Testing Rights in Contested Space: The District of Marshpee versus Reverend Phineas Fish, 1833-1839

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Abstract:

From May of 1833 to March of 1834, the Mashpee Wampanoag tribe of Cape Cod Massachusetts waged an aggressive campaign to gain political and religious autonomy from the state. In March of 1834, the Massachusetts legislature passed an act disbanding the white guardians appointed to conduct affairs for the Mashpee tribe and incorporated Mashpee as an Indian district. Despite being awarded rights to self-government and controlling interest in their affairs, their unwanted minister, Reverend Phineas Fish, remained. This paper considers Mashpee's use of the courts to discharge Fish from his position and regain the land he unlawfully assumed title over. Specifically, the analysis engages with three cases brought before the Barnstable Court of Common Pleas between 1833 and 1839: *Commonwealth of Massachusetts versus William Apess,* an unnamed 1835 case, and *Phineas Fish versus William Mingo and Moses Pocknet.* Treated as related components of a larger strategy, this paper demonstrates how Mashpee used the cases as a series of tests to determine a strategy to settle the matter of contested space, to bring Mashpee property and resources firmly back into the hands of the community, and to dismiss Fish's claim on the contested parsonage land.

"Much evidence was introduced in relation to the parsonage upon the plantation…it would not be expedient for the Legislature to interfere."

- Senator Ira Moore Barton, Special Joint Committee Chairman, March 1834[1]

In March of 1834, the Massachusetts Senate and House of Representatives passed an act to incorporate Mashpee as an Indian District, designating it "a body politic and corporate…with all of the powers and privileges, and subject to all of the duties and liabilities herein provided."[2] Abolishing the tenure of white, non-native, state-appointed overseers, the "proprietors shall, by ballot, elect a clerk and three selectmen," tasked with "the care and management of all proprietary lands held in common" to ensure "the peaceable and exclusive enjoyment of all lands which they heretofore may have rightfully held and improved in severalty."[3] The Act to Establish the District of Marshpee rendered prior laws null and void, articulating the tribe's rights to government, management of resources, and title to their land.[4] However, the decision fell short of addressing equally pressing issues for the tribe: the right to appoint a minister of their choosing, the right to access parsonage land, and the right to undisputed control of the community meetinghouse. The Massachusetts legislative committee opted not to rule on these issues, leaving the selectmen of Mashpee at an impasse; despite being awarded rights to self-government and controlling interest in their affairs, their unwanted minister, Reverend Phineas Fish, remained.[5]

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[1] Report of the Joint Special Committee Relative to the Marshpee Indians, Legislative Packet for Acts of 1834, Chapter 166, An Act to Establish the District of Marshpee, Massachusetts Archives, Boston, MA.

[2] Laws of the Commonwealth of Massachusetts, Acts and Resolves Passed by the General Court, January 1834-April 1836 (Boston: Dutton and Wentworth, 1836), 233. Mashpee is both the name of a physical location and the name for the Wampanoag community that convened in that location. I will use the term to refer to the location and use *community, district, people,* or *tribe* when referring to the inhabitants of Mashpee.

[3] Acts, January 1834- April 1836, 233-34.

[4] Historical records show the spelling of Mashpee as Marshpee. It is not until Mashpee becomes a town in 1870 that the "r" is dropped from the spelling. I will use the modern spelling of Mashpee for my discussion, but retain the alternative spelling in all quotes from primary source documents.

[5] The question of why Fish was not removed along with the overseers is a central component to my larger thesis. I explore why Mashpee religious autonomy did not accompany the extension of rights to self-government and the multi-faceted legal and legislative battle to secure religious freedom for the District. This paper focuses on the

Difficult to untangle questions of authority, access to land and resources, and property rights from questions of legal and political rights, the fight to remove Fish was a complex problem not easily solved and unfolded in three distinct venues: Harvard College, the state legislature, and the superior and inferior courts of Massachusetts. This article addresses the fight waged within the judicial system, looking at three cases concerning access to resources and the parsonage title: *Commonwealth of Massachusetts versus William Apess,* an unnamed 1835 case, and *Phineas Fish versus William Mingo and Moses Pocknet.*[6] Featuring Mashpee people as both defendants and plaintiffs, the cases appear unrelated at face value. A detailed analysis of the three cases brought into concert with the overarching goal of regaining the parsonage and removing Fish, however, reveals a counter-narrative. Each case directly addressed the issue of contested space and resources within the physical location of Mashpee, as well as indirectly addressed the presence of the unwanted minister Phineas Fish. I will argue that Mashpee used the cases as a series of legal tests to determine a viable strategy to settle the matter of contested space, to bring Mashpee property and resources firmly back into the hands of the community, and to dismiss Fish's claim on the contested parsonage land.

