TOP TEN ERRORS BY THE MASSACHUSETTS SUPREME JUDICIAL COURT IN KITRAS V. AQUINNAH, 474 MASS. 132 (2016)

Error #1

"At the time of the 1878 partition, Gay Head was inhabited solely by members of the Wampanoag Tribe of Gay Head (Tribe)" Kitras at 133.

The Record Appendix before the SJC contained the Report of Richard L. Pease, which clearly showed that **Gay Head was not inhabited solely by members of the Tribe**. The SJC cited the Pease Report numerous times. See e.g. Kitras at 136-138 and 144.

"In 1860, the number [of Indians] at Gay Head was 54 families - 237 natives, 16 foreigners. Total 253. (Earle's Report.) In 1870, as will be seen by the census in the Appendix, the whole number is 227; families, 55; natives of Gay Head, 188; foreigners, or those not born there, 39." See page 27 of the Pease Report. In 1870, 83% of the residents at Gay Head were members of the Tribe and 17% were foreigners.

Error #2

"The court concluded that lots numbered 189 and above were created by the partition of the common land and, thus, had the requisite unity of title to establish an easement by necessity. Id. at 293-294. Lots 189 and below were deemed held in severalty by members of the Tribe, which foreclosed the possibility of an easement by necessity because there was no unity of title as to those lots." (footnote omitted) Kitras at 134.

The only issue before the Appeals Court in Kitras v. Aquinnah, 64 Mass. App. Ct. 285, 291(2005) [Kitras I] was whether the United States was a necessary and indispensable party to the action. Any other findings or comments were *obiter dictum*. See Plaintiffs' Motion for Reconsideration to the Land Court dated August 20, 2009

Error #3

"This case presents a unique set of facts in which we must examine a large-scale partition of Native American common land that occurred over one hundred years ago and ascertain the intent of the parties." Kitras at 135.

The common land was owned by the town of Gay Head, granted to it by the Commonwealth of Massachusetts under Chapter 213 of the Acts of 1870, Section 2. The land was held in fee simple absolute by the Town between 1870 and 1878. See motion by the Massachusetts Attorney General on July 9, 1981 to intervene in the Wampanoag Tribal Council U.S. District Court action ("In this case, one defense to this action is that chapter 213 of the Acts of 1870 validly conveyed the lands at issue to the Town of Gay Head. Massachusetts should be permitted to defend the validity of its laws.")

See also testimony of Rep. Gerry Studds before the U.S. House of Representatives ("…the public land [was] transferred to the town in 1870 by the Commonwealth of Massachusetts.") U.S. House of Representatives debate on H.R. 2868, Gay Head Wampanoag Indian Claims Settlement Act of 1985, Congressional Record at 29326, October 7, 1985

All questions of title to Native American land were resolved by Charles Marston and Richard L. Pease under the authority of Chapter 42 of the Acts of 1863 and Chapter 67 of the Acts of 1866 - which specifically defined the boundaries between the lands held by individuals and the common land. See final report from Richard L. Pease entitled "Report of the Commissioner appointed to **complete the examination and determination of all questions of title to land, and of all boundary lines between the individual owners**, at Gay Head, on the island of Martha's Vineyard; under a Resolve of the Legislature of 1866, Chapter 67." (emphasis added)

Error #4 ***[addressing access across common land due to fictional aboriginal rights.]***

"In the plaintiffs' reply brief, they argue for the first time that there was no evidence of such tribal custom. We decline to address this argument. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). See Canton v. Commissioner of the Mass. Highway Dep't, 455 Mass. 783, 795 n.18 (2010)." Footnote 11, Kitras at 136.

Plaintiffs continuously rebutted this allegation. See Plaintiffs' Reply Brief to Land Court dated May 7, 2010, pages 6-8. Up until the Land Court's 2010 decision, the Court had always dismissed tribal custom as insufficient evidence to overcome the presumption of an easement by necessity. See e.g. http://www.decoulos.com/land_court/MLC_Decision_060401.pdf (footnote 22 at page 14) http://www.decoulos.com/land_court/53-Taylor_v_Vand_129925.pdf and http://www.decoulos.com/land_court/50-Black_v_Cape_Cod.pdf

Error #5

"However, this case was not decided on documentary evidence alone. It was presumed and undisputed that there was a tribal custom that allowed the Tribe members to pass freely over each other's land as necessary. This presumed fact is the law of the case and with respect to this one issue. We will continue to treat it as fact. We review the judge's conclusions of law de novo." Kitras at 138-139.

