SJC-11885

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2012-P-0260

DUKES COUNTY

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

v.

TOWN OF AQUINNAH, et al.,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE
LAND COURT

BRIEF OF THE DEFENDANT-APPELLEE VINEYARD CONSERVATION SOCIETY, INC.

Jennifer S.D. Roberts
BBO No. 541715
LaTanzi, Spaulding & Landreth, P.C.
8 Cardinal Lane
P.O. Box 2300
Orleans, Massachusetts 02653
(508) 255-2133

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STATEMENT OF ISSUES

Whether the "clearly erroneous" standard of review required by Rule 52(a), Mass. R. Civ. P., and as interpreted by the Federal courts is applicable.

Whether, under the applicable standard of review, the trial court correctly concluded that no easement by necessity was intended for the benefit of the plaintiffs-appellants'[1] lots.

Whether the trial court correctly refused to reconsider on remand an issue previously decided by this Court, and whether, on this appeal, this Court should similarly decline to do so.

STATEMENT OF THE CASE

Nature Of The Case

Defendant-appellee Vineyard Conservation Society, Inc. ("VCS") accepts the Plaintiffs' description of the nature of the case, excepting (1) that "[a]ll lots in issue were conveyed to members of the Gay Head Indian tribe in 1878," Appellant's Brief at 2, lot 178 having been held in severalty before then, and (2) that the creation of Moshup Trail gave the defendants-

[1] Appellants Maria Kitras, James J. Decoulos, Mark Harding, Sheila H. Besse and Charles D. Harding, in the capacities described at Appellants' Brief, p. 1 ns. 1-2, are hereinafter referred to as "Plaintiffs."

appellees[2] "express access to their lots," id., as a number of Defendants' lots remain without access even after the construction of Moshup Trail. See Add. 20.[3]

Prior Proceedings And Disposition Of The Case Below

VCS accepts the Plaintiffs' description of the prior proceedings and disposition of this matter below, except that (1) it was clear by September, 2008, not April, 2009, that the "case stated" approach would not work because of disagreements over evidence, see T. 9/9/08 at 9-12, 20, 24-25, 28-31, and (2) the trial court did not conclude that the land was of such poor condition "that the commissioners did not take the trouble to give the grantees access to it," Appellants' Brief at 5, but that "the perceived condition of the land negates any presumed intent to create an easement." Add. 10.

In addition, VCS notes that, after this Court issued its decision in Kitras v. Town of Aquinnah, 64

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[2] Appellees, along with VCS, are the Town of Aquinnah, the Commonwealth of Massachusetts, the Martha's Vineyard Land Bank, Jack and JoAnn Fruchtman, Caroline Kennedy and Edwin Schlossberg, and David and Betsy Wice. A121. They are referred to collectively herein as "Defendants." Benjamin L. Hall, Jr. and Brian M. Hall, nominally defendants but aligned with the Plaintiffs in this proceeding, have also appealed, A461-464, and are not included as "Defendants."

[3] VCS employs the abbreviations used in Appellants' Brief.

Mass. App. Ct. 285, *rev. denied*, 445 Mass. 1109 (2005) (hereinafter "Kitras"), one of the Plaintiffs filed an application for further appellate review on the issue of whether this Court erred in concluding that lots 1 through 188 or 189 did not have unity of title with lots 189 or 190 and above. A. 93-114. The application was denied. A. 115.

In addition, after remand, plaintiffs Kitras and James J. Decoulos filed two unsuccessful motions to amend the complaint to assert claims of access benefitting lot 178 on theories of easement by estoppel and easement by grant. A. 205-29.

Facts Relevant To The Appeal

Plaintiffs place the 1878 partition of common lands in Gay Head in the context of the civil rights battles of African-Americans in the mid-nineteenth century.[4] As is set forth below, the history of Indian common lands and enfranchisement is not so neatly circumscribed as Plaintiffs would have it and, in any event, does not support the proposition that tribe members were left with unmarketable and unusable land. The record does support the trial court's conclusion that no easement by necessity was intended.

[4] See, e.g., Appellants' Brief at 6-7.

A. Land Ownership In Aquinnah Prior To 1776

The early history of Aquinnah land title is set forth in Kitras, 64 Mass. App. Ct. at 286-287:

> The area of Martha's Vineyard originally known as Gay Head, now the town of Aquinnah, was "and is still the home of a remnant of that race, which … the white man found here as lords of the soil." Report of the Commissioners, 1856 House Doc. No. 48 at 3. On May 6, 1687, 'Joseph Mittark, sachem of Gay Head," as an Algonquian and chief's son, purportedly deeded Gay Head to New York Governor Thomas Dongan. Id. at 6. Dongan, in turn, on May 10, 1711, transferred his fee to an English religious entity. Id. at 4. This entity neglected Gay Head, neither "demanding rents" nor "exercising over it any jurisdiction or control." Id. at 5.

Fee title to Indian lands passed to the individual states at the time of the Revolutionary War. James v. Watt, 716 F.2d 71, 74 (1st Cir. 1983). The thirteen original states ceded their claims to the western territories to the central government, but retained title to the Indian lands within their borders. Id.

B. The Status Of Various Tribes Between 1776 and 1869

In Massachusetts, after the Revolutionary War, Indians "were wards of the Commonwealth, and the title to the lands occupied by the several tribes was in the Commonwealth, and its use and improvement were regulated from time to time by the Legislature." In Re Coombs, 127 Mass. 278, 279 (1879). From that time

through the late 1800s, the Legislature took an active, although sometimes unfortunate, interest in issues unique to the Indian tribes under its care.

1. The Acts of 1789, 1834 and 1842 And The Division Of The Marshpee Land

As early as 1789, in response to concerns about the state of land titles in the plantation of Marshpee, the Legislature passed an act requiring that the overseers or guardians of the plantation ascertain who were "proprietors" of that plantation and create a record book of the same. St. 1789, c. 52.

In 1834, the legislature passed an act establishing the District of Marshpee, St. 1834, c. 166, § 1. That act delegated the management of the tribe's common lands (but not legal title) to the selectmen, id. at § 6, and confirmed Marshpee proprietors "in the peaceable and exclusive enjoyment of all lands which they heretofore may have rightfully held and improved in severalty." Id. at § 7. Rather than record these in the county Registry of Deeds, the act ordered the commissioner to "enter upon a book, to be kept for that purpose, a description of all the several lots so held by the proprietors in severalty," id., and provided that a proprietor could transfer his

land to any other proprietor and that, in the absence of heirs, his interest would escheat to the proprietary. Id. at § 9.

In 1842, the Legislature passed an act ordering the partition of some of the Marshpee common lands. St. 1842, c. 72. Each proprietor, or their heirs, was to receive an allotment equaling 60 acres when added to the land, if any, held by them in severalty. Id. at § 4. Any remaining land would continue to be held in common. Id. at § 6. And, with respect to the land held in severalty, that land would have "all the incidents of estates in fee" except, among other things, the right of transfer to anyone other than a proprietor. Id. at § 8.

