

# *Land and Law in Essex County. Malden Township and the Abstract Index to Deeds\**

by John CLARKE\*\*

## I

The purpose of this research note is to bring to the attention of students of Ontario land matters the existence and usefulness of a rich documentary source — the Abstract Index to Deeds. As yet little used,<sup>1</sup> this material has tremendous potential value for social and economic historians as well as geographers.

The origin of these documents lies in the legislation of 1865<sup>2</sup> which required the county registrars to abstract the detailed information contained in the older Registrars' Copy Books and to prepare indices for each county. Originally deposited in the district and county registry offices, where a search fee can be required to consult them, the records, together with the more detailed Copy Books<sup>3</sup> were microfilmed by the Genealogical Society of Latter Day Saints. A single copy containing the records for the whole province was deposited in the Public Archives of Ontario, Toronto. A researcher wishing to work on a particular part of the

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<sup>1</sup> Examples include: J. CLARKE, "A Geographical Analysis of Colonial Settlement in the Western District of Upper Canada 1788-1850" (Ph. D. dissertation, University of Western Ontario, 1970); A. G. BRUNGER, "A Spatial Analysis of Individual Settlement in Southern London District, Upper Canada, 1800-1836" (Ph. D. dissertation, University of Western Ontario, 1973); D. P. GAGAN, "The Security of Land: Mortgaging in Toronto Gore Township 1835-1895," in *Aspects of Nineteenth Century Ontario*, ed. F. H. Armstrong, H. A. Stevenson, and J. D. Wilson (Toronto, 1974): 135-53; R. W. WIDDIS, "A Perspective of Land Tenure in Upper Canada: A Study of Elizabethtown Township 1790-1840" (M. A. thesis, McMaster University, 1977). See also W. R. WRIGHTMAN, *Land Records*, London, Landon Project, University of Western Ontario, 1977 (mimeographed). The spelling of all surnames mentioned in the text or in the figures is as they were written in the documents.

<sup>2</sup> An Act respecting Registrars, Registry Offices, and the Registration of Instruments Relating to Lands in Upper Canada received Royal Assent on 18 September 1865; *Statutes of the Provinces of Canada*, 29Vic. C24. The Act applied on and after 1 January 1866 and required all registrations recorded before that date to be included in the Abstract Index. Schedule E of the Act provided a model for the Abstracts; Table 1 fits the model.

<sup>3</sup> As implied in the name, the Registrars' Copy Books contain exact copies of all memorials and instruments.

county has a number of options. The first of these is to travel to the particular County Registry Office where the records have to be shared with the legal fraternity who are using them for contemporary title searches. A researcher requiring immediate access to these records for more than one county is better off consulting the records in Toronto rather than making separate trips to individual registry offices. This strategy is superior not only in terms of the cost of transportation and perhaps accommodation, but it circumvents the legal requirement of a one dollar fee for each search.<sup>4</sup> For the reader wishing to consult a large number of entries, as a geographer interested in the spatial aspects of settlement must do, such costs are prohibitive. For example, the present author, as part of a larger project, is involved with some 3,000 property parcels. The reader will appreciate that a bill of \$3,000 for the basic data would dampen the enthusiasm of all but the most ardent of us. Given enough time, however, the same data can be obtained from Utah for ten dollars per reel of microfilm. Thus, for \$90 this same information is available for perusal in the peace of one's study or office where, buffeted by coffee or other stimulants, one is assailed by the absolute quantity of information available. Most historical researchers, unless motivated by the immediate demands of government contract work, will exercise this third option.

## II

Table 1 is an excerpt from the Abstract Index to Deeds. It lists the land transactions to 1852 on Lot 30 in the third concession of the Township of Malden, a township which has been chosen to outline the main characteristics of the data.<sup>5</sup> Nine types of information are given; all but the first two are self-explanatory. The first, the instrument number, is a device to allow the Registrar to locate either the original document or, by noting the date of registration, to obtain the exact terms of the original instrument in the Copy Books. The 'Instrument' heading of Column 2 indicates the particular legal device or instrument used in a given transaction. In the excerpt chosen to be presented there are six different types of instruments, of which four (the patents, the indentures, mortgages, and the bargain and sales) occur most frequently (Table 2). These terms need to be defined clearly.<sup>6</sup>

<sup>4</sup> The Act of 1865 required a fee of one dollar for each search and twenty-five cents for each original examined. This is still the fee in 1978.

<sup>5</sup> Public Archives of Ontario microfilm, Abstract Index to Deeds, G. S., 936-40, Vol A, p. 74.

<sup>6</sup> The definitions used here were gleaned from the pages of a number of legal dictionaries. The following references proved helpful: *The Pocket Conveyancer or Attorney's Useful Companion*, by a Gentleman of Lincoln's Inn, 2 vols. (London: W. Strahan and M. Woodfall, 1773); H. C. BLACK, *Black's Law Dictionary*, 4th ed. (St. Paul's: West Publishing Company, 1957); J. BURKE and P. ALLSOP, eds., *Stoud's Judicial Dictionary of Words and Phrases*, 3rd ed., 4 vols. (London: Sweet & Maxwell, 1951-53); J. BURKE, ed., *Jowitt's Dictionary of English Law*, 2nd ed., 2 vols. (London: Sweet & Maxwell, 1977).

Table 1: TOWNSHIP OF MALDEN LOT 30 IN THE THIRD CONCESSION

<i>Instrument No.</i>	<i>Instrument</i>	<i>Its Date</i>	<i>Date of Registry</i>	<i>Grantor</i>	<i>Grantee</i>	<i>Quantity of Lands</i>	<i>Consideration of money</i>	<i>Remarks</i>
A15	Patent	6 Mar 1798		Crown	Mathew Elliot	All 200 acres	—	Lot No. 30
	Patent	6 Mar 1798	5 May 1798	Crown	Mathew Elliot	Among other lands	—	Lot No. 30
C115	B & S	8 July 1811	9 July 1811	Mathew Elliot	James Rouse	100 acres	Not mentioned	S½ of Lot 30
115	Mortgage	8 July 1811	9 July 1811	James Rouse	Mathew Elliot	100 acres	—	S½ of Lot 30 Mort
D140	Mortgage	13 Mar 1819	1 Oct 1819	James Rouse	Robert Reynolds	100 acres	£140	S½ of Lot 30 Mort
F44	B & S	24 Sept 1822	8 Aug 1831	Mathew Elliot	Pierre Beniteau dit Labadaine	100 acres	£37.10.0	N½ of Lot 30
A244	B & S	19 Jan 1840	20 Jan 1840	Jeanne Beniteau	Jean [ ] Beniteau	—	Natural love	See Description
I 186	Will	22 Apr 1814	2 Sept 1843	Mathew Elliot	See Will	—	—	of Consideration
A119	Q.C.	26 Mar 1850	26 Mar 1850	Thomas Bain	Michael Malone	—	—	—
120	Will	5 Jan 1827	30 Mar 1850	Pierre Beniteau	See Will of	—	5/-	Lot No. 30
121	Q.C.	8 Mar 1850	30 Mar 1850	Clement Beniteau	John [ ] Beniteau	Among other lands	—	—
143	Q.C.	24 Apr 1850	20 Aug 1850	William I Little	Théodore Washington Little	—	£37.10.0	Lot No. 30
144	Indenture	17 July 1850	20 Aug 1850	Théodore Washington Little	Michael Malone	100 acres	£20	Lot No. 30
146	B & S	8 Aug 1850	17 Sept 1850	James Rouse	John O'Connor the Younger	100 acres	£30.5.0	in the [ ] of Lot 30
176	B & S	8 Mar 1851	8 Mar 1851	Thomas Bain Junior & W.	Michael Maloney	100 acres	£50	S½ of Lot 30
220	B & S and Q.C.	21 Oct 1851	21 Oct 1851	John O'Connor Jun. & W.	Michael Maloney	100 acres	£75	S½ of Lot 30
							£25	S½ of Lot 30

Source: Public Archives of Ontario, Abstract Index to Deeds, Malden Township, f74

*Deed*

The term is a general one, meaning a document under seal, and includes specific instruments such as indentures or deeds of bargain and sale, and patents. It may also include a mortgage of real estate or a lease held for over 21 years. It is a conveyance of realty by a grantor whereby the title is transferred from one to another. It involves two or more individuals and in this respect the term Deed differs from the term Deed Poll in which only the party making it binds himself to it. In the case of Malden Township the only user of deeds was the Canada Company.

