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## Maine Principles of Ownership Along Water Bodies

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# MAINE PRINCIPLES OF OWNERSHIP ALONG WATER BODIES

*Knud E. Hermansen & Donald R. Richards*

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## MAINE PRINCIPLES OF OWNERSHIP ALONG WATER BODIES

*Donald R. Richards\**

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### I. INTRODUCTION

Some of Maine's most valuable land is found along the tidal shore and inland bodies of water. Unfortunately, however, boundaries in, along, or across the area between the high water to low water (or high tide to low tide) are often unmarked, have never been surveyed, and are not described accurately in attempted conveyances (see Figure 1).<sup>1</sup>

The reasons for such shortcomings are numerous. Unaware of the complexities of title, unsure of the extent of ownership, unwilling to proceed through bog when dry ground was easier to walk, or unwilling to claim what was worthless at the time, a surveyor often failed to survey water boundaries for land that by common law was conveyed with upland property.<sup>2</sup> Even when a surveyor was careful to

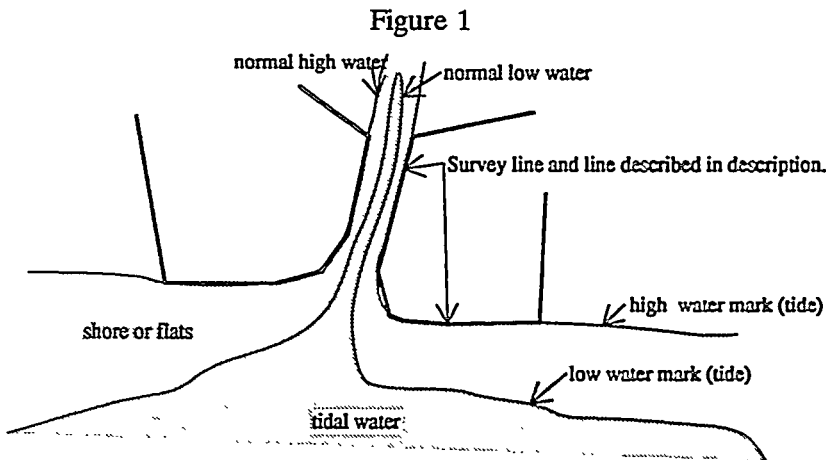
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1. See generally *State v. Brazos River Harbor Navigation Dist.*, 831 S.W.2d 539, 542 (Tex. App. 1992) (“[A] surveyor usually cannot go into a stream to make a corner, so he makes a corner on the bank in order to identify the place where he stopped—the rule being an exception to the one which requires following the footsteps of the surveyor.” (quoting *Moore v. Ashbrook*, 197 S.W.2d 516, 517 (Tex. Civ. App. 1946))). See also *Haight v. Hamor*, 83 Me. 453, 460-61 (1891) (“A majority of the court is of opinion, that it is a common method of measurement in the country, where the boundary is a stream or way, to measure from the bank of the stream or the side of the way, and that there is a reasonable presumption that the measurements were made in this way unless something appears affirmatively in the deed to show that they began at the centre line of the stream or way.” (quoting *Dodd v. Witt*, 79 N.E. 475 (Mass. 1885))).

2. Along tidal water, the ownership boundary is generally the low tide boundary or, in cases where the low tide draws more than 1650 feet below the high tide boundary, a point 1650 feet seaward of the high tidal boundary. See generally *Proctor v. Hinkley*, 462 A.2d 465 (Me. 1983); *Richardson v. Richardson*, 146 Me. 145, 78 A.2d 505 (1951); *In re Hadlock*, 142 Me. 116, 48 A.2d 628 (1946); *Stuart v. Fox*, 129 Me. 407, 152 A. 413 (1930); *Sinford v. Watts*, 123 Me. 230, 122 A. 573 (1923); *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Dunton v. Parker*, 97 Me. 461, 54 A. 1115 (1903); *Emerson v. Taylor*, 9 Me. 42 (1832); *Lapish v. Bangor Bank*, 8 Me. 85 (1831). Along nontidal rivers the ownership boundary is in the center of the stream. See *Richardson v. Richardson*, 146 Me. 145, 78 A.2d 505 (1951); *Stuart v. Fox*, 129



This figure shows the various "lines" along water bodies. As seen in the figure, the boundary has been surveyed and marked along the shore. However, the landowner's title beyond the high water line is not described or located. Thus, the landowner cannot be sure what title he has along or in the water, what limitations there are on this title, or where the boundaries cross the water.

survey the riparian boundaries, erosion, submergence, accretions,<sup>3</sup> the careless use of words in a description, or the simple lack of attentiveness by attorneys often resulted in the erroneous identification of ownership of shores or flats between the uplands and water bodies. Consequently, much of Maine's riparian lands lack definitive surveys in, along, or across their water boundaries, the very boundaries that make the uplands so valuable.<sup>4</sup>

In this regard, attorneys, surveyors, and other real estate practitioners will have to pay more attention to the location of the boundaries and title rights along water as riparian land values increase, development intensifies, environmental restrictions expand, and the need for public recreation grows. This need for increased attention exists because the intensity of development along water bodies causes expansion and crowding and raises the potential for trespass,

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Me. 407, 152 A. 413 (1930); *Coombs v. West*, 115 Me. 489, 99 A. 445 (1916); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910); *Proctor v. Maine Cent. R.R.*, 96 Me. 458, 52 A. 933 (1902); *Nickerson v. Crawford*, 16 Me. 245 (1839); *Lowell v. Robinson*, 16 Me. 357 (1839); *Bradley v. Rice*, 13 Me. 198 (1836); *Graves v. Fisher*, 5 Me. 69 (1827). Along great ponds, the ownership boundary is along the normal low water line at the time of the original conveyance. See *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950); *Bradley v. Rice*, 13 Me. 198 (1836); *Hathorne v. Stinson*, 12 Me. 183 (1835).

3. See *King v. Young*, 76 Me. 76, 79 (1884) ("It seems to be settled both in England and in this country that the land of a riparian proprietor may be increased by accretion.").

4. See generally *Babson v. Tainter*, 79 Me. 368, 371, 10 A. 63, 64 (1887) ("The colonial government of the mother commonwealth granted the great boon to landholders without much thought or intimation about the manner of dividing the flats among its grantees.").

clashing uses, confrontation, and litigation. The recent case, *Bell v. Town Of Wells*,<sup>5</sup> is a good example of the intensity and magnitude of the confrontation that has occurred, and more than likely will continue to occur, along Maine's water bodies, leading to increased demand for competent legal counsel. For example, clients seeking legal counsel concerning shoreland zoning, permits, use of riparian property, and improvements such as docks already have increased dramatically in number. Attorneys must be able to counsel their clients on ownership and public or private rights associated with riparian lands. To do so they need to understand riparian title rights as well as the probable location of boundaries along, within, or across the water body involved.

The present day practitioner is likely involved with development and recreation, while in the past practitioners dealing with riparian rights typically faced questions of property rights arising from fishing weirs, clamming, logging, shipping, ice cutting, and commercial water transport. From these historical practices and conflicts, various rules of construction regarding the extent and location of title evolved.<sup>6</sup>

This Article provides a summary of the Maine common law of riparian boundaries. It is geared toward practitioners who practice or provide counsel in the area of real property law or who must litigate boundaries and title rights involving water bodies. This Article also includes recommendations for fixing previously undefined boundaries across water. However, readers should be aware that this Article does not attempt to provide an exhaustive survey of all riparian law. In recent years state and federal legislation has further limited or restricted specific landowner common law rights along water bodies.<sup>7</sup>

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5. 557 A.2d 168 (Me. 1989) (holding that the public's right to use certain private beach areas in the Town of Wells does not include swimming, sunbathing, or picnicking; such use amounts to trespass on the private owner's property).

6. See, e.g., *Stuart v. Fox*, 129 Me. 407, 413, 152 A. 413, 415-16 (1930) (discussing the historical foundations of title along tidal water).

7. An example is state and federal wetlands legislation denying or limiting improvements in wetlands. See, e.g., 33 C.F.R. § 323 (1994); ME. REV. STAT. ANN. tit. 30-A, § 4401(2-A) (Pamph. 1993); ME. REV. STAT. ANN. tit. 38, § 480-B(4) (West 1989); ME. REV. STAT. ANN. tit. 38, § 957-B (West 1989). Another recent example of state legislation affecting waterfront property is shoreland zoning. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4404 (Pamph. 1993); ME. REV. STAT. ANN. tit. 38, § 482(4-F) (West 1989). Other state and federal legislation restricts the construction of docks, dams, vegetation removal, and the availability and cost of insurance in the 100-year flood plain as determined by the Federal Emergency Management Agency. See, e.g., ME. REV. STAT. ANN. tit. 35-A, § 2501 (West 1988); ME. REV. STAT. ANN. tit. 38, § 436-A(4) (West 1989); ME. REV. STAT. ANN. tit. 38, § 631 (West 1989).

## II. BOUNDARIES IN OR ALONG WATER

Maine common law has recognized four categories of water bodies in regard to title and title rights: 1) tidal waters, 2) great ponds, 3) nontidal navigable rivers or streams, and 4) nonnavigable streams. It is necessary to understand these four categories in order to deal with disputes concerning them.

### A. *Boundaries along Tidal Water*

Tidal water is defined as any body of water that is naturally influenced by the ebb and flow of the tide.<sup>8</sup> Tidal waters include rivers from their mouths to the point upstream where the ebb and flow of the tides are negligible.<sup>9</sup> The common law presumption is that a conveyance of land bounded by tidal water will convey title to the low tide mark or to 1650 feet (100 rods<sup>10</sup>), whichever is closer to the high tide line (see Figure 2).<sup>11</sup> This presumption of tidal water boundary applies equally to all lands along the ocean, bays, and rivers affected by the tides, even though the tidal river water may contain fresh rather than brackish or salty water.<sup>12</sup>

The line of low tide may fluctuate because of accretions and erosion. An owner's lands will increase or decrease accordingly.<sup>13</sup> Beyond the low tide or beyond 1650 feet, whichever is closer to high tide, the State has title.<sup>14</sup>

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8. See generally *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

9. See generally *Lapish v. Bangor Bank*, 8 Me. 85 (1831).

10. The rod, pole, or perch is an ancient surveying measurement used for land descriptions up to the mid-twentieth century. There are 16.5 feet in a rod. For more information on surveying measurements, see Knud E. Hermansen, *When is a Rod Not 16.5 Feet?*, PROBATE AND PROPERTY, Sept.-Oct. 1992, at 8.