The partition, largely of land covered with valuable wood, was not a success. As set forth in the Report of the Commissioners, 1849 House Doc. No. 46 ("Bird Report"), tribe members sold off the wood and, once that was gone, were left with nothing of value with which to support themselves. E260-261. The Bird Report described this as "one of the mistakes of past legislation . . . suggesting the importance of care in avoiding similar mistakes in future." E262. Twelve years later, in the Report to the Governor and Council

Concerning the Indians of the Commonwealth, 1862 House Doc. No. 215 ("Earle Report"), Earle described the division of the Marshpee lands as "a measure which has proved disastrous to the Marshpee tribe." E37.

2. The Acts Of 1811 And 1828 And The Division Of The Chappaquiddick Land

The division of the Chappaquiddick tribe's land, authorized by the Act of 1828, stands in contrast to the experience of the Marshpee. As described in the Bird Report, the Chappaquiddick were "far in advance of any other tribe in the State. … These favorable changes, they attribute partly to the division of their lands under the act of 1828." E241. In 1828, commissioners divided 487 acres among 17 families, reserving 205 acres for public purposes. Id. at E242.

By 1849, some 20 years later, the authors of the Bird Report concurred with the Chappaquiddick's guardian that the common lands should also "be wholly and finally divided." E244. The division of the common lands was accomplished by Jeremiah Pease and Richard Beetle, pursuant to the 1828 Act. Their report, dated December 27, 1850, was recorded at the Dukes County Registry of Deeds. Report of the division of Indian lands at Chappaquiddick, E749. Of

particular note, the commissioners provided for access to the common lands so divided:

> A road or cartway, by gates and bars, for the accommodation of all concerned, is reserved to and from Cohog Point, so called, on the Southeast side of said Neck; and also, on the Southwest side of said Neck from the Pond to the Harbor.
>
> We have also reserved a road leading from the Swimming Place Road, so called, to Sampson's Hill, for the accommodation of the persons herein named, to whom the wood land is set off; and a road leading from the Landing Place to the road on the Northeast side of the Indian Line fence, said road being twenty feet in width.
>
> It is also intended that the persons, to whom the Peat Swamp is set off, shall have the privilege of passing to and from their several shares of said swamp with carts, teams, &c. for the purpose of taking their Peat &c.

E773.

C. The Status Of Land Titles In Gay Head

By the Act of June 25, 1811, the Governor of the Commonwealth was authorized to appoint "three proper persons to be guardians to the Indian, mulatto, and negro proprietors of Gay Head." Earle Report at E34. Guardians were appointed, but, the Indians being dissatisfied with them, they resigned and the guardianship disappeared. Id. at E35.

The Act of 1828 authorizing the division of Chappaquiddick land further provided that whenever the people of Gay Head voted to accept that Act, then the

Governor could authorize a guardian to act and, upon their request, appoint suitable persons to divide their land. Earle Report at E35. The members of the tribe never voted to do so. Id.

By the time of the Bird Report in 1849, the condition of the Gay Head Indians was recognized as different from that of the other tribes of the Commonwealth. The Bird Report contains a letter from Leavitt Thaxter, guardian of the Chappaquiddick and Christiantown tribes of Martha's Vineyard, whom he described as "both surrounded with a white population, with whom they have intercourse, the tendency of which, is, to assimilate them in manners, customs, &c." Bird Report at E310. Of the Gay Head tribe, Thaxter stated that "[t]he Gay Head Indians are differently situated. They live on a peninsula, and have little intercourse with the whites; consequently, they are more peculiar in their manners and customs, and are not so far advanced in the art and science of agriculture, as the two first-mentioned tribes." Id.

Regarding Gay Head, the authors of the Bird Report noted that "[t]he legal condition of this tribe is singularly anomalous." Bird Report at E253.

> For about thirty years, they have been without any guardian, and the division of their lands, and indeed the whole arrangements of their affairs, except of the school money, have been left to themselves. None of the lands are held, as far as we could learn, by any title, depending for its validity upon statute law. The primitive title, possession, to which has been added, inclosure [sic], is the only title recognized or required. The rule has been, that any native could, at any time, appropriate to his own use such portion of the unimproved common land, as he wished, and, as soon as he enclosed it, with a fence, of however frail structure, it belonged to him and his heirs forever. That rule still exists.

Id. at E254. "They do not know, and they do not want to know, under what law they live." Id. at E257. The authors of the Bird Report "urge[d] particularly the importance of confirming the titles of proprietors of lands held in severalty, and of fixing the law of division and descent." Id. at E290.

In 1859, John Milton Earle was appointed commissioner to "examine into the condition of all Indians and the descendants of Indians domiciled in this Commonwealth, and to make report to the governor." Earle Report at E14. Once again speaking of the Gay Head tribe, Thaxter wrote to Earle regarding the division of the lands: "I fear the consequences of any material change, especially relative to the Indians of Gay Head, who are

differently situated than any of the others, especially from their isolated position." E4-5.

As noted above, Earle considered the distribution of land in severalty to individual Indians in Marshpee to have been "disastrous." Earle Report at E37. Earle concluded that the Indian traditional law employed in Gay Head, allowing as it did for ownership of land in common, rather than the Commonwealth's laws, "worked well." E39. Earle described the tribe's customs regarding land ownership as follows:

> Any member of the tribe may take up, fence in, and improve as much of this 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 in question. … To outsiders it seems strange that such a community should live together in peace, from generation to generation, holding real estate in common and severalty, yet without any recorded title of that held in severalty, or any written law regulating its transfer or descent. Yet it is no more remarkable than the whole civil polity of the tribe, by which a community residing in the State, and nominally of the State, and subject to its laws, is yet a sort of *imperium in imperio*, not governed by the laws to which it is nominally subject, but having its own independent law, by which all its internal affairs are regulated. This law is the unwritten Indian traditional law, which, from its apparently favorable working, is probably as well adapted to their condition

> and circumstances as any that can be devised. At any rate, they adhere to it with great tenacity, and are fearful of any innovations upon it.

Earle Report at E29.[5]

D. Determination Of Boundary Lines Of Gay Head Land Held In Severalty

One year after the Earle Report, the Legislature passed an act creating the District of Gay Head, St. 1862, c. 184, § 4, E338, and the following year, appointed a commissioner, Charles Marston, to determine the boundary lines between individual landowners in Gay Head, and between those landowners and the common lands. Resolves, 1863, c. 42, E55. Marston submitted his report in 1866. Report of the Hon. Charles Marston, 1866 House Doc. 219 ("Marston Report"), E59.

