County: **Dukes, ss.**

Case No: **Miscellaneous Case No. 129925**

Date: **July 19, 1989**

Parties: **HUGH C. TAYLOR and JEANNE S. TAYLOR vs. DAVID E. VANDERHOOP and EVELYN VANDERHOOP**

Decision Type: **DECISION**

Hugh C. and Jeanne S. Taylor ("Plaintiffs") commenced this action on October 4, 1988 seeking a declaration, pursuant to GL c. 231A, that David E. and Evelyn Vanderhoop ("Defendants") have no right to enter upon or to pass over a forty (40) foot wide right of way ("Way") depicted on Land Court Plan Nos. 35915A and 35915B as running across a portion of a parcel of registered land owned by the Plaintiffs located on Lobsterville Road in Gayhead, Massachusetts, shown as Lot No. 4 on Land Court Plan No. 35915B ("Locus") (Exhibit No. 1-B), or in the alternative, a declaration that any right of access which the Defendants may possess on or over said Way, does not include the right to use it for vehicular traffic or to install utilities or other services in or over the same. Pending a trial on the merits, the parties filed cross-motions for preliminary injunctive relief. These motions were allowed by Order of this Court dated October 20, 1988, as follows:

> (a) The defendants are enjoined, until further order of this Court, from (i) using for vehicular traffic, (ii) disturbing, or (i-ii) altering the "Way (40.00 wide)" shown on Land Court Plan No. 35915B except that defendants may use the Way, during reasonable working hours, until noon on October 22, 1988, for the purpose of causing one vehicle to pass over said Way in order to reach defendants' land and to excavate a foundation hole on said land; and
> (b) The plaintiffs are ordered, until further order of this Court, to remove from the Way the boat or any other items which may obstruct passage over said Way.

Thereafter, on November 3, 1988, the Order was amended to read as follows:

> A. The plaintiffs are ordered, until further order of this Court, to refrain from obstructing passage over the disputed [Way] . . . or from interfering with the use of the Way by the defendants for passage to and from their land by foot or by ordinary vehicles
> B. The defendants are enjoined, until further order of this Court, from using the Way for construction vehicles of any nature . . . or from altering or causing damage to the Way. . . .

A trial was held in the Land Court, sitting at Edgartown, on January 30, 1988, at which time a stenographer was appointed to record and transcribe the testimony. The matter was submitted on a partial Statement of Agreed Facts (Exhibit No. 1) and oral testimony. Five witnesses testified and five exhibits were introduced into evidence. All exhibits, and certain of the agreed facts, are incorporated herein for the purpose of any appeal. Following trial, the Court viewed the subject premises in the presence of counsel.

On all of the evidence, I find as follows:

1. The Plaintiffs acquired title to Locus by Transfer Certificate of Title No. 3806 (Exhibit No. 1-A) on July 19, 1974. Locus constitutes a portion of the land originally registered to Isaac and Gertrude Taylor ("Taylors") by Final Decree dated August 9, 1971 (See Exhibits No. 1-C-1, 1-C-2 and 1-D). The Taylors' Original Certificate of Title, dated August 9, 1971 (Exhibit No. 1-C-2), contains the following language:

> . . . So much of the land hereby registered as is included within the areas marked "Way-20.00 feet wide; and "Way-40.00 feet wide," approximately shown on [Land Court Plan No. 35915A] (Exhibit No. 1-D), is subject to the rights of all persons lawfully entitled thereto in and over the same. . . .

Although this language is omitted from the Plaintiffs' Transfer Certificate of Title, the aforesaid forty (40) foot wide Way in depicted on the Plaintiffs' Land Court Plan No. 35915B (Exhibit 1. B) and is clearly visible on the ground. In any event, the unexplained omission in a Transfer Certificate of a right in a dominant estate does not extinguish that right absent a release or other appropriate document.

2. By deed from John O. Vanderhoop, Pauline Vanderhoop and Leonard F. Vanderhoop, Sr. dated December 30, 1976, recorded at Book 341, Page 314 in the Dukes County Registry of Deeds (Exhibit No. 1-E), the Defendants acquired title to a certain parcel of unregistered land located to the northwest of Locus and shown in part as a lot marked "Edwin D. Vanderhoop" on Land Court Plan No. 35915A.

3. As shown on said Plan, the Defendants' property lies

between a parcel of registered land located to the north and another parcel of registered land located to the south, both of which parcels are owned by Frances A. Ginnochio ("Ginnochio"). The foregoing parcels appear as Lots No. 1 and 2 on Land Court Plan No. 19215A (Exhibit No. 1-G).

4. At the time of Ginnochio's registration petition, an objection thereto was filed by David F. Vanderhoop, Leonard F. Vanderhoop and Pauline A. Vanderhoop (Exhibit No. 1-H). Thereafter, on November 27, 1946, two Stipulations for Decree (Exhibit Nos. 1- I and 1-J) were entered into by the parties and duly incorporated into Ginnochio's registration decree. The pertinent portion of the Stipulation identified as "Exhibit No. 1-I" reads as follows

> . . . any decree registering the title in [Lot 1] on the Petitioner's plan [19215A], shall subject the fee therein to a right of way over the so-called Coast Guard Station Road as laid out on said plan . . . for the benefit of the present owners of [the Vanderhoop parcel], their heirs or assigns.

