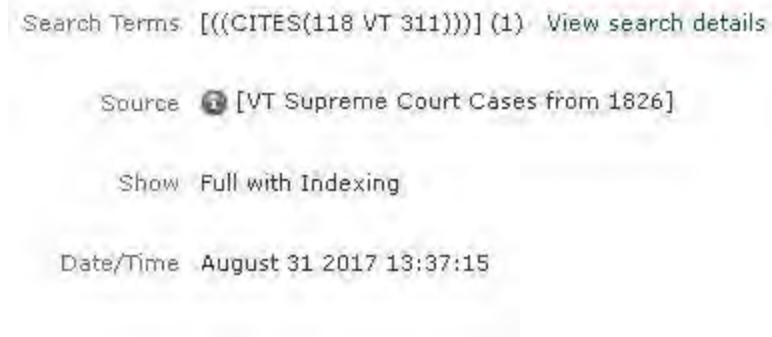


Figure 22: Source of court case citation

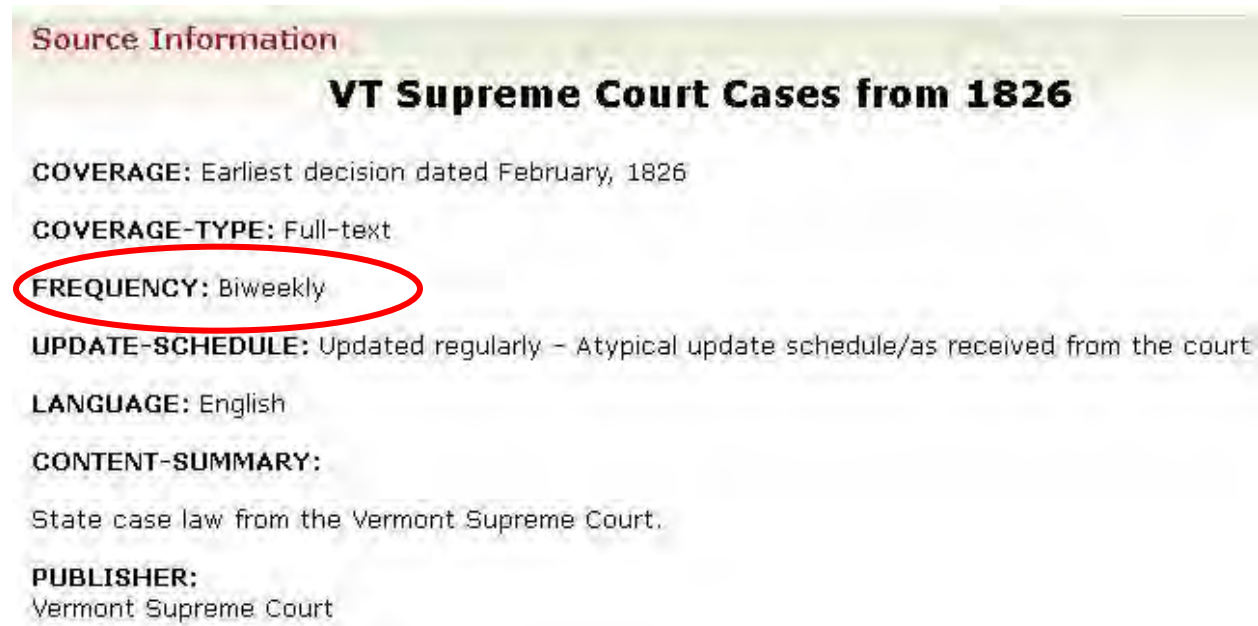


Figure 23: Detailed Information about the source of the court case.

4b(3). RESEARCHING CASE LAW USING “RAVELL LAW”

Finally, I located a free website with a very comprehensive database of court cases, including all Vermont Supreme Court cases. The site is a partnership with Harvard law School, and although it is going to be part of *Lexis/Nexis*, that company has committed to keep the site free. The website is called Ravellaw and is found at www.ravelllaw.com. You can sign up right on the site, and you will have a workspace that tracks your searches. There are citations but no authoritative indication of favorable or unfavorable treatment. See Figure 24 below:

