

THE TITLE AND BOUDARIES OF NEW BRUNSWICK HIGHWAYS

BLAIR DRAKE

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PREFACE

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THE TITLE AND BOUNDARIES
OF NEW BRUNSWICK HIGHWAYS

BY

BLAIR DRAKE

September 1977

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"ONCE A HIGHWAY - ALWAYS A HIGHWAY"

Legal Maxim.

This technical report is an abridged version of an M. Eng. report entitled "A study of Certain Aspects of the Policy and Law Pertaining to Highways as they Affect the Title and Boundaries of New Brunswick Highways". The complete report may be found in the University of New Brunswick Engineering Library.

ABSTRACT

This report is a study of certain aspects of the policy and law pertaining to highways as it affects the title and boundaries of New Brunswick highways.

A substantial review of the historical background of the nature of highways and their creation both in law and in substance is presented as essential to the understanding of the development of highways and the laws that governed them.

It is the basic difference of the legal concept of a common or public highway in contrast to the statutory definition of a highway under the present Highway Act that provides the basis for this report.

The discussions of the methods of establishing and creating each type of highway and the law pertaining to the proper opening and closing of these highways provide an understanding of their differences and how these differences have contributed to the present status of New Brunswick highways today.

An analysis of several typical sections of existing highway, with regard to title and boundary, will indicate to a certain extent, the complexity of the problem of determining what actually are the limits of a highway and what degree of title to the lands is actually held by Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Transportation.

The conclusions and recommendations resulting from this study could provide the terms of reference for a Committee to study this problem in much greater detail and make recommendations to the Provincial Cabinet regarding legislation to properly resolve the existing situation in both an equitable and economic manner.

ACKNOWLEDGEMENTS

I wish to express my appreciation to the staff of the Legislative Library, the Provincial Archives and the library of the U. N. B. Faculty of Law for their invaluable assistance in locating numerous records and documents used in my research. Thanks are also due Mr. Peter MacNutt and Mr. J. T. Keith McCormick, solicitors with the Department of Justice, for their opinions and interpretations on various points of law discussed in the report, Mr. Frank Maddox of the Department of Transportation for his continuous support and interest, and Dr. John McLaughlin and Dr. Wolfgang Faig of the Department of Surveying Engineering who jointly supervised this report and provided special effort and encouragement when it was most needed.

An appreciative note of thanks is due Mrs. Lois MacBeth, who supervised the final typing of this report, and my special thanks and appreciation to Ms. Linda Fox, who bore with me through many late nights of research, typing and preparation of the initial draft.

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GLOSSARY OF LATIN TERMS

<i>ad quod damnum</i>	the name of a writ formerly issuing from the English chancery, commanding the sheriff to make inquiry "to what damage" a specified act, if done, will tend, e.g. if anyone will turn a common highway and lay out another way as beneficial.
<i>ad medium filum viae</i>	to the middle thread of the way.
<i>ad medium filum aquae</i>	to the middle thread of the stream .
<i>animus dedicandi</i>	the intention of donating or dedicating .
<i>certiorari</i>	to be informed of, to be made certain in regards to. The name of a writ of review or inquiry. An appellate proceeding for re-examination of action of inferior tribunal or an auxiliary process to enable appellate court to obtain further information in pending cause.
<i>de facto</i>	in fact; actually; indeed; in reality.
<i>ex parte</i>	on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.
<i>in pais</i>	this phrase primarily means that it has taken place without legal proceedings.
<i>in perpetuum</i>	endless duration; forever.
<i>mutatis mutandis</i>	with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary.
<i>omnia presumuntur rite acta esse</i>	a prima facie presumption of the regularity of the acts of public officers exists until the contrary appears.
<i>onus</i>	a burden or load; a charge; an encumbrance.
<i>prima facia</i>	at first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

CHAPTER 1
INTRODUCTION

1.1 Purpose of the Study

"Once a highway, always a highway. "

The full implication of this maxim was not completely realized by the author until a listing of New Brunswick highways, their boundaries and the various titles and interests existing in the lands under these highways, was being considered for consolidation and updating.

After several meetings with numerous provincial and municipal personnel entrusted with the records, control, maintenance and administration of New Brunswick highways, roads, streets, lanes, alleys, etc., it became apparent that an extremely large percentage of these officials had little knowledge of, or were grossly misinformed about, certain basic data concerning highways.

It is not the intention of this report to unjustly criticize individuals misinformed or unlearned of the specialized field of modern highway law, but rather to emphasize the lack of readily available material on this subject that is so urgently needed in a layman's language.

This report is a rather halting attempt to state the extent to which the author understands (or now is totally confused about) the law of highways in New Brunswick, with a most sincere plea that someone duly qualified, and an authority on the subject, will see this need, and prepare a comprehensive and practical paper on the subject.

It has been pointed out that, "in law teaching, a great deal of statutory

matter is ignored, in spite of its great practical importance and the fact that the courts as well as administrative bodies have to pay great attention to it.

The art of statutory interpretation is something that is taught to all law students, at a basic stage, but it is not then put into practice at all systematically because of the daunting bulk and quality of the statutes. It is natural to turn one's back on this forbidding mass if given the chance, but practitioners and administrators (and for that matter ordinary citizens) cannot take this easy way out. The law teaching world can, and to some extent does, but this is surely an abdication of responsibility. The scathing remarks that judges make about the drafting of statutes should encourage law teachers and students to get to grips with the subject matter, not to wash their hands of it. It may be that what is wanted is to recognize a new process of translating statutes into English (so to speak) not as an alternative to getting to know the texts but as a halfway house towards doing so. "¹

A great deal of the investigation for this study involved certain legalities and technicalities concerning the law of highways, which is (and should be kept in mind) part of the wider field of public land law, or real property law.

Although these laws consist of Federal and Provincial Statutes, Private and Local Acts, Case Law and Common Law, it is apparent that the latter two are almost totally unknown to many administering conveyances of land involving public highways. These administrators should become more aware of these formidable laws, as their actions have far-reaching effects in the field of real property law.

1.2 Historical Background of New Brunswick Highways

Although this report deals primarily with the legal aspects of property

conveyance and highway law, the following section has been included as a means of "setting the scene". It has been strikingly evident that the majority of individuals associated with the land surveying profession do not fully understand the development of highways and highway law, and a discussion of these laws would not be meaningful, nor would the basic reasoning behind the drafting of these laws be understood, if the reader were unfamiliar with the historical aspect of highways.

1.2.1 The Need for Setting the Scene

This scene is an interesting one, and some consideration of the history and geography of highways will facilitate comprehension of the legal aspects of highway law by keeping the reader in mind of its context.

Without having a "feeling" of the era about which this report relies on for its background, its starting point, infancy, growth and development, one would be unable to relate fully to the topic since few appreciate the true extent of rapid growth over the past 100 - 150 years.

We live in a modern world; travelling distances of 100 miles mean very little to today's traveller, and good transportation routes are taken for granted - in any season and any weather.

But to the early settler, the vastness of the country and the hostile topography daunted his efforts to travel quickly and easily.

In 1828, Thomas Baille, then Commissioner and Surveyor-General of Crown Lands in New Brunswick, wrote that "the land communications between the settlements are mere paths cut through the forest, by felling the trees near their roots for the space of eight feet in width, and leaving the stumps for time to destroy.

Wheel-carriages, of course, on such roads are not to be used "2. (See EXHIBIT 1)

As recently as 1910, the Chief Commissioner of Public Works lamented that "there is a tremendous toll of time and energy wasted in travelling over bad roads. Damage to horses, vehicles to an extent seldom realized"3. (See EXHIBITS 2, 3, 4, 5, 7 and 8).

It was under these physical conditions when the land was virtually untouched that the earliest laws were passed and the basis of our modern highway system was founded.

It is also imperative to understand the general physical condition of these early highways, as well as the attitudes of travellers over the roads and of the landowners through whose property these highways ran.

1.2.2 Settlement of the Land

At the close of the American Revolution, about 12,000 Loyalists arrived in what is now New Brunswick, but which was the largely unoccupied part of the Province of Nova Scotia in 1783.

Great dissension existed among the Loyalists in that first year as bitter feelings were created by the inept handling of the placement of the settlers on their new lands. Most Loyalists were required to wait several months while the government began legal proceedings to regain badly needed lands which had been improvidently granted during the pre-revolution years.

Nova Scotia's Surveyor-General, Charles Morris, and his deputies, although very willing, were not materially prepared to furnish surveyed farm lots

for the thousands of new immigrants. The Nova Scotia Governor's general inability to have the Loyalists settled expediently helped support a movement for a separate Province and a new Government for the Loyalists, and in 1784 this was achieved; Nova Scotia was partitioned and New Brunswick, as we know it today, was created.

"Governor Thomas Carleton and most of his executive arrived in Saint John in November of 1784 to establish their new government and direct the colonization of New Brunswick. The key officials, besides Carleton, soon to be involved in land matters were the Provincial Secretary, Jonathan Odell; the Solicitor-, Attorney-, and Surveyor-General, Ward Chipman, Jonathan Bliss and George Sproule respectively (the latter two arriving some months later). For one year, Carleton and his Executive Council ruled from Saint John as the sole executive, judicial and legislative power until an elected Assembly was called together in January, 1786. It was during this year that these officials turned to the Loyalist settlement problem. Guiding Carleton and his executive were colonial precedents and administrative procedures, their own experience, intelligence and ability and the royal instructions. These instructions, in a very general way, set out the reasonable terms and the proper methods for granting and administering Crown lands, for laying out townships, for escheating old grants, for surveying and passing new grants, for collecting fees and quitrents and for the recording of all land transactions.

By January 1785, a scant six weeks after their arrival, Carleton and his council were meeting almost daily as a land committee to supervise and direct the Loyalist settlement; to screen applicants and deal with their petitions; to settle disputes; to inspect improvements and escheat the neglected older grants; to lay out reserves for public, military and naval use; to issue instructions to subordinates,

and in general, to handle the minor problems that arose from the submission of a land petition to the signing of the patent. The first major chore was to gather together the necessary old records and begin the creation of new ones. Odell and Chipman undertook this difficult task in the absence of Bliss and Sproule. New lists of Loyalists wanting lands were composed, as were registers of those already in receipt of allotments. Old Nova Scotian grants were ordered and re-registered, and earlier warrants of survey were inspected. Next, the escheat work begun by Parr was continued by Carleton. The New Brunswick officials tried to avoid unnecessary hardship to those proprietors who really intended to improve their lands. The Executive Council appointed commissioners to evaluate the old settlements and to enquire by jury into the present state of settlement, and the fulfilment of the conditions of a grand (sic) of land. In many cases old inhabitants had no clear title to their lands but the Council showed its magnanimity by taking the hardships and poverty of these people into account and granting to them their improvements and excusing them from paying the established fees -- in other words, the pre-Loyalists were placed on the same footing as the Loyalists. The Council reassured anxious pre-Loyalists who feared the loss of their lands and exhorted them to remain quiet and pursue (your) honest labor on (your) present possessions where no steps to (your) prejudice will be taken or countenanced by government. If, however, an old inhabitant's land did unfortunately fall within one of the Loyalist's reserves, he was paid for his improvements and given first choice of available land elsewhere. "4

1.2.3 Early Crown Grants and Crown Surveys

The early Grants were generally free to the Loyalists and were

relatively small (the average being one hundred acres for a family's head, and fifty acres for each additional member), but carried with them certain reservations and terms to which each grantee was legally bound. Military personnel received additional grants as follows: privates were given one hundred acres; subalterns, staff and warrant officers, five hundred acres; captains, seven hundred acres; field officers, one thousand acres.

Many Loyalists banded together and appointed one main grantee in whose name the grant was made; several grants of 10,000 and 20,000 acres were created in this way.

Surveyor-General Sproule soon discovered that the old surveys and pre-partition records were inadequate and these former, carelessly-done surveys came to cause great confusion and necessitated in many cases, resurveys. (See EXHIBITS 9 and 10). Sproule's early deputy surveyors (responsible for all field surveys) were themselves "Loyalists with military experience as engineers; most lived in the regions in which they did their surveying work, and most were farmers or merchants, or held other official positions, such as sheriff or magistrate, to augment the fees received as a deputy surveyor".⁵

There was an acute shortage of qualified surveyors able to spare the time from the demanding efforts needed to establish themselves and their families in the new colony. To persuade men to work as deputies, Sproule appealed to their sense of duty to their community; "Indeed", as the Surveyor-General wrote, urging Samuel Lee to accept a commission, "this can be your only inducement for little or no profit can attend it".⁶

In some remote parts of the province, the local inhabitants were

instructed to do their own surveys and were issued with temporary licences of occupation until an official survey could be carried out.

Letters of the Surveyor-General sent to his deputies included "warrants of survey, surveying aids in the form of sketches, copies of old grants and plans, as well as specific instructions for laying out roads, public landings, reservations, the scale to be used"⁷ and the size and shape of the grant.

"When farms were plotted, they were usually two hundred acres in size, rectangular in shape, possessing a breadth one-third of their length, and were set out side by side, thus allowing the owners to share adjacent rivers or streams, meadows or marsh lands. If possible, within each grant, equal portions of arable and barren lands were included.

By using the bounds of an earlier grant, if they were accurate, or by using a fixed and permanent marker, the deputy surveyor would mark off his front line and establish an other end marker. From these two end markers, which he cautioned the proprietor to carefully preserve, the surveyor would measure the angles of his side lines and with the aid of chainmen and axemen, he would run these lines out.

Usually the rear lines and in many cases, also the side lines were left to Sproule to determine on paper from the surveyor's plans sent to Fredericton".⁸

Inaccurate surveying tools caused problems as well, and the Surveyor-General encouraged his deputies to make checks "by frequent trial and examination".⁹ Circumferentors could vary one or two degrees "which the best artists in London told me proceeded from an attraction in the brass."¹⁰ Bad weather was especially hard on both instruments and surveyors and, as today, there was the perpetual problem of

magnetic shift that made older surveys obsolete.

Sea captains (because they possessed large compasses) were often employed by local inhabitants to survey and make the original blazed lines for the sides of these granted farm lots, as well as lots created in partitioning the large grants containing hundreds or thousands of acres.

As the majority of the initial Crown Grants fronted on rivers, and extended inland from the rivers for distances of two and three miles (See EXHIBIT 11), these sea captains, as well as the deputy surveyors, would run the side lines back from the river only a distance equal to what was deemed that a settler could clear and use in his lifetime, rather than running out the full length of the side line of the grant or lot.

Years later, possibly when a son had taken over a farm from his father, these side lines would be extended back again, often only the distance it was expected he would clear or use in his lifetime. These extended lines were often run by neighbours, sea captains or others equally unqualified, and a problem that modern-day surveyors have to contend with was created largely by these "extension-surveys". The problem originated from the side lines being extended on the same magnetic bearing as the original line had been run out years before, without making corrections for magnetic shift. This created kinks in the lines on the ground, whereas, these grants were recorded in the Crown Land Office as having straight and usually parallel side lines.

In doing surveys, the deputy was cautioned to avoid any encroachment upon older grants (See EXHIBIT 12); if doubt existed, an extra amount besides the usual ten percent allowance for waste lands was added to the grant to compensate for

possible errors in the vicinity of unknown or disputed boundary lines.

Reserves or allowances were usually made for roads between certain lots to provide the grantees of second tier lots access to the river (See EXHIBIT 13).

Public landings were also set aside for shared and common use by the public.

The attached EXHIBITS 9, 10, 12 and 13 are typed copies of parts of letters written by George Sproule to different Deputy Surveyors.

These excerpts are taken from the hundreds of letters in the Letter Books of the Surveyor-General which are preserved at the Provincial Archives on the University of New Brunswick Campus in Fredericton, New Brunswick.

Reading through these old letters, as well as the "Orders of Survey" Books and the "Warrants of Survey", the author obtained a much better understanding of early land administration, the numerous problems encountered and the manner in which they were resolved.^{11, 12, 13} The author was also better able to appreciate the value of various types of land as the settlers found it, and most importantly, now more fully comprehends the meaning of certain phrases used in the early grants and understands the intent at the time the original Grants were passed.

This is especially true of basically two somewhat controversial phrases relating specifically to roads and highways: i) "Usual allowance of ten percent for roads and waste", and ii) "Reserved road", "Crown reserve road", "Land reserved for a road", and "Excepting and reserving existing highway".

1.2.4 "Ten Percent for Roads and Waste"

Upon reading the letters of New Brunswick's first Surveyor-General, it is soon realized that the "ten percent allowance for roads and waste" was literally

just that, an allowance of ten percent additional acreage to be added to the acreage stated in the grant.¹⁴

The additional land was included to make certain that each grantee would have in his grant of land, the full allotment (as stated in the grant) or arable land. The additional ten percent was to allow for any useless wasteland, swamps, steep embankments, rock outcrops, etc. located in his grant, as well as allowing for the land required for any public roads that might be constructed within his grant.

It is clear the intent was to grant the whole of the land in fee simple absolute, with no encumbrances other than specified reservations, usually with regard to minerals and white pine trees, which the Crown retained for the masts of ships.

Therefore, a patented Crown Grant Lot that was stated on paper to contain 100 acres, actually contained 110 acres or more by admeasurement in the field.

In most of the surveys authorized by Charles Morris, the Surveyor-General for Nova Scotia in the 1780's, there was a liberal allowance for highways, wasteland, etc. so that the grants really contained much more than the stipulated number of acres.

When a highway eventually was laid out by a Commissioner of Highways across a grant with the provision for ten percent allowance, the fee simple title to the land under the highway did not vest in the Crown, but a lesser interest did, that of a public right of way which gave the public the right to pass and repass upon that landowner's property without interference.

1.2.5 "Reserved Roads"

A strip of land expressly "reserved for a road" as mentioned in a patented Crown Grant normally was laid out adjacent to the Crown Grant Lots at regular intervals or as deemed necessary by the Surveyor-General to allow sufficient access to second or third tier lots, or to land still held by the Crown. (See EXHIBIT 14)

This strip of land was in no way affected by the grant of land lying adjacent to it, as it was being reserved as an allowance for a road in a particular location as laid out by a survey conducted under the authority of the Surveyor-General of New Brunswick.

The title to all such reserved roads as laid out remained vested in the Crown and these reserved roads were deemed to be highways whether or not they were used by the public as highways, and whether or not the rights-of-way were fit for public travel. ^{15, 16, 17}

In many cases, the location of a reserved road, as laid out under a Crown survey, made it physically impossible to construct a roadway that could actually be travelled upon. In these cases, deviations or alterations were necessary in actually constructing the highway, and although it was one continuous roadway, the fee simple title to the lands upon which the roadbed was constructed in these deviations more often than not remained vested in the landowner. The public acquired, after a period of time, a right-of-way over these lands, and the Crown's interest was limited to administering the public's right of passage and repassage over that privately owned land.

It has been established in the cases of *LeBlanc v. Saulnier*¹⁸ and *The*

*Queen v. MacGowan*¹⁹, as well as in many others, that a reserve road, or any road having been laid out as a public highway, remains a highway until stopped up or discontinued by the competent government authority, and no portion of it can be acquired by virtue of adverse possession.

Although it is well known that the land taken up by a highway is normally subject to it regardless of ownership and, therefore, the question of land ownership is not strictly relevant to the existence of a highway, interest in this subject has been steadily increasing and, therefore, is discussed in detail in a subsequent chapter.

1.2.6 The Concept and Development of Early Highways

Good highways are very common today, yet those communities which have seen their furthest development take them most for granted and in more recent times have been less than fully appreciative of efforts by the Provincial Government to maintain and create such highways.

Highways have long been recognized as one of the prime concerns of every provincial government, and have increasingly concerned the federal government. As the need for wider and better land communication has grown, so too have the extent and influence of roads. Today, no other country, in relation to its size and population, is better served. But this certainly was not the case in the early days of pre-Loyalist settlements. Roads were slow to appear since settlements were small, relatively long distances apart, and normally connected by the "Indian's Highways" - the numerous inland waterways and the seas.

Canada's first inland "road" (so called) was built at Port Royal, Nova

Scotia. The settlers of this French colony had little to do during their first winter, and, simply to avoid idleness, Samuel de Champlain decided to cut a road some two thousand paces long, from the colony to his favorite fishing creek. This was in 1606, and it was perhaps the last time that any Canadian settler would cut a road just for sport.

During the next 150 years no appreciable roads were constructed, but during the 1760's many trails were improved to join existing scattered settlements. These trails or bridle paths, although called "roads", were largely little more than blazed tree lines through the forests.²⁰

Even the streets within larger settlements or towns were mires, and outside the towns even the most important routes were allowed to become overgrown, or blocked by windfalls and broken bridges.

Reports of 1764 stated that in the Atlantic area, only the road from Halifax to Windsor was fit for wheeled vehicles, and the way to Annapolis was "adequate for horsemen, but still unsuitable for women".²¹

One traveller noted after a trip on horseback from Halifax to Truro in 1786 that:

"There is something like a road eleven miles from Halifax, but beyond that there was only a narrow avenue through the woods, on which the trees had been cut down and sometimes cut across and rolled to one side. The road was generally so soft that even in mid-summer the horses sank to their knees in mud and water, and as each horse put his foot where his predecessor had, the path became a regular succession of deep holes, such as one may see in a road made in deep snow".²²

Such notes are indicative of the degree of development of roads over the period covering the first 180 years of pioneer settlement.

Since what is now New Brunswick was the last of the Atlantic Provinces to be settled, one can begin to appreciate the state of overland communication routes in this area less than 200 years ago.

The arrival of the Loyalists in 1783 and the partition of Nova Scotia to create New Brunswick in 1784 was followed by petitions to the new government for new roads, improvements to existing trails, repairs to bridges, winter maintenance, and the raising of standards to permit carriage travel across the province.

For some time the St. John River and its tributaries were adequate for most transportation needs, and the few inland roads were cut along, or near, their banks.²³

Travel upon them was anything but comfortable. In 1803 the normal method was still by horseback, though one visitor described the province as "a Hell for horses".

In some areas it was possible to make use of natural roadways, cleared by the action of water along the shores of the ocean and lakes. Elsewhere, Indian paths and portage trails were turned into crude bridle paths, over which a horse might pick its way cautiously among the roots and stumps. Gradually, such paths might have been widened and improved to form the basis of a proper road.

1.2.7 The Design and Construction of Early Highways

It is probably more factual to say that the majority of pre-partition roads and a large number of post-partition roads were in fact not created, but

just grew; at all events they were not constructed as we think of constructed roads today, and planning and design were virtually non-existent. The following poem, found in a 1960 Fall issue of the "Better Crops" magazine, published by "The American Potash Institute" under the name of Sam Foss, is included as it all too well describes the origin of, and the extent of the "planning and design" involved in a large number of our present highways which have been subjected to few design improvements since the days of our forefathers, although considerable expenditure may have been made to improve the quality of the travelled surface.

"One day, thru the primeval wood,
A calf walked home, as good calves should;
But made a trail all bent askew,
A crooked trail as all calves do.

Since then two hundred years have fled,
And, I infer, the calf is dead,
But still he left behind his trail
And thereby hangs my moral tale.

The trail was taken up next day
By a lone dog that passed that way;
And then a wise bellwether sheep
Pursued the trail o'er vale and steep,
And drew the flock behind him, too,
As good bellwethers always do.

And from that day, o'er hill and glade,
Thru those old woods a path was made;
And many men wound in and out,
And dodged, and turned, and bent about
And uttered words of righteous wrath
Because 'twas such a crooked path.

But still they followed - do not laugh -
The first migrations of that calf,
And thru this winding wood way stalked,
Because he wobbled when he walked.

This forest path became a lane,
That bent, and turned, and turned again;
This crooked lane became a road,
Where many a poor horse with his load
Toiled on beneath the burning sun,
And traveled some three miles in one.
And thus a century and a half
They trod the footsteps of that calf.

The years passed on in swiftness fleet,
The road became a village street;
And this, before men were aware,
A city's crowded thoroughfare;
And soon the central street was this
Of a renowned metropolis;
And men two centuries and a half
Trod in the footsteps of that calf.

Each day a hundred thousand rout
Followed the zigzag calf about;
And o'er this crooked journey went
The traffic of a continent.
A hundred thousand men were led
By one calf near three centuries dead.
They followed still his crooked way
And lost one hundred years a day;
For thus such reverence is lent
To well-established precedent.

A moral lesson this might teach,
Were I ordained and called to preach,
For men are prone to go it blind,
Along the calf-paths of the mind,
And work away from sun to sun,
To do what other men have done.

They follow in the beaten track,
And out and in, and forth and back,
And still their devious course pursue,
To keep the path that others do.

But how the wise old woods could laugh,
Who saw the first primeval calf!
Ah! Many things this tale might teach, -
But I am not ordained to preach."

It was not until 1786, that, at the first sitting of the Legislative Assembly in Saint John, the first two New Brunswick Acts relating to highways were passed and proclaimed, and thus started the regulating of highways. These two Acts gave duly appointed Road Commissioners the right to "lay out" roads for the use of the settlers.

For over one hundred years a distinction was maintained between the major roads, called the Great Roads, and the less important roads, called the By-roads.

The Great Roads were the main trunk roads which primarily lead either from the South to the North or from the East to the West of the Province being the most important roads of communication directly linking the larger settlements or communities.

The By-roads were the secondary and tertiary highways joining the smaller communities and individual farms with each other and the main trunk roads.

Special consideration was given to protecting the Great Roads and for the funding to provide construction and maintenance of these roads.

Although the majority of all public roads and highways existing today were recorded as "laid out" public roads by the Commissioners of Roads in earlier days, a great number of these roads were already in existence in 1786.

The first returns of these Road Commissioners (that have been located to date) were made in 1788, and in these initial returns, a great number of existing "roads" were simply recorded as public highways. (See EXHIBIT 15)

These roads were named and their approximate length and locality were listed, but there were no changes made in their alignment, and the alignment was very rarely described mathematically. (See EXHIBIT 16)

The authority and duties of these early Road Commissioners are dealt with in a later Chapter on the early laws affecting "highways".

At first, road construction in New Brunswick depended entirely on statute labour, but as early as 1801, the government began making regular annual grants for road construction and maintenance.

Because of these allocations, by 1849, New Brunswick boasted 1239 miles of Great Roads as well as several hundred miles of By-roads. Although the mileage may be considered impressive, the quality of the roads was still very distressing to the traveller.

Construction of new roads, or maintenance of older existing trails was hard, exhausting physical labour.

After a surveyor or Road Commissioner had marked out the course of a new route a variety of procedures to "construct" the new road were employed.

Normally, gangs of freeholders working under Statute Labour Laws, or soldiers ordered to work on roads, would first cut down those trees which lay in the roadway. Then followed the most troublesome problem of clearing away the brush and many of the smaller stumps, as well as roots that a horse might become entangled in.

Usually the larger stumps were left in the ground to rot, often for years, and consequently few routes ran straight over even short sections (See EXHIBITS 17 and 18).

Very few mechanical aids were available to the early settlers to supplement their physical labours. Ploughs sometimes were used instead of shovels to level hills but in general, hand tools predominated.

The initial concept of Statute Labour was to have everyone who would

possibly benefit from a road do the actual work to construct and maintain it, which supposedly was to save unnecessary expenditures of public monies in contracting the work out, yet the result was far from efficient, or economical.

Men were forced to leave productive work on their farms and they bitterly resented it. Moreover, the law said nothing about how much had to be achieved during a day's statute labour, and as a result, the men rarely did as much work as could have been paid for with even moderate taxation.

One of the common nicknames for Statute Labour in these early days was "doin' a little soddin" - since most of the repairs seemed to consist of little more than pitching earth or sod from the ditch to roadway.

The numerous rivers and streams (many of which were too swift or too deep to be forded, yet which had to be crossed) caused considerable and often insurmountable problems for both the roadbuilders and the travellers.

A portion of the monumental supply of wood created by the thousands of trees that had to be cut down in the course of building a road was used to construct the culverts and bridges during the first century of highway construction.

Early culverts were constructed from great logs used to bridge the smaller streams and brooks and, though numerous, were normally covered with earth to make a smoother surface. (See EXHIBIT 19)

Bridges over larger rivers and streams were constructed by placing rough logs over lengthwise supports.

These bridges were lightly constructed, without engineering skill, and many travellers were appalled and alarmed at the necessity of having to use them. (See EXHIBITS 20 and 21)

In the swamps and bogs, the trees were laid down across the road, at right angles to its path, producing a firm but somewhat uncomfortable travelling surface.

Nature was very destructive to the efforts of the early roadbuilders. Even when a road was finally opened, the severe winter frosts and spring thaws did so much damage that there was no guarantee the surface would last a single season.

The sections of road constructed with the use of logs became a nightmare for the travellers, as the logs rotted away (if not first heaved out of position by frost) and if nothing further was done, the roadway degenerated into a series of deep mudholes.

As long as the bridges were made of logs or planks, and not covered, they soon rotted and broke. There are constant references in the old records to roads closed to traffic because of the failure of bridges. In many places ferries were used instead of the construction of a bridge, but these were reported as not always dependable, usually because the ferry was on the other side and there was no operator to bring it across.

In addition to the profusion of problems created by nature, two main human factors that greatly influenced the standard and condition of the early roads were the abuse of political power and liquor among the labourers.

As an indication of the problems that arose from the liquor among the labourers, there is still a stream in the Maritimes called More-Rum Creek, so named because when the roadbuilders reached that point the rum ran out, and they refused to proceed until supplies were refreshed.²⁴

The intrusion of politics (particularly at the local level) became the

most serious impediment to good roads. "No trained civil service existed to originate and supervise work. Rather it was generally held that 'practical' men could turn their hands to any project successfully without benefit of expert advice. Except in the case of a few trunk routes there was no apparent overall planning. For the most part each separate road, and even each stretch of road, was considered to be merely for the use of a few settlers in hauling their produce to market, and therefore of concern only to the local government, an institution introduced by early settlers from the United States. Road Commissioners were politically appointed and rarely had knowledge or experience in roadbuilding: they were more likely to be storekeepers, millers, tavernkeepers, and tradesmen with friends in high places, yet with all the arrogance of ignorance they proceeded to direct operations, frequently with foremen who were equally incompetent. The local projects were so small that it would have been uneconomical to hire capable supervisors even if there had been a desire to do so, with the result that work proceeded by makeshift direction and employed whatever techniques were customary in that district."²⁵

Although up-to-date manuals on techniques of road design, construction and maintenance were available in early New Brunswick, they were almost entirely ignored, even on important routes.

The Provincial Government, which footed most of the bill for highway construction, did not even appoint inspectors, or demand that a satisfactory standard be achieved before grants were made.

Considering the methods used in building highways, as well as the acute shortage of physical labour, materials and money, the Commissioners fervently tried to lay out roads that required little time and effort to construct even the most

basic travelling surface.

The Road Commissioner's reports and plans show that new roads extending beyond established farms into new territory were laid out to pass within twenty feet of the last existing farm buildings, as the landowners "driveway" was utilized as part of the new road. (See EXHIBITS 22, 23 and 24)

This often created problems, because new farmhouses and buildings were often being constructed so as to encroach on the laid out road right-of-way, though not on the travelled portion, and there is even mention in the old records of where a barn was built on the centre of an existing roadway and a new road developed as the settlers drove around it.

By their actions, it is apparent that the commissioners and settlers were more concerned that a road was to be built, than where the road was to be built.

Reading through the various accounts, the Commissioners main considerations for the landowner through whose lands the new road was to pass, were to bring the road as close as possible to his dwelling house and avoid his cultivated fields, keeping in mind that they must avoid as much as possible steep hills, large rock areas, swamps and bogs, as well as choosing the best site for a crossing of a stream or river (when absolutely necessary), preferably selecting a site that could be forded, and if not, a site that would require the shortest bridge.

CHAPTER 2

THE LEGAL NATURE OF A HIGHWAY

A "highway" has always implied a way over which the public have a right to pass and repass.^{26, 27, 28, 29, 30, 31, 32}

This basic meaning of a highway has been accepted as the common usage meaning and has been established as part of the English common law during the period between the year 1189, the first year of the reign of Richard I, and the present day.

Various statutes include a definition of "highway" but the meanings derived from those definitions apply only to the particular statute involved and invariably the definitions are much narrowed in scope when compared to the meaning of a common or public highway as defined in the English common law.

2.1 Definition of "Highway" under the Highway Act, Chapter H-5, of the Revised Statutes of New Brunswick, 1973.

The definition section of the Highway Act, Chapter H-5, of the Revised Statutes of New Brunswick, 1973 defines "highway" as:

"highway" means a road, street or highway designated by the Minister under section 15 to be a highway and includes

- (a) any area made subject to a Department of Highways Development Area.
- (b) a road, street or highway lying within the boundaries of a city, town or village and designated by the Minister under

section 15 and classified as arterial, collector or local under section 14.

- (c) a road or street accepted by the Minister under section 35, and
- (d) a road or street accepted by the Minister under the *Community Planning Act*.

This explicit statutory definition of "highway" is somewhat restrictive when compared to the meaning of a "common or public highway" as defined by the English common law or the meaning of a highway referred to in former New Brunswick Statutes relating to Highways and Roads.

At first, it appears that this Statutory definition is a bit circuitous in that it uses the word "highway" to define "highway", but this is not really so, as a highway as defined by law may (and in fact does) exist without being a highway under the present New Brunswick Highway Act.

The fact that this situation exists has been the cause of considerable misunderstanding and controversy regarding the status of thousands of miles of New Brunswick roads.

Under this New Brunswick Statute, "highways" are only those particular ways or portions of ways which have been designated as highways by the Minister of Transportation in accordance with the provisions of this Statute or its predecessor, the Highway Act of the New Brunswick Statutes of 1968.

For the purpose of subsequent discussion, I will use the phrase "designated highway" when referring to a highway under the present Highway Act or its predecessor, The Highway Act, 1968. Reference to simply "highway" will be used for the more cumbersome phrase "common or public highway" as is extensively

defined in the following section.

2.2 Definition of a "Common or Public Highway"

It has been said that if the word "highway" is given its customary meaning, the phrase "public highway" is an example of tautology - the needless or useless repetition of the same idea, of which the law seems to furnish so many illustrations.

A common or public "highway" is the generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers, driftways, public easements of right-of-way, streets, lanes, alleys, courts, trails, passageways, and cul-de-sacs.^{33, 34, 35}

The prime essential characteristic of a highway is that every person should have a right to use it for the appropriate kind of traffic, subject only to any restrictions affecting all travellers alike.

It follows that a road or path over which only individuals, or a limited class of the public have a right of passage, is not a highway.