5. On November 20, 1953, a Final Decree (Exhibit No. 1~) entered in Ginnochio's registration case incorporating the Stipulation for Decree quoted above in Finding No. 4 as follows:

> So much of said lots 1 and 2 [on Land Court Plan No. 19215A] as is included within the limits of the way forty (40) feet wide, . . . is subject to the rights of all persons lawfully entitled thereto in and over the same (emphasis added), and to the terms of [the] stipulation [referenced above]. . . .
>
> There is appurtenant to said lots 1 and 2 the right to use the way forty (40) feet wide, . . . in common with all other persons lawfully entitled thereto. . (emphasis supplied).

6. The parcels depicted on Land Court Plan No. 35915B as belonging to Taylor, Vanderhoop, Ginnochio and one Broacher were all held at one time as common lands of the District of Gay Head, the same being transferred thereafter to the Town of Gay Head and later partitioned in accordance with Chapter 213 of the Acts and Resolves of 1870.

7. Following the filing of an additional objection to the Ginnochio registration petition by the United States of America ("USA"), an Agreement for Decree (Exhibit No. 1-K) was executed, whereby a perpetual easement for the benefit of the USA was granted in:

> a strip of land twenty (20) feet each side of the center line of existing ways as identified by dotted lines on a plan of land in Gay Head of [Ginnochio] . . . dated April, 1944 ("1944 Plan") (Exhibit No. 1-L) . . . with full right of egress and ingress over said lands by those in the employ of the [USA], on foot or with vehicles of any kind, with boats or any articles used for the purpose of carrying out the intentions of Congress provided for the establishment of life-saving stations; and the right to pass over said lands in any manner in the prosecution of said purposes and to erect such structures upon said land as the [USA] may see fit. . . .

Some time after 1947, the U. S. Coast Guard took over the Life Saving Station ("Station") situated on the parcel marked "1" on the 1944 Plan.

8. The forty (40) foot wide Way appears to have been created some time in the late nineteenth century for purposes of accessing the Station. As it presently appears, the Way runs from Lobsterville Road, a public way, to the site of the Station, crossing over the lands of the Plaintiffs', Defendants',

Ginnochios' and other parcels. The Way constitutes the Defendants' sole means of access from their Land to a public way. The evidence is somewhat vague as to the precise year of the Way's establishment, but I note that the 1887 U.S. Geodetic Survey Map on file with the Land Court shows what now appears to be South Road as the only road then located in Gayhead.

9. From the 1940's through the 1960's, the Vanderhoop family used the Way, or footpaths connecting thereto, to reach the Station for purposes of delivering newspapers and milk, and collecting swill for their pigs. At times, the Vanderhoops crossed over the Way in the course of hunting rabbits or searching for ancient artifacts over the surrounding area. In addition, they occasionally used the Way or connecting footpaths for recreational purposes and/or observing the extent of any erosion of the cliffs of Gayhead. At no time during this period did the Vanderhoops find their use of the Way blocked or obstructed.

10. In 1954, extensive erosion of the surrounding cliffs threatened the Station's structural soundness. Accordingly, the U.S. Coast Guard abandoned the Station and relocated thereafter to Menemsha (See Exhibit No. 3).

The Defendants Vanderhoop assert rights in the subject forty (40) foot wide Way based on the following legal theories: 1) easement by prescription; 2) easement by implication or necessity- and 3) easement in a private way for which the public has acquired rights of use by motor vehicle. For the reasons enunciated below, I find and rule on the evidence that the Defendants have acquired an easement by implication or necessity to pass and repass without

obstruction, by foot or by motor-vehicle, along the entire length of the Way for purposes of access to and egress from their property.

It is familiar law in this Commonwealth that one may acquire a right of way by prescription through twenty years of uninterrupted, open, notorious and adverse use. G.L. c. 187, s 2; Boston Seaman's Friend Society. Inc. v. Rifkin Management. Inc., 19 Mass. App. Ct. 248, 251 (1985); Glenn v. Poole, 12 Mass. App. Ct. 292 (1981); Brown v. Sneider, 9 Mass. App. Ct. 329, 331 (1980); Ryan v. Stavros, 348 Mass. 251, 263 (1964); Garrity v. Sherin, 346 Mass. 180, 182 (1963); Nocera v. DeFeo, 340 Mass. 783 (1959). In the matter herein, the-Vanderhoops' use of the subject Way spans the 1940's through the 1960's. I find such use, however, to be irregular and/or for purposes of reaching the station O Accordingly, the Vanderhoops' use of the Way is of an insufficient nature to establish their acquisition of prescriptive easement rights in and over the Way. See Uliasz v. Gillette, 357 Mass. 96, 101-102 (1970); Akasu v. Power, 325 Mass. 497, 502 (1950). Similarly, I find there to be insufficient evidence in the record before the Court to establish that the Vanderhoops, or the general public, have acquired easement rights in the Way under the theory that it is a private way for which the public has obtained rights.