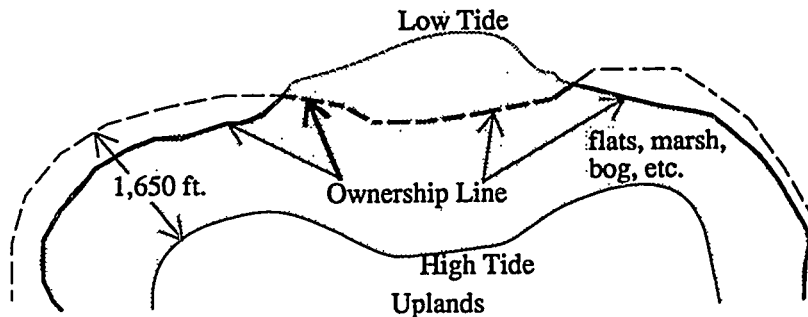
11. See *Emerson v. Taylor*, 9 Me. 42, 43 (1832) (“[I]n all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water-mark, where the sea doth not ebb above a hundred rods, and not more, wheresoever it ebbs further.” (quoting the Massachusetts Colonial Ordinance of 1641)). See also *In re George Hadlock*, 142 Me. 116, 119, 48 A.2d 628, 630 (1946); *Stuart v. Fox*, 129 Me. 407, 412, 152 A.2d 413, 415 (1930); *Sinford v. Watts*, 123 Me. 230, 232, 122 A.2d 573, 574 (1923); *McLellan v. McFadden*, 114 Me. 242, 246, 94 A.2d 1025, 1027-28 (1915); *Dunton v. Parker*, 97 Me. 461, 467-68, 54 A.2d 1115, 1118 (1903); *Erskine v. Moulton*, 84 Me. 243, 247-48, 24 A.2d 841, 842 (1892); *Stevens v. King*, 76 Me. 197, 199 (1884); *Lapish v. Bangor Bank*, 8 Me. 85, 91 (1831).

12. *Stone v. Augusta*, 46 Me. 127, 137 (1858) (*Stone* makes it clear that the intent of the Massachusetts Colonial Ordinance is directed at the ebbing and flowing of the tide and not at whether the nature of the water is fresh, brackish, or salty.). See also *Lapish v. Bangor Bank*, 8 Me. at 93 (1831).

13. *Bell v. Town Of Wells*, 557 A.2d at 175 n.18 (Me. 1989) (citing *King v. Young*, 76 Me. 76 (1884)).

14. *Op. Me. Att’y Gen.* 82-83; *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A.2d 787 (1910); *State v. Brazos River Harbor Navigation Dist.*, 831 S.W.2d 539, 544 (Tex. 1992).

Figure 2



This figure demonstrates that the line of ownership ordinarily goes along the low tide line unless the distance from the low tide line to the high tide line exceeds 1650 feet. Where the flats extend beyond 1650 feet from the high tide line, the ownership line will coincide with a parallel line crossing the flats at a distance 1650 feet from the high tide line.

### B. Boundaries along Great Ponds

A great pond is defined as any body of standing water with a surface area of ten acres or more.<sup>15</sup> Title along a great pond extends to the seasonal normal and natural low water line at the time of the original conveyance.<sup>16</sup> Consequently, if the water of a great pond has receded or been raised by artificial means since the time of the original conveyance, the upland owner neither gains nor loses property.<sup>17</sup> Beyond the normal low water line as it stood at the time of conveyance, title rests with the State (see Figure 3).<sup>18</sup>

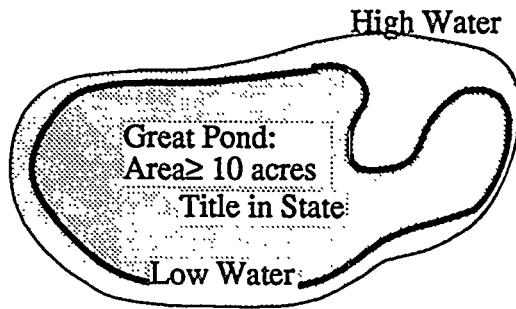
15. *Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950). See also ME. REV. STAT. ANN. tit. 38, §§ 436-A(7) and 480-B(5) (West 1989).

16. *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950); *Stevens v. King*, 76 Me. 197 (1884); *Wood v. Kelly*, 30 Me. 47 (1849); *Bradley v. Rice*, 13 Me. 198 (1836); *Hathorne v. Stinson*, 12 Me. 183 (1835).

17. *Lowell v. Robinson*, 16 Me. 357, 361 (1839) (“In the case of *Hathorne v. Stinson*, 3 Fairf. 183, it was decided by this Court, that a lot of land bounded upon a pond artificially raised by the flowing of a stream by a mill dam, was not limited to the margin of the pond, but included the land thus flowed.”). The same rule is expressed in the case of *Waterman v. Johnson*, 30 Mass. 261 (13 Pick. 1832). See also *Bradley v. Rice*, 13 Me. 198 (1836); *Hathorne v. Stinson*, 12 Me. 183 (1835).

18. See Op. Me. Att’y Gen. *supra* note 14, at 2 (citing *Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950)). See also *Barrett v. Rockport Ice Co.*, 84 Me. 155, 156, 24 A. 802 (1891) (Ponds containing more than ten acres are known as public great ponds, and the State holds them, as well as the soil under them, in trust for the public.).

Figure 3



Along a great pond the landowner's title ordinarily would reach to the low water line. Beyond the low water, title remains with the State of Maine. Between the low and high waters, the common law establishes an easement permitting limited public use, as explained in Part III of this Article.

### C. *Boundaries along Nontidal Navigable Rivers or Streams*

Nontidal navigable rivers or streams are defined as flowing bodies of water capable of being used for reasonable public transportation or commercial use some time during the year for some reasonable part of their length.<sup>19</sup> Maine common law imposes upon nontidal

19. In Maine, the floating of rafts and logs appears to be a critical commercial use defining "navigable" rivers, the term "float a log" being almost synonymous with "navigable." *Brown v. Chadbourne*, 31 Me. 9, 20-22 (1849) held:

[W]here a stream is naturally of sufficient size to float boats or mill logs, *the public have a right to its free use for that purpose. But such little streams or rivers as are not floatable, that cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private, not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use, as a common passage for the public.*

....

The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible, or not, of use as a common passage for the public.

....

The true test . . . is whether a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs. When a stream possesses such a character, then the easement exists, leaving to the owners of the bed, all other modes of use, not inconsistent with it.

....

In the test . . . to determine whether a stream should be considered public, none of the authorities, from which it is derived, requires the stream to possess the quality of being capable of use, during the whole year.

(emphasis added)

See also ME. REV. STAT. ANN. tit. 38, § 480-B(9) (West 1989); ME. REV. STAT. ANN. tit. 38, § 436-A(11A) (West Supp. 1994-95); *Card v. Nickerson*, 150 Me. 89, 104 A.2d



navigable streams a public easement for such reasonable transportation or commercial use.<sup>20</sup> Conveyance of land bounded by a non-tidal river or stream will convey title out to the “thread” of the main stream (see Figure 4).<sup>21</sup> In Maine, the thread of the stream is defined as a line equally distant from the banks’ sidelines at the “natural and ordinary” stage of the water (see Figure 4).<sup>22</sup>

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427 (1954). See generally *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A.2d 787 (1910); *Smart v. Lumber Co.*, 103 Me. 37, 46, 68 A. 527 (1907); *Woodman v. Pitman*, 79 Me. 456, 1 A. 342 (1887); *Parsons v. Clark*, 76 Me. 476 (1884); *Davis v. Winslow*, 51 Me. 264 (1863); *Gerrish v. Brown*, 51 Me. 256 (1863); *Treat v. Lord*, 42 Me. 552 (1856).

20. See *Brown v. Chadbourne*, 31 Me. at 20.

21. See *Richardson v. Richardson*, 146 Me. 145, 78 A.2d 505 (1951); *Stuart v. Fox*, 129 Me. 407, 152 A. 113 (1930); *Coombs v. West*, 115 Me. 489, 99 A. 445 (1916); *Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910); *Proctor v. Maine Cent. R.R.*, 96 Me. 458, 52 A.2d 933 (1902); *Stevens v. King*, 76 Me. 197 (1884); *Nickerson v. Crawford*, 16 Me. 245 (1839); *Lowell v. Robinson*, 16 Me. 357 (1839); *Bradley v. Rice*, 13 Me. 198 (1836); *Graves v. Fisher*, 5 Me. 69 (1827).

In *Mansur v. Blake*, 62 Me. 38 (1873), the court stated:

Fresh water rivers, of what kind soever, do, of common right . . . belong to the owners of the soil adjacent; so that the owners of one side have of common right the propriety of the soil, and consequently the right of fishing, *usque filum aquae*; and the owners of the other side the right of soil, ownership and fishing unto the *filum aquae* on their side. Prima facie, the owner of each bank of a stream is the proprietor of half the land covered by the stream. The conveyance of land bounded upon a highway or . . . stream, carries the grantee to the centre, unless there be decided and controlling or specific description showing a contrary intent.

*Id.* at 40 (citation omitted).

22. In *Warren v. Thomaston*, 75 Me. 329 (1883), the court noted:

In case of fresh water streams, when such stream is the boundary, the deed passes the fee to its centre. The words to the stream, thence up or down the river, in a deed pass a title to the thread of the stream. . . . The general rule is, that when the river is the boundary, the grantee takes *usque ad filum aquae*, unless the river be expressly excluded from the grant by the terms of the deed.

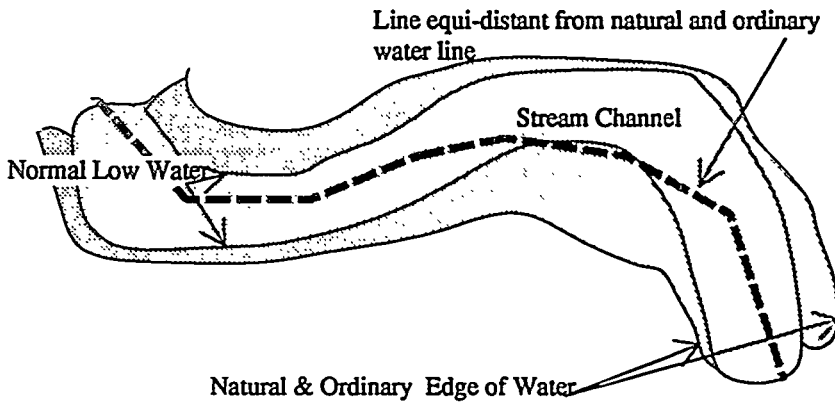
*Id.* at 331 (citations omitted).

The *Warren* case gives a complete analysis of the difference between the thread and the channel of a river or stream, and it gives specific definitions for each. The *Warren* court stated:

The channel is the deepest part of the river. It is the navigable part—the water road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the thread of the stream—the *filum aquae*. But, the thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other.

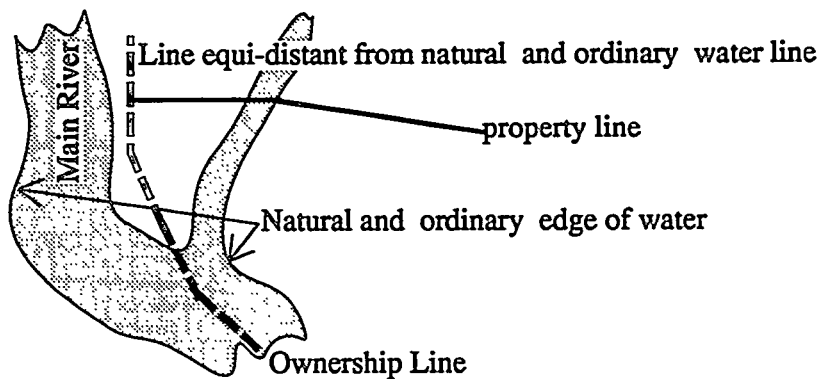
*Id.* at 332.

