COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11885

MARIA A. KITRAS, et al.,
Plaintiffs-Appellants,

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

APPELLANTS' BRIEF AND APPENDIX

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Explanation of Abbreviations

Add. refers to the Addendum reproduced in this volume.

A. refers to the Appendix of docket entries reproduced immediately after the Addendum.

E. refers to the two-volume set of Exhibits.

T. refers to the volume of nonevidentiary hearings, bound sequentially as T. 4/25/06, 9/12/06, 12/4/06, 1/16/07, 7/10/07, 6/13/08, 9/9/08, 9/30/08, 2/4/09, 6/21/10, and 9/8/10.

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ISSUES PRESENTED FOR REVIEW

1. Whether, on the 19th century documentary record, the plaintiffs' lots have access easements by necessity over lots partitioned out of common Gay Head Indian land by a common grantor acting on behalf of the General Court, where the lots were otherwise landlocked under the common law and the General Court indisputably intended these lots, conveyed to individual members of the tribe, to be both usable and salable.

2. Whether the Land Court erred in reading this Court's decision in Kitras I as foreclosing, on remand, consideration of Lot 178 as among those benefitted by an easement by necessity where

> a) this Court's determination about Lot 178 in Kitras I had no bearing on the outcome of the appeal and thus did not preclude further litigation of this issue; and
>
> b) on remand, the plaintiffs proffered additional evidence that Lot 178 was part of the common land partitioned in 1878.

STATEMENT OF THE CASE

Nature of the Case.

The plaintiffs--Maria Kitras and James J. Decoulos, trustees[1] ("Kitras"), Sheila H. Besse and Charles D. Harding, trustees, and Mark D. Harding[2] ("Harding")--appeal from a Land Court judgment

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[1]Maria Kitras is the trustee of Bear Realty Trust, (lots 178, 241, and 711); and Maria Kitras and James J. Decoulos are the trustees of Bear II Realty Trust (lot 713) and Gorda Realty Trust (lots 232 and 243). A. 122-123. The Land Court inadvertently omitted their ownership of lots 232, 241, and 243. Add. 2.

[2]Mark D. Harding owns lot 554. Sheila H. Besse and Charles D. Harding are the trustees of the Eleanor P. Harding Realty Trust which owns lot 555. A. 123.

declaring that their lots have no easements by necessity over the defendants' land. The locus is in the Town of Aquinnah on Martha's Vineyard.[3] All lots in issue were conveyed to members of the Gay Head Indian tribe in 1878. A chalk of the locus (Add. 20) shows the Kitras lots (numbers 178, 232, 241, 243, 711 and 713); the Harding lots, (numbers 554 and 555); the defendants' lots; and the Moshup Trail, a public way laid out in 1955 which gave the defendants express access to their lots. Add. 5, ¶ 18.

As will be explained later in greater detail, the Gay Head Indians' land fell into two rough categories: land held "in common," meaning land used communally by the tribe, and land held "in severalty," meaning lots claimed by individual Indians by enclosing an area of the common land, usually with a stone wall. E. 29, 195. With one exception--Kitras's lot 178, see pp. 44-50, *infra*--it is undisputed that all of the plaintiffs' lots were partitioned in 1878 from the common land.

Prior Proceedings and Disposition in the Court Below.

In 1997, the plaintiffs sought a judgment in the Land Court declaring that the 19th century partition of

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[3]In 1998, the legislature changed the Town's name from Gay Head to Aquinnah. St. 1998, c. 110.

lots from this common land to their predecessors in title included access easements by necessity over other partitioned lots. They relied, and still rely, on the legal presumption that an easement by necessity "is said to arise (or is implied) ... when a common grantor carves out what would otherwise be a landlocked parcel." Kitras v. Town of Aquinnah, 64 Mass. App. Ct. 285, 291 (2005) (Kitras I, Add. 23) (quoting cases).

In 2003, the Land Court dismissed their complaint for failure to join a necessary party, and in 2005, this Court reversed and remanded the case to decide their easement by necessity claims. Kitras I at 301.

On remand, the Land Court ruled that it would first decide whether easements existed; if so, it would then locate the easements on the ground. A. 116. For several years the parties worked toward submitting the first question to the court on an agreed documentary record, i.e., as a "case stated." Middlesex Ret. Sys. LLC v. Bd. of Assessors, 453 Mass. 495, 498-499 (2009); T. 9/12/06, 84, 105, 2/4/09, 67-72. In late 2008 and early 2009, they submitted proposed exhibits and a document noting their respective objections. A. 251.

Beginning in April, 2009, it became obvious that the "case stated" approach would not work because the

parties could not agree on the evidence. T. 6/21/09, 168. The second issue in the appeal concerns the Land Court's decision to strike Kitras's exhibits concerning lot 178, ruling that in Kitras I this Court "determined that Lots 1-188 or 189 do not hold any easement rights" because not partitioned from common land. Add. 14, 17. Kitras, who had urged that this language in Kitras I was not preclusive, made an offer of proof that Lot 178 was in fact carved from the common land. A. 300.

The case went to the Land Court on documents alone, and on August 12, 2010, it ruled as follows:

> Assuming *arguendo* that the presumption [of an intended easement] articulated in Davis v. Sikes, [254 Mass. 536, 545-546 (1926)] is applicable to this case, this court finds that Defendants have produced sufficient evidence to rebut the presumption. Add. 8.

The lower court was persuaded by three of the defendants' arguments. First, it relied on the maxim, *expressio unius est exclusio alterius*, ruling that the Commissioners' reservation of peat and fishing rights in some of the partition deeds "negatives . . . any intention to create easements by implication." Second, the court relied on the tribal custom which allowed "for access for each member of the tribe as necessary over [Indian] lands held in common and in severalty;" for this reason, the court ruled, the commissioners

who partitioned the Indian land "likely assumed easements for access were unnecessary." Third, the court ruled that the land was so "unfertile and unusable" that the commissioners did not take the trouble to give the grantees access to it. Add. 8-11.

On May 3, 2011, a Final Amended Judgment entered, and the plaintiffs claimed timely appeals.[4] A. 426, 457-460.

Facts Relevant to the Appeal.

Factual overview of the case.

At the heart of this case is one factual question: whether Massachusetts officials, when dividing about 1900 acres of Indian common land in 1878 and conveying the resulting lots to individual members of the tribe, intended mutual easements by which every land owner had the common law right to get to and from his or her lot.

As the Land Court recognized, Add. 6-9, a rebuttable presumption helps to answer this question:

> The law presumes that one will not [convey] land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it .... This presumption prevails over the ordinary covenants of a warranty deed. Davis v. Sikes, 254 Mass. 540, 545-546 (1926).

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[4]The plaintiffs do not appeal the summary judgment against them on their prescriptive easement claims over Zack's Cliff Road and the Radio Tower Road. A. 54.

This rule of law was firmly in place and presumably known by the state officials who made these conveyances in 1878. Brigham v. Smith, 70 Mass. 297, 298 (1855); Nichols v. Luce, 41 Mass. 102, 103-104 (1834).