The Defendant Vanderhoops further assert that they hold an easement by implication or necessity over the Way as it crosses Locus. Implied easements do not arise out of necessity alone. Perodeau v. O'Connor, 336 Mass. 472, 474 (1958). Their origin must

be found in the presumed intention of the parties to be gathered from the language of the relevant instruments read in light of the circumstances attending their execution, the physical condition of the premises and the knowledge which the parties had or with which they are chargeable. Labounty v. Vickers, 352 Mass. 337, 347 (1967); Perodeau at 474; Sorel v. Boisjolie, 330 Mass. 513, 517 (1953); Joyce v. Devaney, 322 Mass. 544, 549 (1948); Dale v. Bedal, 305 Mass. 102, 103 (1940). Additionally, where as here the Way in which an easement by implication or necessity is claimed traverses registered land, the proponents thereof bear the burden of proving that such easement rights accrued prior to the date of a Final Decree in such registration case and that they are members of the class referred to in the Decree as having said rights. The imposition of this burden is consistent with the well-settled rule that an easement by implication may not be created against registered land. G.L. c. 185, s. 53; Goldstein v. Beal, 317 Mass. 750, 757 (1945).

One particular set of circumstances which will give rise to an easement by implication, and which I find to be relevant hereto, exists where, during the common ownership of a tract of land, an apparent and obvious use of one part of the parcel is made for the benefit of another part thereof and such use is being actually made up to the time of the severance and is reasonably necessary for the enjoyment of the other part of the tract. Sorel at 516; Jasper v. Worcester Spinning and Finishing Co., 318 Mass. 752, 756-757 (1945); Joyce at 549. Further, where one conveys a portion of his land in such a way as to deprive himself of access to the remainder

thereof unless he crosses the land sold, the law implies from the resulting situation of the parties that such person has a way of necessity over the granted portion of the premises. The law thus presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. New York & New England Railroad Company v. Board of Railroad Commissioners, 162 Mass. 81, 83 (1894); Gorton-Pew Fisheries. Co. v. Tolman, 210 Mass. 402, 411 (1912); Orpin v. Morrison, 230 Mass. 529, 533 (1918); Davis v. Sikes, 254 Mass. 540' 545-546 (1926); Restatement of the Law: Property, Section 474.

In the instant matter, the respective properties of the Plaintiffs' and Defendants' originally comprised a portion of the common lands of the District of Gay Head. Following the enactment of Chapter 213 of the Acts and Resolves of 1870, however, the District of Gay Head was abolished and the Town of Gay Head established. Thereafter, the common lands were partitioned and conveyed to individual owners, the parcels owned by the Plaintiffs and Defendants being among those created by such partition. Accordingly, as it is immaterial whether the severance of common ownership results from execution of law, See Viall v. Carpenter, 80 Mass. (Gray XIV) 126 (1859); Flax v. Smith, 20 Mass. App. Ct. 149 (1985), a reasonable implication arises that some means of ingress to and egress from the resulting lots is necessary to the lot owners' enjoyment of their property. While the foregoing facts

do not support an easement by prescription, they do demonstrate that the subject forty (40) foot wide Way has been the accepted means of access to and from the surrounding parcels since its establishment in the late 1800's. While the record is devoid of evidence that the Way existed at the time of the partitioning of the common lands, the easement, nevertheless, came into existence at that time as an undefined easement by necessity. Where a right of way is not precisely located or established, its existence is not affected. Emery v. Crowley, 371 Mass. 489, 495 (1976). In such instances, the Court has the authority to establish the easement or the same may come into being by acquiescence of the parties involved. Here, the establishment of the Way on the ground, its use and the surrounding circumstances, including the Vanderhoops' filing of an objection in the Ginnochio Registration Case No. 19215A (See Finding No. 4), all serve to define the easement created by the partition. Additionally, as the Final Decree in the Ginnochio registration case incorporates a Stipulation for Decree whereby the registration of the Ginnochio land was made subject to the Vanderhoops' right to cross over the same for purposes of accessing their land, the reasonable inference to be drawn therefrom is that at that time the parties deemed the Way to be the access route to their properties.

As noted above in Finding No. 1, the Original Certificate of Title held by the Plaintiffs' predecessors in title also refers to Land Court Plan No. 35915A, which depicts the forty (40) foot wide Way and which expressly acknowledges that such registration is subject to the rights which others may lawfully possess therein.

