

Benson v. Hodgdon, No. 291-6-04 Wrcv (Eaton, J., Feb. 4, 2009)

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STATE OF VERMONT  
WINDSOR COUNTY, SS

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Ronald Benson, Betty Benson,  
Barry Benson, Edith Benson and  
Town Of Royalton  
Plaintiffs

v.

Perry Hodgdon, Carol Hodgdon  
et al  
Defendants

SUPERIOR COURT  
Docket No. 291-6-04 Wrcv

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for trial by court on the issue of the existence of a public highway on December 15, 2008. The issue of prescriptive rights was previously tried to a jury in May 2006, resulting in a verdict for the defendants. At the December 15 hearing, the Bensons were represented by their counsel, Paul Gilles, Esq. The Town of Royalton was represented by its attorneys, John Klesh, Esq. and William Flender, Esq. The Hodgdon's were represented by their attorney, Andrea Gallitano, Esq. Prior to hearing a settlement was reached with the Taylor defendants and they did not participate in this hearing.

Based upon the evidence adduced at hearing, the court issues the following findings, conclusions and order:

**Findings of Fact**

At issue in this case is whether there exists a public road in the Town of Royalton in an area between Post Farm Road and Slack Hill Road. This road has been variously described as "the old town road," "the old town highway" and "the lane." Plaintiffs claim this road is a public way pursuant to a survey (Ex T-8) in May 1804, duly recorded in the Town of Royalton land records. Defendants claim the road as described in the 1804 survey is not the road claimed by the Plaintiffs, which defendants say is a private cattle path.

This claimed road runs in a generally north and south direction. As described in the 1804 survey, the road (actually described as two roads) commenced north of what is now known as Post Farm Road a short distance. The area north of Post Farm Road will hereinafter be referred to as the northern section of the road. Thereafter, the road as described crossed Post Farm Road, and ran in a southerly direction toward Slack Hill Road. From 1804 until the present, this area has been sparsely populated. This section will be referred to as the southern section of the road. The 1804 survey describes the two roads in the survey as meeting near the William Bowles house, some distance into the southern section. For ease of reference with current landmarks, the Court is using the Post Farm Road as the dividing line in these findings unless otherwise described; the 1804 survey does not make this distinction.

Ronald Benson owns land he inherited from his father in Royalton, Vt. located between Post Farm Road and Slack Hill Road. This parcel is about 27 acres in size and is to the south of the Hodgdon property. The Hodgdon property fronts Post Farm Road and the Benson property is to the south of Hodgdon. The Hodgdon barn is to the south of Post Farm Road and the farmhouse is to the north of Post Farm Road. If the road is where the Town and the Bensons claim it is, the Hodgdon Farm would be at the northern-most end of the southern section of the road, with the Benson property to its south.

Ronald Benson's brother, Barry, owns a similar sized lot, which is adjacent to Ronald's lot. Their father owned both lots and upon his death, the sons subdivided it, roughly in half. When it was subdivided, they used the old town road as the boundary between their lots. A survey done for the Benson's in November 1985 (Ex T-4) describes the boundary between the two parcels as "1612+/-along centerline road."

The road has been lightly traveled, at best, over at least the past 55 years. Before the hearing on the existence of the public road, the Town of Royalton filed a discontinuance of the northern section (that portion of this road to the north of Post Farm Road). The existence of a town road north of Post Farm Road is not at issue here, except insofar as it bears on the question of whether a town road exists to the south of Post Farm Road and if so, its location.

Where the highway described in the 1804 survey departs Post Farm Road in a southerly direction is a matter of dispute. There is an existing path or lane which runs from Post Farm Road, through the barnyard of the Hodgdon farm and thence southerly to the lands of the Benson brothers. As it goes through the barnyard, the lane runs under the "high drive" (a ramp used to access the upper floor of the barn) of the Hodgdon barn, which was built in approximately 1907. There is a gate across the lane in the Hodgdon barnyard. The Hodgdon's have used the lane to move cattle into several fields to the south of their barn.

A pond was built in a low area in the Hodgdon barnyard in about 1966 and as a result the lane was disturbed in that area and a so-called field road was created by-passing the pond and barnyard and connecting the lane with Post Farm Road. The pond was built for fire protection.