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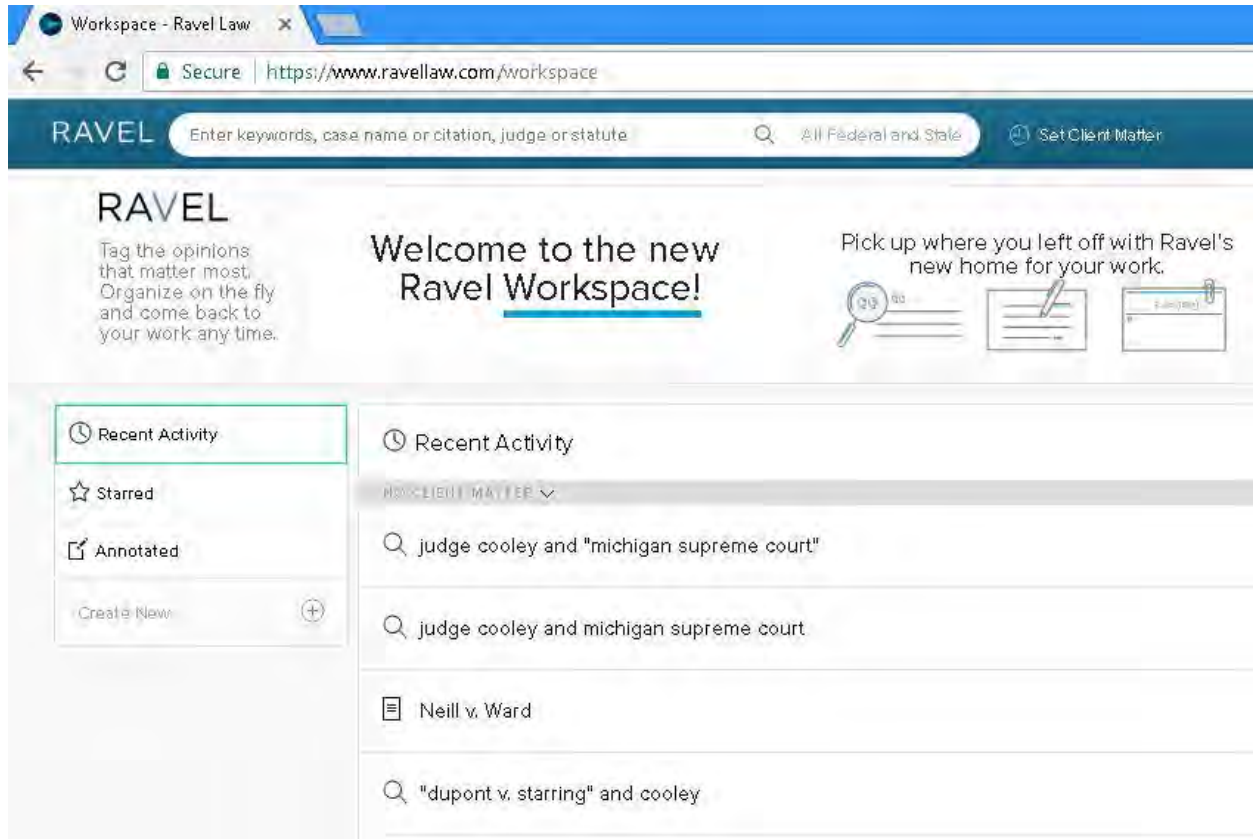


Figure 24: Ravel Law web page once signed in. Early Vermont Supreme Court decisions were easily retrieved by typing in (for instance) “Neill v. Ward” or “103 VT 117”.

4c EXAMPLES OF VERMONT CASE LAW AND WHAT THEY TELL US

I am going to focus on how case law will provide legal direction to the Vermont land surveyor in the area of boundary rules of construction. I am going to incorporate the cases discussed in “Vermont Boundary law” and also perform some inquiries by keywords for Vermont Supreme Court cases between 2000 and 2017. Note that I have placed the page number of the court cases as found in “Vermont Boundary Law” in brackets “[page xx] and the original court case page from Lexis/Nexis in brackets [*Atlantic Reporter page xx*]. The boundary rules of construction I will use as topics are listed below::

1. Adverse Possession
2. Senior Rights
3. Intent of Deed
 - a. Intent in General
 - b. Referenced Map
 - c. Referenced Deeds
5. Natural Monument
6. Artificial Monument
7. Courses and Distances

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8. Area
9. Extrinsic, Parol Evidence
10. Extrinsic, Town Maps and Field Notes
11. Extrinsic, Corroborative Evidence

4c(1). ADVERSE POSSESSION

The largest number of boundary court cases in Vermont (and any other colonial state, I suspect) concerns issues of adverse possession, adverse use, and acquiescence. Fences and division fences also seem to fall into this category in terms of acquiescence. There will be a separate seminar just on these issues during the 2017 Vermont Society of Land Surveyors Fall Conference, so the topic does not need to be covered here.

4c(2). SENIOR RIGHTS

Although our land surveying learned treatises have not spent much time discussing senior rights, I have placed it above intent of the deed in terms of its weight as evidence. This is because its intent cannot be argued. The grantor and grantee is defined under statute (1 V.S.A. §118), however the statute does not clearly spell out senior rights. The language on senior rights in Vermont is not as strong and definitive as that of other states. This may reflect the history of town maps and field notes which establish a system of lots that are similar to those of the public land states, not subject to the concept of senior rights because the conveyances were simultaneous in origin.

7 VT 534 (1833) [page 165] Note: the grantor writes the deed, signs the deed, and when properly acknowledged and delivered, if valid under the law. The grantee does not have to sign or even read the deed, so is at a disadvantage. This is the core of senior rights and the case below is directed at part of the concept. The wording is different in “Vermont Boundary Law” and the case as cited in the Ravel Law website.

The declarations of a grantor, made after the execution of a deed, are not admissible to prove it fraudulent.