"A 'highway' is a way over which all members of the public are entitled to pass and repass; and conversely, every piece of land which is subject to such public right of passage, is a highway or part of a highway."^{36, 37}

A highway need not be a thoroughfare, there being no rule of law which prevents a cul-de-sac from being a highway. Thus, a road hitherto a public thoroughfare, does not cease to be a highway because one end of it is lawfully stopped up, and a road which has never been, and is not intended to be, a thorough-

fare, may be dedicated to the public as a highway, even though it leads nowhere.³⁸

A highway leading to a navigable river, itself a highway, or to a public ferry across a river, is not a cul-de-sac; and the right of passage over the soil, whether covered by water or not, is continuous, and will not be interrupted by a natural or artificial narrowing of the river.³⁹

"If a way leads to a market, and were a way for all travellers, and did communicate with a great road, etc., it is a highway; but if it leads only to a church, to a private house or village, or to fields, there 'tis a private way. But 'tis a matter of fact, and much depends upon common reputation."⁴⁰

No right can be granted, otherwise than by statute, to the public at large to wander at will over an undefined open space nor can the public acquire such a right by prescription. The fact that persons have wandered about at random over open land, or through woods, is no proof that the land has been dedicated as a highway. Land over which a limited class of persons has rights of recreation is not a highway.⁴¹

Public bridges are highways so far as the right of passage is concerned, but to a great extent they form the subject matter of special enactments.⁴²

"In my opinion, unless its meaning is affected by context or association or definition, 'highways' means, in its common use, a public road or way open equally to everyone for travel, and includes the public streets of an urban district equally with connecting roads between urban districts."⁴³

"In view of the many things that are included in the meaning of 'public highway' it seems to me that there must be a great deal of overlapping of meanings and that the words should be construed according to their normal usage. The normal

use of the word 'highway' includes 'road', particularly when the reference is to places where 'there is a public right of travel'.⁴⁴

A highway is a way (whether on land or water) along or over which the public generally have a right to pass. If it is on water, either at sea or on a navigable river, it is simply called a "highway".⁴⁵

A highway and a public road are the same thing, or rather every public road is a highway, whereas a "street" is more restrictive in that it is a roadway with buildings on each side, more or less continuous.⁴⁶

CHAPTER 3

THE CREATION OR ESTABLISHMENT OF HIGHWAYS

Highways exist by land and water. Upon land, highways are established only by some positive act indicating the object and its accomplishment. They are, it may be said, artificially made, or only become such by acts *in pais*.

It is otherwise with navigable rivers and water courses. They are natural highways, pre-existing and coeval with the first occupancy of the soil, and formed practically the first or original highways in point of actual use.

All reserved roads made by the Crown surveyors, all highways laid out or established under the authority of the old Acts relating to Highways, all roads on which public money has been expended for opening them or on which statute labour has been usually performed, all roads and streets established under the authority of any other Statute, all roads dedicated by the owner of the lands to public use, and all alterations and deviations of and all bridges over any reserved road, highway or road, are common and public highways except in so far as they have been stopped up according to law by the proper competent authority.

The following discussion on each of the methods by which highways have been established over the years, are supplemented graphically to better illustrate the title and boundary problems that have developed along with the establishment of the highways.

3.1 Reserved Roads Made By Crown Surveyors

The most common example of reserved roads are those strips of Crown

Land reserved from public sale and settlement as laid out or designated as such upon the original survey and plan, for the sole purpose of making roads, when and as roads might be required to provide access to remaining lands. (See EXHIBIT 25)

The system of survey in laying out any grant lots is and always has been, as a rule, to lay out lots fronting on substantial river or stream, and the sea and extending the lot back, with the side lines as near perpendicular as possible, to a sufficient depth to give adequate acreage.⁴⁷

Strips of Crown Land, usually one chain in width, were laid out or designated as reserved roads, on the surveyor's plan where they were deemed appropriate by the Surveyor-General or his deputies.

The location of these reserved roads was made without regard to the adaptability of the ground for the purposes of a highway. The inevitable result is that many such reserved strips can never become travelled roads, either by reason of absolute unsuitability or by reason of the excessive financial outlay required to construct roadways on them.

Still, they remain highways and the rights of the public to such uses as they are capable of remain, unless they are closed up by the proper authorities in compliance with the statutes.⁴⁸

"The initial matter to be dealt with by this memorandum is what in fact is a reserved road. Although reference is made to same in the Reserved Road Act,⁴⁹ no definition is provided, nor are any definitions provided in the Crown Lands Act⁵⁰ or Highways Act.⁵¹ However, in the Interpretation Act,⁵² section 38 does shed some light, however dim, on the definition of a road. It states that a road is any public highway, road or bridge. Notwithstanding the definition of a road, it remains

to be determined what a reserved road is. Webster's Dictionary⁵³ defines 'reserved' as kept or set apart or aside for future or special use. It is, therefore, contended that the so-called reserved roads for which allowances were made in Crown Grants related to portions of lands which were set aside for future use as a public road or highway.

"There is a very substantial body of law dealing with the manner in which a public road or highway may be established. Halsbury has provided what is probably the most succinct summation of the common law with respect to the creation of a public highway or road, by stating that

'Land dedicated by a person legally competent to do so to the public for the purpose of passage becomes a highway when accepted for such purposes by the public; but whether in any particular case there has been a dedication and acceptance is a question of fact and not of law.'⁵⁴

"It is submitted that the Crown is able to dedicate to the general public a right of passage over Crown lands. To do so the Crown must possess the necessary intention to dedicate, that is animus dedicandi. Cole v. Maxwell⁵⁵ is authority for the proposition that the requisite dedication by the Crown takes place through the express reservation of land for road purposes in a grant or through defining the road on a plan attached to a grant containing a reservation for road purposes.

"Once the dedication occurs there must by virtue of the common law be an acceptance. The latter requires no formal act by individuals but is to be determined as a result of the public use of the road or highway in question.⁵⁶ In many instances in New Brunswick, no actual acceptance of the road or highway took place as there was and continues to be a total lack of use by the public of their right of passage. Does this have the effect of destroying the Crown's intention of creating a public

road? It is my contention that the lack of acceptance has no fundamental effect on the allowances made for reserved road. The authority for such a contention is provided by R. v. Bennett⁵⁷ which held where a street has been properly laid out and recorded, the public acquires a right in the whole extent of it, whether it is opened and used or not. Hence, there is no necessity for a manifest acceptance. "⁵⁸

Oposing arguments have been presented with regard to the question of whether individuals can gain title by adverse possession of the lands on which reserved roads are situated. If an individual exercises "open, notorious, continuous possession over the whole of the land that is subject to the reserved road, is the public's right of passage and repassage subject to being relinquished or abandoned? The answer is no. The Chief Justice in The Queen v. William McGowan⁵⁹ cited with approval the judgment of Byles, J. in Dawes v. Hawkins⁶⁰ which stated

'It is an established maxim that once a highway, always a highway, for the public cannot release their rights, and there is no extinctive, presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of ad quod damnum, or by proceedings under the Statute. '

"This statement of the law in New Brunswick was further strengthened in the LeBlanc v. Saulnier case ⁶¹ wherein Mr. Justice Baxter stated:

'It is enough that a man can go on the ground with the return and plan and discover where the road is, its common width and length and that the highway having been laid out and recorded the public acquires a right in the whole extent of it, whether it is opened and used or not, and they cannot by non-user, release their rights over it. '

"Further clarification of the law with respect to adverse possession insofar as it relates to public roads can be extracted from Nash v. Glover.⁶² Proudfoot, V.C. held that 'the road allowances are perpetual until altered or

extinguished by the proper legal authority' and he further held 'that a grant even by the Crown cannot extinguish it; that the right of the public remains in perpetuum; though it may lie dormant, it may be revised, until steps under the Acts have killed it'.

"In conclusion it is submitted that the allowances made for reserved roads in New Brunswick were properly dedicated by virtue of the intention to dedicate on the part of the Crown, and by virtue of the R. v. Bennett case no de facto acceptance or use by the public need have occurred. Once a reserved road became a public road, this occurred simultaneously with the delineation of the reserved road in a Crown grant or plan attached thereto, the public at large was vested with a legal right to use the surface of this public road for the purposes of passage in perpetuity. This right cannot be derogated except through an act of the Legislative Assembly of New Brunswick, hence the Reserve Road Act. There is a little doubt in the author's mind that the maxim 'once a highway, always a highway' is a true expression of the law as it applies to New Brunswick Reserved roads. "63

An original reserved road cannot be extinguished except by the provisions of Statute law. It has been stated that even a grant by the Crown cannot extinguish it as the right of the public remains *in perpetuum*.

In the absence of express statutory authority, no one would appear to have the right of use, or to permit the use of a strip of land expressly reserved for a road, for any purpose which would substantially interfere with, or obstruct, its primary use for such purposes.

The highest right in highways is the right of the public to travel over

them, and this right cannot be interfered with even by the Crown itself.

A reserved road shown upon the original plan of survey remains as such unless it has been otherwise disposed of by legal means. It is of no consequence that for more than 60 years it has never been opened or used.

By Subsection 2(11) of the Railway Act (Dom.) Chapter 68 of the Statutes of 1919, it was enacted that "'Highway' includes any public road, street, lane or other public way or communication".

In both *Tp. of Gloucester v. Can. Atlantic Ry. Co.*⁶⁴ and *Bruce v. C.P.R.*⁶⁵ it was held that although a road allowance had not been cleared and opened up for public travel and had not been used as a public road that nevertheless it was a highway within the meaning of the Railway Act of Canada applicable to each case at the time.

In *Regina v. Hunt*⁶⁶, A. Wilson, J. said, "Beyond all question a public road laid out by a duly authorized Crown surveyor upon Crown land is a public road though not laid out upon the ground".

These cases show that a public road laid out by a duly authorized Crown Surveyor upon Crown land is a public road, though not laid out upon the ground, and that it cannot be altered afterwards by the Crown, unless duly altered in compliance with statutory provisions.

This does not mean that the Crown is prevented from altering a plan showing grant lots with reserved roads previous to granting away the lots on the plan. If, however, after the original survey, the lots were located, described and granted in conformity with the plan, it would be inferred that the reserved strips so designated were dedicated by the Crown as public roads.

Further, if after a Crown survey and a plan prepared showing grant lots with reserved roads, the Crown deemed it expedient to deviate from the plan in making grants and dispositions, there is nothing to prevent it from doing so.

Lesser known reserved roads or reserved highways are those arising when a roadway established over unpatented Crown Land (usually before the land was surveyed) and being used by the public, is specifically reserved or excepted from the lands being granted. (See EXHIBIT 26)

The location of the road was normally shown on the plan of survey attached to the Grant and on the face of the plan, a notation such as (*Excepting the Highway Road*) was made by the Crown, thereby reserving and retaining the fee simple title to the lands under the highway, and also, by its action, dedicating the one chain strip of land for a public highway. (See EXHIBIT 27)

"A dedication by the Crown may be made by the Crown expressly reserving the particular land in some grant or by defining it by lines on some plan attached to a grant containing a reservation of roads."⁶⁷

Although there may be a presumption of dedication by the Crown arising from facts sufficient to warrant such an inference in the case of a subject^{68, 69}, there is no presumption of a dedication of land as a public highway where there is user of a way over lands of the Crown before a survey was ever made of the lands by the Crown.

This type of reserved road also occurs when a patented Crown Grant abuts and is described as being bounded on one side by an established roadway through the Crown Land, and usually, this roadway is shown as a "Public Highway" on the face of the plan of survey attached to the Grant. (See EXHIBIT 28)

The issue of a Crown Grant without excepting therefrom a road allegedly dedicated to public use by the Crown has no particular significance and is not inconsistent with dedication by the Crown. The road still remains established as a public highway, the notable change in its status in this case is the fact the fee simple title has been conveyed from the Crown to the grantee.

3.2 Highways Laid Out or Established Under the Authority of the Old Acts Relating to Highways

Numerous Statutes since the first Act relating to highways - being Chapter 32 of the 1786 N. B. Statutes, "An Act for laying out, repairing and mending Highways, Roads and Streets, and for appointing Commissioners and Surveyors of Highways, within the several Towns or Parishes in this Province" - have provided the statutory authority and provisions for the establishment of the majority of New Brunswick highways.

Included as APPENDIX A is a copy of The Highway Act, Chapter 6, of the 1810 N.B. Statutes, which enacted the basic provisions contained in most early statutes relating to highways.

These early statutes contained provisions for Commissioners and Surveyors of Highways to be appointed by the Justices at their General Sessions held for the various Counties. (s. 1, APPENDIX A)

The Commissioners were empowered to lay out and regulate public highways, roads and streets only in the Parish for which they were appointed, and were to lay out these public highways such that they would be convenient, not only for the travellers in their Parish, but for inhabitants of adjacent towns, villages and

Parishes. The Commissioners were further empowered to alter (as provided by the Statutes) the width or location of a road already laid out, used and occupied as a public highway, but only if there were no objection to the alteration by the owner or owners of the land over which the road passed or objected to by at least one-third of the freeholders in the area.

If there was an objection, then a Jury of disinterested freeholders would be summoned by the Justices of the Peace, and this jury would decide whether the alteration was necessary or not.

If it was, the Commissioners were empowered to lay out the new road over the freeholder's land and the freeholder was paid for all damages (as determined by the Jury), basically resulting when a new road passed through improved land or necessitated the removal of buildings or fences. (See EXHIBIT 29 and Sections 12 & 13 of APPENDIX A)

The statutes further provided that "in cases where the alterations made occasion a new road to be opened, and the old road or any part thereof, in consequence of such alteration is allowed to be shut up and revert to the owner of the land through which such altered road passed or extends, the Jury in assessing the damages occasioned by such alteration are authorized and empowered to take into consideration the value of the old road or any part thereof thus shut up, in diminution of the damages".⁷⁰

It was also enacted "that whenever any alteration is made in any highway or road in the Province, pursuant to the provisions of this Act, and the part or parts of such road or highway between the points of such alteration are not settled by the erection of dwelling houses thereon, and where the alteration so made shall

not cut off any proprietor from the road so altered, then and in such case it shall and may be lawful to and for the Commissioners of Highways in the Town or Parish where such alteration may be made, to order and direct that the said points between such alteration may be stopped up and enclosed by the proprietor or proprietors of the lands between such points of alteration as aforesaid, after which order and direction the said old road shall no longer be considered public: Provided always, that the altered or new part of the road shall in the opinion of the Commissioners be made equally as good and as passable for travelling as the old road, before the latter shall be shut up and enclosed as aforesaid".⁷¹ (See EXHIBIT 30)

A similar provision was included whereby the Commissioners of Highways were "authorized and empowered, by and with the consent of all the owners of the land over which any road may pass, to shut up and stop the same".⁷²

Under the Statutes, the responsibility for properly recording all laid out roads, as well as those that were altered or closed, rested with the Commissioners and the Statutes further provided for penalties to be applied to the Commissioners who were negligent.

As to the procedures followed, it was enacted "that the Commissioners for each Town or Parish for which they shall be appointed, shall from time to time enter in writing all the highways or roads laid out, altered or shut up, as the case may be, and sign the same, and within three months after such highway or road shall be laid out, altered or shut up as aforesaid, make a return thereof into the office of the Clerk of the Peace for the County in which such highways or roads are situated, to be by such Clerk entered in a book kept for that purpose; which return shall distinctly designate that marks, bounds and lines by which the highway or road

so laid out, altered or shut up, may be known and ascertained; and whatsoever the said Commissioners shall do according to the powers given them in this Act, being so entered, shall be valid and good to all intents and purposes whatsoever, and that every Commissioner or Clerk of the Peace who shall refuse or neglect to perform the duty enjoined and required of each of them as aforesaid, shall forfeit and pay for every such refusal or neglect the sum of three pounds".⁷³

The Surveyors of Highways, once appointed, were authorized and empowered to oversee and repair, under the direction of the Commissioners, the highways, public roads, streets and bridges within the respective Parish for which they were appointed.

It was the duty of the Surveyors "when so directed by the Commissioners, at the most fit and suitable time between the first day of May and the first day of September in each and every year, to summon the inhabitants of their respective districts, by publishing notice in writing of the time and place at which the inhabitants of each district are to assemble to commence their statute labour, in one of the most public places in each district; which notice shall contain the names of the persons of the district in which the same is published liable to work, and also the number of days labour required to be performed by such persons respectively, with the implements of labour they are severally required to bring with them; and the said Surveyors shall then proceed to expend the labour of the persons so summoned in making, mending or improving the highways, roads, streets and bridges, in the most useful manner,".⁷⁴

The Surveyors were further empowered to summon the inhabitants of an area in the winter months for the purpose of "cutting, carrying, and erecting

bushes, and making ways"⁷⁵ over the rivers and marshes after these had frozen and were safe for travel.

The inhabitants liable to do statute labour could also be summoned by the Surveyor to shovel snow and assist in breaking open the roads with their horse and sleds.

Although the Legislature thought fit to vest in the Commissioners and Surveyors extensive and uncontrolled power regarding the summoning of inhabitants to work under Statute Labour as well as to the laying out of roads over private property, it has been held that "there must be an exact compliance with the provisions of the Highway Act of New Brunswick in order that the action of the Commissioners thereunder may be valid".^{76, 77}

Whereas, the Commissioners and Surveyors for the Great Roads were empowered to alter or widen a Great Road "beyond the width originally laid out"⁷⁸ if the cost did not exceed the sum of fifty pounds, they were still required to obtain the consent of the owner or agree to pay for all damages.⁷⁹ (See APPENDIX B)

The Great Road Supervisors had the sole authority for ordering of the repairs and alterations necessary, and for the purpose of making a necessary alteration, they were empowered to "enter on the lands of any proprietor through which it may be thought desirable to make such alteration, in order to make the necessary exploration and survey preparatory thereto, doing no unnecessary damage; but nothing in this Chapter shall deprive the local Commissioners of Highways in their respective Parishes of the power of directing the application of statute labour of the said Parishes, either upon the Great Roads or other roads within the same, as they may deem right, but they shall in no case have the power of altering any

Great Road, and are hereby respectively required in all cases where they deem it necessary to expend the statute labour or any part thereof on any of the Great Roads of this Province, to adhere to the lines already laid out and established by law, or that may be laid out in pursuance of any law now in force or that may hereafter be in force for that purpose".⁸⁰ (See APPENDIX C; also APPENDIX D for comparison with later legislation.)

Whereas, the Highway Commissioners, in altering the course of a highway, were held to an exact compliance with their statutory authority, this has led to the situation whereby highways laid out and duly recorded, but not in exact compliance of the Act, are not highways solely based on the fact that they were laid out.

The reverse situation also exists, whereby the Commissioners closed a highway but not in compliance with the law, and therefore these highways are still highways today.

In *Winslow v. Dalling*, Barker, J. stated "The principal point in dispute is as to the situation of the public highway in question. There is no record of it produced, as none can be found - there is no evidence to show that there ever was any. Those who took part in its original dedication or laying out in 1861, whichever it may have been are, I believe dead; Before 1861, the main highway road for this part of the country ran at the foot of the hill some distance back from the river, but this having become inconvenient for the public accommodation the owners of the front lots, as is said, agreed to give 22 feet off the front of these lots for a road in lieu of the other, and that the said new road ran along near the edge of the bank and within a few feet thereof, the distance thereof varying according to the nature of the ground and the course of the river, but that there is no

public record of said road".⁸¹

"The evidence shows that this was in 1861; that the old road was closed up and its use by the public discontinued, that though no record of the new road was ever filed, and there is nothing to show that any was ever made, and though it is not very clear as a matter of evidence how the new road was laid out or by whom, it nevertheless continued to be the only public highway in that locality, and was used as such without interruption for the following ten years down to 1871, and without objection by anyone".⁸²

"That sometime during the fall of the year 1871 the said late Sperry Shea agreed to sell and convey to one Frederick H. Hale, sufficient ground for a steam saw-mill, and that as there was not room enough between the road as then used and the said river, the said Shea agreed to move the said road further east, which was done and laid out by him and the late George H. Hovey, the then Commissioner of Roads for the Parish of Northampton,"⁸³

"It is somewhat remarkable that the plaintiff nowhere in his will alleges the distance which this road was shifted, as he says it was, nor does he anywhere aver (sic) that that part of the road then taken as the plaintiff claims for Hale's use was closed up as a public highway or its public use as a highway extinguished, or that the right of passage which the public had undoubtedly enjoyed without hindrance for the previous ten years was then ended."⁸⁴

"For the purposes of this case, I must take it as admitted if not proved that in 1861 the old road was abandoned and a new one opened along the bank of the river in its place, twenty-two feet in width from the top of the bank, and that for the following ten years it was used by the public as a public highway - in fact, it seems

to have been the only public highway in that locality. It is unnecessary to inquire whether the new road was dedicated by Shea, the owner of the land, or whether it was laid out under the Highway Act by the proper authority, though this seems improbable, as the width was only 22 feet, whereas, the minimum width allowed by the Act was 4 rods. The result in either case, so far as this suit is concerned, is the same. While the fee in the land thus dedicated would remain in Shea, he would hold it subject to the public right of passage for which it was dedicated, and which the public had by ten years uninterrupted use explicitly accepted. Neither could this public right be extinguished without some formal proceeding for that purpose under the Highway Act, or perhaps a resort to the old writ of *ad quod damnum*. In *Dawes v. Hawkins* (1),⁸⁵ Byles, J. says: 'It is clear that there can be no dedication of a way to the public for a limited time certain or uncertain. If dedicated at all it must be dedicated in perpetuity. It is also an established maxim, 'once a highway always a highway'. For the public cannot release their rights and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are either by the old writ of *ad quod damnum* or by proceedings before Magistrates under the Statute'.

"In *Malloch v. Anderson* (2),⁸⁶ the owner after dedicating a strip of land for a public road, made a conveyance of a portion of it, but it was held that as the dedication had been made and the road been adopted by the public, the subsequent conveyance could not control the prior dedication. Robinson, C.J., said that the dedication having been expressly and deliberately made could not be revoked.

"In *Reg. v. Hunt* (3)⁸⁷, it was held among other things that after a road had once acquired the legal character of a highway it was not in the power of the Crown by grant of the soil and freehold thereof to a private person to deprive the public of their right to use the road.

"In *Nash v. Glover* (4),⁸⁸ it was held that though the plaintiff had taken possession of the original road allowance and held it for over forty years, the public right was not interfered with and the municipality could take possession and open up the road.

"It would therefore seem that even if Shea in 1871 continued to be the owner of all this property, which the evidence shows was not the case, he could not by his own mere notion extinguish the public right which had been acquired by the previous dedication and ten years' subsequent user. It is necessary therefore to see what official action, if any, was taken by the highway authorities towards making the alteration in the road upon which the plaintiff relies, and closing up the old road.

"Hale further says that Shea agreed to have the road changed and to get the Road Commissioner to have it changed, and give enough room for a mill, and that he did so. He further says that George Hovey was the Commissioner; that he (Hale) was not present when it was laid out; but that Shea showed him the bounds of the road as laid out by Hovey. Hale further says that after the road had been shifted according to the arrangement with Shea, he conveyed to him the piece of land already described and mentioned in the deed dated November 6th, 1872, and which became vested in the plaintiff in August, 1892, and is now owned by him. This is really all the evidence of any change in the road made by a Commissioner, and it is, I think, altogether insufficient to prove that part of the bill which alleges

that this change was made by Hovey as a Highway Commissioner.

"The change which the plaintiff contends was made in 1871, involves the total extinguishment of the original road of 22 feet and a donation by the owners of 30 feet off their lots in addition to the original 22 feet. There is admittedly no record of this alleged alteration in the road - that any such record ever existed is a matter of the merest conjecture - there is no evidence that Hovey was even a commissioner - in fact, Jeremiah Bragdon said he thought he was not. But if he was, as I have already pointed out, there is no evidence of one act or thing that he did in reference to this matter. The Highway Act of that day required an application to lay out, alter, widen or extend any public highway to be made to the Commissioners in writing by three, or more freeholders - it required the location to be fixed by stakes and a written statement of the width, marks, bounds and lines of all roads laid out, altered, extended or shut up, to be returned to the Clerk of the Peace, whose duty it was to enter the same within three months in a book to be kept for that purpose. And when any alteration was made in a road, the Commissioners were authorized under certain circumstances to discontinue the old road and direct it to be stopped up and enclosed by the proprietor after which it ceased to be public. In *Reg v. Jones* (5)⁸⁹, Coleridge, J., says: 'there is no part of the administration of the law by justices acting on their own authority in which it is more necessary for the Court to look closely at their proceedings than the stopping of highways'. And our Court has in many cases emphasised the necessity which exists for an exact compliance with the provisions of Highway Acts in order that the action of Commissioners thereunder may be valid."⁹⁰

"In *Basterach v. Atkinson*⁹¹ the Court held that the laying out of a

highway was altogether invalid where the return did not show the boundaries. And in *Oulton v. Carter*⁹², a return of the Commissioners as to closing up a road was held not to deprive the public of the use of the road, because it did not recite in words that they had found that it was not required for the convenience of the inhabitants.

"There are no doubt cases where in the absence of public records such as the one in question, Courts have felt at liberty to apply the maxim, '*Omnia presumuntur rite acta esse*'. It is impossible to make any such presumption in this case. There is no evidence of any one thing having been done by the Commissioner. It seems almost certain that he fixed no boundaries as the Act requires, and I can scarcely presume that he did when there is an almost irresistible inference to the contrary raised by the evidence. It is agreed by all parties that wherever the road is it, as changed, was 22 feet wide. I can scarcely assume that the Commissioner laid it out when the Statute under which he was acting expressly forbade public roads to be laid out under it of a less width than 4 rods. Neither can I assume that the Commissioner directed the old road to be stopped up, and its public character extinguished, when there is no allegation in the bill that such is the fact - when there is no evidence to sustain any such allegation - when the road was not in fact stopped up - and where all legitimate inferences from the facts in proof are entirely opposed to the idea that such a thing was considered by one Commissioner much less three.

"In *Rex v. Marquis of Downshire* (13)⁹³, where the defendant was indicted for obstructing a public road which he alleged had been closed up, Lord Chief Justice Denman says: 'As to the roads generally, they were found by the jury or admitted by the defendant's counsel to have been public; that is to say, the

two first mentioned to have been public footways and the seven last mentioned to have been public highways. The burthen, therefore, of showing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant.¹ So in this case, as the plaintiff claims the land which he admits for ten years was a public highway, the onus is upon him to show that the public right has been extinguished, or, in other words, that the road has been legally stopped. So far as the evidence before me goes, I have no hesitation in holding that the old road is 22 feet, which all parties allege and agree was opened along the bank of the river in 1861, has never been legally closed up - in fact there is no allegation in the bill that it ever had been. It is true that there is a great amount of testimony to the effect that the used part of the road is today and for some years past has been much further east than it was in 1871 and before that. This evidence, voluminous though it is, in reality I think has no direct bearing upon the questions raised by this bill. In the first place, it cannot be relied on as showing an abandonment of the old road by its non-user, for, in addition to the cases I have already cited, *Reg v. McGowan* (14)⁹⁴ is an express authority that the public cannot by non-user relinquish their right in a public highway. *Turner v. Ringwood Board* (15)⁹⁵ is to the same effect. Even if such an abandonment could be proved by non-user, it would be a question by no means easy to determine upon the evidence in this case, whether the non-user even to the extent to which it exists is the result of any intention on the part of the public to abandon the old road and use as a matter of right a new one, said to have been in some way dedicated to their use, or whether it is simply a deviation by the public from time to time rendered necessary by the construction of the mill and other buildings along the bank of the river and encroachments of a less permanent

character from time to time placed on the highway by those who have used and occupied the mill property. In *Dawes v. Hawkins* (16)⁹⁶, already cited, Erle, C.J., says: 'Then was there any evidence of user, from which the jury might reasonably infer a dedication? The parties who passed intended to use the original highway, and probably deviated without knowing it. If they knew the true line and deviated by reason of the obstruction, the user of the line of deviation over the adjoining land by reason of a wilful obstruction, is no more the user of a highway as of right than the user of a deviation over the adjoining land by reason of the highway being foundrous. I know of no decision and no principle making a distinction between a road impassable by nonfeasance, that is neglect of repair, and a road impassable by misfeasance, that is by a ditch and a bank wilfully made. But even if the one deviation be a trespass and the other be a justifiable act, still in neither case is it the use of a highway as of right, and therefore in neither case would the user alone of a line of deviation be evidence against the owner of a deviation. If the user of a line of deviation is not the user of a highway, then the user of such deviation for twenty years would not alter the nature of the act; for if the first traveller who preferred turning aside to beating down the bank and passing through it, did not use a highway, neither did the second or those that followed, the number of passengers being for this purpose immaterial."⁹⁷

In addition to the lengthy judgement by Barker, J. in *Winslow v. Dalling* there are numerous cases involving the matter of the Commissioners complying strictly with the Statutes.

In *Ex parte Weade*⁹⁸, Carter, C.J. stated that "if this continuous road were once laid out by the Commissioners that was the road which was by that act

established, in which the public then acquired a right, and which alone the Commissioners were authorized to record. It was not in their power after such laying out, by their own discretion three months afterwards to abandon a part of such road, and to deprive the public of the right which by their previous act had been established. The judicial part of their authority as to the road, was at an end when they had laid it out; by their ministerial authority they might, and should have recorded the road so laid out. Having only recorded a part of such road, they have done that which they are not authorized to do; that is, they have not recorded the road which they laid out. "

*The King v. Belliveau et al; Ex Parte LeBlanc*⁹⁹, is a case that primarily dealt with the intepretation of the language of the Highway Act, R.S.N.B., 1927, ch. 27, sec. 30, but discussions of several irregularities involved in the case are most explanatory as to the precedure followed in "laying out" a highway.

The case arises from a "return of a rule nisi to quash the return of Alban P. Belliveau as supervisor of highways, District No. 1, Parish of St. Paul, County of Kent, and of Simon D. Cormier as Justice of Peace of Kent County, regarding the laying out of a road over lands of Levi LeBlanc granted on the 8th day of October by Mr. Justice White, returnable before the Appeal Division of the Supreme Court. The main ground on which the rule was granted and the only one dealt by the Court of Appeal was that the public highway was not laid out according to law and was contrary to chapter 25 of the Highway Act. R.S.N.B. 1927".¹⁰⁰

Several key points were made by the Justices in their arguments:

"Hazen, C.J.: - But in this case it is alleged the jury never found the road was necessary, nor did it lay out a road four rods wide as provided by the Act".¹⁰¹

P. J. Hughes, K. C., and George T. Mitton, argued the merits of the case: "The Justice of the Peace was an applicant for the road. He set the law in motion and he could not adjudicate in a case in which he was interested. As to his act not being judicial, in the first place he had to decide to whom he would issue the warrant, to the sheriff, or the deputy sheriff, or the constable. If he was not doing a judicial act, what was the use of his being brought in - why did not the Statute let the Supervisor choose the jury. *King v. Hetherington, Ex parte Security Export Co.* (1922), 50 N.B.R. 137. The first thing the jury had to decide was that the road was necessary. In reviewing the proceedings of Inferior Courts, one cannot go beyond the records. A record cannot be supplemented by affidavit. If the jury had found that the road was necessary, then the supervisor had certain things to do, ie. lay out the road - not make a little plan on paper as in the case - otherwise the jury could not properly assess the damages. *Boyington v. Holmes* (1845), 5 N.B.R. 74; *Oulton v. Carter* (1858), 9 N.B.R. 169; *Rex v. Sterling* (1835), 1 N.B.R. 33. As to the highway, it had to be four rods wide under the Act - if the Supervisor laid it out otherwise he had no authority so to do, as only the Engineer or District Engineer could do so, not the road supervisor".¹⁰²

The following is in part the judgement by Sir J. D. Hazen, C.J. from that case:

"The other preliminary objection was that the act complained of, viz.,

the laying out of the road, was an administrative or ministerial act of the road supervisor, and the complainant has a right of action against the supervisor for any act by him in discharge of his duties, and *certiorari* will not lie. The members of the Court who heard the matter are of opinion that this application cannot prevail either, as they consider that the action of the supervisor, who is called upon under sec. 30 of the Highway Act when application is made to view the lands and to find whether or not the proposed change will be of advantage to the general public, is not a ministerial but an act requiring the exercise of judgement and discretion, and is in effect a judicial act. So far as the preliminary objections therefore are concerned, the Court is of opinion they cannot prevail.

"The law regarding the laying out of highways is embodied in the Highway Act, R.S.N.B., c. 25. The procedure is set out in sec. 30, which provides that:

'When application in writing is made to the supervisor or engineer of a division by five or more freeholders in said division to lay out, widen, alter or extend a highway over any land in said division, he shall view the said lands and if in his opinion he finds that the proposed change will be of advantage to the general public, and if the owner of such lands shall not consent thereto, such supervisor or engineer shall apply to a Justice of the Peace for a warrant (the form of which is given in the schedule to the Act), which the justice is required to grant, directed to the sheriff, deputy sheriff or any constable within the county, commanding him to summon three disinterested freeholders of the county, not resident in the Parish where the proposed highway is situate, at a certain time and place to be named in such warrant, to examine the proposed highway, alteration, widening or extension so applied for, and the supervisor or engineer shall attend at

the time and place specified in the warrant.

"'2. If the said jury after being sworn by a Justice of the Peace find that such highway, alteration, widening or extension is necessary, the supervisor or engineer shall lay out the same immediately, and the jury shall assess the damages and in their assessment take into consideration the benefit, if any, to the owner of such land by the laying out of such highway'.

"It will be seen from a perusal of this portion of the Act that when the jury is summoned its duty is first of all to find whether the highway proposed is necessary or not. If they so find the supervisor shall lay out the same immediately, and the jury shall assess the damages. They have therefore to ascertain first, is the road necessary; secondly, if necessary, to assess the damages to the owner of the land.

"Section 28 also has some application to the matter. It provides:

'1. All existing highways except those heretofore laid and regarded as two road (sic) highways shall until the contrary is proved by deemed to be laid out four rods in width; and all highways that are hereafter established shall be laid out at least four rods in width and shall be worked out to such width as the chief engineer considers necessary.

'2. When the engineer finds it inadvisable or impracticable to lay out a road four rods wide he may with the approval of the jury summoned under the provisions of sec. 30, lay out such road less than four rods but not less than two rods wide'.

"It appears from the return that by a document signed on the 12th day of July, 1928, and addressed to Alban Belliveau, supervisor of roads, road district

No. 1, Parish of St. Paul, County of Kent, Province of New Brunswick, nine persons who describe themselves as freeholders of the Parish of St. Paul, made application to him to lay out a highway which is the one in question in the present proceedings (over the land of Levi LeBlanc). Although addressed to Alban P. Belliveau, one of the signatories to it is Alban P. Belliveau himself, and another of the signatories is Simon D. Cormier, J.P., who is the witness to all the signatures to the application.

"It seems to me to say the least of it most objectionable and improper that the superintendent himself should be one of those who asked him to lay out the road, and that the witness to the signatures should be another of the signatories to the application. It is difficult to understand how they could act fairly and independently, being interested to the extent to which they evidently were in regard to the matter.

"Having reviewed this application it was the duty of the supervisor to view the lands and if he found that the proposed change would be of advantage to the general public and if the owner of such lands should not consent thereto, to apply to the Justice of the Peace for a warrant directed to the sheriff, deputy sheriff or any constable within the county commanding him to summon three disinterested freeholders of the county not resident in the parish where the proposed highway is situate, as stated in sec. 30 of the Act which I have already cited.

There is nothing whatever before the Court to show that the supervisor viewed the lands or came to any opinion with regard to their advantage to the general public, but he evidently applied for a warrant to Simon D. Cormier, Justice of the Peace, who is the same Simon D. Cormier who signed the application in the first instance, and also witnessed the different signatures to it. This warrant was issued by Cormier,

addressed to the sheriff or any constable within the County of Kent, and then follow the words 'Lucien Gaudet', who was the constable evidently selected either by Belliveau or Cormier, for the purpose of executing the warrant. This required Gaudet to summon three disinterested freeholders not resident in the Parish to appear before him at or 'near the place where the road will be start', Kent County, New Brunswick, Parish of St. Paul, on the 26th day of July at one o'clock in the afternoon 'to make jury to consider the necessity of a road' proposed to be laid out over the land of Levi LeBlanc. This warrant was served by Lucien Gaudet on Maxime O. LeBlanc, Albert C. Cormier and Jaddus D. Maillet, of the Parish of St. Mary's, who were accordingly summoned to attend as jurors, and they were sworn to the proper discharge of their duties, and to examine the site of the proposed highway and report whether in their opinion 'it is necessary in the public interest'.