The Bensons' claimed a right of way over the field road, which was contested by the Defendants. That claim was tried to a jury in this action in May 2006, resulting in a defendants' verdict. The Bensons claim the "old town highway" is actually "the lane" running through the Hodgdon barnyard and south to their property. They seek to be able to use this road to access their property.

Perry Hodgdon lives in Randolph, Vermont. He has lived there since 1968. He lived on the Hodgdon property which is involved in this litigation in 1951, when he was 15 years old. At that time, the Hodgdon property was 115 acres. He left the property in 1955 but stayed there one night a week for another three or four years. He got the property in question from his mother's estate in 1987.

Mr. Hodgdon's father farmed on that property. They had a small herd of dairy cows. Post Farm Road runs between the house and barn. The barn is three stories high. There is a high drive on the western end of barn. There is room for vehicles to go under the high drive.

The water flows down into the barnyard. Once the pond was built, the water was directed into the pond. In and around the barnyard it tended to get wet. The barn was built in 1907.

Behind (to the south) the barn the "lane" was used to get the cows into the field. There is a fairly steep pitch going south. Along the lane there are parallel rows of trees running several hundred feet approximately one rod apart.

Mr. Hodgdon is not aware of any public use of the road in his lifetime. The town has not maintained any portion of the roads. He has walked the lane and found no signs of any road. At the point between the Hodgdon property and the Benson's there is a gate. This gate had been there as long as Hodgdon can remember.

There was no objection by the Town of Royalton to the building of the pond in 1966 and no objection to any of the gates across the lane. Towns have the authority to create "pent roads" which are public ways where a town authorizes the use of a private gates, bars or similar restrictions across the road. There is no evidence the Town authorized this lane as a pent road.

The farm pond, barn and gates do not raise doubts as to the existence of the town road. The pond is new, having been built in the 1960s, and the barn has a high drive so people could drive under it and was constructed over 100 years after the 1804 survey. As the area was, and is, quite rural, the existence of gates is compatible with agricultural uses, but not necessarily incompatible with a public road which has received very little public use. That the pond and barn may have encroached on a seldom-used road is scant evidence as to the absence of a road in this area.

In the past, the Bensons have used the route through the Hodgdon farm to get to their property. The Bensons have cut firewood on their land, planted Christmas trees and have camped on the land. Since this dispute has arisen the Bensons have not been able to get to their property through the Hodgdon barnyard. A gate also exists at the location where the lane meets the Bensons' property. The current gate is believed to have been erected by a member of the Benson family. There may have been a gate in that location before the current gate was erected. The existence of a predecessor gate, and its erector, if any, has not been proven.

The Bensons can also reach their property through a right of way from Route 14 to the west of their property along a so-called skid road. Ronald Benson has used that right of way once in the 40 years he has owned the property, a time when he attempted to walk the right of way. It is very steep and could not be easily driven, if at all. The skid road which was used years ago for logging operations is largely overgrown. That this right of way may provide another access to the Benson property is not at issue here. The question before this court at this time is one of public right, not prescriptive rights.

The Bensons' want to be able to use their land and therefore have brought this action, believing that there has never been a discontinuance of the southern section of the 1804 road and that they and the public at large have a right to use it. The Town agrees with respect to that portion of the claimed road lying to the south of Post Farm Road. The Town discontinued the northern section of the road in 2008, although there is no remaining evidence that section of road was ever actually constructed.

When Ronald Benson was a boy, he used to travel on the southern portion of the old town road from time to time. He is not aware of any other uses of the northern part of the southern section of the road, except he was told his grandfather, Raymond Benson, would drive through there once per year on a tractor, believing that by doing so he was keeping the public way open.

The "old town road" to the south of the Benson property (the southern part of the southern section) was used by Henry Dodge to get cattle onto his property from Slack Hill Road. Dodge owned what is now the Frost/Pederson parcel. There is a gate on the old town road at the southern end of the Benson land where the Frost/Pederson (Dodge) parcel begins. At one time the Benson property was used for sheep farming and a fence existed on the eastern side of the property and probably on the western side as well. This serves to explain the gates at both ends of the Benson property.

