COMMONWEALTH OF MASSACHUSETTS

Dukes, ss. L A N D C O U R T

Everel A. Black
John L. Black
Francis F. Cournoyer
Gertrude R. Cournoyer,
Plaintiffs

Miscellaneous
Case No. 69813

vs.

Cape Cod Company
Henry Hornblower, II,
Defendants

D E C I S I O N

The Complaint was brought under the provisions of the General Laws, Chapter 185, Section 1(k) and Chapter 240, Section 6, by the plaintiffs[1] who pray that an easement by necessity be established to and from their land "over land of respondents at a point to be designated by order of the Court and to include the right to install and maintain public utility systems" thereon. In additon to other prayers not now applicable, plaintiffs seek to enjoin defendants from blocking the "public way" passing through their property.

The plaintiffs filed a stipulation dismissing the complaint as against Henry Hornblower, II. The Cape Cod Company answered plaintiffs' complaint, denying the claimed right of way by necessity over its land, the right to install and maintain public utility systems thereon, and their unlawful interference with plaintiffs' ingress and

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1. Francis F. Cournoyer was joined as plaintiff by an amendment to the complaint.

egress. Further, defendants claim that plaintiffs were guilty of

egress. Further, defendants claim that plaintiffs were guilty of laches, but not having been argued this is deemed to have been waived.

The case was heard on June 4, 1974, at the Dukes County Courthouse in Edgartown, Massachusetts. A view of the premises was taken on that day with plaintiffs, defendants, and their attorneys present. Five witnesses were called by the plaintiffs with their testimony being taken by a stenographer who was sworn by the Court. Eight exhibits were introduced into evidence and are incorporated herein for the purpose of any appeal. All references to book and page numbers are to documents recorded at the Dukes County Registry of Deeds unless otherwise noted.

The evidence produced at the trial shows that plaintiffs Cournoyer own the northwesterly half and plaintiffs Black own the southeasterly half of Lot 594 as shown on the plan introduced into evidence as Exhibit No. 5. Defendants own Lot 587 which abuts Lot 594 at the northwesterly corner thereof as shown on said plan.

The land in question was formerly held for the benefit of the Indians located in the Indian district of Gay Head. Until the passage of the St. of 1869 c. 463 the Indians were wards of the Commonwealth and the title to the lands occupied by them was held by the Commonwealth. Coombs, Petitioner, 127 Mass. 278, Danzell v. Webquish, 108 Mass. 133, 134. The Court takes judicial notice of Chapter 42 of the Resolves of 1863 entitled "Resolve Relating To The Establishment of Boundary Lines of Indian Lands at Gay Head." As a result of this resolve, a commissioner was appointed "to examine, and fully and finally to determine, all boundary lines between the individual owners of the land located in the Indian district of Gay Head...and also to determine

the boundary lines between the common lands of said district and the individual owners adjoining said common lands...." By Chapter 67 of the Resolves of 1866 the report of the Honorable Charles M. Marston, the commissioner so appointed under Chapter 42 of the Resolves of 1863, was accepted and a further resolve authorized the appointment of still another commissioner to complete "the examination and determination of questions of title under said resolve, not passed upon by said commissioner." A map of "Gay Head" was prepared [Exhibit No. 8] "under the direction of Richard L. Pease, Eng., Commissioner appointed by Gov. Bullock under Resolve Chap.67 of 1866," recorded in Book 5, Pages 34 and 35.

By Section 6 of St. 1870, Chapter 213, "An Act to Incorporate the Town of Gay Head" the General Court as part thereof authorized the Probate Court of Dukes County to appoint two commissioners to recommend the division of these lands among the Indians. Richard Pease and Joseph Pease were appointed commissioners in 1878 and submitted their report recommending the parceling of the common land to individual Indians [Exhibit No. 1]. Thereafter, Lot 587 was parceled out to Leander Basset and Lot 594 to Amy Spencer [Exhibits No. 2 and 3] as shown on the plan submitted by the commissioners in connection with the set off. [Exhibit No. 6]. Each lot was described by making reference to abutting lots in accordance with the plan which showed the lots set forth as on a grid. The plan itself [Exhibit No.6] showed that the only road ran from the Chilmark town line westerly to the Gay Head Light House. The deeds to the individual lots made no provision for any rights of way or easements to get to and from any of the lots. There was evidence that showed that at the time of

the set-off the whole area was used in common by the Indians for planting corn, as pasture for their wild ponies and presumably in part for their abodes. The lots were undefined on the ground as there were no fences or any other separation of the lots. The Indians traveled on foot or on horseback without reference to any one person's land or boundaries. None of the trails were more than three feet wide and vehicles were never used.

Plaintiffs' title to Lot 594 comes by mesne conveyance from the title set-off to Amy Spencer [Exhibit No. 2] while defendant's title to Lot 587 comes from the lot set off to Leander Bassett [Exhibit No. 3]. Moshup Trail is a two-lane tar road built according to testimony in 1963-1964 which loops southerly from the state road. There is one new house on the south side of Moshup Trail 1/3 to 1/2 mile east of the turn off sought to be established as a right of way to 594. Utility lines end at this house, coming to it from the east. Except for this house, the area is wild and uninhabited, being sparsely covered with grass growing in loose, sandy soil ever more sparse as one approaches the beach to the south. The terrain itself is made up of small hills that may be passed over in a jeep or four-wheel drive vehicle.