"The jury so constituted made their report to Alban Belliveau as follows:

'We, the undersigned jurors in the Parish of St. Mary's, in the County of Kent, having been duly summoned and sworn to examine the site of the proposed highway and having decided in favor thereof, and later during the same day having been duly sworn to assess the damages occasioned by the opening of said proposed road, have assessed damages payable to Levi LeBlanc, the property owner whose land will therefore be traversed and the amount to be paid to Levi LeBlanc, property owner, to be \$30'.

"Belliveau thereupon laid out a highway traversing on the lands of Levi LeBlanc, 'with a uniform width throughout of 66 feet, provided, however, that said highway between fences may not be more than 33 feet or less. All according to a

plan attached'. And this finding or laying out of the highway by Alban P. Belliveau is also signed in the presence of Simon D. Cormier, who was an interested party, having petitioned for the laying out of the road in the first instance.

"I have to confess that I do not quite understand the meaning to be attached to the road supervisor's language in the laying out of the road when he says it shall be a uniform width throughout of 66 feet, but that between fences it may not be more than 33 feet or less. If it is neither more nor less than 33 feet between fences, why of course, it means that the road shall be 33 feet wide, and this it seems to me is not consistent with the statement that it shall have a uniform width throughout of 66 feet as required by sec. 28 of the Highways Act, which provides that all highways that are hereafter established shall be laid out at least four rods in width, and shall be worked out to such width as the chief highway engineer considers necessary, which means, I think, that all highways must be four rods in width, but that the roadbed and ditches may be worked out to a less width.

"While the whole proceedings seem to me to have been irregular, and while affidavits were read to show that the jury was not a disinterested one, as the constable in summoning them was advised who to summon by Clovis Albert, who was an applicant for the highway and the father of Oliver Albert and Joseph Albert, who were interested also in the construction of the road; the affidavit further states that Clovis Albert informed Lucien Gaudet, the constable hereinbefore mentioned, who to summon and the names of the persons whom he, Clovis Albert, wished summoned as a jury, and Lucien Gaudet summoned the three persons mentioned and indicated to him by Clovis Albert.

"Apart from all these irregularities, however, it is clear to my mind

that the jurors did not discharge the duty required of them by the Act, which was to decide in the first place if the road was necessary. They were summoned for that purpose, but they did not so find. In their finding they said that they were summoned to examine the site of the proposed highway, 'and decided in favor thereof'. That to my mind is not a finding that the road was necessary in the interests of the public. It is consistent with the idea that it had been decided that the road should be constructed and they were simply dealing with the question of the site of that road. It seems to me their finding should have been either that the road was necessary or that it was unnecessary, and the language of the Act should have been closely followed.

"The case of *Oulton v. Carter* (1858), 9 N. B. R. 169, seems to me to be very much in point, especially the language of Carter, J., who delivered the judgement for the Court. It was held there that to justify the shutting up of a highway under the 1st R.S., c. 26, 1 R.S., the return of the commissioners must either show expressly or by necessary implication that the road is not required for the convenience of the inhabitants of the parish. He says 'not required for the inhabitants' and 'not required for the convenience of the inhabitants' are not identical in meaning.

"The language of the return of the Commissioners setting forth their proceedings was as follows:

'Having gone upon and viewed the said road we do think that the highway passing over the land of the said Thomas Oulton at Westmount, designated, is not required for the inhabitants of the said parish.

"'Instead', the learned Chief Justice says, 'of adhering strictly to

the language of the Act this return of the commissioners departs from it, and we are called upon to decide whether the expression 'not required for the inhabitants' merits the same as 'not required for the convenience of the inhabitants'. Unless we are perfectly satisfied upon this point the return cannot be supported and the shutting of the road is illegal. We are not prepared to say that the commissioners in substituting the language they employed for that of the Act have used language strictly identical in meaning, and such being our view of the return we think the public were entitled to use the road as they had been heretofore accustomed.

"Under these circumstances, I am of opinion that the rule be made absolute, and the return of Belliveau, the supervisor of highways, of the laying out of the road, should be quashed." ¹⁰³

In *Ex Parte Morrison* ¹⁰⁴, the affidavit of the defendant, Morrison, stated that in the year 1833 he erected a fence across his farm at the rear of his cleared land, that in 1834 the commissioner of highways for the parish laid out and recorded a road across the land in rear of the fence, and bounded southerly by the fence, which road was used without change until 1845, when the commissioners of highways laid out another road or made alterations in the width of the old road, without giving any public notice of their intention; that the alteration brought the southerly side of the road within the fence, but that notwithstanding, the old line of road was continued, and no attempt was made to open the road to the southerly line or to remove the fence, which still remained where it was originally erected.

The affidavit of the commissioners of highways who made the complaint, stated that the laying out in 1845 was merely for the purpose of defining the courses and width of the road laid out in 1834, the record of which was not sufficiently

definite.

It was argued that the laying out in 1834 could not be relied upon. If the road was so imperfectly laid out then that the courses of it could not be ascertained, and it became necessary to lay out another road in 1845, it cannot be said that it is the same road.

It was ruled that "if the commissioners lay out a road where there is a fence, they are bound to remove the fence before they can convict a party for obstructing the road by it. There is nothing to show that this party prevented the commissioners from removing the fence - he only said it was not his duty to remove it. It is of great importance that the *onus* of taking down the fence should be thrown on the commissioners; for if the road is illegally laid out, they would be trespassers in removing the fence, but if it were legally laid down, they would be justified." 105

The importance the Courts have placed on the interpretation of the language used, both in the Statutes and the returns of those acting under the authority of the Statutes, and on a strict compliance with the provisions of the Statutes, in both the establishment of a public highway and in the closing of a public highway, is a result of the nature of a common or public highway.

The Legislature was aware not only of the importance of creating public highways, but also for providing for the permanent and unique character of a highway once it was established and recorded in compliance with the Statutes.

Since the protection of the public's right to use a highway has always been paramount and in so being, has established *in perpetuum* certain rights and interests of the owner of the lands through which the highway traversed, the

Legislature provided for ample protection of the private individual's as well as the public's rights in and to common highways.

Although the Statutes contain provisions to control and prevent it, abuse of these rights occurred in past times as it often does today, not wantonly, but from ignorance of the law, and legal technicalities or legal "niceties" affecting highways, the control of land abutting highways, and even the basic laws respecting the conveyancing of land or real property abutting or laying beneath a highway, and the degree of title actually conveyed in a particular conveyance.

3.3 Roads Subject to Expenditure of Public Money to be Highways

The first Provincial Statute enacting that all roads on which public money had been spent would be public highways was passed on the 20th day of March, 1821.

Chapter 15 of the 1821 Statutes, "An Act for the establishment as public roads of all roads in this Province for which any public monies may have been or shall be hereafter granted" in its entirety states:

" ' Whereas monies have been granted for the cutting, laying out, and improving various roads in this Province, at different Sessions of the General Assembly: And whereas no records have been made or kept of many of such roads, and the same are therefore liable to be shut up, or claimed as private property, and the public thereby deprived of the benefit of the same; for remedy whereof,

Be it enacted by the Lieutenant-Governor, Council and Assembly, that all and every road and roads in this Province, for and upon which any money

has heretofore been appropriated and expended, or shall hereafter be appropriated by the Legislature out of the public monies of this Province, and expended, and of which no records have been heretofore made or kept, shall be deemed and used, and the same are hereby declared and confirmed to be public highways or roads, for the use and benefit of the public, in as ample and full a manner as if the same had been laid out and recorded under and pursuant to the provisions and regulations of an Act made and passed in the fiftieth year of the Reign of His late Majesty King George the Third, intituled (sic). 'An Act for regulating, laying out, and repairing highways and roads, and for appointing Commissioners and Surveyors of Highways, within the several Towns and Parishes in this Province', or under and pursuant to any Act of Assembly, passed or to be passed, for establishing and regulating highways in this Province. "

The Interpretation section of the Highway Act, Chapter 25, of the R. S. N. B. 1927, states:

- "2. In this Chapter, unless the context otherwise requires,
- (f) 'Highway' includes every road, whether recorded or not, upon which public money has at any time been expended, and every bridge and culvert having a span of less than twenty feet, the approaches to which do not consist of continuous cribwork".

The Interpretation section of the Highway Act, Chapter 103, of the R. S. N. B. 1952, states:

- "1. In this Act, unless the context otherwise requires,
- (g) 'Highway' includes every road, whether recorded or not, upon which at any time public money has been expended, and, except in section 4, every bridge upon which at any time public money has been expended; "

Further to this provision, Section 9 of the same Act, being Chapter 103 of the R. S. N. B. , 1952, provides:

"9. Where public monies has been expended upon a road, the Minister may determine at any time the termini of the road upon which the expenditure of public money has been made, and his certificate shall be conclusive as to the termini of such road which becomes a highway by virtue of the said expenditure of public money".

There is no specific reference in either the 1968 Highway Act, being Chapter 5, or the R. S. N. B. 1973 Highway Act, being Chapter H-5, whereby a road upon which public monies have been expended is deemed a designated highway under that Act, yet the provision of Section 15 whereby the Minister may designate any road to be a highway would allow for such a road to become a designated highway by Statute if so desired by the Minister.

The "catch-all, cover-all" provision of Section 66 of the Highway Act, R. S. N. B. , 1973, might also provide for any road upon which public monies have been expended to be considered as a designated highway under the Act.

Case law pertaining to New Brunswick in respect of the expenditure of public monies on a road provide that certain conditions are essential before such a road becomes a highway under a Statutory provision relating to the expenditures of public monies on it.

The expenditure of public money on a road without the consent, knowledge or acquiescence of the owner of the land, does not make the road a highway in law.

In his judgement of *Campbell v. Pond, et al*,¹⁰⁶ White, J. said: "The Legislative, in the statute mentioned, have in express terms provided how public roads may be laid out through private property. These provisions require the

summoning of a jury to ascertain the necessity of the road, and for the appraisalment of damages to be paid for taking the same. It would therefore be a singular and startling result if from the language of the section I have quoted we must infer that without any summoning of a jury, or appraisalment, or payment of damages, any Road Commissioner could, at his own will, expend public monies upon a private road without the knowledge or consent, and it might be, against the protest of the owner of the land, and thereby make such road a public one. I do not so interpret the statute. There is nothing to show that the owner of the land now in question was aware I find that the disputed road was not a public way

A case involving a private right-of-way laid out less than four rods wide, and which sometime thereafter, public monies were spent upon the same with the consent of the owner, Carter, C.J. held in delivering the judgement of the Court, that the expenditure of public money on a road laid out 30 feet wide, can only make it a public highway to that extent, and will not have the effect of extending it to a highway four rods wide.¹⁰⁷

In the same case, a declaration by a Commissioner of Highways at the time of laying out a road, that he intended to lay it out four rods wide, was held to be not admissible.¹⁰⁸

It was further held that "a record of the laying out of a road under the Highway Act 13 Vict. C. 4, should state the width and courses of the road; and if defective in these particulars it will not justify the commissioners and surveyors of highways in entering on land to open a road", i. e., the highway is illegal and the commissioners are trespassing.¹⁰⁹

Under the present Highway Act, Chapter H-5, of the R. S. N. B. 1973, section 3 empowers the Minister to supervise the public monies allotted for the

construction, maintenance and acquisition of ferries and highways, except those highways prescribed under section 186 of the Municipalities Act.

Although the Minister is not empowered to spend public monies on the maintenance of roads which are not highways under the present Highway Act, it is known that public monies were spent on various private roads and driveways from time to time during the period from 1855 up to 1968 at which time the position of Minister of Highways was created and the definition of a highway within the meaning of the Highway Act became much narrower in scope.

It is impossible to suppose that a highway was created on each of these private roads, by merely expending public money on them, unless such roads were laid out and established in a lawful manner under the Act.

If the origin of a road is unknown, it is presumed to be a highway if statute labour or public monies have been performed upon it.

If the road has been laid out and dedicated by the landowner, the performance of statute labour upon it, or the expenditure of public money in opening it, is evidence of its acceptance and establishment as a highway.

Where a road was opened with the assent of the owner of the land, public money was expended on it and statute labour was done on it with his knowledge and approval, and there was continuous user by the public, such a road is a public highway unless closed to the public in conformance with the Statutes in force at the time. ^{110, 111}

In *Rideout v. Howlett*¹¹², affirmed by 42 N. B. R. 200, the judgement delivered by the Court stated that acceptance by the owner of public money for work upon a road over his land constituted that road a public highway under s. 3 of

the Highway Act, 1904 (N.B.) c. 6.

3.4 Highways Established by Modern Statutes other than the Highway Act

Highways established by modern Statutes, refer to those created under provisions of the Community Planning Act, Chapter C-12, the Expropriation Act, Chapter E-14, and the Municipalities Act, Chapter M-22, all of the R.S.N.B. 1973 which came into force on November 19th, 1974.

3.4.1 Highways under the Community Planning Act

The Interpretation section of the Community Planning Act, Chapter C-12, of the R.S.N.B. 1973 states:

"1. In this Act

'street' means the entire width between the boundary lines of a street, road or highway. "

The meaning of "highway" is not specifically defined, but must take the meaning of a common or public highway and not that of a more limited meaning.

Subsection 52 (3) requires that:

"A subdivision plan shall set out

- (f) the area of land to be vested in the municipality as streets, indicating by the names of the streets and, in smaller print immediately below each name, the word 'public' and, if a portion only of the street shown on the plan is to be so indicated, the portion shall be denoted by a line drawn across and at right angles to the street at each terminus thereof identified by an arrow; "

Provisions for the creation and acquisition of the streets by the Crown are contained in Sections 55 and 57 of this Act.

"55(1) Where a subdivision plan provides for the laying out of streets to be publicly owned or privately owned other than in a municipality, approval thereof by the development officer shall not

(a) be given, if the land is not in an integrated survey area, or

(b) be effective, if the land is in an integrated survey area,

until the plan has been assented to by the Minister of Highways.

55(2) The assent of the Minister of Highways under this section shall not be given until the Planning Committee has recommended the location of the streets mentioned in subsection (1) to such Minister, and, with respect to streets to be publicly owned,

(a) such streets have been constructed under the supervision of a person designated by such Minister in accordance with standards approved by him, or

(b) a bond satisfactory to such Minister has been posted guaranteeing construction of such streets in accordance with standards approved by him.

55(3) The assent of the Minister of Highways under this section shall be signed by such Minister or a person designated by him for that purpose, and such assent

(a) with respect to a subdivision of land not in an integrated survey area,

(i) shall be endorsed on the face of the subdivision plan, or

(ii) where such assent is in respect of a plan filed before the coming into force of this Act, shall be on a separate document; or

(b) with respect to a subdivision of land in an integrated survey area, shall be on a separate document.

55 (4) The filing of a separate document purporting to be an assent under this section shall be noted on the relevant subdivision plan by the registrar and shall vest in the Crown as property acquired for highway purposes under the *Highway Act* the land indicated thereon as streets.

55 (5) When a subdivision plan has been assented to by the Minister of Highways, approved by the development officer and, with respect to a plan of land in an integrated survey area, approved by the Director of Surveys, the land indicated on the plan as being publicly owned streets, on the filing of the plan in the registry office, vests in the Crown as property acquired for highway purposes under the *Highway Act*.

55 (6) When a plan amending a subdivision plan has been assented to by the Minister of Highways, approved by the development officer and, with respect to a plan of land in an integrated survey area, approved by the Director of Surveys, the land indicated on the amending plan as being publicly owned streets, on the filing of the amending plan in the registry office, vests in the Crown as property acquired for highway purposes under the *Highway Act*, but land that had vested in the Crown for such purposes and is now intended under the amending plan to be used for purposes other than streets, vests in the person whose land vests in the Crown under the amending plan on such filing.

55 (7) On the filing of an amending subdivision plan in the registry office,

- (a) if such plan has been assented to under section 55, approved by the development officer and, with respect to a plan of land in an integrated survey area, approved by the Director of Surveys, land indicated thereon as being publicly owned streets vests in the

Crown as property acquired for highway purposes under the *Highway Act*, but land that had vested in the Crown for such purposes, and is now intended thereunder to be used for other purposes, vests in the person whose land vests in the Crown on such filing;

- (c) if such plan has been approved and signed by the Minister pursuant to clause 77 (8) (a) (ii) (B), approved by the development officer and, with respect to a plan of land in an integrated survey area, approved by the Director of Surveys, land indicated thereon as being land for public purposes vests in the Crown for such purposes, but land that had vested in the Crown for such purposes, and is now intended thereunder to be used for other purposes, vests in the person whose land vests in the Crown on such filing. "

3.4.2 Highways Established under the Expropriation Act

The Interpretation section of the Expropriation Act, Chapter E-14 of the

R. S. N. B. 1973 states:

"1. In this Act

'expropriating authority' means any person authorized to expropriate by this or any other Act and includes a Minister of the Crown; "

The provisions for the description of the boundary of the land, the plan of the land, and the degree of title to be expropriated is contained in Section 6 of the Act.

"6. Every expropriating authority seeking to expropriate shall file with the Board a notice of intention to expropriate setting forth

- (a) the name of the expropriating authority,
- (b) a description of the land sufficient to identify it,

- (c) a general description of the state of the land,
- (d) the nature of the interest intended to be expropriated and whether such interest is intended to be subject to any existing interest in the land,
- (e) a statement of the purpose for which the expropriation is required, and
- (f) a statement that it is intended that the land be expropriated by the expropriating authority,

which shall be accompanied by

- (g) a plan of survey or a tentative plan of survey of the land, and
- (h) a statement setting out the names of all known owners of the land together with such evidence as is sufficient to satisfy the Board that reasonable steps have been taken to ascertain the owners of the land. "

The provision for the creation and acquisition of title of the highway land is contained in Section 19 of the Act.

"19(1) An expropriating authority may confirm its notice of intention, and the Lieutenant-Governor in Council may expropriate on behalf of an applicant, by registering in the registry office for the county in which the land is situated a notice of expropriation

- (a) where the expropriating authority is the Lieutenant-Governor in Council, signed by the Clerk of the Executive Council,
- (b) where the expropriating authority is a municipality, signed by the clerk of the municipality, or
- (c) where the expropriating authority is other than the Lieutenant-Governor in Council or a municipality, signed by the appropriate signing officer of the expropriating authority,

which notice shall contain a description of the land sufficient to identify it and the names of all registered owners of the land, and shall be accompanied by a plan of

the land filed in accordance with subsection 50(4) of the *Registry Act*.

19(2) Where the expropriating authority is the Lieutenant-Governor in Council, or where the confirmation of a notice of intention requires the approval of the Lieutenant-Governor in Council, there shall be attached to the notice of expropriation registered under subsection (1) the order in council under which the expropriation was authorized or the approval was given, or a copy thereof certified by the Clerk of the Executive Council.

19(6) In the case of an omission, mis-statement or erroneous description in a notice of expropriation, an order, a resolution or a plan registered or filed in accordance with this section, the expropriating authority may register or file an amended notice, order, resolution or plan, which notice, order, resolution or plan shall be deemed to be a substitute for the original notice, order, resolution or plan and shall have the same force and effect as if registered or filed at the same time as the notice, order, resolution or plan for which it is substituted.

19(7) Where the land is required for a limited time only or only a limited estate, right or interest therein is required, the notice registered under this section shall indicate by appropriate words that the land is taken for such limited time only or that only such limited estate, right of interest therein is taken, and the expropriating authority shall be deemed to have abandoned the intention to expropriate any other or greater interest.

19(8) The land described in a notice of expropriation is expropriated upon registration of the notice of expropriation in accordance with this section, and thereupon vests in the expropriating authority, and all right and title of any other person in such land ceases except to the extent that a possessory right

is conferred upon the person by this Act.

19(8.1) Where under subsection (8) the expropriating authority is a Minister of the Crown, the land described in the notice of expropriation is expropriated upon registration of the notice of expropriation in accordance with this section, and thereupon vests in the Crown to be under the administration and control of that Minister, and all right and title of any other person in such land ceases except to the extent that a possessory right is conferred upon the person by this Act. "

The Act further makes provisions whereby the Expropriating Authority may abandon the lands expropriated:

"24(3) Where all the owners upon whom a notice of intention to abandon has been served elect to take the land back, the expropriating authority may registered in the appropriate registry office a declaration of abandonment, executed in the manner required for a notice of expropriation and describing the land or part thereof that is abandoned by the expropriating authority and the land or part thereof that is retained, and shall serve a copy thereof upon each owner.

24(4) Upon registration of the declaration of abandonment, the land declared to be abandoned reverts in the person from whom it was taken or in those entitled to claim under him, and every interest held therein by that person prior to the expropriation is restored as if the expropriation had not occurred. "

Normally, a declaration of abandonment of lands under the provisions of the Expropriation Act is registered shortly after the lands have been expropriated and before any compensation has been paid for the lands and before any construction has been carried out on the adjoining lands.

In the case where construction has been carried out and the new highway

exists adjacent to the lands being abandoned a peculiar situation may arise if the new portion of the highway has been included in a designation under section 15 of the Highway Act. Upon registration of a declaration of abandonment, the land declared to be abandoned reverts in the person from whom it was taken or in those entitled to claim under him, but the land remains subject to the public's right of passage and repassage until such time as a Certificate of Discontinuance issued by the Minister of Transportation is registered at the County Registry Office.

3.4.3 Highways Established under the Municipalities Act

The interpretations in section 118 of the Municipalities Act, Chapter M-22, of the R.S.N.B. 1973 includes:

'118. In this part

'street' includes a public highway, street, lane, alley and square and the bridges thereon; "

Sections 186 and 187 of the Act deal with the matter of "highways".

"186. A road, street or highway vested in a city, town or village under the provisions of section 32 of the *Highway Act*

(a) is subject to any rights reserved by the person who dedicated the road, street or highway if a dedication was made; and

(b) is a public thoroughfare for the enjoyment and use of the public.

187 (1) In this section, 'highway' means any public street, road, lane, alley or way.

187 (2) Subject to this section, the council of a city or town may by by-law stop up and close any, or any portion of any, highway within the municipality.

187 (3) The closure under subsection (2) may be permanent or for such period as is specified in the by-law.

187 (4) Where the closure of a highway or any portion of a highway under subsection (2) is permanent, the municipality

- (a) may hold, sell, lease or otherwise dispose of any right, title or interest which it has in the soil and freehold thereof; and
- (b) is discharged from any obligation to maintain or keep such highway or portion thereof in repair.

187 (5) The council may by by-law close any, or any portion of any, highway to vehicular traffic and not to pedestrian traffic and provide for the erection of barriers to enforce the observance thereof.

187 (6) No by-law is to be passed under this section until the council

- (a) has fixed a time and place for the consideration of objections to the by-law;
- (b) has published a notice of its intention to consider the passing of such by-law in a newspaper published or having general circulation in the municipality once a week for at least two consecutive weeks preceding the time fixed under clause (a); and
- (c) has heard and considered any written objections to the proposed by-law and heard any person who wishes to speak for or against the by-law at the time and place fixed under clause (a).

187 (7) The notice under subsection (6) shall

- (a) define the highway, or portion thereof, to be affected by the by-law;
- (b) state the time and place fixed under paragraph 6(a);

- (c) state the place where and the hours during which the proposed by-law may be inspected; and
- (d) state the person to whom written objections may be sent.

187 (8) No by-law under this section that affects a provincial highway as defined in the *Motor Vehicle Act* is valid until approved by the Lieutenant-Governor in Council.

The assets and liabilities of all the municipalities existing under the *Counties Act*, were transferred to the Crown by:

"194. All property of whatever kind and wherever situated owned by municipalities under the *Counties Act*, Chapter 44 of the Revised Statutes, 1952, is vested in the Crown in right of the Province represented by the Minister.

195. All debts and liabilities of municipalities under the *Counties Act*, Chapter 44 of the Revised Statutes, 1952, are obligations of the Crown in right of the Province as represented by the Minister. "

Under section 194, all right, title and interest the municipalities held in, to, and over the streets and highways within their jurisdiction vested in the Crown as represented by the Minister of Municipal Affairs, but this section did not vest the right, title and interest in the highways which were vested in the Crown as represented by the Minister of Transportation.

It is also important to note that section 186 is subject to section 200, whereby

"200 (1) Sections 186 and 193 and the heading preceding section 193, or any provision thereof, shall come into force on a day to be fixed by proclamation.

200(2) Section 186 and clause (c) of the First Schedule of the Municipalities Act, Chapter 20, 1966 are repealed on a day to be fixed by proclamation and until that day remain in force. "

There has never been a proclamation with regards to section 186, although section 193 came into force on July 23, 1975 and clause (c) of the First Schedule was repealed effective August 20, 1975.

3.5 Highways Established under the Highway Act, Chapter H-5, of the R.S.N.B., 1973

In modern circumstances, it is usual to think of a "highway" as a road created as a work of engineering; a paved surface laid down upon a levelled foundation with drains and other embellishments.

In earlier times, a highway was considered a public right of passage over land, a legal concept rather than a material thing.

Webster's New Collegiate Dictionary defines a highway as "a public way", especially "a main direct road".

3.5.1 Statutory Definition of a Highway under the Highway Act

The Statutory definition of a highway in the present Highway Act, Chapter H-5, of the R.S.N.B., 1973, is defined by the interpretation section of the Act as:

"1. In this Act

'highway' means a road, street or highway designated by the Minister under section 15 to be a highway and includes

(a) any area made subject to a Department of Highways

Development Area,

- (b) a road, street or highway lying within the boundaries of a city, town or village and designated by the Minister under section 15 and classified as arterial, collector or local under section 14,
- (c) a road or street accepted by the Minister under section 35, and
- (d) a road or street accepted by the Minister under the *Community Planning Act*.

Although this definition of a highway is somewhat more qualitative and restrictive compared to the meaning of a common or public highway, it is this definition of a highway, together with certain sections and subsections of the present Highway Act, as discussed in the following section, which are mainly responsible for the creation of the several types of highway that now exist.

3.5.2 Sections of the Highway Act pertaining to Establishment, Title and Jurisdiction of Highways

"12 All land and property acquired for highway or provincial dump purposes shall be vested in Her Majesty in right of the Province, and notwithstanding any other Act when any such land or property is not required the Minister may with the approval of the Lieutenant-Governor in Council enter into an agreement for the sale or lease thereof and may convey any such land or property by a deed of conveyance, lease or other instrument under the Great Seal of the Province and under the hand of the Minister, and the proceeds of any such sale or leasing shall be accounted for as public money.

14 The Minister

- (a) may assign to any highway a name or number,

- (b) may classify and reclassify highways as arterial highways, collector highways or local highways,
- (c) may divide the Province into highway districts and assign to each a number and alter such districts and change the boundaries thereof,
- (d) may divide each highway district into highway divisions and alter such divisions and change the boundaries thereof, and
- (e) may appoint or designate such traffic officers, officers and other employees as he deems necessary for the proper administration of this Act.

15(1) The Minister may designate roads as highways by filing in the registry office of the county in which the roads lie

- (a) a written description of the roads and maps showing the general location of the roads, or
- (b) maps of the roads that have the co-ordinate survey system indicated on them.

15(2) Those roads that have been designated as highways in accordance with this section are highways for the purposes of this Act.

15(3) Where the Minister has designated roads as highways under this section, he shall publish in *The Royal Gazette* a notice that he has designated those roads as highways under this section.

15(4) The Minister may amend a designation made under subsection (1) by adding words to the designation or by amending the maps.

15(5) Where the Minister causes a highway or portion thereof to be discontinued under section 33, the designation under subsection (1) is deemed to be amended accordingly.

15(6) A highway designated under this section includes bridges

and other structures incidental to the highway.

- 16 Where the Minister proposes
- (a) to expend public money on the acquisition and development of any area of land for highway purposes in the Province, and
 - (b) to acquire all the lands in that area over a period of time as they become available or are needed for highway purposes in the Province, the Lieutenant-Governor in Council may declare that area of land to be a Department of Highways Development Area.

18(1) Where land is made subject to a declaration under section 16 the owner of the land may, at any time after the declaration is made, request the Minister to purchase that land.

18(2) If the Minister, within two years of the receipt by him of a request to purchase land given under subsection (1), does not purchase the land made subject to that request to purchase, then that land ceases to be subject to the declaration made under section 16.

- 20 Where the Department of Highways Development Area is created under section 16, the Minister
- (a) shall file a copy of the Order in Council and a plan of the Department of Highways Development Area in the registry office of the county in which the land lies and shall cause notice of the filing of the Order in Council and plan to be published in *The Royal Gazette* within thirty days of their being filed in the registry office, and
 - (b) at the time the lands become affected by sections 16 and 22
 - (i) shall cause to be registered in the registry office of the county in which the land lies, a notice to the persons who appear from the records of that registry office to be the owners

of the land in the Department of Highways Development Area, that the land is so affected, and

- (ii) shall cause a notice to be sent by registered mail to the persons who appear from the records of the registry office in the county in which the affected land lies to be the owners of the land in the Department of Highways Development Area, that the land is so affected.

22 Any person who holds or acquires an interest in land within a Department of Highways Development Area holds or acquires that interest subject to sections 16 to 21.

23 The Minister, by himself, his engineers, agents and workmen,

- (b) may take possession of any land, waters or watercourse that, in his opinion, is necessary for the construction, maintenance or repair of a highway, or for obtaining access thereto,
- (d) may enter upon any land for the purpose of making drains in which to carry off water from a highway and of keeping such drains in repair,
- (e) may alter the course of any watercourse and road and change the level of the same, and
- (f) may enter upon any land and take temporary possession of the land for the purpose of a detour in a highway during the period required to construct or repair the said highway, or for the purpose of a temporary winter road.

29 The Minister may certify that any highway or portion thereof is a highway and his certificate shall be conclusive evidence that such highway or portion thereof is a highway.

30(1) All highways existing on May 1, 1968 except those laid out and recorded as two-rod highways shall, until the contrary is proved, be deemed

to have been laid out four rods in width.

30(2) All highways that are laid out after the commencement of this Act shall be at least four rods in width unless the Lieutenant-Governor in Council otherwise orders.

30(3) The Lieutenant-Governor in Council on recommendation of the Minister and if satisfied that a width of less than four rods is sufficient for highway purposes, may order that a highway be laid out less than four rods but not less than two rods in width.

30(4) Where any doubt or dispute as to the boundaries of a highway arises a line drawn along the centre line of the travelled portion of such highways shall be deemed *prima facie* to be the centre line of such highway.

32(1) The title to the soil and freehold of highways vested in the Crown under Chapter 6 of 4 Edward VII (1904), which Chapter was repealed by Chapter 34 of 8 Edward VII (1908), is hereby declared to be vested in the owners of lands abutting the highways on April 21, 1927 and in the successors in title to such owners, in the same manner as the title was vested in the owners of lands abutting the highways before the passing of the first mentioned Chapter.

32(2) The Lieutenant-Governor in Council may declare by proclamation that any highway shall cease to be under the control of the Minister after a day named in the proclamation and such highway shall after such day be under the jurisdiction of the city, town or village in which it is situated.

32(3) The soil and freehold of every highway owned by Her Majesty to which a proclamation under subsection (2) relates shall be vested in that city, town or village named in the proclamation under subsection (2).

33 (1) Where in the opinion of the Minister, a highway or any portion of a highway is not required for use by the public, he may cause such highway or portion thereof to be discontinued

- (a) by recording in the registry office for the county in which it is situated, a plan thereof, together with a certificate to the effect that such highway or portion thereof is discontinued, or
- (b) by recording in the registry office for the county in which it is situated a certificate to the effect that such highway or portion thereof is discontinued, which certificate shall describe that highway or portion thereof in relation to property owners, property lines and existing highways with sufficient particularity to enable the identification of that highway or portion thereof,

and thereupon that highway or portion thereof ceases to be a highway.

35 (1) No road constructed by a person other than the Minister or a person acting on his behalf shall become a highway for the purposes of this Act until the Minister, with the approval of the Lieutenant-Governor in Council, certifies that he accepts the road as a highway for the purposes of this Act and amends his designation under section 15 accordingly.

35 (2) Notwithstanding the *Community Planning Act* the Minister, with the approval of the Lieutenant-Governor in Council, may accept a road or street as a highway by certifying that he accepts the road or street as a highway for the purposes of this Act and amends his designation under section 15 accordingly.

52 The Minister, with the approval of the Lieutenant-Governor in Council and having regard to access to and development of natural resources, may classify any road, public or private, or any highway or portion thereof as a resource access road.

53 (2) The Minister may acquire land by purchase, expropriation or otherwise for a resource access road.

54 (1) The classification of a road or highway as a resource access road does not affect the soil rights in the road or highway that were in existence immediately prior to the classification of the road or highway as a resource access road.

55 (4) Subject to subsections (1) and (2), a resource access road may be used by the general public.

56 The provisions of this Act relating to highways apply *mutatis mutandis* to resource access roads.

66 Any public road not included in a designation under section 15 due to error or omission or its being bypassed remains vested in the Crown and may be dealt with under this Act in the same manner as a highway.

68 Where land is acquired under this Act for highway purposes by purchase or expropriation that land except any portion of that land lying outside the right of way of the highway is a highway for the purposes of this Act.

3.5.3 Various Types of Existing Highways

The better known of the several types of "designated highways", "common or public highways" and other roadways that now exist within the Province basically as a result of the above quoted sections (but also from former Highway Statutes as well as other Statutes) when considering title, ownership, method of creation and, where applicable, method of closure or discontinuance, are:

1. A Highway that (a) was "laid out", either on paper and/or on the ground,

- (b) was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway has never been built, and
 - (d) over which there has never been public travel.
2. A Highway that
- (a) was "laid out" (either on paper and/or on the ground),
 - (b) was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway was built and over which there has been public travel, and
 - (d) the general inhabitants consider to be a public highway.
3. A Highway that
- (a) was "laid out" (either on paper and/or on the ground),
 - (b) was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway was built and over which there has been public travel, and,
 - (d) the general inhabitants consider to be a public highway, and,
 - (e) has been designated a "highway" under provisions of the 1968 and 1973 Highway Act of the Statutes of New Brunswick.
4. A Highway that
- (a) was "laid out" (either on paper and/or on the ground),
 - (b) was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway was built and over which there has been public travel before 1968,
 - (d) the general inhabitants considered a public highway before 1968,

- (e) has been designated a "highway" under provisions of the 1968 or 1973 Highway Act of the Statutes of New Brunswick, and,
 - (f) a Certificate of Discontinuance issued by the Minister of Transportation has been registered at the office of the Registrar of Deeds for the County.
- 5. A Highway that
 - (a) was "laid out" (either on paper and/or on the ground),
 - (b) that was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway was built and over which there has been public travel,
 - (d) that the general inhabitants considered a public highway,
 - (e) for which a Certificate of Discontinuance issued by a Minister of Public Works before 1968 and registered in the Office of the Registrar of Deeds.
- 6. A Highway that
 - (a) was "laid out" (either on paper and/or on the ground),
 - (b) was reserved by the Crown as a "Reserved Road",
 - (c) on which a roadway has never been built, and over which there has never been public travel,
 - (d) for which the Minister of Natural Resources has issued a Notice that such reserved road is "discontinued" under provisions of the Reserved Roads Act.
- 7. A Highway that
 - (a) was "laid out" (either on paper and/or on the ground),
 - (b) was reserved by the Crown as a "Reserved Road",

- (c) on which a roadway was once built and over which there once was public travel,
- (d) which the general inhabitants once considered a public highway,
- (e) for which the Minister of Natural Resources has issued a Notice that such reserved road is "discontinued" under provisions of the Reserved Roads Act.

