Klink v. Valovcin, Land Court Misc. Case No. 165039, 17-19 (1993).

Case No: **Miscellaneous Case No. 165039**
Date: **June 1, 1993**
Parties: **GUNTHER KLINK, ROSE KLINK, EDWARD BIZIK, GENIA BIZIK, ANNE BURCHSTEAD, JOSEPH CAREY, DOROTHY CAREY, THOMAS CENTRACCHIO, JULIA CENTRACCHIO, CLYDE EAGLES, HELEN EAGLES, GEORGE FURLONG, MARIE FURLONG, ELMER GARDNER, DOROTHY GEORGE, HENRY GILHOOLY, JANET GILHOOLY, JOSEPH HAMELBURG, JOAN HAMELBURG, WENDALL HARVEY, WALLACE HEDQUEST, PAULINE HEDQUEST, DAVID HEFFERNAN, RUTH HEFFERNAN, SUSAN HIBBENS, WILLIAM HORIGAN, PEARL HORIGAN, IRVING HOWARDS, FRIEDA HOWARDS, PHILIP JOANNIDES, BETTY JOANNIDES, MARY LENNON, LOIS LEVINSKY, EDWARD LYNCH, WILLIAM MAGNER, WALTER MAKAR, MARYANN MAKAR, ROBERT McKINLEY, LINDA McKINLEY, PHYLLIS MIGLIOZZI, WILLIAM MOSTYN, CATHERINE MOSTYN, RICHARD MURPHY, JOAN MURPHY, LAURA NASH, EDWARD O'BRIEN, JUDITH O'BRIEN, DONNA POIRIER, KENNETH RICHARDSON, CYNTHIA VUJOVICH, MICHAEL WALSH, PAULA WALSH, EMMA WEGAHAUPT, DAVID WILEY, ROBERT CRONAN (TRUSTEE OF THE SCHOOL REALTY TRUST), WILLIAM J. O'CONNOR, CHARLOTTE C. O'CONNOR, MARY LOFTUS and RITA O'CONNOR (TRUSTEES OF CLAIRE LANE REALTY TRUST) vs. HELEN S. VALOVCIN**
Decision Type: **DECISION**

As the historic period in the history of the Massachusetts Bay Colony, the years from 1641 to 1647, recedes into the past, the citizens of the Commonwealth of Massachusetts have become increasingly unhappy with the colonists' action at that time in providing that the line of private ownership along the ocean extends from mean high water to mean low water mark if the distance does not exceed 100 rods; if in fact the tide ebbs and flows more than 100 rods, the limit of private ownership is 1,650 feet. Accordingly there has been activity in the legislative community to provide more access to the shore front to those who do not own waterfront property, and the courts also have seen an increase in the number of litigants who claim rights to use the beach by implication or prescription. As evidence of this more than sixty plaintiffs in the present litigation have brought an action pursuant to the provisions of G.L. c. 231A to establish their rights to use the beach in front of Lot 4 of the Silver Spring Beach ("Silver Spring") Subdivision owned by the defendant Helen Valovcin by implication, prescription or necessity. The complaint was filed on July 2, 1991. The defendant subsequently moved and continues to move for the dismissal of the complaint for failure to join indispensable parties, i.e., the owners of Lots 1-3 on the Silver Spring Subdivision Plan. I deny the most recent motion to dismiss on these grounds since the rights of the plaintiffs and the defendant can be determined without ruling on the rights of the plaintiffs as against the other waterfront property owners who have not as yet contested use by the plaintiffs of the beach. Nor have

any such lot owners adopted the aggressive tactics of the defendant in attempting to bar the long existing use of the beach and way. The plaintiffs have not pursued their rights to use the accessway or to cross the land of the defendant by necessity. Presumably this count was grounded in the claim that in order to exercise the right preserved to the public

to use the land below high water mark for fishing, fowling, navigation and swimming there must be access to such land. Barry v. Grela, 372 Mass. 278 (1977).