*Patent*

A patent is a grant of privilege and property made by the government. In Upper Canada the grantor was always the Crown and the patent was issued after the fulfilment of settlement duties and the payment of a fee. Patents were made both to individuals and to corporations, for example, the Canada Company. Money was never recorded for the transactions. The patentee had full legal title to the property patented, provided he paid his dues in taxation. If this did not happen the land was seized by a Sheriff's Deed, Sheriff's Sale, or simply by the Sheriff. This also applied to conveyances of land between individuals.

Table 2: TOWNSHIP OF MALDEN — FREQUENCY OF RECORDING PARTICULAR INSTRUMENTS, MONEY AND ACREAGE\*

<i>Instrument</i>	<i>Number Recorded</i>	<i>Number Recorded with Money</i>	<i>Number Recorded with Acreage</i>
Deed	17	17	17
Bargain and Sale	321	274	135
Indenture	106	88	81
Deed Poll	6	4	2
Dower Right	0	0	0
Mortgage	88	76	77
Assessment of Mortgage	16	6	7
Discharge of Mortgage	4	0	1
Deed of Trust	5	4	1
Deed of Release	8	7	3
Lease	1	1	1
Foreclosure	0	0	0
Sherrif's Deed	4	4	3
Bond	0	0	0
Deed of Gift	10	2	10
Deed of Confirmation	2	2	0
Deed of Partition	3	0	0
Agreement	3	2	0
Power of Attorney	13	0	0
Grant	3	2	2
Quit Claim	14	11	9
	624	500	349

\*n.b. Since money is never recorded for patents and wills in the Abstracts, these instruments have not been included in the Table. There were 65 wills registered and 199 patents in Malden Township in the period up to 1852. Source: P.A.O., Abstract Index to Deeds, G. S., 936-940, Vol. A.

### *Indenture*

An indenture is a deed to which two or more persons are parties, the edges of the deed being indented for purposes of identification and security. In this sense all instruments, with the exception of Deed Polls, are indentures. Both parties generally enter into reciprocal and corresponding grants or obligations towards each other. In some instances there may be a transfer of title without consideration, for example, in the case of a will. However, where, as in the case of Instrument 144 on Table 1, an instrument is listed as an Indenture (or Ind.) in the instrument column of the Abstracts, this represents a transfer of title between the two parties, for some consideration. There is one limitation in a transfer of this nature, and that is that the wife of the party of the first part retains her dower right. Dower is defined as that part of a deceased husband's estate that the law allows his widow for life. Few sought to assert this dower right in Essex County and, as Table 2 shows, none did in Malden Township. However, where the person acquiring the land sought to purchase the dower right, this was accomplished by paying a standard fee of five shillings to the wife of the "party of the first part".

### *Bargain and Sale*

This is one method used to convey title to land, originally so that it could be done secretly. Conveyance of title is made with all rights and privileges, in return for monetary consideration or an equivalent in goods or mineral and timber rights. These are the most commonly recorded instruments in the Abstracts.

### *Mortgage*

A mortgage is a deed for the conveyance of real or personal property by a debtor (mortgagor) to a creditor (mortgagee) as security for a money debt. In the Abstracts for Essex County, mortgages are recorded in the Instrument column as 'mortgage' or abbreviated to 'mort.' Occasionally, mortgages are recorded as indentures, although from the context, it is obvious that they are, in fact, mortgages. When this happens the term mort is added to the Comments Column. If, within a certain time, the debt is repaid, the mortgagee is obliged to reconvey the property. This action is recorded in one of three ways: as a *D.M.* or discharge of mortgage in the Instruments Column; as *disch.* in the Comments Column; or by drawing a line through the whole of the entry. Where a mortgagee transfers his responsibility to another individual, such action is recorded in the Instruments Column as an Assignment or Assignment of Mortgage (A.M.). Where common law mortgages were not used, property could be placed in the hands of one or more trustees to secure the repayment of a sum of money or the performance of some particular condition. This was accomplished with a Deed of Trust or Trust Deed, which though different in form from a mortgage had a similar effect. In this instance, instead of a *D.M.*, a Deed of Release is executed by the trustees to reconvey the property to the grantor. If, on the other hand, the mortgagor defaults on his agreement, an instrument of foreclosure is used to ensure the land is transferred to the mortgagee. Foreclosure will also be used

where the instrument used was a bond. A bond would therefore appear to be similar to a mortgage, the grantor putting his land as security against the amount of money borrowed in the agreement.

#### *Grant*

This instrument appears to transfer title and to be similar in effect to an indenture of bargain and sale.

#### *Quit Claim*

This is an instrument whereby one party gives up all his claims to the land. Therefore it may be used to clarify an earlier property description and thus reduce conflict between neighbours, or, indeed, it can be used to settle accounts where a mortgagor has been unable to meet his obligations and foreclosure is imminent.

#### *Power of Attorney*

This gives an individual power to act for another individual.

Other terms such as Will, Deed of Gift, Deed of Partition, Deed of Confirmation and Lease need no explanation.

### III

The reader approaching this section may well ask "by whom are the Abstracts to be used and to what end?" While the writer can envisage this material being useful to economists, historians, and geographers, only the reader can answer these questions from his own perspective within the traditions of his own discipline. The strategy here will therefore be to comment briefly on the completeness of the data and their value to the author, an historical geographer.

The documents are handwritten, and may therefore be illegible in places, a common enough problem for the historian. As abstracts they may not provide sufficient detail on a particular aspect of a transaction but, of course, such detail can be obtained from the Copy Books. The data appear to be consistently recorded with respect to the moneys involved in a particular transaction, and fairly consistently recorded with respect to the acreages involved.<sup>7</sup> Most important for the geographer, the data can be located in terms of the lot (or part of a lot) and concession system.<sup>8</sup> Of course, use of the documents requires familiarity with the meaning of the instruments. While every attempt has been made to ensure that the

<sup>7</sup> As is noted in Table 2, in Malden Township money was recorded in 80.1 percent of the cases and the acreage in 55.9 percent. The latter is thought to be low by the standards of other townships in Essex County, but if the reader is prepared to work with samples rather than total populations, this figure is more than satisfactory. If not, recourse to the Copy Books will allow the gaps to be filled.

<sup>8</sup> W. F. WEAVER, *Crown Surveys in Ontario* (Toronto: Department of Lands and Forests, 1962); R. L. GENTILCORE and K. DONKIN, *Land Surveys of Southern Ontario*, Cartographica No. 8 (Toronto: York University, 1973).



terms described above have been adequately defined, a complete awareness of all the legal nuances is hardly necessary to use the terms to decide, for example, who had title to a particular property at a particular date. In other words, the terms should be examined in the context of the question asked. With respect to the particular question asked here, the distinction between indenture and bargain and sale is unimportant since both instruments convey title. Again, if a particular entry does not contain enough information to make such a decision, its position in a succession of entries will usually clarify events.