The Vanderhoop's status as persons so entitled to use the Way accounts for their failure to file an objection in Land Court Registration Case No 35915. Accordingly, when the Final Decrees of the Land Court of November 20, 1953 (Ginnochio) and August 9, 1971 (Taylor) were extended onto Land Court Plan Nos. 19215A and 35915A and said plans and decrees were made a matter of public record, some easement of passage over the Ways depicted thereupon became appurtenant to the lot now owned by the Defendants. See Dubinsky v. Cama, 261 Mass. 47, 53-54 (1927); Walter Kassuba Realty Corp. v. Akeson, 359 Mass. 725, 728 (1971).

The Plaintiffs' Transfer Certificate of Title fails to include any language subjecting the registration of Locus to similar easement rights in and over the subject Way', but Land Court Plan No. 35915B, which is specifically referred to therein, shows said Way. I therefore deem this omission of no consequence since the Certificate's reference to the plan places the Plaintiffs on notice as to the existence of the Way, and accordingly, causes the registration of Locus to be subject to any and all easement rights which other persons may lawfully possess in and over said Way. See Anderson v. DeVries, 326 Mass. 127, 132 (1950); Myers v. Stalin, 13 Mass. App. Ct. 127, 137 (1971); Brooks v. Capitol Truck Leasing. Inc., 13 Mass. App. Ct. 471, 478-479 (1971). The Plaintiffs thus took title to Locus subject to the Vanderhoops' right of way and must be estopped to deny the existence of whatever easement of travel was created in and over the Way under the land registration records. See Dubinsky at 56. I note in addition thereto that such "easement of travel" is not limited to access in and over the Way

up to the Ginnochio parcel, as the Taylors' Original Certificate of Title contains no express language so limiting the Defendants' rights in and over the Way. Had the Taylors intended to restrict the extent of such passage to that portion of the Way running in front of the Ginnochio property, and not to any point beyond, they should have so petitioned the Court, rather than leaving the Way open to the rights of all persons lawfully entitled thereto in and over the semen. I thus find the Certificate's reference to the Way, and to the rights contained therein (See Finding No. 1), to further substantiate an acknowledgment on the part of the Plaintiffs' predecessors in title that the Vanderhoops, and others similarly entitled to use the Way, possess rights to pass and repass over the entire length of the Way for purposes of accessing their land. Further, as it is fundamental that where an easement or other property right is granted or created, every right necessary for its enjoyment is included by implication, Sullivan v. Donohoe, 287 Mass. 265, 267 (1934); Anderson at 134, the Defendants' right to so use the Way carries with it the right to make reasonable repairs and improvements thereto at their own expense. Such right further includes the right to install utilities therein, or thereupon as conditions may dictate, for purposes of servicing their property. G.L. c. 187, s. 5; Nantucket Conservation Foundation. Inc. v. Russell Management -Inc., 380 Mass. 212, 217 (1980).

In consideration of the foregoing, I rule in summary that the Defendant Vanderhoops have acquired a right of way by implication to enter upon and to pass and repass without obstruction, by foot

or by vehicle, over and along the entire length of the forty (40) foot wide Way, such easement encompassing each and every right necessary or incidental to the Defendants' enjoyment thereof, and that the Vanderhoops, their heirs and assigns are members of the class so entitled to use the Way.

Judgment accordingly.