These officials were appointed as part of a broad legislative initiative to improve the status and wellbeing of the native peoples of Massachusetts. This initiative effected momentous changes for the Gay Head Indians in particular. Between 1869 and 1878, they became citizens of the Commonwealth; their ancestral lands became a Town, entitling them to representation in the General Court; and they became fee owners of real property, with the power to alienate their land.

Until then, Massachusetts owned the fee to the land in Gay Head. Under the common law, the tribe members' "Indian title" was a mere "right of occupancy" which the state had the exclusive power to extinguish and which, if conveyed to anyone outside the tribe, the courts would not enforce. Kitras I, 292-293; James v. Watt, 716 F.2d 71, 74-75 (1st Cir. 1983).

Historical Background to the 1878 Partition.

In 1817, *The North American Review* reported:

> The west end of Martha's Vineyard containing 3000 acres of the best land in the island, and including Gay Head, is reserved for the Indians established at this place and their descendants.

> ... The land is undivided; but each man cultivates as much as he pleases, and no one intrudes on the spot, which another has appropriated by his labor. They have not the power of alienating their lands, being considered as perpetual children, and their property committed to the care of guardians appointed by the government of Massachusetts.

E. 231.

In 1828, for reasons unnecessary to relate, the Gay Head Indians began living as the direct wards of the state, without a guardian. E. 34-35. For the present purposes, little changed for them until 1859.

> *April, 1859-March, 1862*: Commissioner Earle recommended that the General Court extend "the sanction of the law" to lots held by individual tribe members in severalty but recommended against dividing the common land, which he described as "the largest, best and most valuable portion of the property of the tribe."

By the middle of the nineteenth century the General Court, which had been a national leader in targeting discrimination against African-Americans, Jones v. Afred F. Mayer Co., 392 Mass. 409, 474 (1968), was feeling the pinch of conscience about the Indians. Among other indignities, they could not vote, hold or transfer the fee title to their land, make contracts, sue or be sued. E. 34, 127.

By St. 1859, c. 266, the General Court appointed John Milton Earle to investigate and report on the Indians' social, political, and economic condition.

The big question was whether they should "be placed immediately and completely, or only gradually and partially, on the same legal footing as the other inhabitants of the Commonwealth." Among Commissioner Earle's tasks was to identify "all property of [the Indians] in lands, and whether the same is held in severalty or in common ...." E. 14-15.

In his 1861 report he documented his observations of a dignified, civil people as well as the "fearful work" done to them by "the prejudice of caste, social exclusion, and civil disfranchisement." For practical and ethical reasons, he reported, "[t]he condition of the several tribes presents a broad field for the exercise of a wise benevolence." E. 20-23.

He specifically found the Gay Head Indians, living on a peninsula and "almost isolated from the rest of the world," to be "a frugal, industrious, temperate and moral people," who had made more progress than "any other tribe in the state." They had also "suffered so much from outside interference in their affairs that they have become very fearful of it...." E. 31-33. For example, as of 1861 they were opposed to becoming citizens, and Earle thus recommended against it because of "[t]he prejudices of color and caste, and the fears

of the burdens it might impose ...." E. 39.

For purposes of this case, Earle's most significant findings and recommendations concerned the Gay Head Indians' relationship to land. About 450 of the 2,400 acres on the Gay Head peninsula, he found, "is held in severalty, and is fenced and occupied by the several owners, and the remainder is held by the tribe in common." E. 26.[5] By tradition, these common lands were reserved for communal use and communal benefit. Earle described the land as follows:

> The surface of Gay Head is uneven and somewhat hilly, with a great variety of soil, some of it of excellent quality, affording fine pasturage for cattle, and this constitutes almost the sole resource of the tribe for revenue to support their poor. Cattle are brought hither from other parts of the Vineyard, and from the main, for pasturage, and the income therefrom is paid into the public treasury. It amounts to about $225 a year, and is wholly applied to the relief of the poor. The only other sources of income, are, from their cranberry bogs and their clay. These are both public property. . . .
>
> The land is generally rough, affording abundance of stone for fencing, and a considerable amount of what is not taken up and enclosed, or is not used for pasturage, is grown up to bushes, which afford convenient summer fuel for common culinary purposes. E. 28-29.
>
> Also by tradition, any member of the tribe could

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[5]Surveys later showed that the total acreage was "nearer 3,400, of which a little less than one-half [was] held in severalty." E. 71 (footnote).

fence or wall off any part of the common land for private use and then hold this lot in severalty:

> Any member of the tribe may take up, fence in, and improve as much of the [common] land as he pleases, and, when enclosed, it becomes his own . . . . The benefit to the plantation of having more land subdued and brought into cultivation, is considered a fair equivalent for its value in the natural state, and the title to land, so taken up and enclosed, is never called into question.

E. 29, 38.

For the most part, Earle observed, this "unwritten Indian traditional law" respecting land worked well, and the people "are fearful of any innovations upon it." E. 29. He recommended against dividing up the common land, in part because the people opposed it and in part because they used income from this land to support the poor. The common land, he reported, was "the largest, best and most valuable portion of the property of the tribe" E. 37.

By contrast, Earle recommended that the General Court take action concerning the severalty lots enclosed and held by individuals. Their rights, he noted, were insecure, having been "acquired under [the Indian traditional law], from generation to generation" but without legal protection from acts of "disaffected or unprincipled individuals." With respect to these lots, Earle concluded, "[t]he sanction of the law ought

... to be, at once, extended to the rights thus obtained in good faith." E. 39-40.

1862-1866: The General Court charged Charles Marston, and then Richard Pease, with establishing titles to the severalty lots and with fixing the boundaries of the severalty lots and the common lands.

After receiving Earle's report, the General Court acted swiftly. In April, 1862, it passed a law "plac[ing all Indians] on the same legal footing as the other inhabitants of the Commonwealth." While this part of the law excluded the Gay Head tribe, it moved them toward equality by turning the Gay Head Plantation into a district. Excepting the right of legislative representation, Gay Head now had all the powers of a town, including the right to hold property.[6] Its clerk was thus ordered to make and maintain "a register of the lands of [the Gay Head district], as at present held, whether in common or severalty, and if in severalty, by whom held." St. 1862, c. 184 §§ 4,5.

The General Court also adopted Earle's recommendation to give the Gay Head severalty lots the protection of the common law. In 1863 it passed a "Resolve Relating to the Establishment of Boundary

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[6]G.S. 1860, ch. 18, § 9; Hill v. Easthampton, 140 Mass. 381, 384 (1886), citing Opinion of the Justices, 3 Mass. 568, 572 (1807).

Lines of Indian Lands at Gay Head," Add. 33, appointing a commissioner

> to determine the boundary lines between the individual owners of land located in the Indian district of Gay Head, ... and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands ... E. 55.

