

STATE OF VERMONT
WINDSOR COUNTY, SS.

PEACE & PLENTY PARTNERSHIP,	:	WINDSOR SUPERIOR COURT
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	DOCKET NO. S435-94 Wrc
ANTONIO F. DOGANIERO and	:	
RITA L. DOGANIERO,	:	
Defendants	:	

FINDINGS AND CONCLUSIONS

This matter came before the court for hearing on January 24, 1997. The Plaintiff was represented by Martin Nitka, Esq. The Defendants were represented by Stephen S. Ankuda, Esq. Based on the evidence and the arguments of counsel, the court makes the following Findings and Conclusions.

Findings of Fact

1. Plaintiff owns certain real estate in the Town of Ludlow, being a farm of approximately 378 acres. Plaintiff is a family limited partnership of which G. Harry Welch is the general partner, with members of his family being the limited partners. G. Harry Welch originally acquired the real property in his own name in three separate transactions described below, and subsequently conveyed all the premises to the partnership. All three parcels had been part of the farm previously owned for many years by the Hesseltons. The general outline of the Plaintiff's property is a fat U-shape with north at the open top of the U.

2. Defendants own certain real estate which abuts the lands of the Plaintiff. It consists of two parcels acquired at different times, but both of them originally derived from Hesselton lands. Defendants' lands lie within

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the open middle of the U-shape of Plaintiff's lands, and are surrounded by Plaintiff's lands except on the northerly end.

3. In 1955, the Hesseltons' farm consisted of over 400 acres. In that year, they sold a parcel to Zuroy and Hoffman that was essentially the northern half of the open middle of the U-shape described above. The Hesseltons' own house was located at the bottom of the U, and was accessed from the north by Town Farm Road, which runs along the right fork of the U. Access to the Town Farm house on the Zuroy/Hoffman parcel was along Town Farm Lane, which comes off of Town Farm Road. In the deed to Zuroy/Hoffman, the Hesseltons reserved for themselves, their heirs and assigns certain rights of way:

There are excepted and reserved to the grantors, their heirs and assigns rights of way by teams, autos, or otherwise across the premises conveyed to the meadow below the house, to the so-called sugar lot and to the woodland north of the premises conveyed.

As a result, the Hesseltons had the right to use an existing farm road that ran from their house at the bottom of the U, north up the middle of a meadow south of the Town Farm house, and split into two spurs, one leading east to Town Farm Lane, and one leading west to both the sugar lot on Hesselton land, which was directly west of the Town Farm house, and further north to the woodland area on Hesselton land that curled over the top of the Zuroy/Hoffman piece. The Zuroy/Hoffman piece was burdened by this easement in the following way: the westerly spur crossed the southwest corner of Zuroy/Hoffman land as it led from the field road to the sugar lot and woodlot, and the easterly spur crossed the southeast corner of Zuroy/Hoffman land as it led from the field road to Town Farm Lane.

4. In 1968, G. Harry Welch bought all of the Hesselton farm, except for

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a parcel described as consisting of 50 acres that the Hesseltons retained. He bought 350 acres, together with all "privileges and appurtenances thereof", meaning that he acquired the rights of way the Hesseltons owned to cross the Zuroy/Hoffman parcel on the two spurs at the southerly corners of that parcel. The 50 acres that the Hesseltons retained consisted of essentially the southern half of the open middle of the U-shape described above. G. Harry Welch also acquired a Right of First Refusal on that 50 acres. A long portion of the field road from the Hesselton house leading north to the east and west spurs was located on the 50 acres. The deed to G. Harry Welch did not specifically grant a right-of-way to use the field road crossing the 50 acres and leading to the spurs. Nonetheless, Mr. Hesselton took Mr. Welch in a wagon along the field road and the westerly spur to the woodlands and showed him where and how to get wood. Although this required crossing the 50 acres of retained Hesselton land, Mr. Hesselton did not grant permission, but gave Mr. Welch to understand that it was Mr. Welch's right as owner of the farm to use the field road.

5. In 1968, at the time of the purchase by Mr. Welch, the field road was clear and distinct on the ground, and passable by vehicle, especially the spur leading to the west. The spur leading to the east to Town Farm Lane was slightly overgrown, but still clearly discernible. The field road passed through an opening in a stone wall as it went north from the Hesselton/Welch house, and ruts were visible.