Marston reported that he had not completed his work, due to "the infirmities of advancing age and sickness." Id. at E61. He did, however, create a

[5] Plaintiffs contend that Earle recommended that Gay Head lots held in severalty be given the protection of the common law. Appellants' Brief at 11. In fact, while Bird recommended "confirming the titles of proprietors of lands held in severalty," E290, Earle "believ[ed] that no essential change should be made, at present, to the external relations or internal policy of this tribe." E39. Instead, Earle recommended that the sanction of law be extended to protect rights obtained under Indian law. E40.

book of records setting forth descriptions of "a very large proportion of the lots of land," which book was ultimately recorded at the Dukes County Registry of Deeds in 1871 at Book 49, Page 1. E342 et seq.

Richard Pease was appointed to complete Marston's work. Resolves 1866, c. 67, E64. He did so and reported back to the Governor and Council in 1871. Report of the Commissioner ("Pease Report"), E106. Pease also provided a book of records, this time setting forth by lot number detailed descriptions of the lots previously delineated by Marston and descriptions of the common lands. E382 et seq.

E. Indian Enfranchisement

Meanwhile, the Legislature was taking steps to enfranchise the Commonwealth's Indian population. St. 1862, c. 184, provided that "[a]] Indians and descendants of Indians are hereby placed on the same legal footing as the other inhabitants of the Commonwealth," except those supported by the state and those residing on seven plantations, including Gay Head. Id. at § 1, E339. By this act, the plantation of Gay Head was made a district and given the same

duties and liabilities as those earlier provided for Marshpee. Id. at § 3, E340.[6]

Some seven years later, in 1869, the Legislature enacted c. 463, which provided that "[a]ll Indians and people of color, heretofore known and called Indians, within this Commonwealth, are hereby made and declared to be citizens of the Commonwealth," and that all lands held in severalty should henceforth be held in fee simple. St. 1869, c. 463, §§ 1-2, Add. 35. A process was established for dividing common lands upon application of any tribe member to the judge of probate in which the lands lay. Id. at § 3. Gay Head was again singled out: it was excluded from provisions allowing for partition of common land. Id.

F. Division of Gay Head Lands Held in Common

In 1869, a special joint committee of the Senate and House was designated to visit the Indians of the District of Gay Head and inquire as to their

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[6] Plaintiffs contend that, as a result of the 1862 statute, "Gay Head now had all the powers of a town, including the power to hold property." Appellants' Brief at 11. In fact, Gay Head was given only the powers that had been given to the District of Marshpee by virtue of St. 1834, c.166, which did not include the ownership of real estate. In contrast, non-Indian districts "enjoy[ed] all the powers, privileges and immunities that towns in this Province enjoy." Hill v. Selectmen of Easthampton, 140 Mass. 381 (1886).

condition. The report of that visit, Report of the Committee, 1869 Sen. Doc. No. 14, E67, noted that, under Pease's "active and judicious supervision, order is being rapidly brought out of chaos and the limits of each person's lot marked out by stakes and bounds." E70-71. Regarding the common lands, the legislators noted that "[t]his land is uneven, rough, and not remarkably fertile." Id. at E71. The legislators proposed legislation that would, among other things, incorporate Gay Head as a town and grant authority in the local judge of probate to appoint commissioners to divide the common lands or to sell them. E77, 79-82.

The legislation was adopted as Chapter 213 of the Acts of 1870. E84. Common lands held by the District of Gay Head were transferred to the Town of Gay Head to "be owned and enjoyed as like property and rights of other towns are owned and enjoyed." Id. at § 2, E84. However, upon application of the selectmen or petition of 10 resident landowners, the probate judge could order partition or sale. Id. at § 6.

Thereafter, a petition was presented to the local probate judge in September, 1870 to divide the common lands, E87, as a result of which the court issued an order on December 5, 1870, decreeing that the common

lands be divided, and that Joseph L. Pease and Richard L. Pease be appointed to make that division. E97.

The commissioners issued their report in 1878. E492 et seq. By then, they had completed a division of the common land and assigned each lot to inhabitants "adjudged to be entitled thereto," E492, and had "also examined and defined the boundaries of those lots held or claimed by individuals of which no satisfactory record evidence of ownership existed." Id. "[I]n accordance with the almost unanimous desire of the inhabitants," id., the commissioners did not divide the cranberry lands or the clay cliffs. The remaining common land was divided into lots numbered 189 and upwards. E494. Lots 1 to 173 were "run out and bounded under a previous provision of the statute," and Lots 174 to 189 were "run out afterwards by the Commissioners who made partition of the Indian common lands." Id.

Of particular note in the division of the common lands, the commissioners expressly provided for what were, in effect, profits à prendre: the right of various individuals, some identified and some not, to

take peat from various lots.[7] In addition, the commissioners expressly reserved an access easement over Lots 382, 384 and 395: "[r]eserving for the use of the proprietors, in the Herring Fishery, for the purpose of fishing and clearing the creeks, a strip of land, one rod wide, on each side of the creek, so long as the said reservation may be needed for that purpose." E587-88, E592.[8]

SUMMARY OF ARGUMENT

The plain language of Rule 52(a), Mass. R. Civ. P., and the policy rationale behind that rule require that the "clearly erroneous" standard of review apply here (pp.18-20).

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[7] So, for example, the description of Lot 193 includes a statement "[r]eserving however any right or rights to peat on the premises that may justly belong to any person or persons, to them, their heirs and assigns," E504, and the description of Lot 218 includes a statement of such rights "to William Jeffers, his heirs and assigns." E516-17. Similar language is found in descriptions for lots 221, 225, 240-241, 244-246, 254, 277, 293-296, 298, 304, 306-308, 311, 321, 329, 334, 340, 351-356, 365-366½, 369, 378, and 419.

[8] Plaintiffs erroneously assert that Lot 393, along with lots 382 and 384, contained rights regarding the creeks and that those three lots, like the lots burdened with profits à prendre to remove peat, were landlocked. Appellants' Brief at 20. In fact, the three lots providing access rights along the creeks are 382, 384 and 395, lots 384 and 395 abut a road, and 382 abuts 384 and so presumably is accessed by traveling along the side of the creek over lot 384. See E196 (an enlarged copy of that section of E196 showing lots 382, 384 and 395 is appended hereto).

The presumption relied upon by Plaintiffs is not applicable here and, even if applicable, having been rebutted by the Defendants, falls away (pp. 25-8).

The trial court properly held that there was no intent to create an easement based on (1) the language of the grants, under the rule that expression unius est exclusion alerius (pp. 29-32), (2) evidence of tribal use and custom (pp. 32-9), and (3) the physical condition of the land partitioned (pp. 39-40).

Plaintiffs' contention that the Legislature, operating in the context of the post-Civil War period, intended that partitioned land be "salable," should be rejected because (1) it was raised for the first time on appeal, and (2) does not accord with statutory and case law (pp. 43-47).