Figure 4



The cross section of a typical stream is not uniform. Consequently, a line equidistant from the natural and ordinary water lines cannot be expected to reside in the channel or deepest part of the stream. At times the line will approach one bank or the other and sometimes even cut across a bank that is exposed during times of low water.

Figure 5

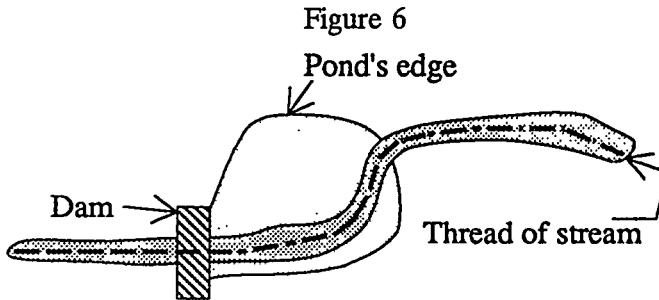


In Figure 5 the low water has exposed an island in the river, blocking an upland owner from access to the main channel.

During times of unusually low water the owner will not have access to the water if the ownership boundary at the thread crosses land exposed by drought and cuts off the property before the water's edge (see Figure 5).<sup>23</sup>

23. See generally *id.* (holding that the channel and the thread of rivers and streams often do not coincide; they may even vary in location to such an extent that when the thread is the boundary, the proprietor of the upland on one side of a river

The rule of conveyance for nontidal navigable streams also applies to artificially created ponds (see Figure 6).<sup>24</sup> The boundary of the conveyed riparian property is the thread of the stream as it existed before the pond was created.<sup>25</sup>



The erection of a dam across a stream will not shift the boundary in a stream unless an operative conveyance expressly calls for a different boundary location.

#### D. Boundaries along Nonnavigable Streams

A nonnavigable stream is defined as a flowing body of water incapable of supporting reasonable public transportation or commercial use at any time during the year.<sup>26</sup> Many times such a stream has an intermittent flow of water. Maine common law treats boundaries along such nonnavigable streams the same as nontidal navigable streams, except no public servitude is imposed on a nonnavigable stream.<sup>27</sup>

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or stream may not have frontage touching the water in the channel when the level of the water body is lowered in times of drought). See also *Graves v. Fisher*, 5 Me. 69 (1827).

24. See *Mansur v. Blake*, 62 Me. 38, 41 (1873); *Lowell v. Robinson*, 16 Me. 357, 361 (1839); *Bradley v. Rice*, 13 Me. 198, 201 (1836).

25. In many cases, title to the fee or to an easement is conveyed to the mill owner so flowage may occur without trespass. In *Bradley v. Rice*, 13 Me. at 201, the court stated: "Had the land been bounded upon a river or stream, or upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood." See also *Lowell v. Robinson*, 16 Me. at 361, in which the court noted:

[I]t was decided by this Court, that a lot of land bounded upon a pond artificially raised by the flowing of a stream by a mill dam, was not limited to the margin of the pond, but included the land thus flowed. The same opinion is expressed in the case of *Waterman v. Johnson*, 13 Pick. 261, with a possible qualification, that the pond may have acquired by becoming permanent another well defined boundary.

26. See *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910); *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 A. 527 (1907). See generally *Bradford v. Cressey*, 45 Me. 2 (1858); *Treat v. Lord*, 42 Me. 552 (1856); *Brown v. Chadbourne*, 31 Me. 2 (1849).

27. See generally *Davis v. Winslow*, 51 Me. 264 (1863); *Brown v. Chadbourne*, 31 Me. 2 (1849).

### III. RESTRAINTS ON OWNERSHIP OF RIPARIAN LANDS

When a parcel of land adjoins a water body, the landowner does not necessarily have exclusive use and dominion over the area adjacent to the water's edge. In some situations a public servitude exists on part of the exposed land along the water. In other cases a conveyance intentionally, or unintentionally, omits title to shorelands, thus denying the landowner the right to use the area immediately adjacent to the water in any way other than as a general member of the public.

#### A. *Public Servitudes on Waterfront Property*

Public servitudes are imposed on all riparian property in Maine with the exception of land along nonnavigable streams. Along a tidal water or great pond the public servitude extends from the normal high tide or water to the normal low tide or water.<sup>28</sup> On navigable streams the public servitude extends from normal high water on one side to normal high water on the opposite side.<sup>29</sup> Public servi-

28. See *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Flood v. Earle*, 145 Me. 24, 71 A.2d 55 (1950) (intertidal public easements for specific activities conferred by Massachusetts Colonial Ordinances).

29. Op. Me. Att'y Gen. *supra* note 14, at 3 ("The waters of the State . . . are held in trust by the State for the use of its people."). There appears to have been a certain traditional *de minimus* privilege to trespass allowed to drivers who traveled along stream banks to keep logs moving downstream. Note the following, however:

The public are not entitled to tow on the banks of ancient navigable rivers, at common law. And where a river cannot be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity, in itself, for public use.

*Brown v. Chadbourne*, 31 Me. 2, 25 (1849) (citing *Ball v. Herbert*, 100 Eng. Rep. 560 (K.B. 1789)).

The use of stream banks was further discussed in 1856:

The stream, in order to have the character of a public highway, must, in and of itself, have a capacity for floating logs. Such a stream, as well as our larger rivers, will, as experience has universally shown, from its windings, and the rush of its waters especially in times of freshets, cast many of the logs which float upon its bosom, upon its shores, intervals and banks, thereby rendering it necessary to go upon such uplands for the purpose of making a clean drive. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. To meet such necessity, it is proved by the Revised Statutes, c. 67, §§ 10 and 11, that all logs or other timber, lodged upon any lands adjoining any waters within this State, shall, in certain contingencies, and upon certain conditions, be forfeited to the owner or occupier of such lands; and that the owner of such timber may at any time before such forfeiture, enter on said lands and remove the same, by tendering a reasonable compensation for all damages as the statute requires. While, therefore, it is true, that persons driving logs may go upon the banks of our public streams and rivers, as necessity may require, it is also true, that a stream, which is so small and shoal in its bed, that no logs can be driven in it, without being propelled by persons traveling on its banks, is private property, and not subject to such public servitude as is claimed in this

tude on riparian property along tidal water, great ponds, or navigable streams may be summarized as the public right to fish, fowl, and navigate (and historically to cut ice).<sup>30</sup> In addition to the general public right to fish, fowl, and boat on all waters other than streams, on great ponds the public has an additional, but limited, right to cross the shoreland to gain access to the pond.<sup>31</sup> The Maine Supreme Judicial Court, sitting as the Law Court, has interpreted “fish, fowl, and navigate” to encompass skating, digging worms, clamming, floating logs, landing boats, mooring, and sleigh travel, among other activities.<sup>32</sup> These public servitudes, which evolved

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case. . . . The right of the public so to use a stream or river for the purposes of commerce, rests in the intrinsic capability of its waters for such use, and is in no way dependent upon the necessity of using its banks.

Treat v. Lord, 42 Me. 552, 563-64 (1856).

30. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *McFadden v. DeWitt Ice Co.*, 86 Me. 319, 29 A. 1068 (1894); *Warren v. Westbrook Co.*, 86 Me. 32, 29 A. 927 (1893); *Barrett v. Rockport Ice Co.*, 84 Me. 155, 24 A. 802 (1891); *Stevens v. Kelley*, 78 Me. 445, 6 A. 868 (1886); *McPheters v. Moose River Log Driving Co.*, 78 Me. 329, 5 A. 270 (1886); *Matthews v. Treat*, 75 Me. 594 (1884); *Davis v. Winslow*, 51 Me. 264 (1863); *Moulton v. Libbey*, 37 Me. 472 (1854); *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384 (1847); *Low v. Knowlton*, 26 Me. 128 (1846); *Deering v. Proprietors of Long Wharf*, 25 Me. 51 (1845); *Parker v. The Cutler Milldam Co.*, 20 Me. 353 (1841). These cases all deal with defining the activities included within the public's right to fish, fowl, and navigate.

31. Ponds containing more than ten acres are known as “great ponds.” They are public ponds. The state holds them and the soil under them in trust for the public. The public, in the absence of statute, have the right to fish and fowl and to cut ice upon them, by virtue of the Colonial Ordinance of 1641, provided the citizen can reach the pond by “passing to it on foot without trespassing upon any man's corn or meadow.”

*Flood v. Earle*, 145 Me. 24, 28, 71 A.2d 55, 57 (1950) (quoting *Conant v. Jordan*, 107 Me. 227, 77 A. 938 (1910)).

It is interesting to note, however, that a person may go freely across woodland, brush, or bog to reach the pond. This right is codified at ME. REV. STAT. ANN. tit. 17, § 3860 (West 1983), which states:

No person on foot shall be denied access or egress over unimproved land to a great pond except that this provision shall not apply to access or egress over the land of a water company or a water district when the water from the great pond is utilized as a source for public water.

The Attorney General shall, upon complaint of a person being denied said access or egress, if in his judgment the public interest so requires, prosecute criminally or civilly any person who denies such right of access or egress.

Any person may maintain an action in the Superior Court having jurisdiction where the alleged denial of access or egress occurred or is likely to occur for declaratory and equitable relief and actual and punitive damages against any person, partnership, corporation or other legal entity for any violations of this section.

Whoever violates this section shall be punished by a fine of not more than \$100 and by imprisonment for not more than 90 days.

32. *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989). *Bell* deals most thoroughly with the public rights permitted and not permitted in the intertidal zone. In *Bell* the court listed the permitted uses as follows:

from commercial use, do not involve any depletion or damage to soil or chattels<sup>33</sup> and do not include the right of the public to wash, swim, picnic, or sunbathe.<sup>34</sup>

### B. Unintended Limitations on Conveyed Title

Historically, title to the area immediately bordering water was valuable for such activities as harvesting salt grass, cutting ice, booming logs, swimming, and sunbathing.<sup>35</sup> The right to engage in these activities, carried on near the water, was deemed to belong to the riparian owner and was not considered part of any public right. As a consequence, title to the land area immediately bordering a water body sometimes intentionally was separated from title to the uplands so a party could be conveyed property on which he could exercise rights of flooding, booming logs, or cutting salt grass without having to acquire the uplands as well.<sup>36</sup> Problems with title can arise when shorelands are intended to be separate from uplands in a

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Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water over them, may dig shell fish in them, may take sea manure from them, but may not take shells or mussel manure or deposit scrapings of snow upon the ice over them.

*Id.* at 174 (emphasis omitted) (quoting *Marshall v. Walker*, 93 Me. 532, 536, 45 A. 497, 498 (1900)). See also *Moulton v. Libbey*, 37 Me. 472 (1854).