Over the next three years, the first commissioner, Charles Marston, met with members of the tribe who claimed enclosed lots as their own and trod the land with a surveyor. After three years, however, he had to withdraw because of illness. In March, 1866, he reported that he had identified the boundaries and adjusted the claims to "very large proportion of the lots." He provided a record book of the titles he had recorded. E. 60-62, 342-381.

In April, 1866, the General Court authorized Richard Pease to complete Marston's work. Resolves, 1866, c. 67; E. 64-65, 70-71.

> *1869-1870: the General Court enfranchised the Gay Head Indians as citizens, made Gay Head a Town, transferred the common land to the Town, and authorized its partition.*

After the Civil War ended in 1865, the next five years of Reconstruction--during which time Congress took extreme action to try to secure Negro suffrage in

the resistant states[7]--saw momentous changes in the legal status of the Gay Head Indians.

In 1869, the General Court enfranchised all Indians of Massachusetts, making the people of Gay Head "the recipients of the glorious privileges of Massachusetts citizenship in full." Because they did not live in a town and thus had no right to legislative representation, however, their citizenship created a "political anomaly:" these new privileges "could neither be exercised nor enjoyed." E. 69, Add. 35.

A legislative committee sent to investigate the people's readiness strongly recommended that Gay Head be made a town, E. 69-78, and also weighed in on the ongoing issue of land. With respect to the ownership of individual lots, it noted Pease's progress and characterized this work as "absolutely essential," given the Indians' new legal status as citizens.

With respect to the common lands, it recommended that, if the Indians themselves wished to divide them, this should be done:

> This land is uneven, rough, and not remarkably fertile. A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the

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[7]United States v. Price, 383 U.S. 787, 801-805 (1966).

> owners had the means; but, deficient as they are in "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused. This, however, is a question of "property," which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.

E. 71.

In April, 1870, two months after the committee filed its report, the legislature passed Chapter 213 of the Acts of 1870, incorporating the Town of Gay Head, conveying all common lands to the new Town, and authorizing partition of these lands.

This statute, which kept the power to convey Gay Head land in the state, changed the process by which the General Court had been addressing the question of land ownership. Under the new procedures, a Dukes County Probate Court judge had administrative oversight over all changes in ownership. With respect to the severalty lots, the court was to appoint

> two discreet, disinterested commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, and the title and boundaries thus set forth and described, being approved by the court, shall be final ....

As for the common land, if the court, the Gay Head selectmen, or "ten resident owners" petitioned for partition--and if the court found that partition was in the parties' interest--it was to entrust this task to the same two commissioners. E. 84-86.

Within four months, seventeen Gay Head citizens petitioned the Probate Court "to appoint two proper persons to divide and set off our parts in severalty to us of all the common land in Gay Head." E. 87-88.

The court granted the petition. In late 1870, it appointed Richard Pease (Marston's replacement in the 1863 severalty lot work) and Joseph Pease

> [1] to make division of all the Common and Undivided Lands of the people in the Town of Gay Head, among those inhabitants of said Town entitled to any portion of the same, defining the part thereof assigned to each one by suitable metes and bounds; [and]
>
> [2] to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, as required by Chapter 213, Section 6, of the Statutes of the year 1870. E. 101.

May, 1871: Pease completed Marston's work, identifying lots 1-173 as severalty land and mapping the boundaries of these lots and the common lands.

On May 22, 1871, Richard Pease filed "a Report of the Commissioner Appointed to Complete the Examination And Determination of All Questions of Title to Land and

of all Boundary Lines Between the Individual Owners at Gay Head," informing the legislature that he had "concluded his labors." E. 109. His report included indices of the new titles to lots numbered from 1 to 173 and of each new owner by name and lot number. E. 152-160. He also included a map showing the "lands of individual owners and the general fields or commons" at Gay Head, E. 66, 779, and twenty-one sectional plans, showing the same information on a larger scale. E. 130, 161-183.

Pease described the land this way:

> 'The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests.' The surface is irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
>
> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. A very large portion of the lands now enclosed, was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value. As it has been cleared up, fenced and tilled, its value has largely increased. . . . While yet, as a community, poor and without and men of wealth, their circumstances are improving. E. 109-110.

An earlier visitor, he said, described the soil as "good, wanting nothing but industry and proper

management to render it capable of producing every kind of vegetable in perfection." E. 114.

Pease further noted that his finished census of the Gay Head inhabitants "will be of great service in the work, yet to be performed, of dividing the common lands, under the provisions of the Act by which Gay Head was made a township." E. 131.

His comprehensive report included Massachusetts' somewhat murky claim to the Gay Head land and the history of the Indians' lack of "absolute control over their land." On their inability to sell their land freely and other legal disabilities, Pease opined:

> It is hardly to be wondered at, then, that the Indians were "thriftless and improvident," for some of the most powerful incentives to elevate a man were wanting. E. 128.

Like others of his generation, Pease placed property ownership high on the list of social values. See, e.g., Bartemeyer v. Iowa, 85 U.S. 129, 136 (1873) ("it has now become the fundamental law of this country that life, liberty, and property [which include 'the pursuit of happiness'] are sacred rights, which the Constitution of the United States guarantees to its humblest citizen..."); Paul v. Virginia, 75 U.S. 168, 180 (1868) (the Privileges and Immunities Clause guarantees freedom to acquire and enjoy property).

These were the values of the legislators who, when the Indians asked to partition their common lands, gave them this power. This, the legislators believed, was "a question of 'property,' which every 'citizen' should have the privilege of determining himself...." E. 71.

The 1878 Partition of the Gay Head Common Lands and Conveyance of Individual Titles to Lots 174-736.

In 1878, the Peases filed their final report to the Probate Court. They asserted that they had

> . . . made and completed a division of the common land and undivided lands of Gay Head, among all the inhabitants of that town, adjudged to be entitled thereto; and have made careful and correct description of the boundaries and assignment of each lot in the division; and have also examined and defined the boundaries of those lots held or claimed by individuals of which no satisfactory record evidence of ownership existed.
>
> In accordance with the almost unanimous desire of the inhabitants, the Commissioners determined to leave the cranberry lands near the sea shore, and the clay in the cliffs undivided; it being, in their judgment impracticable to make a division that would be, and continue to be an equitable division of these cranberry lands, and of the clays in the cliffs, owing to the changes continually being made by the action of the elements. E. 188.

With this report they submitted a map entitled "Plan of Gay Head Showing the Partition of the Common Lands." E. 188-189, 196. Plaintiffs prepared a map showing the lands conveyed in 1871--lots 1-173--and the new lots listed in the 1878 report--lots 174-736. E.

194. All the plaintiffs' lots are in the 1878 group. A. 122-123.

The Peases categorized the lots as follows:

> The lots of common lands drawn or assigned by the Commissioners Joseph T. Pease and Richard L. Pease duly appointed by Hon. Theodore G. Mayhew, Judge of Probate for Dukes County, are numbered from No. 189 and upwards in regular order. Lots No. 1 to No. 173 inclusive were run out and bounded under previous provision of the statutes. The record of these lots will be found in Land Records 49 Book pages 116-187 inclusive.
>
> Lots No. 174 to No. 189 were run out and bounded afterwards, by the Commissioners who made partition of the Indian Common lands. The description of these lots, their boundaries and ownership are here given. E. 190, 193.