This case could only have been decided on documentary evidence - everyone with knowledge of the circumstances at the time of conveyance has passed away. The SJC prefaces all of its alleged evidence rebutting access with either "we infer" or "it is likely". Plaintiffs continuously challenged the allegation that any aboriginal rights existed on the common land after 1870. The common land was not claimed by anyone and was owned by the Town between 1870 and 1878. The presumption by the SJC is inconsistent with the 2001 Land Court's findings of fact and contrary to the intent of the United States Congress. See Public Law 100-95 (formerly 25 U.S.C. §1771(b)).

Error #6

"It is a purchaser's "own folly" that he purchased land that had no access to some or all of the land "and he should not burden another with a way over his land, for his convenience." Orpin, supra at 533-534. Gayetty v. Bethune, 14 Mass. 49, 56 (1817)." Kitras at 139.

Unlike the unique facts in Orpin v. Morrison, 230 Mass. 529, 533 (1918), which included testimony at the closing that the land was being sold without access, many of the land owners harmed by the SJC decision are direct heirs of the Wampanoag Tribe who were granted the lots in fee simple absolute from the partition of the common land in 1878. Was it their "own folly" to be Native American? See http://www.decoulos.com/land_court/Harding_Reply_Brief_050710.pdf

Other Plaintiffs purchased their land at full assessed value with the understanding that the Land Court's policies and decisions provided for easements by necessity. See http://www.decoulos.com/kitras2/Rebutting_ways_necessity_1920.pdf and http://www.decoulos.com/land_court/52-Norton_Aff_129925.pdf Plaintiffs' lands have been continuously assessed as accessible, were shown by the MA Executive Office of Environmental Affairs and the Martha's Vineyard Commission in 2002 as being "developable" http://www.decoulos.com/land_court/61-AQ_Buildout_EOEA_Zoom.pdf and they have been forced to pay taxes based on values that clearly rely upon access.

Error #7

"Admittedly, this case does not present circumstances that typically support the presumption of an easement by necessity. The typical situation involves one grantor and one grantee, and it is their intent that is dispositive." Kitras at 141.

The case is a clear, textbook example of how easements by necessity arise. There was one common grantor - the town of Gay Head - who owned the common lands in fee simple absolute between 1870 and 1878 and who, through the Probate Court, severed the land and created landlocked parcels. St. 1870, c. 213, s. 2. See amicus brief of Michael Pill

"Servitudes by necessity arise only on severance of rights held in a unity of ownership. This severance can take place when a grantor, who owns several parcels, conveys one or more to others. It can also take place when a grantor divides a single parcel into two or more parcels, and it can take place when a grantor conveys less than full ownership in a single parcel. Implied servitudes can arise when the grantor simultaneously conveys all the grantor's interests to two or more grantees, as well as when the grantor retains some interest. Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors." Restatement (Third) of Property (Servitudes) § 2.15 (2000)

Error #8

"There was evidence that tribal custom provided access rights to members of the Tribe, other easements were created, and the land was in poor condition at the time of partition." Kitras at 142.

There was **no evidence in the record** to support this statement.

There were 39 residents of the Town who were not members of the Tribe, who were also grantees of lots created from the common land. *See* 1871 Report of Commissioner Richard L. Pease, which included a census of Town residents, demonstrating which residents were members of the Tribe. What tribal rights of access did the non-Wampanoag property owners have?

There were no other access easements created. The "easements" identified by the SJC were *profits à prendre* to remove peat for fueling the resident's homes, which had the same need for easements by necessity as every other lot that was set-off in 1878. Many of the *profits à prendre* were held by citizens who were not members of the Tribe. There is no language anywhere in the deeds that describes how the peat could be accessed or removed over other lots. See Reply Brief of Wampanoag tribal members Mark Harding, Sheila H. Besse and Charles D. Harding, Jr. dated May 7, 2010.

Commissioners Joseph T. Pease and Richard L. Pease never described the land as being in "poor condition". "It is the commissioners' [appointed by the Probate Court] intent that we view as dispositive." Footnote 16, Kitras at 142.

New paleoecological research conducted by David R. Foster at Harvard Forest proves that the island of Martha's Vineyard was almost entirely clear cut for wood by early settlors and was in a state of recovery in the middle of the nineteenth century.