Conceptualizing the community of Mashpee as contested space is essential to understanding and analyzing the complex battle between the District of Marshpee and Phineas Fish. An Algonquian-speaking tribe, the Wampanoags occupied territory throughout Southeast Massachusetts and Rhode Island prior to the arrival of the Europeans. The presence of

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connection between Fish and property rights rather than questions of authority related to religious self-determination.

[6] Various spellings of the surname Pocknet exist in documents pertaining to Mashpee. The legal documents for this case spell Pocknet as Pognet. The spelling of Pocknett also appears on a number of documents. The form that will be used for this paper is consistent with Moses Pocknet's signature on the Marshpee District Notes and various petitions.

missionaries among the Indians of Cape Cod began early in the seventeenth century. Consistent with the colonial agenda to convert and civilize Native people, missionaries dispersed throughout New England, establishing settlements called praying towns.[7] In 1660, Christian missionary Richard Bourne secured 10,500 acres of wooded land on the coast of upper Cape Cod Massachusetts for the exclusive use of the "South Sea Indians" and their descendants.[8] The General Court of the Plymouth Bay Colony mandated the official construction of four distinct Indian communities, affirming the title to the land secured by Bourne; and bestowing the settlement with the title, Marshpee plantation.[9]

The deed negotiated by Bourne guaranteed that no part or parcel of the lands could be bought or sold to any white person, to protect the land and ensure it remained with the Native population.[10] However, legislative acts passed between 1693 and 1833 placed the Mashpee plantation, its people, and its resources under the strict control of non-Native guardians or overseers. Situated on the southern side of upper East Cape Cod, Mashpee plantation boasted lush streams and ponds for fishing and thick, vast forests containing an abundant supply of a coveted resource, wood. Under the state-appointed guardians, the plantation's primary resource remained under constant assault by poachers, allowing the wood to be removed for the benefit of others and without the consent of the community. Agreements passed by the Massachusetts Legislature in 1783 and 1813 set aside four hundred acres of land within the Mashpee plantation

[7] Historian Jean O'Brien defines the term "Praying Town" as the conjuncture between English Calvinist ideology and a geographically bounded place where cultural negotiations between Indians and colonists occurred. See Jean M. O'Brien, *Dispossession by Degrees: Indian Land and Identity in Natick, Massachusetts, 1650-1790* (Lincoln: University of Nebraska Press, 2003), 32.

[8] The Dutch referred to Nantucket Sound as the "South Sea." Given the proximity of Mashpee to the sound, missionaries referred to the Wampanoag Indians in the area as the South Sea Indians. The largest cluster of Wampanoags converged at Mashpee, many of them displaced from their ancestral homelands by colonial settlements and disease.

[9] A plantation in seventeenth-century New England was a town-in-the-making, a geographic area designated by the General Court as a future town. This Act occurred in 1685; the other three communities were Natick, Grafton, and Gay Head.

[10] Documents Relative to the Marshpee Indians. Massachusetts Senate. No 14, January 1834. Massachusetts Archives, Boston, Massachusetts.

for the use of a minister, commonly known as the parsonage lot. The law extended to the minister usufruct, or use rights, over the land but did not grant ownership.[11] In accordance with civil law, usufruct rights allowed for an individual or group to enjoy the property, drawing profit and sustenance from the land provided the substance of the property remained undiminished and uninjured.[12] The legislative agreements provided a designated space for future ministers, not a title; the parsonage remained part of the commonly held plantation.[13]

A graduate of Harvard College, Congregationalist minister Reverend Phineas Fish arrived at Mashpee in 1811. Formed by Congregationalists, Harvard College provided a series of ministers for Mashpee. Beginning in 1711, the ministers were supported by a fund for the legacy of Reverend Daniel Williams, an English minister who bequeathed his estate for the "blessed work" of converting the Indians in America. Appointed by the trustees of the Williams Fund and confirmed by the overseers, Fish took up residence in the meetinghouse pulpit and parsonage lot. An ideal scenario for a young minister, the position awarded Fish a sizable pension from the William Fund, 520 dollars annually, as well as access to valuable wood and possession of the meetinghouse.[14]