The main thrust of the plaintiffs' case always has been that the owners in the Silver Spring Subdivision have the right to use the 20 foot wide right of way to the beach, which is an extension of the Silver Spring Beach Road, both by implication and by prescription and that they have similar rights to use the beach in front of the defendant's property; that the owners of the lots in the Cooks Brook Subdivision have the right to use the accessway and the beach by prescription; and that the owners of two lots in the so-called Newell Subdivision have prescriptive rights to reach the beach and to use the beach for usual beach purposes. The plaintiffs now seek to amend their complaint by substituting the current owners of the lots whose prior owners were original plaintiffs, and to add to the rights of those in the Cooks Brook Subdivision a right by implication to use the accessway and the beach in front of Lot 4. In essence the amended complaint seeks to add for the benefit of the Cooks Brook Subdivision owners an implied right to use the beach in front of the defendant Valovcin's land. It also adds a prayer for a determination that the

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defendant's title does not extend to the limits of private ownership but only to high water mark. This allegation was implicit in the complaint as originally filed. Since in my opinion the evidence does not support all of these propositions, I allow the amended complaint in part only, i.e., to substitute the plaintiffs named therein for those that appear in the earlier pleadings and to include both the express and implied right of the Cooks Brook lot owners to use Silver Spring Beach Road. In addition, within thirty days after the entry of judgment in this action the plaintiffs may move to amend their complaint by adding to the rights claimed by the owners of lots in the Silver Spring Subdivision and the Cooks Brook Subdivision the right by grant to use Silver Spring Beach Road from the Town Road to Cape Cod Bay.

When the complaint initially was brought, there were two principal areas of dispute. The first centered on the rights of the plaintiffs owning lots in the Silver Spring Subdivision (Class I Plaintiffs), those owning lots in the Cooks Brooks Subdivision (Class II Plaintiffs) and four owners in the Newell Subdivision (Class III Plaintiffs), to use the 20 foot way (which the developers called Silver Spring Beach Road but which the parties have denominated the accessway to the beach) to go to and from their respective lots and the beach which lies in front of the two principal subdivisions involved in this litigation. The second centered on a determination as to whether the plaintiffs have the right to use the beach in front of the defendant's property for all usual beach purposes. During the trial the plaintiffs waived

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during the trial any right to use so much of the latter land as lies above the mean high water mark although from the Court's observations at the view little of the shore is

affected by this concession since at high tide there is little sand left above its mark. While the defendant originally was represented by counsel who withdrew prior to the commencement of the trial, she acted pro se during the presentation of the plaintiffs' case. Successor counsel, however, was obtained to represent her during the presentation of her case, and he conceded that the plaintiffs in the Silver Spring Subdivision had a record right to use the accessway to the beach. It is clear from the record title that the owners of the lots in the Cooks Brook Subdivision have a similar right as well, but that concession was not made by the defendant. There thus remains in the case a determination of the rights of the Class II and Class III Plaintiffs in the accessway and the rights of all the plaintiffs by implication or prescription to use the beach in front of Lot 4. There is a subissue also as to when, if at all, the actions of the defendant stopped the running of the prescriptive period. Finally I have concluded that the Class I Plaintiffs have the right by implication to use the beach in front of Lot 4 for all usual purposes; that the Class II Plaintiffs (other than the O'Briens) have the right to use the way by express grant, by implication and by prescription and also to use the beach by prescription; and that the Class III Plaintiffs have the right to use the accessway and the beach through prescription.

