

SIASCONSET CIVIC ASSOCIATION, INC.

NANTUCKETT ISLAND
SIASCONSET, MASSACHUSETTS 02564

August 1, 1985

Board of Selectmen
Town of Nantucket
Town and County Building
Nantucket, MA, 02554

Dear Members of the Board of Selectmen:

Based on investigation by two of our Directors, we believe that the Town of Nantucket should further examine the legal status of the "lateral ways" leading to the footpath along the "Sconset bluff.

We have carefully read the 1983 report by Zisson and Veara and the earlier letter by James Glidden. We have reviewed maps of the lot subdivisions showing the "ways" as well as the language of several of the old deeds transferring those lots from Flagg to purchasers.

As suggested might be the case in the Veara report, we believe that the ways surely do not belong to the adjacent lot owners. This belief is based on the precise wording in the old deeds and their exact correspondence with details of the original 1883 subdivision plan (as redrawn in 1892).

We notice, however, by direct observation at the scene, that parts of the path are being squeezed by plantings, and that some of the ways are being obstructed by plantings and constructions. These moves, which could in time lead to claims for adverse possession, should not be allowed to go unchallenged.

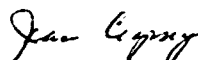
If the Town and the public presently have rights to the ways, they need to be defended against eventual forfeit to aggressive lot owners. If, on the other hand, the Town does not presently have rights, then we believe they must still reside with the heirs of Flagg, and it is our conviction that the Town should try to acquire them - by gift, purchase, eminent domain or whatever. We believe that the long-cherished tradition (which was Flagg's bequest to the island) of free passage to and along the footpath should be defended vigorously by every possible method.

At the suggestion of Mr. Grossman, Messieurs Edward Seckel and Walter Folger, the two SCA Directors charged with pursuing this matter, have discussed their findings and their conclusions with the town attorney, Mr. Foley Vaughan, who seemed to understand the thrust of their thesis. He agreed that there is need for further investigation leading to a course of action.

We respectfully call for a directive by the Board of Selectmen for Town Counsel, or whomever the Board might choose, to undertake the project and to pursue the Town's interest to the maximum extent. We stand ready to review our findings in further detail and to participate in any way that would be helpful.

Would you please let us know how we can be of further assistance?

Sincerely,



Jean Crapsey, President
Siasconset Civic Association

Copies: Folger, Seckel
Vaughan

November 9, 1985
PO Bx 78
Siasconset, MA
02564

Walter -
Hope this
OK by you
Ed S

County Commissioners
Town Of Nantucket
Nantucket, MA, 02554

Subject: The lateral ways to the Sconset footpath.

Dear Commissioners:

I have read and reread the recent report by Vaughn and I have reviewed again the former ones by Zisson/Veara and by Glidden. I have had a long interview with Mr Vaughn, asking questions and discussing various aspects of his report and the problem of the ways in general.

I think his report does not finish the matter. There are some important details which are not conclusively determined, so that the associated questions are not answered with certainty. And two possible courses of action are not addressed. These matters are the following:

1. The "solid-lines" and Flagg's Intent.

Flagg's plan of 1892 does not have the solid lines, suggesting that his ways were intended to be part of the footpath. The earlier 1885 plan was superceded, and is inapplicable the fact that a change was made would indicate that the 1892 detail was deliberate and intended and the 1925 plan was made long after Flagg's death, and can not be used to argue his intent.

Mr Vaughn thinks that the ways were for "access to the water". But it is much more logical that they were for access to the footpath. The footpath was for the use of the public, and so one would think that the access ways would have been for the use of the public also.

Both Zisson/Veara and Glidden emphasize the crucial importance of Flagg's intent. But we are not told whether this point was argued in the petition proceedings of 1925, or whether Judge Davis' "dismissal" explicitly rejected this line of reasoning. Perhaps the "dismissal" was for lack of a convincing argument, and perhaps a better one can and should be made now.

I think Mr Vaughn should be directed to review the 1925 decision in sufficient detail to determine whether Flagg's intent was argued with all possible force. If it was not, then we should decide whether to renew the petition to register the ways as town property.