Judge: **/s/**

Robert V. Cauchon

Justice

Dated: July 19, 1989

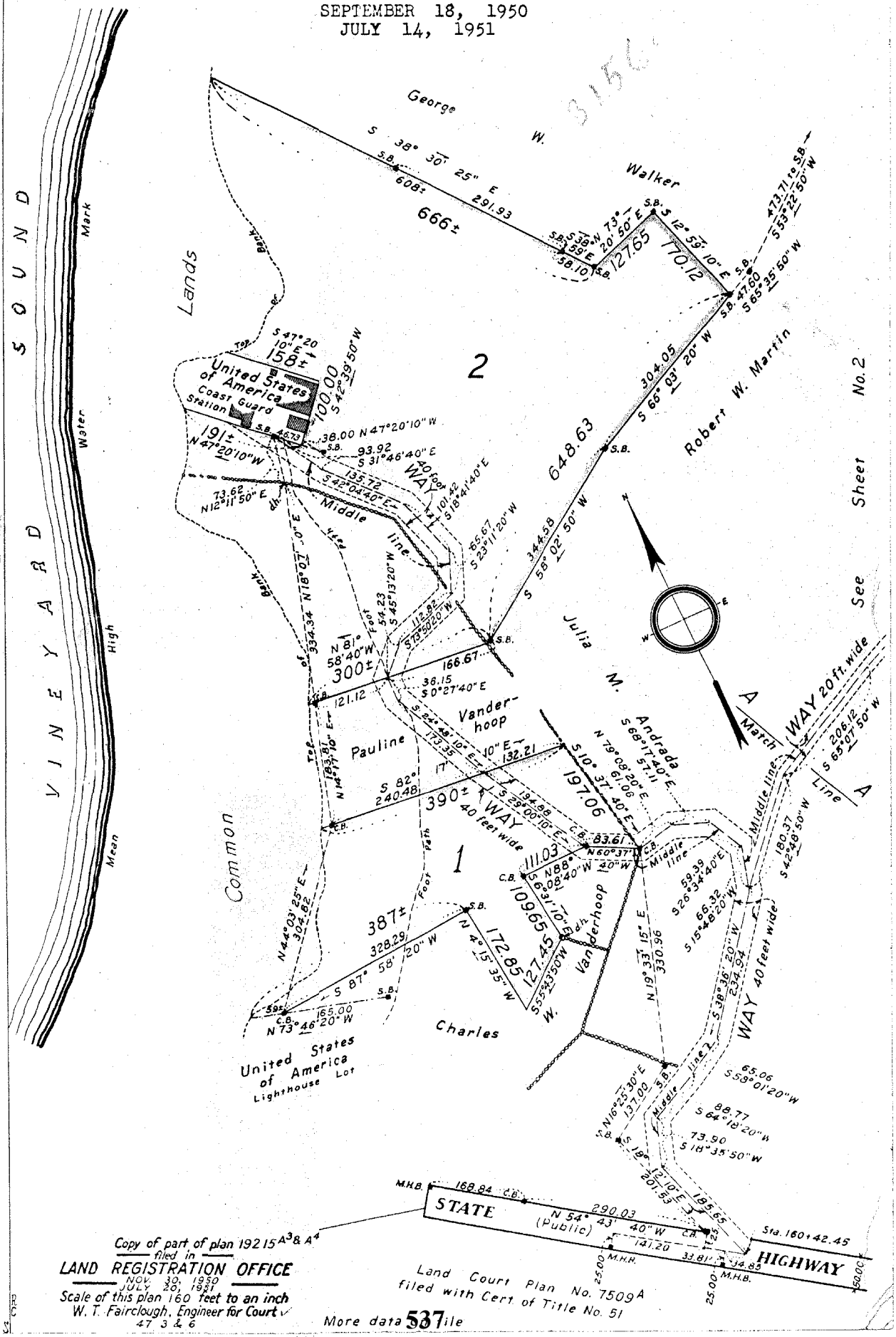
End Of Decision

19215 A
Sheet 1

PLAN OF LAND IN GAY HEAD

Hollis A. Smith, Surveyor

SEPTEMBER 18, 1950
JULY 14, 1951

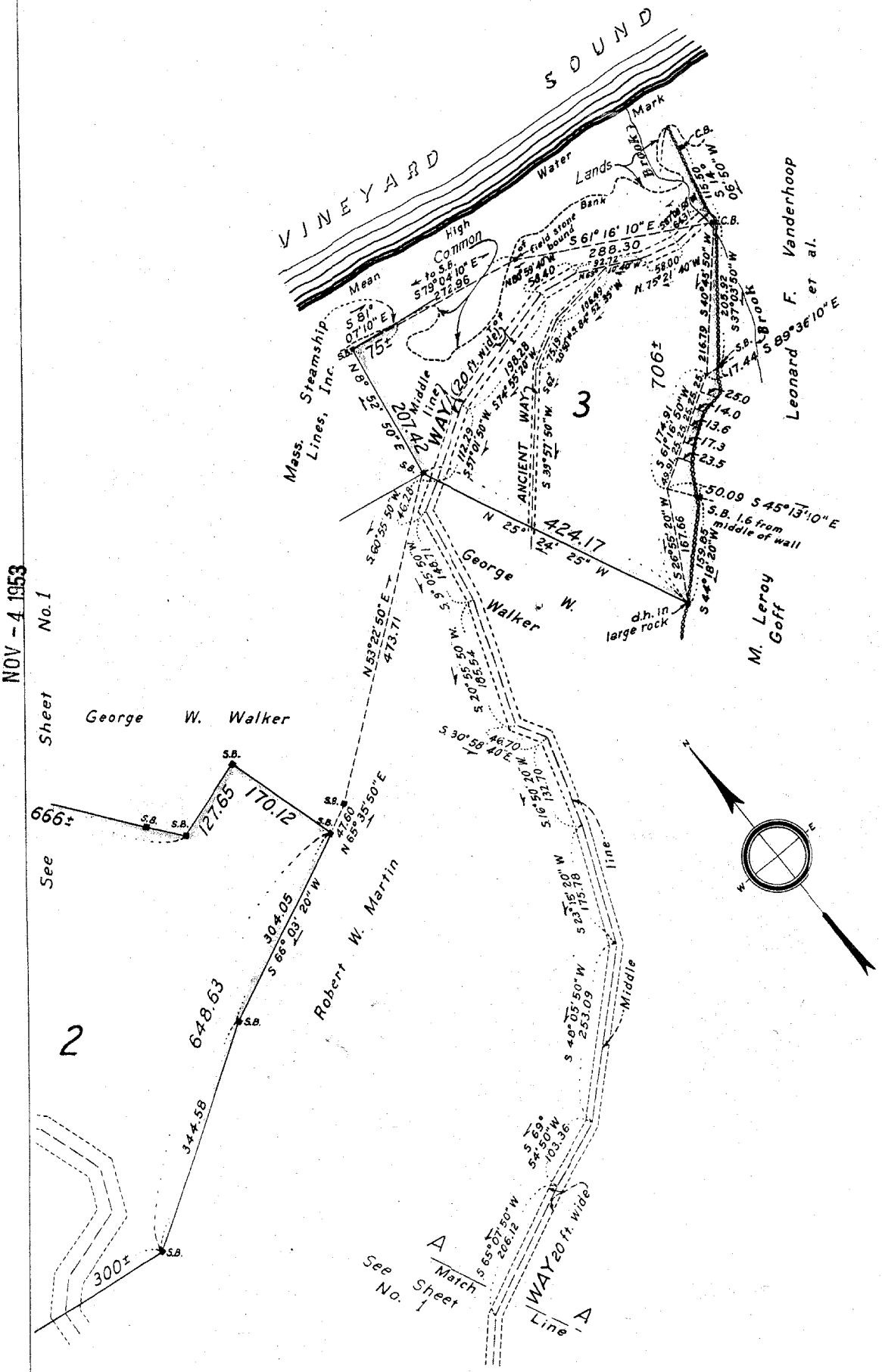


Copy of part of plan 19215 A3 & A4
filed in
LAND REGISTRATION OFFICE
NOV. 30, 1950
JULY 20, 1951
Scale of this plan 160 feet to an inch
W. T. Fairclough, Engineer for Court
47 3 & 6