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A trial was held at the Land Court on September 18, 1992, November 12 and 13, 1992, January 28, February 17 and 18 of this year. A view was taken by the Court in the presence of counsel for the plaintiffs and Mrs. Valovcin on October 30, 1992. At the trial witnesses for the plaintiffs were Roberta Richardson, the owner of Lots 40 and 41 in Silver Spring Subdivision, Eileen Scott, the first owner of Lot 4, Laura Nash, the owner of Lot 16 in the Silver Spring Subdivision, John Cronan, the owner of Lot 4 in what I have called the Newell Subdivision, William Mostyn, the owner of Lot 3 in the latter subdivision, Gunther Klink, the current owner of Lots 50, 51, 58, 59 and 60 in the Silver Spring Subdivision, Daniel Bartlett, a Land Court title examiner, Edward Lynch, the owner of Lots 3 and 6 in the Cooks Brook Subdivision, Clyde Eagles, the owner of Lots 32 and 33 in the Silver Spring Subdivision and the previous owner of the lot entitled "R. Daley", in said subdivision; and Durand Eckeverria, an historian and retired Princeton professor. The defendant called Frieda Howards, the owner of Lot 9 in the Cooks Brook Subdivision, Elmer Gardner, the owner of Lot 10 in the Silver Spring Subdivision, Mr. Mostyn, John Horwarth, who formerly rented Lot 3 adjacent to the defendant's property, Horwarth's wife Marguerite, Darryl Valovcin, the son of the defendant, Mary Alice Price, the owner since 1979 of Lot 3 adjoining that of the defendant, the defendant and Robert W. Perry, a civil engineer with Schofield Brothers, Inc. All exhibits introduced into evidence are incorporated herein for the purpose of any appeal. The lot owners testified not only as to their

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personal use of the beach but to that of neighbors whose conduct they had observed.

On all the evidence I find and rule as follows:

1. Rights in the 20 foot wide road which leads from the town road to Wellfleet Bay were created by John F. Sullivan to whom apparently the prior owners of two adjoining plots of land, together containing approximately 20 acres, had conveyed the title in order that cross easements in the road shown on a plan thereof hereinafter described might be granted and reserved. The road in question lies in the same location as Silver Spring Beach Road as shown on the subdivision bearing that name, and said plan shows it as extending from Wellfleet Bay on the west to a town road on the east. In the deed from John F. Sullivan to Chester E. Pierce dated February 10, 1922 and duly recorded in Book 386, Page 224 (Exhibit No. 1A) there is granted an appurtenant right of way along and over the southerly 10 feet of said 20 foot way as shown on a plan entitled "Map of Property in Town of North Eastham County of Barnstable" dated March 10, 1921 and recorded in Plan Book 9, Page 49 (Exhibit No. 1) to pass and repass along the same with vehicles or on foot and reserving unto himself, his heirs and assigns for the benefit of and as appurtenant to the land lying southerly of said 20 foot road a right of way along and over the northerly 10 feet of said road to pass and repass along and over the same with vehicles or on foot. In the companion deed out to Reuben H. Horton et al (Exhibit No. 1B) dated February 10, 1922 and recorded in Book 386, Page 225, Mr. Sullivan conveyed the premises subject to a

right of way along and over that strip thereof comprising the southerly 10 feet of said 20 foot road shown on said plan and conveyed them for the benefit of the right of way over the strip of land comprising the northerly 10 feet of said 20 foot road.

2. The northerly portion of the 20 acre tract was developed by Pierce and his successors as the Silver Spring Subdivision which is shown on a plan entitled "Subdivision of Land at Silver Spring Beach on Cape Cod Eastham, Mass. developed by Jessie Pierce" dated May 1937 by Schofield Brothers and recorded in Plan Book 61, Page 33 (Exhibit No. 2). It shows 66 numbered lots and two unnumbered lots. Several buildings are shown as already in place in 1937 on the land comprising this subdivision.

3. The southerly portion of the land is on the Cooks Brook Subdivision which contains a total of 21 lots as shown on a plan entitled "Subdivision of Land in Eastham (North) Massachusetts as developed by Cooks Brook Realty Trust" dated February 1955 by Schofield Brothers and recorded in Plan Book 120 at Page 123 (Exhibit No. 3). The property extends from Cape Cod Bay to Higgins Road, a town way (Exhibit No. 3)

4. The final subdivision concerned in this proceeding as seen in Exhibit No. 4 is a plan entitled "Subdivision Plan of Land in North Eastham as surveyed for Hamilton I. Newell et ux" dated April 1959 by Arthur L. Spiral Co. and recorded in Plan Book 147, Page 153 (Exhibit No. 4).

