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December 30, 2011

Dianne Hill, Clerk
York County Superior Court
45 Kennebunk Road
P.O. Box 160
Alfred, ME 04002-0160


RE: Robert P. Almeder, et al. v. Town of Kennebunkport, et al.
Docket No. RE-09-111

Dear Dianne:

Enclosed for filing, please find Plaintiffs' Motion for Reconsideration. Please present it to Justice Brennan for consideration. I also enclose a check in the amount of \$60.00 for the filing fee.

Thank you for your assistance. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Christopher E. Pazar

CEP/sv

Enclosures

cc: Amy K Tchao, Esq.
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Peter Wasserman
Michael & Donna Kelly
Robert Danielson, Esq.
Jennifer Wasserman
Anthony Aversa
Charles Nickerson, Esq.
Joanne Gustin
William Leete, Esq.
Terry O'Connor

shifted the Town's burden of proof with respect to its initial requirement of establishing its own title in Goose Rocks Beach upon the Plaintiffs.

In Count I of its Counterclaim, the Town is the proponent that is claiming title to Goose Rocks Beach and the party asking the Court to declare that it is the fee simple title owner of Goose Rocks Beach. As the party asserting the affirmative of the controlling issue of the Counterclaim, i.e. ownership of Goose Rocks Beach, the Town has the burden of proof. The allocation of the burden of proof in declaratory judgment actions must be determined by reference to the substantive gravamen of the complaint. The party who asserts the affirmative of the controlling issues in the case, whether or not he is the nominal plaintiff in the action, bears the risk of non-persuasion. *Hodgdon v. Campbell*, 411 A.2d 667, 670-671 (Me. 1980). In its Counterclaim to "quiet title" of the Town's claim of fee ownership of Goose Rocks Beach, the Town bears the burden of proving it has better title than the Plaintiffs. *Id.* at 671. To accomplish this goal in the present case, the Town is initially required to prove the title it has alleged. *Hann v. Merrill*, 305 A.2d 545, 550 (Me. 1972). The Town has proven no title in itself to Goose Rocks Beach.

In Count I of its Counterclaim the Town represents it obtained fee title to Goose Rocks Beach by virtue of "royal grants of certain English monarchs confirmed in 1663 by the decree of King Charles II and later re-confirmed by William III and Mary II as joint sovereigns by virtue of the issuance of a new charter in favor of the Town of Kennebunkport, or other such royal grants or land grants in favor of the Town of Kennebunkport." Town's Counterclaim ¶ 3. As a threshold matter, it is the Town's burden to establish this "grant" of title. In support of its claim of title the Town proffered the 1684 confirmatory deed as the sole source of its expressed grant of title to Goose Rocks Beach. In its decision, the Court properly found that the 1684 deed

conveyed no title to the Town. The Town presented no other “grant” of title, which placed title to Goose Rocks Beach into the Town. To prevail in its Counterclaim, the Town has the affirmative burden to establish its claimed grant of title.

The Court erroneously shifted that burden to the Plaintiffs by requiring the Plaintiffs to conclusively prove that the Town did not receive title to Goose Rocks Beach as some unclaimed vestige of common or undivided land. When the burden of proof is properly allocated to the Town, to survive Plaintiffs’ Motions for Summary Judgment, the Town was required to present some expressed grant of title in the Town; either specifically conveying Goose Rocks Beach or the common and undivided land of the Town with evidence that Goose Rocks Beach was contained within the common and undivided land of any such grant. The Town, not the Plaintiffs, had the burden to establish the grants into it from either the Early Proprietors, Massachusetts Bay Colony or the Town recognized “Proprietors/Owners of the common undivided lands”.¹ The Town’s attempt at doing so, the 1684 deed, failed and with it the Town’s claim must fail. The Town failed to meet its burden in establishing evidence of fee ownership title to Goose Rocks Beach. The Plaintiffs in their Motions for Summary Judgment to Count I of the Town’s Counterclaim are not asking the Court to find title to Goose Rocks Beach rests with them. They are asking the Court to find that the Town has not met its burden in establishing a claim of title to Goose Rocks Beach in the Town. When the Court properly assigns the burden

¹ In 1726 the Town of Arundel recognized and confirmed by vote that the common and undivided land within the Town’s borders was owned by the Town recognized “Proprietors”. (Plaintiffs’ Joint Statement of Material Facts ¶¶ 64, 65). In its response to paragraphs 64 and 65 of Plaintiffs’ statement of material facts the Town argues essentially that the “proprietors” and the “town” were one and the same, that the “town” conveyed land based upon the authority given to them by the, now discredited, 1684 deed. (Town’s Reply to Plaintiffs’ Joint Statement of Material Facts ¶¶ 64, 65). In *Eaton v. Wells*, 2000 ME 176, ¶¶ 16, 17; 760 A.2d 232, 239–40, a case where the title to the common and undivided land of Wells, Maine mirrors the title facts of common and undivided land within the Town of Arundel, the Court held that the “town” proprietors held title to the common and undivided land and that to the extent the Town of Wells claimed title, it had to produce an expressed grant of title to these lands from those proprietors to sustain its title claim. To the extent the Town of Kennebunkport claims title to Goose Rocks beach as common and undivided land, it likewise must produce an expressed grant from these “Proprietors” to sustain its title claim. The Town has not done so.

of proof and reviews the evidence presented in the statements of material fact in the proper light, the Court must grant Plaintiffs' Motions for Summary Judgment on Count I of the Town's Counterclaim.