The "law of the case" doctrine precluded the trial court from reconsidering issues resolved in Kitras, and should preclude this Court (pp. 47-50).

ARGUMENT

I. THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW APPLIES TO THIS APPEAL.

Plaintiffs contend that this Court may review all factual issues in this matter *de novo* because the trial court decided this case solely on documentary

evidence. Appellants' Brief at 23. In fact, the standard of review in such a case is an open question, and one that should be resolved in favor of the "clearly erroneous" standard of review.

Rule 52(a), Mass. R. Civ. P., provides in pertinent part that "[f]indings of fact will not be set aside unless clearly erroneous." As interpreted by the United States Supreme Court in Anderson v. Bessemer City, 470 U.S. 564 (1985), Rule 52(a) requires application of the "clearly erroneous" standard even where credibility is not in issue.

The Anderson court stated:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. …
>
> This is so even when the district court's finding do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. … That the rule goes on to emphasize the special deference to be paid to credibility determinations does not alter its clear command …

470 U.S. at 574. In addition to the rule's "clear command," the Supreme Court also noted its rationale:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would

> very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Id. at 574-5.

Massachusetts has yet to address the issue.[9] However, as recently noted by the Supreme Judicial Court, "[w]e generally follow the Federal courts' interpretation of Federal rules of civil procedure in construing our own identical rules." Hermanson v. Szafarowicz, 457 Mass. 39, 49 (2010). Based on the plain language of Rule 52(a) and the rationale underlying it, the "clearly erroneous" standard should be applied to this appeal.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT NO EASEMENT BY NECESSITY WAS INTENDED.

The trial court assumed *arguendo* that the Plaintiffs had the benefit of a presumption but found

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[9] See Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 525, *cert. denied*, 493 U.S. 894 (1989) ("It is unnecessary for us to decide if in appropriate circumstances we might depart from the "clearly erroneous" standard of review where all of the evidence was documentary …"); Zaskey v. Town of Whately, 61 Mass. App. Ct. 609, 614, *rev. denied*, 442 Mass. 1110 (2004) ("it is unnecessary to resolve the question because, even if we treat the matter de novo, we are in accord with the judge's conclusions").

that any such presumption had been rebutted and that no easements other than those expressly granted were intended. Add. 7-8. On appeal, Plaintiffs argue that (1) they have proved the three "elements" of an easement by necessity, (2) they are therefore entitled to a presumption that access was intended, a presumption bolstered by the historical context in which the partition occurred, and (3) on a *de novo* review, the trial court was wrong in holding that the presumption had been rebutted. The trial court's decision, based on applicable law and fully supported by the record, should be upheld.

A. The Applicable Law

1. Easements By Necessity

The Supreme Judicial Court has defined easements by necessity as follows: "when 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." Schmidt v. Quinn, 136 Mass. 575, 576 (1884).[10] This rule is not

[10] Accord, Davis v. Sikes, 254 Mass. 540, 545 (1926) ("if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion").

based on any public policy against landlocked parcels. Kitras, 64 Mass. App. Ct. at 298 ("Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive."). Instead, "the rule is founded on the presumed intention of the parties to the deed, construed, as it must be, with reference to the circumstances under which it was made." Richards v. Attleborough Branch Railroad Co., 153 Mass. 120, 122 (1891).

Easements by necessity, being unascertainable on the record, are discouraged: "It is the law in this Commonwealth that easements of necessity can only be granted in very limited circumstances of reasonable or absolute necessity." Goulding v. Cook, 422 Mass. 276, 280 (1996).[11] The Supreme Judicial Court has adopted a number of rules that make the creation of such interests difficult. The Court has imposed the burden of proof on the party arguing for the existence of such an easement.[12] It has imposed an even heavier

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[11] Accord, Nichols v. Luce, 41 Mass. 102, 105 (1833) ("But these implications of grants are looked upon with jealousy and construed with strictness.").

[12] See Mt. Holyoke Realty Corporation v. Holyoke Realty Corporation, 284 Mass. 100, 105 (1933); Kane v. Vanzura, 78 Mass. App. Ct. 749, 755, *rev. denied*, 460

burden on a grantor claiming such an unwritten, unrecorded, reserved right.[13] Finally, it has directed that such an easement be recognized only if it can be found in the presumed intention of the parties, "a presumption of law which 'ought to be and is construed with strictness.'" Joyce v. Devaney, 322 Mass. 544 (1948) (citation omitted) (emphasis added).[14]

The touchstone of the analysis is the intent of the parties. As the Supreme Judicial Court has often stated, whether an implied easement has been created:

> must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the

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Mass. 1104 (2011); Boudreau v. Coleman, 29 Mass. App. Ct. 621, 629 (1990).

[13] Perodeau v. O'Connor, 336 Mass. 472, 474 (1957); Krinsky v. Hoffman, 326 Mass. 683, 688 (1951); Dale v. Bedal, 305 Mass. 102, 103 (1940); Boudreau v. Coleman, 29 Mass. App. Ct. at 629.

[14] Accord, Orpin v. Morrison, 230 Mass. 529, 533 (1918)("It is a strong thing to raise a presumption of a grant in addition to the premises described in the absence of anything to that effect in the express words of the deed. Such a presumption ought to be and is construed with strictness. There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so."); Home Inv. Co. v. Iovieno, 243 Mass. 121, 124 (1922) ("It is a strong exercise of the power of the law to raise a presumption of a grant of a valuable right in addition to the premises described without any words indicative of such an intent in the deed. Such a presumption is construed with strictness even in the few instances where recognized.").

> knowledge which the parties had or with which they are chargeable.

Sorel v. Boisjolie, 330 Mass. 513, 517 (1953), Krinsky v. Hoffman, 326 Mass. at 688, and Joyce v. Devaney, 322 Mass. at 549, all quoting Dale v. Bedal, 305 Mass. at 103.[15]

Because the issue is one of intent, the benefitted and burdened estates must have had previous common ownership.[16] Necessity of the easement is another factor to be considered, but not the predominating consideration.[17] As noted in Kitras,

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[15] Accord Perodeau v. O'Connor, 336 Mass. at 474.

[16] See Nylander v. Potter, 423 Mass. 158, 162 (1996) ("Without previous common ownership, Potter cannot claim an easement by necessity."); Uliasz v. Gillette, 357 Mass. 96, 102 (1970) ("easements because of necessity can be implied only for the benefit of or against parties to a particular conveyance and their successors in title, and not for the benefit of or against strangers to the chain of title.") (citation omitted); Richards v. Attleborough Branch Railroad Co., 153 Mass. at 122 ("never out of the land of a stranger. The law does not give a right of way over the land of other persons to the owner of land who would otherwise have no means to access it.").