Tensions over property and faith existing between the community and Fish set the stage for the legal battle between the parties in the early district period. Beginning almost immediately after his arrival, petitions addressed to the state legislature, plantation overseers, and Harvard College elucidated the tribe's entrenched distaste for Fish. The people of Mashpee charged that

[11] An Act to appropriate certain lands lying within the plantation of Marshpee, in the county of Barnstable, as a parsonage for the use of the missionary on said plantation. Ch. 45, June 1813. *Laws of the Commonwealth of Massachusetts, Acts and Resolves Passed by the General Court*. Massachusetts Archives, Boston, Massachusetts.
[12] Black's Law Dictionary Free Online 2nd ed. http://thelawdictionary.org/usufruct. Accessed 5/10/2014.
[13] Inherent differences between the English system of private ownership and Native usufruct practices underpinned disputes over land and property. For more on colonial land tenure systems and Native people see William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 2003).
[14] *Records Relating to the Marshpee Indians, 1811-1841. UAI 20.811*, Harvard University Archives. Report on the Claims of Mr. Fish and the Marshpee Indians. Harvard University Archives. Cambridge, Massachusetts.

Fish "neglected his duty; that he did not care for the welfare of the tribe, temporal or spiritual…that he had never visited some of the brethren at all and others only once in five or seven years; that but eight or ten attended his preaching; that his congregation was composed of white people."[15] They took ire that Fish "had possession of five or six hundred acres of the tribe's best woodland, without their consent or approbation, and converted them to his own exclusive use."[16] Fish, "pretending that his claim and right to the same was better that that of the owners themselves," enraged the community, fueling discontent.[17]

Dissatisfaction with the state of rights and religion grew steadily among the Mashpee following the American Revolution.[18] Placed under stringent guardianship laws, the Mashpee tribe's frustrations reached a boiling point by May of 1833. Methodist Pequot itinerant preacher William Apess arrived in Mashpee amidst this great precipice of discontent and impending change.[19] Moving to action at a meeting of the tribal council on May 21, 1833, members of the Mashpee tribe authored an "Indian Declaration of Independence" comprised of three documents.

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[15] William Apess, *Indian Nullification of the Unconstitutional Laws of Massachusetts: Relative to the Mashpee Tribe: or, The Pretended Riot Explained* (Boston: Press of J. Howe, 1835), 20.
[16] Ibid., 22.
[17] Ibid.
[18] A series of Acts were passed to define the relationship between Indian tribes and the state following the establishment of Massachusetts Bay Colony. The Acts addressed land title and established the guardianship system to regulate the tribes. Acts passed by the Colonial government: 1650, 1693, 1700, 1701, 1718, 1719, and 1763. Acts passed by the Commonwealth of Massachusetts: 1789, 1790, 1796, and 1819. For more see Benjamin Franklin Hallett, *Rights of the Marshpee Indians argument of Benjamin F. Hallett, counsel for the Memorialists of the Marshpee tribes, before a Joint Committee of the Legislature of Massachusetts* (Boston: 1835).
[19] Born in Colrain, Massachusetts, in 1798, William Apess was a Pequot author, orator, and minister. He traveled throughout New England on a Methodist preaching circuit, proselytizing primarily to Indian and mixed-race audiences. Two different spellings are used for the last name: Apess/Apes. William Apess used the spelling "Apes" for the first two books he published, and Apess for the last three including *Indian Nullification*. The arrest record and criminal proceedings from Barnstable County court reflect a spelling of Apes. I have chosen to use the form consistent with *Indian Nullification*. For more on the writing of William Apess see Barry O'Connell, *On Our Own Ground: The Complete Writings of William Apess, a Pequot (*Amherst: University of Massachusetts Press, 1992); Sandra M. Gustafson, *Imagining Deliberative Democracy in the Early American Republic* (Chicago: University of Chicago Press, 2011); Jill Lepore, *The Name of War: King Philip's War and the Origins of American Identity* (New York: Vintage, 1999); Maureen Konkle, *Writing Indian Nations: Native Intellectuals and the Politics of Historiography, 1827-1863*, (Chapel Hill: University of North Carolina Press, 2003); Kim McQuaid. "William Apes, Pequot: An Indian Reformer in the Jackson Era." *The New England Quarterly* 50, no. 4 (December 1, 1977): 605–625; Robert Warrior, "Eulogy on William Apess: Speculations on His New York Death," *Studies in American Indian Literatures*, Vol. 16, No. 2 (Summer 2004): 1-13.