II. THIS COURT ERRED IN NOT GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFFS ON COUNT II OF THEIR COMPLAINT.

Plaintiffs move this Court to reconsider its decision not to grant judgment in favor of the Plaintiffs on Count II of their Complaint because the court made an error of law by requiring the Plaintiffs' to prove title "conclusively" before granting judgment in their favor. Count II of Plaintiffs' Complaint is a statutory quiet title action pursuant to 14 M.R.S. §§ 6651-6663. Pursuant to the statute on filing the complaint, Plaintiffs served the Town and published the required statutory notice. This Court ordered an additional publication to all those unknown or unascertained parties. That notice, as did the first, stated in bold print "IF YOU INTEND TO OPPOSE THE LAWSUIT, YOU MUST ANSWER WITHIN THE REQUIRED TIME. FAILURE TO DO SO WILL RESULT IN FORFEITURE OF YOUR CLAIMS" (emphasis added).² As with all quiet title actions, those who did not come forward and answer have forfeited any claim. The only party to come forward claiming title was the Town and it did so by claiming its title claim was simple because it rested on the 1684 document/deed which this Court has correctly found is not a source of title for the Town³.

In an action to quiet title, Plaintiffs must provide prima facie evidence of ownership to the property in question. Possession of a warranty deed or quitclaim deed from a warranty deed constitutes "prima facie evidence of ownership, and will authorize a verdict for the plaintiff,

² This final notice was published by the Portland Press Herald on October 5, 2010.

³ There are twelve properties owned by private parties represented by the TMF Group ("Group of Twelve") who claim rights to use certain beach properties by virtue of recorded plans but do not claim title. The Group of Twelve is specifically identified in footnote 5 of Plaintiffs' Consolidated Reply Memorandum (July 21, 2011). Plaintiffs make this motion without prejudice to any rights claimed by the Group of Twelve.

unless the defendant proves a better title.” *Hann v. Merrill*, 305 A.2d 545, 554 (Me. 1973) (citing *Rand v. Skillin*, 63 Me. 103, 104 (Me. 1873)). More recently, the Law Court has indicated that the plaintiff has the factual “burden of proving better title than that of the defendant.” *Hodgdon v. Campbell*, 411 A.2d 667, 671 (Me. 1980). Although courts have required Plaintiffs to show *some* prima facie evidence of title, such as a deed, *see Smith v. Varney*, 309 A.2d 229 (Me. 1973), courts have never required a plaintiff in a quiet title action to carry the burden of proving “conclusive” evidence of title. Thus, once the Plaintiff shows prima facie evidence of title and either: (1) no defendant comes forth to challenge that title, (2) a court determines that defendants do not, as a matter of law have title, or (3) if plaintiffs have carried their factual burden by proving better title than defendants by a preponderance of the evidence, the court *must* grant plaintiffs’ action to quiet title.

This is a summary judgment motion and what is uncontested is that the deeds provided or referenced in Plaintiffs’ Motions for Summary Judgment are Plaintiffs’ offered sources of title. No party ever claimed that these deeds were not Plaintiffs’ source of title. Plaintiffs have established modern title and as with all title searches, one begins with modern title and searches backwards. The Town’s references to descriptions in earlier deeds does not and cannot eliminate Plaintiffs existing prima facie evidence of title. It is the deeds themselves, the deeds referenced in Plaintiffs’ motions, and the expert testimony of J. Gordon Scannell that establishes prima facie evidence of Plaintiffs’ title to the beach.⁴ All further factual basis for title debated between

⁴ This Court noted that some of Plaintiffs’ deeds do “not unambiguously describe the high and dry sand and intertidal zone as party of their property” Order at 14. While that may be true as to Sherman, Coughlin, and Celi who reference the Emmons Heirs Subdivision Plan dated December, 1921 (Plan Book 8, Page 73, and attached as Exhibit 3 to the Affidavit of Johann Buisman), it is not true as to the twenty three properties listed on Exhibit A as Nos. 1 through 23 whose deeds clearly reference that they extend to the ocean. Exhibit A lists the Plaintiffs and their deeds which are in evidence and breaks them down by category and cites to where they are in the SMF. Additionally, the deeds of Gray (No. 24) and Hastings (No. 25) merely reference prior deeds (Exhibit B) which also clearly reference to the ocean. Finally, the Town does not contest the quiet title claims of Temerlin (No. 27), and Dwelley (No. 26). (Town’s MSJ Brief at 1, n.1). Therefore, given that the twenty six deeds of Plaintiffs are clearly

Plaintiffs and the Town is moot because this Court found that the Town does not possess a document that gives it title and therefore, Plaintiffs no longer have a burden to show *better* title than anyone else.


Quiet title is a show cause action. Plaintiffs put the entire world and all potential defendants on notice of their quiet title action through publication. The Town was the only party to come forward and assert title to the tidal flats in front of Plaintiffs' homes. Although Plaintiffs were prepared to meet their burden of showing better title than the Town—as evidenced by providing affidavits and title history to prove title well above and beyond prima facie evidence of title—that burden is no longer required because this Court has ruled that the Town has no title document. Thus, since Plaintiffs have proved prima facie evidence of title and there is no longer any defendant that *also* claims title, this Court must rule in favor of Plaintiffs on their claim to quiet title.

This Court rested its judgment denying Plaintiffs' summary judgment on Count II of their complaint on the premise that Plaintiffs did not prove title “conclusively.” This was an erroneous conclusion of law. In the event that no defendant has a claim of title to the property claimed by a plaintiff in a quiet title action, a plaintiff is not required to prove title “conclusively.” Many times, parties bring a quiet title action *because* there is a potential cloud on their title. The purpose of a quiet title action is to permanently clear clouds on title by requiring all other parties claiming title to come forward so that the court can determine which party has *better* title, not whether one or both parties have “conclusively” proven title.

not ambiguous and two are uncontested, the court must grant judgment to all but Coughlin (No. 29), Sherman (No. 30), and Celi (No. 28) (Exhibit A). For those three Plaintiffs we will put in additional evidence at trial to show that the lots referenced the Emmons Heirs Subdivision Plan all run to the Atlantic Ocean but will need further evidence and expert testimony.