33. See, e.g., *Woodman v. Pitman*, 79 Me. 456, 10 A. 321 (1887). It was noted in *King v. Young*, 76 Me. 76, 80 (1884) that:

[T]he owner of adjoining land can maintain trespass *quare clausum fregit* against one who enters upon the flats and takes and carries away mussel-bed manure and that neither the ordinance of 1641-7 nor the common law, authorizes the taking of mussel-bed manure from the flats of another person between high and low water mark on tide waters.

In *Pearson v. Rolfe*, 76 Me. 380, 386 (1884), the court held that the user of the public rights in navigable waters could not remove rocks or obstructions, move soil in the stream bed, remove quarried stone, or remove ice from a fresh water stream. In *Moore v. Griffin*, 22 Me. 350, 355-56 (1843), the court held that the taking of sand, sea manure, and ballast are not allowed under the ordinance and that, "The language of the reservation in the ordinance cannot be extended beyond the obvious meaning of the words fishing and fowling." In the case of *Bagott v. Orr*, 2 B&P. 472, it was held that although the right to take shellfish on the shore by the common law was admitted, the right to take shells was not. Neither the ordinance nor the common law would authorize the taking of "mussel-bed manure" from the land of another person. *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) would appear to allow the taking of sea manure but not mussel-bed manure. See also *Marshall v. Walker*, 93 Me. 532, 98 A. 115 (1900).

34. See, e.g., *Bell v. Town of Wells*, 557 A.2d at 175-76 (specifically excluding public bathing, sunbathing, general recreation and walking, except where incidental to fishing, fowling, or navigation, from the rights of the public in the intertidal zone). See also *Charles C. Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910).

35. *Bell v. Town of Wells*, 557 A.2d at 173-76.

36. Cf. *Littlefield v. Littlefield*, 28 Me. 180 (1848); *Nickerson v. Crawford*, 16 Me. 245 (1839).

conveyance. For example, the citation, or call,<sup>37</sup> in the deed description for a “bank,” “shore,” “beach margin,” or other tangible landmark may be used by a scrivener intending to separate the water from the uplands. These terms provide a tempting physical limit to mark the separation of the land from the water. Consequently, such terms may be employed in a deed intending to stop ownership short of, or at, the high water.<sup>38</sup> The same attributes that make these physical and tangible points valuable as markers, however, also cause them to be used as rough points of reference by a deed drafter who has no intention at all that they serve as refined lines of limitation or separation.<sup>39</sup> The appearance of such terms in a deed can be confusing. An analogy could be made to a person describing the location of a house as being “at the intersection of Main and Oak Streets.” The intent could be only to convey enough information to bring another within sight of the house, not to have him believe the house stands literally in the intersection.

Certain monuments near water bodies, such as “bank,” “channel,” “shore,” “high-water,” and “low water,” have been used in this ambiguous way to such an extent that the Law Court has devoted significant effort to explaining the problems with these terms. It is thus essential that the practitioner understand such terms and their potential for confusion so they are not used loosely, with unintended lines of limitation resulting. For example, a description that states, in part, “to the pond’s shore, thence along the shore” leaves the exact location of the ownership line along the water in doubt. The following definitions may be of assistance in treating ambiguous shoreland references with appropriate specificity.

### 1. Bank

The term “bank” refers to the rise in topography found along the edge of water bodies, particularly freshwater.<sup>40</sup> Since most banks have a width composed of a gradual slope, starting at the water and extending uphill several feet, confusion occurs regarding where the line of ownership lies—at the top, middle, or bottom of the bank. To assign a boundary by using a term referencing such a broad width is to invite controversy, and its use should be avoided.

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37. The word “call” refers to a reference in a land survey or deed to an object, measurement, monument, or other detail describing an accompanying physical attribute on the land.

38. *Lincoln v. Wilder*, 29 Me. 169 (1848); *Lapish v. Bangor Bank*, 8 Me. 85 (1831).

39. *Lincoln v. Wilder*, 29 Me. 169 (1848); *Lapish v. Bangor Bank*, 8 Me. 85 (1831).

40. See generally *Stone v. Augusta*, 46 Me. 127 (1858).

## 2. Channel

The channel, or thalweg, is the deepest part of the stream, where the stream would flow if any water moved at all.<sup>41</sup> The channel is not synonymous with the thread of the stream.<sup>42</sup> The channel by happenstance may be the thread of the stream, but that occurs only by chance, as when a raindrop that falls into a cup strikes the exact center of the cup. The practitioner who uses “channel” for a boundary is choosing what cannot be seen, since the line of the channel is visible only when water barely flows.

## 3. Shore

The shore is the land between the ordinary low stage and ordinary high stage of the water.<sup>43</sup> This area also is known as flats, intertidal zone, foreshore, beach, or the beachfront area.<sup>44</sup> In at least one case the “shore” has been held to be synonymous with the “bank.”<sup>45</sup> The shore has two edges, high water and low water, delineating between them an area of measurable width.<sup>46</sup> The term “shore”

41. See generally *State v. Ecklund*, 23 N.W.2d 782 (Neb. 1946); *Lincoln v. Wilder*, 29 Me. 169 (1848).

42. The channel is the deepest part of the river. It is the navigable part—the water road over which vessels pass and repass. It is the highway of commerce. Had the line run to the river and down the river, the boundary would have been the thread of the stream—the *filum aquae*. But, the thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other.

*Warren v. Thomaston*, 75 Me. 329, 332 (1883). But cf. *Bradford v. Cressey*, 45 Me. 9, 11 (1858); *Lincoln v. Wilder*, 29 Me. 169, 179-80 (1848).

43. *Proctor v. Hinkley*, 462 A.2d 465, 473 n.6 (Me. 1983); *Hodgdon v. Campbell*, 411 A.2d 667, 672 (Me. 1980); *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903); *Proctor v. Railroad Co.*, 96 Me. 458, 472, 52 A. 933, 937 (1902); *Abbott v. Treat*, 78 Me. 121, 123, 3 A. 44 (1886); *Littlefield v. Littlefield*, 28 Me. 180, 184 (1848). *Lapish v. Bangor Bank*, 8 Me. 85, 89-90 (1831) (quoting *Storer v. Freeman*, 6 Mass. 435 (1810)) adopted the following definition:

The sea shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus when the tide is out, low water mark is the margin of the sea, and when the sea is full, the margin is high water mark. The sea shore is, therefore, all the ground between ordinary high water mark and low water mark.

44. *Bell v. Town of Wells*, 557 A.2d 168, 169 n.3 (Me. 1989); *Littlefield v. Littlefield*, 28 Me. 180, 185 (1848). See also ME. REV. STAT. ANN. tit. 12, § 572 (West 1994).

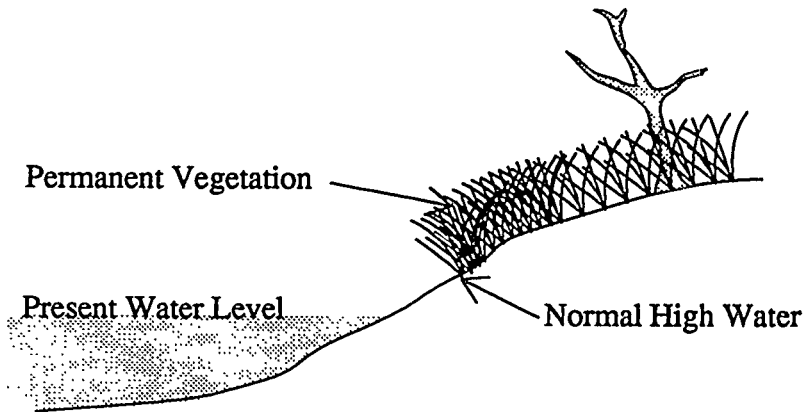
45. *Proctor v. Hinkley*, 462 A.2d 465, 473 n.6 (Me. 1983). But see *Proctor v. Railroad Co.*, 96 Me. 458, 477, 52 A. 933 (1902) (citing *Morrison v. First Nat'l Bank*, 88 Me. 155, 33 A. 782 (1895)).

46. *Sinford v. Watts*, 123 Me. 230, 232, 122 A. 573, 574 (1923); *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903); *Abbott v. Treat*, 78 Me. 121, 123, 3 A. 44, 45 (1886).



should not be used to fix a boundary because the point of ownership along the width of land that compromises the “shore” is uncertain.

Figure 7



Along water bodies, normal high water is the edge of the permanent vegetation. Oftentimes the actual water level is found at some lower level.

#### 4. High Water

High water, generally synonymous with normal high water, is the line reached by the water when the water body is ordinarily full and the water ordinarily high.<sup>47</sup> The line is normally marked by the scour line, which is the line between permanent vegetation and soil or rock swept clean of vegetation by the action of the water (see Figure 7).<sup>48</sup> High water is not the highest point touched by the water in a storm or abnormal flooding, but the highest limit reached when the water maintains its natural and usual flow.<sup>49</sup> Because this is not generally understood, confusion arises when the term “high water” is employed to fix a boundary; its use should be avoided.

47. See, e.g., *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 396 (1847).

48. See *Proctor v. Hinkley*, 462 A.2d 465 (Me. 1983).

49. [T]he line on the river bank reached by the water when the river is ordinarily full and the water ordinarily high. Not the highest point touched by the water in a freshet . . . but the highest limit reached when the river is unaffected by freshets and contains its natural and usual flow; the highest limit at the ordinary state of the river . . . . Sometimes it may be “the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture,” while in other cases “it can only be ascertained by careful observation.”

*Proctor v. Hinkley*, 462 A.2d 465, 470 n.4 (Me. 1983) (quoting *Morrison v. First Nat'l Bank*, 88 Me. 155, 161, 33 A. 782, 784 (1895)). See also ME. REV. STAT. ANN. tit. 38, § 436-A(9) (West 1964); ME. REV. STAT. ANN. tit. 38, § 480-B(6) (West 1964); *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384 (1847).

### 5. *Low Water*

Low water is the level to which the tide ebbs on its out-flow.<sup>50</sup> The low water line along a stream or great pond is the line the water recedes to during summer months.<sup>51</sup>

## IV. COMMON LAW RULES OF CONSTRUCTION FOR INTERPRETING COMMON WATER BOUNDARY TERMS IN CONVEYANCES

As a consequence of the historically careless use of water boundary terms by laypersons and practitioners alike, the courts have adopted certain rules of construction governing their interpretations in conveyances.<sup>52</sup> When the intent of the drafter is clear from the context of the transaction or from the instrument itself, that express intent will control.<sup>53</sup> When the intent is unclear and controversial, certain other rules of construction govern.<sup>54</sup>

In general, Maine courts have been reluctant to interpret a conveyance as separating the lowlands from the uplands.<sup>55</sup> Uplands and shorelands benefit each other to such an extent that separation goes against common sense.<sup>56</sup> The presumption therefore is against separation unless the conveyance expresses explicit intent otherwise.<sup>57</sup> Words such as “by,” “along,” or “side” are insufficient by

50. *See generally* *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384 (1847).

51. *Id.*

52. The rules of construction applicable to navigable waters are similar, and many times the same, as rules pertaining to roads. *See Warren v. Thomaston*, 75 Me. 329 (1883).