What questions are being asked by this researcher? What was the spatial and temporal pattern of land acquisition in Malden Township and Essex County during the first half of the nineteenth century?<sup>9</sup> The land patents hold the answer to this question since they indicate the date when a person, having fulfilled all the requirements specified by the Crown, received the title to his land. Figure 1 prompts a number of questions. What was the role of accessibility, physical environment, Crown and Clergy Reserves, and land speculators in the settlement process? These are continuing themes in the historical geography of Ontario and a number of studies have been directed towards their solution.<sup>10</sup> The patent data on which several of these studies rest are recorded in the Patent Index or Domesday Books in Toronto and form part of the information in the Abstracts.

Who were the owners of property in Essex County in 1825 and 1852, years selected for cross-sectional examination because of the relative wealth of assessment and census returns? Figures 2 and 3, rapidly compiled from these sources, indicate the occupiers of each of the 103 lots of Malden. Figures 4 and 5, which indicate the owners of land at these two times, were constructed from the Abstracts and required considerably more time — Figures 6 and 7 can be used to gauge exactly how much. They illustrate the steps necessary to establish ownership on each of two properties, Lot 3 in the first concession and Lot 24 in the second. In the records these properties are closely intertwined with two others, the so-called Caldwell Grant between Lake Erie and Big Creek and the Bell Farm. The inter-relationship between the documents and property parcels is seen to be complex. The problem of determining who owned these properties is

<sup>9</sup> J. CLARKE, "Aspects of Land Acquisition in Essex County, Ontario, 1790-1900," *Histoire sociale-Social History*, X, 21 (May 1978): 98-119.

<sup>10</sup> J. CLARKE, *op. cit.*, 1970; "Documentary and Map Sources for Reconstructing the History of the Reserved Lands in the Western District of Upper Canada," *The Canadian Cartographer*, VIII, 2 (1971): 75-83; A. G. BRUNGER, "Analysis of Site Factors in Nineteenth Century Ontario Settlement," in *International Geography*, ed. W. P. Adams and F. M. Helleiner (1972): 400-02; R. L. GENTILCORE, "Changes in Settlement in Nineteenth Century Ontario (Canada) 1800-1850: A Correlation Analysis of Historical Source Materials?" in *International Geography*, (1972): 418-19; "Settlement," in *Studies in Changing Geography: Ontario*, ed. R. L. Gentilcore (Montreal, 1972): 23-44; J. CLARKE, "Spatial Variations in Population Density: Southwestern Ontario in 1851," in *International Geography* (1972): 408-10; "The Role of Political Position and Family and Economic Linkage in Land Speculation in the Western District of Upper Canada, 1788-1815," *Canadian Geographer*, XIX, 1 (1975): 18-34.

compounded by incomplete returns on acreage and by missing documents, so that the final solutions rest upon inspired guesswork. While many of the problems can be solved in ten or twenty minutes, it took ten hours to determine that there were twenty-five owners on the Caldwell property in 1852. Access to the Copy Books or original instruments might well have helped and this sort of action is possible when a study is limited to a small number of lots. Where, however, a large number of lots is being studied, financial and time considerations prevent this. The researcher working with a large number of properties must of necessity content himself with an unknown error. This is the case with the present writer who, unable to specify a statistical confidence level for his study of Essex County, is content that the accumulated effect of such error is slight.

Figures 8 and 9 show the results of this painstaking, detailed, and boring work. They show the correspondence between the Abstracts and the Assessment Rolls or Census. Where two documents agree we would seem to have identified owner-occupiers, where they disagree, probable tenancy, and where a property is owned but not assessed we would seem to have identified a new settler or perhaps a speculator.

A third area to which the Abstracts speak is the change in the size of holding through time, a theme recently investigated by Widdis.<sup>11</sup> Were there differences in size of holding, and did this correspond to the different categories of persons described above? Did such differences reflect differing ethnic origins? Did they reflect environmental quality? It would seem that in Essex County there was marked subdivision of holdings beginning in the 1840s. Was this the response of an ever-increasing population in an area where prime agricultural land was limited in a period before the widespread adoption of tile drainage? Can it be related to the economic cycles of expansion and contraction, frequency of transfer (Figure 10), and the average price of land (Figure 11)? Such variables can be collected from the Abstracts for these purposes. Figure 10 compares the frequency of land transfer for Malden Township and Elizabethtown Township, located in the extreme southwest and east of the province. The rates were obviously different. Were there regional patterns? Much work is needed on this and other inter-related themes for which the Abstract Index to Deeds offers the necessary data. It is to be hoped that greater use will be made of them.

<sup>11</sup> R. W. WIDDIS, *op. cit.*, 1977.