The way over which plaintiffs claim their easement is part of an ancient way which commences at an undetermined point off "Old South Road" (which appears on Exhibit No. 5) and runs thence in a generally southeasterly direction to Moshup Trail. Ink lines on Exhibit No. 5 indicate that the way runs from Moshup Trail across Lots 577, 581 and 582 to Lot 587 where it divides into two ways, one

curving to the north, and the other, with which this case is concerned, to the south across Lot 587 to and through Lot 594. From there, it proceeds across Lot 595, a beach area, and thence westerly across Lots 585, 584, 583, 575 and 572 to Moshup Trail. The portion running from Lot 595 westerly to Moshup Trail is known as "Zack's Cliff Road." Since the Complaint alleges the right claimed by the plaintiffs to lie across Lot 587, the Court is unconcerned with Zack's Cliff Road. Because the necessity of access is to Moshup Trail, the Court is unconcerned with that part of the ancient way running between Old South Road and Moshup Trail. The way from Moshup Trail to Lot 594 was originally a horse trail which was widened by the repeated driving of an automobile over it. There is a gate across the way at the westerly boundary line of Lot 587, built by the defendants and kept locked by them since 1964. There was evidence indicating that the plaintiffs and others would, whenever they found it locked, cut the locks and throw them into the bushes in order to pass through Lot 587 to Lot 594 and beyond.

The partition of 1878 of the land held in common by the Indians was to establish parcels to be owned individually by the Indians, and this partition contained no provision for access to and from landlocked parcels by the designated owners of such parcels. There is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access. Rights of way of necessity are created by a presumption of law. Where a landowner conveys a portion of his land in such a manner that he is unable to reach the land retained without travelling over the land conveyed, the law

presumes in the absence of contrary evidence that the intent of the parties to the conveyance was to provide access to the former by passage over the latter. Davis v. Sikes, 254 Mass. 540. The necessity of the right of access does not of itself create the right, but it is evidence that the right can be implied from the intent of the parties. Orpin v. Morrison, 230 Mass. 529, Gorton-Pew Fisheries Co. v. Tolman, 210 Mass. 402. This principle is not disrupted by the fact that these parcels were all created at one and the same time in a partition of the land and not as a result of a landowner conveying out or retaining an inaccessible parcel.

That the Commonwealth in 1878 did not provide for specific means of access to the parcels partitioned perhaps indicates its awareness of the Indians' customary travelling on horseback and on foot without regard to the boundaries of individual lots as a means of access. Use of such a means was, perhaps, an exercise of an easement which now may need only specific location because of the changes in the use and occupation of the land involved and because of changes in modes of transportation. One cannot, obviously, drive an automobile to a landlocked parcel in complete disregard of the boundaries of other parcels.

If the Court were to rule that plaintiffs did have, as a result of the necessity of access and the lack of evidence of an intent on the part of the Commonwealth to deny access, an easement of access to Lot 594, it would not compel any conclusion that their easement lies over the way which they have been using to reach their Lot 594. The most direct way to reach Moshup Trail might be across Lots 586,

582, 583, 575, 576 and 572, in addition to Lot 587. The owners of these lots are not before the Court and thus the Court cannot issue in their absence any decree or judgment that would affect their rights. Even if, as plaintiffs allege, their right were to lie across the way over which they claim an easement, perhaps by prescription, that way runs across Lots 582, 581 and 577, in addition to Lot 587. The owners of these lots are likewise not before the Court, and the Court is powerless to issue in their absence any decree or judgment that would affect their rights. Finally, the Court notes that there are other landlocked parcels which may have rights over Lot 594. While this fact does not of itself prevent the Court from determining plaintiffs' claim, it does suggest the crying need for a thorough and comprehensive planning of access to the entire area. One manner of providing access, which might under other circumstances be judicially imposed, would be to plan ways sufficiently wide to allow vehicular use along the boundary lines of each lot (on all four sides if necessary to give access to Moshup Trail to any given lot), burdening each lot with one-half the width of the way and in turn benefiting each lot with a right of way over such of the other remaining lots as is necessary to reach Moshup Trail. This would be imposed in such a manner as would divide the burden of ways as equitably as possible.

The Court reluctantly concludes that the owners of at least Lots 571, 572, 575, 576, 577, 581, 582, 583, and 586 are indispensable parties to this action, and relief cannot without their presence in the action be granted. Rule 1A of the new Rules of Civil Procedure, designed to provide guidance in the transition of procedure

from the old rules to the new rules, provides in Rule 1A(3) and 1A(8) authority for the Court to dispose of this case under the procedure effected by new Rules of Civil Procedure. Under Rule 19(a) of the new rules, the Court can on its own motion order these other owners to be joined in these proceedings. Rule 19(a) (1), Rule 19(a) (2) (i). Alternatively, under Rule 19(b), the Court can dismiss the case without prejudice until such time as the plaintiffs upon proper pleadings and process can join in this action these indispensable parties. It is the Court's view that any judgment that could issue at this point in these proceedings, assuming such a judgment would be favorable to the plaintiffs, would be either unavoidably prejudicial to one or more parties not now before the Court, or completely inadequate to the needs of the plaintiffs. The Court chooses in its discretion to dismiss the case without prejudice under Rule 19(b) because the information necessary to make an order under Rule 19(a) is not now before the Court. More important, a dismissal without prejudice under Rule 19(b) will not only tend to accomplish the same purpose as an order under Rule 19(a), should the plaintiffs desire to file the appropriate motions and pleadings, but also a dismissal will tend to give the present parties ample latitude in their pursuit of this litigation. The Court is a suitable place for determining rights of the parties before it under the law, but legal process is not always the best means for planning access to a large number of lots; the Court has no special expertise in land development. However, the Court is quite prepared to decide whatever legal issues are presented to it provided all the proper parties are before it.

The Court orders that the petition be dismissed without prejudice to the plaintiffs to file appropriate motions and pleadings for further hearings in this matter.

So Ordered.

William D Rondell
JUDGE

Dated: July 14, 1975.

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