Thirty-seven of the 562 individual deeds included a reservation of the "rights to peat on the premises": twenty-six deeds reserved peat rights for named owners of other lots,[8] and ten reserved peat rights "that may justly belong to any person or persons to them their heirs and assigns." In addition, three deeds reserved

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[8]The grantees of peat rights--a source of heating fuel--in others' lots and the number of each grantee's homestead lot were William Jeffers (Lot 156), Thomas Jeffers (Lot 167), William Vanderhoop (lot 131), Deacon Simon Johnson (Lot 165, Patrick and John Divine (Lot 159), Jonathan Francis (Lot 104), Elizabeth Howwasswee (Lot 79), Isaac Rose (Lot 153), George Belain (Lot 56), Tristram Weeks and Louisa David (Lots 72 and 79), Simon Tristram Weeks (Lot 72), Abram Rodman (Lot 152), Aaron Cooper (Lot 110), heirs of Lewis Cook (Lot 395). One person--Horatio Pease, not a member of the tribe, E. 137-147--owned no separate lot yet was granted peat rights. Add. 21.

to the proprietors of the Herring Fishery a strip on either side of the creek "for the purpose of fishing and clearing the creeks." Add. 21.

All lots burdened with peat and fishing profits, like all lots of the plaintiffs' predecessors, were landlocked. None of the partition deeds--whether reserving profits or conveying title--included explicit access easements. The profit grantees had no legal way to get to their products or remove them from the land, just as the title grantees had no legal way to get to and from their land.

For simplicity, throughout this brief the grantor of the 1878 lots is identified as the General Court, which authorized the Commissioners and the Probate Court to act on its behalf. Add. 36.

SUMMARY OF ARGUMENT

Because the case concerns land development on Martha's Vineyard, it may arouse strong feelings. This lengthy litigation continues to be hard fought. But the law is plain. On the documentary record, to be reviewed *de novo*, the plaintiffs proved that their lots have appurtenant access easements by necessity.

They indisputably proved their entitlement to the legal presumption that the parties to these 1878

conveyances intended to include access easements. As this Court found in Kitras I, all three elements needed for the presumption are rock solid. At the time of partition, a common grantor held title to the common land, Br. (Brief) 26-27; that unity of title was severed by the act of partition into multiple lots, Br. 27; and those lots lost access to a public way as a result of the partition, Br. 27-28.

The historical record of these conveyances adds rock solid support to the parties' presumed intent to include common law access with each lot. In allowing the Indians to choose to partition their common land, the General Court expressly focused on the people's constitutional right to *sell property*--a right denied them during their long history as wards of the state. Without transferable, common law access rights, these lots were useless and unsalable, and the Commissioners, who acted for the General Court--could hardly have intended this cruel outcome. For their part, the Indians would hardly have intended to trade a vast tract of accessible common land for single, unsalable lots. Br. 28-31

The reasons proffered by the defendants to rebut the plaintiffs' presumptive access rights neither make

sense nor comport with the record.

The first reason is the untenable notion that the common land was so "unusable"--i.e., worthless--that the General Court did not bother to include access rights. The record is clear that the General Court knew that the land had a variety of uses: as pasturage for animals, as a source of bushes for fuel, and--with fertilizer and labor--as a future source of productive agricultural land. Br. 33-36.

The second reason is the untenable notion that, because Indian law gave the grantees access over each other's land, the General Court did not consider common law access rights necessary. The General Court is presumed to have known that all Indian rights were extinguished before partition, when it transferred the common lands to the new Town of Gay Head. Br. 36-38. Further, the record is clear that the General Court intended to convey *salable* lots; and it is presumed to have known that the Indian grantees could not legally convey any Indian law access rights. Br. 38-41.

The third reason is the untenable notion that, because the General Court conveyed other rights--profits à prendre for peat and fish--it did not intend to convey access rights in the lots. The record is

clear that it included no access rights with the profits, either. Without access, both the lots and the profits were equally useless and unsalable. The parties cannot have intended either result. Br. 41-43.

Also discussed is the Land Court's erroneous refusal to consider Kitras's Lot 178 among those severed from the common land in 1878. Br. 44-50.

I. BECAUSE THE GENERAL COURT IS PRESUMED TO HAVE INTENDED THE INDIAN GRANTEES TO HAVE LEGAL ACCESS TO THEIR PARTITIONED LOTS, AND BECAUSE THERE IS NO EVIDENCE OF ANY CONTRARY INTENT, THE PLAINTIFFS' LOTS HAVE ACCESS EASEMENTS BY NECESSITY.

A. Applicable Principles of Law.

Standard of Review. The Land Court decided the case solely on documentary evidence, so "this court is in the same position as was the trial judge to decide the issues." Guempel v. Great American Ins. Co., 11 Mass. App. Ct. 845, 848 (1981). Review of all factual and legal issues is *de novo*. Board of Registration in Medicine v. Doe, 457 Mass. 738, 742 (2010).

Easement by necessity: substantive law.

"[W]hen land is conveyed which is inaccessible without trespass, except by passing over the land of the grantor, a right of way by necessity is presumed to be granted; otherwise, the grant would be practically useless.... [A]ll that is required is that a way over

the grantor's land be reasonably necessary for the enjoyment of the granted premises." Schmidt v. Quinn, 136 Mass. 575, 576 (1884). This "settled rule of property law," Leo Sheep Co. v. United States, 440 U.S. 668, 679 (1979), "can be traced back in the common law at least as far as the 13th century." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (a) at 203 (2000). Its rationale is common sense: the parties' presumed intent to include "rights necessary to avoid rendering the property useless." Id.

Most typically, the rule applies to access rights. "In a conveyance that would otherwise deprive the owner of access to property, access rights will always be implied, unless the parties clearly indicate they intended a contrary result." Id., comment (b), at 204.

There are three basic elements of an easement by necessity; "necessity alone does not an easement create." Kitras I at 298. These elements are (a) unity of title, i.e., the grantor having owned both dominant and servient estates; (b) a conveyance which severs this unity of title; and (c) necessity arising from that conveyance. Kitras I at 291; RESTATEMENT, supra, at 206. Necessity "is not limited to absolute physical necessity. It means that the [access rights]

must be reasonably necessary." Davis v. Sikes, 254 Mass. 540, 546 (1926), citing Pettingill v. Porter, 90 Mass. 1, 6-7 (1864); RESTATEMENT, supra, at 207.

These elements establish a legal presumption that the parties intended the grantees to have "a legal right of access" to their land. Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New Eng. Railroad v. Railroad Comm'rs., 162 Mass. 81, 83 (1894). "This presumption prevails over the ordinary covenants of a warranty deed." Id.