One document provided for the adoption of Apess into the Mashpee tribe so he would be able to live among them and speak on the tribe's behalf. Another document addressed the issue of rights, proclaiming:

> That we as a tribe, will rule ourselves, and have to right to do so; for all men are born free and equal, says the Constitution of this country. That we will not permit any white man to come upon our plantation, to cut carry off wood or hay, or any other article, without our permission, after the first of July next [and] That we will put said Resolution into force with the penalty of binding and throwing them from the Plantation.[20]

The last document specifically requested that Fish be discharged and asserted the tribe's right to select a preacher of their own choosing. Dismissing Fish as their minister, the tribe ordered he stop cutting and taking wood from the parsonage immediately and return the keys to the meetinghouse. Adopted and endorsed with over one hundred signatures, President-elect Daniel B. Amos sent the respective documents to Harvard College and posted the resolutions in the areas surrounding the Mashpee plantation.

The case of *Commonwealth versus William Apess* stemmed from an event on the morning of July 1, 1833. The resolutions posted by the tribe concerning the cutting and carrying of wood by non-proprietors were of little consequence to the Mashpee's white neighbors, who benefited from the plantation's vast wood sources. On the morning of July 1, Apess and his followers discovered two white men, the Sampson brothers, "came in defiance of our resolutions, to take away our wood in carts."[21] Apess "asked William Sampson, who was a member of the missionaries church" to "unload his team…to which he replied he would not."[22] Apess then instructed his companions to unload the wood piled into the carts. "One of the Sampsons, who was a justice of the peace, forbade them, and threatened to prosecute them for thus protecting

[20] Apess, *Indian Nullification*, 21.
[21] Apess, *Indian Nullification*, 30.
[22] Ibid.

their own property."[23] The exchange as described came to be known as the "Mashpee Revolt" or "Woodland Riot."[24] Following the incident, William Apess and six of his companions stood trial in Barnstable County Court of Common Pleas on charges of riot, assault, and trespass. The court found Apess and two of his six companions guilty, alleging they "with force and arms, did riotously and routously, assemble and gather themselves together to disturb the peace of the said Commonwealth" and unlawfully took into their possession a cord of wood belonging to William Sampson.[25] Apess, perceived as the instigator of discontent among the tribe, received a harsher judgment than the others; he was held on a bail of two hundred dollars and sentenced to thirty days in county jail.

On the surface, Phineas Fish appeared to have no connection to the incident or the case that followed. However, conflicting accounts of where the incident occurred within the plantation complicate our understanding of Fish's involvement. In his account of the event, Apess stated that he was walking in the "woods" when he happened upon the Sampson brothers loading the cart with wood. On the other hand, the court transcript described wood being flung from the Sampsons' cart on to the "public highway."[26] Arguably, both locations reflect the motivations of the parties giving their description. Apess' use of the term "woods" captured the sentiment of common property and reinforced Mashpee communal ownership over the wooded area of the plantation. The use of the term "public highway" in the court transcript worked to firmly place the incident outside of Mashpee space and into a zone that would support the benign nature of the Sampson's actions. Arguably, the choice to include the location of the public

[23] Ibid., 31-32.
[24] For more on the Mashpee Revolt, see Donald M. Nielsen, "The Mashpee Indian Revolt of 1833." *The New England Quarterly* 58, no. 3 (1985), 400–420.
[25] *Commonwealth of Massachusetts v William Apes et al.* Barnstable County Court of Common Pleas, No. 633. September 1833. Barnstable County Superior Court House. Barnstable, Massachusetts.
[26] *Commonwealth of Massachusetts v William Apes et al*.

highway in the transcript may have been a deliberate attempt to distance the event from its actual location, the parsonage.[27]

Further evidence suggests the likelihood of the dispute occurring on the contested space of the parsonage. One of the Sampson brothers, William, was a member of Fish's congregation. Sampson did not work with the overseers or the tribe as a regular contractor or agent for wood. Furthermore, in his account of the incident and the trial that followed, Apess referenced a report written by Fish on the case. In his capacity as a minister, he would not have been obligated to compose a report for events on the plantation, though he would have if the incident directly affected him or his property. Neither a participant nor a witness in the event, the fact that Fish offered a report on the matter offers a significant clue as to the location of the "riot."[28] Taking these factors in concert, it stands within reason that the Sampson brothers removed the wood from the parsonage belonging to Fish with whom they had a connection, not the common area of the plantation.