[17] See Ward v. McGlory, 358 Mass. 322, 325 (1970) ("An implied easement of necessity, however, is not created because it is necessary to the grantee, but rather to effectuate the intent of the parties."); Perodeau v. O'Connor, 336 Mass. at 474 ("Necessity of the easement is merely one element to determine that intention ..."); Orpin v. Morrison, 230 Mass. at 533 ("It is not the necessity which creates the right of way, but the fair construction of the act of the parties. Necessity is only a circumstance resorted to for the purpose of showing the intent of the parties.").

"[i]t is well established in this Commonwealth: necessity alone does not an easement create." 64 Mass. App. Ct. at 298. Because necessity is an indicator of the parties' intent, if there is alternative access, the parties will not be deemed to have intended an easement.[18] And, the necessity must have existed at the time of the grant,[19] and it ceases when the necessity ceases.[20]

2. Presumptions

Plaintiffs rely on a presumption of law to satisfy their burden of proof in this case. As noted by the Plaintiffs, Rule 301(d) of the Massachusetts Guide To Evidence applies. Of particular import to

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[18] See Uliasz v. Gillette, 357 Mass. at 102 (where petitioners had access to their property from another way) ("In this case there is no reasonable necessity for implying any easement in favor of the petitioners."); Silverlieb v. Hebshie, 33 Mass. App. Ct. 911, 912 (1992) ("No easement by implication arose, first, because as previously observed, it has not been made to appear that the Hebshies lacked an alternative route over their own land to the Brockton sewer, ...").

[19] Schmidt, 136 Mass. at 576-77 ("A right of way by necessity can only be presumed if the necessity existed at the time of the grant"); Richards, 153 Mass. at 122 ("A way of necessity can be presumed to have been granted or reserved only when the necessity existed at the time of the grant.").

[20] Viall v. Carpenter, 80 Mass. 126 (1859)("the right ceased when the necessity ceased"); Schmidt, 136 Mass. at 577 (a way by necessity "continues only so long as the necessity continues.").

this matter, "[i]f the party [opposing the presumption] comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect." See also Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, 34 (2006)("A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] on his adversary the burden of going forward with the evidence.' Epstein v. Boston Housing Authority, 317 Mass. 297, 302 (1944).").

Given the unique circumstances presented in the instant action, the presumption, which is "construed with strictness even in the few instances where recognized," Home Inv. Co., supra, is not applicable. The wholesale division of the common lands of a tribe is not an event to which the presumption has been applied. To do so would read the presumption expansively, contrary to the great weight of authority.[21]

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[21] Plaintiffs assert that every Land Court judge to consider the question has acknowledged that the 1878 partition established the parties' presumed intent to include legal access. Appellants' Brief at 26. The trial court here did not do so, either in its earlier summary judgment ruling (Green, J.) or in the ruling

Even if this Court finds the presumption applicable, it has been negated by Defendants' evidence. The record before the trial court contained deeds expressly delineating some rights and not others, evidence of the physical condition of the common lands, and evidence of aboriginal and English title. Accordingly, the presumption falls away.

Plaintiffs contend both that the presumption is applicable to this case and that, to overcome it, Massachusetts law requires that VCS show that "the parties affirmatively '[desired to] convey land without means of direct access,'" quoting Orpin v. Morrison, 230 Mass. at 533. Appellants' Brief at 31-2. That misstates the law regarding presumptions and regarding easements by necessity.[22]

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that is the subject of the instant appeal (Trombly, J.), instead assuming *arguendo* that the presumption was applicable. A. 69 and Add. 8. The Land Court judge in Black v. Cape Cod Co., Misc. Case No. 69813, was not presented with evidence such as that presented here, none of his analysis regarding intent was necessary in view of his dismissal of the claim, and he did not have the benefit of the decision in Kitras. His decision is not persuasive here.

[22] To the extent that the Plaintiffs rely on the Restatement (Third) Of Property (Servitudes), it should be noted that the Restatement apparently recognizes a public policy against landlocked parcels, a policy that is not embraced in the Commonwealth. Kitras, 64 Mass. App. Ct. at 298.

As provided by Rule 301(d), the Defendants having come forward with evidence that no easement was intended, the presumption drops away. The burden is not on Defendants to show that the parties affirmatively desired to convey land without a means of access, but on the Plaintiffs to show that such a right of access was intended.

In addition, Plaintiffs' contention is also a misstatement of the law regarding easements by necessity. The full quote from Orpin is: "There is no reason in law or ethics why parties may not convey land without direct means of access, if they desire to do so." 230 Mass. at 533. This language does not address what evidence is required to establish or defeat a claimed easement by necessity (in fact, it supports Defendants' position) and it does not shift the burden of proof to the opponent of the easement.

B. The Trial Court Correctly Applied The Applicable Legal Principles To The Facts In The Record.

The trial court assumed *arguendo* that the presumption concerning easements by necessity applied to this case, and then found that the Defendants "have produced sufficient evidence to rebut the presumption." Add. 8. As noted above, there was ample

support for that conclusion. The presumption having thus dropped out, the trial court was left to determine whether the Plaintiffs had carried their burden of proof on the intent to create an easement. Analyzing the factors outlined by the Kitras court, the trial court found that the Plaintiffs had not done so. Its decision should be affirmed.

1. Expressio Unius Est Exclusion Alerius

First, based on the teaching of Joyce v. Devaney, supra, and Krinsky v. Hoffman, supra, the trial court found that, "[i]n light of the express easements granted by the commissioners, the failure to provide for access appears intentional and serves to negate any presumed intent to create an easement." Add. 9.

In Joyce, two lots were created sharing a common driveway. An easement 85 feet long and eight feet wide was intended to reach the rear of both properties where a garage was located on each lot. Because the houses, as constructed, were set further back than was originally proposed, the owner of one lot could only reach his garage by driving over the other lot for a distance of an additional 18 feet. "Thus it is not possible for the plaintiffs to enter their garage without trespassing on lot A for this distance." 322

Mass. at 546. The plaintiffs and their predecessor drove over lot A for some fifteen years before controversy erupted. The plaintiffs brought suit, contending that they had an easement by implication over the abutting lot to reach their garage. The trial court disagreed, and the Appeals Court affirmed:

> The deeds at the time of severance created the specific easements shown on the Harden plan. That plan was then on record. 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 unius est exclusion alterius. What the parties may have intended cannot override the language of the deeds.

322 Mass. at 549 (emphasis added).[23] The Joyce court noted that "[t]he case is a hard one but if we should hold otherwise it would be another instance of a hard case making bad law." Id. at 550.

Several years after the decision in Joyce, the Supreme Judicial Court issued its decision in Krinsky v. Hoffman, supra. There, the plaintiffs sought to establish an easement by implication over a six foot strip in an adjoining passageway. The Krinsky court upheld the trial court's finding of no easement:

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[23] Expressio unius est exclusion alterius: "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999).

> [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.