Because of the "strong likelihood" that the parties did not intend to make the property useless,

> servitudes by necessity will be implied unless it is clear that the parties intend to deprive the property of rights necessary to its enjoyment. Thus, servitudes for rights necessary to enjoyment of the property will be implied unless it affirmatively appears from the language or circumstances of the conveyance that the parties did intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of implied servitudes for rights necessary to its enjoyment.

RESTATEMENT, supra, at 208. Once established, this easement runs with the land. Id., § 1.1 at 8-9.

Easement by necessity: burdens of proof and persuasion.

The burden of establishing an easement by necessity is on the parties asserting it, i.e., Kitras

and Harding. Krinsky v. Hoffman, 326 Mass. 683, 688 (1951). As the 1878 grantees' successors, they are aided by "the principle that a deed is to be construed most strongly against the grantor and that the law will imply an easement in favor of the grantee more readily than it will in favor of the grantor." Id..

They are also aided by the law of presumptions:

> Presumptions. A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statute, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. ... A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

MASSACHUSETTS GUIDE TO EVIDENCE, § 301(d) (2011).

B. On Its Face, The Record Establishes a Legal Presumption That the Commissioners Intended the Indian Grantees to Have a "Legal Right of Access" to The Lots Partitioned From the Common Lands.

The undisputed circumstances of the 1878 partition establish the parties' presumed intent to include a legal right of access. Every Land Court judge to consider this question has acknowledged as much. A. 69 (Green J.); Add. 8 (Trombly, J.); Add. 42-43 (Randall, J.); Add. 54-56 (Cauchon, J.).

1. *Unity of title.*

At the time of the 1878 partition, the common land

was owned by the Town of Gay Head, with the state retaining the power to convey it. Chapter 213 of the Acts of 1870 provided: "All common lands ... held by the district of Gay Head are hereby transferred to the town of Gay Head, and shall be owned and enjoyed as like property and rights of other towns are owned and enjoyed." Add. 36. Assuming *arguendo* that any "Indian title" remained in the common land once it was conveyed to the town,[9] that title was held in common by all members of the tribe. Accordingly, whether held solely by the Town or jointly by the Town and the tribe, there was unity of title in the common lands.

2. *Severance of unity of title.*

That unity of title was severed by the 1878 partition of the common lands into separately-owned lots, as authorized by the General Court in 1870.

3. *Necessity resulting from the 1878 conveyances.*

As a result of the 1878 partition, the plaintiffs' lots became landlocked. Kitras I at 293-294. Implied easements were thus reasonably necessary to give the new owners "a legal right of access" to their lots. Davis v. Sikes, 254 Mass. 540, 545-546 (1926), quoting New York & New England Railroad v. Railroad Comm'rs.,

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[9]For the contrary position, see pp. 36-38, *infra*.

162 Mass. 81, 83 (1894).

As a matter of law, the parties to the 1878 conveyances are thus presumed to have intended a "legal right of access." Davis, supra; Mt. Holyoke Realty Corp. v. Holyoke Realty Corp., 284 Mass. 100, 106 (1933); Viall v. Carpenter, 80 Mass. 126, 127 (1859).

C. The Historical Purpose of These Conveyances, to Ensure the Gay Head Indians' New Constitutional Right to Alienate Their Property, Cements the Commissioners' Presumed Intent That Their Lots Would Have Legally Enforceable Access.

A central purpose of the General Court's 1870 decision to authorize voluntary partition--one year after it enfranchised all Massachusetts Indians, 1869 Mass. Acts c. 463, § 1, and three years after it ratified the Fourteenth Amendment, James v. Watt, 716 F.2d 71, 75 (1st Cir. 1983)--was to allow individual Gay Head Indians to own and convey property like every other citizen. The Land Court's ruling that the General Court did not intend these new property owners to have legally-enforceable rights to access their lots disregards the compelling historical record of the 1870 Act and its constitutional underpinnings.

The General Court could not have made clearer its overarching intent in 1870 to give meaningful content to the Indians' new citizenship, just gained in 1869.

In explicit language, the General Court stated its intention to fix two glaring anomalies incompatible with "all the rights, privileges and immunities" of citizens. St. 1869, c. 463, § 1, Add. 35; U.S. Const., am. 14, § 1.

First, because Gay Head was not a town, its citizens had no right to representation in the General Court and thus could "neither exercise[] nor enjoy[] their new privileges. E. 69; Hill v. Easthampton, 140 Mass. 381, 384 (1886). In 1870, the legislative committee sent to investigate this question recommended making Gay Head a town, despite its poverty and high percentage of people of color. Quoting the still-unratified 15th Amendment, the committee urged that

> the time has long gone by when in the Commonwealth of Massachusetts equal political rights and privileges will be refused to any citizen or body of citizens "on account of race, color, or previous condition of servitude." E. 77.

The second "political anomaly" was the new Gay Head citizens' rights in 1,900 acres of common land without the legal power to divide or convey any of it. The same committee recommended that the General Court authorize partition because of the Indians' right to make "disposition of their landed property:"

> This ... is a question of "property," which every "citizen" should have the privilege of determining

> for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes.

E. 71. It is noteworthy that the committee quoted section 1 of the Fourteenth Amendment,[10] which the General Court had recently ratified.

The General Court's prompt decision to authorize partition was thus born of the impulse to give the Gay Head Indians the property rights to which they were entitled under the Fourteenth Amendment. These "[l]egislators believed that the only proper course was to wipe out 'all distinctions of race and caste, and [place] all [the state's] people on the broad platform of equality under the law." Ann Marie Plane and Gregory Button, *The Massachusetts Enfranchisement Act: Ethnic Contest in Historical Context, 1949-1869*, 40 ETHNOHISTORY 587, 588 (1993), quoting Joint Special Committee on Indian Affairs, "Report on the Indians of

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[10] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., am. 14, § 1.

the Commonwealth," 1869 House Document 483 (Mass. State Library, Special Collections, State House, Boston): 13.

One of the most disabling aspects of their status as wards of the state--noted in reports to the General Court in 1862 and 1871--was that they "could make no sale of their lands to any except other members of their tribe." E. 34, 127. Only a partition which included legal access rights would allow such sales and thus remove this legal disability.

Behind the legal presumption in issue here--the General Court's intent to give the Gay Head Indians land with lawful access--is this history of white settlers' descendants, inspired by the post-Civil War amendments, seeking to expand the Union's freedoms to its Indian residents. This history compels the conclusion that the General Court intended the property rights conveyed to be rights in *salable* land. Salable land requires access rights that run with the land.

D. Nothing in This Record Rebuts The Parties' Presumed Intent to Convey Access Rights By Showing Their Contrary Intent, i.e., Their Desire to "Convey Land Without Direct Means of Access."

In order to overcome the presumption that the parties intended to convey legal access rights, Massachusetts law and the RESTATEMENT are in harmony.