The declarations of a grantor, after making and delivering a deed, are not to be received to prove it fraudulent, [Ravel Law, 16 cites, most off topic]

71 VT 354 (1899) [page 177] This is not a senior rights issue, but one of the relationship between a surveyor and one party to a dispute. *[from Ravel Law]*

Where neither of two adjoining landowners knew the position of the dividing line, the fact that they employed a surveyor to run out the line, and that one of them purchased the timber from another, which was taken from land which was erroneously set off to the seller by reason of a mistake of the surveyor in locating the line, conclusive as against the buyer. The case also defines the conclusions of a referee as conclusive.

The plaintiff and the defendant were adjoining owners and the line between their lands was uncertain. The plaintiff bought the timber of the defendant upon the land in question

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upon the latter's representation that the land belonged to him and a surveyor was agreed upon who, with the assistance of the defendant, ran the line and ran it as the referee finds erroneously. Relying upon the line as run the plaintiff after cutting off the timber paid the defendant for it and afterwards without making any demand for the return of the payment brought this suit to recover it back.

Apparent Lines — Real Lines — Finding of Referee Conclusive. — There was nothing in the case to show that the parties contracted with reference to the apparent lines instead of the true ones, and the finding of the referee as to the correct location is conclusive.

Demand — Necessity for. — A demand was unnecessary, for the plaintiff was not in fault and the defendant was, having sold the timber to the plaintiff by representing that he owned the disputed land and having assisted the surveyor in running the line.

125 VT 112 (1965) [page 198], 125 Vt. 112; 211 A.2d 190; 1965 Vt. LEXIS 207

Note: the details of this case are of interest to the land surveyor in Vermont. Ambiguity in a description is defined, and what the corner of a barn means is also defined.

An ambiguity in a boundary dispute does not arise from possible alternative references unless such alternatives are equally likely under the circumstances of the case...Unless an ambiguity in the legal sense is established, the rule of construction which gives a grantee the benefit of the more favorable alternative position does not apply.

HEADNOTES Conveyancing. Boundaries. 1. An ambiguity in a boundary description does not arise from possible alternative references unless such alternatives are equally likely under the circumstances of the case. 2. Unless an ambiguity in the legal sense is established, the rule of construction which gives a grantee the benefit of the more favorable alternative interpretation does not apply.

*The plaintiff contends that the stable portion of the barn is an entity sufficiently distinguishable from the lean-to structure to raise an ambiguity. The importance to the plaintiff's position of this claimed ambiguity is based on the fact that the defendants now stand in the shoes of the original grantor, Mrs. Gibson. Since it was the grantor's language that established the barn boundary, the plaintiff says that he is entitled to that construction of the ambiguity [***4] most favorable to him, since he is successor to her grantee. It is apparent from the findings that, using the southerly side of the lean-to structure as the point of measurement for the boundary, puts the line fifteen feet from it, while measuring from the barn, without considering the lean-to, puts the boundary about three feet from the south wall of the lean-to, and increases the plaintiff's holdings by a strip about twelve feet wide.*

*[**192] The alleged ambiguity contended for by the plaintiff arises only when a physical distinction is drawn between the attached lean-to roofed structure and the rest of the barn. That it is logically possible to refer to the southerly end of the horse barn and mean the wall inside the lean-to structure cannot be denied. But it is not enough for ambiguity,*

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in the legal sense required here, that there be possible alternatives. The alternatives [***5] must meet a standard of equal application, and since the ambiguity claimed here is latent, it is up to the plaintiff to demonstrate [*115] by evidence convincing to the trier this equal application.

In the ordinary course of events, the reference to the end of a building as marking a parallel dimension for a boundary would be taken to mean that portion constituting its exposed structural limit. Unless the evidence persuaded the trial court that it was equally likely that the parties intended to refer to the wall of the barn located in the interior of the lean-to portion as the point of measurement by that language in the deed, he was not bound to reach the result [***6] for which the plaintiff contends

4c(3). INTENT OF DEED

7 VT 100 (1835) [page 165] legal and constructive possession

A party taking possession of a part of the land conveyed by his deed, is in legal construction in possession of all the land described. But it is necessary that the deed give a definite and certain extent to the land, otherwise he will be deemed in possession only to the extent of his actual possession.

7 VT 511 (1832) [page 165] intent of deed

Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best serve the prevailing intention manifested on the face of the deed.

91 VT 425 (1915) [page 183] intent of deed

Where the language of a deed is clear and unambiguous it is to be interpreted by its own language, and the court is not at liberty to look at extraneous circumstances to ascertain its intent; for the understanding of the parties must be deemed to be that which their own written instrument declares.

The location of a disputed divisional line was a question of fact to be determined on the evidence.

111 VT 274 (1940) [page 189]

The intention of the parties, as gathered from the language used when applied to the premises, controls in giving construction to what is conveyed by a deed.

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115 VT 71 (1947) [page 191]

Where the words of a deed are ambiguous and capable of either of two constructions, it is the rule of construction that the meaning will be adopted which will give the deed force rather than that which will make it of no effect.

One of the established rules for the construction of written instruments to ascertain the intention of the parties is that it is the duty of the court, if possible, to construe the instrument so as to give effect to every part and form from the parts as a harmonious whole.

118 VT 399 (1984) [page 194] title vs. location

The construction of a deed and its legal effect as to the described boundary therein is a question of law, but the location of the boundary on the land is a question of fact.