326 Mass. at 688.[24]

The express grants to which the trial court here had reference were the right to remove peat and the right of access along a creek for the purpose of fishing and clearing. Plaintiffs characterize both these rights as profits à prendre, both granted without an express right of access, and argue that their existence therefore supports the proposition that access easements must have been intended by implication for the full enjoyment of these expressly granted rights. Appellants' Brief at 41-3. This analysis is wrong on the law and on the facts.

Regarding the applicable law, profits are defined as:

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[24] See also Zotos v. Armstrong, 63 Mass. App. Ct. 654, 657 (2005) quoting Boudreau v. Coleman, 29 Mass. App. Ct. at 629 ("having expressly reserved some easements, failure to reserve others must be regarded as significant.").

> a right in one person to take from the land of another either a part of the soil, such as minerals of all kinds from mines, stones from quarries, sand and gravel; or part of its produce, such as grass, crops of any kind, trees or timber, fish from lakes and streams, game from the woods, seaweed, and the like.

Gray v. Handy, 349 Mass. 438, 440 (1965). The right to take peat, as provided in the description of a number of the lots, is a profit à prendre, as is the right to take fish, but the right of access along the shores of a creek for the purpose of fishing and clearing is not. It is a classic access easement.

In addition, as noted above, the access easements along the creek were themselves accessed from the road shown on the 1878 plan by the commissioners. E196. So, contrary to Plaintiffs' contention, they were not rights requiring further implied rights for their enjoyment. They were expressly granted rights of access, and, under Joyce and Krinsky, their existence negates any intent to imply other easements.

2. Tribal Use And Custom

Next, based on tribal use and custom, the trial court found both that the commissioners likely determined that access easements were not necessary at the time of partition and that, on the same grounds, such easements were not intended. Add. 10. As the

Kitras court stated, "we see no reason why the common practice, understanding and expectations of those persons receiving title could not shed light on the parties' probable, objectively considered intent." 64 Mass. App. Ct. at 300.

Plaintiffs contend, first, that Indian title was extinguished (or that the Legislature "likely believed" so, Appellants' Brief at 37) by the time of the 1869 enfranchisement act or at the time of partition, and second, that, in any event, the Legislature likely believed that the Indians' ownership of real property was governed by the common law alone, because only then would it be marketable. Neither proposition withstands scrutiny.

a. When aboriginal title was extinguished is irrelevant.

Whether aboriginal title was formally extinguished in or about 1870, and VCS respectfully suggests that it was not,[25] is irrelevant to the issue

[25] When and whether aboriginal title actually was extinguished was a matter of considerable dispute some 100 years after the partition of the Gay Head common land. James v. Watt, supra (suit by Gay Head tribe members challenging land transfers pursuant to 1870 Mass. Acts. c. 213, among other statutes); Mashpee Tribe v. New Seabury Corporation, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (suit by Mashpee tribe challenging land transfers pursuant to

addressed by the trial court: whether, as a matter of Indian tribal law, custom and usage, tribe members freely accessed tribal lands.

The evidence before the trial court established that, in the 1800s, Gay Head operated under Indian traditional law. The author of an 1817 article reporting on a visit to Gay Head noted that "[t]he land is undivided; but each man cultivates as much as he pleases, and no one intrudes on the spot which another has appropriated to his labor." E231. The 1849 Bird Report noted that the tribe had been without a guardian for some 30 years, and that "the division of their lands, and indeed the whole arrangement of their affairs, except of the school money, have been left to themselves." E254. Clay from the cliffs and cranberries were shared communally, open to all who wished to dig and load the clay or harvest

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Acts of 1834 and 1842); see also Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979) (suit by Chappaquiddick tribe members).

With respect to Gay Head, Congress passed 25 U.S.C. § 1771 et seq. in 1987, retroactively approving prior transfers of land in Gay Head from, by or on behalf of the tribe or any individual Indian, "including any transfer pursuant to any statute of the State," §1771(a), and extinguishing any aboriginal title in the land "as of the date of such transfer." § 1771(b). It was upon the passing of this statute in 1987 that the Tribe's Indian title, or right of occupancy, was expressly terminated retroactively.

cranberries. E255. "They do not know, and they do not want to know, under what law they live." E257.

By 1861, in describing Gay Head, Earle noted the dual nature of land holdings—in common and in severalty—and the primacy of Indian tribal law pertaining in Gay Head. E29. Earle reported that "[t]he Indian traditional law, so far, has worked well, and seems adapted to the condition and wants of the tribe, but its success has resulted from a general acquiescence in its administration." E39-40. As a result, Earle recommended that the rights acquired under tribal law be given the sanction of law. Id.

In the 1871 Pease Report, Pease noted a slight change to Indian traditional law regarding lots held in severalty since the Bird Report: "Since that report was prepared a different rule has obtained; the prior consent of the 'selectmen,' of the 'land committee,' became necessary to perfect title, as well as the payment of some small stipulated sum into the public treasury." E128.

The record evidence of Indian tribal law, custom and usage in existence in the 1870s was found persuasive by the trial court as indicating no need for, and thus no intent to create, easements for

access. Add. 8. Plaintiffs have offered no evidence to indicate that Indian tribal law, custom and usage, having prevailed for many years, suddenly stopped in 1878 and so the challenge on this ground should fail.

b. The Legislature's "belief" regarding applicability of the common law is irrelevant.

Whatever the Legislature believed about the primacy (or not) of the common law when it passed St. 1870, c. 213, authorizing the division of Gay Head's common lands, is irrelevant. At the time of passage of that act, the Legislature did not know when, or even if, members of the Gay Head tribe or the selectmen would avail themselves of the opportunity to request partition, as provided at § 6, or would continue to hold the land in common. Notably, the tribe had not taken advantage of the right to partition contained in the Act of 1828.

It is thus unlikely that the Legislature considered what would happen if, at some point, (a) the tribe requested division of the land, (b) the probate court judge agreed to that division, and (c) individual tribe members, against all prior history

and practice,[26] decided at some point in the indefinite future, (i) to sell their land to non-Indians and (ii) not to honor traditions regarding access.

More to the point is the understanding of the parties to the transaction: the commissioners and members of the Gay Head tribe. The commissioners were plainly familiar with the English real property law concept of easements—they created easements for peat removal and access for fishing and creek clearing—but were silent on the issue of access to individual lots. Richard L. Pease, in particular, was familiar with the Bird Report, having quoted it in his own report, see E128-29, and would thus have been familiar with an earlier division of a portion of the Chappaquiddick land and the reported concerns about "the want of well-defined highways." E245. Being familiar with the Gay Head tribe's method of land use, the commissioners may well have assumed that, in contrast to Chappaquiddick, access to these common lands would be, as it had always been, by tacit consent of the

[26] The Bird Report noted "[t]hey will allow no white man to obtain foothold upon their territory. They have steadily refused to lease to white applicants a foot of land." E257. A 1911 history noted of Gay Head, "[t]he town is now in its fortieth year of existence … But it is still an 'Indian' town, for the white man has made no invasion here." E214.

tribe, unfixed and changing to meet the changing needs of tribe members, under tribal law.