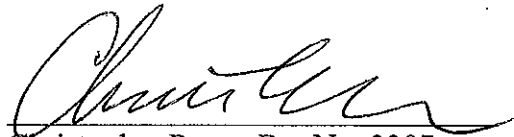
In conclusion, this Court held, as a matter of law, that the Town does not have any claim of title to the beach. Plaintiffs, while not yet proving perfect title, have established prima facie evidence of title through deed descriptions, through references to prior deeds that clearly convey all land to the sea or ocean, and through expert legal opinion that Plaintiffs own the intertidal zone adjacent to their uplands. This is all that the law requires. Thus, because Plaintiffs have proved prima facie evidence to title and because, as a matter of law, no other defendant claims title to the intertidal zone at Goose Rocks Beach, this Court must grant summary judgment in favor of Plaintiffs on Count II of their Complaint.

Dated: December 30, 2011



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Dated: December 30, 2011



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NOTICE

Pursuant to Rule 7 of the Maine Rules of Civil Procedure, opposition to this Motion must be filed not later than 21 days after the filing of the Motion, unless another time is provided by the Rules of Court. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2011, I caused to be served by placing a copy of the Plaintiff's Motion For Reconsideration in the U.S. Mail, postage-prepaid, and addressed to the following:

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Dated: December 30, 2011

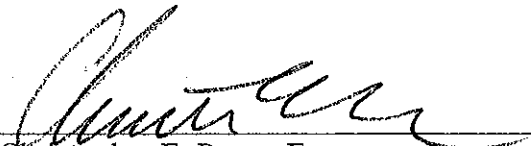
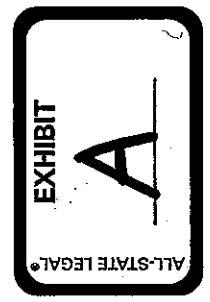

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Attorneys for Plaintiffs

EXHIBIT A

No.	Plaintiff(s)	Map/ Lot	Property Description	Citation
1	Robert F. Almeder and Virginia S. Almeder, Trustees of the Almeder Living Trust dated October 28, 2008	33-1-32	The deed into plaintiffs recorded June 19, 2009, Book 15659, Page 864, runs to the Atlantic Ocean. The 1928 resting deed, Book 788, Page 14, describes the Almeder property as Lot 11 on the Emmons Heirs Plan, Plan Book 8, Page 73 ("Emmons Plan").	Compl. ¶ 5 and Exhibit 1.; SMF ² ¶¶ 1-5.
2	Christopher B. Asplundh	35-9-7	The 1973 source deed and 1940 resting deed describe the Asplundh property to the Atlantic Ocean and by the ocean.	Compl. ¶ 6 and Exhibit 2; SMF ¶¶ 1-5.
3	Janice M. Fleming	34-1-8	The source deed and 1961 resting deed describe the Fleming property to the Atlantic Ocean.	Compl. ¶ 10 and Exhibit 6; SMF ¶¶ 1-5.
4	Susan Flynn, Simon A. Flynn, Sr., Moira M. Flynn, Gregory M. Flynn, Robert Clyde Paul Flynn, and Virginia Mary Rodriguez	33-1-5	The source deed and 1954 resting deed describe the Flynn property to the Atlantic Ocean.	Joinder as Plaintiff (Nov. 22, 2010) and, Exhibit A; SMF ¶¶ 1-5.
5	William D. Forrest and Nancie M. Julian	34-1-2	The source deed and 1961 resting deed describe the Forrest/Julian property to said ocean.	Am. Joinder as Plaintiffs (Apr. 5, 2011), ¶ 1 and Exhibit A; SMF ¶¶ 1-5.
6	Nancie M. Julian	34-1-1	The source deed and 1961 resting deed describes the Julian property to the Atlantic Ocean. Also in the chain of title to the Julian property is an August 15, 1890 deed, recorded at Book 443, Page 376, which describe the property as to the sea and by the sea.	Am. Joinder as Plaintiffs (Apr. 5, 2011), ¶ 2 and Exhibit B; SMF ¶¶ 1-5.
7	John O. Gallant and Sharon A. Gallant	34-1-12	The source deed and 1959 resting deed describe the Gallant property to the Atlantic Ocean. The resting deeds refer to deeds that date back to 1921 and 1898.	Compl. ¶ 11 and Exhibit 7; SMF ¶¶ 1-5.
8	Jule C. Gerrish	34-1-34	The source deed and 1968 resting deed are the same and describe the Gerrish property to the Atlantic	Compl. ¶ 12 and Exhibit 8; SMF ¶¶ 1-5.

¹ Plaintiffs' Complaint filed with the court on October 26, 2009.

² Plaintiffs' Joint Statement of Material Facts filed with the Court on April 29, 2011 in support of Plaintiffs' motions for summary judgment.



