Ulster County Clerk's Index No. 0525/04

Court of Appeals
of the
State of New York

MOHONK PRESERVE, INC.,

Plaintiff-Respondent,

– against –

KAREN PARDINI and MICHAEL FINK,

Defendants-Appellants.

MOTION FOR LEAVE TO APPEAL

SHARON A. GRAFF, ESQ.
GRAFF LAW, LLC
78 Main Street, P.O. Box 4148
Kingston, New York 12402
Tel.: (845) 338-4993 Ext. 4
Fax: (845) 338-9358

ZUCKERMAN SPAEDER LLP
399 Park Avenue, 14th Floor
New York, New York 10022
Tel.: (212) 704-9600
Fax: (212) 704-4256

Attorneys for Defendants-Appellants

COURT OF APPEALS
STATE OF NEW YORK

----------X

MOHONK PRESERVE, INC.,

Plaintiff-Respondent,

-against-

KAREN PARDINI and MICHAEL FINK,

Defendants-Appellants.

----------X

Ulster County
Index No. 04-0525

NOTICE OF MOTION
FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the accompanying Statement in Support of Leave Application and the briefs and record filed in the Appellate Division, Third Department, Defendants-Appellants Karen Pardini and Michael Fink will move this Court, at the Court of Appeals Hall, located at 20 Eagle Street, Albany, New York, on September 14, 2015, for an order granting leave to appeal to this Court from an order of the Appellate Division, Third Department, reversing the judgment of the Supreme Court and declaring Plaintiff-Respondent Mohonk Preserve, Inc., the owner of certain disputed real property in Ulster County.

Dated: New York, New York
August 25, 2015

ZUCKERMAN SPAEDER LLP

Paul Shechtman
399 Park Avenue, 14th Floor
New York, NY 10022
(212) 704-9600

Sharon Graff
Graff Law
78 Main Street
Kingston, NY 12402

Attorneys for Defendants-Appellants
Karen Pardini and Michael Fink

TO: R. Anthony Rupp, III
Rupp, Baase, Pfalzgraf & Cunningham LLC
1600 Liberty Building
24 Main Street
Buffalo, NY 14202

Attorneys for Plaintiff-Respondent
Mohonk Preserve, Inc.

Index No. 04-0525

COURT OF APPEALS
STATE OF NEW YORK

MOHONK PRESERVE, INC.,

Plaintiff-Respondent,

-against-

KAREN PARDINI and MICHAEL FINK,

Defendants-Appellants.

STATEMENT IN SUPPORT OF LEAVE APPLICATION

Paul Shechtman
ZUCKERMAN SPAEDER LLP
399 Park Avenue, 14th Floor
New York, NY 10022
(212) 704-9600

Sharon Graff
Graff Law
78 Main Street
Kingston, NY 12402

Attorneys for Defendants-Appellants
Karen Pardini and Michael Fink

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES & RULES

Defendants-Appellants Karen Pardini and Michael Fink seek leave to appeal from an order of the Appellate Division entered on July 9, 2015, reversing the judgment of the Supreme Court and declaring Plaintiff-Respondent Mohonk Preserve, Inc., the owner of 73 acres of undeveloped land in Town of Rochester, Ulster County. (Ex. A). Notice of entry was served by regular mail on July 23, 2015, and therefore this motion is timely. (Ex. B). Because the Appellate Division's order is final, this Court has jurisdiction to hear this appeal. See CPLR §§5602(a)(1), 5611.

QUESTION PRESENTED

Whether the boundaries of disputed land can properly be determined without giving any consideration to the adjoining parcels that have defined the disputed land since 1874.

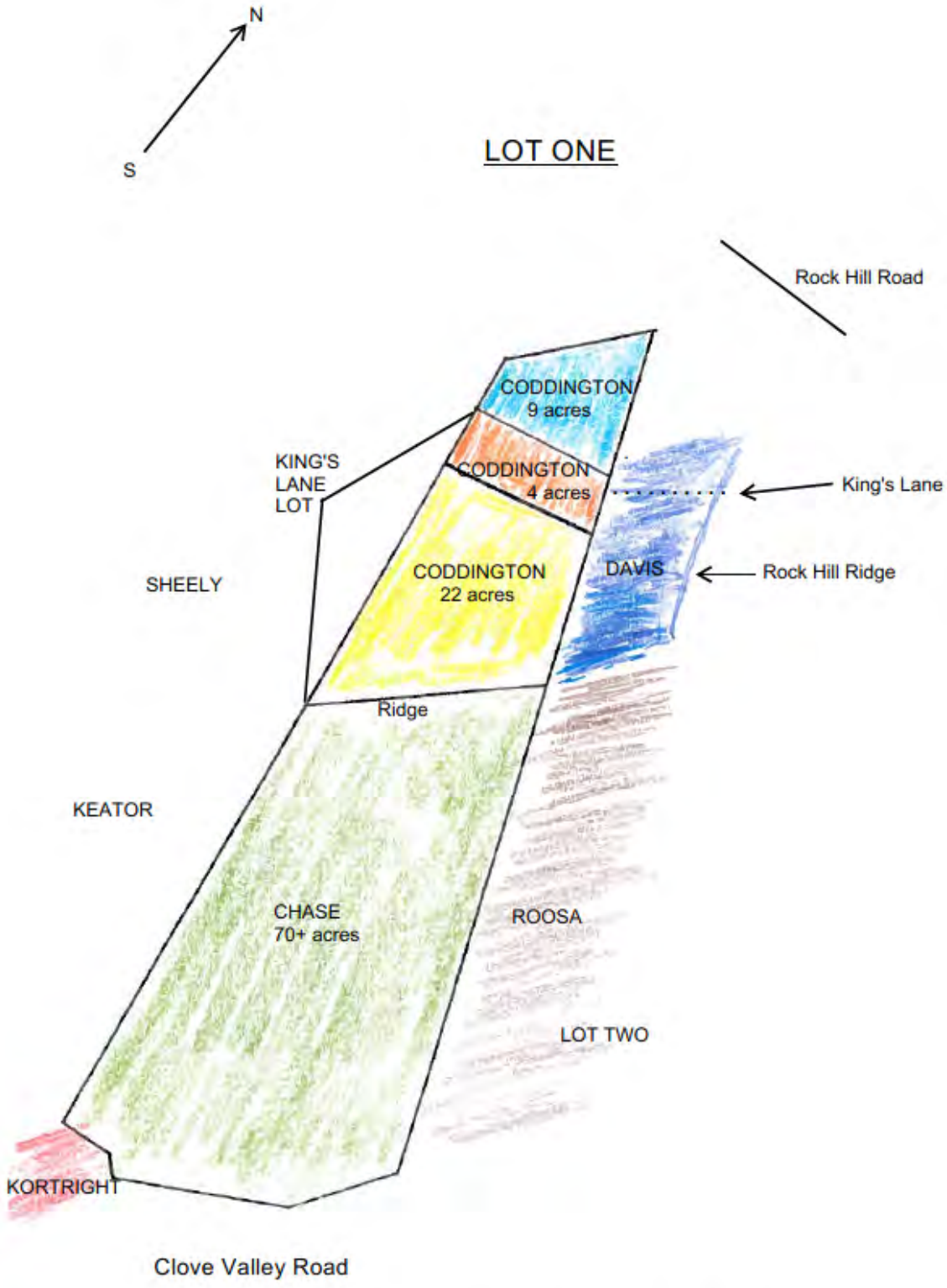
INTRODUCTION

This is a quiet title action involving 73 acres of undeveloped land in Ulster County, shown in green on the adjacent map.[1] After an exhaustive review, Supreme Court concluded that the land belongs to defendants-appellants Karen Pardini and Michael Fink. It rejected the claim of Mohonk Preserve, Inc. ("Mohonk") that the disputed land was part of the "King's Lane Lot," to which

[1] Supreme Court described the property as a 71 +/- acre parcel, and the Appellate Division described it as a 73 acre parcel. The most recent survey puts it at 73.7 acres.

Mohonk's grantor, Gloria Finger, had title. In finding that Ms. Finger did not own the disputed land and therefore could not grant it to Mohonk, Supreme Court looked to the adjacent properties that have defined the King's Lane Lot since 1874: "Northerly by Martin Coddington, Easterly by John I. Davis, Southerly by Henry O. Harp & Wm. Chase and Westerly by John D. Sheely and Jacob M. Keator." That is to say, Supreme Court did what New York law directs a court to do.

The Third Department reversed and awarded the disputed property to Mohonk. Its opinion does not mention the adjoiner descriptions. Indeed, its decision runs counter to more than 180 years of New York property law, dating from this Court's decision in Wendell v. Jackson, 8 Wend. 183 (N.Y. 1831). There, this Court wrote: "any . . . locative call of the premises, such as . . . the land of another person which is certain and notorious, must be adhered to in the location of the grant, although it does not correspond with the course, distance or quantity, which must all give way to such known boundaries." Id. at 190. Because the Third Department did not follow that established rule (or even discuss it), this Court should grant leave and reverse.



Note: the map is based on an exhibit in the record. See Def. Ex. S.

BACKGROUND

A. Supreme Court's Decision

After hearing testimony from 30 witnesses, reviewing more than 100 exhibits and walking the property, Supreme Court concluded that appellants Karen Pardini and Michael Fink own a disputed 73-acre plot of undeveloped land in Ulster County. The court found that Pardini and Fink "acquired a valid interest in the lands in dispute by virtue of the 1855 warranty deed from Catharine Stillwell to Henry Harp, which interest was never conveyed out of [their] chain of title and thus remained in [it]." Op. at 77.[2] In its opinion, Supreme Court focused on the boundaries of the King's Lane Lot, for if the disputed land is not part of the King's Lane Lot, then Mohonk has no valid claim to it.

In concluding that the disputed property is not part of the King's Lane Lot, Supreme Court found these facts:

1. Lot One of the Nineteen Partners Tract

In 1799, the Commissioners of the Town of Rochester in Ulster County created a 19 lot tract known as the Nineteen Partners Tract. Lot 1 consisted of approximately 101 acres between what is now Rock Hill Road on the

---

[2] Supreme Court's Findings of Fact are in numbered paragraphs, which are referred to as "Op. ¶." Its Conclusions of Law are not numbered and therefore are referred to by page (e.g., Op. at 77). Supreme Court's full opinion is attached to the Notice of Motion as Ex. C. "A" refers to the five-volume appendix submitted in the Third Department.

north and Clove Valley Road on the south. Its boundaries are shown on the map by the black line. That same year, the Commissioners granted Lot 1 to John Depuy. On his death in 1818, John Depuy left the northernmost 9 acres of Lot 1 to his daughter Sarah Decker and the remaining 92 acres to the six children of his son Moses Depuy. Op. ¶¶ 1-8. The 9-acre tract is shown in blue on the map.

2. The King's Lane Lot

In 1874, David Osterhoudt conveyed two parcels of land to Martin Coddington. (A 1554-55). The two parcels were: (i) a four-acre parcel on which Osterhoudt had lived and (ii) a second parcel for which no acreage was stated in the deed.[3] The four-acre parcel is shown on the map in orange, and the second parcel in yellow. The deed described the second parcel as "bounded by John I. Davis[,] William Chase[,] Henry O. Harp[,] Jacob M. Keator and John D. Sheely." (A 1555). Because neither of the two parcels fronted on a public road, Osterhoudt also deeded his claim to "a right-of-way leading through the Lands of John Davis . . . to the public road." (Id.); see also Op. ¶¶ 24-25, 54, 58.

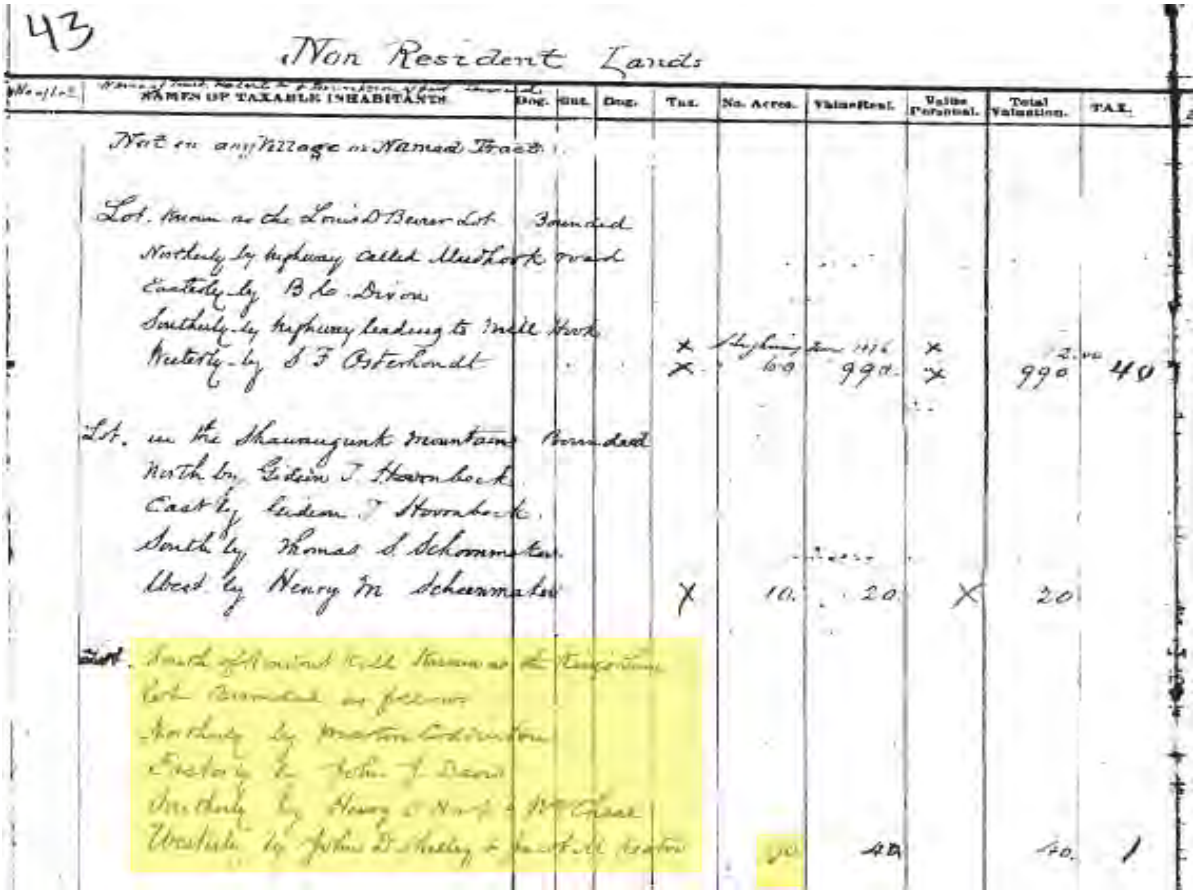
Martin Coddington did not record the deed to the property until 1879. As a result, when the property first appeared on the tax assessment roll in 1876, the

---

[3] Osterhoudt's source of title to the two parcels is lost to history. Piecing together various documents, Supreme Court found that sometime between 1841 and 1851, Osterhoudt had obtained the property in a chain of title that stretched back to Moses Depuy's children. Op. ¶¶ 37-50.

owner was indicated as unknown. (A 1557). The 1876 roll describes the property in virtually the same terms as the 1874 deed but with more detail -- a property "Known as the King's Lane Lot Bounded as follows: Northerly by Martin Coddington, Easterly by John I. Davis, Southerly by Henry O. Harp & Wm. Chase and Westerly by John D. Sheely and Jacob M. Keator." Id.[4] That same adjoiner description appears in the tax assessment rolls for 1877, 1878, and 1879, except that in 1879 Keator is shown as "deceased." (A 1561, 1563, 1565). In 1879, the

[4] The description of the King's Lane Lot appears at the bottom of this page from the 1876 tax assessment roll; it is highlighted in yellow:


43

Non Resident Lands

No. of Lot	NAMES OF TAXABLE INHABITANTS	Dog.	Hse.	Dog.	Tax.	No. Acres.	Value Real.	Value Personal.	Total Valuation.	TAX.
	Not on any Village or Named Tract.									
	Lot known as the Louis D Bevier Lot Bounded Northerly by highway called Musthook road Easterly by B to Dixon Southerly by highway leading to Mill Hook Westerly by J F Osterhoudt				X X	Highway 69	1116 990	X X	2 yrs 990	40
	Lot in the Shawangunk mountains Bounded North by Gideon T Hornbeck East by Gideon T Hornbeck South by Thomas J Schoonmaker West by Henry M Schoonmaker				X	10.	20	X	20	
	South of Road to Mill Known as the King Lane Lot Bounded as follows Northerly by Martin Coddington Easterly by John I Davis Southerly by Henry O Harp & Wm Chase Westerly by John D Sheely & Jacob M Keator					90	40		40	1

(A 1557).

property was included in the County's tax foreclosure sale. On the date of the sale, Martin Coddington paid the back taxes and costs ($10.65) and received a tax sale certificate for property that he had, in fact, owned since 1874. (A 1568). Despite the events of 1879, the property appeared as owner unknown in the 1880 tax assessment roll, but that designation was crossed out with these words: "error taxed . . . to Martin Coddington." (A 2224). In 1881, Coddington recorded a tax deed for the property showing the same adjoiners that had described it in the previous years. (A 1566-67); Op. ¶¶ 28-36.[5]

3. King's Lane

The King's Lane Lot took its name from King's Lane, which was a right-of-way for the property to Rock Hill Road. Remnants of the lane remain visible today, and according to neighbors, a wooden "King's Lane" sign marked the road into the 1970s. Op. ¶¶ 51-62. The lane is shown with a dotted line on the map.