6. Mr. Welch, who was Chair of the Board of the Yale-New Haven Hospital around 1968 and later became its President, purchased the Hesselton farm for use as a second home for himself, his wife, and his four children, who were then ages 5-15. His family, including relatives in his extended family, has

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used the property as a second home since 1968 on a regular and extensive basis. They use it year-round. The house is heated by wood, and all the wood they use they cut and haul from the woodlot on the farm. Mr. Welch mowed the field road and spurs with a tractor and five-foot brushhog every year from the time he bought until the dispute that gave rise to this lawsuit. Over the years the fields were not maintained but Mr. Welch mowed the field roads regularly, and thus they became more distinct. He and his family also used the field road and spurs regularly for snowshoeing, cross country skiing, walking, hayrides, and other recreational purposes. Neighbors, including the Defendants and others, used the roads for similar recreational purposes, as the roadways were open and accessible. Neither Mr. Welch nor any member of his family ever asked anyone's permission to use the field roads, or to mow them. Mr. Welch mowed them and he and his family used them in the belief that the use of the roads was a right that came with ownership of the farm.

7. In 1979, Mr. Welch purchased an additional piece of land from the 50 acre parcel the Hesseltons had retained. This consisted of a long narrow piece of 18 acres along the easterly side of the Hesselton retained land, abutting the right fork of the U of Welch land. The Hesseltons reserved a 50 foot right-of-way east to west across it to permit them to have access from Town Farm Road to their retained land.

8. Also in 1979, the Defendants, Antonio and Rita Doganiero, purchased their first parcel, which consisted of approximately 15 acres and was the southerly portion of the original Zuroy/Hoffman piece. Zuroy and Hoffman had sold the southerly portion, including the Town Farm house, some years before, and it had passed through several owners to Robert S. MacArthur, who sold it to the Doganieros in June of 1979. Throughout each deed in the chain of

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title, the property description stated that the conveyance was subject to exceptions and reservations regarding rights of way contained in the original Hesselton-to-Zuroy/Hoffman deed. Thus, the Doganieros purchased their first property subject to the two spurs that crossed its southerly corners. Mr. Doganiero was an attorney in New Jersey doing exclusively personal injury and worker's compensation work, and Ms. Doganiero was a paralegal. They purchased the property as a second home for themselves and their three children, one of whom was 10 at the time. They have used the property regularly and extensively over the years on a year-round basis. They, like the Welches, have many relatives in their extended family who have also spent considerable time at the property over the years. They have used the field roads at issue here as well as other open roads and trails in the area for walking, snowshoeing, snowmobiling, and general recreational purposes.

9. Shortly after the Doganieros purchased their original property, Mr. Doganiero was outside near the apple tree, which marks the southern boundary of the Doganiero first parcel. He saw someone driving up the field road on a tractor, heading toward the woodlot along the westerly spur. It was Mr. Welch, who stopped and got down and introduced himself. They had a brief conversation, during which Mr. Welch explained about the field road crossing the Hesselton meadow and leading to the woodlot. Mr. Doganiero testified that Mr. Welch stated that he had "permission" from the Hesseltons, and requested "permission" from Mr. Doganiero, which he gave. This is not credible evidence. While it is not clear what words were used to discuss the situation, the credible evidence is that Mr. Welch had the right to use the spurs crossing the Doganiero property, and had no reason to ask permission to cross the Doganiero property, and did not do so. The encounter was a friendly

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one, and the Welches and Doganieros have had good neighborly relations over the years until this dispute erupted in 1994.

10. In the fall of 1980, the Doganieros were at their property when a group of hunters drove from Town Farm Lane along the easterly spur on the southeast corner of the Doganiero land south to the open meadow on retained Hesselton land south of the Doganiero house. The Doganieros spoke to them about their use of the spur and land. They said that Mrs. Hesselton had given them permission to use her right-of-way and land. They left and returned with Mrs. Hesselton, who explained to the Doganieros that she held a right-of-way on the easterly spur to get from Town Farm Lane to her land.

11. In April of 1981, a realtor and two men appeared on the meadow on the Hesselton land south of the Doganiero house. The Doganieros spoke to them and learned that Mrs. Hesselton (now Moodie) was planning to sell her remaining land. They were concerned about the impact of development, and Mr. Doganiero called Mr. Welch, who told him about the right of first refusal he held on that land, and told him he would look into it. Mr. Welch learned of Mrs. Hesselton's desire to sell, and although the two men have different recollections about who called whom, there were further phone calls between them.