53. *Proctor v. Hinkley*, 462 A.2d 465 (Me. 1983); *McLellan v. McFadden*, 114 Me. 242, 95 A.2d 1025 (1915); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910); *Brown v. Heard*, 85 Me. 294, 27 A. 182 (1893); *Haight v. Hamor*, 83 Me. 453, 22 A. 369 (1891); *Bradford v. Cressey*, 45 Me. 9 (1858); *Pike v. Monroe*, 36 Me. 309 (1853).

54. We are to consider all the words of the grant in light of the circumstances and conditions attending the transaction. But we must consider and construe the grant according to settled rules of construction. They are rules of property. And the security of real estate titles depends upon a strict adherence to these rules of construction.

*Stuart v. Fox*, 129 Me. 407, 413, 152 A. 413, 415-16 (1930). *See also* *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Bradford v. Cressey*, 45 Me. 9 (1858).

55. *See, e.g.*, *Stuart v. Fox*, 129 Me. 407, 152 A. 413 (1930); *Sinford v. Watts*, 123 Me. 230, 232, 122 A. 573, 574 (1923); *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Dunton v. Parker*, 97 Me. 461, 54 A. 1115 (1903); *Freeman v. Leighton*, 90 Me. 541, 38 A. 542 (1897); *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 A. 429 (1891); *Stevens v. King*, 76 Me. 197 (1884); *Nickerson v. Crawford*, 16 Me. 245 (1839).

56. *See generally* *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 24 A. 429 (1891).

57. *See* *Stuart v. Fox*, 129 Me. 407, 152 A. 413 (1930); *Sinford v. Watts*, 123 Me. 230, 232, 122 A. 573, 574 (1923); *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Dunton v. Parker*, 97 Me. 461, 54 A. 1115 (1903); *Stevens v. King*, 76 Me. 197 (1884); *Nickerson v. Crawford*, 16 Me. 245 (1839).

themselves to convey the uplands without the lowlands.<sup>58</sup> This is true even when the measurements given do not extend further toward the water than the edge of uplands.<sup>59</sup> Furthermore, a description that cites only the area measuring the uplands is not persuasive as conveying only the uplands—since the custom with surveyors defining a complete property (both uplands and shorelands) often has been to exclude from the description the area of flats and shore and to cite only the area of the uplands even though both may be intended to be conveyed.

#### A. Common Water Boundary Terms Used as Words of Separation

Terms often used as evidence of intent to separate the uplands from the shore or flats include “by the bank,” “along high water mark,” “high tide,” “by the shore,” “by the head of the cove,” and “along the near (or upland) shore.”<sup>60</sup> The use of one of these terms

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58. *Wilson v. Harrisburg*, 107 Me. 207, 213, 77 A. 787, 789 (1910) (“[A] deed which describes a line along a nontidal river as running ‘with’ or along the stream, or as running ‘by’ or ‘on’ the stream or ‘up’ or ‘down’ the stream, carries the title to the center of the stream, unless the contrary appears . . .”). See also *Dunton v. Parker*, 97 Me. 461, 54 A.2d 1115 (1903).

59. The general rule of construction may be thus stated; whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made a part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not, in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stone, then the center of the thing so running over or standing on the land is the boundary of the lot granted . . . . And it is undoubtedly true that where a grant is bounded upon a nonnavigable fresh-water [sic] stream, a highway, a ditch or a party wall, or the like, such stream, way, ditch or wall are to be deemed monuments, located equally upon the land granted and the adjoining land, and in all such cases, the grant extends to the center of such monument.

*Coombs v. West*, 115 Me. 489, 491-92, 99 A. 445 (1916) (quoting *City of Boston v. Richardson*, 95 Mass. 146, 154 (1866); *Bradford v. Cressey*, 45 Me. 9, 13 (1858)). The Law Court in *Haight v. Hamor*, 83 Me. 453, 460-61, 22 A. 369 (1891) had stated earlier:

The rule is well established when the road is the terminus *ad quem*, but there is little authority when it is the terminus *a quo*, and there is no monument at the other end of the line. A majority of the court is of opinion that it is a common method of measurement, in the country where the boundary is a stream or way, to measure from the bank of the stream or the side of the way, and that there is a reasonable presumption that the measurements were made in this way, unless something appears affirmatively in the deed to show that they began at the center line of the stream or way.

*Id.* at 372 (quoting *Dodd v. Witt*, 139 Mass. 63, 65 (1885)). Cf. *Stevens v. King*, 76 Me., 197, 199-200 (1884).

60. *Proctor v. Hinkley*, 462 A.2d 465, 467 (Me. 1983); *McLellan v. McFadden*, 114 Me. 242, 247, 95 A. 1025, 1028 (1915); *Whitmore v. Brown*, 100 Me. 410, 414-15, 61 A. 985, 987-88 (1905); *Wilson & Son v. Harrisburg*, 107 Me. 207, 212-13, 77 A. 787,

with the preposition “to,” a word of exclusion, often has been held by the Law Court to limit the title to property above a line where the monument coincides with the line of normal high water or high tide.<sup>61</sup> In other words, when the grantor conveys “to” one of these monuments and then writes the description “along” the same monument or another similar monument, courts will presume such conveyances to exclude the shores or flats from the grant.<sup>62</sup> Use of such terms without “to,” however, may not be conclusive in excluding title to the lowlands.<sup>63</sup> For example, it is common for a description to run not to a shoreland monument but to a fixed and tangible monument such as a tree and then go “along” the water body. In this situation, the conveyance extends ownership to the full limit of the grantor’s potential title in the water body. The monument near the water is presumed merely to fix the direction from the previous

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789-90 (1910); *Brown v. Heard*, 85 Me. 294, 27 A. 182, 182 (1893); *Bradford v. Cressey*, 45 Me. 9, 12 (1858).

61. “[T]he word ‘to’ is a word of exclusion rather than of inclusion.” *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903) (citation omitted). Cf. *Hodgdon v. Campbell*, 411 A.2d 667 (Me. 1980); *McLellan v. McFadden*, 114 Me. 242, 95 A. 1025 (1915); *Wilson & Son v. Harrisburg*, 107 Me. 207, 77 A. 787 (1910); *Proctor v. Railroad Co.*, 96 Me. 458, 52 A. 933 (1902); *Stone v. City of Augusta*, 46 Me. 127 (1858).

62. See, e.g., *Mansur v. Blake*, 62 Me. 38, 41-42 (1873); *Bradford v. Cressey*, 45 Me. 9, 13-14 (1858).

63. In determining the construction of the description in a deed of land upon the seashore, certain well-established general principles must be applied. By the Colonial Ordinance of 1641-7, it was provided that in such cases, “the proprietor of the land adjoining shall have propriety to low water mark,” etc. By reason of this ordinance the owner of the upland adjoining tide water prima facie owns to low water mark; and does so in fact, unless the presumption is rebutted by proof to the contrary . . . . It is, of course, true that the owner of upland and shore may separate the ownership by the conveyance of one and the retention of the other, and, as has frequently been decided in the states to which this ordinance is applicable, where the side boundary line of the lot conveyed is “to the shore,” and thence “by the shore,” the side line terminates at the inner side of the shore, and shows, in the absence of other calls or circumstances showing a contrary intention, that the inner side of the shore is intended as the boundary. That is, a call in a deed which describes a line as running to a strip of land, whether shore or upland, does not carry the line over, across or onto the strip referred to, because the word “to” is a word of exclusion rather than of inclusion . . . .

But it does not by any means follow from the mere fact that the shore of land adjoining tide waters is made a boundary, or that the boundary is “by the shore,” that it is by high water mark. The space between high and low water mark, properly called the shore, is frequently of many rods in width, it has an outer or seaward side and an inner or upland side, and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore is intended as the boundary it is necessary to look for something further. It follows, that the starting point of a boundary “by the shore” is one of the important elements in throwing light upon the question as to which margin of the shore is intended, because, as we have already seen, low water mark is as much the shore as is high water mark.

*Dunton v. Parker*, 97 Me. 461, 467-68, 54 A. 1115, 1118 (1903) (citations omitted).

upland monument toward the water body.<sup>64</sup> For example, if the description says in part “stone; thence S830E 102 rods to a tree on the bank; thence along the pond,” the tree serves to fix the boundary from the stone to the tree. Implicit in such a description is the idea that the boundary then runs down from the tree to the water (see Part V of this Article), goes along the water, and includes the shores and flats (see Part II of this Article).

### B. *Specific Principles in Construing Separation of Uplands from Lowlands*

When the intent to include, or exclude, lowlands from a conveyance is not clear from the deed, the Law Court has provided some guiding principles for construing such conveyances. Each principle is based on past and present actions involving the riparian land and its conveyances.

#### 1. *Mix of Monuments Principle*

If one or more calls in a deed are for the “water,” while other calls in the same deed are for the “shore” or “bank,” the edge of the shore or bank at the low water line is held to be what is meant by the call for the “shore” or “bank.”<sup>65</sup> By contrast, if the “shore” or “bank” is called for in a description without mention of the water or water’s edge, it is presumed that the high water edge of the shore or bank is what is meant.<sup>66</sup>

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64. It is familiar law, however, that when land is described as bounded by a monument standing on the bank . . . [or] if the monument do[es] not stand exactly on the bank but a short distance back from it—the monument then being referred to only as giving the direction of the line to the stream and not as restricting the boundary on the stream.

*Erskine v. Moulton*, 66 Me. 276, 280 (1877); *Cf. Mansur v. Blake*, 62 Me. 38 (1873); *Bradford v. Cressey*, 45 Me. 9 (1858).

65. *Dunton v. Parker*, 97 Me. at 468-69, 54 A. 1115, 1118 (1903); *Proctor v. Maine Railroad Co.*, 96 Me. 458, 472-73, 52 A. 933, 937 (1902).

66. Running to a monument standing on the bank, and from thence running to the river, or along the river, &c., does not restrict the grant to the bank of the stream; for the monuments, in such cases, are only referred to as giving the direction of the lines *to the river*, and not as restricting the boundary *on the river*. If the grantor, however, after giving the line to the river, bounds his land by the *bank* of the river, or describes his line as running *along the bank* of the river, or bounds it upon the *margin* of the river, he shows that he does not consider the whole *alveus* of the stream a mere mathematical line, so as to carry his grant to the middle of the river. And it appears to me equally clear that the grant is restricted when it is bounded by the shore of the river, as in the present case.

*Bradford v. Cressey*, 45 Me. at 13-14 (quoting *Child v. Starr*, 4 Hill 369 at 375). *See also Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. 14, 17, 24 A. 429, 430 (1891) (holding that where the terms “the sea” or “the shore” are used in a deed to designate a boundary, they include the beach to the low-water mark).

## 2. *Long Uncontested Possession Principle*

The intended boundary is deemed to be the high water edge of the shore or bank when a conveyance uses a term other than “the water” as the call for a boundary monument and the conveyance is followed by a long uncontested possession of the shore or flats by someone not claiming title through the grantee.<sup>67</sup> This was frequently the situation around mill ponds where the mill owner intended to retain the title to boom the logs at the shore or where the grantor had erected fishing weirs and continued to maintain them after the conveyance. Unfortunately for the practitioner seeking to clarify title to such riparian land, evidence affirming uncontested historical possession, such as the booming of logs or the existence of fishing weirs, may have disappeared over time.