Land Court Plan No. 7509A
filed with Cert. of Title No. 51

More data 537 file

19215 A
Sheet 2



NOV - 4 1953

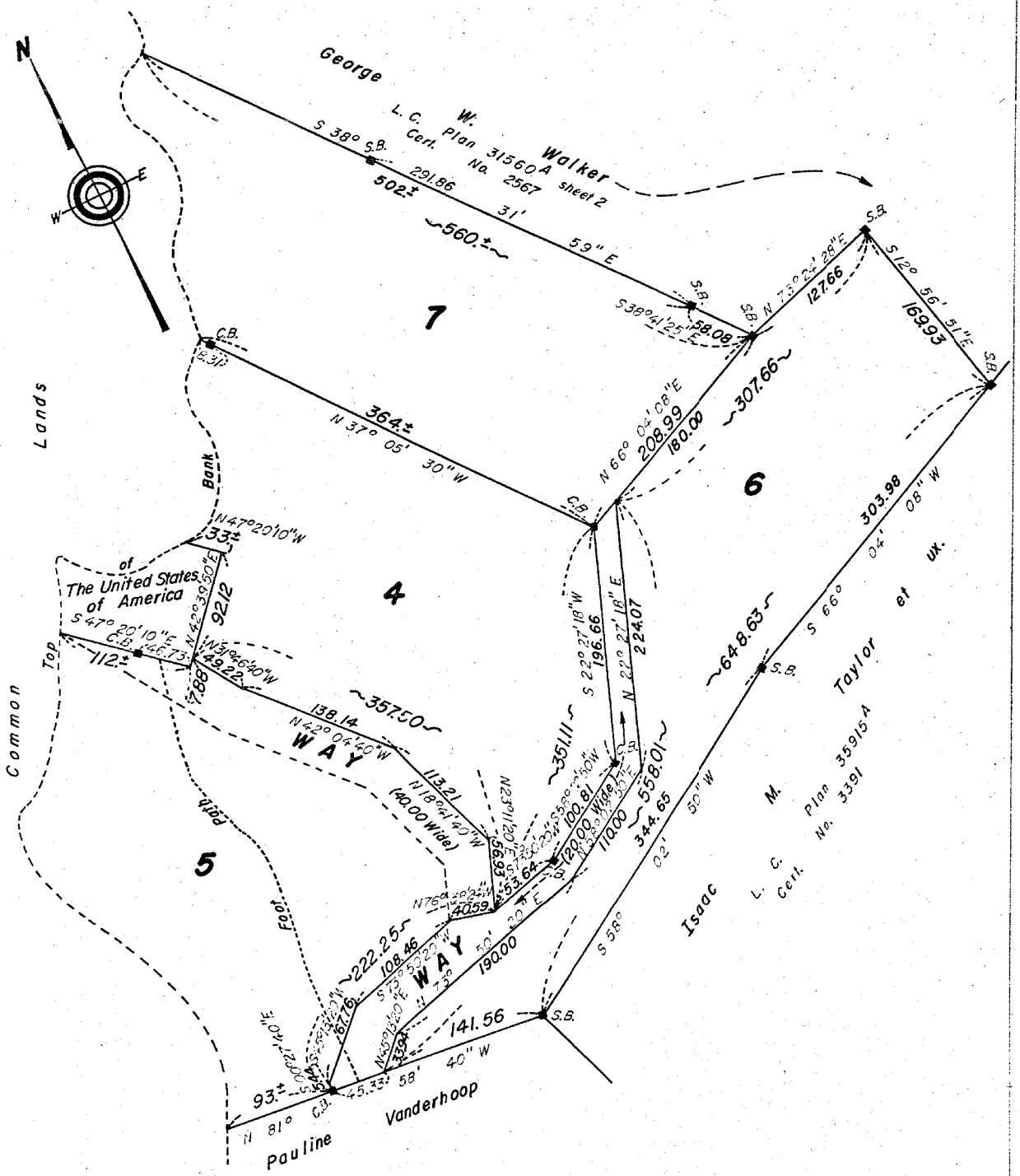
Scale of this plan 1 inch to an inch

SUBDIVISION PLAN OF LAND IN GAY HEAD

Dean R. Swift, Surveyor

October 7, 1976

19215 B



Subdivision of Lot 2
Shown on Plan 19215A sheet 1
Filed with Cert. of Title No. 1756
Registry District of Dukes County

Separate certificates of title may be issued for land shown hereon as Lots 4, 5, 6 & 7 By the Court.