Figure 1

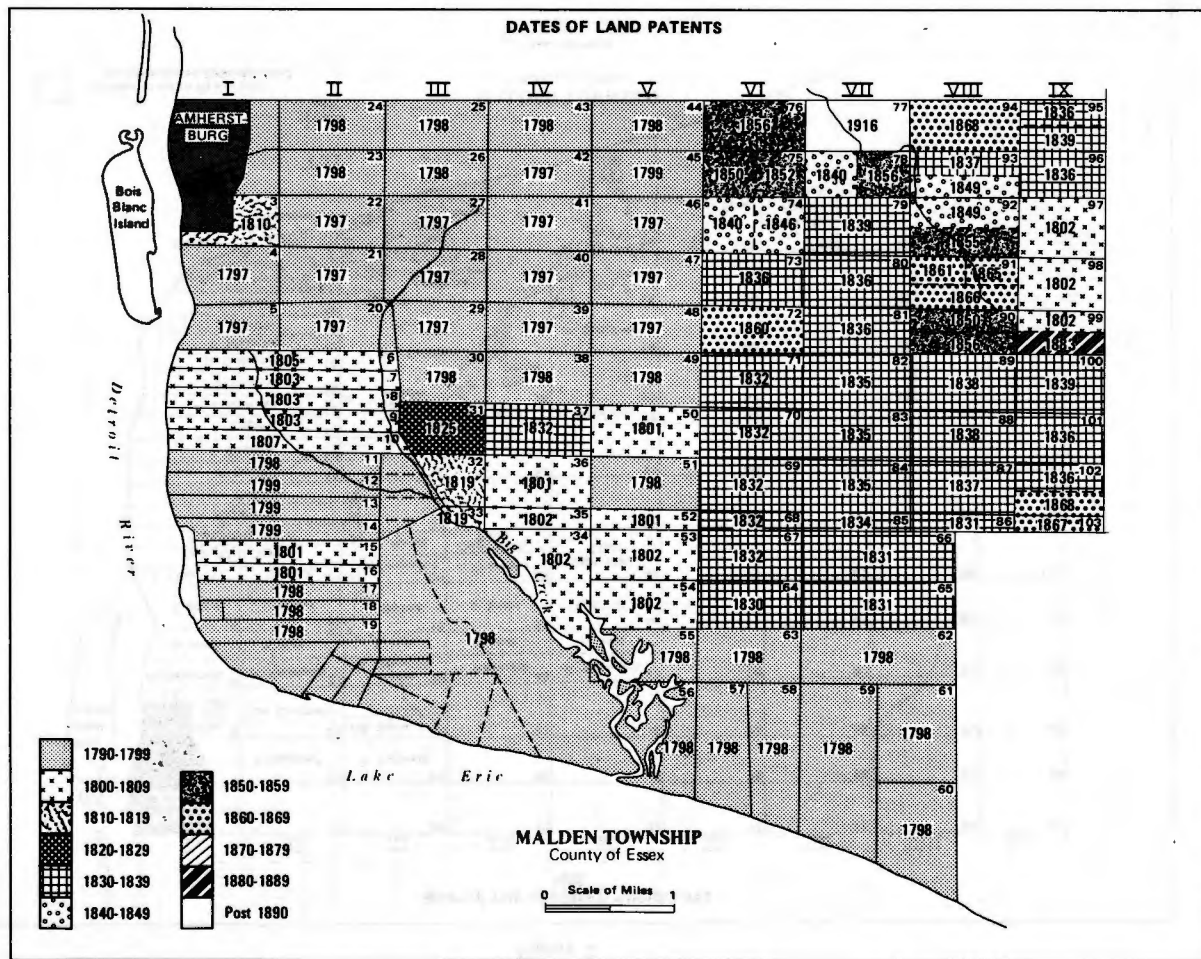


Figure 2

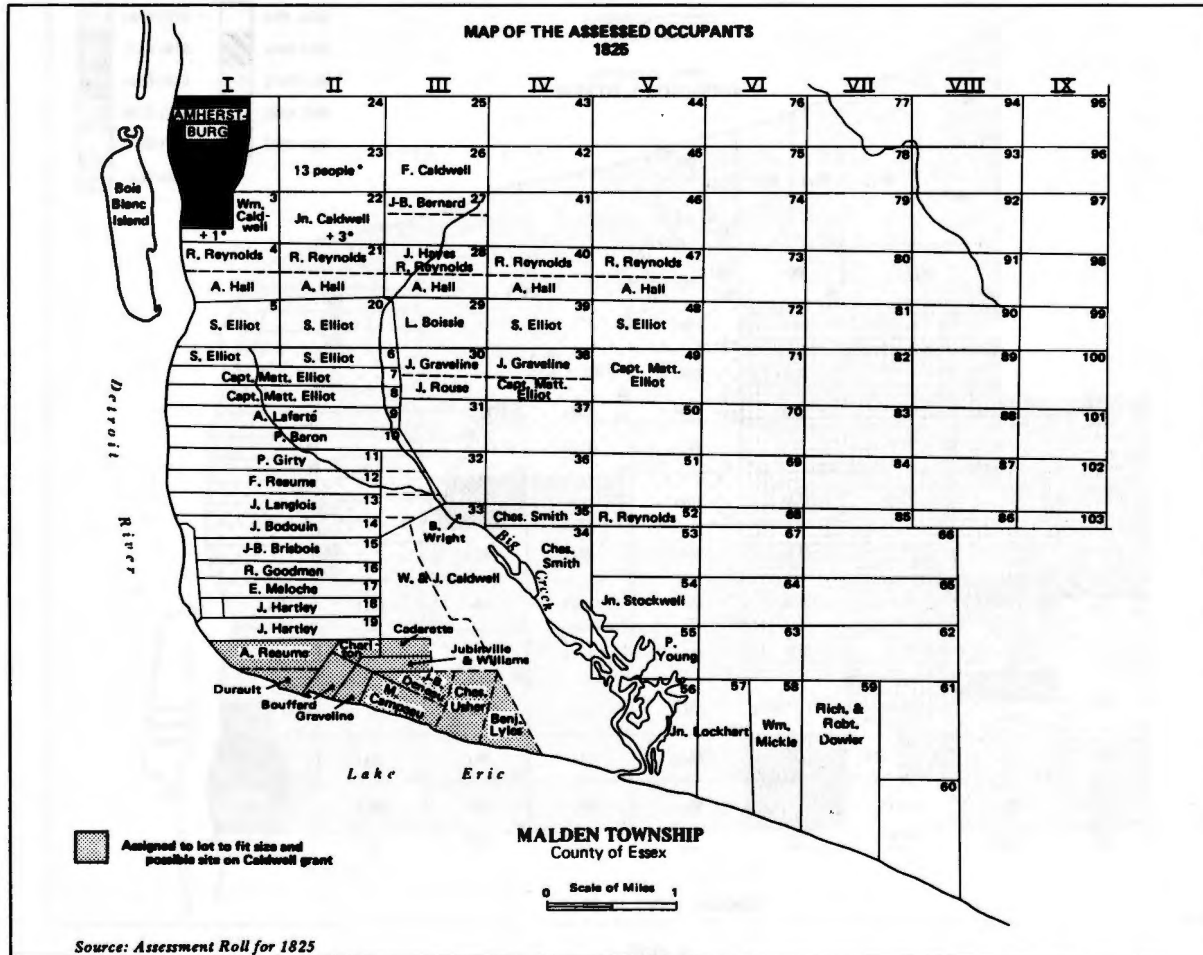