---

[5] In the nineteenth century, any property sold at a tax sale "was subject to a mandatory two year redemption period following the tax sale [during which] the owner could redeem the property." Op. at 76. The two year redemption period explains the gap between the 1879 tax sale and the 1881 tax deed.

4. The Northerly Adjoiner of the King's Lane Lot: Martin Coddington

The northerly adjoiner of the King's Lane Lot is identified in the 1876 tax assessment roll and in subsequent years as Martin Coddington. The parties agree that in 1872, Coddington purchased 58 acres immediately north of Osterhoudt's property and that the 58 acres included most of the 9 acres that John Depuy had left to Sarah Decker. (A 1953). Thus, when Coddington purchased the King's Lane Lot from Osterhoudt in 1874, he was buying an adjoining lot.

5. The Easterly Adjoiner of King's Lane Lot: John I. Davis

As noted above, the 1874 deed from Osterhoudt to Coddington, the 1876 to 1879 tax assessment rolls, and the 1881 tax deed identify the easterly adjoiner of the King's Lane Lot as John I. Davis. The 1874 deed also states that the land acquired by Coddington from Osterhoudt was served by a right-of-way through the property of John I. Davis to the public road. (A 1555). The right-of-way was King's Lane, and it helps fix the location of Davis' property. The location of Davis' property is also fixed by the 1851 deed pursuant to which he obtained the property; it indicates that the property is "bounded on the Southwest by a lot of land called . . . Kings Land [sic] and on the South East by . . . Jacob S. Roosa." (A 1950-51). Davis' property is shown on the map in purple; it is bounded on the east and south by the Rock Hill Ridge, a prominent ridge that is the

highest elevation point through the lots, which is also shown on the map. See Op. ¶¶ 63-79.

6. The Southerly Adjoiner of the King's Lane Lot: Henry O. Harp/William Chase

In 1855, Catharine Stillwell conveyed two parcels of land to Henry O. Harp. The second of the parcels was described as part of the "one sixth part of Lot No. one in the tract commonly called the nineteen partner tract which . . . John Depuy . . . did . . . devise . . . to Cornelius Alliger." (A 1801-02).[6] Cornelius Alliger was the husband of Jane Depuy, one of the six grandchildren to whom John Depuy had bequeathed Lot 1. Op. ¶ 82. From Harp, the property was transferred to Hasbrouck, Roosa, and Lawrence. (A 1803-1807). In 1873, Lawrence conveyed the property to William Chase. (A 1808). Chase's property is shown on the map in green; it is the southerly adjoiner of the King's Lane Lot and the disputed property in this case. See Op. ¶¶ 80-92.[7]

---

[6] The first of the two parcels was a 50-acre lot located approximately 1,000 feet to the east of the disputed property.

[7] Pardini and Fink's surveyor, Robert Cross, gave this testimony about Chase's being the southerly adjoiner:

> Q: Do you place any significance on the fact that the [Osterhoudt to Coddington] deed recites that Osterhoudt is residing on the land?
>
> A: . . . when [Osterhoudt] describes lands to the south being William Chase, who better would know than

7. The Westerly Adjoiner of the King's Lane Lot: Keator and Sheely

The 1874 Osterhoudt-to-Coddington deed and the tax assessment rolls identify John D. Sheely and Jacob M. Keator as the westerly adjoiners. The location of their properties is not in dispute. See Op. ¶¶ 97-99. Keator's property "cornered on" the King's Lane Lot. (A 871).

8. The Southern Property Line of the King's Lane Lot

Supreme Court found these facts about the southern property line of the King's Lane Lot, which divided it from the 73-acre parcel to its south: (i) the King's Lane Lot was once part of the 200 acre Curran Farm, and the lot came into possession of David Osterhoudt sometime between 1841 and 1851 (who sold it to Martin Coddington in 1874), Op. ¶¶ 37-38, 50; (ii) when the King's Lane Lot was separated from the Curran Farm, the southern boundary of the old farm became the southern boundary of the King's Lane Lot, Op. ¶ 134; (iii) the 1841 deed conveying the farm to John Curran described the farm's boundary as along "the edge of the high Rocks . . . southwesterly as it runs to a pine tree, standing . . . on the said bounds of Joseph Depuy" (A 2172); (iv) in 1841, Joseph Depuy owned property immediately to the southwest of Lot 1, Op. ¶ 142; and (v) although the

---

> [a] neighbor. He certainly knew that William Chase owned to the south of him.

(A 873).

high rocks of the Rock Hill Ridge do not extend into Lot 1 (they turn sharply southeast), the ridge continues to run southwesterly across Lot 1 to a point that is approximately the same elevation (880 feet) as the high rocks in Lot 2, Op. ¶¶ 139, 141; see also id. 65 ("[a]lthough the edge of the rocks peter out on Lot 2, the Rock Hill Ridge continues through Lot 2 and Lot 1 and bisects Lot 1"). Based on these findings, Supreme Court concluded that "the Curran Farm divided Lot 1 into a Northern 30 +/- acre portion and the Southern 71 +/- acres in dispute." Op. ¶ 126.

9. Mohonk's Expert and the Negative Inference

At trial, Mohonk's expert, Richard Brooks, opined that "the deed call [for the Curran Farm] to go Southwesterly to the bounds of Joseph Depuy . . . should be read to describe a boundary that [ran to the East bounds of Lot 1 and then] turn[ed] North . . . and then [made] a second . . . turn Southwest across Lot 1, where there are no rocks, to the bounds of Joseph Depuy." Op. ¶ 151. Supreme Court rejected this testimony because it "disregard[ed] the . . . directional call . . . and insert[ed] two additional directional calls not contained within the [Curran] deed." Op. ¶ 152; see also id. at 66 (Mohonk's "argument is convoluted and illogical").[8]

---

[8] As Supreme Court noted, Brooks had advanced a different theory in an affidavit in opposition to Pardini and Fink's motion for summary judgment. There, Brooks opined that the southern boundary of the old Curran farm "followed along the rock ledge that broke Southeast in Lot 2 around the bounds of [Lot One]." Op. ¶ 164; see also id. ("Brooks abandoned this claim at trial").

Moreover, Supreme Court took judicial notice that another surveyor, Norman Van Valkenburgh, "was present in court each day . . . and actively aid[ed] [Mohonk's] counsel throughout the trial," Op. at 83; that Van Valkenburgh was not called as a trial witness for Mohonk; and that Van Valkenburgh had previously testified in a related action that the 1841 "Curran deed followed along the high rocks that form Rock Hill Ridge through Lot[] . . . 1 exactly where [Pardini and Fink's experts] place it," Op. ¶ 161. On this basis, the Court drew a "negative inference . . . from [Mohonk's] failure to call Norman Van Valkenburgh as a witness." Op. at 84-85.

10. The Size of the King's Lane Lot

As previously noted, the King's Lane Lot was described in the Osterhoudt-to-Coddington deed as a four acre parcel plus a second parcel of unspecified acreage. In the 1876 tax assessment roll, the combined acreage for the two lots is shown as 26 acres (the 4 acre house parcel plus the 22 acre undeveloped parcel). (A 1557). In the 1877 tax assessment roll, however, the property is shown as 96 acres. (A 1561). Supreme Court found that the 96 was a scrivener's error; a clerk mistook the "2" for a "9" and wrote 96 instead of 26. See Op. ¶¶ 110-115 ("[t]here are several other "2's" on the three pages of the [1876] assessment rolls . . . many of which closely resemble the "2" contained in the statement of acreage

for the King's Lane Lot").[9] In the 1879 tax assessment roll, 96 acres was changed to 92 acres without explanation. (A 1565).

11. The Easterly and Westerly Adjoiners of the Disputed Land

In addition to looking to the adjoiners of the King's Lane Lot, Supreme Court also looked to the adjoiners of the disputed property. It found this: First, in litigation that ended in 2003, it was determined that the portion of Lot 2 on the Southeast side of the Rock Hill Ridge belonged to Jacob Roosa in the 1870's. See Shawangunk Conservancy, Inc. v. Pardini, 305 A.D.2d 902, 903 (3d Dept. 2003). As indicated on the map, Lot 2 is to the east of Lot 1, and Roosa's property is shown in brown. See Op. ¶ 95 ("[t]his Court finds that the lands in dispute . . . were bounded on the East by Roosa throughout the 1870's and 1880's and this fact . . . has already [been established by] this Court and the Appellate Division").[10] That means that Roosa was the easterly adjoiner of the disputed property in the 1870s. Second, the lands of Sheely and Keator did "not run the entire Westerly length of Lot 1 and that one of the adjoiners for the [73] acres in dispute . . . was Kortright, whose lands bounded the Southerly and Westerly portion of Lot 1."

---

[9] Footnote 4, supra, shows the relevant page from the 1876 tax assessment roll. Supreme Court found that the acreage number, highlighted in yellow, was 26.

[10] The location of Roosa's property is confirmed by the 1851 deed pursuant to which Davis obtained his property. As noted above, it states that Davis' property is "bounded . . . on the South East by the said Jacob S. Roosa." (A 1951).

Op. ¶ 100. Kortright's land is shown in red on the map; he was a westerly adjoiner of the disputed property.

12. Appellants Pardini and Fink's Ownership of the Disputed Property

As noted above, in 1855 the southernmost parcel in Lot One was conveyed to Henry O. Harp, and in 1873 to William Chase, who was identified as the southerly adjoiner to the King's Lane Lot the next year. From there, title to the southernmost parcel passed in an unbroken line to Pardini and Fink in 1987. (A 1817-1922). On this basis, Supreme Court concluded that Pardini and Fink "acquired a valid interest in the lands in dispute by virtue of the 1855 warranty deed from Catharine Stillwell to Henry Harp, which interest was never conveyed out of [their] chain of title and thus remain[s] in [it]." Op. at 77.[11]

13. Mohonk Preserve's Invalid Claim

Mohonk based its claim on the 1881 tax deed that resulted from the 1879 tax sale to Martin Coddington. As noted, the deed purported to transfer a

---

[11] As discussed, the 1855 Stillwell to Harp deed described the now disputed property as being "part of Lot No. One." (A 1801-02). The 1855 conveyance also included a 50-acre parcel located 1,000 feet to the east of the disputed property. See supra at 9 n.6. In 1865, when David Lawrence purchased the property, a more generalized description was used: "[a]ll those two certain" lots that had previously been conveyed to Harp plus a third parcel of 17 acres located adjacent to the 50 acre parcel. Much the same language -- "those two pieces and parcels" plus a third -- was carried forward in deeds conveying the property into modern times.

parcel of 92 acres "known as the King's Lane Lot" to Martin Coddington and included the now familiar adjoiner description: "bounded to the Northerly by Martin Coddington, easterly by John I. Davis, southerly by Henry O. Harp and William Chase, westerly by John D. Sheely and Jacob M. Keator." (A 1566-67). The same adjoiner description continued in subsequent deeds from 1881 to 1994, when Mohonk purchased the disputed property from Gloria Finger. In ruling against Mohonk, Supreme Court concluded that Ms. Finger did not own the 73 acre parcel and therefore could not sell it -- i.e., that the 73 acres were not part of the King's Lane Lot.

Supreme Court based its decision on these facts. First, the King's Lane Lot could not include the 73 acres because Chase was identified as the southerly adjoiner. If the King's Lane Lot included the 73 acres, Chase's property would disappear. Second, the King's Lane Lot could not include the 73 acres because Davis was the only identified easterly adjoiner. If the King's Lane Lot included the 73 acres, then Roosa would have been identified as another easterly adjoiner. Third, if the King's Lane Lot included the 73 acres, then Kortright would have been identified as another westerly adjoiner. Fourth, the southern boundary of the King's Lane Lot was the boundary of the old Curran Farm, which ran across Lot 1 and divided the King's Lane Lot from the 73 acres to the south of it. And fifth, the King's Lane Lot could not include the 73 acres because the lot is only 26

acres; the 92 acre description is based on a scrivener's error dating to 1877. Op. ¶¶ 100, 118.

On this basis, Supreme Court concluded that Appellants Pardini and Fink's claim was "more legally and factually supported as well as the more cogent of the two narratives presented." Op. at 2. Ms. Finger owned only the property that Osterhoudt had conveyed to Coddington in 1874 and therefore could not grant the disputed land to Mohonk.

B. The Third Department's Decision

The Third Department reversed and awarded the property to Mohonk. The court found (i) that for more than 100 years appellants Pardini and Fink's title contained "no description of the [disputed] property . . . as they rely merely upon the general 'being clauses' in the deeds"; (ii) that Mohonk's "chain has included for over 100 years an actual description of the 92 acres from which [its] 73 acres parcel was purchased"; (iii) that, "upon our review of the purported '2' in '26' acres in the 1876 tax assessment, we find that the number was, in fact, a '9' for '96'"; and (iv) that the "prominent ridge [which] played a significant role in [Pardini and Fink's analysis] does not remain prominent to the pertinent area[;] the land smoothes considerably on the lot in dispute." (Ex. A). In its opinion, the Third Department did not mention the adjoiner description that has defined the King's Lane Lot since 1874, or the description of the Curran Farm boundary or the

negative inference that the Supreme Court drew against Mohonk for not calling Van Valkenburgh as a witness.[12]

REASONS LEAVE TO APPEAL SHOULD BE GRANTED

Among the primary reasons for granting leave to appeal is that an Appellate Division decision "present[s] a conflict with prior decisions of this Court." 22 NYCRR 500.22(b)(4). This case presents such a conflict. Indeed, the Third Department's decision conflicts with numerous other decisions of that court. The Third Department determined the boundaries of the King's Lane Lot without any reference to the adjoining properties that have defined the lot since 1874. That is like fixing the location of a jigsaw puzzle piece without reference to the surrounding pieces. It is not how a court should resolve a property dispute in this State under settled law.

---

[12] Supreme Court also found, in the alternative, that Pardini and Fink were entitled to the disputed property by adverse possession. Op. ¶¶ 187-298; id. at 79-81 ("Mr. Fink and Ms. Pardini's use and occupation of the lands in dispute has been open, notorious, hostile, continuous, and exclusive as was that of their predecessor, Wilbur Smith"). After purchasing the property, Pardini and Fink recruited people to pick up the vast amount of garbage and debris that had been left behind by their predecessor; they maintained and widened the access roads and trails; they harvested firewood for sale and to heat their nearby home; they gave permission to others to hike and hunt on the property; and Ms. Pardini, an emergency responder, used the property to train her K-9 rescue dogs. Despite this evidence, the Third Department concluded that Pardini and Fink had "offered only vague, and non-specific testimony regarding their activities on the property" and reversed on this ground as well. (Ex. A).

As far back as 1831, this Court opined that "any . . . locative call of the premises, such as . . . the land of another person which is certain and notorious, must be adhered to in the location of the grant, although it does not correspond with the course, distance, or quantity, which must all give way to such known boundaries." Wendell, 8 Wend. at 190. The same principle was restated in 1877: a court is "justified in rejecting the length of the . . . course in [a] deed as a false description, by comparing it with the known . . . locative calls of the grant." Robinson v. Kime, 70 N.Y. 147, 154 (1877).

Until this case, the Third Department has faithfully applied this rule of preference. See, e.g., Shattuck v. Laing, 124 A.D.3d 1016, 1019 (3d Dept. 2015)("the rules of construction require that resort be had first to . . . adjacent boundaries [before] courses and distances [and] quantity"); Schweitzer v. Heppner, 212 A.D.2d 835, 839 (3d Dept. 1995)("resort to adjacent boundaries . . . takes precedence over distances"); Gibbs v. Porath, 121 A.D.3d 1210, 1214 (3d Dept. 2014)("quantity is the least reliable of all descriptive particulars"); Fletcher v. Flacke, 97 A.D.2d 623 (3d Dept. 1983)("[a]rea has the lowest preference as a call"); see also Trustees of Southampton v. Buoninfante, 303 A.D.2d 579, 580 (2d Dept. 2003)("last [resort is] to quantity").

In this case, however, the Third Department ignored that settled rule. It failed to give adjacent boundaries preference. The critical inquiry here was

simple: what were the boundaries of the King's Lane Lot? For there is no dispute that Gloria Finger owned only the King's Lane Lot and that she could not grant what she did not own. Put differently, if the King's Lane Lot does not include the southernmost 73 acres, then Mohonk, as Ms. Finger's grantee, had no entitlement to it.

What should be obvious is that if the King's Lane Lot stretched to the southern tip of Lot 1, as the Third Department found, then William Chase's property would disappear. That makes no sense. As Pardini and Fink's surveyor testified, the call for Chase to the south could not have been an error. Osterhoudt lived on the northernmost four acres of the King's Lane Lot and knew who his southern neighbor was when he sold the lot to Coddington in 1874. See supra at 8 n.7. And there is no evidence that Chase's property was absorbed into the King's Lane Lot in later years. It stayed where it always was. To 1994, "southerly by William Chase" remained a descriptor of the King's Lane Lot.

That Chase's land was to the south of the King's Lane Lot should be the beginning and end of this case. But, as Supreme Court observed, there is much more that undermines Mohonk's claim. The southern border of the old Curran Farm became the southern border of the King's Lane Lot sometime between 1841 and 1851, when the lot was carved out of the farm. That border divides the lot at the ridge that runs across Lot 1, and it leaves 70 +/- acres to the south for Chase

(and now Pardini and Fink) to own. The directional call along "the edge of the high Rocks . . . southwesterly as it runs to a pine tree, standing . . . on the said bounds of Joseph Depuy" can have no other meaning. See supra at 10-11. Moreover, if the King's Lane Lot included the southernmost 73 acres, then Roosa would have been identified as another easterly adjoiner and Kortright as another westerly adjoiner, and neither was. As shown on the map, Roosa's property bordered Davis' property on the southeast ("bounded on . . . the South East by the said Jacob S. Roosa"), which makes the pieces of the puzzle fit perfectly.