In Massachusetts, the evidence must show that the

parties affirmatively "[desired to] convey land without direct means of access." Orpin v. Morrison, 230 Mass. 529, 533 (1918). In Orpin, the clear, direct evidence held to rebut the presumption was "a conversation between [grantor and grantee] to the effect that no right of way over other land of the former would attach to the lot conveyed to the latter." Id. at 531.[11]

Similarly, under the RESTATEMENT the evidence must be "clear that the parties intend to deprive the property of rights necessary to its enjoyment." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (e) at 208 (2000). The RESTATEMENT's first illustration is a deed to landlocked property which flatly states, "This conveyance does not include any rights of ingress or egress over other property of grantor, including grantor's adjacent right of way." There is no implied servitude for access here, the authors assert, "because

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[11]Notably, Orpin--based on direct evidence of the parties' subjective intent *not* to include access--was criticized as allowing parole evidence to trump the "elementary principle that the grant of a thing carries with it whatever is reasonably necessary to its enjoyment." Comment, *Evidence of Intention as Rebutting Ways of Necessity*, 29 YALE L.J. 665 (1920). See, e.g., Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985) ("[w]hat is required...is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based on the circumstances of the conveyance").

the intent not to create a servitude is clearly stated." Id. at 209.

The record here contains no such evidence. Mindful that review is *de novo*, we show why the Land Court was wrong to rule that "Defendants have produced sufficient evidence to rebut the presumption." Add. 8.

> *1. The General Court expressly believed that the partitioned lots were a resource which could be developed with fertilizer and labor.*
>
> The Land Court ruled:
>
> [T]he perceived condition of the land negates any presumed intent to create an easement. . . It is clear on this record that the common land was believed to be "uneven, rough, and not remarkably fertile" and that the legislators believed that the land would "lie untilled and comparatively unused" following the division of the common land. . . . It is clear from the record before this court that the land was believed to be unfertile and unusable." Add. 10.

In short, according to the Land Court, the legislators saw no need to give the Indian grantees any access at all to their "unfertile and unusable" lots.

This selective reading of the record omits the General Court's explicit statement that the common land could easily be brought into productive use. Here is the full passage from its committee's 1870 report:

> This land is uneven, rough, and not remarkably fertile. A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the owners had the means; but, deficient as they are

> in "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands,[12] than to be divided up into small lots to lie untilled and comparatively unused. This, however, is a question of "property," which every "citizen" should have the privilege of determining for himself . . . .

E. 71. In short, the committee believed that if the Indians were slightly less poor they could make the common land "reasonably productive." It also recognized the land's current value as pasturage--echoing Earle's observation that the common land "afford[s] fine pasturage for cattle" and "constitutes almost the sole resource of the tribe for revenue to support their poor." E. 28-29. By definition, land which can be made "reasonably productive" and which already provides "fine pasturage" is not "unusable."

Indeed, the legislators' characterization of the land as "*comparatively* unused" because "untilled"--a notably non-Indian perspective--is a far cry from "unusable" land. Poor people make what use they can of their resources; as Earle noted, these were a "frugal" people who used even the bushes of the common land as "summer fuel for common culinary purposes." E. 28-29.

A year after the committee issued its 1870 report,

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[12]The people decided to keep the cranberry lands in common, i.e., in the Town. E. 188.

Commissioner Pease echoed their view that the common land had potential. He began by quoting Earle's observation that "a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests."[13] He then described how the people had improved the severalty lots earlier claimed from the common land, and how these methods could benefit the still-rough common land to be partitioned. Pease spoke with hope of their progress:

> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. A very large portion of the lands now enclosed,[14] was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value. As it has been cleared up, fenced and tilled, its value has largely increased. . . . While yet, as a community, poor and without and men of wealth, their circumstances are improving. E. 110.

Nowhere in this record does a single legislator or person acting for the General Court suggest the view that the partitioned lots were "unusable." On the

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[13]Pease quoted a different visitor's description of the soil as "good, wanting nothing but industry and proper management to render it capable of producing every kind of vegetable in perfection." E. 114.

[14]As noted, "the lands now enclosed" refer to the severalty lots which individual Indians severed from the common land with a stone wall. E. 29, 195.

contrary, they expressly believed the lots to be a usable resource. All that was needed was rockweed, labor, energy and skill. And, of course, access.

2. The General Court knew that Indian access rights, even if still extant at the time of partition, could not make these lots transferable.

The Land Court also mistakenly found for the defendants for this reason:

> The prevailing custom among the tribe at the time of division allowed for access for each member of the tribe as necessary over lands held in common and in severalty. The commissioners were familiar with this system and likely assumed easements for access were unnecessary given the tribal culture at the time. This fact also negates any presumed intent to create an easement.

Contrary to the Land Court's finding, the record contains no clear evidence that the parties "likely assumed easements for access were unnecessary given the tribal culture at the time." The General Court knew more about the law and tribal rights than the Land Court attributed to them. They knew that tribal rights were, if not extinguished, not transferable.

> a) The General Court likely doubted that any traditional rights remained in the Gay Head common land by the time of partition.

It is unlikely that the General Court believed that any vestige of Indian title remained at the time of partition. While it was aware that the Indians shared their common land, E. 38, it is also presumed to

have been "aware of the statutory and common law that governed" this same matter. Globe Newspaper Co., Petitioner, 461 Mass. 113, 117 (2011).

In 1862, the General Court, bestowing citizenship on many Indians but not on the Gay Head tribe, provided that any Indian, upon becoming a citizen of the state, "shall not thenceforward return to the legal condition of being an Indian." St. 1862, c. 184, § 2. In 1869, the General Court made the Gay Head Indians citizens. St. 1869, c. 463. With this act, it likely believed that Indian law was extinguished on Gay Head.

Other legislative acts had the same likely effect. In 1870, when incorporating Gay Head as a town, the General Court transferred all the common lands "to the town of Gay Head," which it empowered to own and enjoy the land as the "property and rights of other towns are owned and enjoyed." St. 1870, c. 213, § 2. Legally, upon this transfer to the Town, which then held the common lands "for the public use of the inhabitants," G.S. 1860, ch. 18, § 9, those inhabitants' "aboriginal rights [were] extinguished." Clark v. Williams, 36 Mass. 499, 500-502 (1837). The General Court

presumably was aware of this holding.[15]

At the latest, the General Court likely viewed any lingering aboriginal rights as extinguished upon partition, when the Indians' new fee title merged with their "right of occupancy" into fee simple absolute. James v. Watt, 716 F.2d 71, 74-75 (1st Cir. 1983); Cf. Farnum v. Peterson, 111 Mass. 148, 151 (1872) (merger of title and possessory interest).

b) The General Court, intending to convey *salable* property, knew that property with only tribal access was not salable.

Assuming *arguendo* that the General Court believed that traditional Indian access rights on Gay Head survived partition, those rights provided no "legal right of access"--i.e., no access enforceable in Massachusetts courts. Davis v. Sikes, 254 Mass. 540,

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[15]In 1878, the General Court is also presumed to have believed that the state had the exclusive control over its Indian residents and title to their lands, without concurrent federal control. Danzell v. Webquish, 108 Mass. 133, 134 (1871).