2. ABUTTERS' WAYS and Ownership

I asked Mr Vaughn for a detailed definition of "abutters' ways". He said they were private ways, owned by the

abutters, possibly with usage rights belonging to particular groups (most likely, the other property owners of the sub-division) but not the general public. He thinks that all the ways (in parcel A as well as parcel B) are abutters' ways. He cites a technicality of wording in the deeds conveying the lots from Flagg to purchasers. He "seems to remember" that if the deed describes the lot as "bounded by a way" (as opposed to "bounded by the line of a way"), then the way is an abutters' way, and is owned to its center-line by the abutters.

If indeed the matter were as simple as that, one would think that Zisson/Veara and Glidden would have cited the point. But neither even used the term "abutters".

The phrases "bounded by..." in Flagg's deeds were not used to define the extent of the lots, but rather simply their locations. Their extent was, in each case, explicitly defined as "(so many) feet on the (east) side". And so I don't see how the technicality applies in these cases.

I think Mr Vaughn should be directed to determine with certainty whether the ways are necessarily "abutters' ways" by virtue of the particular language of the deeds. If so, I suppose there is no use to try to argue Flagg's intent, or to approach the heirs of Flagg as the true owners.

3. Usage and "ADVERSE POSSESSION"

Mr Vaughn thinks that a case might be made to take one or more of the ways by adverse possession. One would have to prove that by usage and tradition, the public had established rights to the ways and did in fact establish ownership. He has ^{not} tried to evaluate the chances of making a successful case.

I have discussed with many old-timers in the neighborhood their use of the ways through the years. Many senior citizens with names of Eldridge, Folger, Egan, Cahoun recall how all through their lives the ways were used as though by right, to the point of making a local tradition. Historian Stackpole says that he has no doubt that the ways belong to the town by right of usage and tradition.

I believe that the town should proceed to build its case for adverse possession. If it is done with energy and conviction, it should succeed. Mr Vaughn has no reservations—he simply waits for a directive and the cooperation of the local citizens to furnish testimony. My investigation suggests that the testimony is no problem. It is only the will of the town to proceed that might seem to be lacking.

4. Flagg's Heirs

If the ways are not necessarily abutters' ways, then I believe that the town should make a preliminary approach to the heirs of Flagg to see if they might be acquired by purchase or gift. If the heirs were favorably disposed toward the idea, this method might even take

precedence over the others.

5. Obstructions

There are possibly several cases of encroachment by lot-owners on the ways adjacent to their lots. The two most apparent cases of this should be reviewed by town officials to determine whether disciplinary action is called for. I believe that unless obstruction of the ways by the lot-owners is prevented, they will all be lost by adverse possession to the lot-owners.

Because of the length of the discussion above, please allow me to summarize these recommendations:

1. Instruct Mr Vaughn to study in detail the Judge Davis decision of 1930 to dismiss the petition for the lateral ways, in order to determine whether new arguments about Flagg's intent might be presented as a basis for a new petition.
2. Instruct Mr Vaughn to determine with certainty whether the particular language of Flagg's deeds necessarily makes the ways "abutters' ways".
3. If the results above are negative with respect to the town's interest, then instruct Mr Vaughn to begin building a case for "adverse possession" proceedings by the town.
4. If the ways are not necessarily "abutters' ways" then make a preliminary inquiry to Flagg's heirs about the idea of gift or purchase.
5. Order the review by town officials of the two apparent cases of obstruction by adjacent lot-owners. Initiate disciplinary action if appropriate.

I have written all this down for your convenience and later reference, but I think that I could present it verbally with better speed and efficiency at your meeting of Nov. 27, 1985. I shall be present and prepared to speak to the matter, if you so desire.

Sincerely,

Edward Seckel

Edward Seckel

Copies: Dick Eldridge, Sconset
Walter Folger, Sconset
Fred Egan, Sconset
Charles Cahoun, Sconset
Edouard Stackpole, Nantucket

EDWARD FOLEY VAUGHAN
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February 5, 1986

SCONSET FOOTPATH

Supplemental Memorandum on East-West Ways

This memorandum is responsive to the December 11, 1985, request of the County Commissioners asking for copies of the pleadings and decision of Judge Davis in the Town's 1925 Sconset "Footpath" Registration Case No. 11227, in the Land Court (see my memorandum to the Commissioners on the Sconset Footpath east-west ways dated October 30, 1985).