Rather than define the King's Lane Lot by identifying the adjoining properties, the Third Department pointed to four "significant problems with [Pardini and Fink's] analysis." As shown below, none of the four points presents a problem.

1. The Third Department wrote that Mohonk's chain "has included for over 100 years an actual description of the 92 acres from which [Mohonk's] 73-acre parcel was purchased." That misses the mark. For more than 100 years, the actual description of the King's Lane Lot has been the same: "Northerly by Martin Coddington, Easterly by John I. Davis, Southerly by Henry O. Harp & Wm. Chase and Westerly by John D. Sheely and Jacob M. Keator." That description did not give Gloria Finger the right to grant the southernmost 73 acres to Mohonk.

2. The Third Department rejected Supreme Court's findings (i) that the acreage of the King's Lane Lot in the 1876 tax assessment roll was "26" and (ii) that the "96" shown in 1877 (and the "92" shown in 1879) were scrivener's errors. As the Third Department saw it, the acreage in 1876 was "96," and therefore the King's Lane Lot stretched to the southern tip of Lot 1. But "[a]rea has the lowest preference as a call." Fletcher, 97 A.D.2d at 623. In a conflict between acreage and adjoining properties, the latter takes precedence.

In any event, the Third Department erred in concluding that the acreage in 1876 was 96. The chart below is derived from the 1876 and 1877 tax assessment rolls. The number in the center at the top is the number in dispute. The first row shows numerous other numbers taken from the rolls, each of which contains a "2" (e.g., "20"). The second roll shows several numbers taken from the rolls, each of which contains a "9" (e.g., "99").

96

1876 Assessment Roll (A 1557-59)

20	12.00	250	201	173	41.20
990	12	2	990		

1877 Assessment Roll (A 2194-95)

120	200	2100	201	2611	23
390	391	596	3259	3958	380

One does not need a handwriting expert to conclude that the disputed number is "26," not "96," which means Supreme Court got it right.

3. The Third Department wrote that "according to the topographical map in the record, as well as testimony, the 'prominent ridge' that played a significant role in [Pardini and Fink's] case, does not remain prominent into the pertinent area." This supposed "problem" is not a problem at all. As Pardini and Fink's surveyors explained, although the high rocks in Lot 2 do not

extend into Lot 1 (they turn sharply to the southeast), the ridge continues to run southwesterly across Lot 1 to point at Lot 1's western edge that is approximately the same elevation as the high rocks in Lot 2. No one disputes these facts. See Op. ¶ 144 (Mohonk's expert conceded 'that the ridge itself did continue southwest across Lot 1 to the point on the bounds of Joseph Depuy where [Pardini and Fink's experts] placed the Curran Farm line").

Notably, the Third Department ignored the fact that Norman Van Valkenburgh, who was present in court every day and assisted Mohonk's counsel to present its case, had previously testified that the "Curran deed followed along the high rocks that form Rock Hill Ridge through Lot[] . . . 1 exactly where [Pardini and Fink's] experts place it." Op. ¶ 161. That prior testimony is a "substantial problem," but not for Pardini and Fink. Supreme Court was correct in drawing a negative inference from Mohonk's failure to call Van Valkenburgh as a witness, and the Third Department erred in not giving that inference weight. See Schweitzer, 176 A.D.2d at 839 ("Supreme Court's assessment of the experts' credibility and the weight to be accorded to the testimony is generally entitled to deference by the reviewing court").

4. Finally, the Third Department wrote that, "for over 100 years, Pardini's chain of title makes no reference and contains no description of the property they now claim, as they rely merely upon the general 'being clauses' in

the deeds." While it is true that the description of Chase's property became less specific over time, see supra at 14 n.11, the entitlement of Chase's successors to a parcel of land in the south of Lot 1 has never changed. As Supreme Court put it, the parcel was never conveyed out of the chain of title that leads directly to Pardini and Fink and therefore remains in it. If Chase owned the disputed property in 1873, and he did, then Pardini and Fink own it now. See also Town of North Hempstead v. Bonner, 77 A.D.2d 567, 568 (2d Dept. 1980)("[p]laintiff has an affirmative duty to show that title lies in it, which is not satisfied merely by pointing to weaknesses in defendants' title").

CONCLUSION

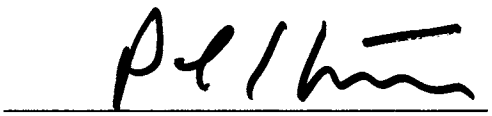
We recognize that the facts of this case take time to digest. One has to look at the map as one puts the adjoining properties in place. But once the adjoiners are in place, Pardini and Fink's right to the disputed 73-acre parcel is plain. The broader importance of this case should also be plain. It is vital to every landowner in this State that the law be applied properly when title is disputed. Property rights matter, and so does adherence to legal rules. Because the Third Department did not apply established law, this Court should grant leave and reverse.[13]

---

[13] In its Third Department brief, Mohonk argued that "from a public policy standpoint, the impropriety of awarding [Pardini and Fink] title to the disputed property is especially apparent here because Mohonk Preserve is a not-for-profit

Dated: New York, New York
August 25, 2015

ZUCKERMAN SPAEDER LLP



Paul Shechtman
399 Park Avenue, 14th Floor
New York, NY 10022
(212) 704-9600

Sharon Graff
Graff Law
78 Main Street
Kingston, NY 12402

Attorneys for Defendants-Appellants
Karen Pardini and Michael Fink

---

land trust whose objective in acquiring the disputed property was to further this State's well recognized conservation policies. Mohonk Reply Br. at 15. But Pardini and Fink are also conservationists who intend to keep the land pristine. Of course, none of this should matter. Land disputes are decided by applying the law to the facts, not by asking which claimant will make better use of the land.

EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 9, 2015 519815

MOHONK PRESERVE, INC.,
Appellant,
v MEMORANDUM AND ORDER

KAREN PARDINI et al.,
Respondents.

Calendar Date: April 21, 2015

Before: Lahtinen, J.P., McCarthy, Garry and Rose, JJ.

Rupp Baase Pfalzgraf Cunningham, LLC, Buffalo (R. Anthony Rupp III of counsel), for appellant.

Graff Law, LLC, Kingston (Sharon A. Graff of counsel), for respondents.

Lahtinen, J.P.

Appeal from an order and judgment of the Supreme Court (Cahill, J.), entered December 19, 2013 in Ulster County, which, in an action pursuant to RPAPL article 15, among other things, declared defendants to be the owners of certain real property.

The parties to this action both assert ownership of approximately 73 acres of undeveloped real property in the Town of Rochester, Ulster County. Plaintiff, a not-for-profit land conservation organization that owns adjoining land to the west, purported to purchase the property in 1994 and traces its title to an 1881 tax deed. Defendants, who own adjoining property to the south and east, claim to have bought the property in 1987, they trace title to an 1855 conveyance, and also allege that they established adverse possession of the property. Plaintiff

commenced this action to quiet title in 2004 after observing logging activity on the disputed land. Defendants counterclaimed alleging, among other things, that they had superior title. A lengthy nonjury trial was eventually conducted where both parties presented experts and extensive evidence supporting their respective positions. In addition, at the parties' request, Supreme Court viewed the disputed property. Supreme Court rendered a decision in defendants' favor, finding, among other things, that they had shown superior record title. Plaintiff appeals.

"[I]n reviewing a verdict after a nonjury trial, this Court may independently review the evidence and, while deferring to the trial court's credibility assessments, grant the judgment warranted by the evidence" (Shattuck v Laing, 124 AD3d 1016, 1017 [2015]; see Henshaw v Younes, 101 AD3d 1557, 1560 [2012]). "In the context of a boundary dispute, deeds must be construed in accordance with the parties' intent and extrinsic evidence is admissible to clarify any ambiguities" (Mohonk Preserve, Inc. v Ullrich, 119 AD3d 1130, 1131 [2014] [citation omitted]; see Schweitzer v Heppner, 212 AD2d 835, 838 [1995]). The parties agree that far less than precise records and deeds were used for portions of Ulster County in the nineteenth century – during a time key to resolution of ownership of the property – and, thus, the use of extrinsic evidence was appropriate in this case.

The property in dispute is the southern 73 acres of a 101-acre parcel conveyed to John Depuy in 1799 and known as "Lot 1" of the "Nineteen Partners' Tract." When Depuy died in the 1820s, he bequeathed a portion of the northern section of Lot 1 to his daughter and the remaining southern section of approximately 92 acres to the six children of Moses Depuy. What happened thereafter to the 92 acres is not entirely clear from the real property and other relevant records.

Plaintiff relies on an 1881 tax deed (resulting from a 1879 tax sale) to Martin Coddington that referred to a parcel known as the "Kings Lane Lot" and purported to transfer 92 acres. This description continued in subsequent deeds to plaintiff's grantor, who transferred the subject southern 73 acres of the 92-acre parcel to plaintiff. Defendants presented proof – ultimately

credited by Supreme Court – that the Kings Lane Lot was, in fact, a 26-acre lot to the north of the relevant 73-acre parcel and, accordingly, the pertinent property was never in plaintiff's chain of title.

Although defendants presented a detailed effort to deconstruct plaintiff's claim to the property, the proof supporting their claim to the property was tenuous at best. Defendants' evidence attempting to erode plaintiff's claim to title pointed to the conclusion that the proper plotting of the Kings Lane Lot – which was originally described only by referencing adjoining property owners – placed it immediately north of the disputed 73-acre parcel, and that scrivener's errors on the tax assessment rolls between 1876 to 1881 changed the acreage of the Kings Lane Lot from 26 to 96 and then to 92. Defendants' experts asserted that the important 1881 Coddington tax deed (prepared based on a 1879 tax foreclosure sale) actually involved property that Coddington had purchased in 1874 – but did not record the deed until 1879 – and was part of property that had been known as the Curran farm. The Curran farm was purportedly on the north side of a prominent ridge that ran along part of that farm's southern border and, thus, entirely north of the disputed 73-acre part of Lot 1 that was located generally south of the area of the ridge. The acreage of the Kings Lane Lot first appeared in the 1876 tax assessment. Supreme Court accepted defendants' assertion that the number of acres recited was, in fact, 26 and that, thereafter, the "2" was mistaken for a "9" resulting in 96 acres being listed in the 1877 tax assessment. This purportedly became the source for the incorrect reference in the 1881 tax sale deed of the acreage of the King's Lane Lot as 92 rather than 26.

There are several significant problems with defendants' analysis. First and importantly, for over 100 years, their chain of title makes no reference and contains no description of the property they now claim, as they rely merely upon the general "being clauses" in the deeds. Second and equally important, on the other hand, plaintiff's chain has included for over 100 years an actual description of the 92 acres from which plaintiff's 73-acre parcel was purchased. Third, upon our review of the purported "2" in "26" acres in the 1876 tax assessment, we find that the number was, in fact, a "9" for "96." This undercuts a

key link in defendants' argument that the relevant property was never properly in plaintiff's chain of title. Finally, according to the topographical map in the record, as well as testimony, the "prominent ridge" that played a significant role in defendants' analysis and apparently was a factor in an earlier case,[1] does not remain prominent into the pertinent area. Although the ridge is clear on an adjoining parcel, the land smooths considerably on the lot in dispute. For all the above reasons and after review of the extensive record, we reverse.

We also reject defendants' argument that they obtained title to the disputed property through adverse possession. Defendants offered only vague, non-specific testimony regarding their activities on the property and such evidence was insufficient as a matter of law to establish their continuous possession and occupation of the disputed property (see RPAPL former 511, 512; Robbins v Schiff, 106 AD3d 1215, 1217 [2013]). The remaining arguments have been considered and are unavailing.

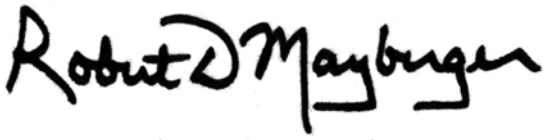
McCarthy, Garry and Rose, JJ., concur.

---

[1] The ridge was a physical characteristic ostensibly noted in resolving litigation involving other lots from the Nineteen Partners' Tract (see Shawangunk Conservancy v Fink, 261 AD2d 692, 693 [1999]).

ORDERED that the order and judgment is reversed, on the law and the facts, with costs, and plaintiff is declared to be the owner of the subject real property.

ENTER:



Robert D. Mayberger
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD JUDICIAL DEPARTMENT

MOHONK PRESERVE, INC.,

Plaintiff,

v.

Index No.: 04-0525
R.J.I. No.: 55-04-0705

KAREN PARDINI and
MICHAEL FINK,

Defendants.

NOTICE OF ENTRY OF ORDER

The attached order was granted and entered with the Clerk of the Appellate Division, Third Department on July 9, 2015

Dated: July 23, 2015
Buffalo, New York

RUPP BAASE PFALZGRAF CUNNINGHAM LLC
Attorneys for Plaintiff-Appellant

By: _____

Phillip A. Oswald, Esq.
1600 Liberty Building
Buffalo, New York 14202
(716) 854-3400

EXHIBIT C

SUPREME COURT CHAMBERS
Ulster County Courthouse
285 Wall Street
Kingston, New York 12401
(845) 340-3225
FAX (845) 340-3228

CHRISTOPHER E. CAHILL
Supreme Court Justice

SHARI S. GOLD, ESQ.
Principal Law Clerk

May 31, 2013

John Connor, Jr., Esq.
PO Box 427
Hudson, New York 12534

Wilkie & Graff, LLC
PO Box 4148
Kingston, New York 12402
Attn: Sharon A. Graff, Esq.

Re: Mohonk Preserve v. Fink and Pardini
Index No. 04-0525

Dear Counselors:

Enclosed please find a copy of a Decision and Findings of Fact and Conclusions of Law in the above-entitled matter.

Very truly yours,

Susan B. Suppies

Susan B. Suppies, Secretary to
CHRISTOPHER E. CAHILL, JSC

/sbs
Enclosure

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

MOHONK PRESERVE, INC.,

Plaintiff,

-against-

Decision
Index No.: 04-0525

KAREN PARDINI and **MICHAEL FINK,**

Defendants.

Supreme Court, Ulster County
RJI No. 55-04-00705

Present: Christopher E. Cahill, JSC

Appearances:

John Connor, Jr., Esq.
Attorney for Plaintiff
PO Box 427
Hudson, New York 12534

Wilkie & Graff, LLC
Attorneys for Defendants
PO Box 4148
Kingston, New York 12402
By: Sharon A. Graff, Esq.

Cahill, J.:

After hearing the testimony of the more than 30 witnesses who testified at the most lengthy trial this Court has conducted to date, after considering the well over 100 exhibits which were introduced into evidence at the trial, and after reviewing the 1,299 pages of trial testimony, and after considering the proposed findings of fact, conclusions of law and memorandums of law submitted by each party post-trial, the Court hereby adopts the

proposed request for findings of fact and conclusions of law submitted by the defendants, as revised by the Court and excepting the exhibits attached by the defendants to the request, as the decision of the Court in this case. In a landscape whose boundaries lack absolute certainty due to a history stretching back to the late 1700s of unrecorded deeds, adjoiner descriptions, less than precise 18th and 19th century-style record keeping, scrivener's errors, etc., the narrative of title and of possession put forth by the defendants at trial has emerged in this Court's mind by a preponderance of the evidence as being the more legally and factually supported as well as the more cogent of the two narratives presented. Among the salient decisive points for defendants, as elaborated in their Findings and Conclusions, are: the Martin Coddington tax matter in 1881 was a redemption, and, thus, no new chain of title was created; the acreage for the King's Lane property written on the 1876 tax roll for the Town of Rochester was, in this Court's opinion, a 2 rather than a 9; William Chase was clearly the southerly adjoiner of the King's Lane Lot as described in the 1874 Osterhoudt to Coddington deed; and defendants' argument that John Davis was not the owner of lands in Lot 2 that adjoin the lands in dispute is the only conclusion consistent with the prior decision in Shawangunk Conservancy, Inc. v Fink (261 AD2d 692 [1995], appeal after remand, Shawangunk Conservancy, Inc. v Fink (305 AD2d 902 [2003]), of which this Court takes judicial notice. Furthermore, given that that recent litigation dealing with neighboring property bears in part on the result that the Court has reached in this case, and given the extensive

use and possession of the disputed land by defendants and their predecessors in interest, the element of acquiescence is clearly lacking and the doctrine of practical location (see e.g. Roberts v Shaul, 62 AD3d 1127 [2009]) does not apply.

This shall constitute the decision of the Court. The Court requires that the defendants submit a "clean" copy of the findings of fact and conclusions of law incorporating the Court's revisions and deleting "Request of" on the cover page and a proposed order and judgment, on notice, for the Court's signature. The Court will thereafter deliver the original of this decision and the revised findings of fact and conclusions of law to the Ulster County Clerk for filing.

SO ORDERED.

Dated: Kingston, New York
May 29, 2013

ENTER,

CHRISTOPHER E. CAHILL, JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

----------x

MOHONK PRESERVE, INC.,

Plaintiff,

-against-

KAREN PARDINI and MICHAEL FINK,

Defendant.