4c(4). REFERENCED DEED

118 VT 398 (1954) [page 193] deed reference

When another deed is referred to for a description of premises conveyed, deed referred to is regarded as of the same effect as if it had been copied into deed itself, and whatever is described in it will pass.

118 VT 399 (1954) [page 194] conflict between deed and deed reference

When another deed is referred to for a description of the premises conveyed, the deed referred to is regarded as of the same effect as if it had been copied into deed itself, and whatever is described in it will pass.

When a deed contains a particular description and also a reference to a deed, the reference is regarded as a general description. When the particular and the general do not coincide, effect must be given to the particular description.

4c(5). REFERENCED MAP

133 VT 74 (1974) [page 202] 133 Vt. 74; 330 A.2d 84; 1974 Vt. LEXIS 288 Note: an important detail concerning use of recorded maps incorporated deeds is not contained in the “Vermont Boundary Law” book. *This case was cited 5 times, followed 2 times and distinguished once. Cases distinguished can be negative, but in this case, the element distinguished was not of interest to us.*

When a deed’s particular and general descriptions of property do not coincide, effect must be given to the particular description... Where warranty deed described the property by metes and bounds, that it mentioned it was predated from a recorded survey map and that the map marked the northern boundary of the land conveyed “unverified” could not

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prevent grantees from recovering for acreage deficiency along the on the grounds they should have had doubts from the outset due to the map.

There follows a metes and bounds description of the land, which is known as the "Stratton View Development". There is no need to reproduce the entire deed here, but for reasons shortly to become apparent we excerpt, as illustrative, that portion relevant to the northern border of the land conveyed by the deed.

. . . an iron pipe marking the northwesterly corner of the land herein conveyed; thence about south 71 o 53' east along lands now or formerly of Whitney and lands now or formerly of Lightfoot 1,508.6 feet to an iron pipe marking the northeasterly corner of the parcel . . .

*After the conclusion of the metes and bounds description, the following paragraph appears: "The above description [***3] has been prepared from a survey map made by [A] entitled 'Stratton View Development', dated March 16, 1963." This survey map also was recorded in [B], Vermont.*

After the defendants went into possession of the property, Mr. Wehner, who had done some surveying and could capably utilize a transit, discovered a discrepancy between the description of the northern boundary in the deed and its location on the ground. The defendants then hired [C], a qualified and registered land surveyor, to prepare a new survey.

*[**86] The plaintiff contends that the defendants, from the outset, should have had doubts about the accuracy of the northern border, because it was marked "unverified" on the Grant survey map. The trial court found, however, that no reference to this term or caveat with respect to this boundary line was carried forward into the description in the deed.*

*[*77] This warranty deed was one which particularly described the property purported to be conveyed by metes and bounds. Even if the allusion therein to the Grant survey can be considered as more than an acknowledgement of a preparatory source and construed as a reference the purchaser [***4] should check for possible modifications, it cannot be controlling. Such reference is a general description of the property. When the particular and the general description do not coincide, effect must be given to the particular description." The defendants were justified in relying upon the particular description, set forth in metes and bounds, in the deed to them from the plaintiff.*

153 VT 598 (1990) [page 218] 153 *Vt.* 598; 572 A.2d 912; 1990 *Vt.* LEXIS 34 Note: In the details of the court proceedings, the court's ruling on the importance of maps with deeds is entirely supported by a large number of out of state case law. This court case is establishing "new law" on the legal weight of maps in relation to deeds. Also note that the court is comparing adjoining deeds in order to take clear and unambiguous language from one and apply it to the other ambiguous deed. Cited by 2 (particularly on maps), Followed by 2, Distinguished by 1 but not to the points discussed below.

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In construing a deed, a particular description will generally govern over a general description, but less significant aspects of a description will become the controlling influence in determining the identity of premises where other parts of the description are not sufficiently certain or are nonexistent.

Where maps are referred to in a conveyance, they are given considerable weight in determining the true description of the land; further, where an ambiguity or error exists with regard to the description in a deed, an attached map or survey relating to the ambiguity will control.

*...since the boundary of the "closing" segment of plaintiffs' land is not in dispute, the fact that plaintiffs' deed description does not close is of little consequence. Where there are several manifest errors and the proffered interpretation hinges on nothing more than speculation, that interpretation cannot prevail without first applying the established rules of construction to determine the intent of the parties. See *Monet*, 136 Vt. at 264, 388 A.2d at 368.*