Congress eventually confirmed that aboriginal land rights were extinguished when the General Court transferred the common land to the newly-incorporated Town of Gay Head. In 1987, Congress retroactively approved transfers of Gay Head land "by, from, or on behalf of any Indian ... or tribe ... of Indians,... including any transfer pursuant to the statute of any State, and the incorporation of the Town of Gay Head," and affirmed that aboriginal title was "extinguished as of the date of such transfer." 25 U.S.C. §1771b(a),(b).

545-546 (1926). Without a common law easement, any Indian who conveyed his partitioned lot to a non-Indian with the claim that his aboriginal access rights ran with the land would have conveyed a useless, landlocked lot. The part of the conveyance which purported to convey traditional Indian rights was *void ab initio*. Pells v. Webquish, 129 Mass. 469, 471-472 (1880); James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983).

A conveyance of landlocked property with access only by Indian tradition was facially incompatible with the lofty goals of the General Court, on whose behalf the Commissioners acted. In 1871, Pease reported to the legislators that authorizing the Gay Head Indians to sell land to non-members of the tribe would provide them with one of the most "powerful incentives to elevate a man." E. 127-128. Given this mission, it is unlikely that the General Court "desired to" convey unsalable lots without transferable access rights. Orpin v. Morrison, 230 Mass. 529, 533 (1918).

The Land Court's attribution of that desire to the General Court--in effect, the desire to perpetrate a cruel ruse on new citizens, under the guise of ensuring their constitutional rights--runs contrary to every enlightened intent recorded in the legislative history.

Pulling back from these separate points of law to the big picture, the General Court's likely view of the Gay Head Indians' rights at partition was simple. These legislators likely believed that the Indians' ownership of real property was now governed by the common law alone, just like every other state citizen. See, e.g., Drew v. Carroll, 154 Mass. 181, 184 (1891).[16] Their intent to equalize the Indians' legal status is printed in black and white on the record of their actions. E. 69-71, 134, Add. 31,[17] 35;[18] A. Plane and G. Button, *The Massachusetts Enfranchisement Act: Ethnic Contest in Historical Context, 1949-1869*, 40 ETHNOHISTORY 587, 588 (1993).

The Land Court took one bare fact--the General Court's knowledge of the Indians' pre-partition

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[16]St. 1869, c. 463, Add. 35, gave each member of the Herring Pond tribe a right to partition his share of the common land. Id. at 183-184. Once the statute took effect, "every Indian belonging to the tribe had precisely the same kind of right in the lands of the tribe that an ordinary tenant in common has in the lands held by himself and his co-tenants." Id. at 184.

[17]Upon becoming a citizen of Massachusetts, a person "shall not thenceforward return to the legal condition of an Indian." St. 1862, c. 184, § 2.

[18]All Indians of Massachusetts are declared citizens and "entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject." St. 1869, c. 463, § 1.

"prevailing custom" of sharing the common land, Add. 9-10--far beyond its logical reach. As shown, the General Court is presumed to have known much more than this about the law of Indians and real property. At a minimum, they knew that the post-partition survival of Indian access rights was uncertain enough to make an implied common law easement "reasonably necessary." Davis v. Sikes, 254 Mass. 540, 546 (1926).

3. The General Court's reservation of profits in several lots without legal access supports the presumption that it intended the grantees to have legal access to their own lots and to their profits on others' lots.

The Land Court also mistakenly ruled that the parties did not intend access easements because the Commissioners reserved and conveyed rights to peat and fishing rights in some of the lots but reserved and conveyed no mutual access easements in any of them. Add. 5 ¶¶ 15, 16. The court ruled:

> [D]espite the fact that the 1871 and 1878 divisions landlocked certain parcels, no easements, other than those [that] were specifically granted, were intended. Defendants point to Joyce v. Devaney, 322 Mass. 544 (1948) and this court finds its analysis persuasive. "The deeds at the time of severance created the specific easements .... Those easements are unambiguous and definite. The creation of such express easements in the deed negatives, we think, any intention to create easements by implication. Expressio (sic) unuius est (sic) exclusion alterius." Joyce 322 Mass. at 549; see also Krinsky v. Hoffman, 326 Mass. 683, 688 (1951)

> ("[The trial judge] could have attached considerable weight to the fact that, while the deed expressly created an easement in favor of the grantee on the six foot strip owned by the grantor, it contained nothing about a similar right being reserved to the grantor over the grantee's strip. The subject of rights in the passageway was in the minds of the parties and the fact that nothing was inserted in the deed reserving to the plaintiffs rights similar to those granted to the defendant is significant.") . . . . In light of the express easements granted by the commissioners, the failure to provide any easements for access appears intentional and serves to negate any presumed intent to create an easement. Add. 8-9.

This reasoning turns the law of implied easements on its head. Unlike Joyce (express easement for access to garage) and Krinsky (express easement for access to grantees' parcel), the peat and fishing rights conveyed here had nothing to do with access. These "profits" or "profits à prendre" conveyed the right to enter another lot owner's land and to remove peat and fish. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2(b) at 12 (2000). Profits are not "similar" to access rights.

Rather, an owner of profits *needs* access rights, and the partition deeds to profits suffer from the same omission as the partition deeds to land: they gave the grantees no access to the property rights conveyed. Without an implied access easement, the profits were useless. For this reason, the RESTATEMENT provides as follows:

> A conveyance of a profit will include a right of access to the subject of the profit. The implied rights necessary to enjoy profits ... are often called secondary easements.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment b at 204 (2000). The General Court's conveyance of otherwise landlocked profits supports, rather than negates, the plaintiffs' easement by necessity claim.

The canon of construction, "expressio unius est exclusio alterius" thus has no sensible application here. Without access, a profit and a lot are equally useless. The fact that the General Court conveyed ostensibly useless profits hardly shows their *desire* to do so, much less their *desire* to convey hundreds of useless lots. Orpin v. Morrison, 230 Mass. 529, 533 (1918). Nor does their failure to provide legal access to the profits make "clear" that they intended to deprive either the profits or the lots "of rights necessary to [their] enjoyment." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.15 comment (e) at 208 (2000).

> *4. The General Court's silence about the obvious lack of access in these deeds is a legally neutral fact common to all cases of easement by necessity.*

Finally, we must address this Court's observation, relied upon by the Land Court, that the Commissioners were "silent" about the obvious lack of access for the "vast majority of the set-off" lots. Add. 8-9, citing

Kitras I at 299. Respectfully, this observation applies in every single case of easement by necessity. Without a deed noteworthy for its lack of access, these cases would not exist. The absence of language conveying access to land defines the question; it does not suggest the answer. Schmidt v. Quinn, 136 Mass. 575, 576 (1884) (reversing and finding easement by necessity "even though a right of way might have been expressly included in the [conveyance] but was not"); Viall v. Carpenter, 80 Mass. 126, 128 (1859) ("A reservation, in terms, of 'a way of necessity,' would confer no further right than would be conferred by operation of law, without those words").