----------x

Index No.: 04-525
Judge Assigned:
Hon. Christopher E. Cahill, JSC

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WILKIE & GRAFF, LLC
Attorneys for Defendants
Michael Fink and Karen Pardini
78 Main Street, P.O. Box 4148
Kingston, NY 12402
(845) 338-4993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AUTHORITY

TREATISES AND DIGESTS

INTRODUCTION

At issue in this action is ownership of 71+/- acres of land in the Town of Rochester. The land is the Southern portion of a tract once known as "Lot 1 of the Nineteen Partners Tract". Plaintiff asserts ownership by virtue of an 1881 Tax Sale Deed for the "King's Lane lot" which was conveyed, through *mesne* transfers, to Plaintiff's predecessor, Gloria Finger. Defendants assert the King's Lane lot is not the land in dispute and is actually located immediately to the North, in what was once part of a 200 acre parcel conveyed by Elijah Alliger to John Curran. Defendants assert they have superior record title to the lands in dispute by virtue of an 1855 warranty deed conveying an interest in the lands in dispute to their early predecessor in title. Defendants also maintain they have perfected title to the land in dispute by adverse possession based on their use and their predecessor's use of the land as a part of a locally renowned property known as Smitty's Ranch.

Defendants made a pre-trial motion for summary judgment on the issue of record title based upon their title expert and surveyor experts opinions that the King's Lane lot was located immediately North of the lands in dispute in a portion of the former Curran Farm. By Decision dated August 4, 2009, this Court found Defendants established a prima facie showing of entitlement to summary judgment but found an arguable question of fact was raised by Plaintiff's expert surveyor, who claimed in his submission that a crucial boundary line of Plaintiff's early predecessor, Elijah Alliger, did not bi-sect Lot 1 into a 30+/- acre Northern section and the 71+/- Southern section as shown by Defendants' experts, but rather followed along "the edge of a ledge around the bounds of the Finger parcel". See August 4, 2009 Decision and Order of this Court at p. 3. Specifically, this Court cited the sworn Affidavit of Plaintiff's survey expert which stated

"[t]he important operative fact is there is no ledge along the line drawn by Mr. Cross on his map showing deed plot of survey of Elijah Alliger and John Curran" who according to Brooks were predecessors in interest to the property acquired by Mohonk.

Based on the arguable existence of an issue of fact, the non-jury trial of the matter proceeded, the completion of which spanned ten months. Plaintiff's survey expert, Richard Brooks, conceded at trial that there was no ledge of rocks that ran "around the bounds of the Finger parcel" which was the arguable question of fact raised by Plaintiff that precluded summary judgment and necessitated trial.

BACKGROUND FACTS

1. In 1799 the Commissioners of the Town of Rochester created a 19 lot tract known as the Nineteen Partners Tract. (Def. Ex. A)

2. The Nineteen Partners Tract lots each had a separate legal description and the lots were depicted on a map of the Nineteen Partners Tract, filed with the Ulster County Clerk's Office in 1799. (Def. Ex. UUU)

3. Lot 1 of the Nineteen Partners Tract consisted of approximately 101+/- acres. It lies between Clove Valley Road on the South and Rock Hill Road on the North. (Def. Ex. C, Def. Ex. UUU)

4. A prominent ridge known as Rock Hill Ridge runs Southwest through Lots 5, 4, 3, 2, and 1 of the Nineteen Partners Tract. (Def. Ex. A)

5. At issue in this case is title to the 71+/- Southernmost acres within Lot 1.

6. The earliest history of Lot 1 is not in dispute.

7. Lot 1 was first granted to John Depuy by the Commissioners of the Town of Rochester in 1799. (Def. Ex. C)

8. In 1818 John Depuy left the northernmost 9 acres in Lot 1 to his daughter, Sarah Decker, and left the remaining 92 acres to the six children of his son Moses Depuy. The six grandchildren were named Andrew DeWitt Depuy, Abraham Ten Eyck DeWitt Depuy, John Depuy, Sarah Eliza (Depuy) Watkins, Annetje Depuy, and Jane (Depuy) Alliger. (Def. Ex. D)

9. There are no recorded deeds or other instruments from any of the six children of Moses Depuy that convey their interest in Lot 1.(Freer Direct, p.752, lines 1-17, Carle Cross, p. 174, lines 5-9)

10. There are estate proceedings and a will for Andrew DeWitt Depuy that confirm he did not own any land Lot 1 at the time of his death. Freer Direct, p. 752, lines 1-17, Def. Ex. WW, Def. Ex. XX)

PLAINTIFF'S TITLE

11. Plaintiff asserts its title to the disputed lands derives from an 1881 tax sale deed from the Ulster County Treasurer to Martin Coddington purporting to convey a parcel known as the "Kings Lane Lot". (Pl. Ex. 6, Carle cross, p.236, lines 9-15)

12. Defendants assert the 1881 tax sale deed did not convey the disputed Southern 71+/- acres of Lot 1 in dispute, but rather conveyed 26+/- acres in the Northern portion of Lot 1.

13. The origin of the King's Lane lot assessments and the deeds of record reveal the King's Lane lot is North of the lands in dispute.

THE TOWN OF ROCHESTER ASSESSMENT ROLLS

14. Before addressing the King's Lane Lot assessments in particular it is necessary to understand the assessment procedures employed by the Town of Rochester during the relevant time periods.

15. During the mid and late 1800's, the assessment rolls of the Town of Rochester were split into two sections, the resident lands and the non-resident lands. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

16. The first section of the assessment rolls was for "residents". There, the residents of the Town, or their heirs, were listed by name and assessed for personal and real property they owned or occupied. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

17. Lands owned by non-residents were assessed in a separate section of the assessment rolls. Non-resident land assessments provided information such as the name of the owner or heirs of the owner, the names of bounding owners, acreage, and other references to location. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

18. The assessment rolls for both resident and non-resident lands indicated whether or not the taxes were paid. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

19. When a resident land assessment was not paid as a result of the property becoming vacant, the assessment procedure provided for the land to be included on the subsequent year's assessment rolls as a non-resident land. (Chapter 235 of the Laws of 1855)

ASSESSMENTS OF LANDS IN LOT 1

20. The resident land portion of the assessment rolls listed the names of the owners or occupants of the lands and the acreage for which they are assessed, but did not provide any

information as to the location of the lands assessed. (Def. U, Def. V., Def. W, Def. X). Notably, the resident land assessments include assessments against the living children of Moses Depuy or their spouses. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X). It is conjecture to assume that the lands in dispute in this case were not assessed in the resident lands to the named owner(s) or occupant(s) during the years 1876 through 1881, particularly since Lot 1 of the Nineteen Tract was a well known, mapped parcel previously owned by a prominent land owner in the Town, John Depuy. (Carle, cross, p. 237, line 23 - p. 238, line 6).

21. The earliest assessment rolls for the Town of Rochester still in existence date back to 1849. (Carle, cross p. 236 lines 19-23). There is no assessment for any part of Lot 1 in the non-resident lands during any years prior to 1876. (Carle, cross, p. 237, lines 11-18)

22. During all years leading up to the tax sale deed several of the children of Moses Depuy were taxed residents of the Town of Rochester, as was William Chase, David H.B. Osterhoudt and Martin Coddington. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

23. There is no evidence to suggest the lands in dispute were not included in the resident land assessments prior to 1876 or that they were not assessed in the resident lands from 1876-1879.

THE KING'S LANE LOT ASSESSMENT.

24. In August 1874, David H.B. Osterhoudt conveyed two parcels of land to Martin Coddington.

25. The first parcel was described as a 4 acre parcel occupied by Osterhoudt at the time the deed was given. The second parcel was described as bounded by John I. Davis, William Chase and Henry O. Harp, Keator and Sheely. No acreage was stated for the second parcel. (Pl.

Ex. 4)

26. Martin Coddington did not record this deed for several years. (Pl. Ex. 4)

27. In 1876, an assessment for a lot bearing the same adjoiners as called for in the Osterhoudt to Coddington deed appeared on the Town of Rochester assessment rolls for the very first time. (Freer, direct, p. 759, lines 1-15), Carle, cross, p. 262, lines 2-11). The assessment was for "non-resident" lands and refers to the lot as the "King's Lane Lot". The assessment states the lot is "not in any known tract or patent", and states the owner is not known. (Def. Ex. U)

28. The appearance of the 1876 assessment of the King's Lane Lot as non-resident lands was not random or coincidence. It was clearly based on the 1874 conveyance and was an assessment of the land conveyed by Osterhoudt to Coddington in the 1874 deed. (Freer direct at p.751 line 16- p. 762, line 7, Carle cross at p. 262, lines 2-11).

29. Logic and the assessment procedure in place at the time dictate that once Osterhoudt sold the land in 1874, he did not pay the taxes due on the parcel in 1875. With the deed to Coddington unrecorded, the parcel was assessed as non-resident land in the 1876 assessment rolls. (Pl. Ex. 4, Def. Ex. U)

30. Martin Coddington, the fee owner under the 1874 deed from Osterhoudt, did not pay the assessment against the King's Lane Lot in 1876, 1877, or 1878. He did pay the assessments against him in the resident lands during those years. (Def. Ex. U, Def. Ex. V., Def. Ex. W, Def. Ex. X)

31. As a result of the default in payment of the non-resident land assessments from 1876 through 1878, the King's Lane Lot was included in the County's 1879 tax foreclosure sale.

32. The amount of unpaid taxes in 1879 amounted to $10.55, not including interest or

penalties. (Def. Ex. V)

33. On October 7, 1879 Martin Coddington recorded the deed from Osterhoudt at the Ulster County Clerk's Office. (Pl. Ex. 4) The same day he paid the County Treasurer $10.65 and received the tax sale certificate for the lands he already owned by virtue of the 1874 deed from Osterhoudt. (Pl. Ex. 101)

34. In 1880, the King's Lane lot assessment in the non-resident lands section of the assessment rolls was crossed out with the notation "error - taxed in resident lands to Martin Coddington." (Def. Ex. X)

35. The Court finds that the King's Lane Lot assessment that gave rise to the 1879 tax sale was an assessment of the lands conveyed by Osterhoudt to Coddington in 1874.

36. The Court finds that the fee owner of the King's Lane lot from 1876 through 1881 was Martin Coddington.

OSTERHOUDT'S SOURCE OF TITLE

37. There is no deed of record for the lands into Osterhoudt, but it is clear from numerous instruments of record that the "King's Lane lot" sold by Osterhoudt was once part of a larger parcel referred to as the "Curran Farm".

38. The chain of title for the "Curran Farm" begins with the 1841 deed from Elijah Alliger to John Curran in which Alliger conveys 200 acres by warranty deed, which included land in the Northern portions of Lots 1, 2, 3,4 and 5 of the Nineteen Partners Tract. (Def. Ex. G, Robert Cross direct at p.594, lines 13-25, p. 597, lines 1-9, James direct at p. 519, line 5 - p. 521, line 12, Def. Ex. "S")

39. The Curran Farm was foreclosed upon in 1847 by the mortgagee, Richard Gilbert.

(Def. Ex. H) When Gilbert sold the farm in 1851, he reduced the amount of acres called for from 200 to 145 in the deed and explained *"that he does not covenant or warrant the correctness of the line between this farm and the premises "now owned or occupied by Osterhoudt"* and goes on to say that the *"purchaser takes the farm at his own risk to settle the line with Osterhoudt". (Def. Ex. H)*

40. The language from the aforementioned 1851 deed from Gilbert is an acknowledgment of Osterhoudt's claim to a portion of the lands of the Curran Farm that affected the boundaries thereof. (Def. Ex. H)

41. The bounds of the reduced Curran Farm are corroborated by the 1850 creditor's petition that Jordan Sahler filed against the Estate of John Curran.(Def. Ex. YY) The petition called for "King's Lane" as the easterly boundary of the farm and called for "Osterhoudt" as the Southerly boundary. (Def. Ex. YY) The call for "King's Lane" as the easterly boundary of the Curran Farm in this instrument is significant because the original 1841 Alliger to Curran description calls for the easterly boundary to be a ledge of high rocks that are much further East than King's Lane. (Pl. Ex. 4, Def. Ex. YY) This resolves the question of the location of Osterhoudt and how the Osterhoudt lands derive from John Curran's original 200 acre parcel. This new boundary line creates a parcel that scales to 55 acres, the amount of acres by which the subsequent conveyances of the Curran parcel are reduced. (Robert Cross direct at p.601, lines 13-25, p. 602, lines 1-10)

42. The 1850 creditor's petition was the first reference of record to the road known as "King's Lane" and describes the Curran Farm as containing approximately 142 acres. When plotted, the Curran Farm as described in the creditor's petition scales to approximately 142 acres,

which is consistent with the reduced acreage in the 1851 deed from Gilbert. (Robert Cross direct at p. 603, lines 1-4, p. 609, lines 1-9)

43. An 1851 deed for lands adjoining the King's Lane lot provides an additional nexus between the Osterhoudt family and the lands formerly belonging to the Curran Farm.

44. The 1851 deed describes a 35 acre parcel conveyed to John I. Davis and recites that the lands being sold were acquired under "the Will of Henry P. Osterhoudt". (Def. Ex. J)

45. The Will of Henry P. Osterhoudt is not recorded in the Ulster County Clerk's Office, and there are no deeds of record from John Curran into any Osterhoudt. (McGregor direct at p.1257, lines 11-21, p. 1276 lines 6-26, p. 1258, lines 18-24)

46. The Surrogate's Court records relating to John Curran as well as the creditor's petition reveal that John Curran was financially distressed and indebted to many. He appears to have pledged or conveyed a portion of the 200 acre Curran Farm to Osterhoudt by an instrument not of record to secure a loan or pay a debt. (Freer direct at p. 763, line 12 - p. 765, line 21) While there is no instrument of record into Osterhoudt, the claim "_____ Osterhoudt" certainly was acknowledged by the farm's mortgagee, Richard Gilbert, who, after foreclosing upon the Curran Farm, reduced the acreage called for from 200 acres to 145 acres and left the new owner to settle the boundary line with Osterhoudt. As explained in detail below, the "King's Lane" is the dividing line between the 55 acres parceled off and the 145 acres remaining.

47. This sequence of events compels the conclusion that between 1841 and 1851, approximately 55 acres of the Curran Farm was acquired by the Osterhoudt family, a 26+/- acre portion of which was in the Northern end of Lot 1 and referred to as the King's Lane lot and a portion of which lay between King's Lane and the ledge of high rocks in the Northern portion of

Lots 2,3,4, and 5 of the Nineteen Partners Tract. Both parcels were accessed by Kings Lane. (Def. Ex. S)

48. All expert surveyors agreed that the parcel acquired by John I. Davis lies on the Northwest side of Rock Hill Ridge. (Robert Cross direct at p. 530, lines 11-13, Def. Ex. S, Def. Ex. BBB, Brooks cross at pp. 240 - 244, Brooks direct at p. 140, lines 16-20, p. 145, lines 1-4) This location places the John I. Davis parcel within the bounds of the Curran Farm as it was described in 1841. (Robert Cross direct at p.535, lines 17-22, James direct at p. 530, lines 11-13, p. 531, lines 19-25, Def. Ex. S, Def. Ex. BBB)

49. The scaled acreage contained in the John I . Davis, Junior parcel is 29+/- acres. Defendants' expert surveyors both opined that the adjoining King's Lane Lot consisted of 26+/- acres. The total scaled acreage equals 55 +/- acres which is the amount of acreage by which the Curran parcel was reduced following the foreclosure deed and corroborated by the creditor's petition against the Curran Estate. (James direct at p.534, lines 1-25, p. 535, lines 1-12)

50. The facts that support a finding that the "King's Lane lot" was once a part of the 200 acre Curran lands which came into the ownership of David H.B. Osterhoudt are:

(a) the 1850 Creditor's Petition description of the Curran Farm as bounded East by King's Lane and South by Osterhoudt, and being 142 acres (Def. Ex. YY);

(b) the contemporaneous language in the 1851 Gilbert deed acknowledging the claim of Osterhoudt affecting the boundary of the farm (Def. Ex. J);

(c) the 1851 deed to John I. Davis calling for King's land as his Southwesterly adjoiner (Def. Ex. H);

(d) the 1874 deed from Osterhoudt calling for Davis as his adjoiner (Pl. Ex. 4) and,

(e) the 1876-1879 assessments against the "King's Lane lot" (Def. Ex. U, Def. Ex. V, Def. Ex. W)

These recorded instruments all make clear that the phrase "King's Lane lot" relates specifically to a portion of the former 200 acre parcel of John Curran.