Over the years, the Bensons have let snowmobilers (VAST) use their property. The Benson property is no longer used for sheep farming and the gates are left open some of the time, especially in winter so that snowmobiles may pass through.

Lisa Ginett is a land surveyor. She has been a registered surveyor since 1986 and has been surveying since the 1970s. She does a lot of work on boundary lines and old roads. In recent years, this type of work has occupied more of her time.

Ginett was hired by the Bensons to investigate the road in question here. Ginett went to the Town of Royalton records and found the original survey to the road in 1804, which was properly recorded. Ginette then did a site inspection to try to determine the road. As indicated, there are actually two roads described in the survey, one on each side of the then-existing William Bowles house located in what this Court has referred to as the southern portion of the road. The southern-most of these roads begins near the William Benson cellar hole and runs south. The northern road runs from near the Bowles cellar hole northward, forming the northern part of the southern section of the road in question and the northern section across the Post Farm Road, which has now been discontinued.

The first of these roads as described started north of Post Farm Rd. at an old beech tree. The old town road is described as running south to the old road (presumably Post Farm Road) at a location three rods east of Squire Cleveland's house. Squire Cleveland's house was near where Hodgdon's farmhouse is now. Its precise location is unknown. Hodgdon's land lies principally in what was originally town Lot 22. There is no remaining evidence on the ground of exactly where Squire Cleveland's house was located. Squire Cleveland's widow received a dowers lot, which calls out a boundary along this disputed road, referring to it as "the road," in a deed (Ex. T-22) in 1836.

Ms. Ginett did not find the beech tree. In fact, Ms. Ginett did little, if any, work concerning the road as it was described north of Post Farm Road. She made no effort to locate the beech tree, assuming all traces of it to have vanished in the 204 years since the survey.

References are made in the 1804 survey to lot numbers. These are the lot numbers originally assigned when the town was laid out. In the 1804 survey, the road is stated to start at a beech tree on the west line of Lot 13. The west line of Lot 13 is a location which Ginett could have determined through survey, despite the presumed absence of the beech tree.

Although there is no visible evidence of a road north of Post Farm Road, there is considerable evidence of one to the south of Post Farm Road. However, if the edge of Lot 13 is used as the starting point, the existing signs of a road seem to be too far to the west. This is confounded somewhat by the inability to precisely locate the Squire Cleveland homestead.

The 1804 survey references the William Bowles house as the point where the two roads described in the survey meet. This point is well south of where Squire Cleveland's home was located. While doing a site inspection, the Bowles cellar hole was located in the spring of 2008 by Gordon Tuthill, a surveyor, and shown to Ms. Ginett. The William Bowles cellar hole is located on Lot 15 and its distance from existing signs of a roadway was precisely as described in the 1804 survey. The Bowles cellar hole is approximately mid-way between Post Farm Road and Slack Hill Road.

The Bowles cellar hole became the point of focus of the road. With the location of the Bowles house and the 1836 Cleveland widow's deed, the location of the road can be determined. The first call in the survey, for the beech tree at Lot 13, does not match up with the rest of the calls and Ms. Ginett disregarded it in reaching her conclusion that the "old town road" exists where the physical evidence indicates a roadway. The record calls in Lot 23, 22, and 21 all match up with the location of the roadway as evidenced on the ground. The calls in old deeds and surveys which reference the road match up with the evidence on the ground if the original point of origin, the beech tree on Lot 13 is not used as the starting point.

Ginett feels that the evidence on the ground of a road case matches reasonably well with the 1804 survey description. Ginett has not done much work on the southern end of the road below the Benson lots, concentrating her efforts on the northern end of the southern section. Site inspection work on the southern portion of the southern section, in the Frost/Pederson lands, was mostly done by Larry Swanson in his work surveying the Frost/Pederson parcel in 2000. Swanson was able to find evidence on the ground of the road all the way to Slack Hill Road. Swanson suggested the existence of a town highway might be an impediment to the title of the Frost/Pederson parcel.

In a few places there are stone walls along the existing signs of a roadway and some mature trees. At places these walls and mature trees are within the surveyed right of way. There were no old culverts found along the old road.