5. The conveyances out of lots on the Silver Spring Subdivision Plan commenced as early as 1937, but these were

unnumbered lots on the plan. The greatest number of conveyances took place in the 1940's and 1950's with nearly 70% of the transactions having been consummated prior to the first conveyance out of Lot 4 in 1957. The language in these deeds varied so far as the appurtenant rights are concerned. In some instances the granted premises were conveyed "together with the right of way to the public way and to the beach over Silver Spring Road aforesaid" or with an appurtenant right to use all the private ways shown on the plan. There is at least one deed out of Lot 60 from Frank Schafer, the son of Jessie Pierce, which conveyed the appurtenant right to use the private beach at the end of Silver Spring Beach Road in common with all others legally entitled thereto.

6. The conveyances out of the Cooks Brook Subdivision commenced in 1954 and continued thereafter until 1960, at least so far as the plaintiffs in this litigation are concerned. The two plaintiffs who own lots on Claire Lane in the Newell Subdivision hold pursuant to two chains of title which commenced in 1942 or 1959. The language in the Cooks Brook Subdivision generally included this phrase: "together with the right to use, in common with others, the beach below the bluff along the westerly side of the subdivision, for recreational purposes, and the right to use all roads, ways, drives and paths in said subdivision as shown on said plan, for purposes of passage".

7. Conveyances in the Newell Subdivision grant only rights to the way within that subdivision and do not include rights by implication or otherwise in Silver Spring Beach Road or the beach

itself. Any rights of the plaintiffs who own lots in this location are grounded in prescription.

8. Perhaps fearing that the ocean would continually erode the waterfront lots, the developers sold many of the upland lots first. Soon thereafter, summer homes or cottages were constructed on many of them, and their early owners typically reached the beach by crossing any of the four vacant beach front lots instead of using the accessway itself. Ultimately, however, the combination of the elements increased the sand dunes on the lots over which access to the beach was to be had, and the property owners concentrated on improving access to the beach by locating it within the area denominated on the two subdivision plans. The first man-made assistance in traversing the area to the beach from the top of the bluff which runs in front of the waterfront lots along both subdivisions was a large rope anchored on posts similar to those used in ships at sea during stormy weather and which served as an assist to those attempting to negotiate the route down to the beach. Subsequently the rope was replaced by a series of stairs, the first initiated by Mr. Mostyn in 1962 (Exhibit No. 13) in which he solicited the neighborhood for contributions toward building a portable stairway about 100 feet in length of rough fir wood, in 10 foot lengths including wooden banisters. Over the years the initial staircase was followed by two successors, each more elaborate than the one it replaced, with the current stairway having a platform at the top of the bluff and two intervening platforms between it and the beach. Each year the neighbors put

the staircase down in the spring and pulled it up in the winter for storage purposes and to preserve it from the fury of the Atlantic. Exhibit No. 14 is a photograph of the area showing one of the early staircases in place, the houses on the waterfront lots and the public beach to the north. Exhibit No. 35 which was prepared by Schofield Brothers shows the staircase in 1983 as being outside of the 20 foot right of way as laid out by the developers, but the stairs then were in the process of being moved to winter storage and were not in their usual place. At the time of the view the stairs had been partially pulled up, and it was not possible to descend them to the foot of the bluff. Exhibit No. 35 also shows proposed stairs, a proposed plan walkway and proposed beach grass, all for consideration by the Department of Environmental Quality Engineering (DEQE) now the Department of Environmental Protection (DEP). A consideration of the efforts by the plaintiffs and the neighborhood association for approval by state authorities is outside the scope of this action.

9. In addition to constantly raising ever higher the dune where the staircase is located, the elements have filled in the areas beside and behind Mrs. Valovcin's cottage. Sand has also filled in much of West Road, which runs on the easterly side of her cottage parallel to the ocean from Silver Spring Beach Road to Cooks Brook Road. Gradually access by motor vehicles in the entire area is being affected by the velocity and ferocity of the wind as it continually causes accumulations of sand along the shore areas during the winter months.