With respect to tribe members, one certainly cannot assume familiarity with English law. As noted above, the Gay Head tribe was described as "differently situated," "isolated" and "singularly anomalous." As described in the Bird and Earle Reports, Gay Head Indians held property pursuant to unwritten "primitive" or "traditional" law. If it was enclosed, the encloser owned it; if not, it was held in common. There is no indication that tribe members had any concept resembling an easement, or any need for the same. It is difficult, therefore, to attribute to them any intent to create such a right.

The condition of Gay Head is to be contrasted with that of the Chappaquiddick tribe. The commissioners dividing the common lands of the Chappaquiddick, who were much more assimilated and for whom, as noted above, well-defined highways were an issue, provided express access easements in their 1850 land division. See discussion supra at 7-8. That commissioners would make such provision in one case,

and not in the other,[27] underscores the notion that the lack of express easements in the division of the Gay Head common lands was a deliberate choice.

3. The Perceived Condition Of The Land.

As the third ground for its decision, and as again suggested by Kitras, the trial court considered the apparently poor condition of the land being divided as evidence that no easement was intended. Add. 10. On appeal, Plaintiffs challenge that finding of fact. Whether assessed *de novo* or against a "clearly erroneous" standard, there was ample evidence to support it.

The Kitras court pointed to the 1870 report of the committee appointed by the Legislature, which described the land as "uneven, rough, and not remarkably fertile," E71, and the main road in Gay Head as in "deplorable condition." E75. The record

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[27] While one cannot know for sure, it is likely that Richard L. Pease, who partitioned the Gay Head common lands, was familiar with the 1850 partition of Chappaquiddick lands in which access easements were provided. One of the commissioners of that partition was another Pease, Jeremiah. In addition, Richard L. Pease was a local historian of both white and Indian cultures whose "intimate acquaintance with the records and history of Martha's Vineyard" was acknowledged by the commissioners appointed under the Resolve of 1855 (E324), and in both Volume I (E199) and Volume III (E219) of Banks' history of Martha's Vineyard.

also contains an 1844 description of Gay Head as "a level, desolate moor, treeless, shrubless and barren of all vegetation, save coarse grass and weeds, and a profusion of stunted dog-roses." E195. And, the 1856 Report of the Commissioners, 1856 House Doc. No. 48, at E323, observed of Gay Head that:

> [o]wing to too close Feeding, and other causes, the sands of the beach, no longer covered, as formerly, with an abundant growth of beach-grass, become the sport of the breeze, and are every year extending inland, covering acre after acre of meadow and tillage land; many acres of which have, within the memory of our informants, been thus swallowed up, and now lie wholly waste and useless.
>
> It is painful to behold this Sahara-like desolation, especially when the conviction becomes irresistible that, unless some remedy is found, the whole will eventually become one cheerless desert waste.

Id. at E330.

While the record also contains reference to some Gay Head land being of "excellent quality," see E28 and E231, by the mid-1800s, it is always with a caveat: "uneven and hilly, with a great variety of soil," E28; "uneven, rough and not remarkably fertile," E71; "very irregular, abounding in hills and valleys, ponds, swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land." E109-110.

It is also notable that 97 years passed between the partition of the common lands and the first law suit raising the issue of access, Add. 38-46, which supports the notion of the 1869 Legislative committee that these lots would "lie untilled and comparatively unused" following partition. E71.

On this record, the trial court's finding that the perceived condition of the land negated any presumed intent to create an easement is supported, whichever standard of review this Court employs.

4. Silence, on this record, is not neutral.

Plaintiffs also challenge the Kitras court's suggestion that the commissioners' silence on the issue of access might be interpreted as a deliberate choice, arguing that easements by necessity are always found where the documentary record is silent and so silence is a neutral fact. Appellants' Brief at 43-4.

Silence on this record, though, is not neutral. The Kitras court described the "careful and lengthy consideration given the partitioning process" by the commissioners. 64 Mass. App. Ct. at 299. That description is borne out by the record: the commissioners created a census of Gay Head inhabitants, E131; divided and "made careful and

correct descriptions" of the common lands, E492; defined the boundaries of lots for which no satisfactory evidence of ownership existed, id.; determined who were the rightful heirs and their fractional interests in particular lots (see, e.g., E412, E415-16, E417, E425-27, E462); corrected errors in Marston's original work (E427, E488); corrected census information where necessary (E602, E697);[28] recognized and used as a boundary the road from Chilmark to the Gay Head light (see E196, and, by way of example, the bounding descriptions for Lots 182, 185, 194-201) and the so-called South Road (see, e.g., the bounding descriptions for lots 56 72, 78-79, 81, 152-55); included "little islets" in ponds in their partition (E713-4); noted, with respect to one lot, the likelihood that the line to the water would change due to "the action of the elements on the unstable sands" (E676-7), with respect to another, described a lot by metes and bounds, "[t]he whole tract being but twenty links in width throughout, or room enough to plant four rows of corn" (E476), and with respect to a

[28] Lots 420 and 680, set off to Lydia C. Jarrett, contain the notation that "[t]he parents of this child, Josiah Jarrett and Mary C. Jarrett, say her true name is Olive Imogene Jarrett, and under that name she will hold that lot."

third, declared the rights of children in their mother's dowry (E489).[29]

Once again, the expression of some things suggests the intentional exclusion of others. The attention to detail exhibited by the commissioners strongly suggests that they deliberately did not provide access easements.

C. Plaintiffs Misstate The Issue To Be Proved And Fail To Carry Their Burden Of Proof.

Plaintiffs contend that, having established the "three basic elements" of an easement by necessity,[30] they have "establish[ed] the parties' presumed intent to include a legal right of access." Appellants'

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[29] "If at any time, during the life-time of their mother, the children of said George David, or any of them, should be destitute of a home, they are to have the right to occupy a part of the dwelling house on said homestead. The widow is to have the use of one half of the barn, and the other half may be used by the heirs to store their hay and crops, and house their cattle, if occasion should arise therefore." E489.

[30] Regarding unity of title, Plaintiffs assert that title to the common land was held by the Town of Gay Head, with the state retaining the power to convey it, to satisfy that requirement. Appellants' Brief at 26-27. VCS reads the historical record differently. See discussion supra at n. 6. However, since unity of title does exist under the analysis employed by the Kitras court, 64 Mass. App. Ct. at 294-95 ("Though owned in equal measure by numerous persons, each partitioned lot thereby had, before severance, common owners, and the unity of title requirement is satisfied for those commonly owned lots"), nothing turns on the dispute.