Scholars have interpreted the Mashpee Revolt as a protest movement consistent with the social reforms of the 1830s, as an example of Native resistance, and most recently by Lisa Brooks as a movement to reclaim and reconstitute Native space.[29] A comment within Daniel Amos' testimony before the legislature in the spring of 1834 offers the opportunity to expand on the interpretation offered by Brooks' current work.[30] When describing the events of July 1, Amos

[27] Wampanoag scholar and elder Amelia Bingham suggests in her 1970 work, *Mashpee: The Land of the Wampanoags*, that the woodlot was synonymous with the parsonage. Arguably this analysis and larger argument supports her suggestion.
[28] Apess, *Indian Nullification*, 32.
[29] Lisa Brooks, *The Common Pot: The Recovery of Native Space in the Northeast* (Minneapolis: University of Minnesota Press, 2008); Jean M. O'Brien, *Firsting and Lasting: Writing Indians Out of Existence in New England* (Minneapolis: University of Minnesota Press, 2010); Daniel Mandell, *Tribe, Race, History: Native Americans in Southern New England, 1780-1880* (Baltimore: Johns Hopkins University Press, 2008).
[30] In her groundbreaking work *The Common Pot*, Lisa Brooks looks at the ways in which Native Americans in New England used writing as a tool to combat colonialism, reclaim sovereign rights, reconstruct communities, and assert

testified that "no riot" occurred.[31] He stated, "the object was to test the question of right to see if we might have redress."[32] The language used by Amos indicated a specific purpose behind the decision to unload the teams of wood; Apess did not happen upon the Sampson brother by chance, but by design. The "riot" was instead a starting point for series of tests to determine a viable course of action for Mashpee to reclaim space legally, not just symbolically.

The leadership at Mashpee used *Commonwealth versus Apess* to test the court and determine whether the law would treat the parsonage property or its resources as separate from the larger plantation. Of the total seven Mashpee individuals cited for the disturbance, three received sentences from the Commonwealth of Massachusetts. William Apess, Charles Degrasse, and Jacob Pocknett were found guilty, most interestingly, of trespass.[33] Had the incident occurred on common plantation property, not the parsonage, the court would not have had grounds to find Mashpee proprietors guilty of trespass on their own property. This fact demonstrates the complexity of ownership and the contested nature of space at Mashpee, further supporting the notion the "Mashpee Revolt" occurred on the parsonage.

The finding in *Commonwealth versus Apess* firmly established that without a legislative act declaring Mashpee no longer under state supervision, they would have no legal redress for actions and infractions against them on the plantation. In 1834, with the end of the guardianship laws with the act declaring Mashpee an independent Indian district, a decided shift occurred; the community began the transition from a state of tutelage to self-government. Among the primary concerns of the newly formed government was the protection of their resources and land, as well

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themselves within the landscape. I would argue that Mashpee used courts in a similar fashion to fortify the newly formed district.

[31] Testimony of Daniel Amos. Committee Notes on the Affairs of the Marshpee Indians, February 5- March 8, 1834. Papers of Ira Moore Barton, Box 1, Folder 1. American Antiquarian Society, Worcester, Massachusetts.

[32] Testimony of Daniel Amos. Committee Notes on the Affairs of the Marshpee Indians.