Surveys taken at various times refer to the existence of a road of some nature along the area between Post Farm Road and Slack Hill Road. Map records along with historical data also support the existence of a road in the area of the "old town highway" between Post Farm Road and Slack Hill Road.

In a 1969 survey (Ex T-5) of the Hodgdon property, the "old highway" is referenced as a boundary line. The survey states "Boundaries were old wire fences, stone walls and old highway. All have been in existence for many years." According to Ginett, use of the term "highway" generally connotes a public way.

A license given by Farrand Hodgdon to Everett Benson to use the field road (Ex. T-25) refers to the field road rejoining the "old town wagon road." The Benson property lies principally in what was originally town lot 23.

Ex. T-7 is a survey of the Rodney Clark lands. His property is east of Hodgdon. That survey also appears to reference the old road.

Historically, surveys were made using chains, which were 66 feet in length (4 rods). The 1804 survey does not give a width for the roadway. However, in 1784, the Town of Royalton had made all town roads three rods wide (49.5 feet), a fairly standard width (see e.g. 19 V.S.A. §32, presuming a width of three rods for state highways). The absence of a stated width in the 1804 survey does not render the survey insufficient in light of the 1784 action establishing a designated width for all town roads.

Now surveys are done using modern equipment, including infra-red surveying equipment. The primitive nature of the surveying equipment used, or human error, may be responsible for the starting point of the 1804 road as described in the survey on the lot line of Lot 13 not matching the existing signs of a roadway further to the west and south. To pick up the first call, the entire road would have to be pivoted. By doing so this would have moved the road off from the evidence of the existing road on the ground.

Ex. T-15 is mislabeled as a Wallens (Wallings) map. It was actually a county map done by Doten in 1856, showing mostly town roads. This map shows a road running in the approximate location of the “old highway” from Post Farm Road to Slack Hill Road.

Ex. T-16 is a Beers map done in 1869. It was county map, broken down by town. Beers did not typically map private roads. It shows a road in the approximate location of the “old highway”. Seth Moxley’s house is depicted on the Beers map. A home of Polydore Williams is depicted on both the Wallens and Beers maps, although he never owned land in the Town of Royalton. The Beers and Wallens (Doten) maps (atlases) are frequently used by surveyors.

Seth Moxley is in the chain of title for Hodgdon and owned the Cleveland holdings sometime after Squire Cleveland. The Squire Cleveland cellar hole is no longer in existence. But Seth Moxley and Polydore Williams both had houses on the Squire Cleveland land in close proximity to one another. The Moxley home was slightly to the west of the Williams home. The Beers map shows the disputed road meeting Post Farm Road at a location across Post Farm Road opposite and between the Williams and Moxley houses.

Nash historical records (Ex.T-18) concerning Royalton indicate the Squire Cleveland homestead is no longer in existence and the cellar hole was filled in. The northern call for this disputed road as described in the 1804 survey is said to be three rods east of Squire Cleveland’s house, a point contended to be some distance to the east of where the Beers and Doten maps show the southern portion of the road meeting Post Farm Road. This has been a source of confusion in this case.

The Wallens map shows a B. Cleaveland home (not Squire Cleveland) and shows the southern portion of the road being west of this Cleaveland home, not the three rods east called out in the 1804 survey. Ginett doesn’t know if the Cleaveland home on the Wallens map was Squire Cleveland’s house. The Nash records indicate the B. Cleaveland house depicted on the Wallens (Doten) map is not the Squire Cleveland house. Those records do not rule out the Polydore Williams house as being that of Squire Cleveland. Polydore Williams married a daughter of Squire Cleveland. If the Williams house was Squire Cleveland’s, it was located to the west of where the disputed road is located and much more consistent with the survey description, with the exception of the starting point on the edge of Lot 13 at the beech tree.

The Beers map shows homes for H. Ballou and E. Ballou. H. Ballou is in the Benson chain of title. E. Ballou is in the Frost/Peterson chain of title, located at the extreme southern end of original town Lot 25.

Using all of these materials, Ginette was able to locate the road. There are places where the ground evidence varies from the calls by about 150', but this is in the area from the William Bowles cellar hole southward. This does not create a concern for Ginett. For the most part, the calls line up well with the physical evidence. It is to the south of the Benson land where the physical evidence varies from the calls in the 1804 survey. (Ex. T 19). Where there is drift from the straight line called out in 1804 it is within the three rods.