THE LOCATION OF KING'S LANE

51. This Court finds that "King's Lane" was a lane that ran from what is presently Rock Hill Road through the lands of John I. Davis and DuBois Coddington and into the "King's Lane Lot" on the Northwest side of Rock Hill Ridge as shown on the Survey of Robert James, L.S. (Def. Ex. S)

52. "King's Lane" is first described in an 1850 creditor's petition filed by a creditor of John Curran. (Def. Ex. YY)

53. The petition refers to the lane by name and establishes that "King's Lane" marks the Eastern boundary of the Curran Farm as it existed in 1850, which had been reduced by 55+/- acres as a result of the claim of Osterhoudt. (Def. Ex. YY, James direct at p. 534, lines 1-25)

54. The 1874 Osterhoudt to Coddington Deed for the "King's Lane" lot describes this very lane as a right-of-way leading through the lands of John Davis and DuBois Coddington to the "public road" now known as Rock Hill Road. (Pl. Ex. 4, James direct at p. 533, lines 23-25, p. 534, lines 1-8)

55. King's Lane remains visible at present and was located by actual field inspection and survey by Defendants' survey experts Robert G. Cross, P.L.S. and Robert James, L.S. The right-of-way has remnants of stone walls running along it, which the surveyors testified was customary with roads designated "lanes" in the 1800's. The right-of-way begins at the public road now

known as Rock Hill Road and runs Southwesterly through the lands of DuBois Coddington and John I. Davis and into the 26 +/- acre King's Lane lot where it terminates. (Def. Ex. S, James direct at p. 523, lines 18-23, p. 524, lines 1-25)

56. Lifelong residents of Rock Hill Road knew it as "King's Lane" and recalled a wooden road sign reading "King's Lane" existing on the road up until the 1970's. (Weaver direct at p. 542, Lines 15-25; Roger Lapp direct, p. 1162, lines 14-20, Richard Lapp direct at p. 522, lines 11-20 and p. 523, lines 9-12; Ron Lapp direct at p. 590, lines 1-3)

57. In summary,

(a) several lifelong residents of Rock Hill Road recalled an old wooden sign reading "King's Lane" upon the old roadway and testified they always knew the roadway as "King's Lane";

(b) the 1850 creditor's petition establishes this road way is "King's Lane",

(c) the 1874 Osterhoudt to Coddington deed calls for John I. Davis as its adjoiner and describes this same road as running through John I. Davis and DuBois Coddington to the public road, and

(d) the testimony of Mr. Cross and Mr. James which confirmed the location of the King's Lane described in the 1850 creditor's petition and in the 1874 Osterhoudt to Coddington deed as being one and the same and located entirely on the Northwest side of Rock Hill Ridge, west of the high rocks that traverse Lots 5 through 2 of the Nineteen Partners Tract. (Cross, direct at p.600, lines 11 - 25; James direct at p. 534, lines 4-8, Def. Ex. BBB)

58. Neither the 4 acre parcel upon which Osterhoudt lived, nor the adjoining 22 +/- acre parcel described in the 1874 Osterhoudt to Coddington deed fronted upon any public road. Thus,

the 1874 deed from Osterhoudt to Coddington included two rights-of-way, one exiting the parcel to the East over King's Lane and a second that exited the parcel to the West over the lands of Sheely. (Def. Ex. S)

59. Plaintiff asserted throughout the trial that the location of King's Lane was of great importance in defining the location of the King's Lane lot. (Brooks, direct at p. 111, lines 12-16; Carle, direct at p. 83, lines 13-15, p. 84, lines 12-18; Carle, cross at p 185, lines 1-13, p. 187, lines 1-4) Plaintiff offered no rebuttal evidence to Defendants' overwhelming proof of the location of King's Lane which was based upon not only actual field survey, but multiple ancient public records and testimony of lifelong residents of Rock Hill Ridge.

60. The only offer of proof made by Plaintiff as to the location of King's Lane was a reference on a 1940 map by Loyal Nerdahl which was never filed, was not certified, and which was not a survey of the lands depicted, but rather a deed plot performed by an in-house surveyor. (Def. Ex. 10a, Def. Ex. 10b)

61. This offer by Plaintiff was refuted by the testimony of Robert James. L.S. who actually inspected the area depicted on the 1940 map and found no evidence for the existence of a road and further testified that the terrain was impassable and not suitable for a lane or road. (James direct at p. 540, lines 5-9).

62. On the few occasions that Plaintiff's employees accessed the lands in dispute, they did so by the access roads located on the other lands of Pardini and Fink. (Huth, direct at pp 41-42)

THE EASTERLY ADJOINER OF THE KING'S LANE LOT

63. The 1874 deed from Osterhoudt to Coddington, the 1876 - 1879 assessment rolls, and the 1881 tax sale deed all call for John I. Davis as the adjoiner to the King's Lane lot. (Def. Ex. U. Def. Ex. V, Def. Ex. W, Pl. Ex. 6, Pl. Ex. 6A)

64. The lands of John I. Davis were located on the Northwest side of Rock Hill Ridge and do not adjoin the lands in dispute. (Def. Ex. S, Pl. Ex. 96)

65. Defendants' expert surveyors, Robert G. Cross, P.L.S. and Robert James, P.L.S., both testified that John I. Davis' lands were located immediately East of the "King's Lane" parcel on the Northwest side of Rock Hill Ridge and that the lands of John I. Davis did not extend beyond the ridge. (James direct at p. 530, lines 20-25, p. 531, lines 1-4)

66. Plaintiff's expert surveyor, Richard Brooks, P.L.S., concurred that the lands of John I. Davis were located entirely on the Northwest side of the ridge and did not extend Southeast over the ridge. (Brooks cross at p. 144, lines 21-25 Brooks rebuttal cross at p. 195, lines 1-4)

67. The 4 acre house parcel described in the 1874 deed from Osterhoudt to Coddington, which all experts concurred was in the Northern end of Lot 1, calls for John I. Davis as the Easterly adjoiner, which is consistent with the opinion of all three surveyors who testified that the lands of John I. Davis were located entirely on the Northwest side of the ridge. (James direct at p. 531, lines 19-29, Brooks cross at p. 140, lines 16-20, Brooks rebuttal cross at p. 1236, lines 6-25, Page 1237, lines 1-6, Pl. Ex. 113)

68. The lands in the 1874 deed from Osterhoudt to Coddington are served by a right-of-way through the lands of John I. Davis and DuBois Coddington to the public road. (Pl. Ex. 4, Def. Ex. S)

69. If John I. Davis were located on the Southeast side of the high rocks forming Rock Hill Ridge, as was suggested by Plaintiff's title expert, the right of way described by Osterhoudt would never cross the lands of John I. Davis but would only go through lands of DuBois Coddington, who Mr. Carle averred was the only adjoiner to Lot 1 on the Northwest side of the high rocks. (Pl. Ex. 8)

70. The fact that the right-of-way given by Osterhoudt requires one to pass through John I. Davis on the way to the public road fixes the location of John I. Davis on the Northwest side of the rocks within the former 200 acre Curran parcel. (Def. Ex. S)

71. The 1876 - 1879 assessment rolls and the 1881 tax deed likewise call for John I. Davis as the Easterly adjoiner. (Def. Ex. U, Def. Ex. V, Def. Ex. W) Plaintiff's expert, Terrence Carle claimed that DuBois Coddington owned all the land on the Northwest side of the high rocks.(Carle cross, p. 260, lines 8-25) Mr. Carle offers no explanation for why Dubois Coddington was not identified as an adjoiner to the "Kings Lane lot" if this were true. Osterhoudt lived on the lands he described in 1874 and knew his Easterly adjoiner was John I. Davis. (Pl. Ex. 4)

72. The creditor's petition filed in 1850 contains the earliest reference of record to "King's Lane" to describe the right-of-way serving the lands Osterhoudt conveyed to Martin Coddington. It also calls for the lands of Osterhoudt as the Southerly adjoiner. (Def. Ex. YY)

73. The 1851 deed into John I. Davis likewise confirms the placement of this parcel on the Northwest side of the ridge, offering a description that reads as follows: "On the southwest by the Depuy lot or Kings Land, in the Northwest by the farm lately owned by John Curran, on the Northeast, by a lot of Jacob S. Roosa, and on the Southeast by the said Jacob S. Roosa". (Def.

Ex. J)

74. The record owner of the lands on the Southeast side of the ridge, North of Lot 1 and adjoining John I. Davis, was Jacob S. Roosa. Jacob S. Roosa is a predecessor in title to Defendants Karen Pardini and Michael Fink. (McGregor rebuttal direct at p. 1279. lines 2-17) Pardini and Fink were adjudged the fee owners of that land following a lengthy and attenuated trial in an action brought against them in Ulster County Supreme Court and their ownership was twice affirmed unanimously by the Appellate Division, Third Department. Shawangunk Conservancy Inc. v Fink, 261 AD2d 692, 695 (3d Dept 1999), Shawangunk Conservancy, Inc. v Fink, 305 AD2d 902, 903 (3d Dept 2003).

75. The only testimony Plaintiff offered to suggest an alternate location for the lands of John I. Davis was the testimony of their title expert, Terrence Carle, who opined the lands of John I. Davis were located on the Southeast side of the ridge. (Pl. Ex. 8) Mr. Carle's opinion was contradicted by the testimony of Plaintiff's own surveyor, Richard C. Brooks. P.L.S.. and by numerous deeds of record. (Brooks cross at p.140, lines 16-19, p. 144, line 5 - p. 145, line 4, Pl. Ex. 4, Def. Ex. YY, Def. Ex. J, Def. Ex. H) Mr. Carle made no effort to explain how his opinion could be reconciled with the fact that the 4 acre parcel conveyed by Osterhoudt to Coddington, which was located in the Northern end of Lot 1, was bounded by John I. Davis. This fact alone refutes Mr. Carle's opinion. Mr. Carle made no effort to address rights-of-way called for in the Osterhoudt to Coddington deed that pass through John I. Davis and DuBois Coddington to the Public Road.

76. If Mr. Carle's assertion was true, that John I. Davis's lands were located Southeast of the high rocks and Dubois Coddington's were Northwest of the high rocks in Lot 2, that assertion

would require another adjoiner to the King's Lane Lot, namely, Dubois Coddington - a fact that Mr. Carle did not directly address.

77. Lot 2 of the Nineteen Partners Tract is located immediately East of Lot 1. (Def. Ex. A) This Court finds that the Easterly adjoiner for the 71+/- acres of Lot 1 in dispute in this case during the 1870's was Jacob Roosa and his heirs, not John I. Davis. (Def. Ex. B, McGregor rebuttal direct at p. 1279, lines 2-17, p. 1283, lines 2-9) This finding is supported by the instruments of record calling for Roosa as the adjoiner to the Jansen Homestead Farm, the 1851 John I. Davis deed, and the 1899 deed from the heir of Jacob S. Roosa. (Def. Ex.VVV, insert reference to John I. Davis Deed Ex. #, Def. Ex. WWW).

78. This Court cannot accept any argument that John I. Davis was the Easterly adjoiner of the lands in dispute. This Court takes judicial notice of the fact that exhaustive litigation over title to the portion of Lot 2 on the Southeast side of the ridge was engaged in between 1995 and 2003. (Shawangunk Conservancy Inc. v Fink, 261 AD2d 692, 695 (3d Dept 1999), *appeal after remand,* Shawangunk Conservancy, Inc. v Fink, 305 AD2d 902, 903 (3d Dept 2003). The case, *Shawangunk Conservancy, Inc. v. Michael V. Fink and Karen Pardini,* centered around title to the portion of Lot 2 lying Southeast of Rock Hill Ridge and adjoining the property in dispute in this case on the East. This Court also takes judicial notice of the fact that the surveyor who testified in opposition to Ms. Pardini and Mr. Fink in the prior litigation was Norman Van Valkenburgh, L.S. This Court notes that Mr. Vanvalkenburgh is the same surveyor who prepared and certified Plaintiff's survey of an adjoiner description in the present case, upon which Plaintiff bases its claims. The surveyor who testified for Plaintiff in the present case, namely Richard Brooks, L.S., based his opinions on the Van Valkenburgh survey, not on his own independent

work. (Brooks cross, page 126, line 14 - p. 127, line 5, p. 132, lines 2 - 7) This Court takes further judicial notice of the fact that in the prior litigation over title to Lot 2 Pardini and Fink were awarded summary judgment on the issue of record title to Lot 2, which award was affirmed unanimously by the Appellate Division, Third Department, and which finding was again confirmed following a non-jury trial in the action and again affirmed unanimously by the Appellate Division, Third Department. In short, the Ulster County Supreme Court and the Appellate Division, Third Department have each *twice* rejected the assertion that John I. Davis was the owner of lands in Lot 2 that adjoin the lands in dispute in this case and have each *twice* found that title to the lands in Lot 2 that adjoin the lands in dispute devolve from Defendants Karen Pardini and Michael Fink's chain of title. While the Judgement of this Court and the Appellate Division concerning title to Lot 2 are not binding in the present action, they should not be disregarded or treated lightly. The Honorable John G. Connor, JSC, in rendering his bench decision, found the deeds relied upon by the Plaintiff were for lands "not in this area" in referring to the Southeast portion of Lot 2 where first Norman Van Valkenburgh and now Terrence Carle seek to place the land of John I. Davis. The prior trial over Lot 2 was based on adjoiner descriptions. The two lots' adjoiner descriptions are interdependent. This trial is partially, in effect, a retrial of those same facts.

79. This Court credits the testimony of Defendants' survey experts and the testimony of Plaintiff's survey expert, Richard Brooks, who all testified that John I. Davis, Jr.'s lands were located on the Northwest side of Rock Hill Ridge and bounded the lands of David H.B. Osterhoudt on the Northwest side of Rock Hill Ridge.

THE SOUTHERLY ADJOINER OF THE KING'S LANE LOT

80. William Chase was the Southerly adjoiner of the King's Lane lot in Lot 1. (Pl. Ex. 4, Def. Ex. K)

81. The only chain of title conveying part of Lot 1 by name begins with the 1855 deed from Catherine Stillwell to Henry O. Harp which describes, in pertinent part, "All that other lot being the undivided one Sixth part of Lot No. one in a tract commonly called the nineteen partner tract which said lot No. One was allotted to John Depuy ...and John Depuy late of Rochester did by his last will and Testament devise Said undivided one Sixth part of Said lot No. one to Cornelius Alliger dec. late of Rochester aforesaid." (Def. Ex. E)

82. Cornelius Alliger was the husband of Jane Depuy, who was one of the six grandchildren to whom John Depuy bequeathed Lot 1 in his Will. It was common in that era for a wife's property to be conveyed in the name of her husband. (Freer direct at p.756, lines 2-7; Carle direct at p. 198, lines 13-19).

83. The 1855 deed from Stillwell to Harp was a warranty deed. (Def. Ex. E)

84. The two parcels described in the 1855 deed from Stillwell to Harp, the second of which was an interest in Lot 1, were subsequently conveyed, in 1873, to William Chase, who ultimately conveyed the interest in Lot 1 to William Bloomer in 1888. (Def. Ex. B)

85. Defendants' title expert, Arthur Freer, opined that the interest in the Southern portion of Lot One entered Defendants' chain of title in 1855 and was never conveyed out of Defendants' chain. (Freer direct at p. 728, lines 8-25) Defendants' surveyors Robert G. Cross, P.L.S. and Robert James, L.S. both opined that the undivided one sixth part of Lot One described in the 1855 Stillwell to Harp deed was the land in dispute in this case. (Robert Cross direct at p. 640,

lines 7- 21, Def. Ex. S, Def. Ex. BBB)

86. Plaintiff's title expert, Terrence Carle, acknowledged that the 1855 deed conveying an interest in Lot One was in Defendant Pardini and Fink's chain of title. (Carle cross at pp. 263-266, p. 208, lines 10-15)

87. The 1874 Osterhoudt to Coddington deed and the tax assessments and tax sale deed call for Chase and Harp as adjoiners of the King's Lane Lot. (Pl. Ex. 4, Def. Ex. U - X, Pl. Ex. 6)

88. William Chase acquired his interest in Lot 1 in 1873, nearly a year before the Osterhoudt to Coddington conveyance, and he retained his ownership in Lot 1 well past 1881 when the tax sale deed was issued. (Freer direct at p. 767, lines 1-19, Def. Ex. B) He was a record owner of lands in Lot 1 during each year the that the assessment rolls and tax deed called for William Chase as the Southerly adjoiner to the King's Lane lot. Henry Harp was a prior owner of the Lot. (Freer direct at p. 767, line 23 - p. 768, line 2, Def. Ex. B)

89. Plaintiff's title expert theorized that the call for William Chase as a Southerly adjoiner of Lot 1 was a reference to some other non-contiguous lands owned by William Chase to the Northeast. (Carle direct at p. 189, lines 1-19).

90. William Chase did not own any lands that adjoined Lot 1 on any side prior to and throughout the years of the Kings Lane lot assessments and tax sale. (Carle p. 188, lines 24-25) In addition, throughout those years the other lands of William Chase were not South of the land in dispute but rather were Northeast of the lands in dispute and East of Lot 2.

91. When considered in conjunction with the 1855 warranty deed from Stillwell to Harp and later to William Chase, it defies logic and stretches reason to conclude that the call for William Chase as a Southerly adjoiner of the Kings Lane Lot is in error. This is particularly true

where the adjoiner call for William Chase is first made by the resident owner, David H.B. Osterhoudt, the neighbor of William Chase. (Pl. Ex. 4) In addition to the 1874 Osterhoudt to Coddington deed calling for Chase as an adjoiner, the 1876 -1879 assessments of the "King's Lane lot", and the 1881 tax deed for the King's Lane lot all identify William Chase as a Southerly adjoiner. There is no support for the conclusion that the call for William Chase as an owner of the lands in dispute is an error, and to do so would ignore the plain language of these documents and instruments.

92. This Court finds that the adjoiner call in the 1874 Osterhoudt to Coddington deed for William Chase and the subsequent assessments and tax sale deed specifying William Chase as a Southerly adjoiner of the "King's Lane lot" show that he was, in fact, the Southerly adjoiner of the "King's Lane Lot" which places William Chase as an owner of the lands in dispute in this case.