[33] *Commonwealth of Massachusetts v William Apes et al.*

as the removal of Fish. The newly elected selectmen of Mashpee solicited the services of trusted counsel Benjamin Franklin Hallett to prepare a pamphlet regarding these issues. Titled the "laws and facts touching the parsonage of Marshpee," Hallett outlined the legal and legislative underpinnings case against Fish.[34] In the pamphlet, Hallett made multiple references to an undated and unnamed 1835 suit brought by the Mashpee selectmen against a white man employed by the minister for cutting wood on the common land. In accordance with the Act of 1834, "no persons other than the proprietors or inhabitants of said district, shall ever cut such wood, or transport the same therefrom…no sale or transfer of wood standing upon the common lands of said district, shall be valid in law, unless made to a lawful proprietor."[35] With Hallett's pamphlet dated May 20, the unheard case took place between January and April of 1835, close to a year after the passing of the new laws. Referencing the case, Hallett declared "the District Attorney on ascertaining the wood was taken from the parsonage, so called, undertook to decide the whole question before it went to court, as it was stated to us, and without any examination as to Mr. Fish's title, refused to act upon the complaint."[36] Further, he commented, "the courts at Barnstable, it is said, are closed to them, in the way pointed out by the law, the District Attorney refusing to prosecute the men who cut wood on the parsonage."[37] Conversely, no case matching Hallett's description was recorded on the docket in 1835.[38]

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[34] A prominent political figure, lawyer, and a native of Barnstable Massachusetts, Hallett served as legal counsel for the tribe following the Mashpee Revolt. For full biographical information on Hallett, see Johnson, Rossiter, ed. *Twentieth Century Biographical Dictionary of Notable Americans,* Vol. I-X. (Boston, MA, USA: The Biographical Society, 1904).

[35] Acts, January 1834- April 1836, 235.

[36]*Records Relating to the Marshpee Indians, 1811-1841. UAI 20.811*, Harvard University Archives. Loose Pamphlet, *Legal Opinion of Counsel in the case of Marshpee Indians vs Revd Phineas Fish*, May 1835, U.A.I2.108, Harvard University Archives. Cambridge, MA. Loose pamphlet, 154.

[37]*Records Relating to the Marshpee Indians*, Loose Pamphlet, *Legal Opinion of Counsel*, 167. The caption at the bottom of pamphlet's last page reads, "The Selectmen of Marshpee District, are at liberty to make such use of the foregoing, as they see proper." It remains unclear whether Hallett delivered this argument or whether the pamphlet was presented as evidence.

[38] Despite extensive research in the archives of the Barnstable County Superior Court, I have been unable to locate the unnamed case Hallett refers to. No case within this time frame lists the Selectmen as litigants, nor is anything

Though the litigants and facts may be lost to posterity, the far-reaching implications of the case's dismissal are not. The dismissal of the case by the district attorney Charles Warren suggests that the courts of Barnstable County held little regard for the newly passed laws and even less regard for the rights of the Mashpee.[39] The district attorney's decision to forgo investigating the ownership title to the land demonstrated that justice remained subordinate to expediency; like the legislature, dismissal appeared to be attractive alternatives to the settlement of the matter. For Mashpee, the unnamed case eliminated the option to use the 1834 laws as a means to bring suit to stop Fish from stripping the parsonage lands of its valuable timber.

Without a definitive legislative or legal ruling on the matter, the rights to the parsonage and its resources remained contested. In September of 1836, two separate cases appeared on the Barnstable County Court of Common pleas docket: *Phineas Fish versus William Mingo* and *Phineas Fish versus Moses Pocknet*. In each case, Phineas Fish entered a "plea of trespass," reporting that on July 21, Mingo and Pocknet "with force and arms seized, took and drive away a certain milk cow of the plaintiff of the value of twenty dollars, there then found and being, and converted and disposed of the same to their own use" and "with force and arms, seized and drove away a certain other milk cow of the Plaintiff of the value of twenty dollars…confined the said cow in one of the district pound of said Marshpee…for the space of twenty six hours…and other wrongs to the Plaintiff then and there and against the Peace of said Commonwealth."[40] For expedience, the court joined the matters, hearing them as one issue. Josiah Sampson, "one of the justices assigned to keep the Peace within and for" the county, heard the matters on August 21 at

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recorded in the court documents resembling the dispute described. It is likely the matter was dismissed without being marked up for trial.

[39] This was not the first encounter between Warren and the people of Mashpee. In 1833, Warren opted not to allow the trial of William Apess to be continued to the next session of the court. Warren stated that the postponement would be a waste of taxpayers' money. This encounter establishes an existing bias and connection between the two parties in question.