10. Beginning as early as the 1950's Mrs. Richardson's father Lincoln Grush made arrangements to have Silver Spring Beach Road made passable in the spring by securing the services of local workmen to improve the surface of Silver Spring Beach Road (Exhibit No. 11A) and to dig out the winter build-up of sand on the accessway to the beach (Exhibits Nos. 10A and 10B). He also arranged for benches and trash cans at the top and bottom of the stairs. The first boardwalk was built on the area between the wider road and the stairs about 1962.

11. Prior owners of both Lots 3 and 4 testified to the use that was made of the accessway in the beach at the times of their ownership to which uses they did not object. Indeed the defendant's immediate predecessor solicited her neighbors for contributions to the cost of opening the right of way as evidenced by a letter dated October 18, 1974 in which she suggested that she would be happy to discuss with the people who use the way the formation of an association to maintain it as well as to protect her property from erosion by such use (Exhibit No. 29).

12. It is clear that from the time the development was first conceived until the present, property owners, their families, their guests and their summer tenants consistently used the beach in front of the defendant's home without objection from her predecessors. In the fashion of beachgoers everywhere, they also placed their belongings on the beach at the foot of the stairs and on either side of the stairs. Uses which were made were those usual in a summer community: the placing of a blanket or a beach

towel on the sand and the sitting thereon to play card games, to entertain grandchildren, to read the latest novel, to dig holes or build castles in the sand or merely to enjoy the canvas of sea and sky; ultimately the area residents proceeded to the ocean to swim, to use the float once in place offshore, to use their boats and to carry on the myriad other activities familiar to those who live in a seashore community. The use followed no set pattern, for on any one day the particular property owner might choose to join his or her friends already on the beach, whether they were located to the right of the staircase in front of the defendant's property or to the left in front of the property of a nonparty to this litigation. On other occasions the owner might wish to follow Mae West's dictates and retreat to an area of privacy to read or meditate or simply enjoy the scenery. In any event the property owners in the development who were beachgoers, including all the plaintiffs or those claiming under them in this litigation as well as their predecessors, consistently used the beach for a period of at least twenty years openly, notoriously, thus rendering a claim of right adverse to all the world. In a very few instances the testifying lot owner could not remember an earlier intervening owner, but the pattern is so pervasive that any apparent gaps are immaterial.

13. Mrs. Richardson's testimony as to such use commences with the period in 1945 and continues to the present. Her family built a home on Lots 40 and 41 in the Silver Spring Subdivision which they occupied in 1950. Earlier, as tenants of Lots 22 and 24, she and her family regularly used the beach in front of the defendant's

property. In accordance with Mrs. Richardson's testimony as well as that of other current or former lot owners within the various subdivisions, I find that the following Silver Spring Subdivision plaintiffs[1] have shown a similar pattern of use for a period of at least twenty years: Michael Walsh and Paula Walsh as the owners of Lot 7, Robert McKinley and Linda McKinley as owners of Lot 8, Elmer Gardner as owner of Lot 10, Laura Nash as the owner of Lots 11, 15, 16 and 20, William Horigan and Pearl Horigan as the owners of Lot 12, Walter Makar and Maryann Makar as the owners of Lot 18, Henry Gilhooly and Janet Gilhooly as the owners of Lot 19, Ruth Mayo as the owner of Lot 21, Richard Murphy and Joan Murphy as the owners of Lots 22, 23 and 24 (two of which lots also have rights to use the beach specifically set forth in the deeds), Clyde Eagles and Helen Eagles as the owners of Lots 32 and 33, Joseph Hamelburg and Joan Hamelburg as the owners of Lot 36, Anne Burchstead as the owner of Lot 37, Robert Richardson and Roberta Richardson as the owners of Lots 40, 41, 44 and 45, Wendall Harvey as the owner of Lot 49, Gunther Klink and Rose Klink as the owners of Lots 50 and 51, Philip Joannides and Betty Joannides as the owners of Lot 53, Emma Wegahaupt as the owner of Lot 55, William Magner and Pauline Magner as the owners of Lot 60, and George Furlong and Marie Furlong as the owners of the unnumbered lot entitled "R. Daley". In the Cooks Brook Subdivision, the following plaintiffs have

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[1] As used in this paragraph the phrase "the plaintiffs" includes their predecessors in title. Appendix A hereto (Exhibit No. 7) is a chart which shows the chains of title of the various plaintiffs.