## 3. *Value Apart Principle*

Whether the flats or shore are capable of being separated from the uplands, and whether such separation is worthwhile, may serve as evidence of an intent to separate the lowlands from the uplands. A separate conveyance of the shore or flats from the uplands may be considered reasonable intent when activities have been carried on along the water that have not needed the support of the uplands to make them valuable. Examples of such activities include fishing, log booming, and salt grass cultivation.<sup>68</sup>

## 4. *Separated and Brought Back Principle*

It is possible for one part of a deed to be construed to exclude the water, while a later part of the same deed brings the water back.<sup>69</sup> A qualifying clause of the deed, or other documents cited in the property description, may be used to determine the ultimate intent of the grantor to retain the lowlands with the uplands.<sup>70</sup>

67. See, e.g., *McLellan v. McFadden*, 114 Me. 242, 248-49, 95 A. 1025, 1028-29 (1915).

68. See, e.g., *Stuart v. Fox*, 129 Me. at 412, 152 A. at 415; *McLellan v. McFadden*, 114 Me. at 248-49, 95 A. at 1028-29; *Dunton v. Parker*, 97 Me. 461, 467, 54 A. 1115, 1118 (1903); *Clancey v. Houdlette*, 39 Me. 451, 457-58 (1855).

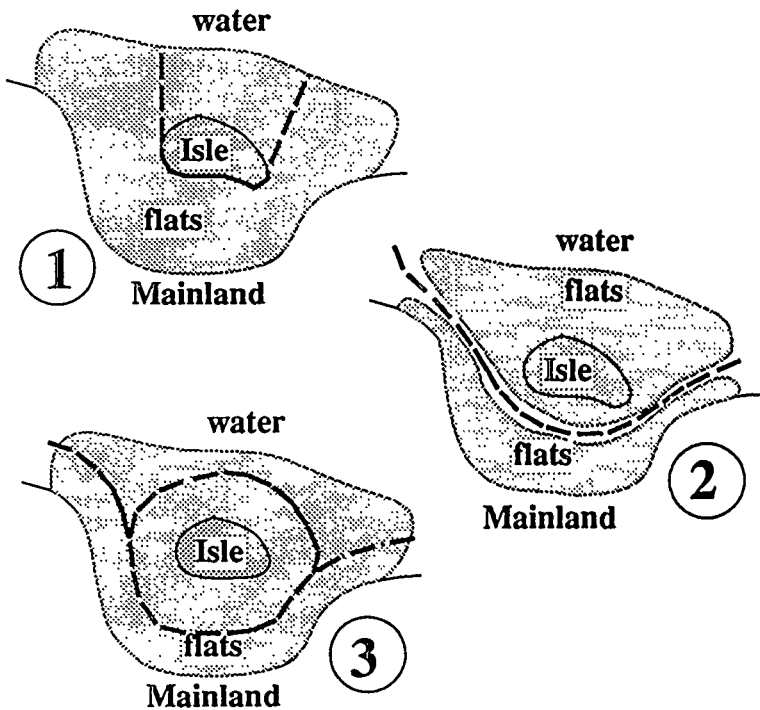
69. *Hodgdon v. Campbell*, 411 A.2d 667, 672 (Me. 1980).

70. *Snow v. Mt. Desert Island Real Estate Co.*, 84 Me. at 16, 24 A. at 429. See also *Seekins v. Lougee*, 152 Me. 153, 156, 125 A.2d 916, 917-18 (1956); *Dunton v. Parker*, 97 Me. at 468, 54 A. at 1118; *Dillingham v. Roberts*, 75 Me. 469, 471-72 (1883); *Lincoln v. Wilder*, 29 Me. 169, 182 (1848); *Lapish v. Bangor Bank*, 8 Me. 85, 91-92 (1831). In *Whitmore v. Brown*, 100 Me. 410, 416-17, 61 A. at 985, 988 (1905), the court stated that the words “together with all the privileges and appurtenances thereto belonging” do not convey the shore and flats. In *Snow v. Mt. Desert Island Real Estate Co.*, the court stated that the right in the shore is a fee ownership subject to a public servitude, but as that is usually regarded as an appurtenance, it is ownership, not an easement. However, it cannot be conveyed as an appurtenance because land cannot be appurtenant to land, only an easement or the like can be an appurtenance.

### 5. Islands Principle

Islands seemingly connected to the mainland by shore or flats are treated different from other uplands. Islands lying within 100 rods (1650 feet) of the mainland uplands do not include any shores or flats that extend between the island and the mainland.<sup>71</sup> The island does, however, include the flats extending to the seaward side or on all sides where there is a channel or where 100 rods distance has limited the mainland owner's claim to the flats.<sup>72</sup>

Figure 8



One: If the flats are continuous between the island and mainland, they are part of the title to the mainland. Two: If there is a channel between the island and the mainland, each owner takes title to the flats on his respective side of the channel. Three: The mainland owner can claim title to all flats within 100 rods. Beyond 100 rods, the owner of an island can claim title to any flats within 100 rods of the island's shore.

71. *Babson v. Tainter*, 79 Me. 368, 372, 10 A. 63, 64 (1887). See also *Thornton v. Foss*, 26 Me. 402, 405 (1847) (holding that where title to islands extends to low water mark, title includes flats lying between islands and low water mark and not to flats to right or left of land not covered by water at low tide).

72. Cf. *Babson v. Tainter*, 79 Me. at 372, 10 A. at 65.

## V. THE SPECIAL PROBLEM OF BOUNDARIES THAT CROSS UNSURVEYED RIPARIAN LANDS

The title rights discussed to this point have focused on boundaries that are approximately parallel with the water's edge. A different circumstance arises, however, when a boundary is marked by a pin on the bank beyond the water's highest reach but the riparian owner has title beyond the pin, perhaps all the way to the water's edge. Unfortunately for the owner, the conveyance may fail to define and locate the boundary crossing the intervening area, from the farthest reach of the water up the bank or shore to the extent of title along or in the water body.<sup>73</sup> Consequently, courts have had to provide guidance on how to locate the boundary from the edge of the uplands, across the lowlands, to the limit of title.

### A. *Competing Doctrines of Construction*

Courts in Maine and other states have adopted rules of construction in order to provide guidance on how to locate boundaries that cross water or cross uplands to reach water. These rules of construction are used in conjunction with a riparian grant that has failed to locate the boundaries crossing the flats.<sup>74</sup> The courts have attempted to fix a method that is equitable, functional, and easy to understand and apply. The various methods courts have considered at one time or another are summarized as 1) extension of the property line, 2) proportionment, 3) the colonial method, and 4) the perpendicular method.

#### 1. *The Extension Method*

Extension of a property line means staying on the same azimuth as the upland boundary that leads to the water. This method is often used because of its simplicity.<sup>75</sup> However, without an express requirement from the operative conveyance that the boundary be so extended, this method can produce ludicrous results in some situations and inequitable results in others.<sup>76</sup> Where boundary lines cross the uplands at an angle oblique to the water's edge, the lines can diverge or converge to such a degree that the upland owner's boundary stops short of the water. In addition, the resulting water

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73. See, e.g., *Emerson v. Taylor*, 9 Me. 42, 47 (1832).

74. The rule by which the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor, is not an absolute rule of law irrespective of manifest intention, like the rule in *Shelley's case*, but is merely a principle of interpretation adopted for the purpose of finding out the true meaning of the words used.

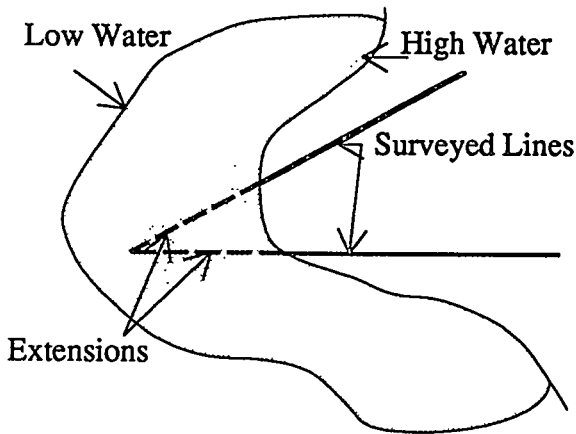
*Stuart v. Fox*, 129 Me. 407, 413, 152 A. 413, 416 (1930) (quoting *Crocker v. Cotting*, 166 Mass. 183, 185, 44 N.E. 214 (1896)).

75. See generally *Proctor v. Hinkley*, 462 A.2d 465 (Me. 1983).

76. See, e.g., *Treat v. Chapman*, 35 Me. 34 (1852).



Figure 9



In this example, extending the boundaries causes them to intersect prior to reaching low water. This denies the owner access to the water and leaves the common boundary between the adjoining lots uncertain. Even if the lines were to reach the water before they intersect, one parcel may have its water frontage limited inequitably as a result of the direction of a common side boundary.

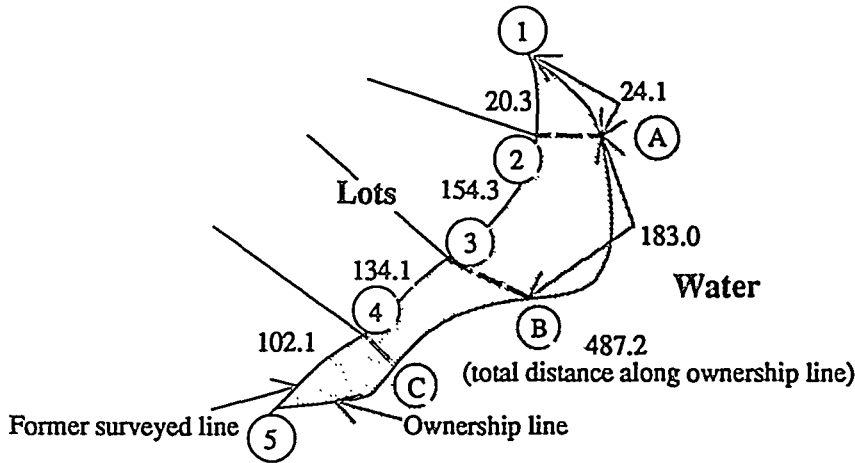
frontage may be reduced or enlarged to such an extent as to unjustly enrich one neighbor while denying another almost all benefit of water frontage (see Figure 9).

## 2. *The Proportionment Method*

The proportionment method is used to set waterfront boundaries for adjoining properties. It requires that boundary termini along the water be fixed proportionate to the length of the respective properties' boundaries along the previously surveyed upland (see Figure 10).