93. This Court credits the testimony of Arthur Freer, Robert G. Cross, P.L.S. and Robert James that the call in the 1874 Osterhoudt to Coddington deed for William Chase is as an owner of the lands in dispute which adjoin the King's Lane lot to the South and that the reference to Henry Harp as a Southerly adjoiner to the King's Lane Lot was a reference to Harp as a prior owner of the lands in dispute. (Freer direct at p. 723, lines 22-25, p. 724, lines 1-8, p. 728, lines 20-23; Robert Cross, direct at p.621, lines 9-11, p. 623, lines 15-25, Robert James, direct at p, 561, lines 20-24, p. 562, lines 1-12 and 18-21)

94. Therefore, this Court rejects the theory of Plaintiff's title expert that the adjoiner calls for William Chase were referring to lands Chase owned in Lots 3 and 4 of the Nineteen Partners Tract. (Pl. Ex. 7) The deed upon which Plaintiff's title expert bases his opinion is the very deed

that explicitly conveys to William Chase the land in Lot 1. (Def. Ex. E)

95. This Court finds that the lands in dispute in this case were bounded on the East by Roosa throughout the 1870's and 1880's and this fact, as noted above, has already been the subject of extensive litigation before this Court and the Appellate Division, Third Department. The 1899 conveyance of this Roosa parcel was by an adjoiner description which called for William Harp, formerly William Chase to the South. (Pl. Ex. 119) This is further acknowledgment of William Chase's ownership of Lot 1 by yet another adjoiner. (Pl. Ex. 119)

96. Plaintiff's title expert, Terrence Carle, acknowledged that the 1855 deed conveying an interest in Lot One was in Defendant Pardini and Fink's chain of title. (Carle, pp. 263 and 266) Defendants' title expert, Arthur Freer, opined that the interest in the Southern portion of Lot One entered Defendants' chain of title in 1855 and was never conveyed out of Defendants' chain. (Freer direct at p. 724, lines 1-8)

THE WESTERLY ADJOINERS OF THE KING'S LANE LOT

97. The 1874 Osterhoudt to Coddington deed calls for two owners, namely, Keator and Sheely, as adjoiners to the lands. The subsequent assessment rolls and tax deed identify Keator and Sheely as the Westerly adjoiners to the lot. (Pl. Ex. 4, Def. Ex. U-X, Pl. Ex. 6)

98. Defendants' expert surveyors Robert G. Cross, P.L.S. and Robert James, L.S., testified as to an 1843 deed (Liber 59 at Page 629) conveying lands to John D. Sheely which were placed to the West of Lot One north of the Curran Farm division line. *See Def. Ex. "D".*

99. Defendants' expert surveyor Robert G. Cross, P.L.S. testified the lands of Catherine Keator (formerly owned by Jacob M. Keator) had a common corner with lands located north of

the Curran Farm Line on the West side of Lot 1. (Robert Cross, direct at p.620, line 16 - p. 621, line 17, Def. Ex. BBB)

100. Defendants' Expert surveyor, Robert G. Cross, P.L.S. testified that the lands of Sheely and Keator did not run the entire Westerly length of Lot 1 and that one of adjoiners for the 71 +/- acres in dispute in this case was Kortright, whose lands bounded the Southerly and Westerly portion of Lot 1. (Cross, direct at p. 622, lines 18-25, p. 623, lines 1-3) The King's Lane lot adjoiner description does not contain a call for Kortright, and the absence of the call further confirms that the King's Lane lot is not the land in dispute.

THE SIZE OF THE KING'S LANE LOT

101. This Court finds that the King's Lane Lot was a 26 +/- acre parcel located in the Northern portion of Lot 1, and not a 92 +/- acre parcel consisting of nearly all of Lot 1 as Plaintiff avers. (Def. Ex. BBB, Def. Ex. K, Def. Ex. S)

102. This Court finds that the King's Lane lot was originally within the bounds of the 200 acre parcel conveyed by Alliger to Curran in 1841. (Cross, direct at p. 605, line 22 - p. 606, line 10, James, direct at p. 535, lines 1-12, Def. Ex. BBB)

103. The King's Lane lot is first described in the Osterhoudt to Coddington deed as a 4 acre parcel and a second parcel described by adjoiner with no reference to acreage. The deed also gives reference to two very important rights-of-ways running through lands located North of the land in dispute. These rights-of-way give access to the 26+/- acres and do not give access to the lands in dispute. (Def. Ex. BBB, Def. Ex. S)

104. A parcel described by adjoiner is defined by the location of the lands of the

adjoiners called for and cannot extend into the lands of the adjoiner. A parcel described as bounded by William Chase goes only to the bounds of William Chase, not *into* the lands of William Chase.

105. This Court credits Defendants' expert surveyor, Robert G. Cross, P.L.S. and Robert James who testified and opined that the only location where the "Kings Lane lot" adjoiner calls fit is in the Northern 26+/- acre portion of Lot 1 and that these adjoiner calls do not fit for the lands in dispute in this case. (Robert Cross, direct at p.621, line 22 - p. 623, line 10, James direct at p. 531, Line 5 - p. 534, line 8)

106. As noted above, Plaintiff's theory is based upon its title expert's erroneous opinion as to where the lands of John I. Davis were located. Plaintiff's experts put undue weight on the fact that some of the assessment rolls refer to the parcel as between 92-96 acres.

107. The first reference to any acreage associated with the King's Lane lot appears in the 1876 assessment rolls. (Def. Ex. U)

108. Defendants' survey expert Robert G. Cross, P.L.S. testified that they examined the assessment rolls and opined the acreage stated in the 1876 assessment roll for the King's Lane lot was 26 acres. (Robert Cross direct at p. 630, lines 9-20)

109. Plaintiff's title expert, Terrence Carle, testified that he believed the first digit in the acreage stated in the 1876 assessment rolls is a "9", not a "2", and that the assessment is for 96 acres, not 26 acres. (Carle direct at p.177, lines 15-25)

110. The only assessment rolls offered into evidence by Plaintiff were excerpts of the non-resident land assessments for the years 1876-1879. Defendants offered the entire resident and non-resident rolls for these years, as well as for the year 1880. (Def. Ex. U, Def. Ex. V, Def.

Ex. W, Def. Ex. X)

111. Notwithstanding the low priority given acreage calls, especially those derived from assessment rolls, this Court has been called upon to determine whether the 1876 assessment roll describes the parcel as a 26 acre parcel or a 96 acre parcel.

112. In reviewing all of the assessment rolls offered into evidence, it is obvious that more than one person made entries on the rolls since a variety of script and print appears on the rolls.

113. There are several other "2"s on the three pages of the assessment rolls offered by Plaintiff which are written in a script style, many of which closely resemble the "2" contained in the statement of acreage for the "King's Lane lot" in the 1876 non-resident land assessments. (Pl. Ex. 5)

114. In the 1878 non-resident lands assessment rolls, the lot assessed immediately above the "King's Lane lot" has the number "20" written in the column for the value of the real property. The numeral "2" looks virtually identical to the "2" in the 1876 assessment rolls at issue. See Def. Ex. "W". The resident land assessments for the years 1876 - 1880 submitted by Defendants has several similarly drawn "2"s. (Def. Ex. U, Def. Ex. V, Def. Ex. W, Def. Ex. X).

115. This Court finds, based on the comparison of the handwriting of the number of acres contained in the 1876 assessment of the King's Lane lot and the handwriting contained in all of the assessment rolls received in evidence, that the King's Lane lot was originally assessed as "26" acres in 1876 and that the subsequent assessments of "96" and then "92" that carried forward into the 1881 tax deed were scriveners errors.

116. The assessment of the King's Lane lot as "26" acres is buttressed by the fact that all 5 of the adjoiners called for in the assessment for the 26+/- acre parcel as depicted by Robert G.

Cross, P.L.S. are correct. Davis, Chase, and Sheeley were current owners of adjoining land and Henry Harp and Jacob Keator were former owners of adjoining lands. (Freer, direct, p. 766, line 19 - p. 768, line 11, Pl. Ex. 95, Def. Ex. W) There are no missing adjoiners.

117. That the accurate assessment of the King's Lane lot as "26" acres is further buttressed by the fact that the assessment makes no reference to Lot 1 of the Nineteen Partners Tract or the heirs of John Depuy or Moses Depuy as would be expected if the assessment related to all but 9 acres of a well known, 101 acre mapped tract. (Def. Ex. U - X) Moreover, the assessment explicitly states that the land is "not in any known tract or patent." (Def. Ex. U - X)The assessor clearly did not intend to assess substantially all of a known patent lot.

118. To accept Plaintiff's argument that the King's Lane Lot was 92 acres, the Court would have to

(a) accept the premise that John I. Davis owned the Southeastern portion of Lot 2, which was unanimously refuted by all of the surveyors who testified in this case, including Plaintiff's surveyor, and which was twice rejected by the Ulster County Supreme Court and unanimously rejected twice by the Appellate Division, Third Department, and

(b) reject the proof that William Chase was the record owner of land in Lot 1 at the time of the assessments (Freer direct at p. 727, line 3 - p. 729, line 1),

(c) overlook the fact that adjoiners John Kortright to the Southwest and DuBois Coddington to the Northeast were not called for in the assessment description;

(d) disregard the fact that King's Lane does not run through, or even to, the land in dispute but rather serves the 30 +/- acre parcel in the Northwest end of Lot 1(Def. Ex. S); and

(e) find that the deed calls for Jacob Roosa as the adjoiner to the Jansen Homestead Farm

were incorrect. (Def. Ex. B, Def. Ex. WWW)

119. This Court finds, based on the adjoiner description given, that the King's Lane lot was a 26+/- acre parcel originally part of the 200 acre Curran Farm located immediately North of the land in dispute.

120. The location of the lands described in the 1874 Osterhoudt to Coddington deed and later in the 1881 tax deed is established by several undisputable facts.

121. As noted, the 1874 Osterhoudt to Coddington deed describes a 4 acre house parcel and another parcel of unstated acreage, both of which are served by the rights-of-way described in the deed. (Pl. Ex. 4)

122. Expert surveyors for Plaintiff and Defendants concur that the 4 acre parcel was located in the Northern end of Lot 1. These experts also concurred that the second parcel of unstated acreage adjoined the 4 acre parcel on the South. (Pl. Ex. 113, Def. Ex. BBB, Def. Ex. S)

123. The only disagreement between the Plaintiff's expert surveyor and Defendants' expert surveyors was the location of the southern bounds of the second parcel. Defendants, through their expert witnesses and through documentary proof, demonstrated that the parcel was bounded on the South by the ridge line of Rock Hill Ridge. Plaintiff argued that the location of the boundary extends South over Rock Hill Ridge and down to the Southernmost bounds of Lot 1 near Clove Valley Road.

125. All parties agree that the Curran Farm Description subdivided Lot 1. The only remaining dispute is where. Because Lot 1 was divided into a Southern and Northern Part, the 1879 sale and 1881 tax deed could not have affected William Chase's interest in the adjoining portion of Lot 1 as called for in the tax sale description and tax deed.

126. Here, this Court will refer to its decision on Defendants' motion for summary judgment wherein Defendants' expert surveyor, Robert G. Cross, P.L.S. opined that the Curran Farm line divided Lot 1 into a Northern 30+/- acre portion and the Southern 71+/- acres in dispute. This Court found that Defendants had set forth a prima facie case but found that Plaintiff had raised an issue of fact warranting trial of this action. That issue was whether the Curran Farm boundary divided Lot 1 at the point identified by Defendants' experts or, as contended by Plaintiff's expert surveyor, Richard C. Brooks, L.S. whether the Curran Farm boundary line followed the cliffs *South* around the bounds of Lot 1. Plaintiff entirely abandoned this position at trial and argued instead that the Curran Farm line did continue Southwest, as shown by Cross, but only to the West bounds of Lot 1. Plaintiff further contended at trial that the Curran Farm deed should be interpreted to turn North along the East bounds of Lot 1 and then *again* head Southwest to traverse Lot 1 at a location where no rocks existed as will be explained below.

127. It is apparent from warranty deeds and other ancient instruments recorded between 1841 and 1874 that the 30+/- Northern acres of Lot 1 were a part of the property conveyed by Elijah Alliger to John Curran in 1841.

THE SURVEYORS' TESTIMONY

128. The Court finds that the 1841 Alliger to Curran deed included the King's Lane lot as shown on the map of Robert G, Cross, P.LS. (Def. Ex. K)

129. The testimony of Robert G. Cross, P.L.S. and Robert James, P.L.S. and Robert G. Cross, Jr. concerning the deed language and the natural features of the land was uncontradicted.

130. The 1841 deed from Alliger to Curran (hereinafter referred to as the "Curran Farm" deed) conveys 200 acres of land in and around Lot One by a detailed description including courses, bearings and distances, adjoiner references, references to major lot lines, calls for significant monuments such as the Old Shawangunk Footpath, and fixed natural monuments such as a spring and a cliff of high rocks which exist to date, and all of which carry a high degree of priority in determining conflicting calls. (See Def. Ex. "G").

131. The place of beginning in the 1841 deed is identified as a "stone set in the ground near a large spring called Sanders Spring in the north corner of a lot formerly belonging to Joseph Depuy deceased." This point also marks the Northeasterly corner of lands of Joseph Depuy (deceased) and the Northwesterly Corner of Lot One of the Nineteen Partners Tract. (Def. Ex. G, Def. Ex. BBB, Def. Ex. S)

132. The next courses and distances in Curran Farm call for fixed reference points, such as the corner of another major tract called the Grote Transport near the "Shawangunk Footpath" which is also shown on the 1799 Nineteen Partners Tract Map. (Def. Ex. A, Def. Ex. G)

133. The final three deed calls in the Curran Farm deed are of particular importance. It is undisputed the deed calls go from a corner of a lot in the Nineteen Partners Tract South 50 degrees East to the edge of high rocks at a heap of stones. This call brings the Curran Farm squarely into the interior lines of Lot Five, of the Nineteen Partners Tract. (Def. Ex. S, Def. Ex. BBB, Def. Ex. G)

134. The Curran Farm Deed next calls for the bounds to follow the edge of the high rocks Southwest from Lot Five then through Lot Four, Lot, Lot Three, Lot two, and finally *through Lot 1* to a pine tree on the bounds of Joseph Depuy standing above the Sanders Spring

and then along the bounds of Joseph Depuy northerly to the place of beginning. (Def. Ex. S, Def. Ex. BBB)

135. Specifically, the deed calls describe a boundary running generally Southwest along the "edge of the high rocks" (Rock Hill Ridge) as they run through Lots 5, 4, 3, and into Lot 2, and then continuing south west through Lot 2 and across Lot 1 to the bounds of Joseph Depuy, to a point "above Sanders Spring". (Def. Ex. G)

136. The high rocks forming Rock Hill Ridge are one of the most prominent physical features within the Nineteen Partners Tract that, of course, exists today. (Def. Ex. A)

137. Rock Hill Ridge extends all the way through Lots 5, 4, 3, 2, and 1. The Ridge line is the highest elevation point through these lots. (Def. Ex. A, Def. Ex. BBB, Def. Ex. CCC)

138. Mr. Cross and Mr. James depict the Curran Farm line as continuing along the Ridge line Southwesterly as this Ridge runs to the bounds of Joseph Depuy. (Def. Ex. BBB, Def. Ex. CCC, Def. Ex. K, Def. Ex. S)

139. The high rocks that run Southwest along the Ridge do not extend all the way through Lot 2 . Instead, they turn sharply Southeast within Lot 2, while the Ridge continues to run southwesterly through Lot 1, to the bounds of Joseph Depuy. (Def. Ex. A, Def. Ex. S, Def. Ex. BBB). The high rocks pick up again on the bounds of Joseph Depuy, where Mr. Cross and Mr. James found the corner, also marked by an ancient stone pile. (Def. Ex. BBB, Def. Ex. CCC)

140. The deed language includes a directional call, "along the edge of the high rocks as they run southwesterly to a pine tree standing above Sanders Spring on the bounds of Joseph Depuy". (Def. Ex. G)

141. The point on the bounds of Joseph Depuy where Mr. Cross and Mr. James locate

the Curran Farm corner is the same elevation as the ledges in Lot 2 before they break South. (Def. Ex. BBB, Def. Ex. CCC)

142. The lands of Joseph Depuy were located immediately Southwest of Lot 1. One must cross Lot 1 in order to get from where the high rocks peter out in Lot 2 to the bounds of Joseph Depuy.

143. Robert G. Cross, Sr., P.L.S. and Robert James, P.L.S. both testified that the directional call to go Southwest across Lot 1 from the point where the high rocks break Southeast in Lot 2 controls over the call to continue "along the edge of the high rocks as they run" since, if the edge of the high rocks were followed the description would never close because the high rocks peter out and turn Southest before they reach Lot 1. (James, re-direct at p. 578, lines 4-21, Robert Cross, direct at p.600, lines 2-10)

144. Robert James, P.L.S. testified that at the point where the high rocks break Southeast into lot 2 there are no other edges of high rocks to follow. Richard Brooks, P.L.S. conceded this point and also conceded that the ridge itself did continue southwest across Lot 1 to the point on the bounds of Joseph Depuy where Robert G. Cross, P.L.S. and Robert James, P.L.S. placed the Curran Farm line. (James re-direct at p. 576, line 22 - p. 577, line 23, Brooks, rebuttal cross at p.1239, line 22 - p, 1240, line 23)

145. The various calls in deeds have different degrees of importance. (Robert Cross, direct at p. 628, line 25 - p. 629, line 20)

146. When two or more calls in a deed are in conflict, there is a general order of priority that a surveyor gives to the calls. (Robert Cross, direct at p. 628, line 25 - p. 629, line 20)

147. When there is a conflict between a directional call (ie: Southwesterly) and a call for

a natural monument (ie: "high rocks as they run"), in general the call for the natural monument that is actually present on the ground will take priority over the directional call, but not in every case. (Robert Cross, cross at p. 670, lines 5 - 8, p. 676, lines 11-14).

148. A call for an adjoiner (ie: on the bounds of Joseph Depuy) takes priority over both. (Robert Cross, direct at p. 628, line 25 - p. 629, line 20)

149. Defendants' surveyors, Robert G. Cross, P.L.S. and Robert James, P.L.S. both addressed the call in the Curran Farm deed which begins at a point in Lot 5 of the Nineteen Partners tract and then reads "along the edge of the high rocks as they run southwesterly to a pine tree standing above Sanders Spring on the bounds of Joseph Depuy. Both explained and opined that at the point in Lot 2 where the high rocks break Southeast, the remaining adjoiner and directional call to go "Southwesterly to .... the bounds of Joseph Depuy" take priority over the call to follow along the edge of the high rocks as they run since the rocks essentially peter out in Lot 2, and to the extent they can be followed, they lead away from the lands of Joseph Depuy. Therefore, there is no conflict between the natural monument and the directional call and even if there was, the call to reach the adjoiner "Joseph Depuy" and its corresponding directional call take priority.