The requested pleadings are referenced in the Index to this memorandum. Comment on some of them follows.

Document No. 3: Town's Registration Petition: of importance here is the language at the bottom of page 1 in which

"Petitioners claim as appurtenant to the above described land rights or easements as follows: Rights of way in all ways shown on said plan to and from Atlantic Street."

This of course refers to the east-west ways.

Document No. 6: Title abstract - only facing sheet and citation were copied. The abstract does not add anything to the issue. There is no discussion of the ways.

Document No. 10: Answer of Stanley H. Swift - this brief one paragraph answer is representative of the many answers

filed in the Registration proceeding all of them simply alleging that land of the respondent is claimed improperly by the Town in its Registration Petition.

Document No. 11: Mackie Substituted Answer: this document squarely takes up the issue of the Town's claim to appurtenant rights in the ways bounding the Mackie land (see Page 2, 1st paragraph).

Document No. 12: this notice of motion is included to show who the various responding parties were by the time 1929 had rolled around.

Document No. 13: Judge Davis' decision: this decision is, as they say, the law of the case and, for better or worse, delineates the rights of all of the respondent parties.

That confusion existed 56 years ago as well as today may be seen in Judge Davis' comment on grants of land by Flagg first to the proprietors on September 21, 1892, of the strip of land covering the path and running to the foot of the bluff and second on September 22, 1892, to Mitchell (one of the respondents in the registration case) of land to the East of the bluff lot sold to Mitchell (seemingly duplicating the Town grant) but at the same time making such grant subject to the September 21, 1892, grant to the proprietors. Judge Davis said:

- "Just what interest he [Flagg] thought he had, or was conveying by the quitclaim deeds [to Mitchell and others] does not appear."
(Page 2 of decision)

Document No. 14: Order for Decree: of note here is the language dealing with appurtenant claims. The only right the

court finds to be appurtenant is

"...an easement on a continuation of the path as per plan over Grice Lot."

This should be contrasted with the appurtenant rights originally claimed by the Town in the registration petition (document No. 3).

Document No. 17: Brief of respondents Beer et al: this is a lengthy piece of work. The first two pages set forth the claims of various respondents which are, as to one group ownership of the land east of their lots (i.e. embracing the path) down to the foot of the bluff based upon deeded rights and, as to a second group, similar land ownership based on adverse possession ("prescriptive rights").

The next several pages are devoted to tracing the title history forward from 1834 into the hands of Flagg and then to the Proprietors and some of the respondents in the case and particularly at pages 10 and 11 (top) proving the Grice claim to own to the Ocean (Lot 1).

Pages 12 - 16 trace the title history of the Aurora Heights Division of Sconset from 1840 forward.

Page 17 contains a discussion of Rosaly Lane and 2 other east-west roads as they appear on Codd's map of Aurora Heights dated November 4, 1887. The author treats these roads as public ways but the map itself which appears at Book of Plans 2, Page 52, Nantucket Registry of Deeds, although giving the ways names, does not characterize them as public or private.

As is pointed out (correctly) further along at Page 17, the

Town's attempt to register the lower half of the "Path" based upon Flagg's 1892 conveyance has no life because Flagg never owned it. This explains why Judge Davis granted the petition covering land only down to Judkin's property.

The rest of the brief details the basis for ownership of several more of the clients of the author of the brief, ends at Page 25 and contains no discussion of the east-west ways other than as noted at Page 17.

Document 18: Bill of Exceptions on January 27, 1930: one of the respondents, Mary K. Mitchell took an appeal, then called a Bill of Exceptions, to the Supreme Judicial Court from Judge Davis' decision. The appeal was decided (Document No. 20) in the astonishingly short time of 2 months. The SJC upheld Judge Davis.

Document 19: This letter is found in the Mary Mitchell registration case No. 9173, and is included for its historical interest reflecting as it does the existence of the path back in 1880. The Mitchell property was composed at Lots 41, 42 and 43 and would be located near the Benchley property today.