As noted at p. 6, *infra*, the General Court is presumed to have known the common law of implied easements of necessity, which was settled law in 1878 and remains settled law today. This Court is asked to uphold that law and rule that the plaintiffs' lots have implied access easements.

II. KITRAS LOT 178, LIKE THE PLAINTIFFS' OTHER LOTS, IS ENTITLED TO AN ACCESS EASEMENT BY NECESSITY.

A. The Land Court's Ruling About Lot 178 on Remand and the Applicable Principles of Law.

The Land Court erroneously excluded Kitras Lot 178 from the remand proceedings, Add. 14, as follows:

> [I]t is clear from the 2005 Appeals Court decision in this case that the court properly considered and foreclosed the issue of which lots were held separately and which lots were held in common ownership; Lot 178 is among the former. This determination ... is explicitly a threshhold determination made by the court in order to reach the question of whether the United States is an indispensable party. The Appeals Court found, affirmatively, that Lots 1 through 188 or 189 do not benefit from an easement implied by necessity but that Lots 189 or 190 and above may be so benefitted, and remanded the case to this Court for further proceedings consistent with that opinion. Therefore, the issue of whether Lot 178 was held in separate ownership has been adjudicated, and this Court has no authority to consider it further. Add. 18.

This ruling is reviewed *de novo*. Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011).

B. This Court's Determination About Lots 174-189 Was Not Essential to Its Decision in Kitras I.

The narrow question in Kitras I was whether the plaintiffs' easement claims were properly dismissed for failure to join an indispensable party. Here is the holding on this question:

> [G]iven the possibility that at least some easements by necessity benefitting lots formerly part of the common land properly could be routed on nontribal land, and because any easement claims that do affect the Settlement Lands may be resolved by joining the Tribe directly, we do not think that the United States is an indispensable party within the meaning of Rule 19. Id. at 298.

To reach this question, this Court first needed to decide whether "easements by necessity may be implied for some or all of the lots in question." Id. at 291.

That is, the main question was moot unless at least one lot qualified for this easement. On the summary judgment record, this Court determined that lots 189 and upward all qualified. Based solely on this ruling, it decided the main question. Id. at 293-294.

In this crucial sense, its contrary determination about lots 1-189--that, lacking unity of title, these particular lots did not compel the Court to decide the "indispensable party" question--was a finding with no "bearing on the outcome of the [appeal]" and thus no preclusive effect on remand. Jarosz v. Palmer, 436 Mass. 526, 533 (2002). "If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded." Id., quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment h (1982).

The Land Court thus erred in holding that this Court made "a threshhold determination [about Lot 178} in order to reach the question of whether the United States is an indispensable party." Add. 18. Even after this Court proceeded to decide that question based on "Lots 189 or 190 and above," it included Kitras Lot 178 as one of the "lots at issue" in considering the possible location of the easements. Id. at 294.

The only "threshhold determination" upon which the Kitras I decision depended was the determination that "easements by necessity may be implied for some . . . of the lots in question." Id. at 291. The decision was not "dependent upon" which lots did or did not qualify for the easement. Jarosz, supra.

C. The Record, Including Kitras's New Documents Improperly Stricken Based on Issue Preclusion, Showed That Lot 178 Was Part of the Common Land Partitioned in 1878.

In 1870, as noted at pp. 26-27, *infra*, when the General Court transferred the common land to the Town of Gay Head, there was unity of title in this land.

In 1871, Commissioner Pease reported to the General Court that he had "concluded his labors," E. 109," i.e., he had completed Marston's work in fixing the boundaries of the severalty lots *and* the common land. E. 55. His report included a surveyed map and sectional plans showing 173 severalty lots and the common land, i.e., "The General Fields or Commons." E. 130, 161-183, 779. Pease noted the "work yet to be performed, of dividing the common lands." E. 131.

On the face of this record, all lots created after Pease's 1871 report--lots 174 and above, including Lot 178--were thus carved out of the common land owned by the Town of Gay Head and shown on Pease's map.

Lot 178 thus qualifies for an easement by necessity: until 1878, there was unity of title in the Town; partition destroyed that unity of title; and, as a result of partition, Lot 178 became landlocked.

Assuredly, Lots 174-189 are in a peculiar category of their own. The 1878 Commissioners divided the Gay Head individual lots into three categories: lots 1-173, conveyed in 1871 as severalty lots, E. 151-160; lots 174-189, described as "run out and bounded afterwards, by the Commissioners who made partition of the Indian common lands;" and lots "189[19] and upwards," described as "the lots of common lands drawn or assigned by the Commissioners...." E. 190.

The Commissioners explained that Lots 174-189 were outliers: "lots held or claimed by individuals of which no satisfactory record evidence of ownership existed." E. 188. So far as the evidence shows, the only "record evidence of ownership" under Indian law was an enclosure, typically a stone wall. E. 29, 195.

On remand, Kitras relied on the following evidence as additional factual support that Lot 178 had never been enclosed and was carved out of the common land.

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[19]Lot 189, irrelevant here, is a conundrum; the Peases placed it in two separate categories. E. 190.

In 1863, an Indian named Zaccheus Howwasswee made a will leaving his wife, Elizabeth, "my homestead and the dwelling house and all other buildings standing thereon, together with all other of my lands however situated or bounded, whether owned in severalty *or in common with others*. . . ." E. 781, emphasis added. In 1870, the General Court conveyed the common land to the Town. E. 84. In 1871, Richard Pease conveyed severalty lots 51, 79, 93, 94 and 96 to Zaccheus, lot 79 being his homestead. E. 153, E. 789-791. In 1873, Zacheus died. In 1878, the Commissioners conveyed Lot 178 to his widow, Elizabeth.

In an affidavit, Kitras's surveyor attested that lot 178 was not adjacent to any of the Howwasswee severalty lots; that he found "no stone walls ... which define any of the boundaries of Lot 178;" and that Lot 178 was "located on the General Fields or Commons, as shown on" Pease's 1871 map and sectional plans. E. 793; A. 300-304.[20]

Had the Land Court properly considered this post-remand evidence, it should have found that this lot was

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[20]See, LAND COURT MANUAL OF INSTRUCTIONS FOR THE SURVEY OF LANDS AND PREPARATION OF PLANS, §§ 2.1.3.5.9 and 3.2.4 (importance of stone walls as evidence of property lines).

part of the common land until bounded and set-off to Elizabeth in 1878. At a minimum, Kitras is entitled to a trial on this issue.

CONCLUSION

The Kitras and Harding plaintiffs ask this Court to reverse the Land Court's decision; to order the entry of a judgment declaring that all their lots have access easements by necessity; and to remand the case to locate those easements on the ground. With respect to Lot 178, the Kitras plaintiffs alternatively ask for a trial to determine whether this lot was part of the common lands until bounded and conveyed in 1878.

Respectfully submitted,

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