150. Plaintiff's surveyor, Richard Brooks, L.S. concurred that the edge of the high rocks does not continue to Lot 1. Since there is no other edge of high rocks to follow at the point where the high rocks break Southeast in Lot 2, there is no conflict between natural monuments and directional calls in the Curran Farm deed.

151. Notwithstanding these facts, Mr. Brooks opined that the deed call to go Southwesterly to the bounds of Joseph Depuy should not be followed and instead the deed should

be read to describe a boundary that went along the edge of the high rocks as they run, then leaving the high rocks, but continuing Southwest along the ridge to the East bounds of Lot 1 (not Joseph Depuy), then turning North, away from the high rocks as they run and not following any other monumentation called for, for some 1100 feet, and then making a second uncalled for turn Southwest across Lot 1, where there are no rocks, to the bounds of Joseph Depuy. Notably, Mr. Brooks' survey places this final Southwest line at a point in Lot 1 where there are no ledges or rocks whatsoever. (Pl. Ex. 113)

152. In so doing, Mr. Brooks disregards the deed's natural monument call, directional call, and adjoiner call and inserts two additional directional calls not contained within the deed in order to finally reach the adjoiner called for, namely, Joseph Depuy.

153. Mr. Brook's interpretation must be rejected as it is at odds with accepted principals of land surveying and well accepted legal principals of deed interpretation.

154. Mr. Brook's testimony is also at odds with the opinions of the surveyor who actually performed and certified the survey upon which Mr. Brooks based his opinion.

155. The survey upon which Plaintiff basis its claim to title of the land in dispute was performed by Norman Van Valkenburgh, L.S. in 1993, who at the time was an employee of Mr. Brook's surveying firm. (P. 126, lines 19-24, P. 131, P. 138-139.) The survey map was certified by Norman Van Valkenburgh in December 1993. (Pl. Ex. 29)

156. Plaintiff's survey expert Richard Brooks testified that his opinions in the case were based upon his review of the survey work by his former employee, Mr. Van Valkenburgh.

157. Mr. Van Valkenburgh was never called by Plaintiff to testify at the trial of this action, though he was present in the Court room throughout the trial.

158. Plaintiff instead relied solely on Richard Brooks, L.S. as their expert survey witness. Unlike his former employee, Mr. Brooks did not opine that the lands of John I. Davis were located Southeast of the "high rocks" in Lot 2. Instead, Mr. Brooks concurred with the opinion of both of Defendants' expert surveyors that the lands of John I. Davis, Jr. were located on the Northwest side of the "high rocks" in Lot 2.

159. There is further substantial conflict between the sworn conclusions of Mr. Van Valkenburgh upon which he based the boundary line determinations depicted in his 1993 survey of the land in dispute in this case and the testimony of Richard Brooks, L.S. at trial.

160. One such conflict involves the 1841 deed from Alliger to Curran that divided Lot 1 into a 30+/- acre Northern portion and the 71+/- Southern portion in dispute in this case.

161. On this issue, Mr. Van Valkenburgh's sworn testimony on the subject is that the 1841 Alliger to Curran deed followed along the high rocks that form Rock Hill Ridge through "Lots, 5, 4, 3, 2, and 1" exactly where Mr. Cross and Mr. James place it, and exactly where hatching is extended on the Brandt and the 2009 Brooks Open Space Conservancy Map, as well as the 1799 Nineteen Partners Tract Map. In other words, the ridge formed the boundary line, as would be expected in an era that well preceded motor vehicles and relied on more primitive modes of transportation. This Court takes judicial notice of Mr. Van Valkenburgh's prior sworn testimony from the *Shawangunk Conservancy v. Pardini and Fink* action is contained within the record on appeal in that action at p. R449, lines 6-26, excerpts of which are annexed hereto.

162. Mr. Van Valkenburgh's sworn testimony on this subject is explicit in its detailed description of the fact that Rock Hill Ridge is a prominent feature that bisects Lots 1, 2,3,4, and 5 of the Nineteen Partners Tract and is the boundary line of the lands conveyed from Alliger to

Curran in 1841 that is depicted as a shaded area bisecting these lots on the original Nineteen Partners Tract Map of 1799. Mr. Van Valkenburgh's prior sworn testimony from the *Shawangunk Conservancy v. Pardini and Fink* action is contained within the record on appeal in that action at p. R393, line 20 - R394, line 15, excerpts of which are also annexed hereto.

163. Mr. Van Valkenburgh's survey of adjoining lands offered in evidence in this action depict the 1841 Alliger to Curran boundary line as following along the high rocks from Lot 5 and into Lot 2 and depicts the ledge and line continuing Southwesterly into Lot 1 in the same location as Mr. Cross and Mr. James depict the line coming into Lot 1.

164. Mr. Brooks, by contrast, first alleged in his Affidavit in opposition to Defendants Summary Judgment motion that the boundary line in issue did not continue Southwesterly through Lot 1, but rather followed along the rock ledge that broke Southeast in Lot 2 "around the bounds of the Finger parcel" and this Court takes judicial notice of that fact. (See April 22, 2009 Affidavit of Richard C. Brooks at ¶¶6,8) Mr. Brooks abandoned this claim at trial and asserted the boundary line at issue did not follow along any rock ledge at all after the high rocks break South in Lot 2. (Pl. Ex. 113)

165. Mr. Brooks acknowledged he never actually surveyed any of the lands in dispute and had no knowledge whether or not rock ledges cross Lot 1 anywhere within the lands in dispute, though he claimed in his summary judgment affidavit that the Curran farm bounds followed a ledge of rocks south around the bounds of the Finger parcel.

166. Mr. Brooks acknowledged that no rock ledges run North along Lot 1 in the direction he argues the 1841 Alliger to Curran boundary line travels.

167. Mr. Brook's opinion testimony that the 1841 Alliger to Curran deed travels North

along Lot 1 where there are no rock ledges whatsoever is of little probative value since he based his opinions on the work of his former employee, Norman Van Valkenburgh who actually performed the survey and who found the rocks referred to in the 1841 Alliger to Curran deed do continue across Lot 1 in the same location and in the same Southwesterly direction as determined by Robert G. Cross, P.L.S. and Robert James, L.S. Mr. Van Valkenburgh's prior sworn testimony from the *Shawangunk Conservancy v. Pardini and Fink* action is contained within the record on appeal in that action at p. R449, lines 6-25, excerpts of which are annexed hereto for ease of reference.

168. Mr. Van Valkenburgh's prior sworn testimony also confirms that at the time he performed the survey and completed his map of the lands in dispute he had not made any effort to locate the Easterly adjoiner called for in the 1881 Tax deed, and it is apparent that Mr. Van Valkenburgh simply retraced the boundary lines of Lot 1 to show the location of the bounds of the parcel. The prior sworn testimony of Mr. Van Valkenburgh is contained in the record on appeal from that action at pp. 424, line 2 - p. 425, line 24 and p. 508, lines 3-25 (excerpts of this testimony from the record on appeal are annexed hereto).

169. It is axiomatic that a property that is described only by the names of its adjoiners cannot be identified until the bounds of the adjoiners named are located.

170. Mr. Van Valkenburgh's sworn testimony confirms that when he did eventually research ownership of Lot 2 (well after his map was stamped, certified, and filed), he concluded by certified report, that Mr. Fink and Ms. Pardini were the owners of the Southeast portion. Mr. Van Valkenburgh reached these conclusions while he was the employee of Mr. Brook's surveying firm.

171. Van Valkenburgh testified under oath that he later changed his mind. That change of heart occurred after he retired from the Brooks firm and became a paid consultant for the Plaintiff. The prior sworn testimony from the *Shawangunk Conservancy v. Pardini and Fink* action is found in the record on appeal from that action at p. R 508, lines 3-25, excerpts of which are annexed hereto for ease of reference.

172. Mr. Carle's testimony that the lands of John I Davis, Jr. are located in the Southeast portion of Lot 2 is entirely undercut by his concession that John I. Davis, Jr. is not in Fink and Pardini's chain of title while acknowledging they are the owners of Lot 2.

DEFENDANTS' RECORD TITLE TO THE LANDS IN DISPUTE

173. Defendants identify the 1855 deed from Catherine Stillwell to their predecessor Henry O. Harp as their source of record title to the portion of their lands that are in dispute in this case. (Freer direct at p. 728, Def. Ex. B)

174. The 1855 Stillwell to Harp deed was a warranty deed in which Stillwell recites and warrants that she is in full peaceable possession of the lands conveyed. (Def. Ex.E, Freer direct at p.722, lines 18-23)

175. A warranty deed acknowledges undisturbed ownership, and it transfers that ownership and it warrants the title. (Freer direct at p. 722, lines 18-23)

176. The 1855 Stillwell to Harp deed recites, in pertinent part, that it conveys

> "All that other lot being the undivided one Sixth part of Lot No. one in a tract commonly called the nineteen partner tract which said lot No. One was allotted to John Depuy ...and John Depuy late of Rochester did by his last will and Testament devise Said undivided one Sixth part of Said lot No. one to Cornelius Alliger dec. late of Rochester aforesaid" (Def. Ex. E)

177. Cornelius Alliger was the husband of Jane Depuy, who was one of the six children of Moses Depuy who received a 1/6 interest in Lot 1 under the will of John Depuy. (Freer direct at p. 756, lines 2-7). It was common for a woman's property to conveyed in the name of her husband in that era. (Freer direct at p. 756, lines 6-7).

178. There is no deed of record out of Jane Depuy or Cornelius Alliger. However, there is evidence of record that Catherine Stillwell acquired other 1/6 interests in land from the children of Moses Depuy. (Freer direct at p.757, line 17 - p. 758, line 8)

179. Unrecorded deeds for property were not uncommon in that era. (Carle cross at p. 249, line 19- p. 250, line 12)

180. In fact, Lots 1, 2, 3, 4, and 5 have multiple gaps in their chains of title but, clearly these lands were conveyed by instruments not of record. (McGregor rebuttal direct at pp. 1283, line 10 - p. 1286, line 17).

181. For example, the heirs of Roeliff Litts conveyed a portion of the Curran Farm West of the high rocks in Lots 2, 3, 4, and 5 to Elijah Alliger in 1825, but there are no deeds of record into Roeliff Litts or any of his heirs for any of the lands conveyed to Elijah Alliger. (McGregor direct at pp.1210, line 1 - p. 1211, line 3)

182. Another 58 acre portion of the Curran Farm, including the Northernmost portion of Lot 1, was originally acquired by the 11 children of Sarah Decker. There were no deeds of record into Elijah Alliger from 6 of the 11 heirs. (McGregor rebuttal direct at pp. 1283, line 10 - p. 1286, line 17)

183. Lot 2 of the Nineteen Partners Tract was originally granted to Peter Harp in 1799. (McGregor direct/rebuttal at pp. 1285, lines 8-9). There are no deeds or instruments of record

from Peter Harp conveying any interest in Lot 2. Nevertheless, as stated earlier the Appellate Division, Third Department unanimously affirmed Ms. Pardini and Mr. Fink's record title to the Southern portion of Lot 2 based upon a chain of title from their predecessor Jacob Roosa, who had no record source of title from Peter Harp or any of his heirs.

184. The interest in the lands in dispute that entered Ms. Pardini and Mr. Fink's chain of title in 1855 was never conveyed out of their chain by any owner. (Freer direct at p. 751, line 3-24)

185. While the interest was not expressly described after 1862, it was carried forward in the chain by direct reference to the 1862 deed, and then later by "beings" clauses and other savings clauses. (Freer direct at p 800, line 17 -22)

186. While there is no "being" clause in the simplified 1958 deed, the property description is identical to the description in the 1951 deed which contained the clause "being the same premises conveyed by Selig Brenner by deed bearing date January 13, 1922 and recorded in Ulster County Clerk's Office in Book of Deeds No. 486, page 533". Furthermore, all subsequent conveyances of the property used the more detailed 1951 deed description. The fact that the subsequent conveyances in 1965, 1972, and 1987 were missing the text that incorporated the property in dispute by reference has been judicially determined to be a scriveners or recording error.

ADVERSE POSSESSION BY PARDINI AND FINK AND THEIR PREDECESSORS

187. The lands in dispute in this case have been continuously, openly, notoriously, and

exclusively occupied in a hostile manner under color of title and claim of right by Defendants Pardini and Fink and their predecessor in title. They have been part of a known farm or single lot for in excess of forty years. Although the land in dispute has been referred to as "Lot 1" by the parties in this litigation, this separate designation of the 71+/- acre portion of Smitty's Ranch is a product of the litigation. In fact the entirety of Pardini and Fink's lands which include the land in dispute have been known by prior owners, neighbors, guests, and patrons alike simply as "Smitty's Ranch". When viewed as a single farm it has a host of improvements including a former bar and hotel, guest house, cabins and trailers, cisterns, trails, etc.

188. The property in dispute does not front on any public road and if viewed as a separate parcel, and not as part of the Smitty's Ranch Farm, it is landlocked. The property is improved, however, by a series of horse trails and logging roads that originate on the other lands of Defendants Pardini and Fink (formerly Smitty's Ranch") and wind through the property in dispute and only on the lands in dispute.

189. The property in dispute is steep, rocky, and wooded, and is suited for camping, hiking, horseback riding, hunting, and logging in areas where larger trees grow on the property as well as for millstone quarries and removing rock for sale and personal use. Mr. Fink and Ms. Pardini harvested rock from the disputed lands and used it to construct the foundation of their house on undisputed portions of Smitty's Ranch. (Pardini, direct at p. 1060, lines 17-25, p. 1061, lines 4-6, and lines 9-11; Fink, direct at p. 1135, lines 17-25, p. 1136, lines 1-12, Dowd, direct at p. 817, lines 5-8)

190. The property is part of a 300 acre property formerly known as Smitty's Ranch. Smitty's Ranch was a locally famous, if not infamous bar, rooming house, and dude ranch

operated by Wilbur Smith beginning in 1958 and continuing throughout the 1960's, 1970's and into the 1980's. It was renowned for the crowds of young people, free spirits, and ethnically diverse guests that congregated there in its heyday.

191. As noted, the only access into the portion of Smitty's Ranch in dispute in this case is through the series of horse trails and log roads that originate and weave through the adjoining Ranch lands. There are no roads or trails leading from the 30+/- acre parcel into the land in dispute, and Plaintiff's predecessors could not access the lands in dispute except by going through dense growth by foot. It is clear from testimony that the only entries by Plaintiff were casual during trespass across other lands of Pardini and Fink.

192. During the ownership of Smitty's Ranch, Wilbur Smith, known to nearly everyone as "Smitty", allowed members of Smitty's Ranch's hunting club to hunt the land and they were prominent in their distinct bright colored jackets that distinguished them from the local hunters that Smitty also permitted to hunt his property. (Richard Lapp, direct at p. 519, lines 13-23, Ron Lapp, direct at p. 586, lines 10-19, p. 587, lines 8-17)

193. Several families that lived on the other side of the ridge off Rock Hill Road, including the Lapp family and the Weaver family, had Smitty's permission to hunt his land and preferred the portion of Smitty's Ranch in dispute in this case for hunting deer and other game. Other residents of Clove Valley Road had Mr. Fink and Ms. Pardini's permission to hunt, including the Olsen and Douglas families.

194. Smitty himself regularly patrolled his ranch on horseback, rifle in hand. His image on horseback climbing or descending the roads and trails through the portion of his ranch in dispute was striking. (Pardini direct at p. 1034, lines 6-21, p. 1035, lines 1-8, p. 1046, lines 1-25)

195. The Ranch lands immediately adjacent to the portion in dispute served as the parking area for Ranch patrons and were filled with cars during summer weekends. A man in a wheelchair named "Vic" collected parking fees and watched the parking lot from his position on the porch of the bar building a few hundred feet away.

196. For years five mobile homes sat along the boundary line of the Southern portion of the Ranch lands in dispute and were rented to Smitty's friends. The mobile homes remained well after Pardini and Fink purchased the Ranch. A cabin occupied by Smitty's former caretaker, Jim Cosmo, was located only feet from the bounds of the land in dispute. Pardini and Fink permitted Mr. Cosmo to remain in the cabin until the mid-1990's.