Before he went to the Frost/Pederson parcel, Swanson had seen some deed calls which referenced an old town road. Accordingly, he was looking for them when he went to the property. The Frost/Pederson property covers a lot of original Town Lot 16. In early 1800s deeds to property in this area the "old town road" is referenced with a 5 rod call.

Swanson found evidence on the ground of an old road. Coming off from Slack Hill Road there was evidence of a slight depression which looked like an old roadbed. Further to the north, there was greater evidence of a roadbed with stonewalls on each side. Where the Pederson property meets the Benson property there was pronounced evidence on the ground of a roadbed. This may have been due to the presence of mature trees in that area or stone walls. Swanson is not sure now, as it has been eight years since he did his survey.

In Swanson's experience historically town roads were not created as dead end roads. It is also quite common for roads on the ground to differ from the location where they were originally laid out.

Swanson did not try to determine where the road was laid out. He did not undertake to survey the existence of the town road. His work was limited to surveying the Frost/Pederson parcel. As part of that work he spoke to two long time local residents, both of whom thought there was a public highway in the area at one time.

Swanson showed the town highway on the survey as a potential encumbrance to his clients, Frost/Pederson. The 1804 calls do not fit the roadbed on the ground by the Frost/Pederson lands and at places are as much as 150 feet from the surveyed call. In other places the evidence of the road is very close to where the 1804 survey indicates it should be.

Margaret Trombley is on the selectboard of the Town of Royalton. The Town hired Gordon Tuthill to conduct tax mapping. The Town feels this is a town road, although the Town has not used it or maintained it during the lifetime of any witness.

Gordon Tuthill is a land surveyor. He started working with the Soil Conservation service in 1945. He stayed with them until 1957. He was then employed with an engineering firm for two years. At that time he developed a forest management business. Later he became a real estate salesperson. In 1970 he became a land surveyor. His historical research involving land started in about 1949. He is no longer licensed as a land surveyor. He let his license lapse due to health concerns in 1999. His lack of current licensure is not a factor in the Court's decision.

Tuthill was first asked to work for the Town in June 2007 when he was asked to determine if the road in question was a Town highway. Tuthill feels it is not. Tuthill did not prepare a survey in this case. He did not plot how the discovery of the Bowles cellar hole affects the preliminary work he did. He did have a survey done by Robert Farnsworth. The Farnsworth survey (Ex. D-CC), done under the direction of Tuthill, does not account for findings on the ground. It does not also properly account for the location of the Bowles cellar hole. The Farnsworth survey is of little value in answering the question before this court.

There was a survey in 1793 which laid out another town road. No evidence on the ground has been found to exist that the road was ever used. This road was substantially east (approximately 26 rods) of the road shown in the Beers atlas. It is not the Bloss/Ballou road. Tuthill feels the 1793 survey has some bearing on the existence of the 1804 survey, but he can not explain what that is. However, in his deposition Tuthill conceded the 1793 survey had no bearing on the 1804 survey.

In 1800, a road was created to access the Bloss farm on Lot 23, 24 and part of Lot 25 from the Branch Road, which was near where Slack Hill Road exists today (a location at the southern end of the southern section of the road in dispute). Tuthill refers to this as the Bloss/Ballou road. Tuthill does not feel the Bloss/Ballou road is the road called out in the 1804 deed. There is a 5 rod call for a road in some old deeds in this area. Tuthill can not be sure the roads called out in the 1804 survey, the Cleveland widow's dower and the 5 rod call is not the Bloss/Ballou road. The descriptions do not fully fit the 1804 description, although they are parallel and close to one another in this southern section.

Tuthill disagrees with Ginett in that her opinion does not account for the first call in the 1804 survey, the road call on the northerly side of Post Farm Road. In Tuthill's opinion, only the endpoint of the 1804 road lies on the Bloss/Ballou road; that portion opposite the Bowles cellar hole.