Figure 3

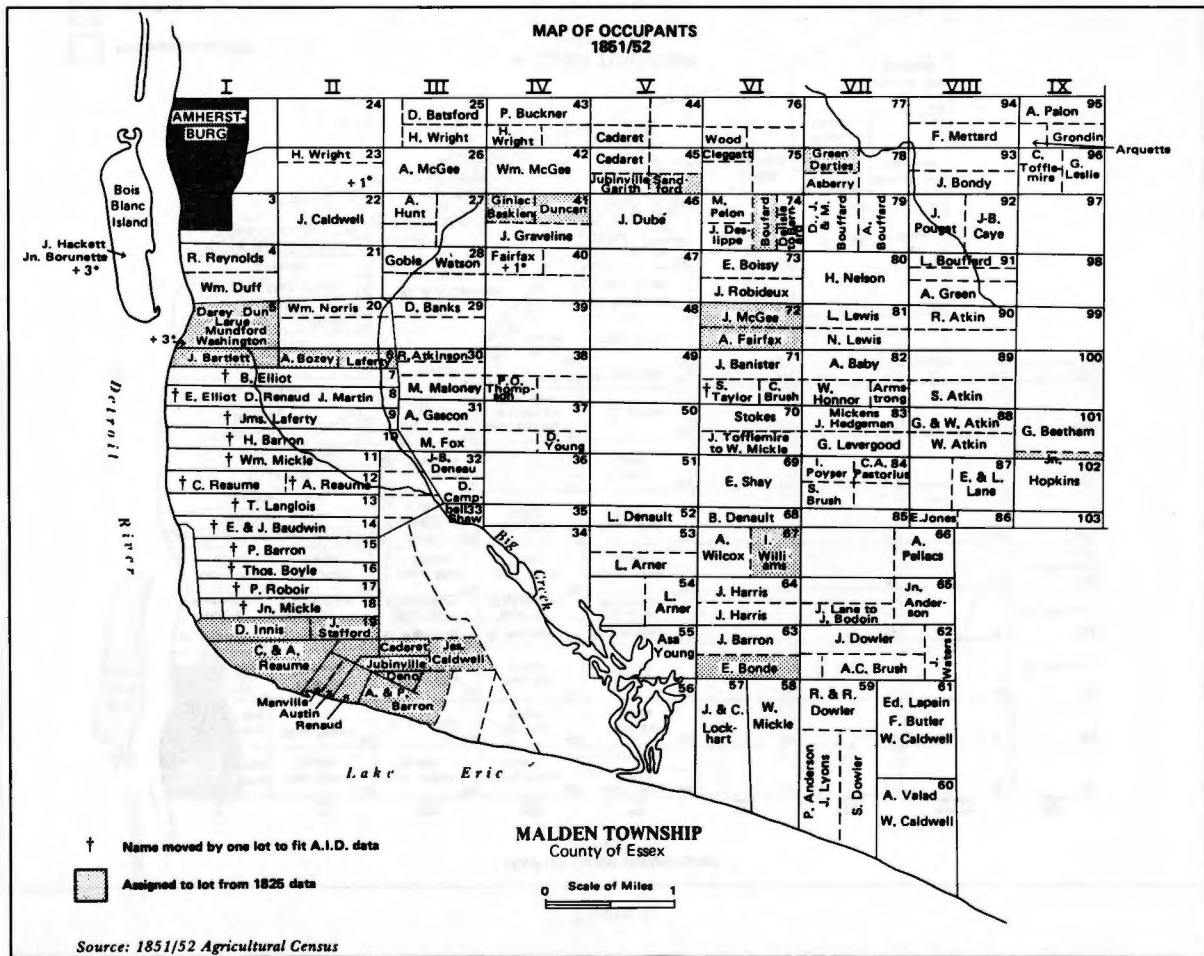


Figure 4

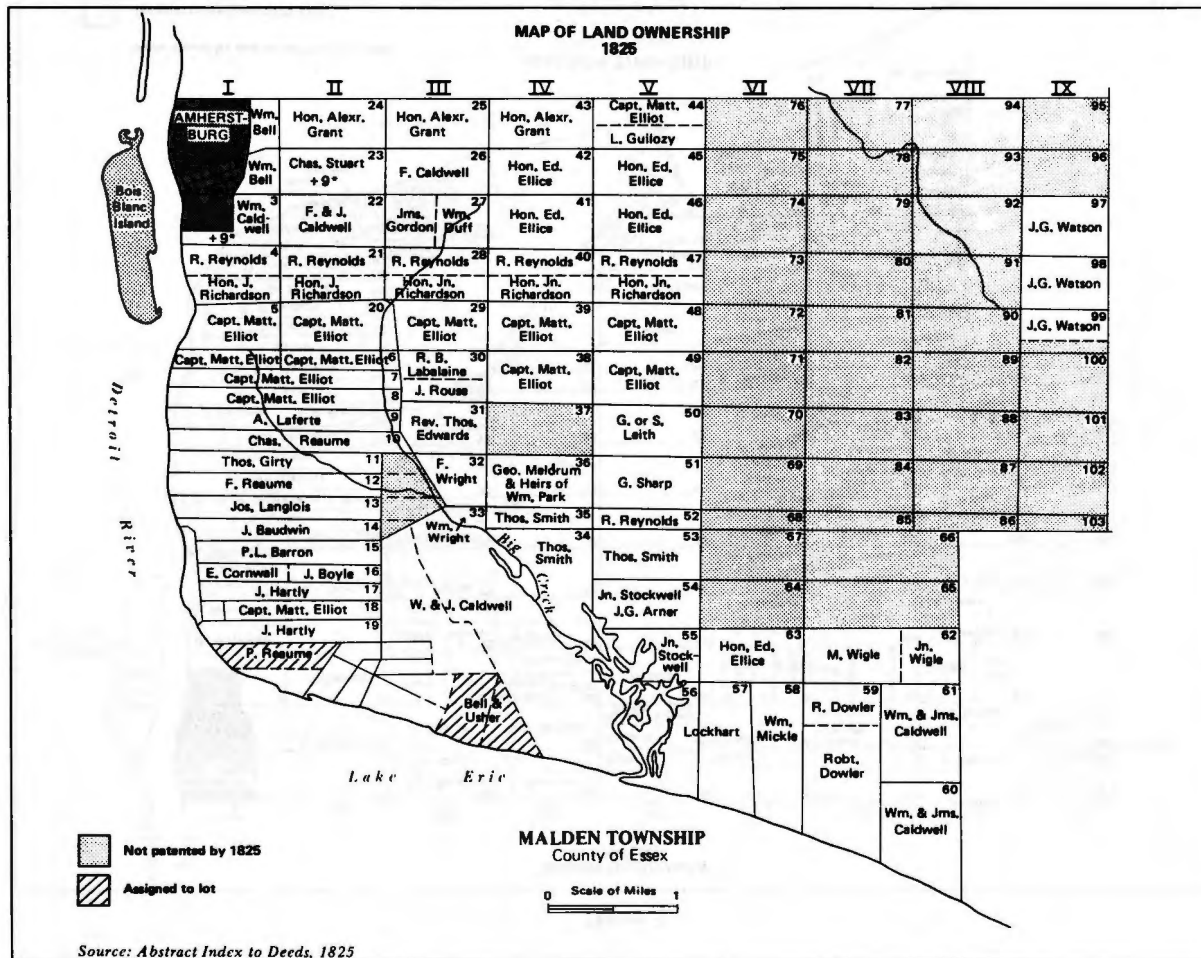