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established a similar use for twenty years: Phyllis Migliozzi as the owner of Lot 1, Dorothy George as the owner of Lot 2, Edward Lynch and Agnes Lynch as the owners of Lot 3, Mary Loftus as the owner of Lot 4, Joseph Carey and Dorothy Carey as the owners of Lot 5, Edward Bizik and Genia Bizik as the owners of Lot 7, John Jenson and Marjorie Jenson as the owners of Lot 8, Irving Howards and Frieda Howards as the owners of Lot 9, Donna Poirier as the owner of Lot 10, David Heffernan and Ruth Heffernan as the owners of Lot 11, Mary Lennon as the owner of Lot 13, Thomas Centracchio and Julia Centracchio as the owners of Lot 14, Wallace Hedquest and Pauline Hedquest as the owners of Lot 16 and John Burns and Mary Burns as the owners of Lot 17. It is unclear from the testimony when Lot 15 was built upon, so I am unable to find that the plaintiffs O'Brien have acquired a prescriptive right to use the beach. As to the Class III Plaintiffs John and Doris Cronan and William and Catherine Mostyn, the owners of Lot KK4 and KK3 respectively clearly established a pattern of use by themselves and by their families and guests for well over the prescriptive period of twenty years.

14. The defendant's birthday party in 1986 was the precipitating factor of a dispute between the plaintiffs and the defendant over use of the beach with the defendant resorting to the Eastham police for assistance. Sometime thereafter (and the timing is not clear) the defendant erected a "No Trespassing" sign on the bulkhead which helps support the embankment on which her house is located. The first sign did not refer to the beach (Exhibit No.

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33). It fails to make it clear to third parties that it is the beach rather than the embankment to which the sign refers so it fails to meet the standard set forth in G.L. c. 187, s.3 for the prevention of prescriptive easements. There is no evidence that the defendant ever posted on the beach, as distinguished from the embankment, a notice in a conspicuous place for six successive days to prevent the acquisition of the easement as provided in the statute. Moreover, the plaintiffs never were physically barred from exercising the easement rights which they claimed. The fact that the defendant disputed their right to use the beach in a sense only intensifies the adverse nature of such use. To the extent it is material I find that the prescriptive period has not under the circumstances here stopped running.

15. Early relations between the plaintiffs and the defendant were pleasant, and she initially agreed to join the neighborhood association. Ultimately the good feelings dissipated when she was asked to sign a consent for an application to the Department of Environmental Protection to authorize the removal of the sand dune and to make other

improvements within the accessway envisioned by the plaintiffs. In effect she resigned from the association and after the unfortunate birthday party incident actively took pictures of her neighbors on the beach, complained to the town authorities and generally disputed the rights which the members of the association and the property owners in the area claimed to use of the accessway and the beach. The initiation of this action in 1991 followed.

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At the commencement of the defendant's case, counsel for the defendant conceded that the owners of the properties in the Silver Spring Subdivision had the right to use the so-called accessway, the extension of Silver Spring Beach Road to the beach, but he disputed the right of the owners in the Cooks Brook Subdivision to use the way. The early history of the conveyances out from Mr. Sullivan, however, negate any difference in the rights of the two parcels of land from which the subdivisions came to the use of Silver Spring Beach Road which is shown of record in 1920 as preceding all the way to Cape Cod Bay. The right to use the way runs with both parcels and is clearly shown on plans of the later subdivisions of these two parcels seen at Exhibits Nos. 2 and 3. Accordingly it cannot be doubted that all the property owners in the two subdivisions have the right to proceed to the beach over Silver Spring Beach Road to the water. Indeed the initial conveyances out from Jessie Pierce of lots in Silver Spring expressly included a right of way to the beach and to the town road over Silver Spring Beach Road. The language of the original deeds out from Sullivan is clear so there is little need to discuss the rights of the lot owners after the parcels were subsequently subdivided. It cannot be doubted that the developers of the tracts which became Silver Spring Subdivision and Cooks Brook Subdivision intended the lot owners to have the right to use Silver Spring Beach Road to go both to the beach and to the public way. Rahilly v. Addison, 350 Mass. 660, 663 (1966). Bacon v. Onset Bay Grove