8. A Highway

- (a) that was a common or public highway prior to 1968,
- (b) that was considered a public highway by the general inhabitants,
- (c) which has not been designated a highway under the provisions of the 1968 or 1973 Highway Act,
- (d) to which the public has acquired the right of passage and re passage and have in law established a public right of way,
- (e) for which there is no Minister of the Crown, or other specific body by law to administer these public roads, but it is possible for the Minister of Transportation, if he so desires, to regulate them under the "catch all-cover all" provision of section 66 of the Highway Act,
- (f) these public roads may lie within a Municipality as well as outside its boundary,
- (g) these public roads may lie on lands owned:
 - (i) in fee simple by the Crown,

- (ii) in fee simple by an individual or a company,
 - (iii) in fee simple by a Municipality,
 - (iv) as a combination of (i), (ii), and (iii)
- but all subject to the public's right of passage and repassage.

9. A Highway
- (a) that was an existing roadway in 1968,
 - (b) that was considered a public highway by the Crown and the general inhabitants prior to 1968,
 - (c) that was designated a "highway" under the provisions of the 1968 or 1973 Highway Act,
 - (d) these designated highways may be within a Municipality as well as outside its boundary,
 - (e) these designated highways may lie on lands owned:
 - (i) in fee simple by the Crown,
 - (ii) in fee simple by the Municipality,
 - (iii) in fee simple by an individual or company,
 - (iv) as a combination of (i), (ii), and (iii),but all subject to the public's right of passage and repassage.

10. A Highway
- (a) that was an existing highway in 1968,
 - (b) that was considered a public highway by the Crown and the general inhabitants prior to 1968,
 - (c) that was designated a "highway" under the provisions of the 1968 or 1973 Highway Act,

- (d) for which a Certificate of Discontinuance issued by the Minister of Transportation and registered in the Office of the Registrar of Deeds for the County,
- (e) these designated highways may be within a Municipality as well as outside its boundary,
- (f) these highways may be on lands owned:
 - (i) in fee simple by the Crown,
 - (ii) in fee simple by the Municipality,
 - (iii) in fee simple by an individual or companybut all subject to the public right of passage and repassage which existed prior to the designation of the roadway as a "highway" under the Highway Act.

11. A Highway

- (a) that was a common or public highway prior to 1968,
- (b) that was considered a public highway by the general inhabitants,
- (c) which has been designated a highway under the provisions of the 1968 or 1973 Highway Act,
- (d) which has been transferred to a Municipality under subsection 32 (2) of the Highway Act,
- (e) these designated highways lie solely within the bounds of the Municipalities,
- (f) these designated highways may lie on lands owned:
 - (i) in fee simple by the Crown as represented by the Minister of Transportation, the Minister of

Natural Resources or other Minister of the
Crown,

- (ii) in fee simple by the Municipality,
 - (iii) in fee simple by an individual or company,
 - (iv) as a combination of (i), (ii) and (iii),
- but all subject to the public right of passage and
repassage.

12. Highways accepted by the Minister of Transportation under
under the provisions of the Highway Act and various sections of the Community
Planning Act:

- (a) these are streets marked "public" on a subdivision
plan assented to by the Minister of Transportation
and which have vested in the Crown upon filing of the
plan,
- (b) these streets are not designated under section 15 of
the Highway Act,
- (c) these streets may lie within a Municipality as well as
outside its boundary,
- (d) the fee simple title lies vested in the Crown,
but all subject to the public's right of passage and
repassage.

13. Areas made subject to a Department of Transportation
Development Area are considered highways under the Highway Act:

- (a) these "highways" may lie within a Municipality as

well as outside its boundary,

- (b) the title to these highways is subject to the various interests existing in the lands at the time the lands became subject to the Department of Transportation Development Area.

14. Resource Access Roads are highways under the Highway Act; these being any road, private or public that has been "classified" as such by the Minister of Transportation:

- (a) these highways may lie within a Municipality as well as outside its boundary,
- (b) the soil rights in the highway remain as they were before the road was "classified" as a resource access road.

15. Any road or street "accepted" by the Minister of Transportation under section 35 of the Highway Act is a highway. These may have been existing streets built by an individual and to which abutting lots may have been sold:

- (a) these highways may lie within a Municipality as well outside its boundary,
- (b) these highways may lie on lands owned:
 - (i) in fee simple by the Crown,
 - (ii) in fee simple by an individual or company,
 - (iii) in fee simple by all abutting landowners,
 - (iv) as a combination of (i), (ii) and (iii),but all subject to the public's right of passage and

repassage.

16. Private roads and driveways, to which no right to pass and repass are enjoyed by the general public, but certain private individuals who have used the road without interference or objection from the owner of the road, may have acquired the right to pass and repass uninterrupted, although this does not extend the same rights to the general public:

- (a) these private roads exist throughout the Province,
- (b) the land is owned in fee simple by either:
 - (i) the Crown
 - (ii) the Municipality
 - (iii) a private individual
 - (iv) a company.

Even of these better known types of highways or roadway, there are several that are little known or not widely recognized by the general public, lawyers, land surveyors as well as the vast majority of the staff of the Department of Transportation.

One example of a public highway not widely recognized is the type listed as number 10 on page 85.

This type of public road existed as a public right of way before the Department of Transportation (Highways) was created in 1968, and was subsequently "designated" as a highway under the provisions of the Highway Act. Subsequent to this, a Certificate of Discontinuance has been issued by the Minister of Transportation under the provisions of the Highway Act, which in effect "undesignates" the particular roadway, making it once again simply a "public road" and not a "highway"

under the Highway Act. The general public retains its rights to pass and repass over the roadbed and the owner of the fee simple title to these lands has no right to stop up this roadway.

This situation gives more credence to the ancient maxim, "Once a highway, always a highway", except under the definition of "highway" in the Highway Act, the maxim would have to read, "Once a public road, always a public road", since the Department of Transportation's "highways" include only designated public roads, and not all public roads.

Further to these little known highways, are lands (formerly subject to a "highway") held in fee simple (completely free of the encumbrance of the public's right of passage and repassage by Her Majesty the Queen, in Right of the Province of New Brunswick, as represented by the Minister of Transportation.

These lands were formerly designated highways, the land being held in fee simple by the Crown, but subsequently a Certificate of Discontinuance has been issued by the Minister of Transportation, legally taking away the public's right to pass and repass over these lands.

There are also other lands held in fee simple (completely free from the encumbrance of the public's right of passage and repassage) by Her Majesty the Queen, in Right of the Province of New Brunswick, but as represented by a Minister other than the Minister of Transportation.

These lands were also formerly "designated highways" under the Highway Act, the land being held in fee simple by the Crown, but to which a Certificate of Discontinuance has been issued by the Minister of Transportation, thereby taking away the public's right to pass and repass over the land.

The reason these lands are not held by the Crown as represented by the Minister of Transportation, is a result of the policy to build highways, or widen existing highways, on lands held by the Crown as represented by the Ministers of Municipal Affairs, Supply and Services, Natural Resources, Education, and others, but not to transfer administration of these lands to the Minister of Transportation by an Order-In-Council, thereby creating a "grey area" of rightful or valid control and administration of these lands, especially after they are freed from the public's right to travel over them by a Certificate of Discontinuance issued by the Minister of Transportation, which is all he is empowered to do with those lands being discussed.

3.6 An Analysis of Various Sections of the Highway Act pertaining to Establishment of, Title to, or Jurisdiction over a Highway

In order to understand the differing status New Brunswick roads have as outlined in the previous section, several of the aforementioned sections pertaining to the establishment of, the title to, or the conveyance of title or jurisdiction of a highway will be discussed to show how they have contributed in creating the existing situation.

3.6.1 Section 12 of the Highway Act

Although this section makes provisions that all lands acquired for highway purposes, as well as lands for provincial dumps, shall be vested in Her Majesty the Queen, in Right of the Province of New Brunswick, it does not provide that the Queen will be represented solely by the Minister of Transportation in regards to these lands.

This means that lands purchased by the Department of Transportation in the name of Her Majesty the Queen, and intended for highway purposes need not

specify on the deed of conveyance that such land is for highway purposes or that it is deemed to be a highway upon registration of the deed, and further, no reference need be made as to which Department the land is being acquired for.

This can be the cause of much uncertainty in the instance whereby lands being used by the Minister of Transportation for highway purposes have been acquired by the Minister of another Government Department for non-highway purposes, and for which there has never been an Order-In-Council transferring administration and control of the land to the Minister of Transportation. Considering the definition of "highway" under the Act, such lands cannot be considered part of a highway under the Act.

A further "grey area" arises regarding such land when the Minister of Transportation, with the approval of the Lieutenant-Governor in Council, conveys such land by a deed of conveyance, lease or other instruments. The question arises as to whether the conveyance is valid in that the Minister of Transportation is not authorized to convey lands which he does have the authority to administer.

3.6.2 Section 14 of the Highway Act

The two provisions of this section that are of interest to this report are:

- "(a) may assign to any highway a name or number,
- (b) may classify and reclassify highways as arterial highways, collector highways or local highways, "

The exact same provisions were contained in clauses 13(a) and 13(b) of the Highway Act, Chapter 5 of the 1968 Statutes.

Whereas neither Act contained provisions requiring the Minister to notify the public either by publication in the Royal Gazette or by registration of Notices in the Registry Offices as to his "assigned" names or numbers and his classifications, there are to date, no maps or plans showing all the names or numbers and classifications of the designated highways.

The lack of such a requirement appears somewhat inconsistent with the provision of subsection 65(1) wherein the Minister, with the approval of the Lieutenant-Governor in Council, may make regulations with respect to *arterial highways* or *collector highways* designating a control line on either or both sides of such portions of those highways he deems necessary.

Further confusion regarding the classification of highways stems from the maps and attached documents registered by the Minister in the apparent designation of certain roads as highways during 1970.

These maps are stamped (using red ink) in the lower left hand corner, "ROADS DESIGNATED AS HIGHWAYS UNDER SECTION 14 OF THE HIGHWAY ACT" and "ROADS TO WHICH HIGHWAY ACT IS NOT APPLICABLE". (See page (i) of EXHIBIT 31)

The roads delineated and depicted as being highways are listed not only as arterial, collector or local, but also as "TRANS CAN.", "D", "E" and "F" which cannot truly be considered as "classifications", although it is quite apparent this was in fact the intent at the time these maps were registered.

This apparent intent is further substantiated by the documents to which the maps are attached. These documents list the name or number of each road, and opposite the name or number are the "class" of each road. (See pages (ii), (iii), (iv), (v) and (vi) of EXHIBIT 31)

Although it is not specifically provided that once the Minister has assigned a name or number to a highway that he may change these names or numbers from one highway to another, neither does it state that he shall not attempt this exchange or re-assignment.

It is for this reason that today, as traffic volumes on highways change, or a new highway is established, the particular number assigned to a highway is far from a permanent identification of a particular highway.

Reference within the Department of Transportation to "the new Highway 11" and "the old Highway 11" (which is now Highway 134 - in places) still exist a decade after the new highway was established.

3.6.3 Section 15 of the Highway Act

The designation of roads to be "highways" within the meaning of this Act are to be carried out in compliance with this section of the Act.

This section is not exact re-enactment of section 14 of the Highway Act, Chapter 5 of the 1968 Statutes.

In 1970, the Minister caused to be registered at the various County Registry Offices documents with attached plans for the purpose of defining highways under the Highway Act.

EXHIBIT 32 is a copy of selected portions of the document registered at the Registry Office in and for the County of York and to which particular reference will be made in analyzing the initial registration of such documents.

Both the 1968 and the 1973 Highway Act provide for the Minister to "designate" roads as highways. Synonyms for "designate" listed in Webster's New

World Thesaurus are: "indicate, point or mark out, name".

It is of interest that on page (i) of EXHIBIT 32, the Minister stated:

"Under the authority of section 14 of the Highway Act, Chapter 5, 17 Elizabeth II, 1968, I, the Minister of Highways for the Province of New Brunswick, hereby prescribe the following described roads to be highways under the Highway Act"

Also, on page (ii) of EXHIBIT 32, it is stated that:

" the roads shown as

- (a) Trans Canada;
- (b) Arterial;
- (c) Collector; and
- (d) D, E and F

are prescribed highways under section 14 of the Highway Act, Chapter 5, 17 Elizabeth II, 1968".

Synonyms for "prescribe" listed in Webster's New World Thesaurus are: "guide, order, give directions".

Although only the Courts can rule on whether or not "prescribe" means the same as "designate" in this case, it has been argued that such is not the case, and in fact, it is possible that those roads were not in fact designated as highways recognizable under the Highway Act.

Subsection 15(1) provides that the Minister is to file either "(a) a written description of the roads and maps showing their general location", or "(b) maps of the roads that have the co-ordinate survey system indicated on them", in the registry office as part of the process of designating roads as highways.

As of this date, the Minister has never caused to be registered maps of the roads that have the co-ordinate survey system indicated on them.

Referring once again to page (i) of EXHIBIT 32 at the top right hand corner

of the "page" is typed "written description" and directly below this is a statement regarding "these descriptions". Apparently, the pages of the document such as pages (iii), (iv), (v) and (vi) of EXHIBIT 31 have been intended to be the required "written description".

It is the "considered legal opinion" of the solicitor for the Minister of Transportation, that the information listed on the aforementioned pages of EXHIBIT 31 could not be considered a "written description" as required and intended to be prepared under the provisions of this section. ¹¹³

Apart from the legal ramifications of the registration of such a "written description", it is obvious the filing of a Notice which is barely sufficient to identify the actual road being designated, is next to useless when questions arise concerning the width intended to be designated as a highway, and whether the hundreds of substantial portions of old roadbed created by upgrading-diversions were designated or not.

The usual practice within the Department of Transportation is to consider each incident on the merit of whether it is more advantageous to consider that a particular section of road was intended to be designated, or that it was not intended to be designated, and act accordingly.

Subsection 15(3) provided that the Minister shall publish a Notice in the Royal Gazette that he has designated certain roads as highways.

As it does not specifically state that he shall list those roads, so affected, in the Royal Gazette, the Notice as such provides little public notice, as intended. A copy of the Notice pertaining to the designation of highways in EXHIBIT 32 is attached as EXHIBIT 33.

The Legislature provided in subsection 15(4) for the amending of the designations of the highways.

The filing of amendments to a designation are extremely rare, there having been only 15 - 20 since 1968. Copies of the filed amending designations for York County are attached as EXHIBIT 34. Whether all of these designations were in fact effective is very questionable since Notices are not always published in *The Royal Gazette* as required by subsection 15(3) of the Highway Act. The Department of Transportation is scheduling massive amending designations of highways during the late spring and summer of 1977. (See EXHIBIT 35)

3.6.4 Section 16 of the Highway Act

The records show that the Lieutenant-Governor in Council has declared only one area of land to be a "Department of Highways Development Area" as provided for by section 16 of the Act.

Possible reasons why the Minister of Transportation has not made more extensive use of this Statutory provision are the lack of adequate finite planning, the lack of funding to purchase the land as it becomes available (as provided for by section 18 of the Act), the lack of funding to determine the registered owners of the lands or property involved and to prepare the necessary plans (as required by section 20 of the Act).

3.6.5 Section 23 of the Highway Act

Although it might not be considered an abuse of section 23, the somewhat questionable manner by which the provisions of this section have on numerous

occasions been utilized, cannot be condoned when one considers the problems that have arisen, and will continue to arise, as a direct result of those actions.

Under the authority of clauses 23(b) and 23(e), certain relatively small sections of land have been taken and utilized in the construction or upgrading of a highway and have subsequently become part of the highway. Usually no plan of the amount or shape of land taken is prepared, and there having never been a written conveyance of any form, a highway that once may have had a uniform width and uniform title to the lands upon which it did lie, has by the actions of those concerned only with the construction and maintenance of the highway, been effectively altered in its boundary limits, as well as there having been created a title and jurisdiction problem. Frequently, as little actual land is taken, the contiguous owner is not aware of the encroachment of the highway onto his lands.

3.6.6 Section 29 of the Highway Act

It has been stated by a solicitor for the Department of Transportation, that the Legislature intended that by this provision the Minister of Transportation might "certify that any highway or portion thereof is a highway", but the highway so certified must first be a highway as defined by the Highway Act.¹¹⁴

This provision was included to provide a convenient form of evidence that a roadway was a highway under the Highway Act, if such evidence were required in a Court of Law.

It was not intended as a means whereby the Minister of Transportation could by a Certificate, not requiring the approval of the Lieutenant-Governor in Council, make any roadway a highway within the meaning of the Act.

3.6.7 Section 30 of the Highway Act

Subsection 30(1), although stating by the use of the same words as have been used in former Statutes pertaining to highways, technically is ineffective wherein the definition of a highway is different than that of the former Statutes.

On May 1, 1968, there were no highways within the meaning of a highway under the Act.

This is an interesting point when considering the first "designations" of the majority of New Brunswick highways in the summer and fall of 1970 and keeping in mind that the designations were just that - a designation that a roadway (whether private or public, and no matter what the laid out width) was to be a highway under the Highway Act.

The designation did not "lay out" the highway, nor did it set a width for the highway. The designation was basically a declaration by the Crown that it was taking control and administration of those roadways on an "as is" basis.

Subsection 30(2) provides that all highways laid out after the commencement of this Act, are to be at least four rods in width unless the Lieutenant-Governor in Council otherwise orders. Since "laying out" contemplates the laying out of a new line of highway on the ground by a survey in the usual manner, this subsection would not prevent the designation of a roadway less than four rods wide to be a highway under the Act.

The general interpretation given the provisions of subsection 30(4) by the Department of Transportation as well as by Registered New Brunswick Land Surveyors has been the single major cause of the massive conflicting survey information and plans describing and depicting, in every imaginable form, the "boundaries"

of New Brunswick highways.

One of the first New Brunswick Statutes to make provisions for determining the boundaries of a highway is Chapter IV of the 1904 Statutes, being "An Act relating to Highways". (See APPENDIX E)

The Legislature at that time saw fit to enact:

"7(1) All existing highways, except those heretofore laid out and recorded as two rod highways, shall, until the contrary be proved, be deemed to have been laid out four rods in width, and all highways that may hereafter be established shall be at least four rods wide, and shall be worked out to such width as the Superintendents in their respective divisions shall consider necessary. In the event of any doubt or dispute as to the boundaries of any highway or road, a line drawn along the centre of the traveled portion of such highway or road shall be deemed to be *prima facie* the centre thereof, and if any allegation be made to the contrary, the same shall be proved to the satisfaction of the Superintendent by the party making the same; and in all such cases an appeal shall lie from the decision of the Superintendent to the Chief Commissioner."

The Chief Commissioner herein referred to being the Chief Commissioner of Public Works, whose title was changed to Minister of Public Works in 1913, and remained the chief administrator of highways until 1968, when the position of Minister of Highways was created.

The provision, that "if any allegation be made to the contrary, the same shall be proved to the satisfaction of the Superintendent by the party making the same; and in all such cases an appeal shall lie from the decision of the Superintendent to the Chief Commissioner" allowed for the introduction of evidence to prove

or show cause why the centre line of the travelled portion should not be used as the centre of the highway. Most certainly in earlier days the actual travelled portion of the highway was not always constructed in the centre of the "laid out" highway. The path of least resistance usually became the location of the travelled roadbed. Large boulders and tree stumps often created slight diversions and curves in a highway that was laid out to be straight although the Chief Commissioner in an instruction booklet prepared in 1910, advised his superintendents to construct the roadbed "in the centre of the road allowance".¹¹⁵

This provision enabling evidence to be shown why the centre of the travelled portion of a highway should not be used as the centre of the highway was re-enacted in the Highway Act of the R. S. N. B. 1927, as:

"and if any allegation is made to the contrary, the same shall be proved to the satisfaction of the engineer by the party making the same; and in all such cases an appeal shall be from the decision of the engineer to the Minister, whose decision shall be final".

A similar provision re-enacted in the Highway Act of the R. S. N. B. 1952, stated:

"and if any allegation to the contrary is made the same shall be proved to the satisfaction of the Minister by the party making the same".

It was only 13 years ago, in the Highway Act, Chapter 6, of the 1963 Statutes that a similar provision was not re-enacted and by this Act, the provision of the 1952 Statute was repealed.

Therefore, effective since 1963, the centre of the travelled portion of any highway at any particular time determines the boundary of the highway.

Such a situation has led to the creation of plans of survey with conflicting information, for, if a surveyor retraces the centre line of the existing travelled portion of a highway in 1975 and his measurements do not agree with a plan prepared by a surveyor in 1965 for the same highway, then automatically there is a "dispute or doubt" and since he is not required to resolve the differences, he may accept his work and totally ignore the work of the previous surveyor with regard to the determination of the boundary of the highway. Although to make such a statement appears ridiculous, the County Registry Offices are filled with plans to prove that such is actually the case.

The result after 73 years of legislation providing "where any doubt or dispute as to the boundaries of a highway arises a line drawn along the centre line of the travelled portion of such highways shall be deemed *prima facie* to be the centre line of such highway" leads one to question the reasoning behind the Legislature's decision to persist in re-enacting over the years the former 1904 provision in substance, with only minor changes - and which have proven to be detrimental changes.

In comparing the provision for the determination of the limits of a highway in the 1904 Act to the similar provision in the 1973 Act, and considering these provisions in relation to 1) the methods of surveying, 2) the value of the land abutting a highway and 3) the nature of the physical roadbed, as well as the Statutes regulating the survey, use and subdivision of the land abutting a highway in force in 1904 and in 1977, one readily recognizes the full significance of the folly of the present legislation in an age of today's technological advancements in surveying instruments and methods. In light of more recent Statute Law relating to the surveying

of boundaries of various interests in real property, it is apparent such Legislative practices are contributing to further an already untenable situation.

Although the practicing registered land surveyor contributes extensively to the creation of conflicting information regarding the boundaries of highways, it is the Department of Transportation that has been the major offender in perpetrating the problem of continually redefining the boundaries of a highway by solely considering the centre of the travelled portion of a highway.

The basic reason for this is that the main and almost exclusive concern has, throughout the years, been for the construction and maintenance of the highway, and extremely little or no concern has been expressed regarding the proper acquisition of the title to the lands taken for highways, nor has concern ever been expressed that they should be well defined mathematically in the event that the need arise to retrace them.

Even surveys carried out in the past ten years in which the field centre line, as laid out and marked on the ground, has been properly defined and adjusted within the New Brunswick Grid Co-ordinate System, the land required for the highway right-of-way has been expropriated using plans showing only magnetic bearings and field distances.

The result of a recent retracement survey by the Department of Transportation of a section of highway built to Trans Canada Highway standards, emphasizes the underlying problem existing with the present legislation regarding the determination of highway boundaries.

A brief historical review of this particular section of highway just mentioned; 1) the original field centre line was laid out in 1968, 2) the complete

survey was co-ordinated using all the original hubs in 1968, 3) design and property plans were prepared in 1969, 4) the land was expropriated in 1970 using a plan with only magnetic bearings, 5) the highway was constructed in 1970, 6) the registered New Brunswick Land Surveyor defined a portion of the boundary in 1973, 7) a Department of Transportation Design Location Crew traversed the centre line of the existing travelled portion of the highway in 1975.

The result is that the boundaries are mathematically defined in four different, yet very similar, ways and are shown on four different plans, containing conflicting information as to the mathematical definition of the boundaries of that section of highway.

Basically, the problem stems from the fact the legislation allows the boundaries of a highway to perpetually shift with the centre line of the travelled portion.

Such legislation can indeed be troublesome, especially in cases where the boundary limits of a highway were not originally defined or established by the *constructed* centre line, but by a significantly different *designed* centre line. (See FIGURE 1)

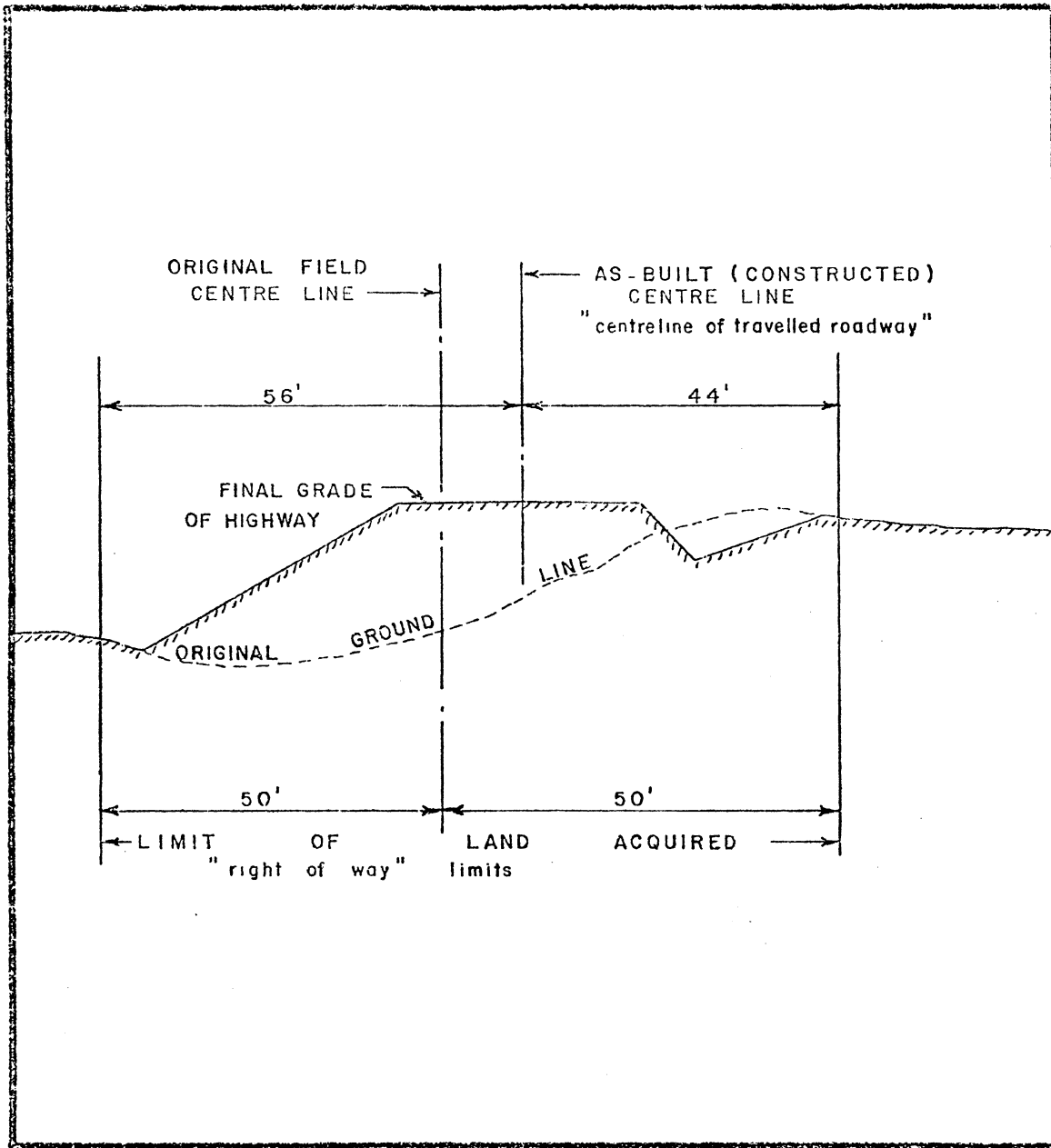
3.6.8 Section 32 of the Highway Act

Subsection 32(1) is a re-enactment in substance of section 29 of the Highway Act, Chapter 25, of the R. S. N. B. 1927, with only a minor change, that being the insertion of the date (April 21, 1927) the former Act came in force.

The original provision in 1927 stated:

"TITLE OF THE CROWN DIVESTED"

FIGURE 1



ORIGINAL FIELD CENTRE LINE VS. AS BUILT CENTRE LINE

Present Legislation allows for "floating" highway boundaries, as the original field centre line is not always the same as the as built (constructed) centre line, and the constructed centre line often changes with recaps and upgrading of the highway.

"29(1) His Majesty releases any right he may have under Chapter 6 of the Acts of 1904, which chapter was repealed by Chapter 34 of the Acts of 1908, to the title to the soil and freehold of highways, and such title is hereby vested in the present owners of lands abutting on the highways, in the same manner as the title was vested in the owners of lands abutting on the highways before the passing of the first above mentioned Act.

29(2) His Majesty shall be bound by the provisions of this section. "

This section returned the title to the lands under the highways to the abutting landowners, but provides that the title is not vested in the owners that existed in 1904, but is vested in the owners abutting the highways on April 21, 1927.

Although the provisions of this section are easily understood, it is somewhat difficult to understand the reasoning behind such legislation, especially in light of legislation in Nova Scotia in 1929 by which title vested in the name of the Crown and has remained so ever since.

The 1907 and 1908 Synoptic Reports of the Legislative Assembly provide little insight into the actual reasoning, as there was no specific debate regarding the matter of the title to the highways.

The 1908 Act (See APPENDIX F) did not make specific reference to the title of highways, but, whereas that Act repealed all provisions of the 1904 Act, it effectively conveyed title to the abutting landowners and this matter was duly clarified in the Highway Act of the R. S. N. B. 1927.

Subsections 32(2) and 32(3) simply provide for the transfer or conveyance of title and administration of a street or highway from the Crown, as

represented by the Minister of Transportation, to the municipality in which that street or highway is situated.

This section has only been used twice by the Minister of Transportation to transfer *en masse* the title and administration of highways.

In 1970, 107 miles of highways in the City of Saint John were, by proclamation under section 32(2), vested in the City of Saint John. (See EXHIBIT 36)

On May 31, 1974, by Order-In-Council 74-386, jurisdiction and title to most highways situated in all of the 85 villages existing on that date, were effectively transferred to the respective municipality in which the highways were located. (See EXHIBIT 37)

By this Order-In-Council, the Minister conveyed all right, title and interest that the Crown (as represented by the Minister of Transportation) held in, to, and over those highways. The Order-In-Council did not state what particular interests the municipalities were receiving, nor did it list the highways that were being affected, or the widths of any particular highway. In most instances, the Minister was only transferring the jurisdiction or administration of the highway since the Crown did not have any title to the highway.

This Order-In-Council was not registered in the County Registry Offices, it was not published in any newspaper, and the Royal Gazette only published the fact that Order-In-Council 74-386 was passed; it did not specify what it contained.

Further to this, a large number of the municipalities were never notified of the transfer and the documents, including plans, maps, deeds, leases, etc., for these highways that the Department of Transportation possesses have never been

transferred to the respective municipalities.

It is also a fact that the highways located in such former villages as Lewisville and Nashwaaksis (as well as many others amalgamated with a city or town prior to May, 1974) have never been transferred, and in fact are still legally and technically under the jurisdiction of the Minister of Transportation, and as well, whatever title the Crown ever held in and to the lands under these highways still remains vested in the Crown.

As far as the records show and as far as anyone can ever remember, there has never been a transfer of jurisdiction or title to any municipality that has expanded its boundaries to include highways formerly in the county and under the administration of the Minister of Transportation.

Also there are no records to show that a transfer has ever been made under the provisions of this section to affect any other highway or street in any of the 20 towns or other 5 cities in the Province. In the majority of cases, such a transfer from the Minister of Transportation to a municipality would have little or no affect with regard to the title of the lands under the streets for, as with the City of Fredericton, the title of the lands under the streets in the older sections of the municipality remain vested in Her Majesty the Queen in Right of the Province of New Brunswick as represented by the Minister of Natural Resources, even to the present day.

This very briefly outlines the status of highways designated under the Highway Act and located within a municipality.

Since the transfer of title to the villages in May of 1974, the Department of Transportation has purchased by deed in the name of Her Majesty the Queen

numerous parcels of land required for highway purposes lying within the boundaries of several of the villages.

These parcels of land have never been subsequently deeded to the respective village in which the land is lying, nor has there ever been a transfer of jurisdiction and title under section 32 (2).

This procedure of acquiring the necessary land for highway construction within a municipality since May of 1974 is creating a more complex situation with regard to the title, boundary and jurisdiction of highways or streets within a municipality, as it creates two owners to the fee simple under that section of the street or highway. (See FIGURE 2)

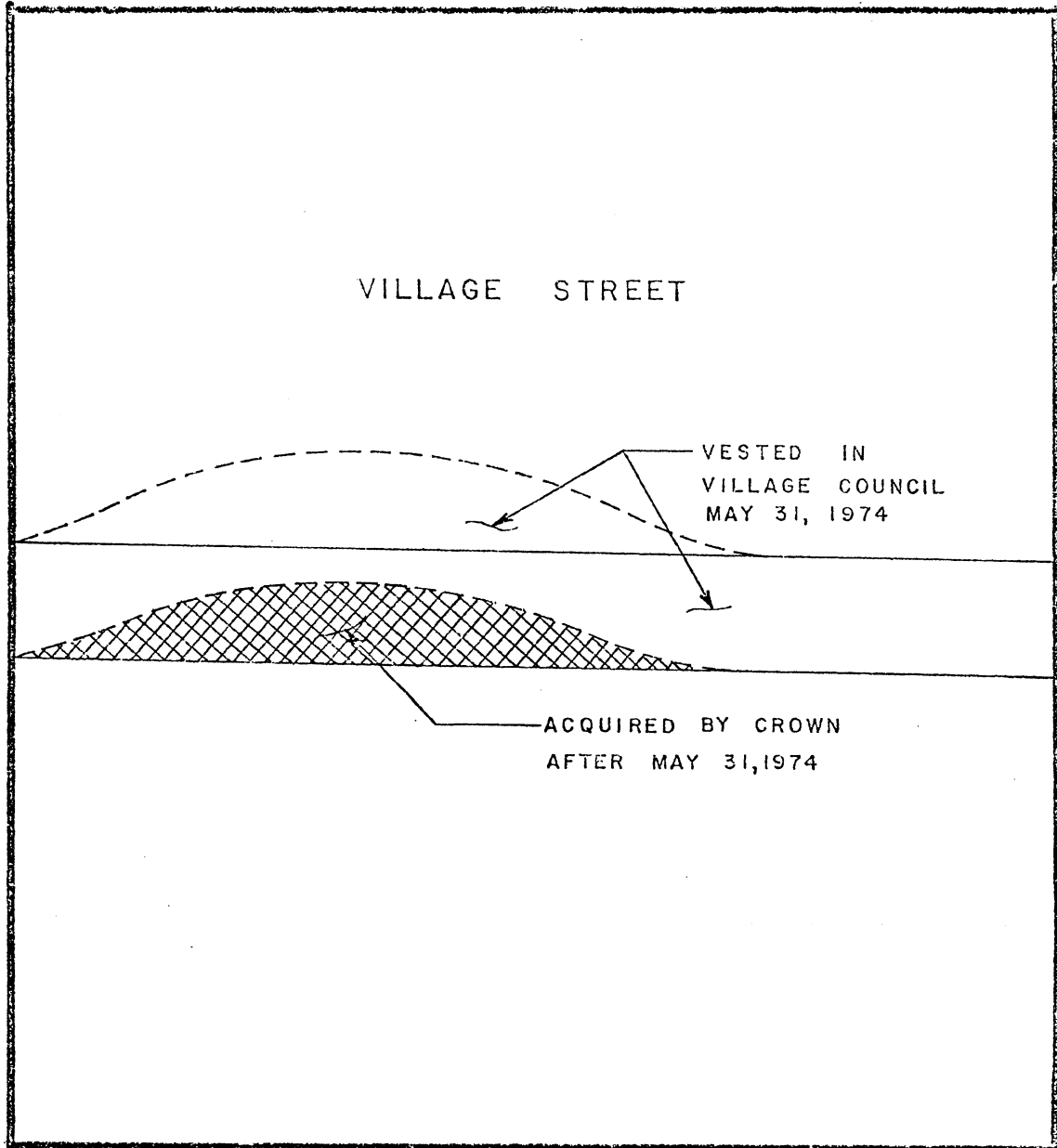
3.6.9 Section 33 of the Highway Act

The Minister of Transportation is empowered by this Section to discontinue a highway or any portion of a highway not required by the public, and upon registration of a Certificate of Discontinuance and a plan showing the highway to be so discontinued, that highway ceases to be a highway under the Highway Act.