*In the instant case, the descriptions referring to the land of adjoining property owners are particular descriptions, see *Monet*, 136 Vt. at 264, 388 A.2d at 368 ("A reference to an established [*604] property line in a deed description establishes that property as a monument.") ; however, "[w]here maps are referred to in a conveyance, they are regarded as incorporated into the instrument and given considerable weight in determining the true description of the land." *Pennsylvania Game Comm'n v. Keown*, 80 Pa. Commw. 471, 474, 471 A.2d 937, 939-40 (1984); see *Duchesnaye v. Silva*, 118 N.H. 728, 732, 394 A.2d 59, 61 (1978); *Hammond v. Lindsay*, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981). Further, ^{HN3} "[w]here an ambiguity or ^{HN3} error exists with regard to the description in a deed, an attached map or survey relating to the ambiguity or error will control." *Eves v. Morgan City Fund*, ^{HN3} 252 So. 2d 770, 775 (La. App. 1971); see *Williams v. Skyline Dev. Corp.*, 265 Md. 130, 161, 288 A.2d 333, 351 (1972). Accordingly, in *Mazzucco v. Eastman*, 36 Misc. 2d 648, 650, 236 N.Y.S.2d 986, 988 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 889, 239 N.Y.S.2d 535 (1962), the court awarded disputed land described both by lot number and by metes and bounds to the party claiming the priority of the lot description, stating*

when there is a conflict between a specific description by metes and bounds and a lot as shown upon a map by which a tract of land is conveyed, the latter provision will control. When in a deed the lot intended to be conveyed is properly designated by its number on a recorded plot, but the deed, in attempting to give a more particular description, incorrectly or inaccurately sets forth the dimensions of the same, such designation by lot number will prevail over such other description in the deed.

In the instant case, defendants' deed unambiguously describes their property as "[b]eing Lot 36 as delineated on Hazen's Survey and Plan of Lots in the Village of Wilder," and plaintiffs' deed unambiguously describes the disputed property line as continuing "southerly ^{HN3} along the westerly boundary of Lot #36." In contrast, the more detailed description of the disputed boundary line in defendants' deed is incorrect and

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*ambiguous. Consequently, the unambiguous description by lot number should prevail over the erroneous reference to an adjoining property owner. The trial court's theory, created in an attempt to reconcile the ambiguities and inaccuracies in the [*605] deeds' descriptions, is not supported by any evidence in the record and cannot supplant the plain meaning of the lot descriptions in the deeds.*

4c(6). NATURAL MONUMENT

149 VT 351 (1988) [page 215]

Natural monument will control over artificial monument in determining boundary of land...

4c(7). ARTIFICIAL MONUMENT

7 VT 100 (1835) [page 164]

When the original monuments are found, no testimony can be received to show that the surveyor intended to locate the boundaries elsewhere

103 VT 117 (1930) [page 187] adjacent lots as monuments

Another rule is that resort may be had to the lines of adjacent lots to determine the location of a lot when its location on the ground cannot be ascertained. [page 233]

103 VT 117 (1930) [page 187] lines, if surveyed on the ground serve as monuments to fix boundaries

The actual location upon the ground of original lot lines will control, if capable of being ascertained [page 225]

103 VT 117 (1930) 153 A. 219

So far as it appears from the evidence, the lines and corners of lot 59, as claimed by the plaintiff, are not marked upon the ground...It does not appear from the evidence that he found any marks of any kind or age indicating the location of that line...The fact that there are no marks upon the ground to indicate the location of the lines of 59, as claimed by the plaintiff, is strong evidence, if not conclusive, that such lines were never surveyed, or, if surveyed, they cannot be ascertained. [page 232]

These monuments are facts; the field notes and plats indicating courses, distances and quantities are but descriptions, which serve to assist in ascertaining those facts. Established monuments and marked trees not only serve to show with certainty the lines of their own tracts, but they are also resorted to, in connection with the field notes and

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other evidence, to fix the original location of a monument or line which has been lost, or obliterated by time, accident or design. [page 233]

In “Hull v. Fuller, 7 VT 100, 110”[1835] this court said “When the original monuments are found, no testimony can be received to show that the surveyor intended to locate them elsewhere. [page 233]

136 VT 261 (1978) [page 204] the legal standing of abutter property line

A reference to an established property line in a deed description establishes that property as a monument.

Location of a disputed boundary line on the ground is a question of fact to be determined on the evidence, and trial court’s findings of fact will not be overturned unless clearly erroneous, despite inconsistencies or substantial evidence to the contrary.

139 VT 124 (1980) [page 207] monuments don’t always prevail over courses and distances.

Note: See Attorney General 1940 opinion on the definition of “metes and bounds”.

Although a deed description by monuments generally prevails over a conflicting description in the deed by metes and bounds, where the monuments referred to in the deed did not exist when the property conveyed, and the monuments relied on by person attacking the metes and bounds description in the deed were not mentioned in the deed, the metes and bounds description controlled.

4c(8). COURSES AND DISTANCES

91 VT 425 (1915) [page 182, 183] numerous statements on courses and distances, including cardinal direction.

111 VT 274 (1940) [page 189] “more or less” explained

The words “more or less” and “about” when qualifying a quantity of land described in a deed with an uncertain boundary may be considered equivalent to a suggestion that the uncertain boundary is located by some monument upon the ground rather

4c(9). AREA

30 VT 735 (1888) [page 169] lot described only as area.

A deed which described land simply as so many acres of a certain lot, passed on undivided interest in such lot equal to the proportion which the number of acres sold bore to the whole number of acres in the lot.

111 VT 274 (1940) [page 189] Note: refer to attorney general opinion 1940 on metes and bounds. This ruling concerns the subordination of area to boundary description by course and distance and or monuments.