No.	Plaintiff(s)	Map/ Lot	Property Description	Citation
9	Goose Rocks Beach Holdings LLC	33-1-10	Ocean. The source deed and 1963 resting deed describes the grantor's right to the Atlantic Ocean.	Joinder as Plaintiff (Nov. 3, 2010) and Exhibit A; SMF ¶¶ 1-5.
10	Goose Rocks Beach Holdings LLC	34-1-20	The source deed and 1966 resting deed describes the grantor's right to the low water mark.	Joinder as Plaintiff (Nov. 3, 2010) and Exhibit A; SMF ¶¶ 1-5.
11	Goose Rocks Beach Holdings LLC	34-1-22	The source deed and 1968 resting deed describes the grantor's right to the shore front.	Joinder as Plaintiff (Nov. 3, 2010) and Exhibit B; SMF ¶¶ 1-5.
12	Leslie A. Josselyn-Rose, Trustee of the LAJR Trust dated February 24, 2009	35-10-36	The source deed and 1946 resting deed describe the LAJR property to the sea.	Compl. ¶ 15 and Exhibit 11; SMF ¶¶ 1-5.
13	Deborah J. Kinney	34-1-10	The source deed and 1952 resting deed describe the Kinney property to the ocean.	Compl. ¶ 16 and Exhibit 12; SMF ¶¶ 1-5.
14	Donna K. Lencki, as Trustee of The Donna Lencki Revocable Trust of 1993	35-10-30	The source deed and 1965 resting deed describe the Lencki property to the ocean.	Joinder as Plaintiff (Oct. 28, 2010) and Exhibit A; SMF ¶¶ 1-5.
15	Terrence G. O'Connor and Joan M. Leahey	34-1-24	The source deed and 1921 resting deed describe the O'Connor/Leahey property to the Atlantic Ocean.	Compl. ¶ 18 and Exhibit 14; SMF ¶¶ 1-5.
16	Kristen B. Raines	35-10-37	The source deed and 1956 resting deed describe the Raines property to the Atlantic Ocean.	Compl. ¶ 20 and Exhibit 16; SMF ¶¶ 1-5.
17	Linda M. Rice	34-1-25A	The source deed describes the Rice property to the Atlantic Ocean. A 1990 partition references the property "by the sea."	Compl. ¶ 21 and Exhibit 17; SMF ¶¶ 1-5.
18	Anne E. Robinson	35-10-14	The source deed and 1972 resting deed describe the former Robinson property to the ocean.	1 st Am. Compl. ¶ 27-1 and Exhibits 25 and 25-1; SMF ¶¶ 1-5.
19	Michael J. Sandifer and Alice B. Sandifer, Co-Trustees of the Alice B. Sandifer Trust dated August 31, 2005	35-10-35	The source deed and 1929 resting deed describe the Sandifer property to the sea and by the sea.	Compl. ¶ 22 and Exhibit 18; SMF ¶¶ 1-5.
20	Eleanor A. Scribner and Robert H.	35-10-11	The source deed describes the Scribner property to the	Compl. ¶ 23 and

No.	Plaintiff(s)	Map/ Lot	Property Description	Citation
	Scribner, Trustees of the Eleanor A. Scribner Qualified Personal Residence Trust dated July 30, 2004		low water mark. The resting deed reference is to the Estate of Samuel H. Scribner, York County Probate Court Docket No. 1103-A, deceased October 1, 1954..	Exhibit 19; SMF ¶¶ 1-5.
21	Richard M. Vandervoorn, Lawrence W. Vandervoorn, and Robert O. Clemens, Trustees of The Cornelius J. Vandervoorn Qualified Personal Residence Trust	34-1-32	The source deed and 1955 resting deed describe the Vandervoorn property to the Atlantic Ocean.	Compl. ¶ 26 and Exhibit 22; SMF ¶¶ 1-5.
22	Steven H. Wilson and Shawn B. McCarthy, Co-Trustees of The Twombly Family Trust u/d/t dated January 24, 2002, as amended.	33-1-3	The source deed and 1950 resting deed describe the Twombly property as including beach in front of said lot.	1 st Am. Compl. ¶ 27-2 and Exhibit 26; SMF ¶¶ 1-5.
23	Beth G. Zagoren	34-1-17	The source deed and 1963 resting deed describe the Zagoren property to the Atlantic Ocean. The deeds also reference an 1854 deed from William Smith to James S. Bailey.	Compl. ¶ 27 and, Exhibit 23; SMF ¶¶ 1-5.
24	Eugene R. Gray, as Trustee of the Qualified Personal Residence Trust dated October 31, 2005	34-1-29	The source deed incorporates the 1959 resting deed which describes the Gray property to the Atlantic Ocean.	Compl. ¶ 13 and Exhibit 9; SMF ¶¶ 1-5.
25	Edwina D. Hastings, Trustee of the Edwina D. Hastings Revocable Trust UTA dated August 25, 2006	34-1-11	The source deed incorporates a 1963 deed which includes references to prior deeds from Whittemore into James dated October 6, 1921 and October 14, 1921 and recorded in Book 695, Page 269 and Book 694, Page 197, describing the Hastings property to the sea. Pursuant to an order entered in <i>Davis v. Mitchell</i> , York Sup. Ct., Docket No. CV-90-119, an abstract of same recorded at Book 6373, Page 249, the court confirmed that the boundary of the Davis property ran to the low water mark.	Compl. ¶ 14 and Exhibit 10; SMF ¶¶ 1-5.
26	Willard Parker Dwelley, Jr. and W. Parker Dwelley, III, and John H.	35-9-4	The source deed and 1964 resting deed describe the Dwelley property to the Little River.	Compl. ¶ 8 and Exhibits 4 and 4-1; SMF

No.	Plaintiff(s)	Map/ Lot	Property Description	Citation
27	Dwellely, Co-Trustees of the Joan H. Dwellely Testamentary Trust J. Liener Temerlin and Karla Sue Temerlin, Trustees of the Temerlin 1988 Family Trust dated October 1, 1998, amended April 5, 1999 and June 1, 2007	35-9-1 35-8-1	The source deed and 1965 resting deed describe the Temerlin property as Lots 19 and 21 under a plan.	¶¶ 1-5; Town MSJ ³ at 1 n.1. Compl. ¶ 25 and Exhibit 21; SMF ¶¶ 1-5; Town MSJ at 1 n.1.
28	Mark E. Celi and William E. Brennan, Jr., Co-Trustees of The Celi Kennebunkport Real Estate Trust No. 1	33-1-19	The source deed and 1946 resting deed references the Celi Trust property as Lot 7 on the Emmons Plan.	Joinder as Plaintiff (Apr. 26, 2011) and Exhibits A and B; SMF ¶¶ 1-5. Compl. ¶ 7 and Exhibit 3; SMF ¶¶ 1-5.
29	John T. Coughlin and Priscilla M. Coughlin, Trustees of P.M.C. Realty Trust	33-1-22	The source deed and 1939 resting deed references the Coughlin property as Lot 10 on the Emmons Plan. Further a 1938 deed recorded at Book 915, Page 259, describes a conveyance of a strip of land, adjoining the Coughlin property, as being part of Lot 9 and running to the Atlantic Ocean, including a reference to the Emmons Plan as running to the Atlantic Ocean.	Compl. ¶ 24 and Exhibit 20; SMF ¶¶ 1-5.
30	Carolyn K. Sherman	33-1-24	While the source deed provides no actual description to the low water mark, the resting deed referenced by J. Gordon Scannell, Esq. is to a 1925 resting deed describing the Sherman property as Lot 13 on the Emmons Plan.	Compl. ¶ 24 and Exhibit 20; SMF ¶¶ 1-5.