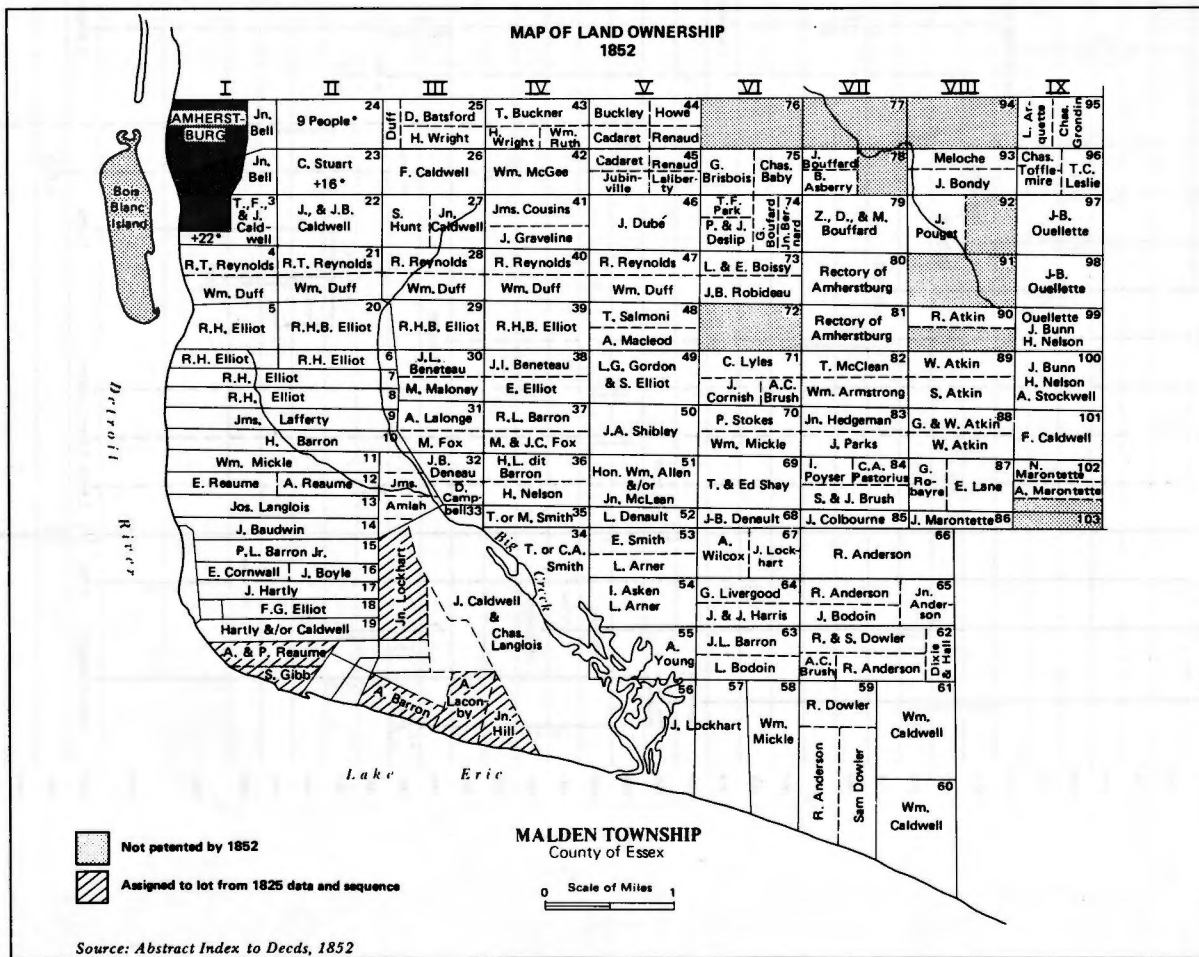
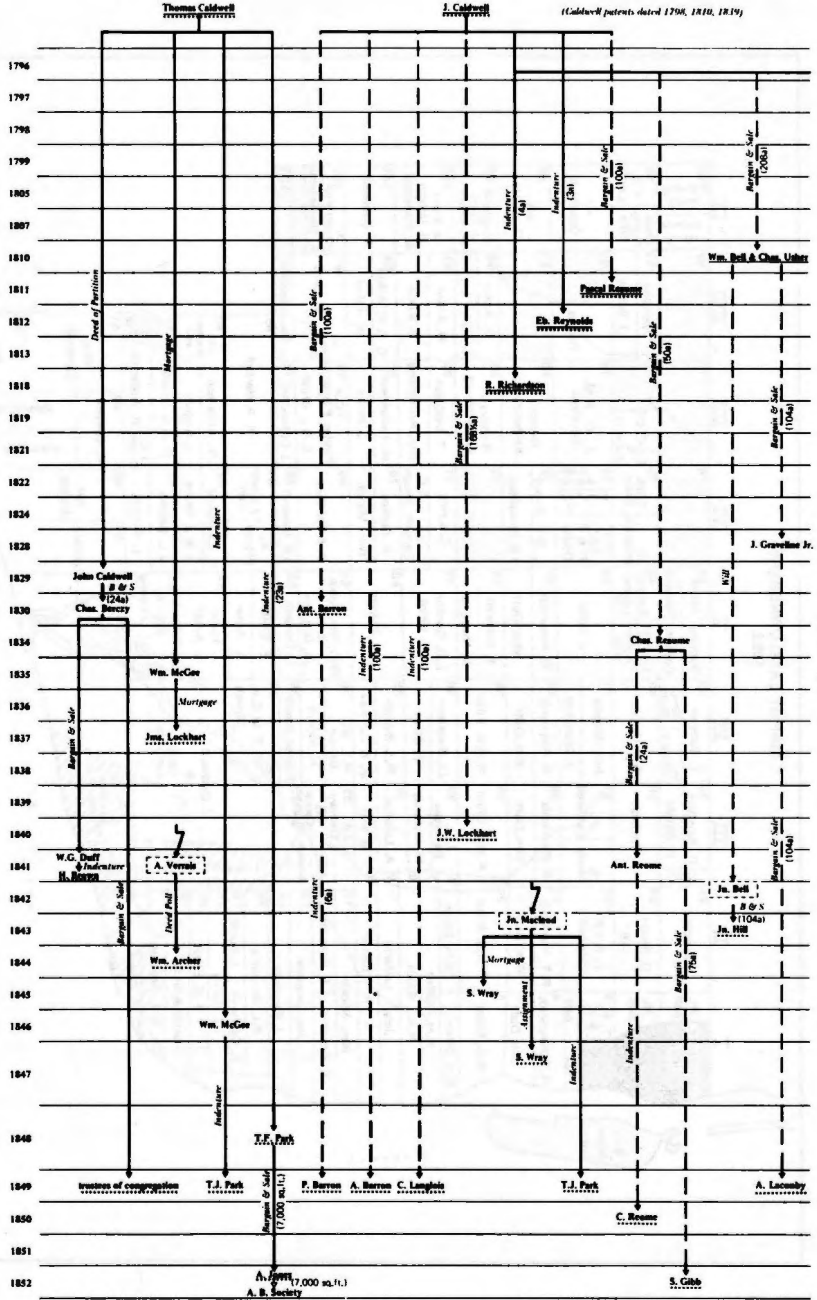