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Assoc., 241 Mass. 417, 423 (1922). See also Wellwood v. Havrah Mishna Anshi Sphard Cemetery Corp., 254 Mass. 350, 353 (1926).

The rights of the so-called Class III Plaintiffs are different since title to their subdivision never was in Sullivan and rests completely on prescription. So far as their right to use the way is concerned they have shown open, uninterrupted use of the way for far more than twenty years and accordingly they have the benefit of the presumption that such use was adverse in nature. Daley v. Town of Swampscott, 11 Mass. App. Ct. 822 (1981). It is clear from all the evidence that there is appurtenant to their respective lots the prescriptive right to use Silver Spring Beach Road and the accessway to the beach.

The rights of the plaintiffs to the beach in front of Lot 4 fall into separate classifications. The plaintiffs who own lots in the Silver Spring Subdivision have a right to use the beach as an incident of their ownership of lots in that subdivision. This aspect of the case is governed by Anderson v. DeVries, 326 Mass. 127, 133-134 (1950). In

Anderson, as here, many of the lots in the subdivision were conveyed out prior to the conveyance of the lots abutting the beach. The subdivision was large, and the parties who had purchased property therein used a right of way to the beach as well as the entire beach believing that they had acquired the right to do so. The Supreme Judicial Court in ruling that such rights had been acquired stated:

> In the instant case, we are dealing with a seashore resort where residents of a summer colony are given access to the beach. A right of way which would not permit them to travel seaward beyond the high water mark

> would not furnish access to the water for bathing and swimming and such a way would be worthless to them. It would be inconsistent with the manifest intention of the parties if these deeds and instruments were so construed as to deprive these owners of land in lot A from reaching the water. They were given a way to the beach. There is no express mention of any right to use the beach. . . . The way to the beach carried with it the right to use the beach for the purposes for which the way was obviously intended. We do not agree with the respondents' contention that the use of the beach should be confined to an area not greater than the width of the right of way. . . . A space on the beach no wider than the width of the way would hardly furnish a place adequate for the use and enjoyment of a large number of lot owners and their families and guests. . . . The use of the beach by these lot owners included whatever was reasonably necessary for the full enjoyment of the privilege granted.

Compare Labounty v. Vickers, 352 Mass. 342 (1967). Logistically in the present case it would be impossible for the owners of sixty-six plus lots and their families and guests to confine their activities on the beach to the 20 foot width of the accessway itself. Anderson is directly in point on this aspect of the controversy.

Accordingly the owners in the Silver Spring Subdivision of which the defendant's lot is a part have the implied (and in some cases, the express right) to use the beach in front of Lot 4, as appurtenant to their lots, for the usual purposes of swimming, sunning, boating and general enjoyment of the pleasures of Cape Cod in general and Eastham in particular.

The third amended complaint which the plaintiffs sought to file and which I have denied other than to correct the names of the present owners of the lots in question contained the claim of a