Clear and well defined metes and bounds which readily determine the boundaries of land conveyed prevail and settle the boundaries over over any general words of description that may have been used in the deed which tend to enlarge or diminish the boundary.

Descriptions of land conveyed by quantity, unless certain, especially when “more or less” generally gives way to a description of boundaries, even when land with bounds comprises a different quantity.

4c(10). EXTRINSIC EVIDENCE

7 VT 100 (1835) [from Ravel Law]

There is an inconsistency in the description of the land conveyed -- Hull v. Fuller, 7 Vt. 100, 104 (Vt. 1835)... This inconsistency, it is argued, vitiates the deed. Upon reference to the deed, it is found, that this difficulty does not appear upon its face, but is discovered by tracing the courses and distances upon the land. The description in the deed is well enough, but the difficulty occurs in its application. It is not, therefore, ambiguitas patens, but a latent ambiguity, which may well be cured by extraneous proof. It is the common case, of a want of perfect correspondence, in the several particulars given in the deed, by way of description.— Nothing is more common than to find, upon applying the description in a deed to the several localities referred to, that course or distance, or the precise relative location of visible objects has been mistaken. It never was supposed that a deed is void for such inaccuracies. But the difficulty being latent, the intent of the parties may be ascertained by extraneous proof. The rule which allows resort to such proof, of itself implies the validity of the instrument. -- Hull v. Fuller, 7 Vt. 100, 105 (Vt. 1835)

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103 VT 117 (1930) 153 A. 219 The verdict and reasoning is explained.

The court below erred in denying the motion of the defendant to set aside the verdicts. The defendant asks in his motion that the verdict be set aside and judgment rendered for the defendant. [page 236]

...under our present practice, the rule is that, when it is clearly apparent that on another trial the party against whom the reversal is made cannot strengthen his case by a proper amendment of his pleadings, or by the introduction of new and additional evidence, we render such judgment as the trial court should have rendered, thereby saving the parties the needless trouble and expense of a new trial. [page 236]

In Dupont v. Starring Justice Cooley said: "It has been repeatedly held by this court that a boundary line long treated and acquiesced in as the true line ought not to be disturbed on new surveys...Fifteen years recognition and acquiescence are ample for this purpose...and in view of the great difficulties which often attend the effort to ascertain where the original monuments were planted, the peace of the community requires that all attempts to disturb lines with which the parties concerned have long been satisfied should not be encouraged. " Diel v. Zanger, 39 Mich 601 [page 237]

4c(11). PAROL EVIDENCE

7 VT 522 (1834) [page 165]

Some consideration is necessary to make a deed of land to be valid.

Parole proof is admissible to show a consideration where none is expressed in a deed, or the sum is left blank.

103 VT 117 (1930) [page 187] 153 A. 219 Note; this important case for land surveyors was overturned in part on the issue of the Vermont Supreme Court findings on Parol evidence with only one witness. The two cases which address the issue of parol evidence and are not in "Vermont Boundary Law" book. Lexis/Nexis flagged this case negative because of the single issue of parol evidence. In 153 VT 67, the issue of the witnesses in 103 VT 117 was not really effected. In 188 VT 610, it is noted that the overruling of 103 VT 117 was for other reasons than those of the case at hand. So negative or cautionary treatment in Lexis/Nexis does need to be followed up to see if the negative treatment concerns a boundary issue that is relevant.

The plaintiff criticizes the conclusiveness given in the opinion to the testimony [of the witnesses] ...on the ground that the credibility of these witnesses is for the jury, and the jury might disregard their testimony if they so desired. But this is not the law...The general rule is that, where a credible witness testifies distinctly and positively to a fact, and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to can be drawn, the fact may be taken as established, and a verdict directed on such evidence. [page 238]

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Vermont Structural Steel v. State Department of Taxes 153 VT 67, 569 A.2d 1066 (VT) (1989)

To be set aside, findings must be shown to be clearly erroneous. The rule entitling a party introducing uncontroverted evidence the right to judgment is not a single, clear, guiding principle, but a patchwork of loosely related concepts applied differently in different contexts. Therefore, it is properly limited to those rare instances where the testimony concerns uncontroverted direct evidence, where rejection of that evidence by the trier appears arbitrary and unreasonable, and where no explanation of the rejection is provided or apparent. To the extent that Neill v. Ward, 103 Vt. 117, 160, 153 A. 219, 238 (1930) holds to the contrary, it is overruled.

Cameron's Run LLP v. Frohock 188 VT 610, 9 A.3d 664 , (VT) (2010)

*[*P12] HN2 In boundary disputes, "[t]he burden is upon the plaintiff of showing that the location of this common [property] line upon the ground is where he claims it is."* Neill v. Ward, 103 Vt. 117, 145, 153 A. 219, 232 (1930), overruled on other grounds by Vt. Structural Steel v. Dep't of Taxes, 153 Vt. 67, 569 A.2d 1066 (1989).