Figure 5



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Figure 6. LOT THREE IN THE FIRST CONCESSION





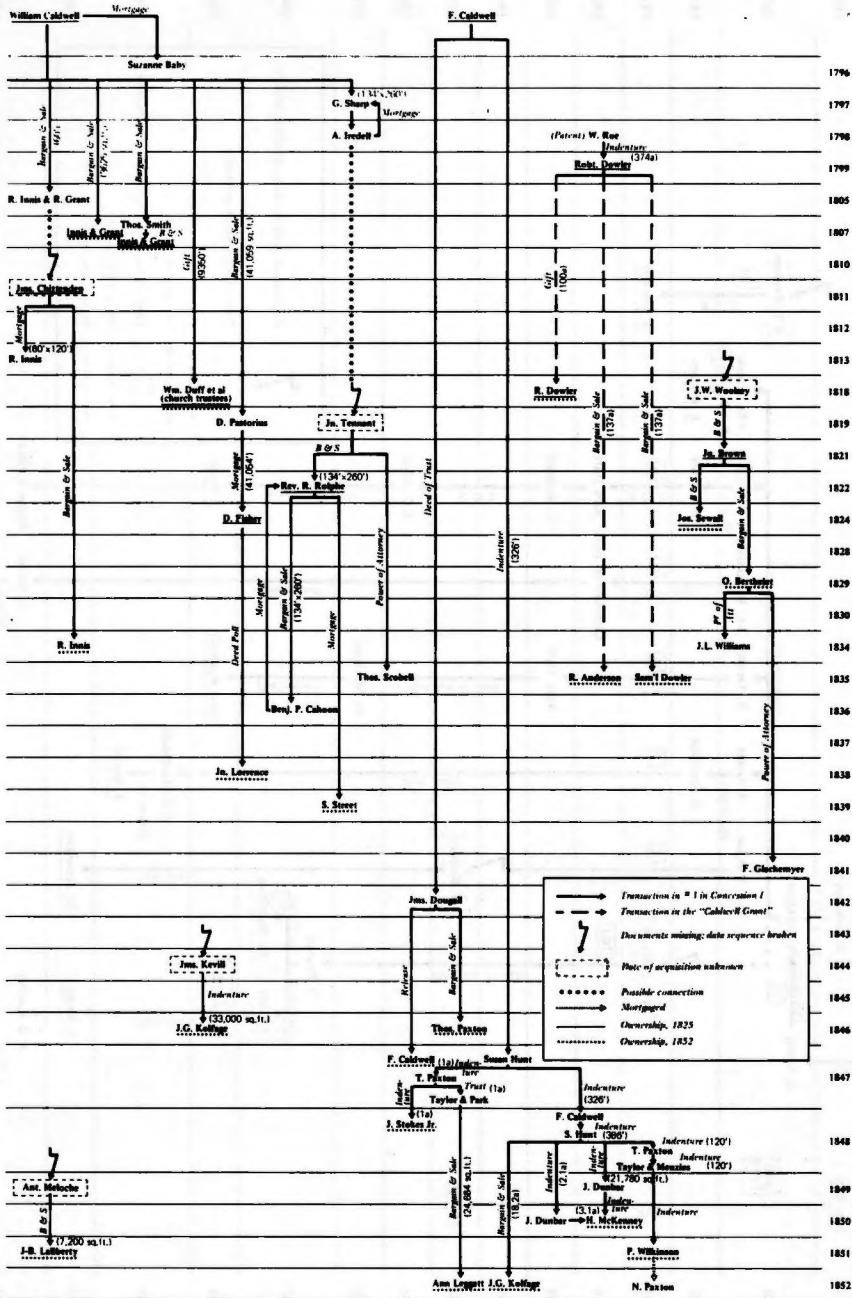


Figure 7. LOT 24 IN THE SECOND CONCESSION

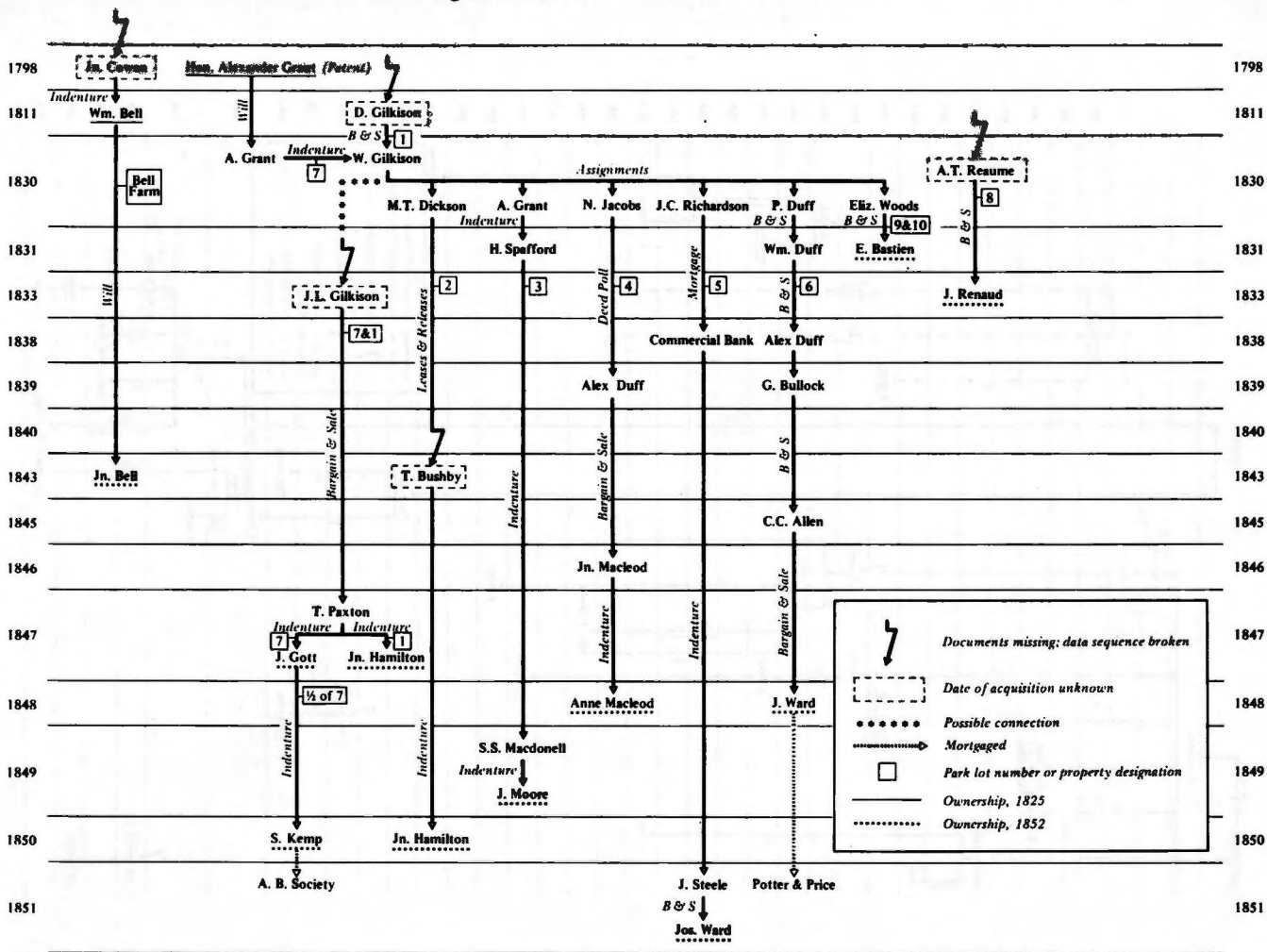


Figure 8

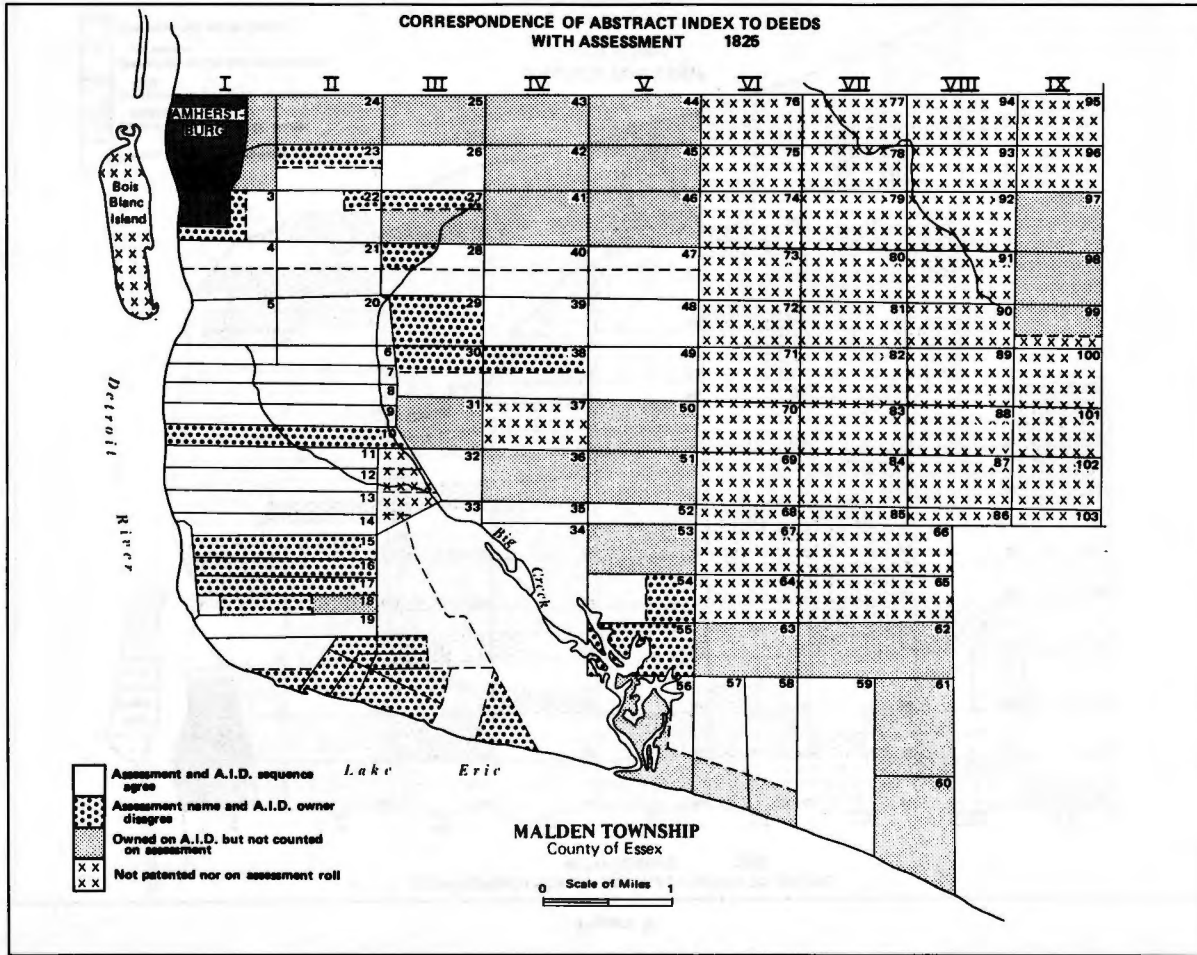
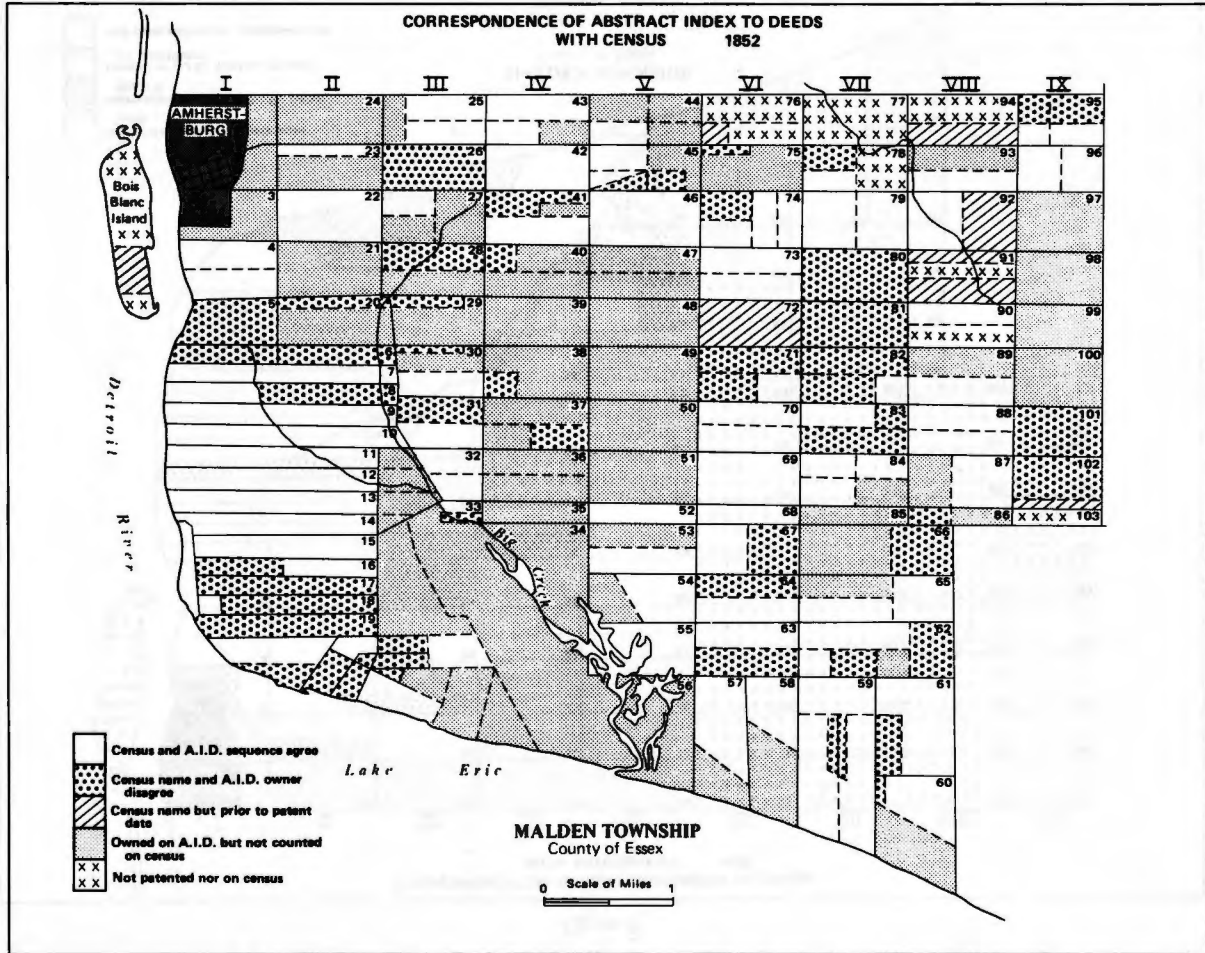