³ Town of Kennebunkport's Motion for Summary Judgment (March 18, 2011).



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Know all Men by these Presents, That

I, Sophronia P. Marsh of Kennebunkport County of York and State of Maine

Book 1407

Five
dollars

In consideration of One Dollar and other valuable consideration paid by Constance Sheedy Gray of Grafton County of Middlesex and Commonwealth of Massachusetts

the receipt whereof I do hereby acknowledge do hereby give grant bargain sell and convey unto the said Constance Sheedy Gray, her heirs and assigns forever, a certain lot or parcel of land situated at Goose Rocks Beach in said Kennebunkport, bounded and described as follows: Beginning on the southerly side of the Town Road leading from Goose Rocks Beach to Batsonts River at an iron stake and the westerly corner of land of Marion C. Cameron thence running south, 12 degrees 58 minutes east one hundred thirteen and seven-tenths feet by land of said Cameron to an iron stake at the top of the bank by the ocean, thence by the same course to the ocean, thence westerly by the ocean one hundred and two feet to land now or formerly of Smith & Benson, thence northerly by said Smith & Benson land to an iron stake at the top of the bank by the ocean, thence by said Smith & Benson land in the same course to the road at an iron stake driven in the ground, thence easterly by said road to the point of beginning.

Also all land owned by said grantor, if any, which may be included by an extension of the lines in this description running northerly and southerly and extending to the old Town Way mentioned in deed of George F. Piper to George F. Hutchins dated May 1, 1892, and recorded in said York County Registry of Deeds in Book 528, Page 228

Both of the said lots being the same premises conveyed by deed of Beatrice H. Seidel to Sophronia P. Marsh et als., dated August 28, 1936, and recorded in the York County Registry of Deeds, Book 885, Page 89. Reference is also made to the deed of Sophronia P. Marsh et al., to Elvin M. Stone et al., dated September 30, 1949 and recorded in the York County Registry of Deeds, Book 1142, Page 1, and the deed of Elvin M. Stone et al., to Sophronia P. Marsh et al., dated September 30, 1949 and recorded in the York County Registry of Deeds, Book 1310, Page 800, which two deeds establish the westerly boundary line of the first described premises. In witness whereof, the above granted and bargained premises with all the privileges and appurtenances thereof to the said Constance Sheedy Gray her

heirs and assigns to them and their use and behoof forever. And I do covenant with the said Grantee her heirs and assigns, that I am lawfully seized in fee of the premises that they are free of all incumbrances that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my heirs, shall and will warrant and defend the same to the said Grantee, her heirs and assigns forever against the lawful claims and demands of all persons in witness whereof, I the said Sophronia P. Marsh being unmarried

BY said and seal this 25th day of August, 1953, one thousand nine hundred and fifty-three.
Signed, Sealed and Delivered in presence of
Sidney W. Thaxter Sophronia P. Marsh (seal)

State of Maine, Cumberland ss. August 25, 1953 Personally appeared the above named Sophronia P. Marsh and acknowledged the above instrument to be her free act and deed Before me, Sidney W. Thaxter Justice of the Peace
Recorded according to the original record. September 14, 1953 at 9H, 500 A.W.

Know All Men by these Presents,

That I, STANLEY P. JAMES of Lynchburg in the Commonwealth of Virginia,

in consideration of One Dollar (\$1.00) and other valuable considerations

paid by MARY NEWCOMB DAVIS of Waterville in the County of Kennebec and State of Maine,

the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Mary Newcomb Davis, her

Heirs and Assigns forever,

the following described property: a one-quarter interest in common and undivided in a certain lot or parcel of land with the buildings thereon situated at Beachwood, so called, in Kennebunkport in the County of York and State of Maine, bounded and described as follows:

Commencing at a hub driven in the ground on the front of the sea wall fifty (50) feet westerly from the westerly corner of land now or formerly of Jelleson and Boston; thence running one hundred (100) feet northerly parallel with the westerly line of said Jelleson and Boston land to a hub driven in the ground; thence westerly fifty (50) feet; thence turning and running southerly by land formerly of Carrie P. Whittemore by a line parallel with and fifty (50) feet distant westerly from the first described boundary line one hundred (100) feet and continuing the same course to the sea; thence easterly by the sea to the point formed by the intersection of the first described boundary line and the line of the sea boundary; the said first boundary line being extended; thence northerly on said extended line to the point of beginning.

Being the same premises conveyed to the late Minnie H. James by said Carrie P. Whittemore by warranty deed dated October 6, 1921 and recorded in York County Registry of Deeds in Book 695, Page 269.

Also a one-quarter interest in common and undivided in another certain lot or parcel of land with the buildings thereon situated at said Beachwood in said Kennebunkport, bounded and described as follows:

Commencing at the northeast corner of the within granted premises at a point on the Kings Highway, at the dividing line between land now or formerly of Cleaves and the within granted premises; thence running westerly by the Kings Highway fifty-five (55) feet; thence turning and running southerly by land formerly of Carrie P. Whittemore by a straight line to the northwest corner of premises conveyed by said Whittemore to the said Minnie

BOOK 1546 PAGE 170

H. James fifty (50) feet more or less to land now or formerly of Cleaves; thence turning and running northerly by Cleaves land sixty-five (65) feet more or less to the point of beginning.

Being the same premises conveyed to the said Carrie P. Whittemore by deed of A. Isabelle Fearing et al dated October 14, 1921 and recorded in said York County Registry of Deeds and being the same premises conveyed by said Carrie P. Whittemore to said Minnie H. James by warranty deed dated October 14, 1921 and recorded in said York County Registry of Deeds in Book 694, Page 197.