103 VT 117 (1930) 153 A. 219 examples of accepted parol evidence

Julius Converse, a man 70 years old, and who has always lived in Moretown, was a witness for the defendant. He bought the Converse lot from his father in 1887, and sold it 5 years ago. It had been in his family since 1854. He has known the lot since he was a boy, and was on it with his father. His father told him where the corners were. He told him that the hollow stump with the stake in it was at the southwest corner...He went to this corner the Saturday before he testified, but the stump was gone; there was a mound where the stump used to be, but all he found was he was present at this old stump in 1925 when Mr. Dempsey started his survey around some lots from it. He went with Dewart through two lot, but Dewart's compass must have varied, because he was about 2 rods from the stump when he came back. [page 228]

James McNulty, a witness for the defendant, worked for C.J.Brown on lot 60...beginning 35 years ago. Brown pointed out the line...There were several trees with old marks on them...They cut clear to the line. Another time he was chopping for Abijah Herring near the line, and Herring pointed out the same line to him as his line. [page 231] Note: McNulty worked for owners on both sides of the disputed line.

4c(12). TOWN MAPS AND FIELD NOTES

7 VT 100 (1835) latest approved town lot lines prevail [from Ravel Law]

Where commissioners, appointed by the legislature, to re-survey and complete an allotment of a town, alter some of the original lines, and the parties in possession subsequently convey agreeably to the corrected lines, this is sufficient evidence of an acquiescence, and will bind the parties and their grantees. -- Hull v. Fuller, 7 Vt. 100, 104 (Vt. 1835)

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103 VT 117 (1930) town maps and field notes, standing [page 187]

Town plan and description of lots in field book, held admissible on offer to show that lot lines of certain, as actually surveyed and marked on the ground, were substantially as described in field book.

103 VT 117 (1930) presumption committee made use of all allowances when laying out lots [page 187]

...it appears from the records of the proprietors' meetings that there were mistakes in the original survey, and trouble in the early settlement of the lots in the first division. It is clear that there was an expansion of lots between 57, as located on the ground, and the Berlin town line; and it is a reasonable explanation to say that 58 was located on the ground as a small lot to compensate for the same. [page 237]

103 VT 117 (1930) presumption of survey [page 187]

In action of trespass involving boundary of lot, evidence held to create legal presumption that such a survey as is shown by town plan and field book was made.

103 VT 117 (1930) 153 A. 219 [page 186] General objection that field notes had no legality under statute held without merit (in view of legislative action and history)...

On November 7, 1804, the Legislature passed an act authorizing and empowering the proprietors "at any legal meeting already named or hereafter warned for the purpose to ratify and confirm the division of said town into severalty, so far as the name has been made, in fact. An such division, so ratified and confirmed, shall be good and valid in law, to all intents and purposes, any law, usage, or custom to the contrary notwithstanding. [page 223]

All deliberative bodies or legislative bodies, during their session, have the power to do and undo...as often as they think proper, and it is the final result only which is to be regarded as the thing done...this court has held that any town, like an individual, may change its purposes...and, unless some right in another has been acquired...no one may complain of the change [page 224].

148 VT 145 (1987) [page 214]

Range lines are presumed straight (no monuments found), location is determined prima facie by extending range line from actual point where actual location can be ascertained...

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148 VT 145 (1987) [page 214]

all parties agreed that monuments...and old fence line...running to monument at boundary...thus, these monuments are controlling.

148 VT 145 (1987) [page 214] range line establishment (reestablishment?) criteria

mutual recognition is necessary...knowledge of boundary...party must know of facts...concurring party against whom clear and definite acquiescence greater than 15 years in order to establish range line.

4c(13). CORROBATIVE EVIDENCE

91 VT 425 (1915) [page 182] Surveys and maps external to the deed

Deeds, surveys and plans not referred to in a deed can neither restrict nor extend the import of the terms used therein.

A survey and plan, not being participated in, authorized or ratified by all parties to either one or two contracts to convey lands described in such survey, and not being referred to in the contracts, nor in the deeds given in pursuance thereto, cannot be considered in either the contracts or the deeds.

103 VT 117 (1930) [page 187] age and acquiescence related to legal weight of corroborative evidence. Note: this statement might apply to all kinds of boundary surveys.

Undisputed evidence as to age of marked lines and corners of lots in questions and of adjoining lots; that such lines have been recognized and acquiesced in as true lot lines by all parties in interest for many years; and that other surveys have followed these same lines; are, in absence of proof to the contrary, conclusive that they are true lines and corners located and marked in original survey

103 VT 117 (1930) [page 186] Charter of town held inadmissible...as foundation for allowance of...not mentioned in field notes to account for overrun

This was an improper use of the [town] charter...The charter is not part of the field book...Nor is it the foundation of the survey, town plan and field book relied upon by the plaintiff...The most that can be said of the quoted portion of the charter is that it gave the committee...authority to make allowance called for by it in their layout and survey; and unless they did so, there is no basis for any one to make allowances later. The presumption is that the committee, in making the survey, made all allowances permitted by law... [page 226]

144 VT 561 (1984) [page 210] Survey after court decision rendered denied.

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103 VT (1930) [153 A. 219] examples of monuments accepted by the court, as follows:

The parties agree at trial that a stone mark at the northeast corner of 57 and the northwest corner of 56...a stone...marks the southwest corner of 56 and the southeast corner of 57...that a stone...marks the northwest corner of 57 and the northeast corner of lot 58 [page 228]

It was agreed that a line, substantially parallel with the southwesterly line of 57, extended southwesterly from the northeast corner of 58 to the southerly range line, is the line between 57 and 58 [page 228]

The evidence shows that a mound of decayed wood covered with grass where an old hollow birch stump with a stake stuck in it formerly stood...marks the northwest corner of 58, the northeast corner of 59...