NOV 5 1976 Jeanne M. Maloney Recorder.
Deputy

P.A.R.

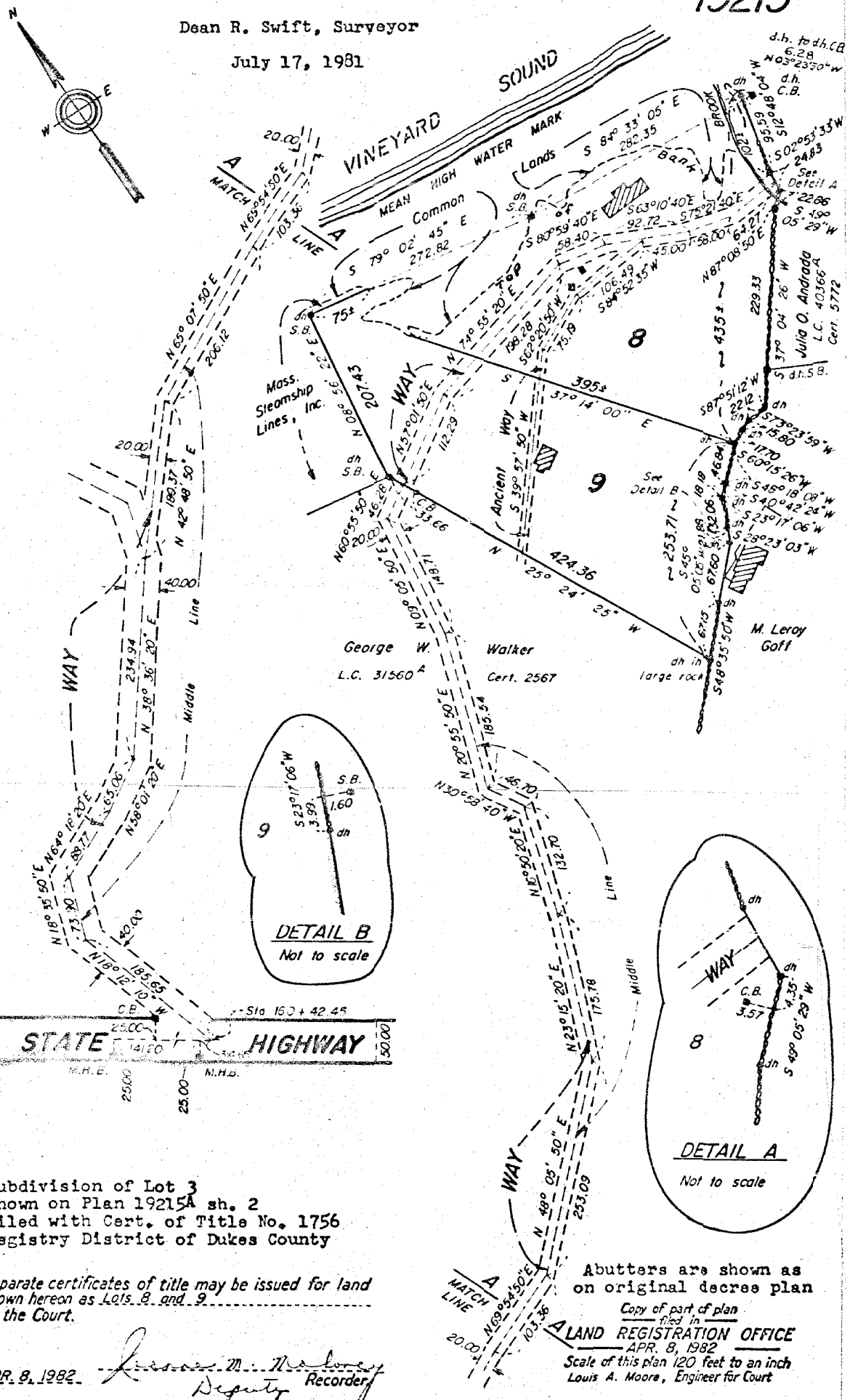
Copy of part of plan filed in
LAND REGISTRATION OFFICE
NOV 5, 1976
Scale of this plan 100 feet to an inch
R.L. Woodbury, Engineer for Court

SUBDIVISION PLAN OF LAND IN GAY HEAD

19215C

Dean R. Swift, Surveyor

July 17, 1981



Subdivision of Lot 3
Shown on Plan 19215A sh. 2
Filed with Cert. of Title No. 1756
Registry District of Dukes County

Separate certificates of title may be issued for land shown hereon as Lots 8 and 9 By the Court.