Meaning and intending hereby to convey to said Mary Newcomb Davis my one-quarter interest in the above described premises devised under the will of said Minnie H. James duly proved and allowed in the Probate Court of York County, an abstract thereof having been duly filed in the Registry of Deeds of said York County.

We have and in hold the aforegranted and bargained premises, with all privileges and appurtenances thereof to the said Mary Newcomb Davis, her

Heirs and Assigns, to her and their use and behoof forever.

And I do covenant with the said Grantee, her Heirs and Assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances;

that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my Heirs, shall and will warrant and defend the same to the said Grantee, her

Heirs and Assigns forever, against the lawful claims and demands of all persons.

In Witness Whereof, I, the said Stanley P. James,

and I, Martha W. James, wife of the said Stanley P. James,

joining in this deed as Grantor, and relinquishing and conveying my rights by descent and all other rights in the above described premises, have hereunto set our hands and seal this 19th day of March in the year of our Lord one thousand nine hundred and sixty-three.

Signed, Stated and Delivered
-in presence of-

Stanley P. James
Martha W. James

COMMONWEALTH OF VIRGINIA

State of Virginia

} ss. Lynchburg, Va. March 19, 1963

Personally appeared the above named

Stanley P. James

and acknowledged the above instrument to be his free act and deed.

Before me, *Thos H. Kieley*

Notary Public
My commission expires May 19, 1963.



York, ss.
Received MAY 1 1963 at 11:15m. A.M.
and recorded from the original.

SEE
840
BOOK
173
PAGE

I. R. S. 95

BOOK 1541 PAGE 172

MA 111

Know All Men by these Presents,

That I, ELIZABETH NEWCOMB WETTER of Memphis in the State of Tennessee,

in consideration of One Dollar (\$1.00) and other valuable considerations

paid by MARY NEWCOMB DAVIS of Waterville in the County of Kennebec and State of Maine,

the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Mary Newcomb Davis, her

Heirs and Assigns forever,

the following described property: a one-quarter interest in common and undivided in a certain lot or parcel of land with the buildings thereon situated at Beachwood, so called, in Kennebunkport in the County of York and State of Maine, bounded and described as follows:

Commencing at a hub driven in the ground on the front of the sea wall fifty (50) feet westerly from the westerly corner of land now or formerly of Jelleson and Boston; thence running one hundred (100) feet northerly parallel with the westerly line of said Jelleson and Boston land to a hub driven in the ground; thence westerly fifty (50) feet; thence turning and running southerly by land formerly of Carrie P. Whittemore by a line parallel with and fifty (50) feet distant westerly from the first described boundary line one hundred (100) feet and continuing the same course to the sea; thence easterly by the sea to the point formed by the intersection of the first described boundary line and the line of the sea boundary; the said first boundary line being extended; thence northerly on said extended line to the point of beginning.

Being the same premises conveyed to the late Minnie H. James by said Carrie P. Whittemore by warranty deed dated October 6, 1921 and recorded in York County Registry of Deeds in Book 695, Page 269

Also a one-quarter interest in common and undivided in another certain lot or parcel of land with the buildings thereon situated at said Beachwood in said Kennebunkport, bounded and described as follows:

Commencing at the northeast corner of the within granted premises at a point on the Kings Highway, at the dividing line between land now or formerly of Cleaves and the within granted premises; thence running westerly by the Kings Highway fifty-five (55) feet; thence turning and running southerly by land formerly of Carrie P. Whittemore by a straight line to the northwesterly corner of premises conveyed by said Whittemore to the said Minnie

H. James fifty (50) feet more or less to land now or formerly of Cleaves; thence turning and running northerly by Cleaves land sixty-five (65) feet more or less to the point of beginning.

Being the same premises conveyed to the said Carrie P. Whittemore by deed of A. Isabella Fearing et als dated October 14, 1921 and recorded in said York County Registry of Deeds and being the same premises conveyed by said Carrie P. Whittemore to said Minnie H. James by warranty deed dated October 14, 1921 and recorded in said York County Registry of Deeds in Book 694, Page 197.

Meaning and intending hereby to convey to said Mary Nowcomb Davis my one-quarter interest in the above described premises devised under the will of said Minnie H. James duly proved and allowed in the Probate Court of York County, an abstract thereof having been duly filed in the Registry of Deeds of said York County.

We have and in hold the aforegranted and bargained premises, with all privileges and appurtenances thereof to the said Mary Nowcomb Davis, her

Heirs and Assigns, to her and their use and behoof forever.

And I do covenant with the said Grantee, her Heirs and Assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances;

that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my Heirs, shall and will warrant and defend the same to the said Grantee, her

Heirs and Assigns forever, against the lawful claims and demands of all persons.

In Witness Whereof, I, the said Elizabeth Newcomb
Wetter,

and I, Henry Wetter, Jr., ~~with~~ ~~the~~ ~~and~~ husband of the said
Elizabeth Newcomb Webber,

joining in this deed as Grantor, and relinquishing and conveying
my rights by descent and all other rights in the above
described premises, have hereunto set our hands and seals this
19th day of March in the year of our Lord
one thousand nine hundred and sixty-three.

Signed, Sealed and Delivered
in presence of

Elizabeth Newcomb Wetter
Henry Wetter Jr.

TENNESSEE
State of ~~Shelby~~ } ss.
Shelby

March 19, 1963

Personally appeared the above named
Elizabeth Newcomb Wetter

and acknowledged the above instrument to be her free act and
deed.

Before me,

R. H. [Signature]
Rundon [Signature]
Notary Public
MY COMMISSION EXPIRES [Date]



Yerk, ss.
Received MAY 1 1963 at 11:15 (a.m.) M
and recorded from the original.