Respectfully submitted,

Erbaugh



[NHA Home - Historic Nantucket Articles](#)

Originally published in the *Historic Nantucket*, Vol 20, no. 4 (April 1973), p. 19-27

"The Path Along The Bluff" BY Edouard A. Stackpole

In recent months there has been a considerable study made of roads and rights-of-way outside the perimeter of the town, and of the original layouts and acceptances by the town. Some of these ways have been difficult to trace but one of the most unusual has had the good fortune to have been carefully documented--the "Path Along the Bluff"--that extensive footpath which leads all the way from the village of 'Sconset to Sankaty Head.

Situated as it is at the top of the bluff, always commanding intriguing glimpses of the sea and the heathland on either side, the "Path" curves and dips as it follows the conformation of the bluff, and provides an entirely unique opportunity for a stroll to and from the famed lighthouse at Sankaty.

Undoubtedly, the most unusual feature of the path is that it is public (being owned by the town) and yet that it leads directly across the front yards of all those owning property fronting on the bluff. A number of years ago there was an attempt by one property owner to close that section of the path running through her front lawn, but a decision rendered by the late Judge Davis of the Land Court upheld the town's contention that the "Path" was a public way.

The owners of the adjacent fronting property have, in most cases, had their grounds landscaped, so that the stroller apparently is walking on and across a series of front lawns and gardens, with only a gap in the hedges to locate the actual "Path." In other instances, the path winds through natural terrain and thickets and in one case wanders through a thicket of Scotch broom. For at least half its mile-length, however, the adjoining property owners have actually maintained the path for public use.

But the fact that it does lead into and across private property has not created a nuisance to the owners of the residences along the bluff. This result has been occasioned by a comparably simple fact that those who take advantage of the opportunity to walk the mile-long path are too deeply appreciative of the experience, and it is rare, indeed, that private property is not respected.

The story of the origin of the "Path Along the Bluff" is interesting from both the legal and esthetic viewpoints. It began three quarters of a century ago, when a summer resident of Nantucket, William J. Flagg, decided to invest in a real estate development at the east end of the island.

It was early in 1873 that Mr. Flagg obtained title to a large section of land between 'Sconset and Sankaty, in that portion of the island laid out by the original Proprietors as "Plainfield," bordering on Sesachacha lots. Although the original title gave him ownership to the foot of the bluff itself, the "Proprietors" reserved for themselves the beach land from the foot of the bluff to mean high water. This later became part of the present Codfish Park.

At the same time, or soon after, Mr. Flagg acquired other land at the east end and made plans for dividing the section into house lots. He was careful, however, to run the easterly boundary of these lots at what he no doubt considered a safe distance from the edge of the bluff.

The "Proprietors of the Common and Undivided Land," controlling as they did the outlying land on the island, were petitioned in July, 1883, by Mr. Flagg, for another set-off. The petitioned requested the Proprietors to "...set off to him [Flagg] by metes and bounds, all the common land lying eastward in the Plainfield division, and by the Atlantic house. Also, all lying between these lines and the lines of Squam division, except the Pond."

The Proprietors duly convened to consider this petition, but it was some months later--December 8, 1883--that they agreed to "set off the land to said Flagg" at the same time requesting him to "account said Proprietors with an equivalent of ten sheep commons;" also, "to secure to said Proprietors a roadway two rods wide, over and across those portions of land by him reserved as set forth in the quit claim deed from Flagg."

This set-off by the Proprietors is entered in the town records under date of December 8, 1883, although it was decided upon three months previous. The grant reads:

Pursuant to a vote of the Proprietors of the Common and Undivided Lands of the Island of Nantucket, passed Sept. 26, 1883, we have this day set off to William J. Flagg, of the city and State of New York, as follows:

All the common land lying Eastward of the east line of the Plainfield Division and of the South line of said division of Plainfield on the South, and the south line of the Squam division on the North, with the understanding said Flagg will reconvey a certain portion thereof to said Proprietors, to be held in trust by them.

This was signed by Andrew Myrick, William C. Folger and Allen Coffin, as lot-layers.