APR. 8, 1982 — Deputy Recorder

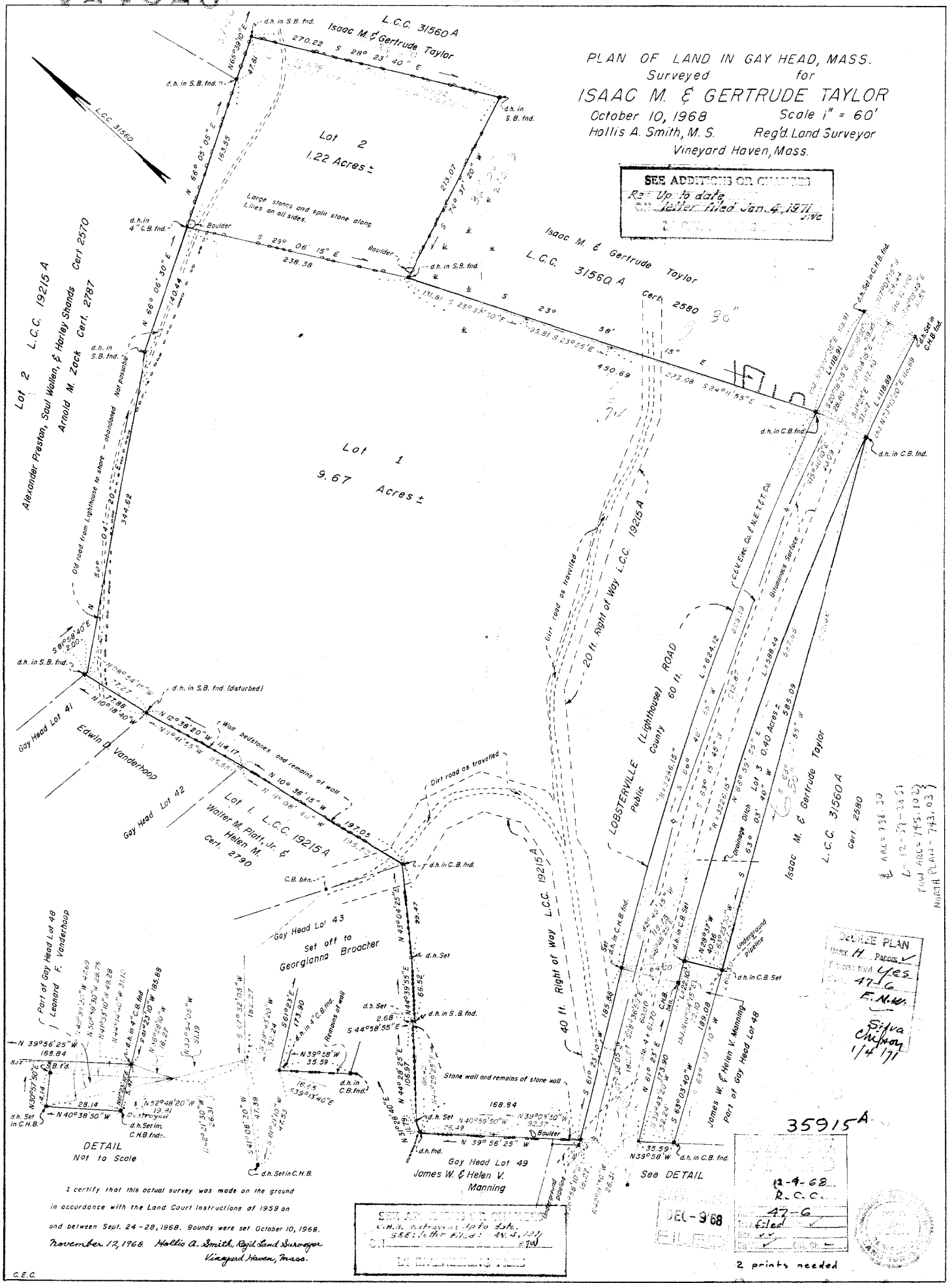
Abutters are shown as on original decree plan

Copy of part of plan filed in
LAND REGISTRATION OFFICE
APR. 8, 1982
Scale of this plan 120 feet to an inch
Louis A. Moore, Engineer for Court

ACM

Form LCE-S-3. 2500 9-81

359154



35915A