It has always been contended by those who prepare and register these Certificates of Discontinuance for the Minister that upon registration of the Certificate and plan, the "title and land revert to the abutting landowners". They have always believed that the land lying beneath any highway was owned by the Crown, and that a Certificate of Discontinuance effectively conveyed the title to the soil and freehold, as well as extinguishing forever and absolutely the public's right of passage and repassage over the land.

It is not well known that a Certificate of Discontinuance is not an

FIGURE 2



HIGHWAYS OR STREETS IN VILLAGES

Non-uniform boundary and title created; cross-hatched section acquired by deed by D. O. T. during upgrading of highway, whereas old highway was only a legal easement, a public right-of-way, and was transferred to the Village on May 31, 1974. The cross-hatched section is vested in the Crown, having been acquired since May 31, 1974.

effective conveyance of the fee simple to the lands under a highway, but is merely a Notice that the public's right to pass and repass over that land as between the public and the owner of the land, is being legally extinguished as provided in the Statutes.

There are certain instances when it can be argued that a Certificate of Discontinuance does not in fact even extinguish the public's right of passage and repassage over a certain highway. The argument can arise because of the specific wording of the section - "and thereupon that highway or portion thereof ceases to be a highway". Although until the question reaches the Courts and a ruling is made on the meaning or intention of the section, the most a solicitor can provide is his "considered legal opinion" and these "opinions" certainly have been known to vary from solicitor to solicitor.

The opinion expressed by the solicitor for the Minister of Transportation is that a Certificate of Discontinuance merely causes a highway to cease being a highway under the Highway Act.¹¹⁶ In the case where a designated highway under the Highway Act was a common or public highway before being designated a "highway" under the Act, a Certificate of Discontinuance merely "undesignates" the highway as a highway under the Act; it does not take away the rights the public enjoyed before the highway was designated.

In that case where lands acquired by the Crown for a highway under the Highway Act were not subject to the public's right to pass and repass before that land was designated as a highway under the Highway Act, then a Certificate of Discontinuance does in fact legally extinguish forever and absolutely the public's right to pass and repass over that land.

Basically, it could be stated that by a Certificate of Discontinuance the Minister of Transportation may legally extinguish or take away any rights of the public to pass and repass upon certain lands that he has created under the Act, but he cannot extinguish or take away rights they already enjoyed in highways before the Highway Act created his position and those designated highways as defined under the Act.

3.6.10 Section 35 of the Highway Act

This section provides for control by the Minister of streets and roadways constructed by a private individual who either dedicates them to the public or wishes the Crown to assume responsibility for their maintenance.

If there exists a roadway constructed to the standards required by the Minister and if it serves a number of private properties, this section provides the means for the Minister to assume this private street as a public highway and which will be designated as a highway under the Highway Act.

3.6.11 Section 56 of the Highway Act

This section states that "the provisions of this Act relating to highways apply *mutatis mutandis* to resource access roads".

The provisions for establishing and determining the title of a resource access road are included in section 52 and subsections 53(2), 54(1), 54(4), and 55(4) and under section 56, the Highway Act applied to these roads in the same manner as it applies to highways, with only the necessary changes in points of detail being made.

3.6.12 Section 66 of the Highway Act

If ever there were a general section included in a Statute to protect against an error or omission, few could be as effective or powerful as section 66 of the Highway Act.

This section simply provides that any public road not included in a designation due to *error or omission or its being by-passed* remains vested in the Crown and "may be dealt with under this Act in the same manner as a highway".

Such a "catch-all, cover-all" provision effectively enables the Minister of Transportation to deal with any and all common or public highways as though they had been specifically designated a highway under section 15 of the Act.

Even though it were impossible to say that a certain road was not designated due to an error or an omission there is nothing to prevent saying that it was by-passed, since obviously it was, otherwise, it would have been designated, if such were the intention.

Although section 15 provides for the Minister to state which highways he definitely designated, section 66 leaves it wide open as to which public roads he may have intended to designate as highways, and to which public roads he may deal with as though he had designated them as highways.

3.6.13 Section 68 of the Highway Act

This is another "general" section or at least it is a section which has been used by interpreting the provisions in very general or broad terms.

As there is no statutory definition (within this Act) of the phrase "highway purposes", it has been interpreted to include practically any purpose

beneficial to the Department of Transportation.

It is basically a result of this broad interpretation that the Minister of Transportation authorizes the purchase by deed of hundreds of acres of land which are not required for the actual location of the constructed highway, that being the "right-of-way" as defined in the Highway Act.

These large parcels of land are acquired in fee simple normally as a result of the necessity of acquiring a parcel from a substantially large tract of land to which the Minister of Transportation will not allow access for improvement or development of the remaining land, although it is usually possible to provide an access for restricted uses such as farming or logging.

In many cases, access cannot be provided directly to the new highway because of the grade, the erection of a structure or an access ramp, and in many instances it would be too costly to provide a parallel road for access to the severed property, therefore the whole of a property may be acquired rather than only the required portion.

In the instance where the land required for the designed highway is expropriated, the severed land is normally acquired by deed at a later date. But in the instance where the land required for the designated highway is being negotiated for and a settlement is reached, the complete tract of land is acquired by one deed and no distinction is made in the deed that only a portion is required for the designed highway and that the rest is surplus land acquired because of severance or some other reason.

It is because of instances such as just discussed that section 68 provides that "where land is acquired under this Act for highway purposes by purchase

or expropriation that land except any portion of that land lying outside the right of way of the highway is a highway for the purposes of this Act". (See FIGURE 3)

The interpretation section provides a unique definition for "right of way" which is not substantially different from a right-of-way in law, but is possibly the only instance of the term "right of way" defined as such in any New Brunswick Statute.

It was enacted that:

"1 In this Act

'right-of-way' means those portions of land constructed and maintained as a highway that are under the administration and control of the Minister; "

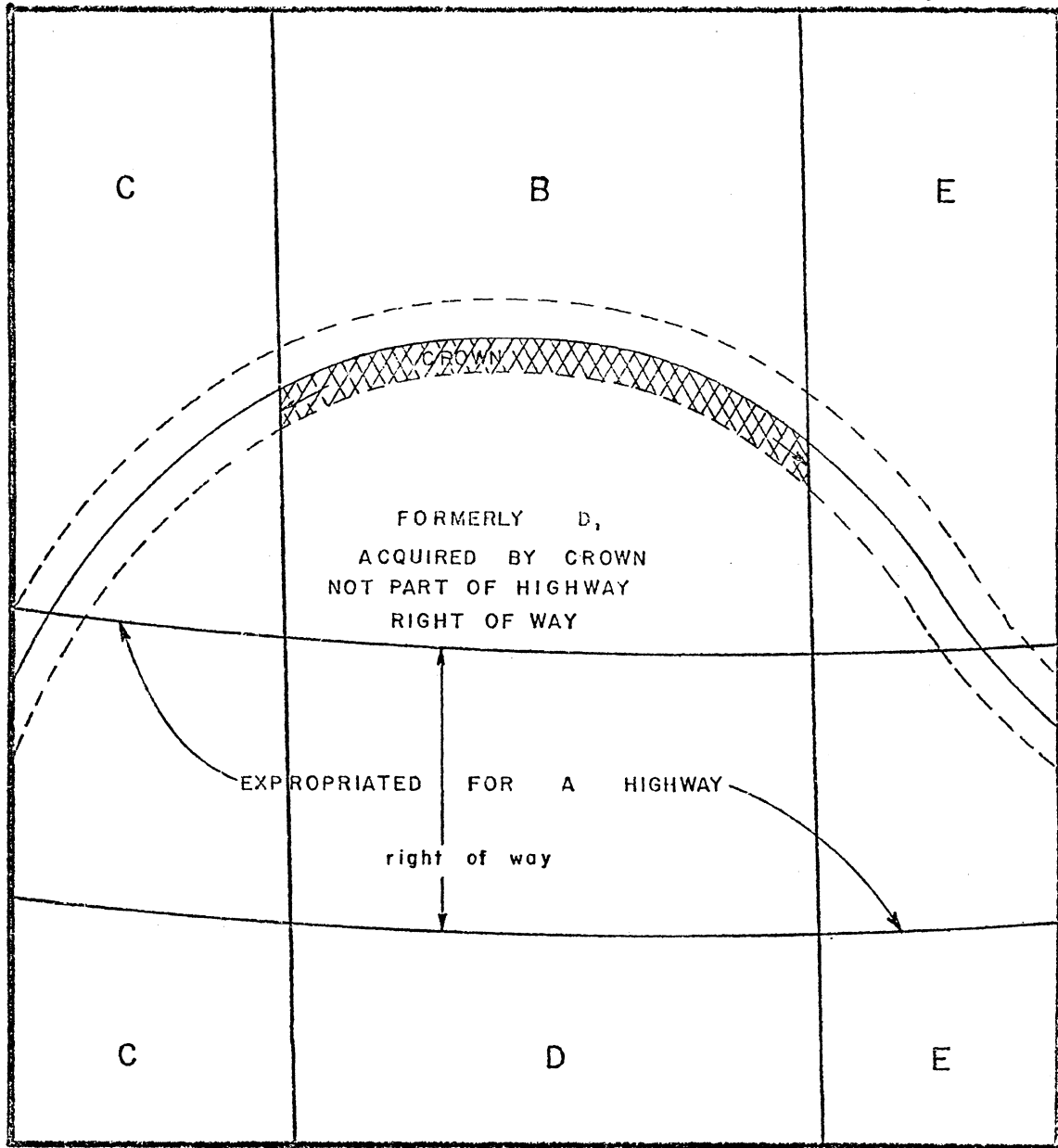
In law, a "right of way" is a right of passage or of way and is a servitude imposed by law or by convention, and by virtue of which one has a right to pass on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, through the estate of another. 117, 118, 119, 120, 121, 122, 123, 124

A "right of way", in its strict meaning, is the right of passage over another man's ground; and in its legal and generally accepted meaning, it is a mere easement in the lands of others, obtained by lawful use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a highway.

A "right-of-way" does have a twofold significance, being sometimes used to mean the mere intangible right to cross, a right of crossing, a right of way, and often used to otherwise indicate that strip of land which has been acquired for highway purposes, and upon which the roadbed is built.

The statutory definition in the Highway Act has defined "right-of-way"

FIGURE 3



DISCONTINUANCE PROBLEM

Sections of old highway on lands of C and E cannot be discontinued since B would not have access to a public "highway".

(note that it is hyphenated) as land, a physical or material thing, rather than as an intangible legal concept, such as a form of easement.

It has been noted that the use of the phrase "right-of-way" in section 68 is in an unhyphenated form, but it can be argued that the Courts would hold that the phrase must be given the meaning of the statutory definition under the Act.

CHAPTER 4

TITLE TO AND BOUNDARIES OF HIGHWAYS

In most central and western Canadian Provinces, there is no private proprietorship in the soil of public roads. The land, at first the wasteland of the Crown, held for the beneficial use of the public, was, in course of settlement, surveyed so as to allocate road allowances, which became the streets and highways of the country. The freehold of these highways remained in the Crown.

In New Brunswick, as in the other Maritime Provinces and the New England States, this is not the case for the majority of the highways. The abutting landowners are still the major owners of the soil, subject to the public right of easement; that is, a mere right to pass and repass.

In law, a highway is a public right of passage over land and is therefore a legal concept and is abstract.

Since a highway is a public right over land, its existence is a separate question from the question of ownership of that land.

"The public" as such does not own the land which is subject to the highway. In more recent times, the Crown or a Municipal Council owns the land, but such a public body is not "the public".

Land ownership is not strictly relevant to highways, because whatever land is taken up by a highway is normally subject to it regardless of ownership. The majority of New Brunswick highways consist solely of rights-of-way, that is, rights of passage and the abutting landowners hold the fee simple to that land, though very little enjoyment of actual possession. Minerals under the surface will

be his, that is to say, those varieties of mineral which are not appropriated by the Crown in some manner. The landowner may be able to work them provided the highway (and the rights of other property owners) is not interfered with.

He may even be able to protect his rights as landowner against persons using the highway who go beyond their rights as members of the public to journey along it.

Apart from statutory authority, the owner's consent is necessary before other persons can lay pipes in the subsoil, tunnel through it, or otherwise interfere with it; and if such pipes are laid, or tunnel made, under statutory authority, the existence of the highway will not of itself deprive him of a right to compensation.

Similarly, the owner of the land, being also the owner of the air above may restrain the creation of wires above the highway, and, subject to certain statutory restrictions, may himself erect, or permit others to erect, such wires so long as they are high enough not to interfere with the public right.

These rights of an owner have been affected by various Statutes, such as "An Act to Incorporate the New Brunswick Telephone Company (Limited)", S.N.B. 1888-90, c.78, page 179, which says at section 8:

"8. The said Company may and is hereby authorized by its servants, agents and workmen to enter upon any street, public road, bridge, water course, or highway in any city, incorporated town, village or municipality in the said Province, and on the same to construct, erect and maintain" (emphasis added).

This statutory authority pertains only to highways lying with a municipality, and the right of the Company to erect overhead wires or put underground cables on the right-of-way of a highway in the Province of New Brunswick is contained in the Highway Act, R.S.N.B. 1973, C. H-5, at Section 44. Sub-section 1 of section 44 says in effect that no one may put an underground cable on a highway right-of-way unless he notifies the Minister of Transportation and the Minister's approval is obtained. Although approval may be obtained from the Minister to bury cables on a highway right-of-way, this approval does not of itself deprive the owner of the lands on which the highway is situated of a right to compensation.

Similar Statutes, regulations and agreements are in effect for other companies or corporations that make use of highway rights-of-way.

Two often quoted cases are, *Hickman v. Maisey* 1900¹²⁵ and *Harrison v. Duke of Rutland* 1893¹²⁶, which indicate that the Courts view "the interest of the public in a highway" as consisting "solely in the right of passage".

The law shows the Province upholding this interest in the public in travelling freely against the interest of the landowners in defending as far as possible the exclusive enjoyment of their land, and the law does this largely by empowering the Minister of Transportation and Municipal Councils to acquire and exercise such rights over land as are necessary for the purpose.

As indicated in earlier sections of this report, there are several methods by which a highway may be and have been established within this Province.

These various methods, as well as certain established procedures of

acquiring additional land for highways by the Crown, have created a most complex situation with regards to not only the boundaries, but also the title to the highways.

An understanding of the various degrees of title and combinations of title to New Brunswick highways should provide the incentive to enact Legislation whereby the existing situation could economically be rectified once and for all time.

4.1 The *Ad Medium Filum Viae* Rule

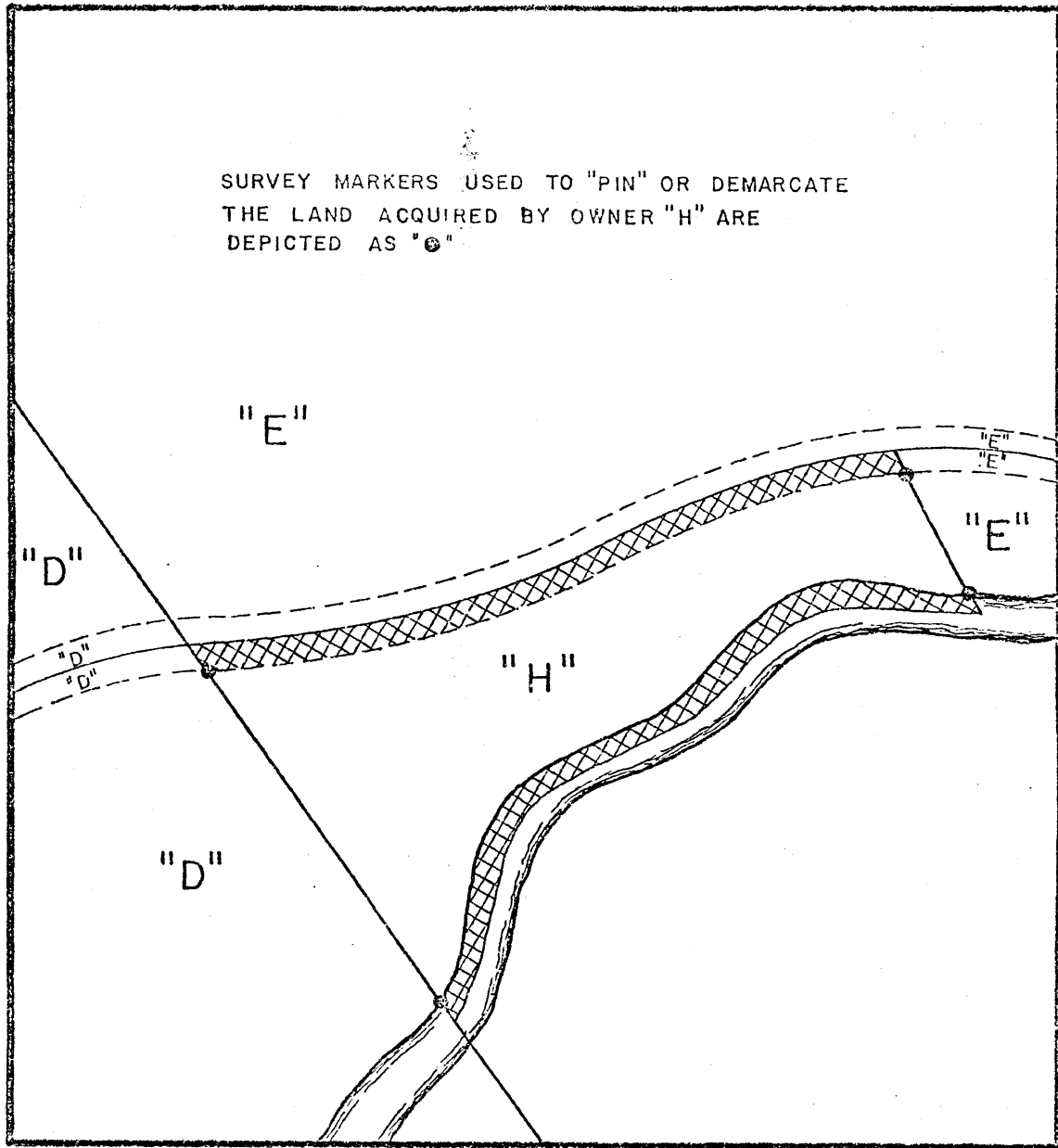
Ad medium filum viae means "to the middle thread of the way". The rule as applied to highways consisting of a right of way, means that, if Blackacre is owner of the land on one side of a highway and Whiteacre of the land on the other side, it will be presumed at common law that their ownership divides along the centre of the actual highway. This resembles the similar application of *ad medium dilum aquae* to rivers. (See FIGURE 4)

If on the other hand, Blackacre owns the land on both sides of the highway, it will be presumed at common law that Blackacre is also landowner of the land on which the highway is situated. (See FIGURE 4)

In the aforementioned case of *Harrison v. Duke of Rutland*¹²⁷, in his judgement, Kay, L. J. said, "the soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway".

It is from such English case law as well as the common law presumption, that the *ad medium filum viae* rule is applicable to the provisions of subsection 32(1)

FIGURE 4



AD MEDIUM FILUM RULE

Cross-hatched sections of both highway and river are owned by "H" although his property is "pinned" at the "limits" of the highway and the river.

Owners "D" and "E" hold the title to all land under the highway along those sections where they own the land on both sides of the highway.

of the Highway Act in determining the boundary lines of the lands of the abutting owners.

Application of this rule can be rebutted by proof of different ownership, for example, when a highway laid out by a Commissioner of Highways followed along a common line of two owners, the land for the highway having been said to be totally from one owner, or that one rod was taken from one owner and three rods taken from the other. (See EXHIBIT 38)

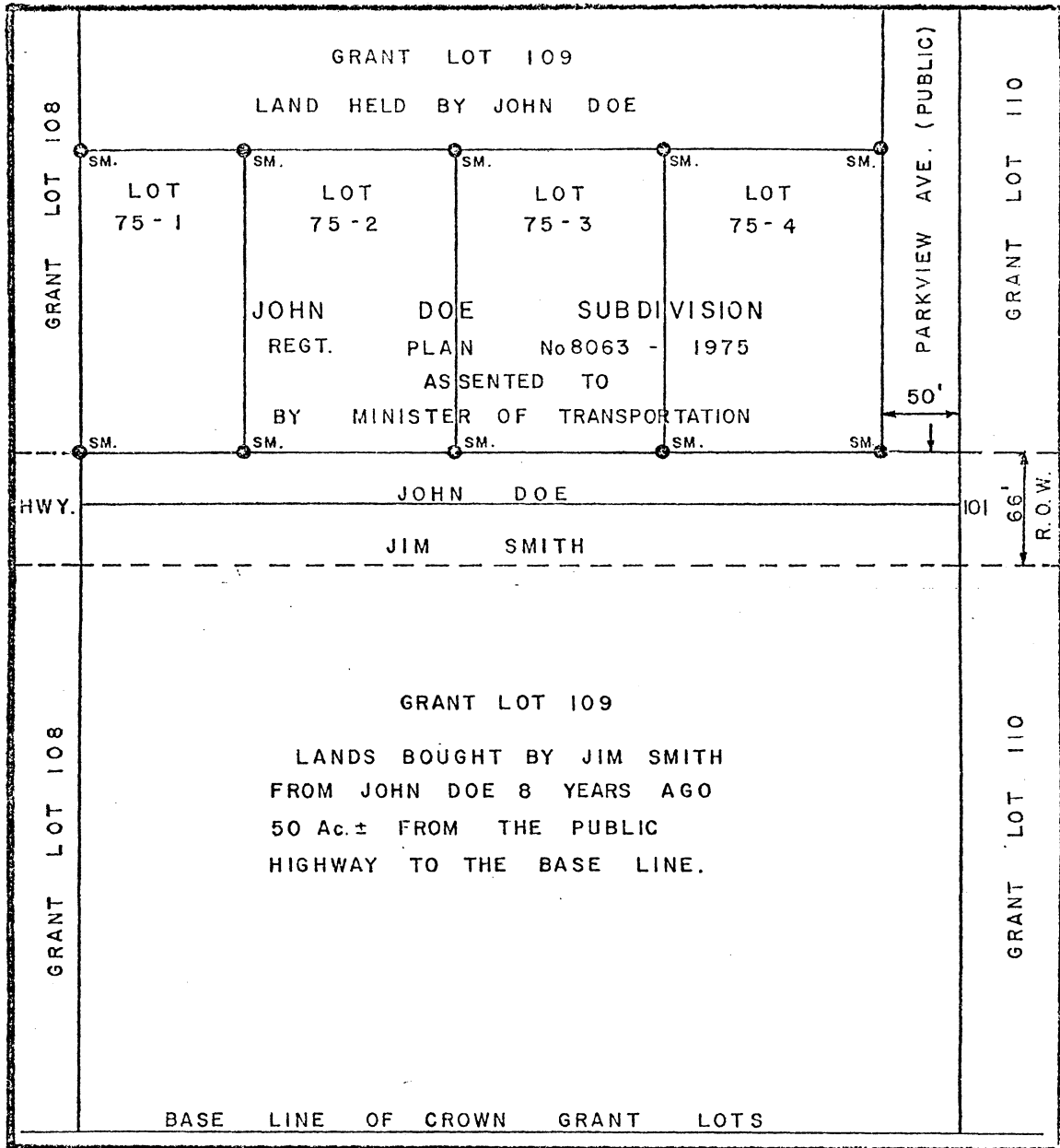
Another example is when the land on each side of a highway consists of separate lots having been expressly bounded by, but not including the land of the highway. In this case the land under the highway is still held by the developer of the abutting land. (See FIGURE 5)

This case where the title is held by a third party (not an abutting owner) may well be the case where land is developed residentially in lots and these lots are sold off with boundaries running along, but not extending into, the roadway. The land ownership of the roadway may well not be conveyed in any part to any of the purchasers, and if so, will remain unconveyed as the property of the estate developer or whoever else owned it last.

There are several New Brunswick cases as well as other Maritime cases regarding the *ad medium filum viae* rule. In these cases, it has been held that "the doctrine is elementary that the law presumes the ownership of half the soil over which a highway exists to be in the owners of the land on either side of that highway, and that although lands described in a conveyance may be bounded by or in that way, the ownership *ad medium filum viae* will pass".¹²⁸

The New Brunswick cases of *Pattison v. St. John*,¹²⁹ *Williams v.*

FIGURE 5



TITLE TO LANDS UNDER HIGHWAY

A "third party" landowner may hold title *ad medium filum* of the highway, if expressly reserved by a grantor in a conveyance.

*Portland*¹³⁰ and *Simonds v. Chesley*¹³¹ provide similar authority for deciding cases regarding New Brunswick highways.

It has been taken as settled law that lands expropriated for highways under provincial statutes become vested in the Crown as its property, the right of the original owner, upon payment of compensation, being extinguished.

It is likewise clear that where there has been no expropriation or other acquisition by the Crown of lands for highway purposes, the law presumes that the title to the soil lies vested in the abutting landowners to the middle of the highway.

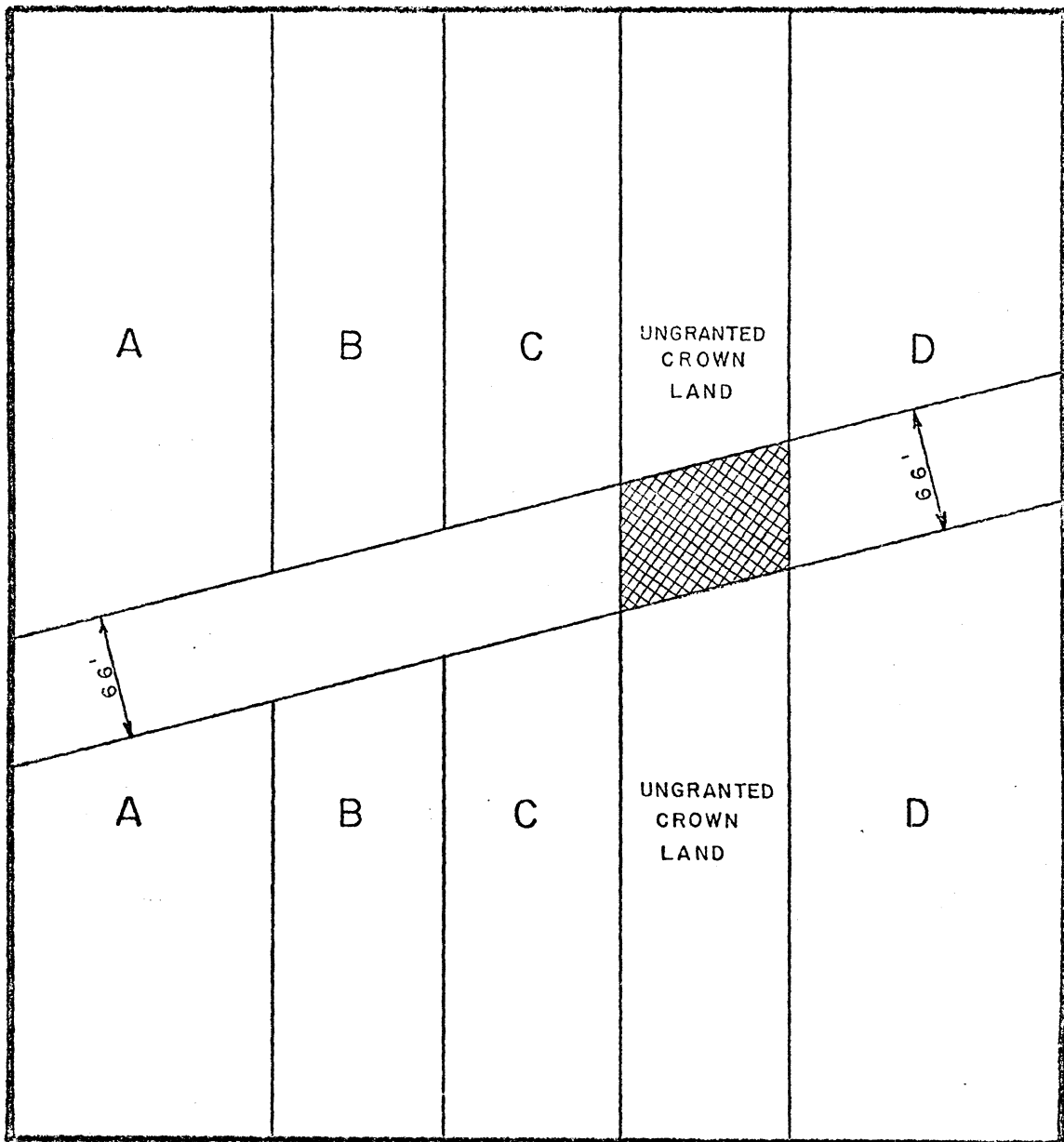
The fact that the title is in the Crown excludes the *ad medium filum viae* rule. Such would be the case where land has been expropriated, expressly reserved in a Crown grant, or otherwise purchased, by which the fee simple is vested in the Crown.

In *S. M. T. (Eastern) Ltd. v. Ruch*¹³², Harrison, J. held that "that soil under the highways in New Brunswick is held under grants from the Province of New Brunswick, and if such roads were at any time abandoned the land over which they run would be available to the owners, relieved of the public easement of passage over it. Grants of land bordering on a highway carry with them the soil under the highway to the middle line thereof". (See FIGURE 6)

The following "Legal Gems" with respect to the conveyancing of real property must be considered, as they affect the title to highways:

1. To be effective as a conveyance of land the deed must so describe the land as to identify it.
2. If a deed in describing the land to be conveyed, refers to a

FIGURE 6



NEW HIGHWAY OVER UNGRANTED CROWN LAND

Land required for a new highway is acquired by conveyance from private landowners, but is simply built on Crown Lands administered by the Department of Natural Resources. A proper transfer of administration and control by an Order-In-Council is not obtained, nor is proper notice given to those administering Crown Lands advising them of the highway. A subsequent Crown Grant might convey the fee simple title to the lands under the highway to a private owner.

particular map or plat, such map or plat is part of the deed for the purpose of identifying the land conveyed.

3. When a deed describes the boundaries of the land to be conveyed by reference to monuments, natural or artificial, *the intention of the parties is the controlling factor* and all rules of construction are mere aids in determining such intention.

4. In a description of land a monument is any object on the ground which helps to identify the land conveyed. It may be either natural or artificial and may be a tree, a stone, a stake, a river, a lake, a highway, a wall, a house, a ditch, a graveyard, an ocean, a farm or a mining claim.

5. When the terms of a deed conflict then generally (a) monuments, either natural or artificial, govern over courses and distances (b) distances govern over courses, (c) a specific description will govern over a general description and (d) any of these will govern over an estimated "contents" or area. These rules, however, are rules of construction only, not rules of law, and different priorities will prevail if there is evidence of such an intent.

6. When the description of land in a deed carries it "to", "by", "from" or "along" a street, road, alley, way, highway, creek, stream or similar monument, the common law rule is that the grantee takes title to the land to the centre of such street, road, alley, way, highway, creek, stream or similar monument, assuming, of course, that the grantor owned to the centre of such monument.

7. If the description of land in a deed carries it to or from a *point on the side of a street, stream, road or similar monument, and along such*

street, stream, road or similar monument, still the grantee should take title to the centre of such monument under the common law rule, but there are contra cases.

8. If the description of land in a deed carries it to or from *a point on the side of a street*, stream, road or similar monument and *along the line on the side* of such street, stream, road or other similar monument, still the grantee should take title to the land to the centre of such monument under the common law rule unless it is expressly excluded from the grant. Such seems the better rule.

9. Title to the land under the waters of a non-navigable stream belongs to the abutting riparian owners and title to the land under the waters of a navigable stream belongs to the Crown.

Depicted in FIGURE 5, is a "Subdivision Plan" assented to by the Minister of Transportation which has been registered at the County Registry Office and, as shown, all corners of the residential lots created were marked by survey pins.

In his deed to the purchaser of Lot 75-3, John Doe uses this language, "thence south to a survey marker on the north side of Highway 101, thence along the north side line of Highway 101 to the place of beginning, being a survey marker on the north side line of the said Highway, and being intended to convey Lot 75-3 on the attached plan". The rest of the description was accurate and sufficient to identify the Lot.

The point considered in this situation is: when the description in the deed describes two points or a line which constitutes one side of a monument such as a road, street, highway, stream, alley or the like, and the grantor owns to the centre of the monument or beyond, does the description carry title to the

grantee to the centre of the monument or does the grantor retain the strip between the side line and the centre of the monument?

In logic it can be said that two points determine a line and a line determines a boundary. The grantor in this case has described the boundary line of the land conveyed as the "side line" of the Highway. Hence, no part of the Highway passes to the grantee.

The result is that the strip in the highway still belongs to John Doe.

The contrary view is depicted in FIGURE 7.

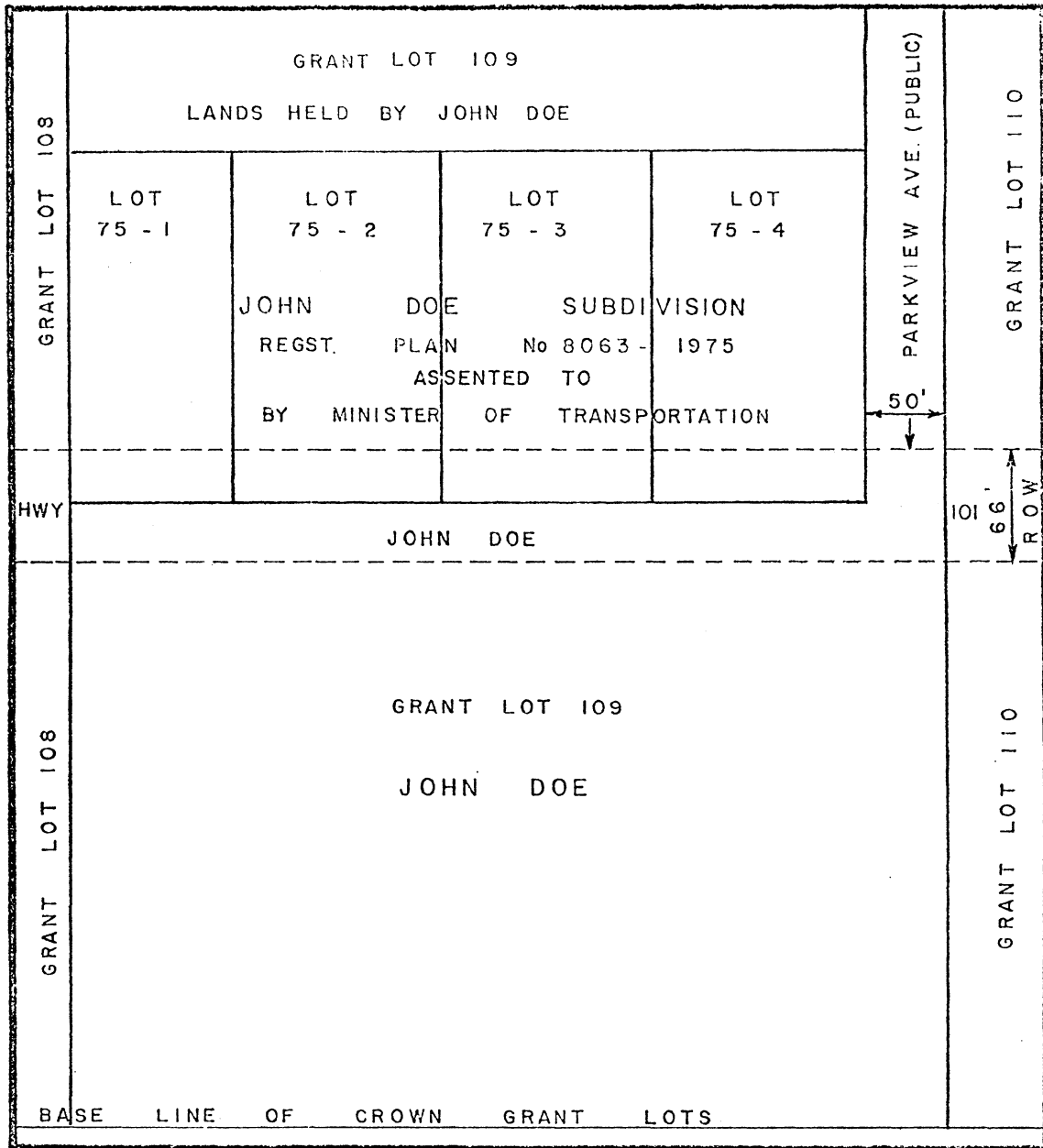
The general rule that when a description carries the boundary of land conveyed to a monument such as a street, stream, road and the like, title to the centre of the monument passes to the grantee should apply, unless the strip between the centre and the side line thereof is *expressly excluded* from the conveyance.