[40] Copy of Writ. *Phineas Fish versus William Mingo and Moses Pognet.* Court of Common Pleas, No. 1042. September 1836. Barnstable County Superior Court House. Barnstable, Massachusetts.

his home in Barnstable County.[41] The plaintiff and defendants appeared before Sampson to state their cases. Siding with Fish, Sampson found Mingo and Pocknet "guilty in manner and form as the Plaintiff declared" and awarded Fish damages in the amount of four dollars, as well as the costs of suit, six dollars and ninety-three cents.[42]

On the surface, the case of Fish's milk cows appeared to be a provincial and petty dispute, a common crime, one party absconding with another's property. Arguably, the reality was quite the opposite. Relationships between the suit's participants complicated the straightforward matter of trespass and theft. The plaintiff, Fish, occupied a contested position in Mashpee. Dismissed by the tribe on numerous occasions, Fish refused to relinquish his post as missionary, a position he interpreted to be a lifetime appointment.[43] The defendants, William Mingo and Moses Pocknet, occupied well-respected positions within the community; both were elected officials in the district. At the time of the case, Mingo served as chairman of the board of selectmen and Pocknett oversaw municipal duties related to the upkeep of public highways and roads. [44] The following year, voters elected Pocknett to serve as a selectman. Lastly, the justice appointed to hear the matter, Josiah Sampson, hardly represented an impartial interpreter of the law. In the account of the Mashpee Revolt written by Apess, he referred to one Sampson brothers by his first name William, and to the other as a Justice of the Peace in the county of Barnstable.[45] Never before named in scholarship, my research puts a name to the unidentified brother Sampson; Josiah was the only Sampson to hold the title of justice of the peace in the county of

[41] Copy of Writ. *Phineas Fish versus William Mingo and Moses Pognet.*
[42] Copy of Judgment for Phineas Fish against William Mingo and Moses Pognet. *Phineas Fish versus William Mingo and Moses Pognet.*
[43] Report on the Claims of Mr. Fish and the Marshpee Indians.
[44] Documents Relative to the Marshpee District. Massachusetts Senate. No 35, January 1837. State Library of Massachusetts, Boston, Massachusetts.
[45] Apess, *Indian Nullification*, 30.

Barnstable in 1833 and 1836.[46] Directly involved in the Mashpee Revolt, Josiah Sampson played a key role in the event that resulted in the arrest of six members of the tribe.

Furthermore, we must consider the charges themselves: trespass and theft. The alleged infraction occurred in Mashpee District on a portion of the common land called Santuit Field. At the time of this case, the title to Santuit Field was under heavy dispute. Phineas Fish claimed the land as part of the parsonage dedicated to the use of the minister. Mashpee district argued that Fish had no title to the land and that the land had been deeded to the community since time immemorial, a claim legitimized in the eyes of the law through the agreement made by Bourne in the 1660s. With the event in question taking place on commonly held property, Fish's claim that Mingo and Pocknet were guilty of trespass illustrated the deeply contested nature of property rights at Mashpee. Furthermore, the decision demonstrated the challenge Mashpee district faced; the decision to side with Fish and against the community confirmed an existing bias and undermined Mashpee's ability to use the courts for redress.

The charge of theft also offers an opportunity to expose an interesting tension between the laws of Massachusetts and the bylaws of Mashpee. During a district meeting in December of 1835, the selectmen proposed "to make bylaws respecting cattle, horses, sheep and swine going at large on Marshpee Commons."[47] The legal voters of Mashpee "voted that no cattle, horses, sheep or swine shall run at Large in the District of Marshpee after the 15th day of April 1836."[48] Further, the district "voted to establish two public pounds in the district of Marshpee at such places as the selectmen shall hereafter direct and cause to be erected" and "to take up all cattle

[46] John Hayward. *The New-England and New-York law-register* (Boston: Press of J. Hayward, 1835). Published annually, consulted editions published 1833-1838.
[47] Book of Records of District Meetings and Doings of Selectmen of Marshpee, 1834-1880. Microfilm, One Reel, Serial number 899479. Mashpee Town Archives, Mashpee Town Hall. Mashpee, Massachusetts.
[48] Book of Records of District Meetings and Doings of Selectmen of Marshpee, 1834-1880. "Legal voters" were the male proprietors of Mashpee district over the age of twenty-one.

running at large on Mashpee common land, pasture, and meadow from May the tenth until October twentieth D. 1836." Conversely, Massachusetts passed a similar statute concerning the impounding of wandering livestock in 1835.[49] Given the location in question, Santuit Field, it was likely that the cows were wandering at large, not confined to a pen. No evidence was presented by Fish to suggest the animals were removed from an enclosure. Exercising their right to enforce laws established at legal district meetings, Mingo and Pocknet deposited the cow in the pound. Hardly a theft, Mingo and Pocknet acted within their powers and duties as elected officials of Mashpee.