12. During the course of those phone calls, Mr. Welch asked Mr. Doganiero if he was interested in purchasing the northern half of the remaining Hesselton land, with Mr. Welch acquiring the southern half. The northern half included the open meadow directly south of the Doganiero house. The field road ran right through it. There was some question about whether Mr. Welch would purchase the entire land and resell the northern portion to the Doganieros, or whether there would be a simultaneous sale to both. Mr.

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Welch was in charge of all the negotiations and communications with Mrs. Hesselton (Moodie) or her realtor. Mr. Welch planned to finance his portion with Mrs. Moodie, as he had done with his other purchases from her. She wanted a mortgage on the whole of what she sold, which complicated the arrangements Mr. Welch was making with Mr. Doganiero. During the telephone conversation between the two men on May 17, 1981, Mr. Welch referred to wanting to maintain the rights of way. During the telephone conversation on May 27, 1981, Mr. Doganiero said he wanted a survey and was prepared to pay cash for his portion, and wanted the rights of way issue reviewed by Attorney Kesman. Mr. Kesman was Mr. Welch's attorney, and not an attorney for the Doganieros. Mr. Doganiero never contacted any attorney of his own, and never had any dealings with anyone except with Mr. Welch by telephone. Mr. Doganiero thought at that time that the meadow piece might be subject to an existing right-of-way. In the end, despite his comment on the telephone on May 27, 1981, he did nothing to check on the right-of-way situation prior to the purchase, and did not review any proposed deeds prior to the purchase.

13. Mr. Welch had Mr. Kesman prepare a proposed Purchase and Sale Agreement between Welch and the Doganieros based on the proposal that Mr. Welch would buy the whole piece and resell the northern portion to the Doganieros. This document was specific about the meadow piece to be sold to Doganiero being subject to a right-of-way over the field road for the benefit of Welch. Mr. Welch signed it and mailed it to the Doganieros on June 5, 1981. The Doganieros claim never to have received it, although it was addressed correctly and was not returned to Mr. Welch. In any event, it was ignored by Mr. Welch, who wound up making final arrangements with Mrs. Hesselton Moodie on the other basis, *i.e.* that separate deeds would be given

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to Welch and to the Doganieros. Mr. Doganiero sent a check for \$10,000 pursuant to telephone instructions from Mr. Welch, and Mr. Welch financed the entire amount of his share of the purchase price with a mortgage loan from Mrs. Moodie secured by his portion only. Closing costs were shared by the purchasers. Mr. Kesman prepared the deeds, which were signed by Mrs. Moodie on June 13, 1981, and made both conveyances "subject to all rights of way of record." There was no specific reference to the field road that ran north and south across both parcels conveyed. The 50 foot right-of-way that Mrs. Hesselton had reserved in the 1979 conveyance to Welch, which is not at issue here, was specifically extinguished.

14. The closing took place in Mr. Kesman's office on June 25, 1981 without either purchaser being present. Mr. Welch checked afterwards with Mr. Kesman by telephone, and wrote to the Doganieros on June 29, 1981 to inform them that the closing had occurred, that the deeds would be returned from the recording office in approximately three weeks, and that the Doganieros must be glad there were "no remaining entanglements." The Doganieros now claim this must have been a confirmation of the termination of rights of way, but that evidence is not credible. The credible evidence is that it is a reference to the Doganieros not having acquired property subject to a mortgage from Mr. Welch to Mrs. Hesselton Moodie.

15. The evidence shows that neither purchaser was attentive to what the deeds would or would not provide for with respect to any right-of-way on the field road across the northern portion. Although Mr. Doganiero had mentioned it on the telephone, it clearly had no impact on the price he was prepared to pay, and he thought that the piece he was buying would be subject to such a right-of-way. He did nothing to address the issue before the closing, and he

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was evidently prepared to accept whatever he got. Although Mr. Welch had been aware of the issue before the closing, as reflected in the proposed Purchase and Sales Agreement he caused to be prepared, his attorney did not prepare deeds that clearly established his right-of-way across the northern portion with the meadow. Mr. Welch was in a position to create a deeded right-of-way, because he held the right of first refusal, and he could have insisted on buying the whole parcel first and conveying half to the Doganieros subject to his right-of-way.