This view seeks to avoid vexatious litigation which may and does arise by the grantor's retention of long narrow strips of land. Such litigation is just about the only purpose which such retention of title can serve for until the street is abandoned the grantor is in no position to make a beneficial use thereof.

Considering next the intention of the parties, and in particular the intention of the grantor, John Doe; the parties usually do not realize that John Doe is the owner of the land under the highway, and therefore do not even consider the strip under the highway when the deed is prepared.

Of course, if the strip is considered by the parties, the grantor has the right to retain such strip and too, the grantee would have the right to reject the deal if the strip were retained.

FIGURE 7



TITLE TO LANDS UNDER HIGHWAY VESTED IN ABUTTING LANDOWNERS

Abutting landowners hold title *ad medium filum* of the highway when there is no express reservation of the lands under the highway by the grantor. This method is considered the better rule when conveying land abutting a highway.

However, it is not inconsistent with the general rule allowing title to the centre of the monument to pass to the grantee to treat the two survey markers or the line on the side of the highway where it is more convenient to place the markers than in the roadbed, not as a boundary line as such, but merely as the measuring points from which to identify the land conveyed, and indicating the side of the road on which the land lies. Thus the grantor's intention may be found as granting to the middle of the highway, and the placing of the survey markers on the side of the highway was out of convenience or even necessity, since to place a survey marker in the middle of a highway could be considered a nuisance or obstruction and thereby be in contravention of the provisions of section 69 of the Highway Act of the R.S.N.B., 1973.

Although Case Law exists to the contrary, it would appear the better rule is where a grantee acquires title to the land to the middle of the road, stream, or highway, unless the grantor in the deed expressly excludes the portion in the road, stream or highway.

Even though it is believed this is the better rule, and perhaps, on the whole is the wisest, reference to a filed subdivision plan or an attached plan is strong evidence to the contrary that the grantor intended to convey the strip of land in the highway.

The problem of rightful ownership to the land in a highway becomes more complex after a Highway Authority such as the Minister of Transportation representing the Crown acquires land abutting an existing highway for the purposes of widening or diverting the existing highway, without acquiring similar title to the land in the existing highway.

4.2 Interpretation of "Abutting Landowner"

The phrase "abutting landowner" as used in subsection 32(1) of the Highway Act has been interpreted by solicitors (from the Department of Justice) for the Minister of Transportation as meaning those landowners abutting the highway who acquired title and possession to the abutting land for purposes other than that of using it as a highway or as part of an existing highway.¹³³

This is an extremely important consideration, since the Minister of Transportation in representing Her Majesty the Queen, cannot be considered an "abutting landowner" and therefore does not acquire the title to the lands under an existing highway when he acquires land abutting that highway for the purposes of adding it to the existing highway for highway purposes.

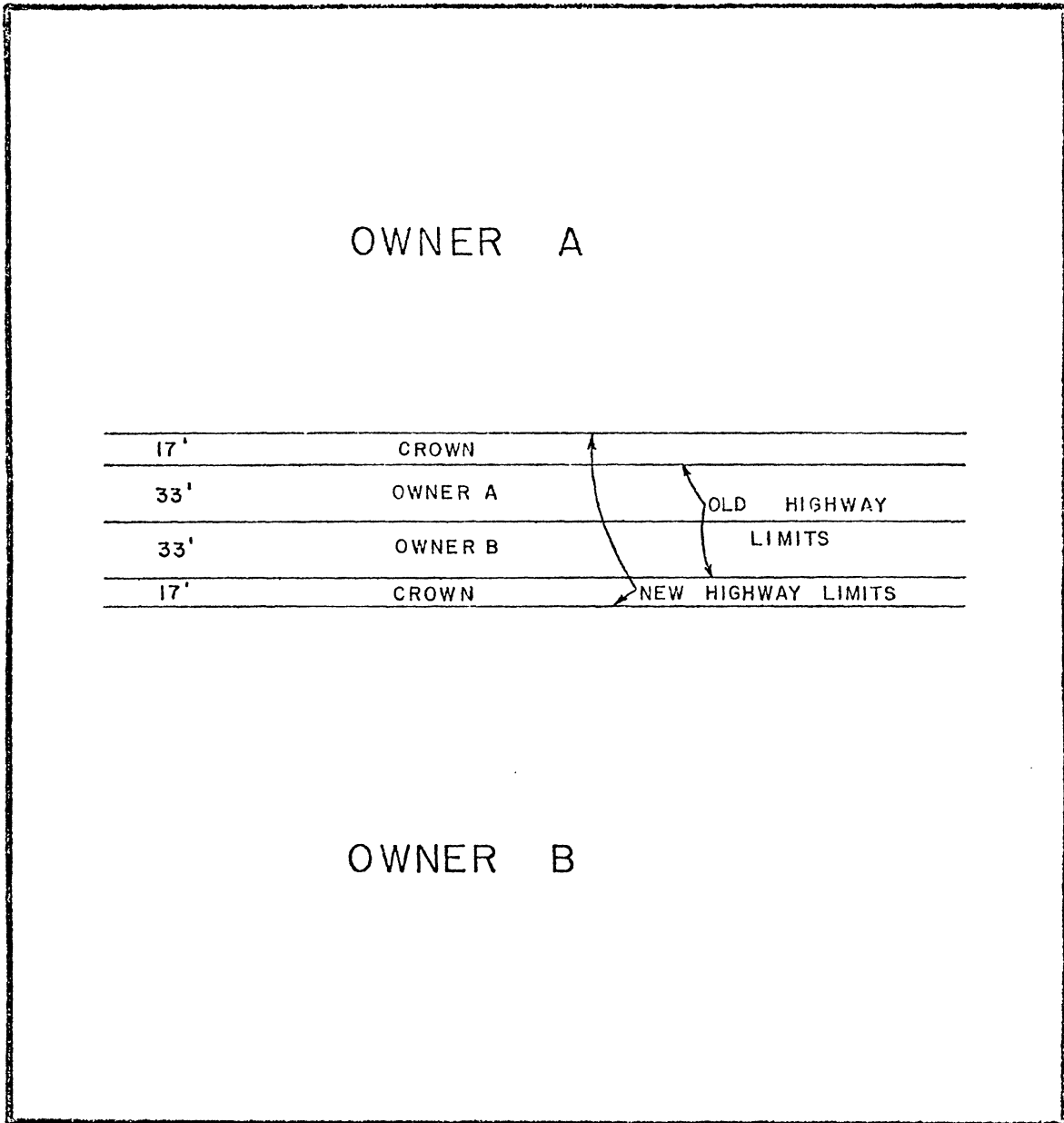
This consideration alone is the major cause of the complexity of the problem of title to New Brunswick highways.

Referring to FIGURE 8, the centre sixty-six foot width of highway represents an existing highway laid out under the law by a former Commissioner of Highways in, let us say, 1850. The two narrower seventeen foot wide strips shown adjacent to the former highway represent lands acquired by deed or by expropriation for highway purposes by the Minister of Transportation, in representing Her Majesty the Queen, in, let us say, 1973.

These two seventeen foot strips were acquired by a plan and description, *expressly* depicting and stating that no portion of the old highway was being acquired by this instrument of conveyance.

The situation created by this conveyance obviously is not proper land management, and such a situation normally would not be allowed to be created by

FIGURE 8



NON-UNIFORM OWNERSHIP OF A HIGHWAY

Ownership of the lands under a highway does not become uniform when the Crown acquires new lands to widen an existing public right of way as it has been the Crown's policy to take title only to the strips outside the old highway limits.

a developer or private individual subdividing his land.

By this conveyance, the abutting landowners now hold a strip of land thirty-three feet wide which is subject to the public right of way, and which is severed from the rest of their property by a seventeen foot strip owned by the Crown, which is also subject to the public's right of passage and repassage.

If the Crown as represented by the Minister of Transportation was considered as abutting landowner under the Act, then upon the expropriation of strips of land abutting an existing highway, title to the old sixty-six foot right of way would automatically vest in the Crown and both title and boundary of the highway would be clarified - and much simplified from the existing situation.

4.3 Non-Uniform Title and Boundary of Highways

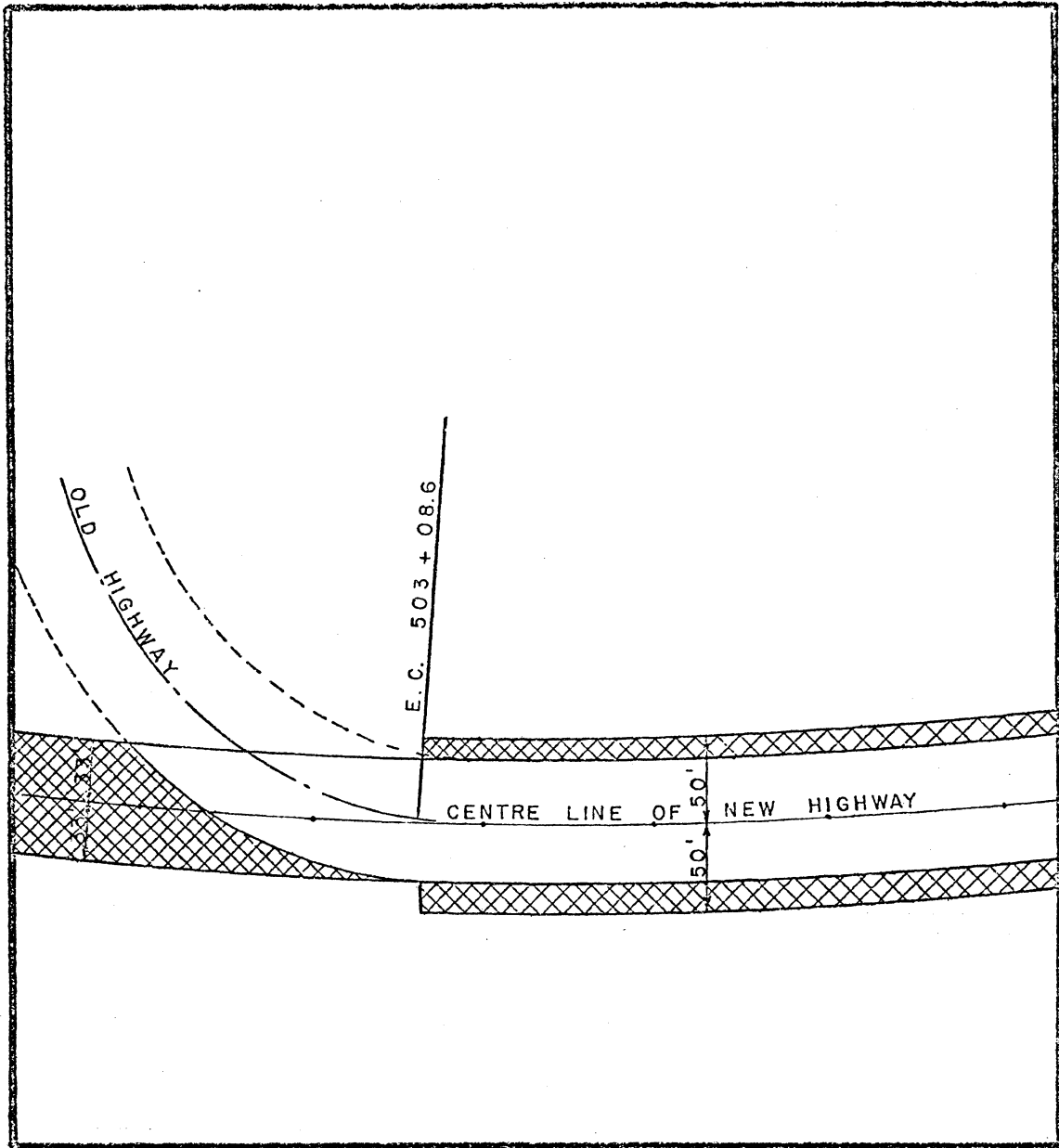
FIGURES 9, 10 and 11 depict parts of existing Highway 4 east of McAdam, New Brunswick, and are actual tracings of portions of one of the thousands of "attached plans" forming a part of the deeds conveying title to bits and pieces of land similar to the cross-hatched sections depicted on these FIGURES.

The numerous sections of old highway right-of-way lying outside the depicted limits of the new highway have almost exclusively been ignored since they were created about 35 years ago.

Very few Certificates of Discontinuance have been issued by the Minister of Transportation in an effort to extinguish the public's right of passage over these irregular portions, and it is most questionable that such Certificates would legally have the desired effect.

The most prevalent boundary and title problem that exists on New

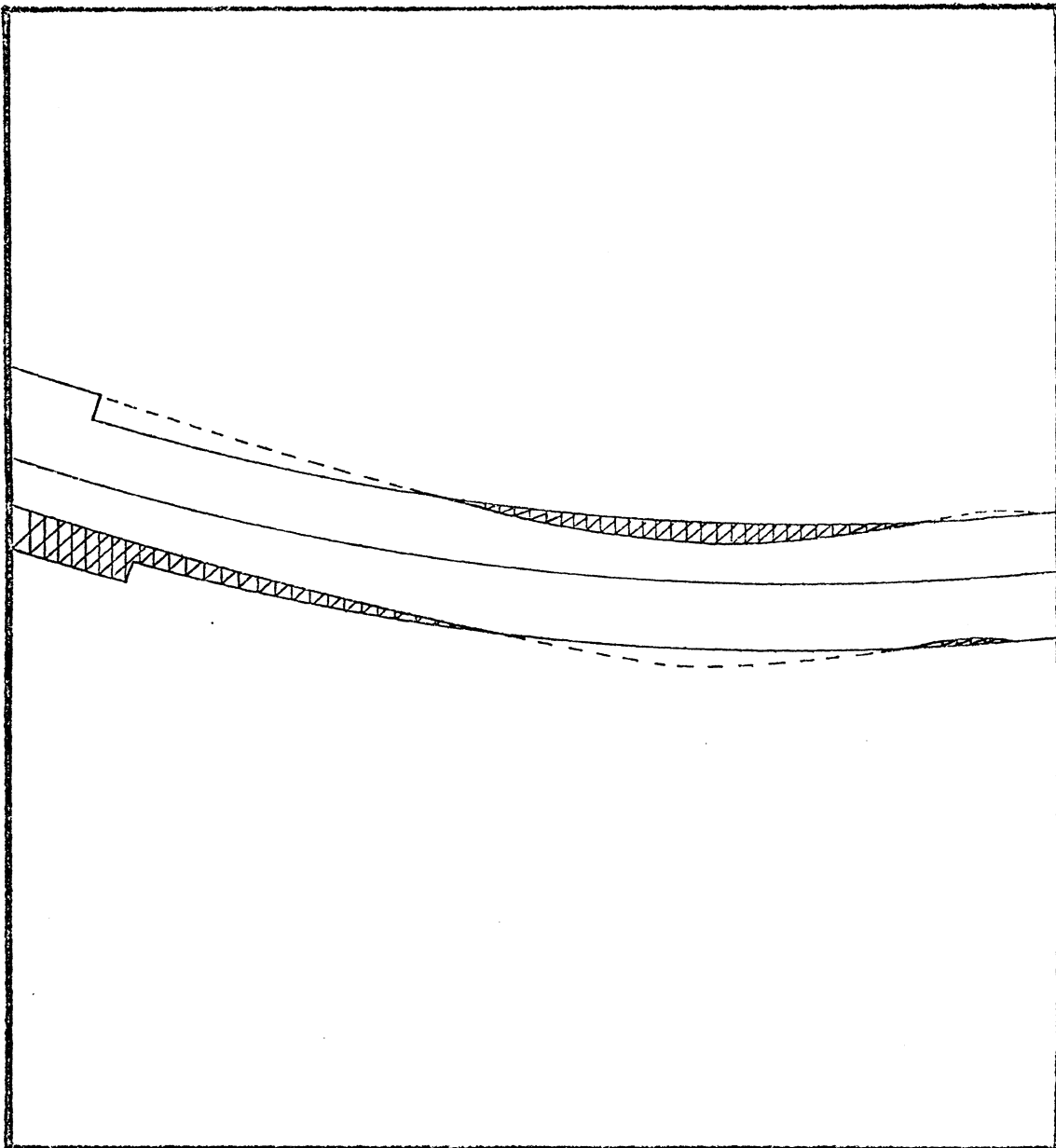
FIGURE 9



SKETCH DEPICTING POLICY OF ONLY ACQUIRING TITLE
TO LANDS OUTSIDE EXISTING HIGHWAY LIMITS

Existing Highway 4 east of McAdam; being part of the section of highway shown on page (iii) of EXHIBIT 32. The cross-hatched sections were acquired by deed by the Crown in about 1940. The old highway is only an easement.

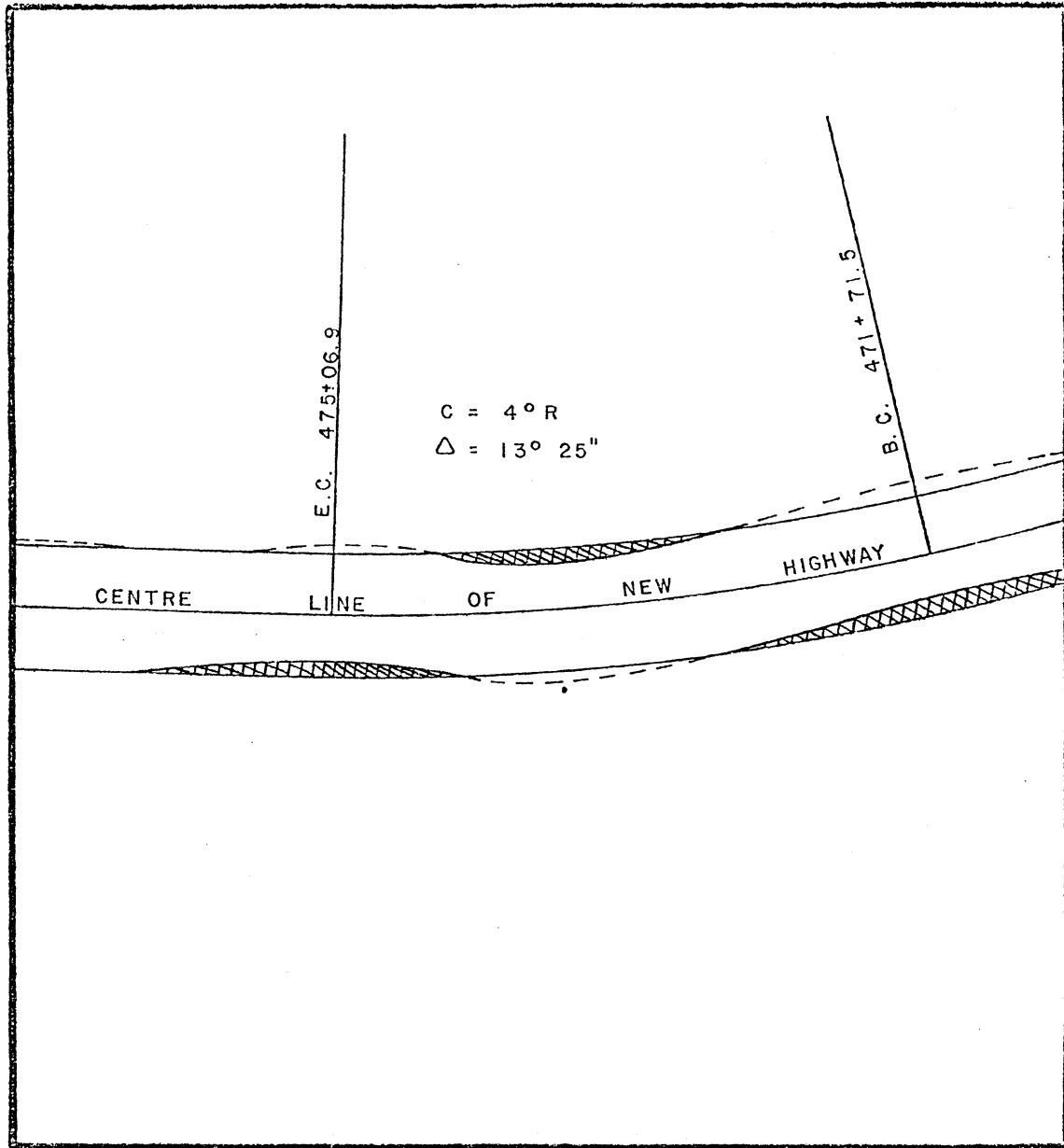
FIGURE 10



COMPLEX TITLE AND BOUNDARY PROBLEM

Cross-hatched sections indicate portions acquired in fee simple by the Crown; old highway is a 66-foot public right-of-way, an easement; sketch is a tracing of an actual plan attached to a deed of conveyance.

FIGURE 11



NON-UNIFORM TITLE AND BOUNDARY

Existing Highway 4 east of McAdam, being part of the section of highway shown on page (iii) of EXHIBIT 32. The cross-hatched sections were acquired by deed by the Crown in about 1940. The old highway is only an easement.

Brunswick highways is depicted in FIGURE 12 and results from the manner by which the Crown has over the years acquired the lands needed for widening or upgrading existing highways.

After an alignment for a new highway has been selected and the right of way limits determined, the written description of the lands to be acquired invariably were described as being all the land "X" number of feet to the right and left of the "centre line" of the new highway, "saving and excepting the land occupied by the old highway".

If the "saving and excepting" reservation had not been included, and the plans had not expressly depicted that the lands occupied by the old highway were not to be conveyed, the boundary as well as the title of today's highways could be not only more uniform, but determinable mathematically.

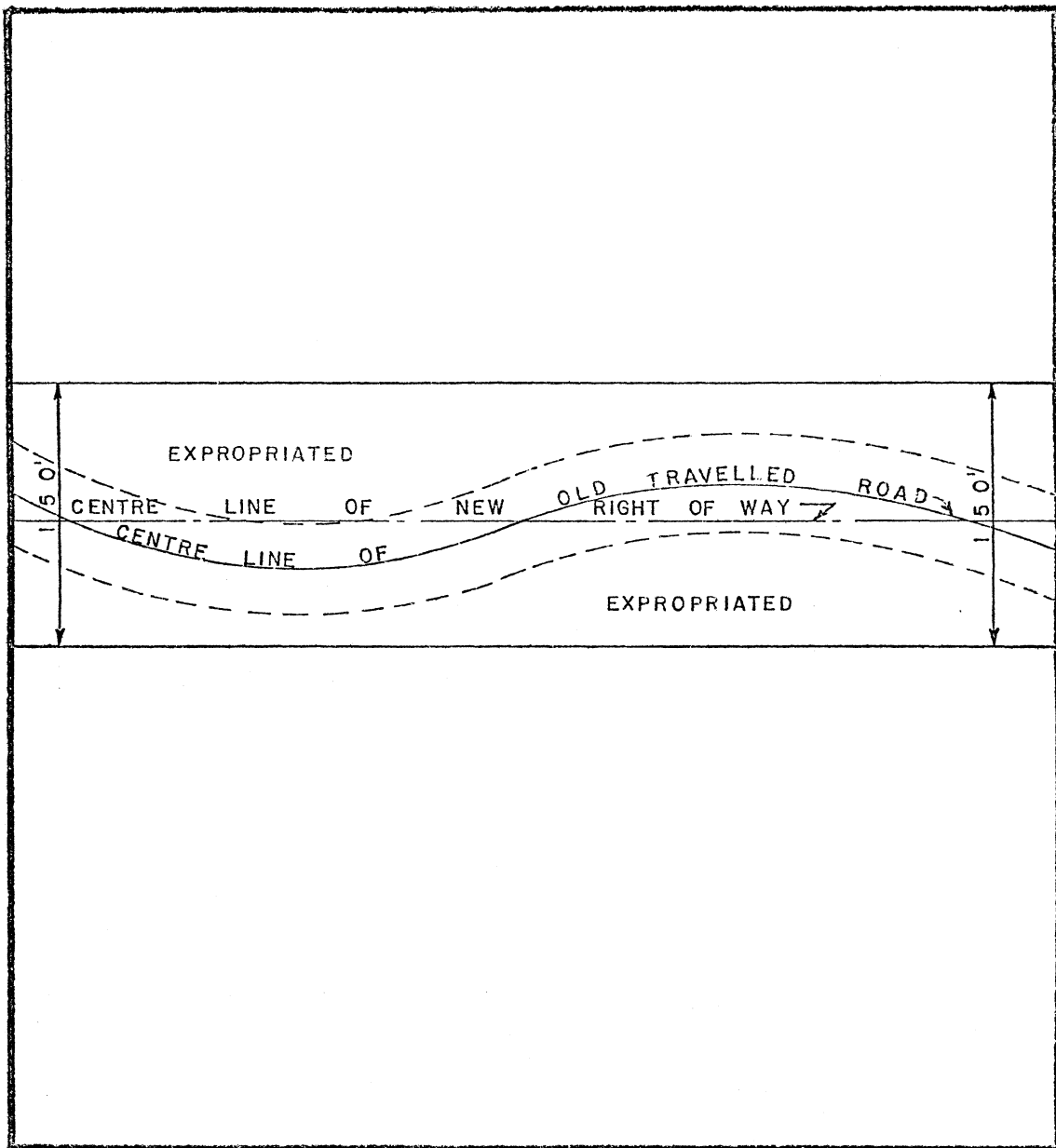
FIGURE 13 depicts a typical example of the complex title and boundary problem that has been created by the procedures used by the Crown in establishing new highways.

The narrow "LAID OUT HIGHWAY" is an old public highway laid out by the Commissioners of Highways along a Crown Grant line between owners A and B.

Sometime later, owner C received a Grant from the Crown, reserving and excepting therefrom the highway which had developed across the land, being Parcel 6 on FIGURE 13.

The alignment of the old highway has also gradually wandered over onto the lands of B, and which portion has become a highway through dedication by B and acceptance by the public.

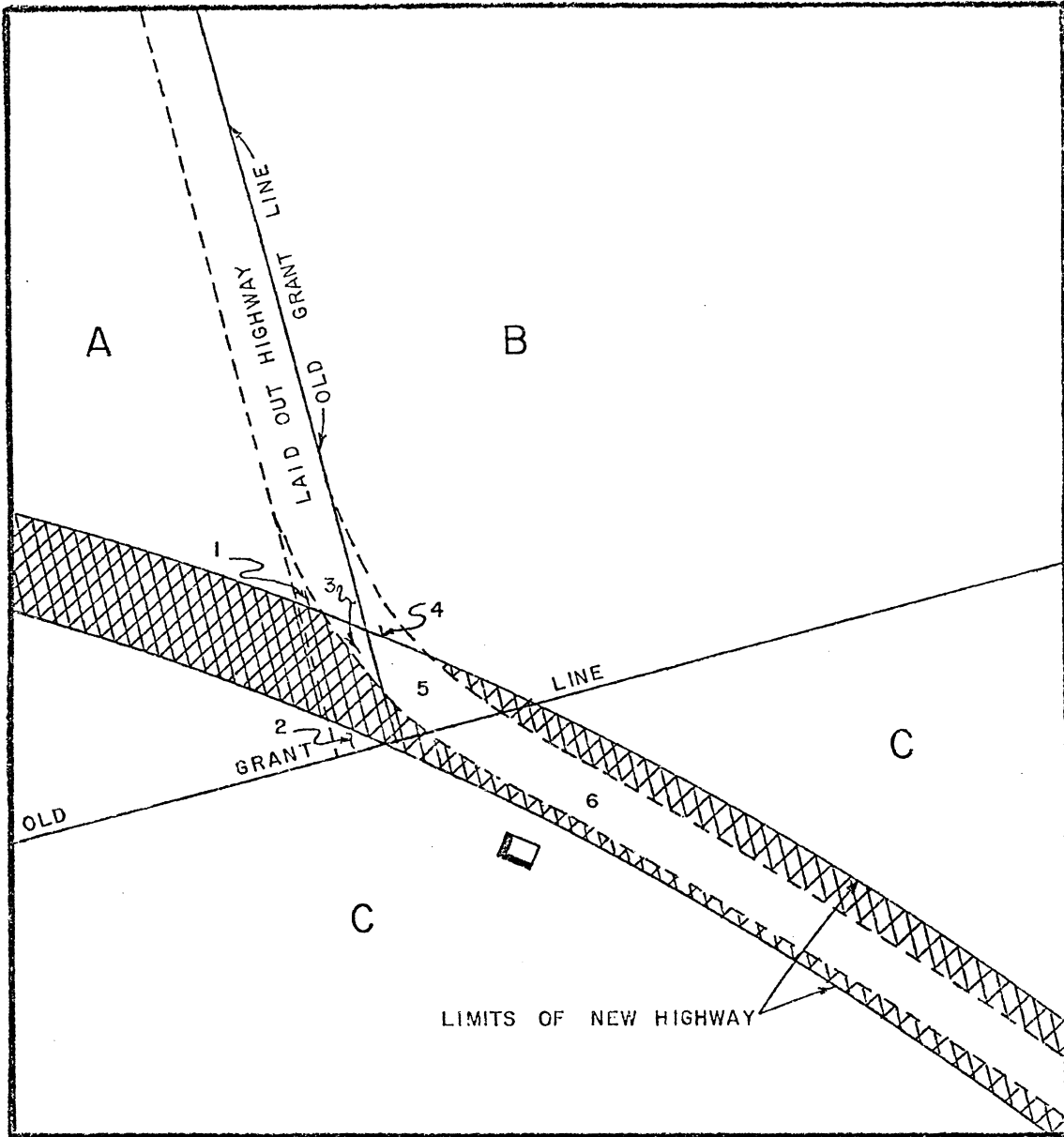
FIGURE 12



SKETCH DEPICTING POLICY INVOLVING EXPROPRIATIONS

A 150-foot strip has been expropriated by the Crown, "saving and excepting all lands occupied by the old highway". The policy of not including the old highway creates a complex title and boundary situation, which could easily have been avoided. Such policy indicates a lack of concern for land management and boundary retracement problems.

FIGURE 13



ANALYSIS OF TITLE TO LANDS UNDER HIGHWAYS

In more recent times, the Crown has expropriated all those cross-hatched sections for a new highway, having excluded all portions of the "existing highway" visible at the time of expropriation.

Considering now the title to each of the numbered parcels as depicted on
FIGURE 12:

- PARCELS 1 & 2 : owned by A, subject to a public right of way not recognized by the Crown.
- PARCEL 3 : owned by A, but not recognized as such by the Crown; subject to the public right of way.
- PARCELS 4 & 5 : owned by B, but not recognized as such by the Crown; subject to the public right of way.
- PARCEL 6 : owned by the Crown, but administered by the Minister of Natural Resources, subject to public right of way.

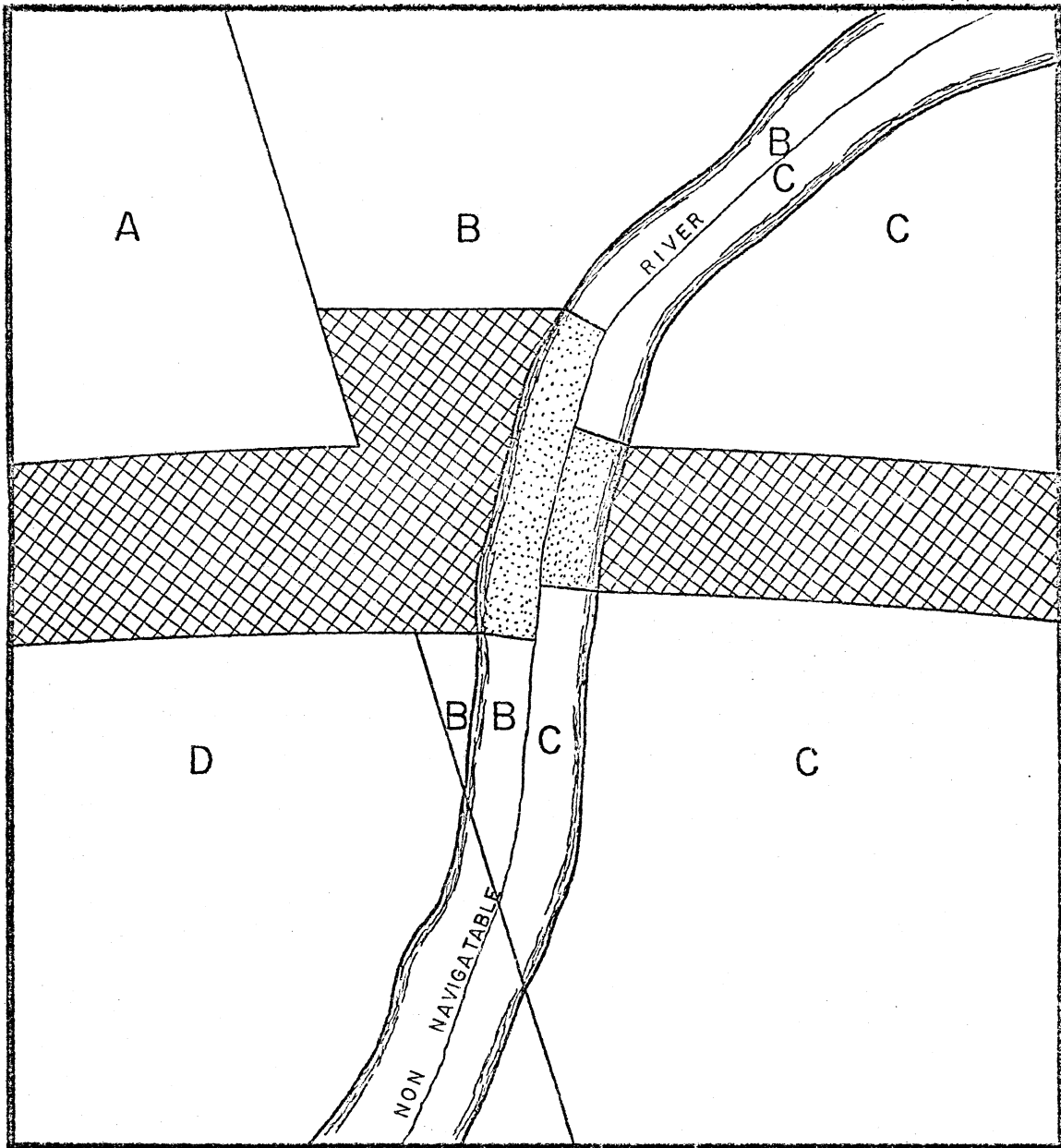
FIGURE 14 depicts a somewhat ridiculous situation but is one of hundreds that exist where a non-navigable river is intersected by a highway, the land for which was expropriated "to the bank of the river".