right by implication to use the beach adjoining the Silver Spring Subdivision for the owners of lots in the Cooks Brook Subdivision. I denied the motion to amend as to this aspect of the case, because in my opinion the developers of the two subdivisions intended that the owners of the lots therein had the right to use the beach in front of their respective subdivisions which in the case of the Silver Spring Subdivision is the beach to the right of the accessway and in the case of the Cooks Brook Subdivision is the beach to the left. Use of the latter beach is a question not raised nor decided herein since the owners of the waterfront lots in that subdivision are not parties. I am not convinced that the 1922 division intended that each parcel of land should have the right to use the entire beach in front of both parcels but rather that there was a common right to use the way with separate rights in each portion of the beach reserved to the parcel in front of that portion. Accordingly I find no right by implication in the owners of the lots in the Cooks Brook Subdivision to use the beach in front of the defendant's lot. However, it is clear from all the evidence that there is a prescriptive right in the owners of all the lots (i.e., the Class I, II and III Plaintiffs other than the O'Briens) to use the beach in front of Lot 4, such right having been acquired by adverse use in addition to the implied rights of the Class I Plaintiffs. See Ivons-Nispel, Inc. v. Lowe, 347 Mass. 761-762 (1964). Daley, supra. As the Supreme Judicial Court pointed out in the Dennis case the unexplained use of an easement for twenty years is presumed to be under claim of right and adverse

and will be sufficient to establish title by prescription unless controlled or explained. In Ivons-Nispel as here there is no explanation of the long continued use by the plaintiffs of the beach, nor was there ever any control of their use by the previous owners of Lot 4. It cannot therefore be doubted that they have established such a prescriptive right. As I have already suggested, the Cronans and the Mostyns fall into a different category since the subdivision in which their parcels are located was not within the original Sullivan tract of land so that they had no express or implied right to proceed over the accessway to the beach or to use the beach itself. The plaintiffs attempted to show that at one time there had been an exchange of land between Newell and Horton, et al, Trustees (see Exhibits Nos. 41a and 41b) so that the Mostyn parcel might be viewed as a part of the Cooks Brook Subdivisions, but I reject this contention. However, this class of plaintiffs, like the Class II Plaintiffs, have established rights in the beach by long continued use thereof over twenty years under claim of right and adverse to the owner of the beach.

The plaintiffs argue that the defendant's title goes only to mean high water mark, and accordingly she has no right to object to their use of the beach between mean high water mark and low water mark (which is also the only part of the beach in which they claim rights). See Lund v. Cox, 281 Mass. 484, 491 (1933). They rely on the testimony of historian Durand Eckeverria as to the early history of the Eastham area and the conveyance out from the Crown of the properties in Eastham prior to the joinder of the

Massachusetts Bay Colony and Plymouth Colony. The Massachusetts courts, however, have consistently rejected the contention that there is a difference in the rights along the sea in different parts of the Commonwealth, and in Opinion of the Justices, 365 Mass. 681 at 685 (1974) the Supreme Judicial Court specifically ruled, in accordance with earlier decisions, that although the old Colony ordinance was strictly speaking limited to the area of the Massachusetts Bay Colony, "it has long been interpreted as effecting a grant of the tidal land to all coastal owners in the Commonwealth". Therefore it cannot be contended that the rights of coastal owners in Eastham differ from those in Salem or Boston.

In conclusion therefore I find and rule that the plaintiffs in the Silver Spring Subdivision have acquired the right by grant and by implication to use the beach in front of Lot 4 and also have acquired such right by prescription. I further find and rule that the plaintiffs who are the owners of lots in the Cooks Brook Subdivision have the right to use Silver Spring Beach Road and its extension to the sea by grant as well as by implication from the subdivision plan. I further find and rule that all the plaintiffs in each class (other than the O'Briens) have a prescriptive right, as appurtenant to their lots, to use the beach between mean high water mark and low water mark for all usual beach purposes as set forth herein. Finally I find and rule that the Cronans and the Mostyns as owners of their respective lots have acquired the right to use Silver Spring Beach Road, the accessway and the beach area in front of Lot 4 by prescription for all usual beach purposes.

A permanent injunction will issue restraining the defendant, her agents, servants, assigns and those claiming under her from interfering with the rights of the plaintiffs to use the accessway and the beach for all usual purposes in a reasonable manner and from time to time to make improvements thereto, subject, where applicable, to the approval of the Eastham Conservation Commission and the DEP. The plaintiffs for their part are to exercise their rights in a nonantagonistic manner which recognizes the rights of all entitled in the way and beach.

Judgment accordingly.

Judge: **Marilyn M. Sullivan**
Justice

See text for Appendix "A".

End Of Decision