16. At some point not long after the closing, there was a telephone conversation between Mr. Welch and Mr. Doganiero. The evidence is conflicting about what was said. The court finds that Mr. Welch said something to the effect of "I hope this won't change anything between us," referring to the right-of-way situation. It is a reasonable inference from the evidence that by this time Mr. Welch had seen the deed he actually received and realized that it did not specify a right-of-way across the portion acquired by the Doganieros, and he was testing the waters. Mr. Doganiero testified that he told Mr. Welch, "You have my permission to use the property as you have done in the past, until we come up to Vermont to live." It is not credible that Mr. Doganiero was so specific about permission. After listening carefully to the testimony of both witnesses and to the testimony of Rita Doganiero, on both direct and cross examination, and observing the demeanor of all witnesses, the court finds that his response was much more vague, such as "I am not going to object," or "I have no problem with that," and therefore susceptible to different interpretations and recollections. This was not a clear conversation about permission to use land. Both men were being deliberately vague and hoping for the best. It was not a clear

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acknowledgement on the part of Mr. Welch that he needed permission, because his understanding all along had been that he didn't, but it would have been more comforting to have it in the deed, and it was worthwhile knowing whether the Doganieros were going to make an issue of it. It was not a clear grant of permission on the part of Mr. Doganiero, as it is fairly clear that Mr. Doganiero was not fully aware of the exact status of the rights of way. In any event, it did not involve Rita Doganiero. When Antonio Doganiero got off the telephone and Rita asked what the conversation was about, she initially questioned why her husband had raised no objection to the Welches' continued use of the rights of way. She was not pleased, but she decided to do nothing. She did not telephone Mr. Welch to explore the issue or concur in a grant of permission. At no time did the Doganieros write a letter to Mr. Welch making clear that they understood they were granting permissive use of any portion of any property they owned. Rita Doganiero's testimony that the whole purpose of buying the meadow was to cut off the Welches' access to the spurs on the Doganieros' original parcel and make them useless is not credible, as the evidence shows they did not have a clear understanding of the status of the rights of way prior to their second purchase, they did not contact a lawyer or negotiate to protect their position, and they were willing to accept a deed to the meadow with or without an exception for a right-of-way, but knowing that one might exist.

17. On July 22, 1981, Mr. Welch wrote a letter to Mr. Doganiero offering to buy the northern portion that the Doganieros had just bought at a price that would cover all their expenses, and stating that the offer was good until August 31, 1981. Mr. Welch's testimony that he did that because he questioned whether the Doganieros had really wanted to buy the land, and he

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wanted to give them a way out, is not credible. A more reasonable inference from the testimony is that after receiving back the recorded deed, he realized he had not acquired a deeded right-of-way, and he was trying to create an opportunity to rectify that if possible without raising any red flags. At this time, Mr. Welch had owned and used the field roads for a period of 13 years. It takes 15 years of use for adverse use to ripen into an enforceable property interest in the absence of a deeded right.

18. In the years that followed, both families used their properties and the roadways on each other's property as described above, and they had good neighborly relations. The issue of the legal status of the right-of-way never came up.

19. Some time before the spring of 1994, the Doganieros moved to their property in Vermont to live permanently. They acquired sheep and a llama, and enclosed the meadow parcel they had bought in 1981 from Mrs. Moodie with a fence. They built a barn on their original house parcel directly on the site of the westerly spur leading to the Welch sugar lot and woodland. On July 4, 1994, the Welches were at their property, and Mr. and Mrs. Welch and a friend took a walk along one of their usual loop routes, which made use of the field road and the easterly spur linking the field road to Town Farm Lane. They discovered the fence the Doganieros had erected. They had a brief encounter with Mr. Doganiero, who said he had been to a lawyer and that the Welches did not have a right-of-way across the Doganiero land. This lawsuit ensued.

20. Plaintiff seeks a declaration of an enforceable right-of-way 18-20 feet wide across the Doganiero property along the field roads, including both spurs on the original Doganiero parcel, on grounds that there is a deeded right-of-way established in the original Hesselton-to-Zuroy/Hoffman deed, and

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on the basis of adverse use. Defendant claims that the deeded right-of-way was limited to the spurs on the Doganiero house parcel, that there is no deeded right-of-way for the benefit of Plaintiff across the Doganiero second parcel, that the spurs on the Doganiero house parcel were rendered functionless by the conveyance from Moodie to Doganiero without reserving or excepting a right-of-way on the adjoining roadway and therefore any rights of way on the spurs are now meaningless, and that Defendant's grant of permission in 1981 defeats Plaintiff's claim of adverse use for the prescription period.

Conclusions of Law

Based on the foregoing facts, the court makes the following conclusions:

1. Defendants are correct that the Plaintiff did not acquire a deeded right-of-way across the second Doganiero parcel (the meadow piece the Doganieros purchased in 1981) as a result of the right-of-way reserved by the Hesseltons in 1955 in their deed to Zuroy/Hoffman. The Hesseltons still owned that land up to 1981, and did not need to, nor did they, create a right-of-way for their benefit across their own land, which they continued to own until 1981. There is no other deed instrument that could provide the basis for a deeded right-of-way. Plaintiff's claim for recognition of a deeded right-of-way fails.