Tuthill walked the Bloss/Ballou road. He could drive his car to the Benson property across the Hodgdon farm. Tuthill saw some parallel trees on the north end of the alleged road, about one rod apart. The trees were approximately 150 years old. Since these were one rod apart, he felt this was a cattle lane, suggesting a private use.

Tuthill could follow the road through the Benson property. However, when it gets to the Pederson property the road is not visible. Further south, there are two stone walls only 13 feet apart at their closest point, expanding to 27 feet apart. He found no evidence

of any culverts, except one, which was located on Lot 23. He feels if this had been a Town road the culverts would have been more substantial.

Tuthill saw no evidence of parallel fencing in areas where he saw signs of a road. These would be evidence of a town road. He feels the lack of fences suggests the remains of the road which is evident today was not a town road.

Tuthill concedes he has found town roads without parallel fences, mature trees or stonewalls. The absence of fences, mature trees and stonewalls does not mean there is not a Town highway here. Tuthill has found town highways where there were signs on the ground which were less than three rods wide.

Tuthill and Ginett differ on the existence of the road north of the Bowles cellar hole. Ginett says it is the surveyed 1804 road, Tuthill says it is not. Tuthill says the road north of the Bowles cellar hole is parallel to the 1804 survey road but is not the same road. Tuthill was unable to tell how far apart these two roads are. He also saw evidence of only one road on the ground, not two roads parallel to one another.

Tuthill does not feel the existing signs of a road, which he believes to be the Bloss/Ballou Road, is the town highway surveyed in 1804. Despite this, Tuthill used the call in the 1804 survey from the existing roadbed and located the Bowles cellar hole through the use of that survey. This is very strong evidence that the Bloss/Ballou road and the 1804 surveyed road are one and the same road.

The evidence is strong that a road existed between Post Farm Road and what is now known as Slack Hill Road. There is ample reference to a road in this area in deed descriptions, historical maps and in evidence remaining on the ground. This road or path was used many years ago by Ronald Benson when he was a young boy, by Raymond Benson, by Henry Dodge and, in part, by Farrand Hodgdon. The absence of physical evidence of a three rod width road is of little value to the court given the passage of time since the 1804 survey. Many public roads exist with the absence of physical evidence of a three rod width.

The question remains if this evidence of a road is one and the same as the 1804 surveyed road. If the location of the Squire Cleveland home could be determined stronger evidence might exist to answer this question. Even so, the first call in the 1804 deed does not fit the evidence on the ground of that these roads are one and the same. This is the primary source of disagreement between Ginett and Tuthill. Ginett feels the existing evidence in deeds, maps and on the ground is so strong that she disregards the first call in the 1804 survey. Tuthill, being unable to reconcile the first call with the existing evidence on the ground, has concluded the 1804 surveyed road is not the one for which physical evidence still exists.

While the court respects the opinions of both experts, here the opinion of Lisa Ginett is more credible. The evidence found on the ground, especially the Bowles cellar hole, fits too closely with the 1804 survey to be coincidence. Supporting references in the

Beers and Wallens atlases indicate a town road in this area. Deed references also describe a road and a license given by Farrand Hodgdon, father of the current owner, references the “old town wagon road”.

Whether the first call in the 1804 survey was mistaken, or whether it can be explained in some other way, is lost to antiquity. However, when one disregards the first call in the 1804 survey, a portion of the road which may never have actually existed, the remainder of the evidence strongly indicates the 1804 town road is the road or lane which leaves Post Farm Road at the Hodgdon barnyard, runs southerly through the Benson and Frost/Pederson lands and connects with Slack Hill Road.

This road may have been disrupted somewhat by the creation of a pond in 1966, but that disruption of a very short distance given the length of the road is of no moment to the existence of the road. In other locations the road has “wandered” some distance from what is described in the 1804 survey, but many reasons, including the vicissitudes of the times may serve to explain this. These departures from the surveyed road are fairly small in distance and do not create questions as to the existence of the road.

As the Town has never discontinued the road between Post Farm Road and Slack Hill Road, the court finds a town highway continues to exist running from Post Farm Road to the northern end of Slack Hill Road. This road is located as depicted by the marking “centerline road layout 05/08/1804 on Ex. T 19. The road follows the “edge of wheel track” as depicted on Ex. T-19 from the point west of the William Bowles cellar hole until it joins with the “Old Town Highway” or “Woods Road” as surveyed on Ex. T-6. The evidence on the ground indicates the location of this road, using the Bowles cellar hole as the point of reference for further clarity. Consistent with then-existing Royalton law, this road is three rods in width.