There are marked trees, marked 5 or 6 years ago, the whole distance of the line. Where there is old growth timber on both sides of the line, there is a well-marked line of trees with old marks. The marks are of different ages; some trees have three sets of marks on them. The youngest of these old marks is not less than forty years old, and the oldest are at least 75 years old. [pages 228, 229]

Mr. Deward was employed by the defendant in 1925 to locate the true dividing line between 59 and 7, third. He went to the leaning maple corner, and soon found it was wrong. He located the pile of stones at the foot of the ledge as the true northwest corner of 59, and placed a stake in the pile of stones. The plaintiff admitted at the trial below that the leaning maple corner is wrong, and that the true northwest corner of 59 is on the range line. He admits that the pile of stones at the foot of the ledge is on the range line, but claims now that the corner is 56 rods farther to the northwest [page 229]

There are several large trees along the line marked on their northeast and southwesterly sides which indicates they were marked as line trees. The marks on the trees are from forty to fifty years old. J.A.Chapin located this line as the dividing line between 59 and 60 when he surveyed the lines in 1913. [page 229]

The stake on the southerly range line is set in wet, swampy ground. Three or four witness trees are near the stake. They are marked by a single blaze on the side facing the stake, which is the way corners are witnessed. [page 229]

The evidence shows that a beech tree, now lying on the ground...marks the northwest corner of 60 and the northeast corner of 61...as these lots are located on the ground. This tree is marked on four sides as a corner, the oldest marks being about 50 years old. When Mr. Dewart surveyed the lines in 1925, this tree was standing, and he marked it on four sides with the numbers of the lots cornering there. [page 230]

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He cut out one of the marks on it, and it was approximately one hundred and thirty years old, which would indicate it was first marked about the time of the original survey. [page 230]

There is nothing to indicate that the line of marked trees was intended as a lot line. There is no marked corner at either end of it, and if extended either way, it does not intersection any range line at a marked corner, nor coincide with any marked lot line... [page 235]

There are certain definite conclusions that can be drawn from the fact[s] hereinbefore set forth and the evidence:

- 1. That there was an original survey of the lots in question*
- 2. that there are no marks upon the ground from which it can be inferred that lots 58, 59 and 60 were surveyed and located on the ground, as claimed by the plaintiff*
- 3. that there are old marked lines and corners on the ground...recognized and acquiesced in as the true boundaries of the lots in question by their owners and those interested for more than 30 years, and that such marked lines and corner are evidence of the lines originally run... [page 235]*

125 VT 1 (1965) Markings on the ground which are not set out in the deed are not controlling as to the location of boundaries...Markings on the ground which are not set out in the deed may have some evidential effect to establish acquiescence in a particular line. A boundary line fixed by the court

2010 VT 60 (2010) 9 A.3d 664 (2010) Acceptance of monuments by the court

When locations of the monuments are not proved, courses and distances must govern. See Neill, 103 Vt. at 162-63, 153 A. at 239 (citing Bagley, and holding that where field book survey included measurements to "corner trees" which could no longer be found, destruction of monumental trees "confine" proponent "to the courses and distances given in the field book"). Because they were not derived from the location of original posts, the placement of the 1977 survey pins were monuments only of that survey, and the pins do not constitute the monuments mentioned in the deed.[3]

Footnote 3: The trial court cited Pion v. Bean, 2003 VT 79, ¶ 15, 176 Vt. 1, 833 A.2d 1248, to support its conclusion that the 1977 pins were in the same positions as the original posts based on "credible testimony as to the location of those [lost] pins." The "credible testimony" referred to, however, was not that old pins were found, or that their locations were described by eye witnesses as in Pion, but that the original posts "were in the same place as Robenstein's pins" based on the surveyor going "along Railroad Street setting his pins as if it were a three rod road ... [and] apparently determined rear dimensions based on the same assumption" of corner monuments no longer in existence. Id. (Emphasis added.) Pion upheld the trial court's findings reestablishing the location from both parol and survey evidence. This did not happen here. In the context of the court's adoption of the three-rod-road-assumption, and absent findings of fact confirming any physical or descriptive evidence as to the location of the original markers, the

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testimony relied on in the instant case concerned the surveyor's methodology, rather than direct evidence on the whereabouts of the old posts.

CONCLUSION

In this booklet, you have learned about some of the statutes, laws and court cases which make up the body of boundary law in Vermont. More importantly, you have now learned how to delve into the details of these laws to find out more about how the statute or court case will guide your responsibility to “know the law”. Happy hunting!

Finally, remember that the purpose of this booklet is to help land surveyors to “know the law”, not to practice law. We work closely with attorneys in our work and will be guided by their legal expertise when involved in joint work. We will also not be afraid to ask an attorney for legal advice on our boundary projects.