Brief at 24, 26. There is more, however, to the analysis than that. As described in Kitras,

> we require that (1) both dominant and servient estates were once owned by the same person or persons, i.e., that there existed a unity of title; (2) a severance of that unity by conveyance; and (3) necessity arising form that severance, all considered "with reference to the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried into effect."

64 Mass. App. Ct. at 291 (citations omitted) (emphasis added).

Apparently appreciating that more is required of them, Plaintiffs argue for the first time on appeal that the enfranchisement act of 1869 and the 1870 act incorporating Gay Head were intended to "allow individual Gay Head Indians to own and convey property like every other citizen," Appellants' Brief at 28, and that the broader historical context in which the partition occurred "compels the conclusion that the General Court intended the property rights conveyed to be rights in *salable* land." Appellants' Brief at 31 (emphasis in original). This Court should not consider those arguments.[31] And, even if the Court

[31] Amato v. District Attorney, 80 Mass. App. Ct. 230, 237 n.11 (2011) ("We do not consider issues,

chooses to do so, those assertions are not born out by the record or case law.

The 1869 and 1870 statutes did not treat Gay Head Indians "like every other citizen." The 1869 statute denied to the Gay Head tribe the right to seek division of the common lands. St. 1869, c.463, § 3. The 1870 statute authorized, but did not mandate, the division of the common lands. St. 1870, c. 213, § 6. Under that statute, the common lands would remain undivided unless the selectmen or any ten resident land owners petitioned the local probate judge, and, then, it was left to the probate judge to determine whether to grant or deny the petition, the right of appeal from that decision being reserved. Id.

As noted by the Supreme Judicial Court, the 1869 statute "put them [the Indians], for the most part, on the basis of ordinary citizenship." Drew v. Carroll, 154 Mass. 181, 183 (1891) (emphasis added). In an earlier decision, in In Re Coombs, 127 Mass. at 279-80, the Supreme Judicial Court stated that "[i]n thus enfranchising the Indians and conferring on them the rights of citizens, it was not the intention of the

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arguments, or claims for relief raised for the first time on appeal.").

Legislature to give at once to the several tribes, or to the individual Indians composing those tribes, the absolute and unqualified control of common lands occupied by them."

This record does not support the conclusion that, at the time of the partition, the Legislature intended that property rights in marketable land be conveyed. In fact, it does not even support the proposition that the Legislature believed that the common lands should be conveyed. Instead, the Legislature left to members of the tribe the decision whether to request division, and to the local probate judge the decision whether to grant that request. This comported with the recommendation of the committee appointed in 1869: "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 property, in accordance with their own wishes." E71.

And, it also bears noting that, whatever the intent of the Legislature, the Indians did ultimately obtain the right to sell their interests in the common land and they did in fact do so. Had this argument been raised below, VCS would have agreed to the admissibility of title documents, which would have

shown, in some instances, arm's length transactions for consideration. See A. 257-8.

III. THE TRIAL COURT PROPERLY REFUSED TO RECONSIDER AN ISSUE PREVIOUSLY DECIDED BY THE KITRAS COURT

Plaintiffs challenge the trial court's refusal to reconsider this Court's conclusion in Kitras that each of lots 1 through 188 or 189 were "owned by a different individual, and the unity of title required to imply an easement by necessity fails," 64 Mass. App. Ct. at 293 (citation omitted), on the grounds that, because the finding was not necessary to the Kitras court's decision, it is not binding under the doctrine of *res judicata*. Appellants' Brief at 45-47. The applicable doctrine, however, is not *res judicata*, but "law of the case." Under that doctrine, the trial court was plainly correct in declining to reconsider the decision of a superior court, and this Court should exercise similar restraint.

Issue preclusion, relied upon by Plaintiffs here, provides that "when an issue has actually been litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the

same or different claim.'" Jarosz v. Palmer, 436 Mass. 526, 487-8 (2002) (emphasis added). Here, there has been no final judgment, and so *res judicata* does not apply.[32]

The "law of the case" doctrine, however, does apply. As recently described by the First Circuit Court Of Appeals, that doctrine has two branches: (1) the "mandate rule," which "prevents relitigation in the trial court of matters that were explicitly or implicitly decided by an earlier appellate decision in the same case;" and (2) the rule that "binds a 'successor appellate panel in a second appeal in the same case' to honor fully the original decision.'" United States v. Matthews, 643 F.3d 9, 13 (1st Cir. 2011) (citations omitted).

Regarding the former, "[w]hen a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand." United States v. Rivera-Martinez, 931 F.2d 148, 150 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991), quoting 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶

[32] See Bagley v. Illyrian Gardens, Inc., 28 Mass. App. Ct. 127 (1989) (*res judicata* not applicable to case where no final judgment had yet been entered).

0.404[a] (2d ed. 19191) (emphasis in original). Regarding the latter, "[t]his branch 'contemplates that a legal decision made at one stage of a criminal or civil proceeding should remain the law of that case throughout the litigation, unless and until the decision is modified or overruled by a higher court.'" United States v. Matthews, 643 F.3d at 13.

Under the "mandate rule," the trial court here was precluded from reconsidering this Court's earlier decision regarding the unity of title issue, whether necessary to the Kitras decision or not, and properly declined to do so. And, under the second branch of the rule, this Court should decline to reconsider the unity of title issue.

In any event, were this Court to reconsider the holding in Kitras, it would reach the same result. Plaintiffs are incorrect in asserting that the common lands were owned by the Town of Gay Head. See discussion supra at n. 6. And, that contention runs afoul of an express holding in Kitras that the common land was "owned in equal measure by numerous persons." 64 Mass. App. Ct. at 293.

In addition, the contemporaneous evidence regarding the particular lot for which Plaintiffs seek

reconsideration, lot 178, establishes that it was not part of the common land. In the report submitted by the commissioners to the probate court in 1878, they clearly distinguished between lots 189 and above as being "common lands drawn or assigned by the Commissioners" and lots 174 to 189. E494. Notably, lots 174 to 189 were not "drawn and assigned," like the common lands. Instead, along with metes and bounds descriptions of the lots, their ownership was "here given." Id.

Finally, whatever probative value there is in the materials offered by Plaintiffs now, there is no justification for waiting until the remand to offer these materials in evidence. Certainly, the 1863 will and 1871 and 1878 conveyances were available, as was whatever information could be obtained by a surveyor.

CONCLUSION

For the reasons set forth above, VCS respectfully requests that this Court affirm the judgment of the trial court in all respects.

Rule 16(k) Certification

I, Jennifer S.D. Roberts, hereby certify that the above brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

Respectfully submitted,

S/

Jennifer S.D. Roberts
BBO No. 541715
LaTanzi, Spaulding & Landreth
Attorney for Defendant-Appellee
Vineyard Conservation Society, Inc.

8 Cardinal Lane
P.O. Box 2300
Orleans, MA 02653
(508)255-2133

Dated: August 15, 2012

ADDENDUM

MENAMSHA POND