Looking further into the evidence suggests another possible motivation to impound the wandering cows. The issue of removing wood remained a primary concern for Mashpee district, specifically the removal of wood by Fish from land under dispute for profit. Applying for an injunction against Fish in 1839, Mingo testified before the court regarding the state of the wood on the parsonage lot and the condition of resources. Mingo stated that "in 1836 he examined the said lot and found cut and corded thereon for market one hundred and seventy nine cords of wood, besides a large amount that had been before cut and carried in that year."[50] Hardly a coincidence, Mingo examined the parsonage lot the same year Fish filed trespass charges against him and Pocknet. It stands within the realm of possibility that Mingo and Pocknet used the wrangling of the wandering milk cow as an opportunity to survey the amount of wood cut on the parsonage.

The decision by Sampson to rule in Fish's favor presented a quandary for Mashpee district; Sampson had legally reinforced Fish's unofficial claim to the parsonage lands.

[49] See *The Revised Statutes of the Commonwealth of Massachusetts* (Boston: Dutton and Wentworth, 1836), 195-199.
[50] Testimony of William Mingo. *Solomon Attaquin and Selectmen versus Phineas Fish*. Superior Judicial Court, No. 6451. March 1839. Barnstable County Superior Court House. Barnstable, Massachusetts.

Essentially, for the third time in a span of three years, the courts denied Mashpees' claim to the parsonage lot as part of the commonly held plantation. By finding Mingo and Pocknet guilty of trespass, Sampson affirmed Fish's claim to sole ownership over the parsonage property. Consistent with Warren's decision to dismiss the unnamed case in 1835, Sampson continued the precedent that usufruct rights had become de facto ownership. Whether by design or by accident, *Fish versus Mingo and Pocknet* essentially allowed the Massachusetts legal system to evaluate the validity of decisions made by Mashpee district. The defendants placed the cows in custody in accordance to the district's bylaws on the pounding of livestock. Sampson's decision in favor of Fish disregarded the existence of the standing bylaws and rendered them inconsequential under the state legal system. The matter of Fish aside, this ruling exposed yet another nuance. The Act of 1834 placed Mashpee in a unique and precarious position: the law-making ability of the district was subject to the discretion of Massachusetts and effectively created an *imperium in imperio*, a government within a government.

The indictment of Apess and others for trespass, the dismissal of the 1835 case, and the guilty verdict in the matter of *Fish versus Mingo and Pocknet* cemented the impossibility of obtaining an adequate remedy in law. Through a series of legal tests, Mashpee determined the next option and best course of action would be to pursue a favorable ruling through a suit in equity.[51] A suit in equity as opposed to a suit in law allowed for the district to obtain a decree from the court ordering Fish to cease in his actions, rather than asking the court to award damages for the latter. In March of 1839, Mashpee selectmen filed the case of *Attaquin versus Fish*, seeking an injunction to stop Phineas Fish from cutting the wood on the parsonage. Massachusetts Chief Justice Lemuel Shaw authorized an injunction against Fish "requiring him to forbear and refrain from cutting or carrying away any cord wood or timber from the tract of

[51] Bill in Equity. *Solomon Attaquin et al. versus Phineas Fish.*

four hundred acres described in law as the parsonage of Marshpee."[52] Mashpee found viable legal grounds on which the court would stop Fish from stripping the land of its resources, bringing them one step closer to protecting the natural resources at Mashpee and regaining the parsonage for a minister of their own choosing. When interpreted in concert as legal tests, the cases demonstrate the complex manner in which Mashpee wielded legal action as a tool to fortify the fledgling district. However, these three cases offer only a glimpse into the challenge the community at Mashpee faced in removing Phineas Fish, upholding the title to their lands, and protecting their resources. The fight against Fish, waged on multiple fronts, was not won in one place, but through concerted effort and deliberate action.

[52] Copy of Injunction authorized by Justice Lemuel Shaw. *Solomon Attaquin versus Phineas Fish.*

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