Martha's Vineyard was "once a well-wooded, island, with many ponds and brook."[1] John Brereton, a passenger on the ship of the English explorer Bartholomew Gosnold in 1602, reported that the Vineyard landscape consisted of "a high canopy forest" with "an impressive assemblage of oaks, hickories, white cedar, wild black cherry, beech and other trees".[2]

In a book published by the Vineyard Conservation Society, Inc. and Peter W. Dunwiddie [3], it was reported that:

> The destruction of forests on the Vineyard was part of a process that was occurring throughout the eastern United States following European settlement. The land was a commodity; components of the biological communities were things to be taken if useful, eliminated if they were not. Timber was harvested, wild game hunted, minerals extracted.

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[1] Ritchie, William A., "The Archaeology of Martha's Vineyard", page 1, The Natural History Press, Garden City, NY, 1969.

[2] Brereton, John, "A Briefe and True Relation of the Discoverie of the North Part of Virginia", Dodd, Mead & Co., NY, 1903.

[3] Dunwiddie, Peter W., "Martha's Vineyard Landscapes: The Nature of Change", page 24, The Vineyard Conservation Society and Peter W. Dunwiddie, 1994.

Error #9

Additionally, the Chappaquiddick Tribe, located on a small island on the eastern coast of Martha's Vineyard, had their common lands divided. The commissioners who partitioned Chappaquiddick's common land included in their deeds express rights of access to roads. It is likely that the commissioners of the Gay Head partition were well aware of the division of the common land at Chappaquiddick because Richard Pease, in his report written in 1871, frequently quoted and cited prior commissioners' reports that described the Chappaquiddick Tribe (as well as other tribes residing in Massachusetts).[20] See Pease Report, supra at 22. See also Report of the Commissioners, 1849 House doc. No. 46, at 8, 11; Report of the Commissioner, 1862 House Doc. No. 215, at 16. The fact that an earlier partition of common land on Martha's Vineyard provided rights of access to Tribe members, known to the Gay Head commissioners, supports a finding that the absence of access easements in the conveyance flowing from the Gay Head partitions was intentional, thereby rebutting the presumption of easements by necessity. Kitras at 144.

> [20] **One of the commissioners who divided the common land at Chappaquiddick was Jeremiah Pease. The relation, if any, between Jeremiah and the brothers Richard and Joseph Pease is unknown.**

There was no evidence to support conclusions that the Chappaquiddick division of Indian land provided for express access rights. In 2010, the Land Court reviewed the evidence and failed to address the matter.

The Report of the Commissioners, 1849 House doc. No. 46, at 8 and 11, describes the division of 187 acres in Chappaquiddick among 17 families – with no discussion on how access was obtained to the divided lots. See http://www.decoulos.com/land_court/68-74_VCS_Evidence.pdf The only discussion of the Chappaquiddick Tribe in the Report of the Commissioner, 1862 House Doc. No. 215, at 16 is a breakdown of their population by gender and age. http://www.decoulos.com/land_court/4-Earle_Report.pdf

Chappaquiddick was divided several times in the 19th century. None of the divisions were documented in the Record Appendix of Kitras. New evidence found at the Dukes County Probate Court (and not a part of the public record) shows that a division of Chappaquiddick occurred at the same time – **by the same Commissioners and Civil Engineer who divided Gay Head**. Many of the lots were left without access. See Map of Indian Lands at Chabbaquiddick, Martha's Vineyard, made under the direction of Joseph T. Pease and Richard L. Pease, Commissioners, appointed by the Judge of the Probate under Chapter 463 of the Acts of 1869, by John H. Mullin, Civil Engineer.

Error #10

One report described Gay Head as a "Sahara-like desolation" and implored the Legislature to provide a remedy to the poor condition of the Gay Head land, predicting that "unless some remedy is found, the whole will eventually become one cheerless desert waste."[21] Report of the Commissioners, 1856 House Doc. No. 48, at 9. The special joint committee of Massachusetts senators and representatives who visited Gay Head in 1869, and whose assessment of the land the trial judge credited, thought it better for the common land to be held in common for the whole Tribe "as pasturage and berry lands," than for the land to be divided into lots that ultimately would "lie untilled and comparatively unused." Report of the Committee, 1870 Senate Doc. No. 14, at 5. The land also was described as "uneven, rough and not remarkably fertile." Id. Kitras at 145.