The lands vested in the Crown must necessarily be bounded by lines extended from the bank to the middle thread of the river and at right angles or as near as possible to right angles to the bank of the river, if there is no line on the plan to indicate otherwise.

FIGURE 15 depicts situations where land held by the Crown, but administered by a Minister of the Crown other than the Minister of Transportation, is "taken" or "assumed" as part of a new highway without a proper transfer of administration to the Minister of Transportation.

FIGURE 16 depicts a frequently recurring situation which is not normally recognized by the Department of Transportation.

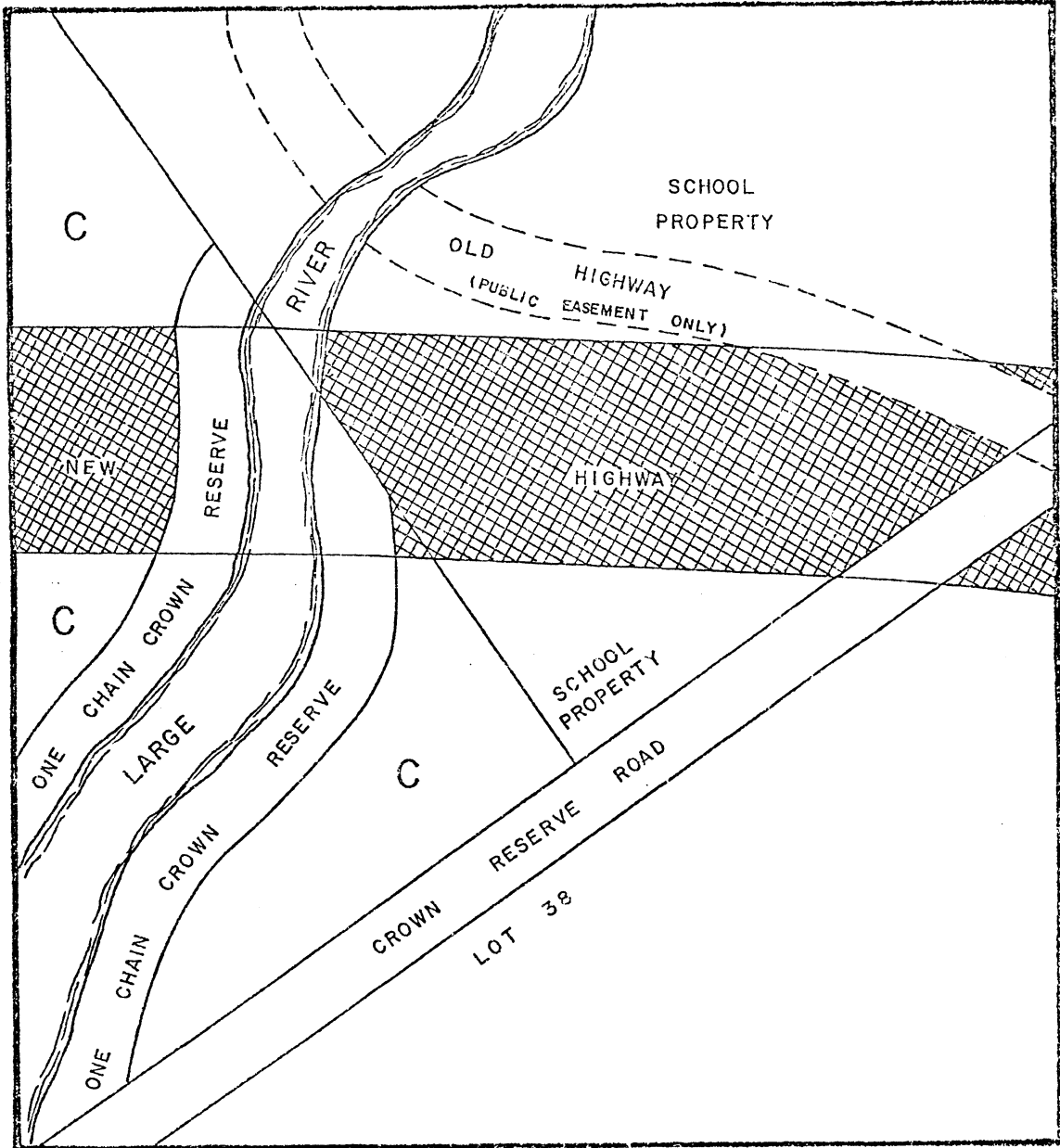
FIGURE 14



HIGHWAY BOUNDARIES INVOLVING A NON-NAVIGABLE RIVER

Cross-hatched sections depicted on an attached plan and defined in the written description when acquired by expropriation for a new highway. Dotted section also vests in the Crown although not shown on the attached plan to the expropriation document.

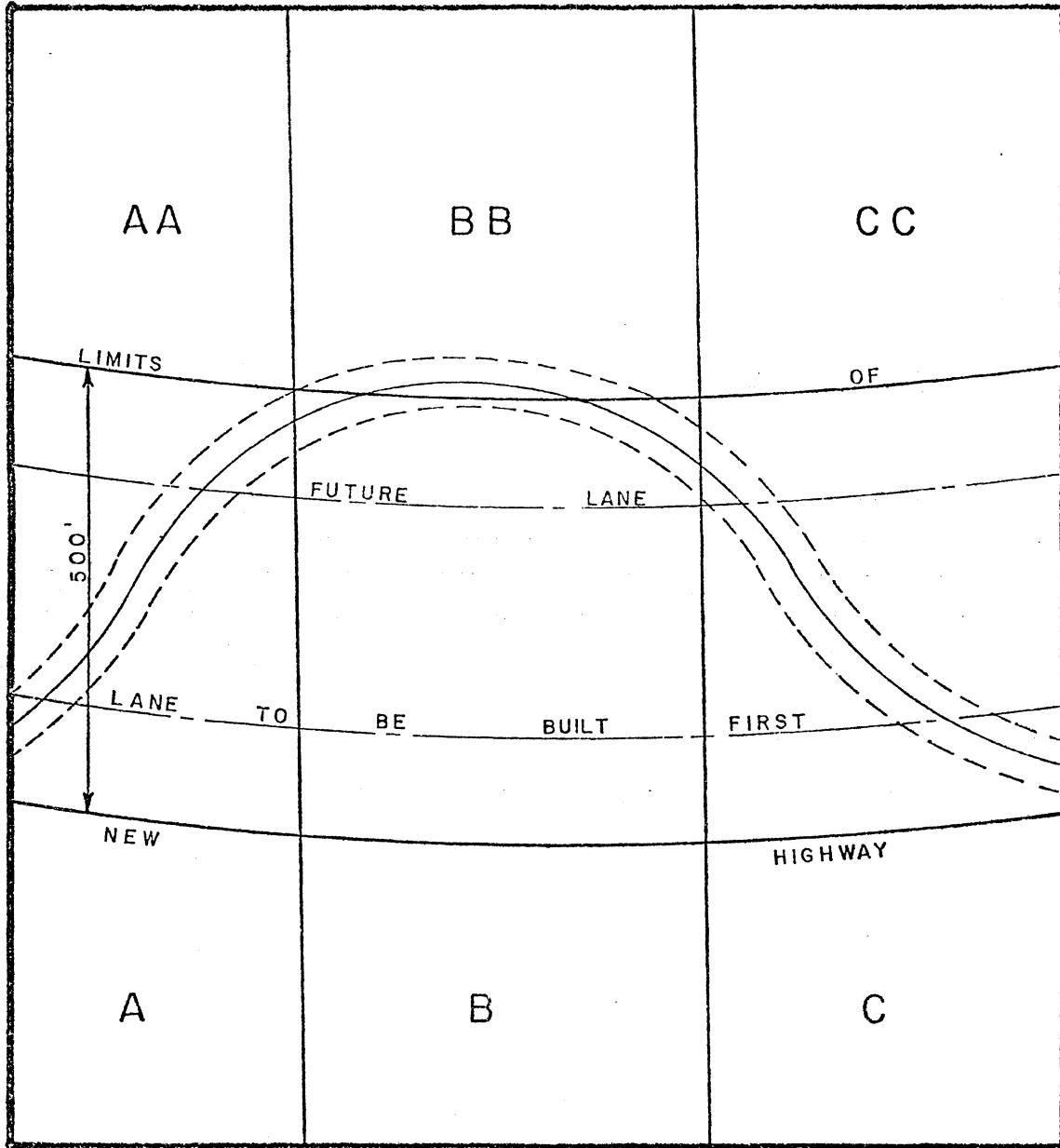
FIGURE 15



ANALYSIS OF PROBLEMS CREATED THROUGH OCCUPATION
WITHOUT PROPER TRANSFER OF ADMINISTRATION

Complex title and boundary situation created by partial conveyance and partial occupation without transfer of administration to the Minister of Transportation. The cross-hatched sections are acquired by deed; the remaining sections are simply occupied, although administered by other Ministers of the Crown for other purposes.

FIGURE 16



ANALYSIS OF TITLE TO HIGHWAY

Owner B holds title to cross-hatched section (which is subject to a public right-of-way) after 500-foot wide strip was expropriated for a new highway. Owner BB holds title to the remaining portion of the old highway lying outside the new highway. If portion of old highway outside new highway limits is effectively discontinued, the frontage owner BB has on a public highway is substantially reduced as owner B would still retain the cross-hatched section.

After the land was acquired for the new highway, owner BB requested that the portion of old highway lying outside the bounds of the new highway be discontinued.

The Minister of Transportation issues a Certificate of Discontinuance which is to extinguish the public's right of passage and which does render that section unrecognizable as a highway under the Highway Act.

The point to consider is that owner B still holds title to the small cross-hatched section, which effectively reduces the frontage owner BB now has on the designated highway.

FIGURE 17 depicts a similar situation. After the new bridge and highway are constructed and the old highway falls into disuse, the abutting owners, normally A and D, request the Minister to discontinue that portion (shown dotted) of the old highway not required for the new highway.

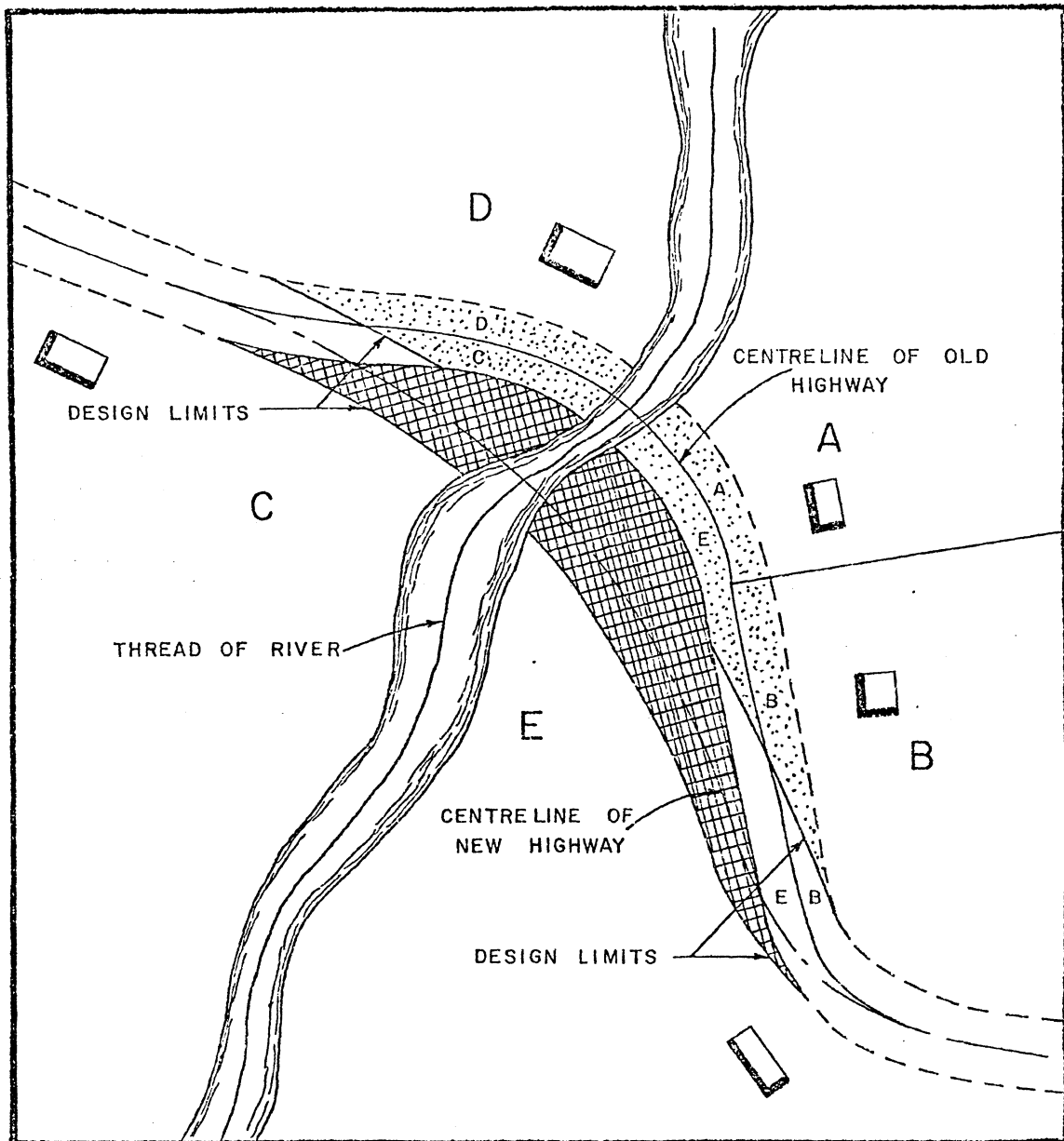
The usual reason for this request is to allow these owners (A and D) to stop up the old highway to prevent the public from parking on the old highway in front of their property which has developed into a nuisance for them.

The Minister normally issues these Certificates if the land will not be required for governmental purposes in the future, but no one ever fully considers the effect of such a discontinuance, if effective.

In the case depicted in FIGURE 17, a Certificate of Discontinuance would effectively extinguish the access of owner A to a designated highway, since owner E would still hold title to a thirty-three foot strip between the designated highway and the lands of owner A.

Similarly, owner D would lose considerable frontage on a designated

FIGURE 17



SKETCH DEPICTING DISCONTINUANCE PROBLEMS

Cross-hatched section acquired by deed by the Crown for new bridge diversion. Old highway never discontinued but allowed to become overgrown from non-maintenance. Highway "limits" become vague or indiscernible. If old highway is effectively discontinued, access problem is created.

highway because of the strip of land retained by owner C.

The situation depicted in FIGURE 18 is one that commonly occurs and which is resolved on an individual and somewhat inconsistent basis.

This section of the present Highway 101 was upgraded prior to 1960 and at that time the diversion of the old highway created a portion of the old highway into a loop which is not part of the main highway today.

During the fall of 1970, the Minister of Transportation filed documents "prescribing" a road as Highway 101, the general location of which was shown on a map drawn at a scale of 1 inch equal to 10560 feet, and since a 100-foot wide highway would be less than one hundredths of an inch on the map, it would be impossible to indicate any small diversions or irregularities along the road.

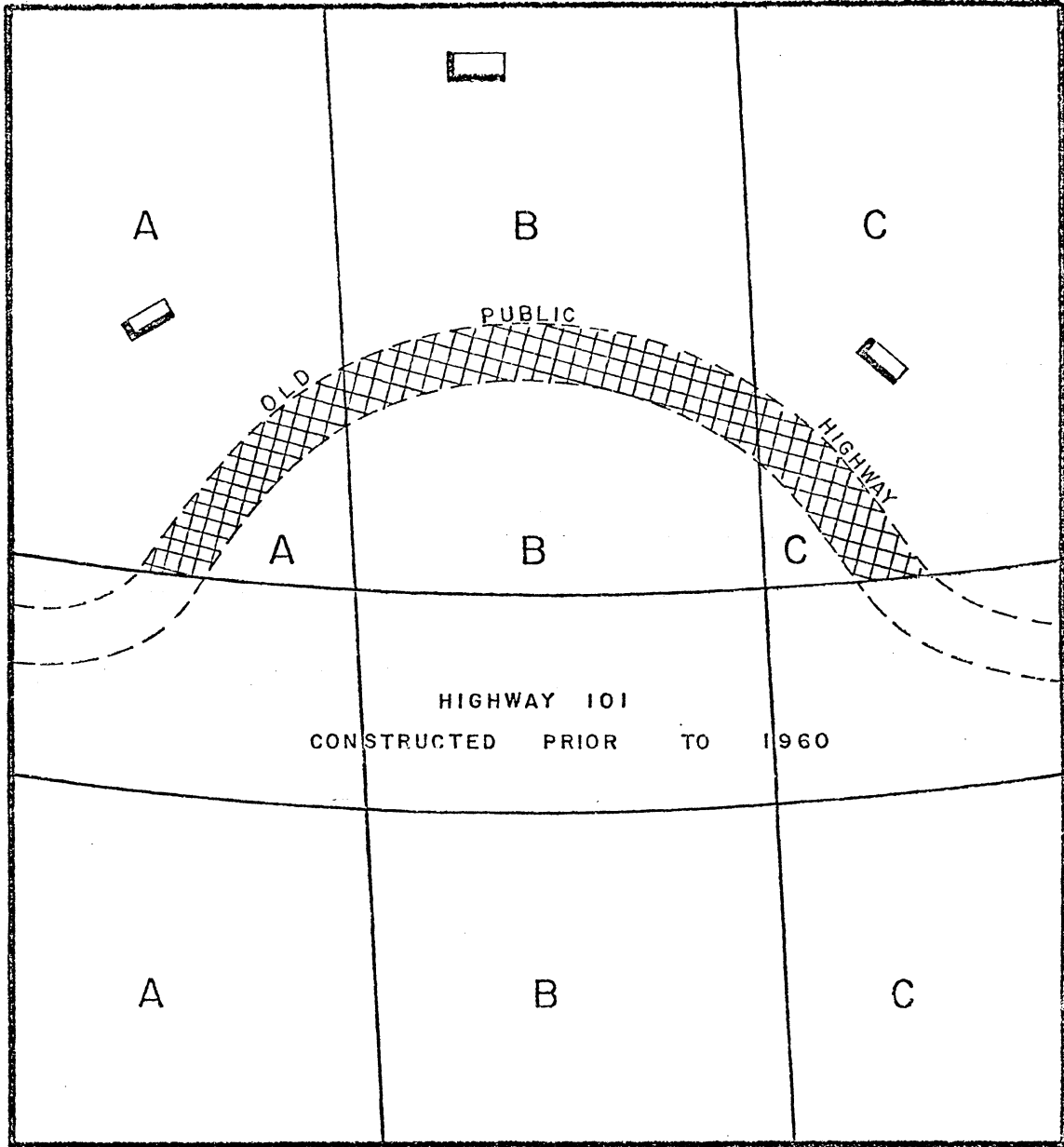
The question therefore arises whether or not these diversions were designated as highways under the Highway Act or not.

FIGURE 19 depicts a similar case of whether or not the old highway should be considered a designated highway or not. (See also EXHIBIT 35)

Normally the Minister of Transportation will issue a Certificate of Discontinuance for these portions of the old highway at the request of an abutting landowner, yet the Department is extremely reluctant to recognize any portion of an old and unused highway as a highway today if a landowner tries to subdivide his land by creating lots abutting one of these old highways.

An old highway owned by the Crown, as depicted in FIGURE 19, upon discontinuance becomes a strip of land owned by the Crown, unencumbered of any rights of the public to travel upon it. This land may be held by the Crown or conveyed by deed or grant to someone willing to purchase that land.

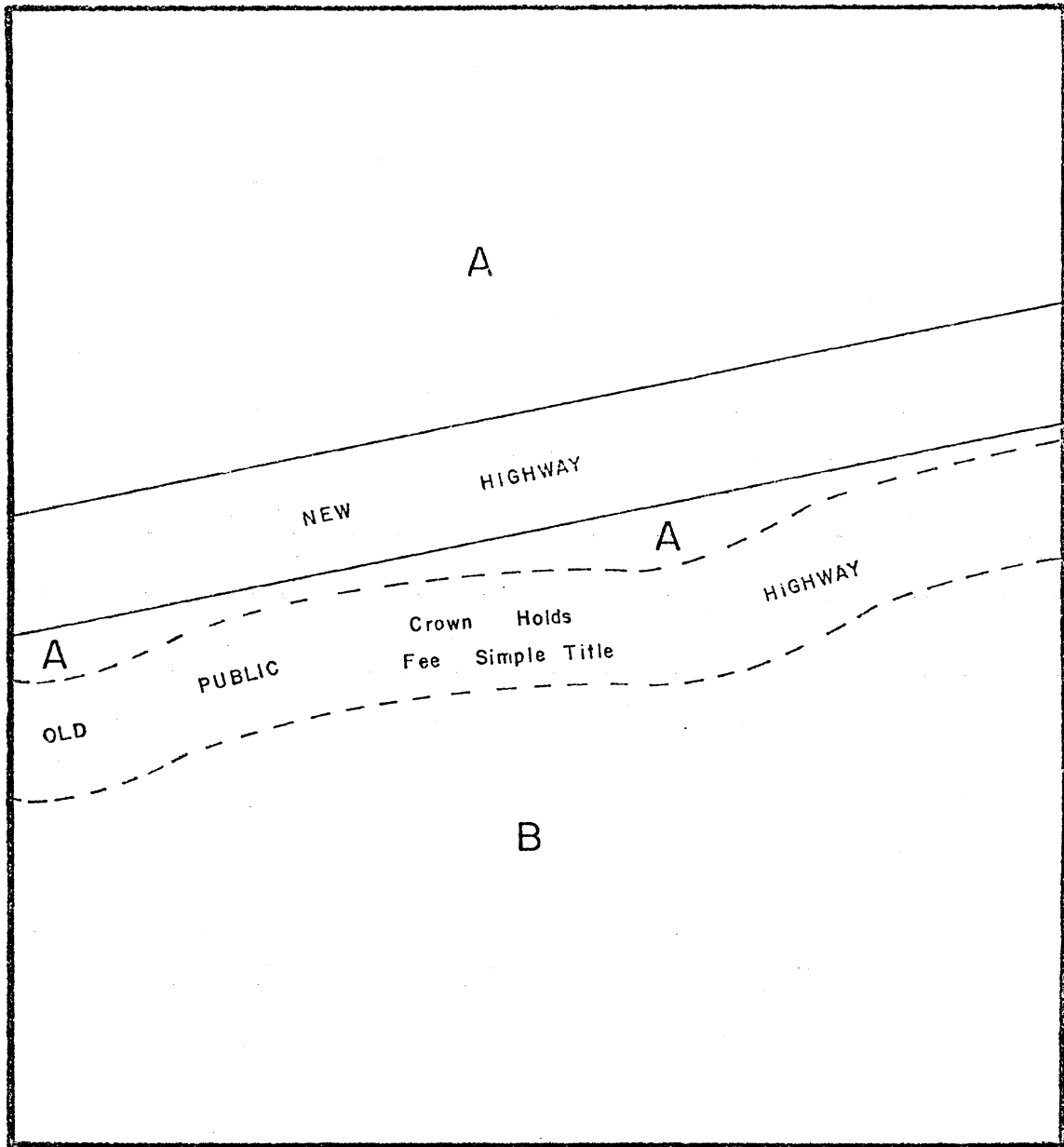
FIGURE 18



PROBLEM IN DESIGNATION OF HIGHWAYS

Cross-hatched section of old highway may or may not be considered to have been designated when Highway 101 was "prescribed" a highway on August 25, 1970 or designated a highway on April 14, 1977, as registered in the Office of the Registrar of Deeds for

FIGURE 19



DESIGNATED HIGHWAY PROBLEM

It is questionable as to whether the old highway (which forms part of new highway in places) is a designated highway.

It is most important to realize that this land does not "revert" to the abutting landowners, A and B; the title to the land remains vested in the Crown.

A common example of encroachment by a highway upon lands owned by someone other than the Crown as administered by the Minister of Transportation, is depicted in FIGURE 20. (See also EXHIBITS 3 & 8)

FIGURE 21 depicts an example of a deviation upon private lands from the allowance for a "Reserved Road".

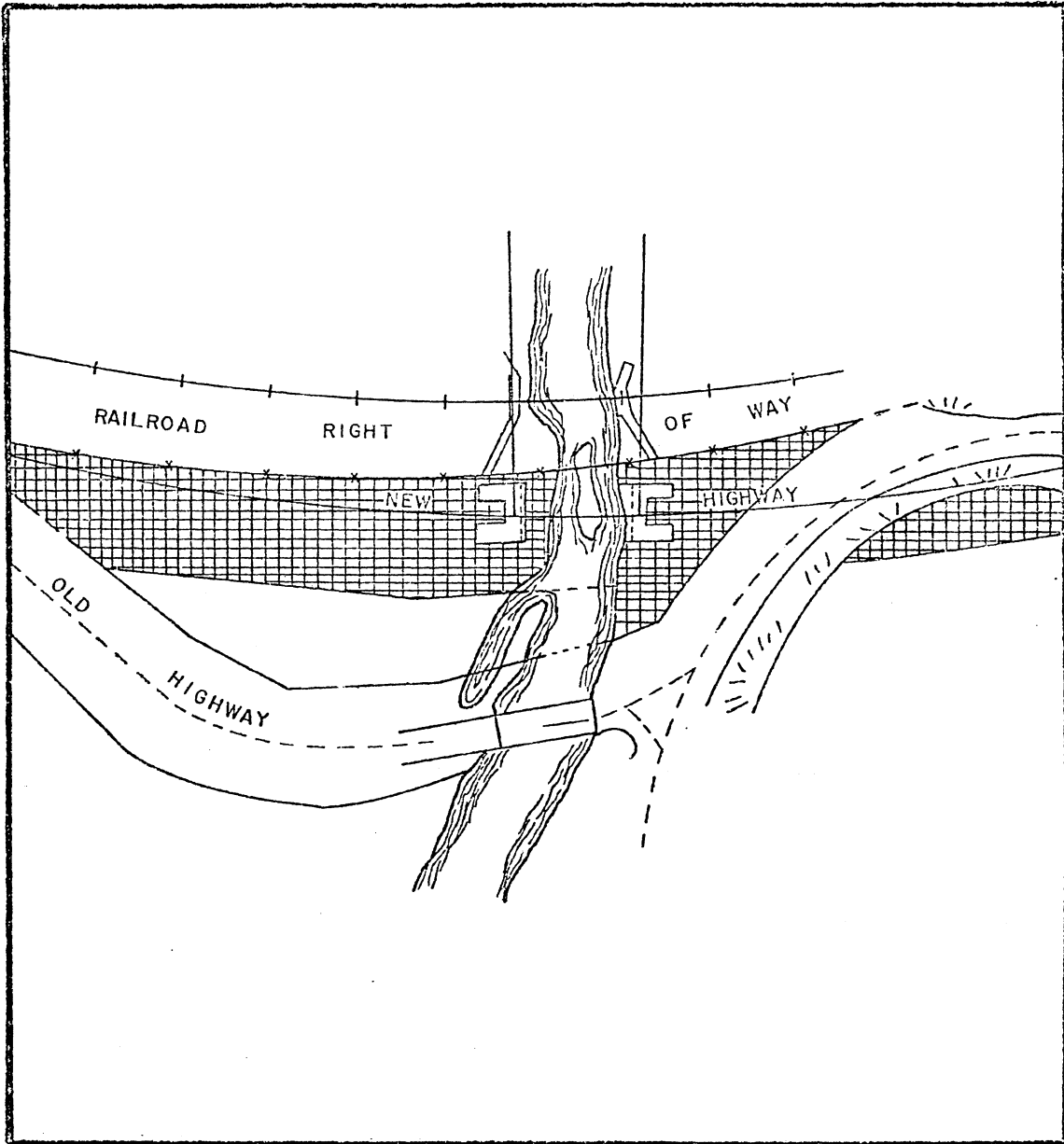
The "TRAVELLED ROAD" lying between the fences becomes the highway through dedication of the owner of the land and acceptance by the public using the road. Although the public acquires a right to use the land as a highway, the title to the land remains with the abutting landowner, whereas the title to the lands of the Reserved Road is vested in the Crown.

The situation depicted in FIGURE 22 does not frequently occur, but there are several instances where this has been known to happen.

The Department of Transportation acquires land for a new highway along the bank or shore of a river or lake and rather than acquiring a uniform boundary for the highway (by acquiring the title under the lake or river), the bank or shore existing at the time of the survey for the new highway, is taken to be the boundary limits of the new highway.

This procedure leaves a very irregular and mathematically undefined boundary for the highway and, during construction of the highway, this boundary is obliterated or physically altered in such a manner that retracement of the boundary becomes most difficult or even impossible.

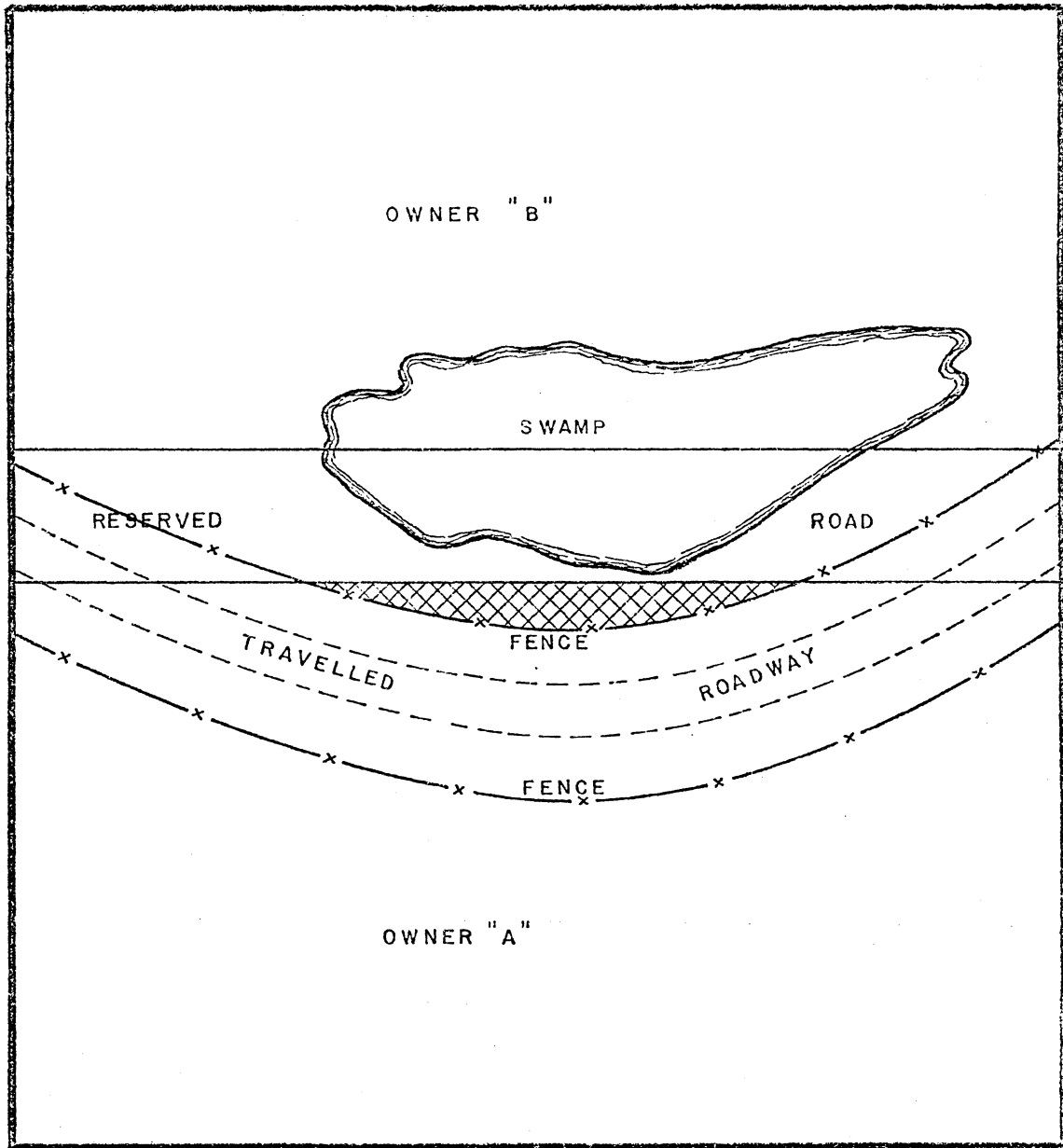
FIGURE 20



HIGHWAY ENCROACHMENT

Existing encroachment of a public highway at Garden Creek in York County.

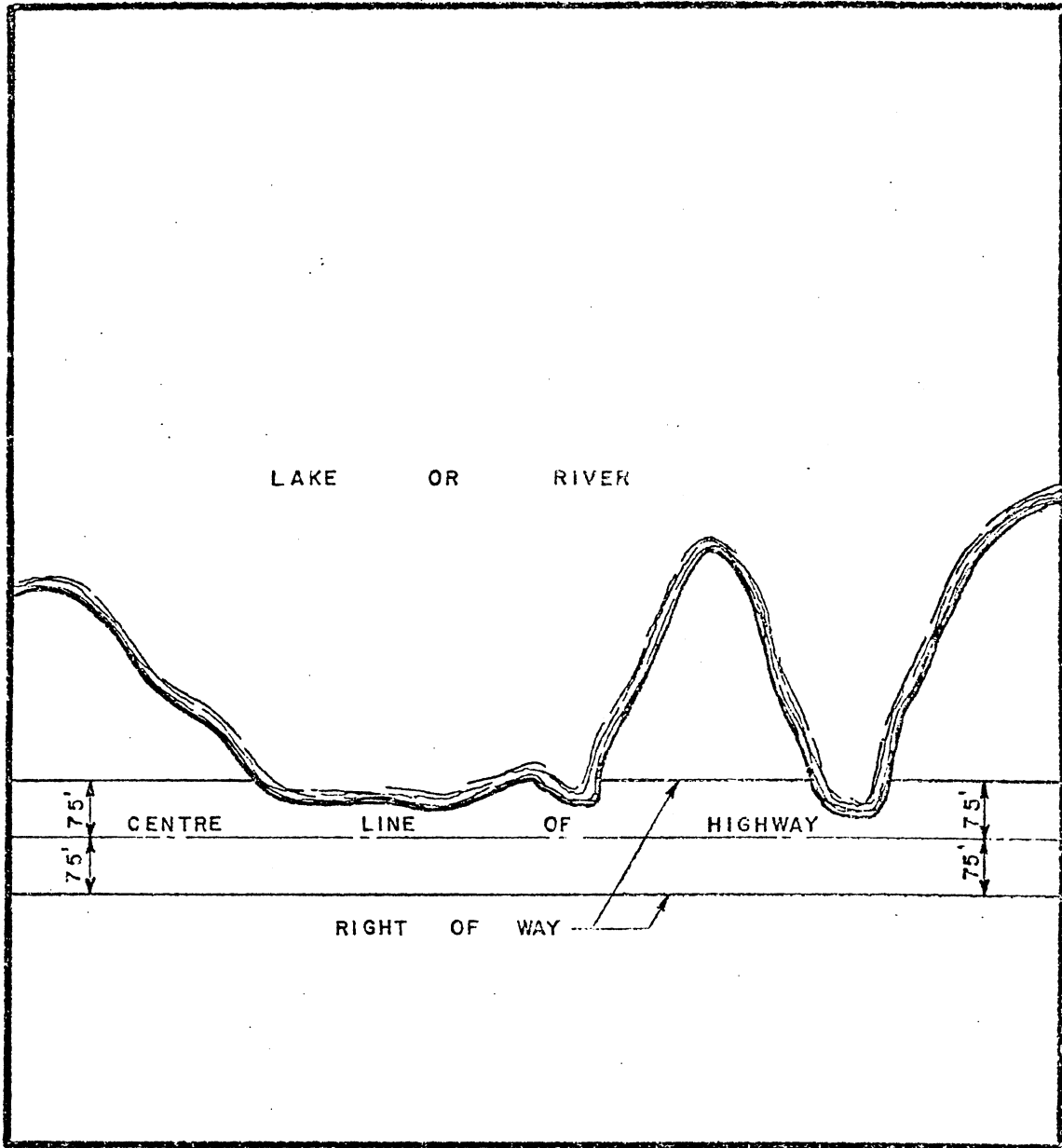
FIGURE 21



DEVIATED HIGHWAY

Deviation from laid out "RESERVED ROAD" due to a natural obstruction. Travelled road created along path of least resistance. The fee simple to cross-hatched section as well as the land under the deviated highway is held by owner "A".