This method, like the extension method above, may produce undesirable results. In order to apply the proportionment method, the actual ownership boundary (which one is seeking to fix) must join the original, surveyed boundary at some point to provide a corner point of beginning. This point of beginning is needed to start measurements from when marking off succeeding properties' proportional boundary measures. Consequently, if the low water line does not touch the line of actual survey at some point, the proportionment method cannot be employed. This is a common situation along some stream channels, great ponds, or islands. In other cases, the point of intersection is ambiguous or some distance away and requires considerable research and survey efforts to locate, making the proportionment method very costly. The proportionment method also is susceptible to variations when the length of a bound-

Figure 10



20.3	1-2	1-(A) <sub>new</sub>	=	$\frac{20.3}{410.8} \times 487.2$	=	24.1
154.3	2-3	A-(B) <sub>new</sub>	=	$\frac{154.3}{410.8} \times 487.2$	=	183.0
134.1	3-4	B-(C) <sub>new</sub>	=	$\frac{134.1}{410.8} \times 487.2$	=	159.0
102.1	4-5	C-(5)	=	$\frac{102.1}{410.8} \times 487.2$	=	121.1
<hr/>						<hr/>
410.8						487.2

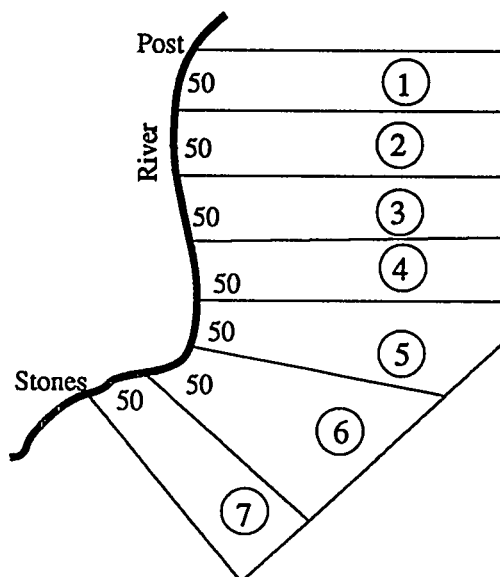
The extent of ownership and the former survey line coincide at corner points 1 and 5. Between these points, the boundaries must be established across the flats to the water. To fix points A, B, and C, a proportion of the recorded distances between points 1 and 5 is equated to a proportion of the present frontage between points 1 and 5. The resulting calculations give distances to be measured from a known corner.

ary changes because of accretion and erosion. Any physical change in the frontage, regardless of where the change occurs, will change the ownership boundaries in front of the parcel in question, thus changing the dependent proportions of the total frontage. For example, erosion in front of a neighbor's lot may decrease the total of all neighbors' frontage. As a consequence, the length of each parcel, part of the total frontage in question, loses a proportional part of its frontage even though the erosion was along a limited section in front of a single parcel. As an added problem, because of the dependency of each lot corner to other lot corners, all lot owners may have to be joined as parties in any litigation between two feud-

ing parties in order to fix mutually proportioned waterfront boundaries.<sup>77</sup>

Proportioning is appropriately used to fix the termini of adjoined boundaries when 1) the lot was created as part of a plan of lots and the deed refers to the overall plan; 2) the plan shows the corners terminating at the great pond, the tidal water, or the thread of the river; 3) one or more monuments were not set or their former position can no longer be determined; and 4) there is excess or deficiency between the recorded distance and actual distance along the water frontage between existing monuments or former positions (see Figure 11).<sup>78</sup>

Figure 11



As seen in Figure 11, this subdivision plan extends the boundary to the water giving no indication that the survey or description stops the boundary short of the absolute limit of title. When old plans are retraced with modern equipment, the record measurements typically do not match the retracement measurements. This situation requires reportioning the frontage to establish the location of the entire side boundaries.

### 3. *The Colonial Method*

The colonial method was adopted early in Maine's history and was limited to use in those areas governed by the Massachusetts Co-

77. See, e.g., *Reitz v. Knight*, 814 P.2d 1212 (Wash. Ct. App. 1991).

78. *Brown v. Gay*, 3 Me. 126 (1824).

lonial Ordinance that dealt with water affected by the tides.<sup>79</sup> This method for apportioning flats among adjoining upland properties is not appropriate in all situations.<sup>80</sup> The advantage of the colonial method over the other methods is that, once determined, the direction of the boundaries remains fixed regardless of additional shorefront accretions or erosions. Determining a common boundary for adjoining properties across flats or water by this method depends solely on existing corners of the adjoining properties.

The colonial method was first described by the court as follows:

The mode of applying the principle is this. Draw a base line from the two corners of each lot, where they strike the shore; and from those two corners, extend parallel lines to low water mark, at right angles with the base line. If the line of the shore be straight, as in the case before us, there will be no interference in running the parallel lines. If the flats lie in a cove, of a regular or irregular curvature, there will be an interference in running such lines, and the loss occasioned by it must be equally borne or gain enjoyed equally by the contiguous owners . . . .<sup>81</sup>

The colonial method sees to it that loss or accretion gain is "borne equally" by adjoining property owners; it sets as the direction of their common boundary the average or mean bearing of the two lines drawn across the fronts of their contiguous properties (see Figure 12).

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79. *Emerson v. Taylor*, 9 Me. 42 (1832). See also *Call v. Carroll*, 40 Me. 31 (1855).

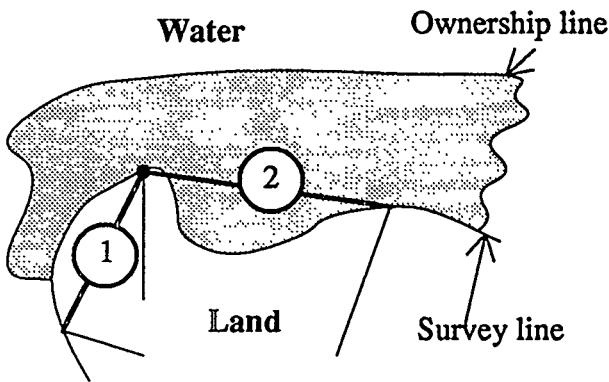
80. *Babson v. Tainter*, 79 Me. 368, 371, 10 A. 63, 64 (1887) ("No rule can compass all cases. The Massachusetts court has adopted different rules for different classes of cases, and has frequently had occasion to remark upon the difficulty and embarrassment attending a practical application of any construction of the ordinance.").

We are not aware of any cases, where, in apportioning appurtenant flats among contiguous owners of upland, the foregoing principles and mode of proceeding would not be properly applicable as the rule of decision. Still we do not undertake to affirm that there may not be some peculiarity in the form of the upland to which flats are appurtenant, and some peculiarity of manner in which the upland may be divided among contiguous owners, the effect of which we have not anticipated, which would vary the principle. Should any such cases hereafter present themselves, requiring the application of a different principle, such new principle must of course be applied.

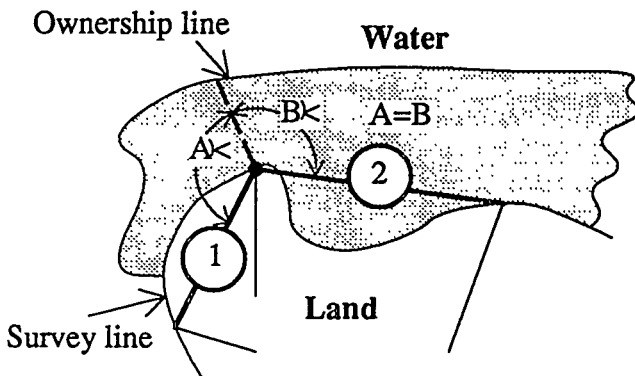
*Emerson v. Taylor*, 9 Me. at 46.

81. *Emerson v. Taylor*, 9 Me. at 44-45.

Figure 12—Steps 1 &amp; 2



Step 1: Connect adjoining corners forming lines 1 & 2



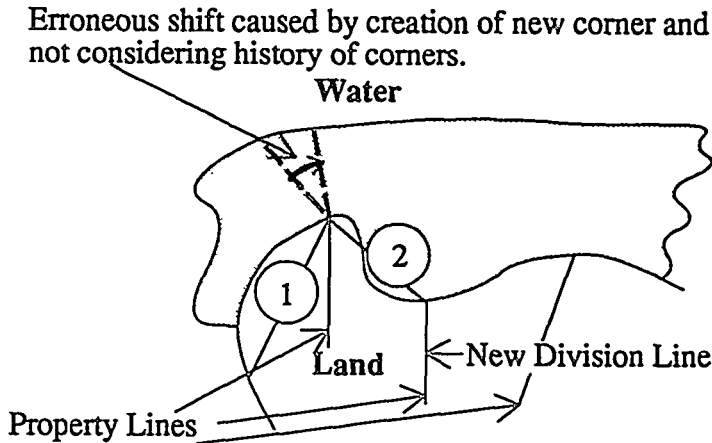
Step 2: Strike an average direction between lines 1 & 2

The figure illustrates the steps necessary to use the colonial method properly. As seen from the figure, this method is dependent on being able to fix corner locations in addition to the joint corner in question.

The colonial method has three problems. First, it may cause adjoining property boundaries across flats to intersect before reaching a property's limit at or across water. This is the same problem that can occur with extension of an upland boundary, although it happens less frequently with the colonial method. Second, the proper application of this method requires that all corners on the water side of adjoining properties be identified. The researcher, or more likely the surveyor, may need to perform tedious research, possibly to the earliest grants dealing with the land, and may need to survey one or more adjoining parcels in order to recover the necessary adjoining corners. Third, equitable application of this method requires adjoining corners used in the calculation to have been created at the same

time as or prior to the creation of the corner under scrutiny.<sup>82</sup> Failure to consider the history of adjoining corners will cause the boundary to change with each new subdivision.<sup>83</sup> In order to use the colonial method, research to the point of common ownership is required for all adjoining parcels and surveying is required to reach even the far corners of parcels that do not adjoin the parcel in question (see Figure 13).

Figure 13



Referring to the properties in Figure 12, one can see that a new division line interposed between the original property lines will cause the colonial method boundary established in the previous figure to shift if the historical creation of each boundary is not considered.

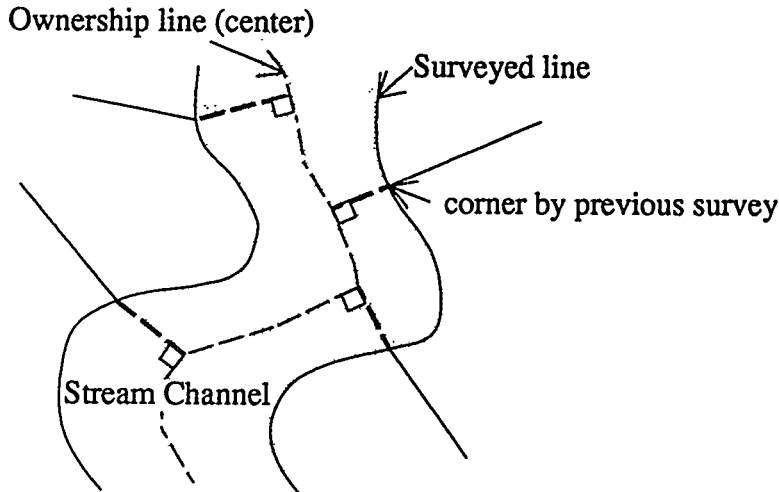
#### 4. *The Perpendicular Method*

The perpendicular method fixes the boundary reaching across flats or shore at the shortest distance between the actual ownership line and the known surveyed corner on the upland. The line of shortest distance is that line perpendicular (or normal) to the line of ownership (see Figure 14).