> **[21] The commissioners explained that the "sands of the beach, no longer covered, as formerly, with an abundant growth of beach-grass, become the sport of the breeze, and are every year extending inland, covering acre after acre of meadow and tillage land; many acres of which have, within the memory of our informants, been thus swallowed up, and now lie wholly waste and useless." Report of the Commissioners, 1856 House Doc. No. 48, at 9.**

These comments were not made by the Commissioners appointed by the Probate Court who partitioned the common land and should not be dispositive. See SJC's own reasoning on the importance of those Commissioners at footnote 16 on page 18. They were made by commissioners in 1856 who visited Gay Head for the first time and knew nothing about the history of the Vineyard or its people. The "prediction" of these commissioners clearly did not come true, since the Town and the Vineyard Conservation Society fought hard to protect "rare, endangered coastal heathlands" that surround Plaintiffs' lands and Aquinnah has become a vacation destination for wealthy out-of-state, second homeowners due to its natural beauty. http://www.decoulos.com/land_court/Oneill-Decoulos_121296.pdf

Other commissioners appointed by the Legislature made the following comments in 1869 (13 years later and nine years before the 1878 partition created the landlocked condition): "In addition to what is held in severalty, there is the large tract of some nineteen hundred acres held in common. This land is uneven, rough, and not remarkably fertile. A good deal of it, however, is, or might be made, reasonably productive with a slight expenditure, and, doubtless, would be if the owners had the means; but, deficient as they are in the "worldly gear," it is, perhaps, better that these lands should continue to lie in common for the benefit of the whole community as pasturage and berry lands, than to be divided up into small lots to lie untilled and comparatively unused. This, however, is a question of "property", which every "citizen" should have the privilege of determining for himself, and the people of Gay Head have certainly the right to claim, as among the first proofs of their recognition to full citizenship, the disposition of their landed property, in accordance with their own wishes." *Report of the Committee of the Legislature of 1869, on the Condition of the Gay Head Indians*, January, 1870; Page 5. Exhibits, Vol I, page 71. See also Harding Land Court reply brief, pages 5-8.

The 1871 report of Richard L. Pease, who lived on the Vineyard and was one of the two Commissioners appointed by the Probate Court, provided a clear description of the Gay Head land.

> Its peculiar geological characteristics have long attracted the attention of scientific men. Hitchcock speaks of it in enthusiastic terms, as "**a most picturesque object of scenery**," and says, "**there is not a more interesting spot in the State to a geologist**." Sir Charles Lyell, the famous English geologist, is highly laudatory of it. There is also **enough of interest about it to attract the curious and the lovers of rare natural scenery, who are neither scientific nor learned**.
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> "The territory embraces about every variety of soil, a portion of the land is of the very best quality, and capable, under good culture, of producing most abundant harvests." The surface is very irregular, abounding in hills and valleys, ponds and swamps, fine pasture-land and barren beach, with occasional patches of trees and tilled land.
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> Increasing attention is paid to agriculture, but there is room for great improvement. As an abundance of that most excellent dressing, rockweed, can be procured, additional labor, energy and skill would bring a sure reward. **A very large portion of the lands now inclosed, was, a generation since, wild, rough land, unfenced, and seldom tilled, and of course unproductive and of little value.** As it has been cleared up, fenced and tilled, **its value has largely increased.**
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> . . . The chief interest of Gay Head is not in its agricultural capabilities, which have never yet been developed, but in the rare scenery, the rich and varied colors of its lofty cliffs present to the admiring gaze of the traveler and the passing voyager, in its singularly mixed clays and sands, and in the numerous specimens of fossils and petrifications found in its banks." (**emphasis added**).

Martha's Vineyard was "once a well-wooded, island, with many ponds and brook."[4] John Brereton, a passenger on the ship of the English explorer Bartholomew Gosnold in 1602, reported that the Vineyard landscape consisted of "a high canopy forest" with "an impressive assemblage of oaks, hickories, white cedar, wild black cherry, beech and other trees".[5]

It was European settlement and pillage that ravaged the Gay Head landscape prior to the 19th century, and the newly released map by Henry L. Whiting shows that the landscape was on a path to full ecological recovery.

> "This beautiful island off the coast of Massachusetts – longtime home to the Wampanoag Gay Head Indians – is also one of the most popular vacation spots on the east coast." Senator Edward M. Kennedy on the floor of the U.S. Senate in support of H.R. 2855 (which led to 25 U.S.C. §1771) on August 6, 1987, Congressional Record – Senate 22895.

Isn't it there a slight bit of hypocrisy for the SJC to rely on the poor condition of the land when Aquinnah is well known as one of the Commonwealth's premier showpieces of natural beauty?

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[4] Ritchie, William A., "The Archaeology of Martha's Vineyard", page 1, The Natural History Press, Garden City, NY, 1969.

[5] Brereton, John, "A Briefe and True Relation of the Discoverie of the North Part of Virginia", Dodd, Mead & Co., NY, 1903.