This "quit claim deed" referred to as given by Flagg is recorded in Book 68 of the town's registry records. It conveys the land requested by the Proprietors, with exceptions, as follows:

First, all the land lying eastward of the land lying eastward of the land conveyed to me and Eliza Flagg, my wife, by deeds respectively of Frederick M. Pitman (see Book 62, Page 464), and James H. Wood (See Book 66, Page 498), and between the extension of the northern boundary line of the said land purchased of Pitman and the southern boundary line purchased of Wood.

Second, all that tract of land lying eastward and between the extension of the northern and southern boundary lines of a certain tract of land conveyed by me and Eliza Flagg to William Ballantyne, by a deed recorded with the town records.

The land hereby released to be forever held in trust by the said Proprietors and their successors for the purpose of roadways and other public uses and purposes and not to be granted or set off by them in severalty to any individual person or persons.

And I also convey to said Proprietors a right-of-way two rods wide along the shore above the high water mark over and across the tracts of land hereinabove excepted and reserved, said right-of-way 2 rods wide being forever secured to said Proprietors notwithstanding any changes that may hereafter take place on the beach affecting the position of said line of high water mark.

There can be little doubt in the established purpose for the land that Flagg reconveyed to the Proprietors, and which that corporate body agreed to guarantee.

It was in the spring of 1892 that Mr. Flagg sold to a Mr. Heath the most northerly of the lots which he had laid out ten years before. It was then recorded for the first time that the easterly boundary was "a foot path along the top of the bank." This lot was later owned by the Grice family.

Mr. Flagg called his real estate development "Sankaty Heights." He was aware of one fact that has not been fully appreciated—that there had been in existence for many years (perhaps as long as 'Sconset had existed) a footpath along the bluff top, which was used by the villagers and by farmers and fishermen.

Sheep grazed here by the hundreds, sometimes straying down the bluff. Fishermen used the gullies from the village to 'Sachacha Pond to haul up their dories and their catch of fish. The "Path" probably ran all the way along the bluff to the pond. The government's erection of Sankaty Lighthouse in 1849 literally cut the "Path" in half.

Mr. Flagg must have recognized this fact, for on August 1892, he entered the following petition:

The undersigned requests the Proprietors of the Common and Undivided Lands of Nantucket to accept a certain tract of land in that part of Nantucket known as Sankaty Heights, but in perpetual trust nevertheless, for the residents and visitors of Nantucket, and to be used as a foot-path or foot promenade and for no other purpose or purposes whatsoever.

It is provided, however, that the same Proprietors may, when they choose, to convey and transfer the said land in like perpetual trust and for the purpose above-named to the Town of Nantucket or other corporation or body known to control the highways of the Town of Nantucket. William J. Flagg.

On Sept. 1, 1892, Mr. Flagg sold a block of three lots to the late Mary K. Mitchell, and the warranty deed stipulated that the easterly boundary was the footpath along the bank.

On Sept. 3--two days later--the Proprietors voted to accept the tract of land offered by Mr. Flagg as a footpath, and on Sept. 21, 1892, Flagg conveyed the tract to the Proprietors, the tract including that land lying between the easterly tier of lots on the west and the beach upland belonging to said Proprietors on the east, excepting certain lots previously sold and not material to this controversy, the strip of land so conveyed to be held by the Proprietors in trust for the purposes of a footpath along the bank, with authority to convey the land to the town. This deed was recorded in Book 76, Page 342.

On Sept. 22, 1892, Mr. Flagg gave the Mitchell estate a quit-claim deed of all interest in the land lying eastward of the lots theretofore conveyed to her, with the condition that all of the land lying between the east line of said lots and the edge of the bank be kept open for a footpath along the bank; and further reciting :

This deed being subject to my deed of Sept. 21, 1892, conveying the same premises to the Proprietors of the Common and Undivided Lands in Nantucket in trust for uses and purposes therein specified, recorded in Book 4, Page 342.

From the fact that Mr. Flagg had made doubly sure that the "Path" would be preserved it appears that he was cognizant of the long use of the path as a traveled way. His efforts to protect it were further urged by his awareness of its appeal to the summer visitor as a perfect way for a stroll.