82. See *Call v. Carroll*, 40 Me. 31, 34 (1855).

83. *Id.*

Figure 14



From the present terminus of the side boundaries, a straight line is extended to the line of ownership along a direction that allows for the shortest distance to the ownership line. The resulting line created is always perpendicular to the line of ownership at the point of intersection.

The perpendicular method always will provide the property owner frontage, is easy to apply, and does not require costly research and field survey beyond the parcel in question. Its only limitation is the rare situation when two or more points along the line of ownership may be the same distance from the terminus of the boundary. This situation is extremely rare given the typical irregularities of shores and water courses and the precision of modern equipment that recognizes even small differentiation between what appear otherwise to be equivalent choices. Many courts in other states have applied this method for all riparian land.<sup>84</sup> The Law Court in dicta appears to have adopted this method for nontidal bodies of water.<sup>85</sup>

### B. Recommendation

The colonial method has been the accepted method in Maine for extending a property's side boundaries across shorelands to tidal water when they are not otherwise marked or described in the oper-

84. See, e.g., *State v. Corvallis Sand and Gravel Co.*, 416 P.2d 675 (Wash. 1966); *Tauscher v. Andruss*, 401 P.2d 40 (Or. 1965); *Driesbach v. Lynch*, 234 P.2d 446 (Idaho 1951).

85. *Shawmut Mfg. v. Town of Benton*, 123 Me. 121, 124, 122 A. 49, 50 (1923) ("By implication of law, in the absence of negating words, the side lines of a riparian proprietor, whose estate is bounded by an innavigable river, are extended from the termini on the margin, at right angles from the stream, to include one-half of the bed of the river.").

ative conveyance. The perpendicular method has been suggested by the Law Court to be the proper method for extending boundaries to nontidal waters where they have not been previously surveyed or described. However, under some conditions where a boundary has been previously described to the limit of ownership but its physical location is now unknown, Maine common law has applied the proportionment method to fix boundaries at the water edge extent of ownership.

The method for extending side boundaries toward water that is easiest to apply, least costly, and most effective is the perpendicular method. This method is independent of subsequent variations that occur on, or are present on, nearby riparian parcels. The perpendicular method is easily applied by the layperson and the surveyor. Most important, this method always assigns water frontage regardless of the existing boundary or ownership line configuration. A riparian landowner should not be forced to survey a neighbor's property, research ancient titles, and spend considerable money on attorney and survey fees to find out where her boundary resides. The perpendicular method would not only avoid these onerous requirements but spare the landowner being assigned boundary extensions that never reach the water. Using the perpendicular method the landowner starts at the corner shared with her neighbor on the bank and establishes her boundary in the direction that gives the shortest distance to the water.

Consider the following sequence of figures illustrating the various locations assigned for the common boundary between lot 1 and lot 2 (along a great pond) as defined by the several methods discussed.

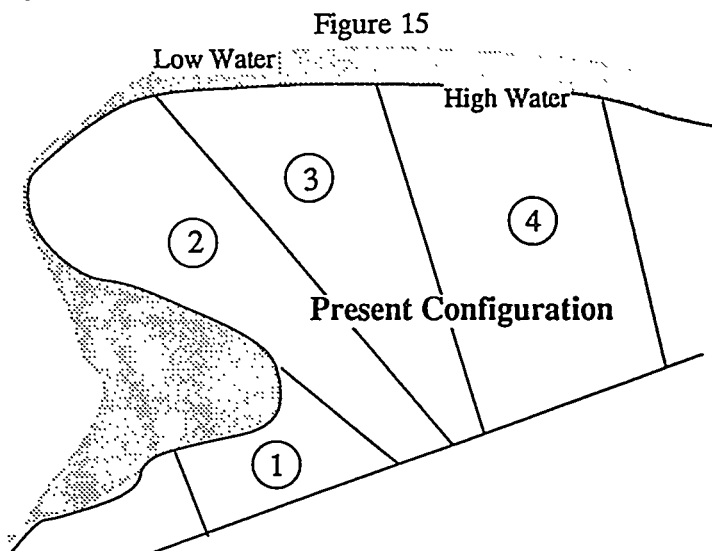
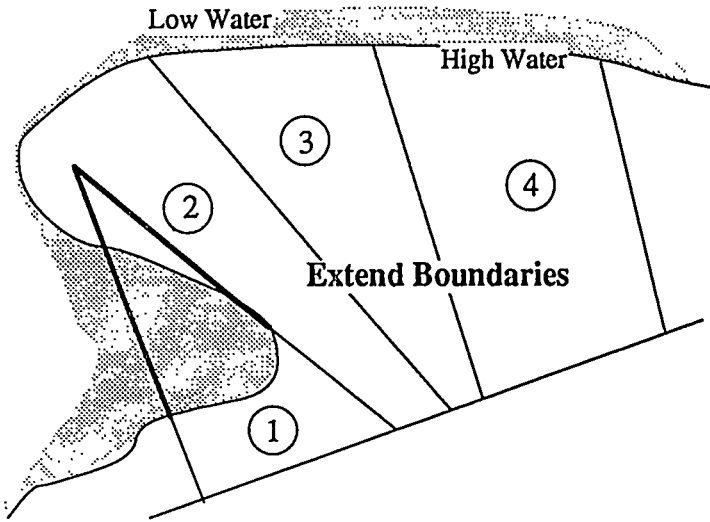


Figure 15 shows the present boundary configuration for lots 1-4, where described boundaries stop short of the low water's edge.

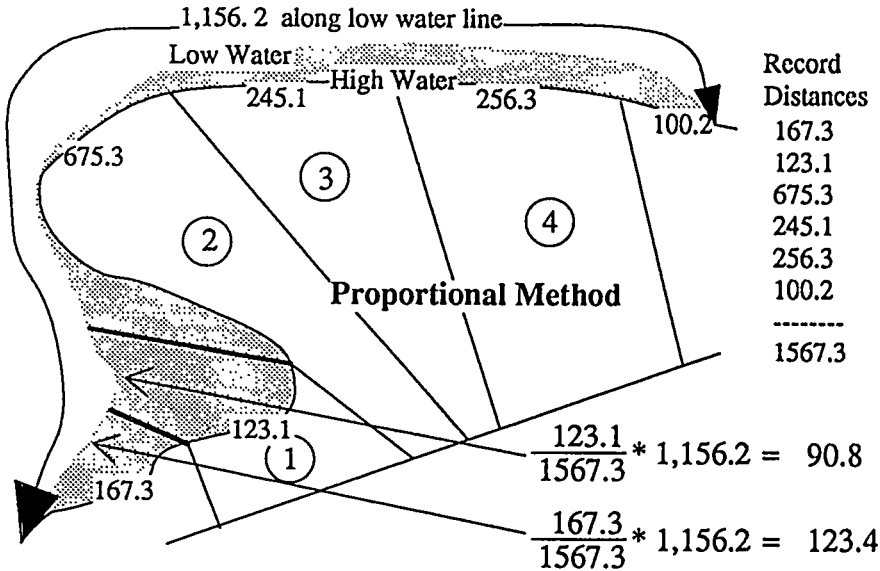


Figure 16



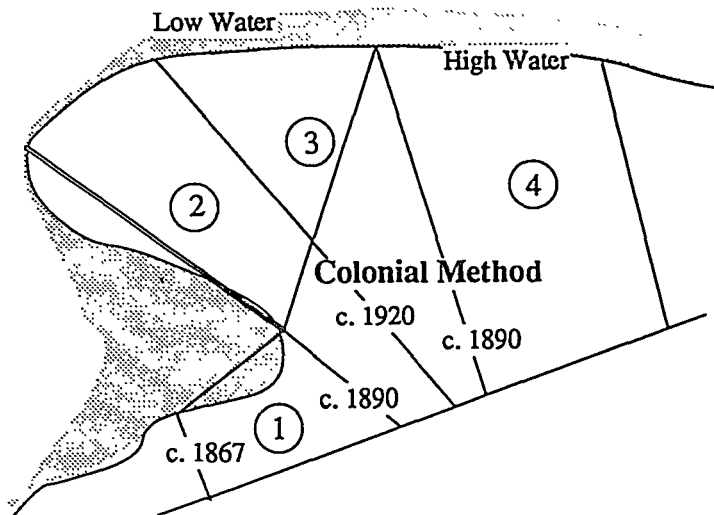
Extension of the present boundaries denies lot 1 frontage along the low water. A triangular overlap results on lot 2, while the ownership of the flats west of lot 1 is unknown.

Figure 17



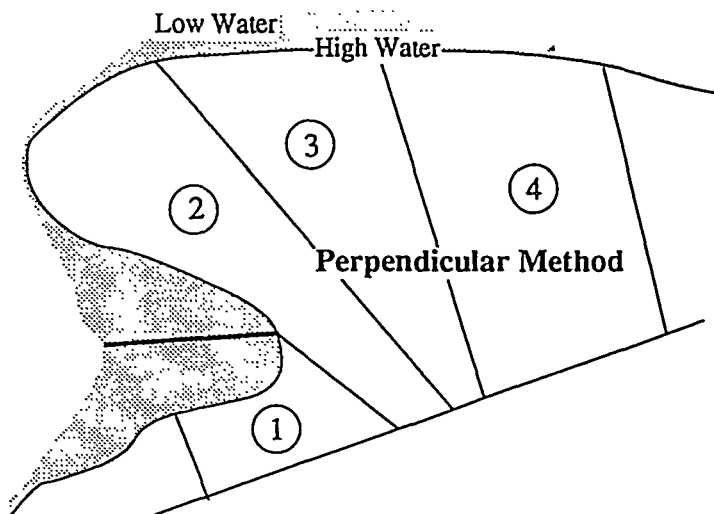
The proportionment method requires extensive surveying all along lots 1-4 and beyond. Intervening points for all the lots along the low water have to be established in order to establish the common boundary between lot 1 and lot 2.

Figure 18



The colonial method requires considerable survey effort and research to locate adjacent boundaries of the same age or older than the boundary in question. The method produces a ludicrous result by actually cutting off some of the uplands thought to belong to lot 2, reducing the shoreline of lot 2, and giving lot 1 shoreline and upland that it cannot effectively use.

Figure 19



Using the perpendicular method, the common boundary between lot 1 and lot 2 is simply the shortest distance to the low water. There is no need for extensive surveying, extensive research, or locating other intermediate boundaries.

## VI. CONCLUSION

The practitioner involved with a conveyance along a water body must understand and be able to explain the extent of title, limitations on the title, and how boundaries may be fixed and extended. In most cases, the owner of land bordering on a water body has title extending across the shore beyond the normal reach of high water. Where the title does extend beyond the reach of high water, the public often has certain rights beyond the high water line. In some cases, persons may have extended their use of a client's shorefront beyond what is permitted by these public rights. It is in the client's best interest to know this. For parcels bordering a great pond, the public's right to pass over property by foot to access the great pond should be brought to the client's attention. A great deal of confusion and litigation has involved riparian title and the location of boundaries on or near water. Knowing the common law rules of construction as well as boundary definition methods for waterfront property can avoid such confusion.