FIGURE 22



IRREGULAR BOUNDARY TO HIGHWAY DUE TO NATURAL PHENOMENON

Land was acquired for a new highway leaving the edge of water as part of the boundary. During construction this boundary is obliterated or physically altered. Uniform highway limits should be created at time of original land acquisition.

4.3.1 Boundaries of Highways as Determined by Returns of Commissioners of Highways

In reading through the hundreds of "Return of Highway" as recorded in the County Registry Offices by the Commissioners of Roads and Highways, it is seen that a great inconsistency existed in both the form and content of the Return, depending upon the individual Commissioner preparing the Return.

EXHIBITS 39, 40, 41, 42, 43, 44 and 45 are typical examples of the *written* portions of the Returns made by the Commissioners of Highways.

Most of the early Returns were very vague (See EXHIBIT 46) as to the mathematical alignment of the highway that had been laid out, except where it followed an original Crown Grant line. Other Returns were relatively precise (See EXHIBIT 39) in defining the alignment or boundaries of the highway.

EXHIBITS 46, 47, 48, 49, 50 and 51 are examples of written Returns which indicate the variety of *widths* of the highways as they were laid out by the Commissioners of Highways.

EXHIBITS 52, 53, 54, 55, 56 and 57 are examples of the plans attached to the written descriptions. As with the written descriptions, certain plans are somewhat more precise than others.

EXHIBITS 58 and 59 are typical examples of the later plans which were attached to deeds when the Crown began acquiring title to the lands required for a highway diversion of a new "laid out" highway.

EXHIBIT 60 is an example of the later deeds and plans for new highways that were laid out less than four rods wide.

4.3.2 Boundaries Affected by Physical Conditions of the Roadway

The material condition of the roadbed as well as the manner by which it had been constructed and was maintained greatly influenced the location of the boundaries of the highways.

EXHIBITS 61, 62, 63, 64 and 65 depict the material condition and travelled width of earlier roads in the Province. These roadways, being much narrower than today's ditched highways, utilized much less land than most existing roadways in New Brunswick today. For this reason a constructed roadbed, though not built concentric to the laid out highway, could easily lie within the limits of the laid out highway.

The earliest highways were built along the paths of least resistance, and therefore were not always built as straight as the bounds of the limits of the highway had been described, but when these early roads began to be upgraded with the use of mechanized equipment, numerous small kinks and slight curves were naturally eliminated to make the highway straight and more direct.

EXHIBITS 66, 67, 68, 69, 70 and 71 show some of the older equipment and methods used to upgrade and widen the earlier roadbeds. As these roadways were improved materially to accommodate faster vehicles and facilitate easier travel, the centre line of the travelled portion of the highway invariably changed (often twenty or thirty feet) and in so doing, the limits of the highway were assumed (over a period of time) to have changed with the centre line.

EXHIBITS 72 and 73 show instances where the new roadbed has not been materially constructed in the same location as the old roadbed. Additional land for the construction of the new roadbed was not purchased, yet the new roadbed has

been constructed along a more direct route than the old roadbed in order to eliminate a small curve or kink in the old roadbed (as in EXHIBIT 72), or to reduce the degree of curve of a sharp turn in a highway (as in EXHIBIT 73).

4.3.3 Title and Boundaries Affected by "Gifts Donated by Abutting Landowners

In many cases, the abutting landowner freely gave or "donated" the land to be used for the new highway. These "gifts" were usually acquired verbally by the highway authority, with no written record to show that this land was to be part of the highway, and further, there are no written records to show that the highway authority discontinued and legally stopped up the old highways.

Instances of the abutting landowner giving a substantial part of his land as a "gift" to the highway authority are not as prevalent today as they were forty or even twenty years ago, yet cases are known along Highway 7 in the Village of Geary where the Crown in 1950 was acquiring by deed (and paying substantial compensation) the title to the lands lying adjacent to the existing Broad Road in order to widen the right of way from 66 feet to 80 feet, and yet, certain individual parcels were donated as "gifts" to the highway authority.

This particular section of highway was being resurveyed in 1974, and when no records could be found (for certain sections) indicating that the highway had been widened in this area, the abutting landowner (who was also the abutting landowner in 1950) was contacted, and as he said, "the land wasn't worth much, the old highway needed to be fixed, and by building it over there, they were moving the road way from my house, so I told them to just take what they needed, I didn't want any money for it".

Situations such as this present somewhat of a problem when trying to determine what the legal width of the highway is today, since the records of the Registry Office indicate that land was purchased from Owners A and C, but not B, whose land lies between A and C, yet B's land is being used as part of the highway as much as the land that was acquired from A and C. (See FIGURE 23)

4.3.4 Policies and Actions of the Department of Transportation which Adversely Affect the Title and Boundaries of Highways

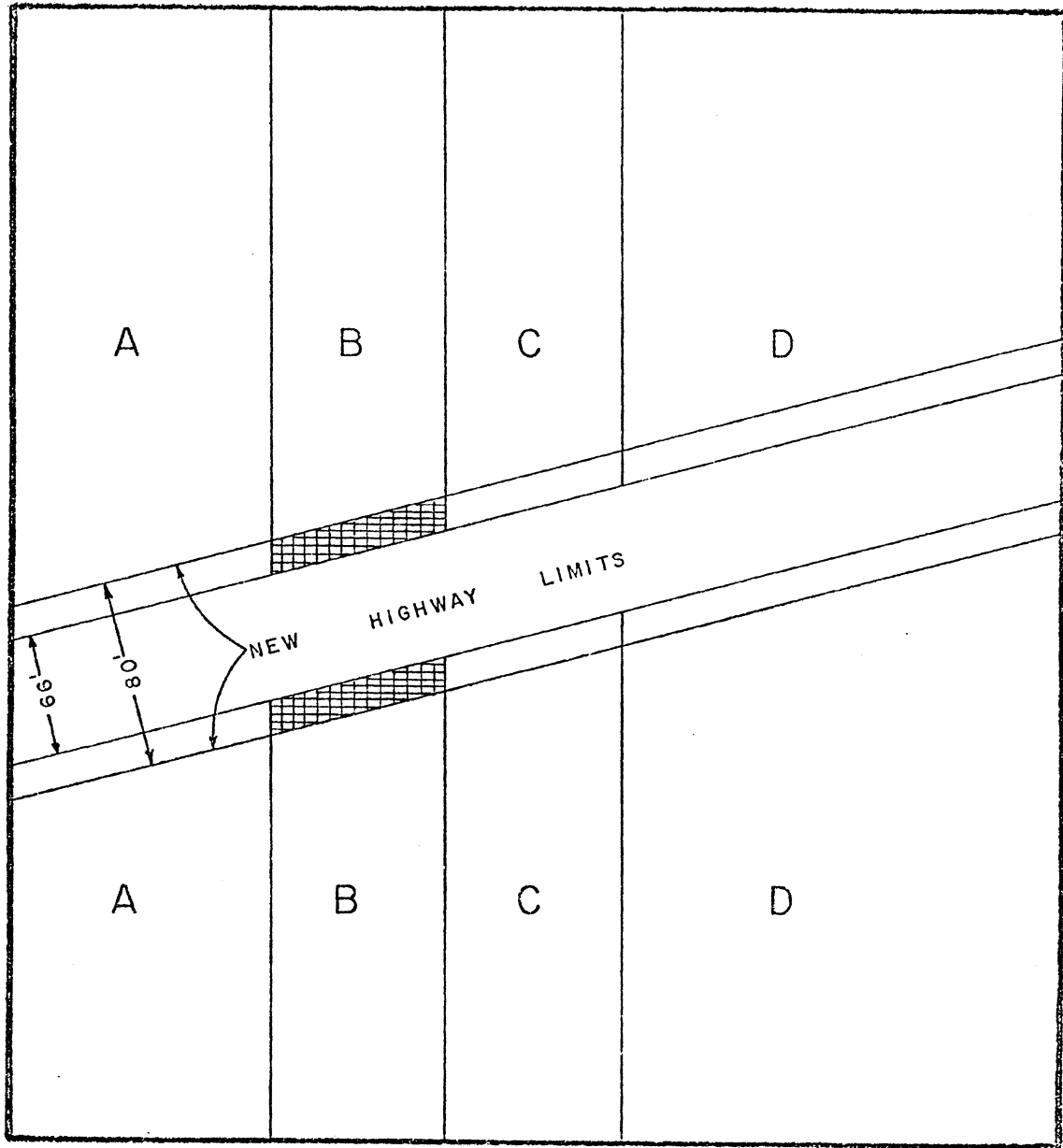
It is perhaps the method by which the Department interprets discrepancies between the written description of a document and the attached plan to that document, that perpetuates the most obvious legal problem regarding the determination of actual title and boundary to a highway.

Contrary to the decisions and precedents of Case Law and the Common Law, the policy of the Department of Transportation is to maintain that the written description is almost invariably incorrect and that the plan should be held depicting the true intention of the parties, when a discrepancy is discovered between the written description and the plan, even though there is no ambiguity in the written description.

Discrepancies between the written description included in a document such as an Order-In-Council, a Deed or an Expropriation Notice and the attached plan to that document are much more prevalent in documents prepared by a clerk, technician or Civil Engineer employed by the Department, than documents prepared by a solicitor or a private law firm.

Since these documents, involving the transfer of title to millions of dollars

FIGURE 23



GIFT DONATED BY ABUTTING LANDOWNER

The cross-hatched sections were given or "donated" as a gift by owner "B" to the highway authority, resulting in obscure title to highway.

worth of land, are very rarely proofread by a solicitor, lawyer or other person with legal training, errors, blunders, discrepancies or mistakes are made in their preparation, and normally these discrepancies are not noticed until after the documents have been duly executed and registered in the Office of the Registrar of Deeds.

The discrepancies are often brought to the attention of the Department by property owners affected by the document or by land surveyors who have noted a discrepancy while conducting a survey of lands contiguous to those affected by the document prepared by the Department.

In most instances the Department will advise those making an inquiry, whether it be a landowner, a land surveyor or a lawyer, that the intention of the Department is depicted on the attached plan and to hold the information depicted on the plan over any conflicting information contained in the written description in the document.

The reasoning behind such advice can be better appreciated by understanding that in the normal procedure followed by the Department in acquiring land by negotiated settlements the plan normally depicts the limits or boundary of the lands determined by a design engineer as the required right-of-way needed for a proposed highway construction project.

After an engineering drawing or plan has been completed enough to determine the amount of land needed, the plan is forwarded from the Design Branch, the Structures Branch or District Office to the Right of Way Branch with a request that the additional lands depicted within the new right of way limits be acquired.

A Right of Way Agent employed by the Department, whose training is usually limited to the fields of appraisal and negotiation, contacts the owner and

negotiates a settlement agreement.

This settlement agreement, which basically contains the owner's name and address, the terms of the agreement, the amount of compensation to be paid and the amount of land to be conveyed is forwarded to an engineering technician responsible for having the deed of conveyance prepared, including the legal description of the lands to be conveyed by the document, and the actual plan to be attached to the document.

An application to the Minister of Finance for a cheque, made payable to the owner, is requested by a secretary in the Right of Way Agent's Office.

Upon receipt of the cheque from the Minister of Finance, the secretary types up the deed and forwards both to the Right of Way Agent.

The Right of Way Agent again contacts the owner of the land being acquired, gives him the cheque, has the deed signed by the owner, and witnesses the deed himself. The deed is returned to the Head Office in Fredericton, where the Right of Way Agent has an Affidavit of Subscribing Witness notarized, which is then included in the deed.

The deed and attached plan are then either delivered personally, or mailed to the Development Officer, if the area is subject to planning regulations, to have the plan stamped "approved for filing" and the deed stamped "exempt" under clause 48(1)(gg) of the Community Planning Act, Chapter C-5, R.S.N.B. 1973.

The deed is again returned to the Head Office in Fredericton, and mailed to the Registrar of Deeds for the appropriate County for registration. Upon registration, the Registrar of Deeds returns the deed to the Head Office in Fredericton for permanent filing in the Department's records.

Although there are variations to the procedure just outlined, it would be conservative to state that 80 percent of all deeds registered by the Department of Transportation in the past twenty-five years have generally followed this procedure.

Even though it has been during this period that the majority of problems have been created, it is virtually impossible to criticise the individuals responsible for the preparation of either the plans or the documents used to acquire land for the Department. Rather, the criticism or condemnation must be directed at the policies adopted and used by the Department as a result of the conditions and restraints under which the Department has operated.

The Department experienced the start of a period of rapid growth in the early 1950's, basically due to the emphasis put on the importance of good road transportation systems and the extensive financial assistance provided by the Federal Government for highway construction.

In the past twenty-five years the Department has acquired more and more property as the large highway projects such as the Trans Canada Highway, Highway 1 from Saint John to St. Stephen, the new Highway 11 from Moncton to Campbellton, Wheeler Boulevard in Moncton, the Saint John Throughout in Saint John and many others, developed from the planning stages to actual construction.

This substantial increase in the number of land transactions that had to be dealt with by the Department without the simultaneous increase in staff and equipment to handle the increase in the normal work load (not considering the increased work load due to advancing technology, increased land values and the associated problems, litigations, compensation hearings, new regulations, etc.)

naturally tended to have an adverse affect on the quality of the work as the quantity of work had to increase.

The Department of Transportation, being engineering orientated and emphasising construction, did not hire additional qualified staff nor provide the proper training of existing staff to efficiently cope with work expected from this section of the Department.

Considering the training and background education of the personnel responsible for the preparation of the property plans and the deeds of conveyance or expropriation notices, as well as the small number involved in this work, one can only conclude that they individually did a tremendous job under the circumstances.

It is only the fact that they were understaffed and not qualified or properly trained to perform the jobs they were doing that this section of the Department has become responsible for contributing to the massive problem that now exists with regard to the title and boundaries of highways in this Province.

It was also during this period that the engineering technicians employed to lay out the alignment of a new highway and gather the necessary topographical information, also "picked up" the landowners' property lines before he returned to the office to plot his data.

Those engineering technicians had no training in legal land surveying or in real property law, and normally had never been inside an Office of a Registrar of Deeds.

These technicians basically marked down the location of fences and tree lines and if possible, talked to the owner or occupant of the property to ask

his name and where his property lines were.

As there was less long-range planning in the past than is presently done, the necessary land acquisition for a construction project was usually done only a month or two before the construction actually began. The vast majority of all land acquisition during this period was effected by the process of expropriation.

This method of acquisition was employed extensively because sufficient lead time (the time between the date the decision to construct a particular highway is made and the date the construction is to begin) was never provided to allow negotiated settlements, or in many cases, to even determine the owner of the lands involved and the location of the property lines.

These expropriations required only three weeks "lead time" and their use was considered necessary to prevent interruption of construction programs.

One of the major problems created in the use of these mass expropriations results from the manner in which these expropriations were registered in the Offices of the Registrar of Deeds.

Under the Statutory provisions in force prior to the enactment of the Expropriation Act, Chapter E-14, R.S.N.B., 1973, the Minister of Transportation need only to register a copy of the Order-In-Council authorizing the expropriation of lands as described in the Order-In-Council, and file an attached plan to the Order-In-Council.

The Registrar of Deeds normally registered the Order-In-Council listing Her Majesty the Queen as grantee and listing the grantor the first name indicated on the plan. In many of these expropriation notices, land was expropriated from as many as fifty to one hundred individuals at one time, thereby making each one a

grantor, yet the vast majority of their names were never recorded in the main index books (Grantee - Grantor) as grantors.

There are many instances where the actual owners were not known and therefore were not even shown on the plan attached to the Order-In-Council. The title to the land was legally vested in the name of Her Majesty the Queen, although what is usually considered proper notice to the public is never actually given by having these grantor's names recorded in the index books in the Office of the Registrar of Deeds.

There are many instances where an absentee owner has returned to find his whole property now lying under a highway. If proof of ownership at the time of the expropriation of the lands can be made, the Department pays the compensation the owner is entitled to though it may be ten or even fifteen years since the land was expropriated.

The problem areas just discussed are basically a result of actions done by the Department. Similar problems also arise due to inaction by the Department either as a result of apathy or from the lack of adequate staff to carry out the necessary "follow-up" conveyances or transfers needed to prevent costly investigations, resurveys, title searches, and litigations being created at a later date. Many of these recommended "follow-up" conveyances or transfers show responsible land management that benefit both the public and the individual landowners directly involved.

Mainly, these "follow-up" conveyances or transfers take the form of legally stopping up and discontinuing the portions of old highway which are not required by the public and which may in the future create a problem for the proper

use or development of adjacent land.

Normally, these "follow-up" conveyances or transfers are not initiated by the Department, but result from an agreement with the property owner at the time the new highway was being constructed, or from a request by a property owner years after the diversion was built and created the portion of old road that is no longer required.

EXHIBITS 74, 75, 76 and 77 are examples of the construction of a new bridge in nearly the same location as a previous bridge.

In most of these instances, land was acquired for the new bridge, but once the new bridge was completed and the old bridge removed, no effort was ever made to dispose of the land under the old bridge, thereby creating a vague (at least not readily determinable mathematically) boundary for the highway.

In many instances, the Crown did not own the land under the old bridge and therefore, upon the acquisition of title to the lands for the new bridge, a more complex title and boundary situation has been created.

Whereas nothing is usually done to clarify the boundary or title while good physical evidence of the boundaries is still available, when the matter of trying to establish these boundaries at some later date arises, it becomes somewhat of a costly challenge, and in many past cases, has been virtually impossible to retrace with confidence the bounds of these portions of old highway.

The problems that may and do arise from such practices can create litigations resulting in costs that are often unjustifiable when considering the actual value of the land in question. For example, EXHIBITS 78 and 79 are copies of portions of plans attached to deeds whereby the Crown acquired title to lands for

new bridges in 1940 and 1964. EXHIBIT 80 is a marked-up portion of a plan of survey prepared in 1976 for the acquisition of land for a new bridge and diversion in the area, and depicts the location of the former bridges. No land was ever reconveyed, nor were the old highways discontinued, yet a registered New Brunswick Land Surveyor surveyed and pinned a lot in 1973 showing the highway in this area to be 66 feet wide. The lot shown on the filed subdivision plan, which was purchased by a gentleman from the United States of America in 1973, lies almost wholly upon a public highway. The costs incurred by the Department of Transportation, the Land Surveyor, the vendor and the purchaser to rectify such a problem normally is out of proportion to the actual value of the lands involved.

Depicted in EXHIBIT 81 is an example of one of the hundreds of "crossings" or "fords" that existed before the construction of a bridge at or near that area, thereby making the fording of the stream unnecessary.

EXHIBITS 82 and 83 depict examples of these same crossings, but near which a bridge has been built in more modern times. The notable point is that until such early crossings and fords are legally closed and the public's right to pass is extinguished, they remain public highways if they were public highways before the construction of the bridge.

Non-user, even over a long period of time, does not extinguish the public's right to pass and repass.

Another policy of the Department of Transportation, although unwritten, is to allow abutting landowners to totally remove or obliterate old portions of highways not in use that were created by diversions in upgrading an old highway, without properly discontinuing the highway and transferring title to the owner, if the Crown

holds the title.

A somewhat converse situation is created (although both result in a confusion of title and boundary) by the Department of Transportation when, in acquiring title to lands for highway purposes by negotiated acquisition, a deed is obtained from someone other than the actual owner of the lands. In many cases, the value of the lands being acquired is relatively small, and rather than expending considerable time and effort to obtain proper legal title to lands which already have a title problem, a deed is obtained from the occupant of the land, if any, and from anyone else who appears to have a claim to the lands. It may be that none of these deeds actually convey good title to the Crown, but they do satisfy the people who might prevent any immediate construction from taking place on the lands.

In such cases, time usually prevents the actual owner from submitting a claim against the Department. If, after a period of time, the title to the lands is determined and properly settled, and a conveyance is made to a new owner, the description normally calls for the lands to be bounded by "the highway road" and the new owner accepts the location and boundary of the new highway as being the proper limits, since the highway was there when he acquired title to the property abutting it.

It appears that one of the greatest inconsistencies when considering the volumes of regulations governing the surveying and conveyancing of land in the Province of New Brunswick, is that there are no regulations or guidelines with regard to the preparation of descriptions used in documents conveying land. Various Statutes of New Brunswick provide extensive regulations for the subdivision of land, the methods of surveying land, and the registering of documents in the Office of the

Registrar of Deeds, yet there are no regulations with regard to the preparation of the descriptions of the lands being conveyed. As a result, descriptions are prepared by farmers, Justices of the Peace, lawyers, clerks and technicians who appear to show little concern over the fact that it is virtually impossible for even a trained surveyor to retrace or locate the lands they have described. It is sufficient to say that such is often the case with the descriptions prepared by the Department of Transportation and used in their conveyances for land acquisition.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this report has been to examine the background of New Brunswick highways, and the various factors which have influenced the creation of their present title and boundary problems.

Although the content of this report includes topics other than the policy and law relating to highways, they have been necessary to appreciate the nature and scope of these problems.

Most of the problems that do exist have been recognized by the Department of Transportation and certain professional groups and individuals for a number of years. (See EXHIBITS 84, 85, 86, 87 and 88)

Personnel with the Department of Transportation have continually made efforts to improve the situation, though with little apparent success. Lack of adequate funding for office space, equipment and the skilled personnel required have certainly been contributing negative factors.

Certain concerned individuals and professional groups have in past years voiced their criticism of the Department's handling of the acquisition of lands for highways by not having maintained properly indexed records of the lands that have been acquired, sold off, or otherwise affected, and for not having prepared accurate plans and descriptions of these lands being affected.

As a result, in more recent years, the Department of Transportation has begun to exercise much greater regard for the rights and welfare of the owners through whose land it is passing or affecting in the construction of a new highway.

In the past, land acquisition and description practices of the Department have left landowners with indeterminate and inaccurate land boundaries. The Department now recognizes that in this day of increasing land costs, stricter interpretation of deed descriptions, stricter governmental regulations on the survey and control of land use, these past practices are no longer tolerable.

As well, it is recognized that as a governmental department of the Crown, the Department of Transportation has a responsibility to the people of this Province and is obligated to provide a public service maintaining policies that reflect the highest of moral and professional standards.

The Department has recently taken steps to upgrade its practices, supporting training and education programs for its personnel, improving land surveying procedures and implementing modern surveying with new equipment and technology.

The Department also realizes that it is not fair or just to prevent a landowner from the full and free use of his land nor to deny him the right of knowing where the highway right-of-way is located on the ground. Therefore, it is making a conscientious effort to improve on its apparent lack of concern in the past for proper land surveying practices, as well as its past use of blanket or poorly worded descriptions by unqualified personnel, which has implied that the cheaper method has been used where the Department could get by with it.

Antiquated practices, which are not suitable or compatible with other improvements in standards and technology implemented by the Department, are gradually being replaced within the system.

One ancient practice that is gradually being replaced is the method

used to define the limits of the highway boundary. The Department has always adamantly claimed possession by position of the improvement on the ground rather than the wording of descriptions contained in a document or as depicted on a former plan of survey. More recently, the old way of defining right-of-way by physical possession and occupation seems to be going out of favor (i. e. 33 feet left and right of the centre line as occupied by most highways).

Whereas the Department acquires fee simple title to lands for new highways in most cases today, and where possible the boundaries or limits of the lands are defined on the New Brunswick Grid Co-ordinate System independent of the field centre line laid out on the ground, occupation by the constructed roadway is not now a recommended basis for title purposes due to lack of definition and lack of permanence of the centre line location. Further, with the construction of four lane divided highways, the constructed roadways are often not coincident with the field centre line, nor is the line halfway between the centre lines of the constructed roadways usually coincident with the field centre line.

Although "centre line monumentation" has been used as the prime method of defining highway locations for nearly two hundred years, there is a definite trend toward defining, or "monumentation" of, the sides or boundaries of the rights-of-way especially those defined within the New Brunswick Grid Co-ordinate System.

Although the Department is generally improving the standards of both engineering surveys and land surveys, similar improvements in the training of those responsible for the preparation of the legal descriptions, deeds, and who control what final plan becomes attached to the deeds, or other documents, has not been appreciable, and tends to negate or offset the improvements in the quality of surveying and the plans of survey.

It is still common practice within the Right of Way Branch for the engineering technician responsible for preparing the deed, description and obtaining the plan to be attached to the deed, to take the linen copy of the Plan of Survey supplied (to be attached to the deed), which is signed and certified by a registered New Brunswick Land Surveyor, and make three Xerox copies of the portion he wants, then mark on in freehand additional distances he has scaled from the plan, color these plans red and attach them to the deed to be registered.

The problems created by such practices indicate an urgent need for improvement within the Department of Transportation which can only be forthcoming by positive policies and by a possible restructuring of certain sections in the Department.

Improvement of anything requires wisdom, patience and persistence. Such pursuit takes time, effort and money. Improvement in the acquisition procedures by the Department of Transportation cannot be achieved without such sacrifice and contribution of time, effort and money. The costs of these improvements can be justified by considering the long term cost-benefits to not only the Department's budget but also to the savings that will be realized by every landowner abutting a public highway.

The poor practices discussed above confound adjacent landowners. Properties adjacent to a highway cannot be accurately surveyed or described for sale or use. Abutting landowners pay a high price for surveys and legal work when making an ownership transfer or mapping for land improvement. Litigation sometimes develops with consequent expense for both the Department and the adjoining landowner. It is not uncommon that legal and surveying costs to clear

up title and boundary problems on a tract of land amount to many times the original land purchase price.

Sometimes, as a result of such problems, improvements constructed must be destroyed or moved at great expense to all involved. Transfer of title, construction work or land development is very often delayed while awaiting decisions. Such delays could have been minimized had proper land surveying methods and legal descriptions been used when the right-of-way was obtained. In many cases the Department has found it costly to purchase added right-of-way due to lack of proper land surveying work and proper descriptions when the first taking was made.

5.1 Recommended Procedures for Department of Transportation

It is recommended that procedures be adopted by the Department of Transportation which will fully reflect its responsibility to the public and which will be in accord with recent or pending legislation relating to the title to, control of uses of, the surveying of, and the subdivision of, land in the Province of New Brunswick.

5.1.1 Policy

The Department of Transportation should adopt a general policy which requires that all rights-of-way be surveyed, located in the field, permanently monumented, referenced to the New Brunswick Grid Co-ordinate System, properly described by qualified staff, and properly recorded in accordance with the procedures listed below.

The Department, for its own good public image and to avoid costly litigation, should take steps to improve its practices in all new right-of-way work and to honestly examine past acquisitions in order to bring them up to recommended standards.

5.1.2 Survey Work

Engineering surveys and property surveys should be carefully performed by acceptable surveying methods with reference to a manual of instructions for field procedure to accurately locate the land taken on the ground with respect to property lines, buildings and existing features. This work should be performed under the jurisdiction of and direct supervision of a Surveying Engineer and a Land Surveyor, respectively.

All work should be done with electronic survey equipment and 1-second theodolites to at least second order accuracy of traverse stations established. Traverses should be mathematically closed and adjusted within the New Brunswick Grid Co-ordinate System. Proper retracement methods should be researched and adopted for redefining old highway alignments more precisely (mathematically) than the former surveys allowed.

5.1.3 Monumentation

Existing monuments or demarcation within a construction area should be located, identified, preserved (if possible), referenced and eventually replaced or referenced in by new supplemental monuments to protect property rights which could be harmed by destruction of valuable land ties during construction. Property

owners' rights should be protected by assuring that property demarcation after construction is equal to or better than the initial monumentation.

Permanent monuments which induce magnetic attraction should be set by qualified land surveyors at all changes in direction on each side of the right-of-way. In urban areas monuments should be set at all key intersection points and at least every one-quarter mile or such that monuments are intervisible. In rural areas monuments should be set at all key intersection points and at least every half mile. In special areas of low land value where large land holdings adjoin the right-of-way, change in direction points may suffice.

5.1.4 Descriptions

Legal descriptions should be based on adjusted transverse distances and azimuths. All such descriptions should be prepared or reviewed by a properly qualified land surveyor. Descriptions should have adequate reference to adjoining land lines, Crown Grant Lot lines, and permanent structures to enable any subsequent surveyor to retrace the work of the original surveyor. Wherever available, the survey and legal description should be described in reference to the New Brunswick Grid Co-ordinate System. Existing blanket, centre line and other loosely described rights-of-way should be transformed into modern, properly described documents as soon as possible.

Although the actual eastings and northings of a co-ordinated point should be expressed in the Imperial unit of feet, S. I. units of measurements should be included in all new legal descriptions and plans of survey.

5.1.5 Documents

Legal documents should be on proper forms in compliance with the law and should be prepared or reviewed by a lawyer. Such documents should not be prepared by unqualified personnel without supervision. Personnel executing deeds or other legal documents as agents of the Crown must be trained and educated as to the proper procedure in order that these documents are effective and legal.

5.1.6 Plans

An accurate, scaled plan of survey depicting the lands being conveyed should either accompany, or be referred to in every right-of-way description. This document should in general conform to standards and regulations for land subdivision plans. Detailed plans of survey should be prepared and filed for complicated interchanges, land acquired in urban areas and where land values are high. Adjacent land lines, natural and man-made topographic features, Crown Grant Lot lines and Base Lines, New Brunswick Grid Co-ordinate data and other dimensional information in S.I. units should be shown in sufficient detail to identify the lands affected. These plans should be of a uniform format and should be certified as to their correctness by a registered New Brunswick Land Surveyor.

Engineering drawings and plans should be of a uniform format depicting such engineering and topographical data as necessary. These plans should be certified as to their correctness by a registered Professional Engineer of New Brunswick.

5.1.7 Registration and Records

The Registrar of Deeds responsible for the filing and registration of documents with regard to land should be given a certified linen copy of the plan of survey for recording in the official permanent records. A second certified linen copy of the plan of survey should be filed in the Office of the Registrar of Deeds as a Reference Plan in a special file (containing only plans relating to highways) to be created as part of a proposal recommended in the following section of this Report. A microfilm of the plan should also be filed in order to facilitate local reproduction of these documents at a reduced scale. A reproducible print could also be filed at a Crown agency office in the area that has the existing capabilities to reproduce a paper print at full scale.

Proper registration of all Notices and other documents pertaining to land should be registered in the Office of the Registrar of Deeds. These documents would include Orders-In-Council, Notice of Controlled Access to a Highway, Notice of a Control Line being established along a highway, as well as many others. These notices should be prepared and registered in a manner that will give proper notice to the public. Notices containing several grantors should be properly recorded as such in the index books to give actual notice.

Records required to be kept by the Minister of Transportation under the provisions of the Highway Act should be updated and properly indexed.

5.1.8 Manual of Instructions and Procedures

The Department of Transportation should prepare and use a Manual of Instructions and Procedures to implement proper and uniform procedures for

field staff and office staff responsible for the surveys and right-of-way acquisition for the Department. It is strongly urged that representatives from the Association of New Brunswick Land Surveyors, the Council of Maritime Premier's Land Registration and Information Service Agency, right-of-way associations, real property section of the New Brunswick Bar, as well as various other government Departments be asked to participate in the preparation of this Manual. Such a Manual should not create unwarranted "red-tape" but should provide much needed guidelines to promote conformity of practices and the integration of the Policy of the Department with the "community" involved with all aspects of land use and land transfers.

5.1.9 Staff

It is urgent that proper staff recognition be given to sections involved in the acquisition of right-of-way for highways. Neglect of this matter has created a very serious situation for many landowners as well as the Department itself.

Trained and qualified staff should be responsible for the plans, legal descriptions and documents used by the Department in its acquisition of right-of-way. Full time legal counsel should be obtained considering the millions of dollars involved in these documents, and the regularity by which the Department finds itself in a court or action requiring the services of a solicitor. Although for years the Department has made efforts to obtain its own solicitor, it remains dependent upon the services that can be obtained from a solicitor employed by another government Department. Such service in the past has proven to be frustratingly slow and inconvenient, often causing delays and wasted effort by those who

must rely on this service.

Sufficient qualified personnel, as recommended by Task Force Committee on the availability of Land Surveyors in 1973, should be acquired by the Department to assist in the preparation of plans of survey and to determine policy on land surveying matters.

5.1.10 Seminars

Joint seminars and study groups should be organized by the Department to train and educate its staff and so that right-of-way specialists, lawyers, engineers and land surveyors can discuss their individual and mutual problems.

5.2 Related Areas Requiring Investigation and Reform

Improvement in the right-of-way acquisition practices by the Department and the addition of qualified staff will greatly improve the problems now associated with the title to and boundaries of highways, but there are other related areas that require study and reform to fully and economically rectify this massive problem.

Non-uniformity in the methods and practices of the Registrars of Deeds require investigation and change to provide proper permanent registration of documents affecting land and providing reasonable notice of these documents.

The numerous inconsistencies and ambiguities existing in the present legislation with regard to land and land use control indicates a need for a committee involving various government Departments, municipal bodies and individuals from certain professional groups to be formed to study these problems, and to make recommendations promoting the integration of provisions that are now apparently

incompatible.

The last and most important area that should be given serious and immediate consideration is that regarding a proposal by which a uniform title to the lands under highways could be vested in the name of the Crown. This proposal would also provide that the boundaries of the highways be defined mathematically within the New Brunswick Grid Co-ordinate System, in a fair, just and reasonable manner, yet economically.

Considering the massive problems with the boundaries and title of the existing highways and the costs that are expected to be incurred in their retracement and definition under the existing legislation, it is recommended that the proposal outlined in APPENDIX G be considered as the basis for further study that could result in positive action before the implementation of the impending new Land Titles legislation.

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125. Hickman v, Maisey, (1900), 1 Q.B., 752.
126. Harrison v. Duke of Rutland, (1893), 1 Q.B., 142.
127. Ibid.
128. O'Connor v. N. B. Telephone Co., (1893) 22 S.C.R. 276, reversing
23 N.S.R. 509.
129. Pattison v. St. John, (1879) 18 N.B.R. 636.
130. Williams v. Portland, (1889) 29 N.B.R. 1, Affirmed 19 S.C.R. 159.
131. Simonds v. Chesley, (1890) 30 N.B.R. 303, Affirmed 20 S.C.R. 174 (C.A.).
132. S.M.T. (Eastern) Ltd. v. Ruch, 14 M.P.R. 206, 50 C.R.T.C. 369,
(1940) 1 D.L.R. 190 (N.B.).
133. Meetings with Solicitor for the Minister of Transportation in March, 1976.