I. R. S. 31, 95

MA 144

BOOK 1544 PAGE 175

Know All Men by these Presents,

That I, NELSON P. JAMES of Binghamton in the County of Broome and State of New York,

in consideration of One Dollar (\$1.00) and other valuable considerations

paid by MARY NEWCOMB DAVIS of Waterville in the County of Kennebec and State of Maine,

the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said Mary Newcomb Davis, her

Heirs and Assigns forever,

the following described property: a one-quarter interest in common and undivided in a certain lot or parcel of land with the buildings thereon situated at Beachwood, so called, in Kennebunkport in the County of York and State of Maine, bounded and described as follows:

Commencing at a hub driven in the ground on the front of the sea wall fifty (50) feet westerly from the westerly corner of land now or formerly of Jelleson and Boston; thence running one hundred (100) feet northerly parallel with the westerly line of said Jelleson and Boston land to a hub driven in the ground; thence westerly fifty (50) feet; thence turning and running southerly by land formerly of Carrie P. Whittmore by a line parallel with and fifty (50) feet distant westerly from the first described boundary line one hundred (100) feet and continuing the same course to the sea; thence easterly by the sea to the point formed by the intersection of the first described boundary line and the line of the sea boundary; the said first boundary line being extended; thence northerly on said extended line to the point of beginning.

Being the same premises conveyed to the late Minnie H. James by said Carrie P. Whittmore by warranty deed dated October 5, 1921 and recorded in York County Registry of Deeds in Book 695, Page 269.

Also a one-quarter interest in common and undivided in another certain lot or parcel of land with the buildings thereon situated at said Beachwood in said Kennebunkport, bounded and described as follows:

Commencing at the northeast corner of the within granted premises at a point on the Kings Highway, at the dividing line between land now or formerly of Cleaves and the within granted premises; thence running westerly by the Kings Highway, fifty-five (55) feet; thence turning and running southerly by land formerly of Carrie P. Whittmore by a straight line to the northwesterly corner of premises conveyed by said Whittmore to the said Minnie

BOOK 1546 PAGE 176

H. James fifty (50) feet more or less to land now or formerly of Cloaves; thence turning and running northerly by Cloaves Land sixty-five (65) feet more or less to the point of beginning.

Being the same premises conveyed to the said Carrie P. Whittemore by deed of A. Isabelle Fearing et als dated October 14, 1921 and recorded in said York County Registry of Deeds and being the same premises conveyed by said Carrie P. Whittemore to said Minnie H. James by warranty deed dated October 14, 1921 and recorded in said York County Registry of Deeds in Book 694, Page 197.

Meaning and intending hereby to convey to said Mary Newcomb Davis my one-quarter interest in the above described premises devised under the will of said Minnie H. James duly proved and allowed in the Probate Court of York County, an abstract thereof having been duly filed in the Registry of Deeds of said York County.

On have and in hold the aforegranted and bargained premises, with all privileges and appurtenances thereof to the said Mary Newcomb Davis, her

Heirs and Assigns, to her and their use and behoof forever.

And I do covenant with the said Grantee, her Heirs and Assigns, that I am lawfully seized in fee of the premises; that they are free of all incumbrances;

that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my Heirs, shall and will warrant and defend the same to the said Grantee, her

Heirs and Assigns forever, against the lawful claims and demands of all persons.

In Witness Whereof, I, the said Nelson F. James,

and I, Bernice C. James, wife of the said Nelson F. James,

joining in this deed as Grantor, and relinquishing and conveying my rights by descent and all other rights in the above described premises, have herunto set our hands and seals this 19th day of March in the year of our Lord one thousand nine hundred and sixty-three.

Signed, Sealed and Delivered in presence of

Charles M. De...
Raymond Martin

Nelson F. James
Bernice C. James

NEW YORK
State of New York } ss.
Broome

March 19 1963

Personally appeared the above named

Nelson F. James

and acknowledged the above instrument to be his free act and deed.



Before me,

C. Fred Chadwick

C. FRED CHADWICK
Notary Public, State of New York
Residence in Broome County
My commission expires March 26, 1965
SUNSHINE AND POWER
Notary Public



York, ss.
Received MAY 1 1963 at H.L.S.M.M.
and recorded from the original.

63869

STATE OF MAINE
YORK, ss.

STATE OF MAINE
COUNTY OF YORK
CLERK'S OFFICE

RECEIVED SUPERIOR COURT
Civil Action
Dec 2 11 02 A.M.
Docket No. CV-90-119

MARY NEWCOMB DAVIS
Plaintiff
v.
LINDA A. MITCHELL
Defendant

ABSTRACT OF DECISION
AND ORDER RELATIVE TO
REAL ESTATE

I, Dianne Hill, the duly appointed and qualified Clerk of the York County Superior Court, do hereby certify that on the 13th day of July 1992, a Decision and Order Concerning Real Estate owned by both Plaintiff and Defendant respectively at Goose Rocks Beach, Kennebunkport, York County Maine, was entered, and that the following is a true copy of so much of said Decision and Order as relates to the said Real Estate in Kennebunkport, York County, Maine, viz:

1. A BOUNDARY BY ACQUIESCENCE FOR PLAINTIFF HAS BEEN ESTABLISHED AND IS AWARDED AS FOLLOWS:

All land situated in Kennebunkport in the County of York and State of Maine, at Goose Rocks Beach, which lies easterly of and adjacent to the following described line:

Beginning on the Southwesterly side of the Kings Highway at a point in line with the westerly edge of a former row of ornamental shrubs as shown on Plan Showing a Standard Boundary survey made for Linda Mitchell, Kennebunkport, Maine" drawn January 28, 1988 by Dow & Coulombe Inc., which point of beginning is ten (10) feet more or less northwesterly, as measured along said Kings Highway, from a set iron rod with cap shown on said plan as being in the boundary line between the property of said Mitchell and grantee, and which point of beginning is also in line, or nearly so, with an existing

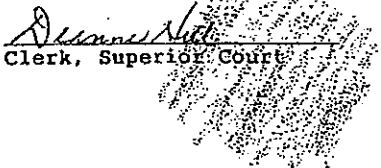
Central Maine Power Company pole in said highway; thence approximately S 5°38' W by the Westerly edge of said former line of shrubs as shown on said plan and a continuation beyond the end of said line, 180 feet more or less to the top of a granite boulder seawall as shown on said plan; thence continuing the same course to low water mark of the Atlantic Ocean, or so far as said Mitchell owns. Said line passes approximately 4.5 westerly from the westerly edge of an existing bulkhead on the residence on grantees property, and passes approximately 3.5 feet westerly from a set iron rod with cap shown on said plan near said sea wall at the Easterly end of a tie line marked "S 86°03'45" W 50.46 feet" on said plan.