The second in the series of legal steps to protect the "Path" came in the next year. The Mitchell estate filed with the Land Court a petition for registration of title to her land, claiming easterly to the ocean. In that case, as in other cases which followed out of this same tract, Judge Davis of the Land Court ruled that title to the strip between the easterly line of the tier lots on the west and the line at the foot of the bank to the east, passed to the Proprietors under said deed of Sept. 21, 1892, and not to the respondent under her deed of Sept. 22, 1892.

Meanwhile, the Mitchell estate had extensively landscaped its grounds, including that portion occupied by the "Path," and had also erected a number of buildings on the beach below.

It was in 1924 that the town voted to seek title to the "Path" through the Land Court. A conference between the late Joseph Kenney, of New Bedford, the town's counsel, and Franklin E. Smith representing the Proprietors, cleared away legal problems, with Mr. Smith suggesting that the Proprietors resign as trustee of the strip (as appointed by Flagg) and that the town be appointed as trustee.

The Proprietors met on May 1, 1925, and voted to give the town a "deed of release to not only the Path, but all the land between the top and bottom of the Bluff along the Path," a distance of some 7,000 feet.

In September, 1924, William S. Swift made a survey for the town, and the plan was accepted by the Proprietors in its release to the town. When the case came before the Land Court the Mitchell estate claimed the land fronting it (including the Path) by reason of adverse possession.

On December 1, 1929, Judge Davis of the Land Court rendered his decree which legally established the "Path Along the Bluff." In regard to the respondent's claim, he found:

The Sankaty Path is in constant use, and is a matter of importance to all lot owners along the bluff. It is a well-defined path, but, owing to inroads from the sea, needs care and repair. It is in good condition in front of the respondent's house, and her lawn has in no way interfered with the path.

There has been nothing in her care of the bluff that has been in any way adverse to the rights of the Proprietors, or of the Town as their successor in title, nor in any of the said acts of the respondent has there been anything adverse to the purpose of the trust under which title to the strip of land has been held, namely, the maintenance of the path. That portions of it have been used by the respondent for access to the beach and for bathing purposes, or for the housing of her gas engine for lighting her summer residence, has not been inconsistent with a reasonable inference of permission of the part of the Proprietors.

"...There is a decided difference between a user of open tracts of seashore property and similar user in a settled community. Title acquired by adverse possession rests practically on estoppel as a matter of public policy. When an owner has permitted himself to be ousted and another to be in open, notorious and exclusive occupation of his land under a claim of right for a period of twenty years, he has lost the right to assert his title. He does not lose it by a reasonable allowance of the use of a portion thereof by a neighbor and on the while to himself, which does not in any way interfere with his own control of the property for which he himself uses it.

In such case permission is to be inferred; and the more so where title to land is in a public body like the Proprietor. On the facts of this case I find that title by adverse possession has not been acquired against the petitioner and its predecessor.

The Sankaty path runs from the Sankaty Lighthouse southerly to a considerable distance beyond the limits of the Flagg land. The petition and accompanying plan cover the entire path. The southerly boundary line of the Flagg tract, title to which is now in the petitioners, is the northerly line of the public way shown on the filed plan immediately south of the Judkins lot, a little over one-half way down the plan. The northerly line of the strip owned by the petitioners is the southerly line of the respondent Grice which is to be shown on the decree plan.

Many are familiar with Bliss Carmen's poem describing the Path, beginning with the line, "Have you ever heard of 'Sconset," but there is another verse which deserves to be equally well known, as written by Mrs. Abbie Ransom. In part, this reads:

"Have you ever followed the path along the bluff,
When the sky is gray and the sea is rough?
When, shoreward thickening, the fog drifts down
Until homes are the wraiths of a phantom town?
I have followed the path to Sankaty Light,
When the moors were brown and the frost was white,
With the sun a ball on the ocean rim,
Where the Indian Summer breathes with Him,
From the north to the south, a curve is swept,
On the far horizon a soft haze slept.
To the west the moorlands, above the sky,
In all the vast silence, Just God and I."