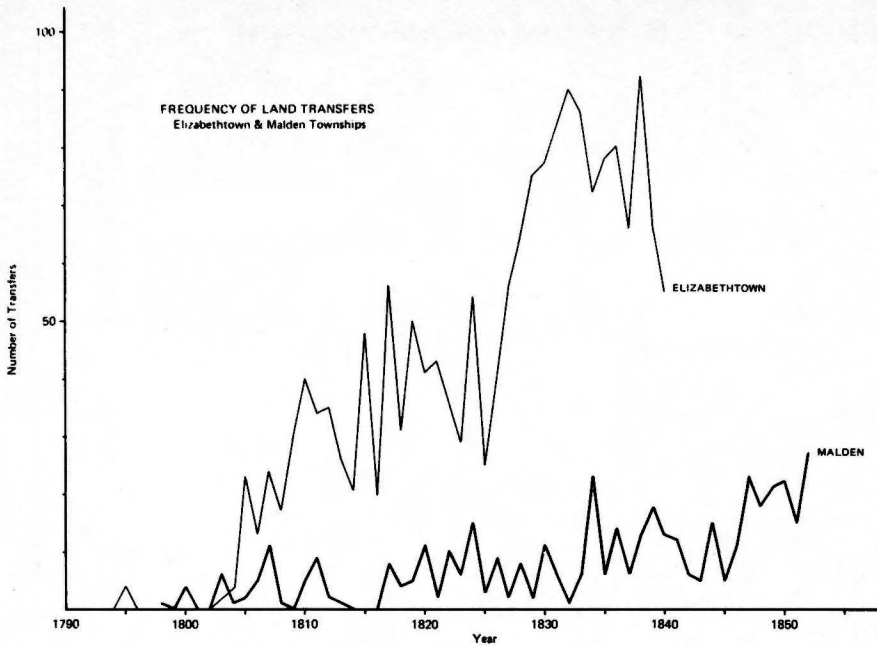


Figure 9





Source for Elizabethtown... R.W. Widdis, "A Perspective on Land Tenure in Upper Canada: A Study of Elizabethtown Township 1790-1840", M.A. Thesis, McMaster University, 1977, p. 90.

Source for Malden: Calculation by the author.

Figure 10

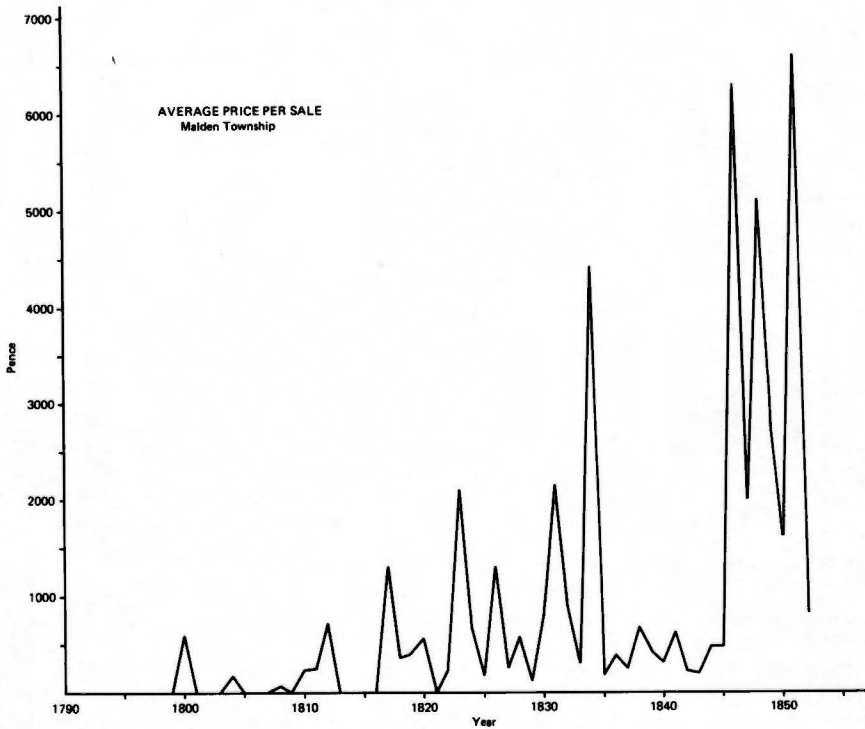


Figure 11