2. The elements of an easement by prescription include adverse use or possession which is open, notorious, hostile and continuous for a period of fifteen years. 12 V.S.A. § 501; Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 155-56 (1989). Many of Plaintiff's recreational uses were no different than recreational uses made by the Doganieros and other

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neighbors. These include walking, snowshoeing, and cross-country skiing. The uses that signify a clear claim of ownership include the mowing of the roads that Mr. Welch did annually with tractors and a 5-foot brushhog, and the hauling of firewood from a remote owned woodlot on a routine basis with the use of tractors and wagons. These activities were open, notorious, and hostile to the ownership interests of the record title holder. They were done continuously from 1968 to 1994. They were done under a claim of right, as the 1955 Hesselton-to-Zuroy/Hoffman and 1968 Hesselton-to-Welch deeds established Mr. Welch's deeded right to the two spurs on the Town Farm piece, and the Hesseltons, the owners of the meadow from 1968 to 1981, recognized a legal right on the part of Mr. Welch to use their property in a manner adverse to their interests. The question is whether the conversation that Mr. Doganiero had with Mr. Welch on the telephone in 1981 after the Moodie conveyances to them operated to terminate the adverse nature of Mr. Welch's use, and thereby cut off the period of open, notorious, adverse, and continuous use at 13 years. If it did not, Plaintiff, as successor in interest to Mr. Welch, may tack its period of open, notorious, hostile, and continuous use on to such use by Mr. Welch for a recognized easement by adverse use. Id. at 160.

3. "The general rule is that open and notorious use will be presumed to be adverse and under a claim of right, unless there is found an exception which rebuts that presumption, such as evidence of permission of the owner of the land to use the right-of-way." Buttolph v. Eriksson, 160 Vt. 618 (1993) (citation omitted). Here, Plaintiff has proved that Mr. Welch's use from 1968 to 1983 and beyond was adverse to the interest of the title holder, and that it was done under a claim of right. The court has found not credible the Defendants' evidence that they granted Mr. Welch permission in 1981 to cross

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their newly acquired meadow piece until such time as they were ready to use it themselves. Rather, the finding of the court is that although there was a conversation in 1981 about continued use of the field road, its content was vague and inconclusive as to the legal status of the use of the field road. Mr. Doganiero did not clearly communicate to Mr. Welch that he understood that Mr. Welch's use of the field road was adverse to the Doganieros' claim of ownership, but that the Doganieros were extending specific permission for such use. The Doganieros easily could have written a letter with that message, but they did not do so. Instead, knowing that the meadow piece was probably subject to a right-of-way, and knowing that Mr. Welch had exercised a claim of such a right over a period of years; and having failed to clarify the status prior to buying the property when they had a clear opportunity to do so, the Doganieros failed to act clearly to rebut the presumption that Mr. Welch's use of their land was adverse. On the contrary, they acquiesced in such use without a clear expression of a claim to be granting permission for an additional 13 years, until 1994. Even then, they did not erect their fence and barn on the field road until they first had consulted a lawyer. This is not consistent with a claim that they had knowingly granted permission in 1981 such that Plaintiff's use was not adverse because it was based on their explicit permission, which could be revoked at any time. Therefore, the court concludes that the adverse use by Mr. Welch under a claim of right was uninterrupted in 1981, and that it was continued by Mr. Welch and Peace & Plenty Partnership until this dispute arose in 1994.

4. The extent of a prescriptive easement is defined by use. In this case, the right is for use of a right-of-way 18 feet wide along the original field roads. Plaintiff may mow and maintain the right-of-way in an open

condition, and use it for vehicles as well as pedestrians, for agricultural and recreational purposes. Defendants may erect gates to enclose the land for animals as long as Plaintiff has an unrestricted means of passage through the gates. The right benefits those who occupy the Hesselton/Welch farmhouse. In other words, if Plaintiff's land is subdivided, grantees of subdivided parcels do not acquire the right, though the right may be transferred to grantees of the Hesselton/Welch farmhouse.

Plaintiff's attorney shall prepare an Order based on these Findings and Conclusions.

Dated at Woodstock this 21st day of February, 1997.

Mary Miles Teachout
Hon. Mary Miles Teachout,
Superior Court Judge

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