4. Judgment for Plaintiff on the Counterclaim of Defendant.

Defendant filed Notice of Appeal of the Decision and Order on August 11, 1992.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court this 11th day of December 11, 1992.

Dated: December 11, 1992


Clerk, Superior Court

RECEIVED YORK S.S.

92 DEC 18 PH 1:23

ATTEST: Carroll Stone
REGISTER OF DEEDS

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al.,)
)
 Plaintiffs,)
)
 v.)
)
 TOWN OF KENNEBUNKPORT,)
)
 Defendants.)

ORDER ON PLAINTIFFS'
MOTION FOR RECONSIDERATION

(Title to Real Estate Involved)

UPON consideration of the Plaintiffs' Motion for Reconsideration of this Court's Order entered December 22, 2011 ("Order") on Plaintiffs' motions for summary judgment and the Town's motion for summary judgment, without hearing, after review and consideration of the written submissions of the parties, said motion is GRANTED.

1. Plaintiffs' Motion for Summary Judgment as to Count I of the Town's Counterclaim.
As to the Plaintiffs' motion for summary judgment on Count I of the Town's Counterclaim of fee simple title, this Court erred when it stated that the "Plaintiffs have not conclusively proven that they are entitled to judgment as a matter of law on the question of whether the Town has a claim for fee simple title to Goose Rocks Beach." Order at 12-13 (emphasis added). The court's initial determination incorrectly shifted the Town's burden of proof as to its claim to "quiet title" of its fee ownership onto the Plaintiffs. First, the Town has the burden to submit a deed or other material that established prima facie evidence of title. Assuming the burden is met, the Town then bears the factual burden of proving it has better title than the Plaintiffs. Hodgdon v. Campbell, 411 A.2d 667, 671 (Me. 1980). This Court held, as a matter of law that the document on which the Town relies as a source of title is not a deed and does not give the Town any title.

While the Plaintiffs made a prima facie case of title, the Town has failed to produce evidence of fee ownership in the Town and cannot meet its burden of proving better title than Plaintiffs.

IT IS SO ORDERED, that as a matter of law, the Plaintiffs' motion for summary judgment is granted and judgment is entered in favor of Plaintiffs and against the Town of Kennebunkport as to Count I of the Town's Counterclaim to fee simple title.

2. Plaintiffs' Motion for Summary Judgment as to Count II of Their Complaint.

As to Count II of the Plaintiffs' Complaint, Plaintiffs satisfied the court's requirement for publication¹ and the only party that came forward claiming title was the Town. This Court concluded, as a matter of law, that the 1684 document is not a source of title for the Town. Order at 8. Thus the Town does not have prima facie evidence of title.

Plaintiffs have satisfied their prima facie evidence of ownership of their properties, including the intertidal zone by showing *some* evidence of title in the submission of their deeds and the opinion of J. Gordon Scannell, Esq. that Plaintiffs each have good title to the low water mark. Smith v. Varney, 309 A.2d 229 (Me. 1973). In a quiet title action, once a plaintiff shows prima facie evidence of title and either: (1) no defendant comes forth to challenge that title, (2) a court determines that defendants do not, as a matter of law have a title document or other evidence showing title, or (3) if plaintiffs have carried their burden by proving better title than defendants by a preponderance of the evidence, the court *must* grant the plaintiff's action to quiet title.

Based on Plaintiffs' Exhibit A and the record citations contained therein, the court finds:

1. The deeds of Plaintiffs Almeder, Asplundh, Fleming, Flynn, Forrest/Julian, Julian, Gallant, Gerrish, Goose Rocks Beach Holdings LLC, LAJR Trust, Kinney, Donna Lencki Revocable Trust, O'Connor/Leahey, Raines, Rice, Robinson, Alice B. Sandifer Trust, Eleanor A

¹ Notice of Filing Affidavit of Legal Publication: Portland Press Herald (Oct. 5, 2010).

Scriber QPRT, The Cornelius J. Vandervoorn QPRT, The Twombly Family Trust, and Zagoren identified on Exhibit A as Nos. 1 through 23 are not ambiguous and that each has good title to their respective properties as set forth in their deeds;

2. The deeds of Plaintiffs Gray (24) and Hastings (25) reference descriptions that are incorporated into their deeds, therefore, each has good title to their respective properties as referenced in their deeds;

3. As to Plaintiffs Dwelley (26) and Temerlin (27), the Town made no challenge to their title nor has anyone else, therefore, the titles of Dwelley and Temerlin are confirmed; and

4. The deeds of Plaintiffs Celi (28), Coughlin (29), and Sherman (30) reference a recorded subdivision plan in their description and without further evidence, the court cannot find that each possess good title to the low water mark, although each has good title to their respective lots as shown on the recorded plan is unchallenged.

IT IS HEREBY ORDERED that Plaintiffs' motion for summary judgment is granted as to Count I of Plaintiffs' Complaint for quiet title and judgment is entered in favor of Plaintiffs as noted above and against the Town of Kennebunkport and any other person claiming fee simple title to Plaintiffs' properties, including the intertidal zone.

Judgment in this action shall be recorded in the York County Registry of Deeds within thirty (30) days after final judgment is entered in this case.

The clerk is directed to incorporate this Order into the docket by reference pursuant to M. R. Civ. P. 79(a).

Dated: _____

Justice, Superior Court