### **Conclusions of Law**

Plaintiffs have the burden of proof of establishing the existence and location of this ancient road. *McAdams v. Town of Barnard*, 185 Vt. 259 (2007). Precision as to location is not required, rather reasonable certainty is necessary as to width, distance and points of termination. *State v. Town of Leicester*, 33 Vt. 653 (1861).

In 1804, the Town of Royalton laid out a town highway as described in a survey duly recorded in the Town land records. In 2008, the Town discontinued that section lying to the north of Post Farm Road. The fact of discontinuance is distinct from proof of the existence of the road. *McAdams v. Town of Barnard*, 185 Vt. 259 (2007). It does not matter if the road has not been discontinued if it never existed to start with.

As discussed above, the Plaintiffs have met their burden of proof in establishing the creation of the road in 1804. While sparsely used and not maintained in living memory, proof of earlier use more extensive than within current memory is ample. Proof that the road, as used, was the road surveyed in 1804, at least with respect to the portion lying between Post farm Road and Slack Hill Road is sufficient.

The southern portion of the 1804 surveyed road has never been discontinued. That road is described in the 1804 survey. As the Town has never discontinued this road it continues to be a town highway. 19 V.S.A. §771. Defendants assert that this road has been abandoned by the Town and is subject to claims of adverse possession. The Court disagrees in light of 19 V.S.A. § 1102 and the rule that public use of a highway is discontinued only when the required statutory procedures are followed. *In re Bill*, 168 Vt. 439 (1998); *Capital Candy Co. v. Savard*, 135 Vt. 14 (1976); *Petition of Mattison and Bentley*, 120 Vt. 459 (1958). Furthermore, the presumption of discontinuance which is now contained in 19 V.S.A. § 717 does not apply because this action was begun prior to the enactment of the presumption on May 23, 2006. See 2005, No. 178 (Adj. Sess.), § 14 (explaining that the act “shall not affect a suit begun or pending at the time of its passage”).

Based upon the Court’s findings of fact, the Court concludes that the 1804 surveyed road, from the point it leaves Post Farm Road, is one and the same road as the lane, old town wagon road or old highway, going southerly through the Hodgdon barnyard, thence southerly to the gate at the Benson property line, thence southerly to the gate at the Frost/Pederson property line, thence southerly connecting to the existing Slack Hill Road. This town highway follows the existing signs of a roadway and is three rods in width. The road has wandered slightly over the 200 plus years since it was surveyed. This is to be expected, given conditions on the ground, infrequent use, and the comparatively primitive surveying tools available in 1804. For the area involving the Hodgdon and most of the Benson property the “wandering” is within the three rod right of way. The only location where wandering has occurred to any appreciable degree (i.e. outside of three rods) is in the area opposite the William Bowles cellar hole on the Benson property and southward. This area is not the area of dispute in this case. Where the road has wandered from the survey to the west of the William Bowles farmhouse it follows the “edge of the wheel track” as depicted in Ex. T-19 until it joins the “Woods Road” or “Old Town Highway” as depicted in Ex. T-6. It is unclear to what extent the wandering in that area remains within the three rod right of way from the 1804 survey. Determination of the issues of dedication and acceptance or improper taking are not raised under the facts of this case given the public road on the Hodgdon property is within the three rods of the 1804 survey. *Town of South Hero v. Wood*, 179 Vt. 417 (2006).

This highway is open to the general use of the public, consistent with the laws of the State of Vermont and the Town of Royalton. Any use of this land inconsistent with the existence of a town highway in this location without the permission of the Town shall be discontinued forthwith.

### **ORDER**

Plaintiffs’ counsel shall prepare a proposed judgment order, consistent with the Courts findings and conclusions, and submit the same to the Court within 10 days.

Defendants shall have five days from Plaintiffs' submission to object to the form of the order.

Dated at Woodstock this 4th day of February, 2009.

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Harold E. Eaton, Jr.  
Superior Court Judge