197. Smitty had the property in dispute logged during the early 1980's by a logger named Billy Bloom. His foreman, Mark Heinitz testified to the logging and the use of skidders and heavy equipment which were visible from Clove Valley Road. Mr. Heinitz was able to locate the area of logging based on a physical landmark, a stone wall, which marks the Southwest boundary of the land in dispute and which is shown on the maps. He also identified the area of logging by associating it with the access road that leads into and through the land in dispute. The access is in plain view of the main ranch buildings. (Fink, direct at p. 1112, lines 1-25, p. 1113, lines 1-18; Heinitz, direct at pp. 1009-1111)

198. Jeffrey Smith, Wilbur Smith's son, spent summers at his father's dude ranch where he not only recalled his father riding his horse with his rifle up the trails through the portion of the Ranch now in dispute, he also recalled his father teaching him how to rock climb on one of the steep rock outcrops on that portion of the property. He recalled witnessing his father identify the lands in dispute as his ranch lands. He testified unequivocally that he "always knew the land

to be part of his father's Ranch lands." (Smith, direct at p. 436, p. 439-440, p. 441, lines 4-6)

199. Michael Fink, Karen Pardini, their relatives and a host of friends and acquaintances were regular guests of Smitty's Ranch and frequented the portion of the Ranch now in dispute during the 1970's and 1980's, when Pardini and Fink bought the Ranch from Smitty. (Pardini, direct at p. 1035, lines 19-23, Fink, direct at p. 1110, lines 3-16)

200. After their purchase in 1987, Pardini and Fink recruited friends and employees to pick up vast amounts of garbage and debris left over from Smitty's ownership from the entire Ranch property, including the portion in dispute. (Olsen, direct at p. 1201, lines 16-25, p. 1202, lines 1-4; Dowd, direct at p. 816, lines 23-25, p. 817, lines 1-5; Fink, direct at p. 1126, lines 10-17; Pardini, direct at p. 1058, lines 12-25)

201. Thereafter, Pardini and Fink continuously maintained and improved the road system throughout the property. They posted the entire Ranch property where it fronted on Clove Valley Road and permitted several friends and acquaintances to continue to hunt, hike, camp, and enjoy the Ranch property, including the portion in dispute in this case. (Fink, direct at p. 1126, lines 18-25, p. 1127, lines 1-6; Pardini, direct at p. 1058, lines 1-11)

202. Pardini and Fink operate a logging company known as Wood Source, Inc. They harvested firewood from the Ranch lands in dispute on a continuous basis for sale and also used it to heat their home on the Ranch property. They exclusively heat their home with wood. (Fink, direct at p. 1135, lines 11-16, p. 1133, lines 1-20; Pardini, direct at p. 1059, lines 24-25, p. 1060, lines 1-4)

203. Neither Plaintiff nor their predecessors in title had anything other than infrequent, casual entries upon the land in dispute that left no trace or indicia of ownership.

Hunting on Smitty's Ranch

204. Several non-party witnesses testified that they hunted the lands in dispute during the 1970's and 1980's after obtaining permission to do so from Smitty, Defendants' predecessor in title.

205. Defendants called Ron Lapp, Sr., a Town of New Paltz Police Officer with 27 years experience on the force.

206. Ron Lapp testified that he began hunting on the land in dispute in the 1980's. Prior to hunting he was familiar with Smitty's Ranch lands and believed the lands in dispute to be part of Smitty's based on the activities he had seen there in his capacity as a police officer. (Lapp direct at p. 584, Lines 2-7).

207. Ron Lapp asked and received permission to hunt Smitty's Ranch, including the lands in dispute, from Smitty. (Ron Lapp, direct at p. 585, lines 17-25)

208. Ron Lapp recounted Smitty identifying his lands as including the lands in dispute and that Smitty gave him permission to hunt those lands. (Ron Lapp, direct at p. 585, lines 17-25)

209. Ron Lapp and several other lifelong residents recounted that Smitty had a hunting club known as the "Clove Valley Hunting Camp." The members of Smitty's hunting club wore prominent bright colored jackets unlike local hunters who did not dress in such bright colors. (Richard Lapp, direct at p. 519, lines 13-23, Roger Lapp, direct at p. 1161, lines 17-22; Ron Lapp, direct at p. 586, lines 10-19)

210. Ron Lapp frequently observed the members of Smitty's hunting club in an area of the property in dispute referred to as "the Hemlock Knob".

211. Ron Lapp asked and received their permission to hunt on the Finger's land, North of the lands in dispute. Mr. Lapp observed the Finger's posted signs marking their boundaries well North of the lands of Smitty in dispute in this action. (Ron Lapp, direct at p. 589, lines 1-9, p. 590, lines 8-20)

212. Mr. Finger described his lands to Mr. Lapp when giving permission to hunt and told Mr. Lapp the Finger's property was all on the Rock Hill Road side of Rock Hill Ridge. (Ron Lapp direct at p. 590, lines 8-20)

213. Ron Lapp recalled the old road that split off from Rock Hill Road on the Northwest side of Rock Hill Ridge was called "King's Lane". (Ron Lapp direct at p.590, lines 1-3)

214. Richard Lapp, a 46 year old and a lifelong resident of Rock Hill Road, who lives 500 - 600 yards from the bounds of Smitty's Ranch, testified he began hunting on Smitty's Ranch with his family when he was 16 years old and has continued to do so his entire life. (Lapp cross at p. 527).

215. Richard Lapp recounted that he knew the lands in dispute to be part of Smitty's Ranch from his father, who had permission from Smitty to hunt there. (Richard Lapp direct at p. 554, lines 14-23)

216. Roger C. Lapp, a retired Ulster County Deputy Sheriff, testified that he hunted on Smitty's Ranch, now owned by Fink and Pardini, for fifty years.

217. Roger Lapp testified that he was very familiar with Rock Hill Road and Smitty's Ranch.

218. Roger Lapp testified that he began hunting the lands with his father fifty years earlier with Smitty's permission. Smitty described the lands in dispute as his lands and told Mr.

Lapp and his father that the lands in dispute were his up to the top of the ridge.

219. Roger Lapp testified as to the existence of the logging road that wound through the portion of the lands in dispute and originated on the west side of Clove Valley Road and described that although the road had always been there during Smitty's ownership it had become wider and better maintained during Fink and Pardini's ownership. (Roger Lapp, direct at p. 1161, lines 2-12)

220. As with Richard and Ron Lapp, Roger Lapp testified to encountering the members of Smitty's hunting club in their "bright orange jackets". (Ron Lapp direct at p. 1161, lines 18-26).

221. Roger Lapp testified that he knew the old road off of Rock Hill Road on the Northwest side of the ridge to be "King's Lane". (Roger Lapp, direct at p. 1162, lines 14-22)

222. Roger Lapp also testified to encounters he had with Smitty in his capacity as a Sheriff's Deputy when he would drive down Clove Valley Road in the vicinity of the portion of the Ranch lands in dispute and have to tell Smitty to have his guests move their cars because there were too many parked along the road in that area.

223. Richard Weaver, also a resident of rock Hill Road, testified that he had hunted on the lands in dispute his entire life, first with Smitty's permission and later with Mr. Fink and Ms. Pardini's permission.

224. He began hunting on the lands when he was just a child with his father and grandfather who owned lands on Rock Hill Ridge.

225. Mr. Weaver recounted that he and his family would walk along the old road known as King's Lane to the North end of Lot 1 and then walk with difficulty to the top of the Ridge,

where it became Smitty's land. Mr. Weaver testified "as soon as you were on top it was Smitty's" (Weaver direct at p. 543, lines 7-12).

226. Mr. Weaver specifically recalled the location of the Finger's posted signs as being close to King's Lane Road, not along the ridge or any part of the property in dispute.

227. As with the other hunters who testified as to hunting on the lands in dispute with Smitty's permission, the portion of Smitty's Ranch in dispute in this action was identified by all the hunters by the geographic landmarks, namely, the cliffs that leave off just East of the lands in dispute and the "hemlock knob" - a large rock area on the portion of Smitty's Ranch in dispute which was particularly suited to deer hunting.

228. The general location of the hemlock knob was identified by these witnesses on Defendants' Exhibit "K". The hemlock knob identified by the witnesses is within the lands in dispute as depicted on the survey map of Robert G. Cross, P.L.S.

229. David Olsen testified much like Keith Douglas and David Douglas, that he had been hunting on the lands of Mr. Fink and Ms. Pardini, including the portion of their lands in dispute, on an annual basis since they acquired the property in the late 1980's.

230. Each of these witnesses recounted that there was no roadway leading from the Northern portion of Lot 1 on the Rock Hill Road side of the ridge into the lands in dispute and that the only way to access the lands in dispute from the Rock Hill Road side of the ridge was to travel Southwest on King's Lane and then bushwhack to the top of the Ridge where Smitty's Ranch lands began.

231. Keith Douglas and David Douglas testified that they have hunted the former Smitty's Ranch lands since about 1990 with the permission of Mr. Fink and Ms. Pardini.

232. Both of these witnesses specifically identified the location of the "hemlock knob" within the portion of the ranch lands in dispute.

233. Both Keith and David Douglas testified that they used the logging road that passes through the lands in dispute to access their hunting location. They also used the other logging roads that wound through other Smitty's Ranch lands to access their hunting locations.

234. Keith and David Douglas testified to seeing stacked cut wood and tree stumps throughout the Ranch lands in dispute and observed the access roads leading to and through the portion of the Ranch in dispute to be clear of debris and well maintained at all times. In fact, they testified to being able to drive their vehicles on the roads and to seeing Mr. Fink's log skidder and vehicles along the roads on the land in dispute.

Logging on Smitty's Ranch

235. The portion of Smitty's Ranch in dispute was first logged on behalf of Smitty during the early 1980's.

236. Mark Heinitz testified that he worked as a logging crew supervisor for the company WL Bloom and Son and supervised that company's logging operation on Smitty's Ranch.

237. Mr. Heinitz testified being shown the bounds of the land by Smitty in connection with the logging operation.

238. Mr. Heinitz testified that the logging operation took place on Smitty's Ranch lands on the West side of Clove Valley Road and testified about the trail through the lands in dispute they used during the logging operation. He testified that the operation used skidders and was very visible from Clove Valley Road. Referring to the Robert G. Cross, P.L.S. survey map, Defendants' Exhibit "K", he identified the stone wall at the Southwest corner of the lands in

dispute as the point in the logging operation where they moved up the ridge through the lands in dispute during their logging operation.

239. Mr. Heinitz testified one of the men working on the crew actually lived at Smitty's in one of the trailers adjacent to the portion of the ranch lands in dispute.

240. The logging was conducted throughout Smitty's Ranch lands on the West side of Clove Valley Road, including the lands in dispute and Mr, Heinitz confirmed it was done under the instruction of Smitty.

241. Mr. Heinitz testified he returned to the property before the trial and observed the trails they used and stumps from the logging operation on the property in dispute. At no time did anyone object or claim the land was not Smitty's. (Heinitz, direct at p. 1012, lines 3-5)

242. Another major logging operation on the property in dispute was undertaken by Mr. Fink and Ms. Pardini in 1990.

243. Mr. Fink and Ms. Pardini own a business named "Wood Source" that practiced selective timber harvesting.

244. Their employee, David Olsen, worked on the logging operation in 1991 for Mr. Fink and Ms. Pardini.

245. The 1991 logging operation of the property in dispute encompassed hundreds of trees. The staging area for the operation was on the West side of Clove Valley Road, immediately adjacent to the property in dispute. (Olsen, direct at p. 1200, lines 16-22)

246. The logs were taken off the property South through the trails on the land in dispute created by Smitty and maintained by Mr. Fink and Ms. Pardini.

247. Several hunters, including the Lapps, Richard Weaver, the Douglas's and David

Schoonmaker, as well as Mr. Fink's sisters, Anita Gehrke and Toby Stover, witnessed Mr. Fink logging his property, witnessed the log skidder, the well used trail leading through the land in dispute, and observed Mr. Fink's pickup truck at the top of the trail as well.

248. Mr. Fink's sister, Toby Stover, observed Mr. Fink's log skidder and the stumps left by his tree cutting on the property in dispute, which stumps are depicted on Def. Ex. K. (Stover direct at p. 617, lines 1-4,, p. 616, lines 22-24, p. 615, lines 19-23). Ms. Stover, who has lived on Clove Valley Road since 1980, was a frequent visitor of Smitty's Ranch, first as a guest of Smitty's and later as a guest of Mr. Fink and Ms. Pardini. (Stover direct at p. 599, lines 21-24, p. 601, lines 7-16, p. 613, lines 1-15, p. 614, lines 10-16)

249. During her frequent visits as a guest of her brother and sister-in-law, Ms. Stover observed that the road leading through the lands in dispute depicted on Def. Ex. K had been widened and was better maintained than under Smitty's ownership. Ms. Stover frequently observed stacks of firewood and brush piled up along the side of the road evidencing Mr. Fink and Ms. Pardini's regular maintenance and upkeep. (Stover direct at p.614, lines 17-25).

250. Ms. Stover frequently heard her brother's chain saw coming from the direction of the land in dispute. (Stover cross at p. 656, line 5)

251. Mr. Fink was frequently heard and observed chain sawing trees on the portion of the lands in dispute. David Schoonmaker, whose family's property is in Lot 5 of the Nineteen Partners Tract, met Mr. Fink in the late 1980's or early 1990's while hunting deer. Mr Schoonmaker had hunted all of Smitty's lands with Smitty's permission for years. He heard a chain saw and encountered Mr. Fink and Mr. Olsen cutting trees with a log skidder going. Upon learning Mr. Fink was the new owner of Smitty's he asked for and received Mr. Fink's

permission to continue hunting on their land. (Schoonmaker direct at pp. 807-811, Def. Ex. CCC)

252. Keith Douglas, another logger from the area, met Mike Fink while he was logging the portion of his property in dispute. Mr. Douglas was friends with Mr. Fink's employee, David Olsen and had gone to see Mr. Olsen while he was working on that occasion.

253. Mr. Douglas and his brother David Douglas walked up the road through the lands in dispute to reach Mr. Olsen and found the road to be in excellent condition. He found Mr. Olsen pulling the tops off trees that had already been cut with the log skidder. The tops were used for firewood. Mr. Fink gave Mr. Douglas permission to hunt the property at that time and thereafter for the next twenty years. The property in dispute was Mr. Douglas' "mainstay" for hunting during rifle season and he hunted there with a bow as well. He always observed the road going through the property in dispute to be maintained and in good condition. (Keith Douglas direct at pp.562-569)

254. The logging road leading through the lands in dispute is very visible from Clove Valley Road. (David Douglas direct at pp.574-575). Like his brother, David Douglas, with the permission of Mr. Fink and Ms. Pardini, regularly hiked and hunted on their lands, particularly on the portion of their property in dispute, throughout the 1990's through 2005. (David Douglas direct at pp. 576- 579). He observed Mr. Fink continuing to cut standing dead trees and firewood on the portion of his property in dispute throughout the 1990's, after the 1990 logging operation had been cleaned up. (David Douglas direct at pp. 576- 579). Ron Lapp, Jr., another hunter, observed Mr. Fink on the portion of his lands in dispute cutting firewood. Mr. Fink's pickup truck was often observed parked on the road on the portion of his lands in dispute on these

occasions. (Ron Lapp, Jr. cross at pp. 594-597, Gehrke direct at p. 1000, lines 1-14)

255. Mr. Fink and Ms. Pardini continuously cleared the logging road leading up through the portion of their lands in dispute. Maintenance is continuously required to keep the road clear of downed branches, trees, and other storm debris. They have always maintained the road and their other woods roads by themselves. (Pardini direct at p. 1130, lines 5-14, p. 1131, lines 1-25, p. 1132, lines 1-35, p. 1133, lines 1-20, p. 1153, lines 1-4, p. 1058, lines 1-11, p. 1059, lines 1-4, Fink direct at p. 1058, lines 1-11, p. 1059, lines 1-14)

256. Mr. Fink and Ms. Pardini have continuously cut dead standing trees as well as downed branches, trees, and tree tops on the portion of their property in dispute for firewood. (Fink direct at p. 1361, lines 1-7, Pardini direct at p. 1060, lines 1-25, p. 1059, lines 1-25) Mr. Fink stacks the firewood he cuts along the logging road through the portion of the lands in dispute. He later loads the firewood into his pickup truck and drives it out onto his adjacent lands.

257. Mr. Fink and Ms. Pardini have never asked anyone's permission to timber harvest and cut firewood for sale and personal use, drive skidders and vehicles, take stone for sale and personal use, hike, allow hunters and visitors, etc. on the portion of their lands now in dispute since they knew it to be the land they acquired from Smitty and used it as such. (Fink direct at p.1135, lines 17-25, p. 1148, lines 21-23, p. 1149, lines 9-14, Pardini direct at p.1072, lines 1-25)

258. Mr. Fink and Ms. Pardini were given life memberships to Mohonk Preserve before Mohonk Preserve, Inc. claims to have acquired any interest in the lands in dispute. (Pardini direct at p. 1071, lines 18-24)

259. Plaintiff's rules and regulations prohibits guests from the use of any motorized vehicles and prohibit logging, tree cutting, taking stone, camp fires, and a host of other activities regularly engaged in by Ms. Pardini, Mr. Fink, and their many, many friends, relatives, and guests that have used the portion of their lands now in dispute continuously throughout Ms. Pardini and Mr. Fink's ownership.

260. The use of the lands in dispute by Ms. Pardini, Mr. Fink, and their many guests, relatives, and friends was open, notorious, exclusive, continuous and hostile. These acts of open, notorious, exclusive, continuous and hostile use and occupation were not done pursuant to the life memberships Ms. Pardini and Mr. Fink received years before Plaintiff alleges to have acquired title to the lands in dispute.

261. Plaintiff's surveyor, Norman Van Valkenburgh observed the logging and the logging trail at the time he prepared the survey upon which Plaintiff bases its claim. (Brooks direct at p. 142, lines 3-9)

262. The trail and logging operation are evidence of adverse occupation that should have been depicted on Mr. Van Valkenburgh's survey map in keeping with good and accepted land surveying practice. (Brooks direct at p.131, lines 15-24)

263. The son of Plaintiff's predecessor, Gary Finger, claimed that the logging on the property in dispute by Mr. Fink and his employee was on behalf of the Fingers.

264. This claim was impeached by Gary Finger's prior sworn testimony that the logging his family had done was conducted on the Rock Hill Road side of the Ridge. Robert Larsen, Plaintiff's ranger acknowledged that the logging on the land in dispute in the early 1990's was done by Mr. Fink.

265. The claim was further impeached by the rebuttal testimony of Randy Winne, who logged the Finger property as an employee of David Waruch's logging company and who testified that the logging of the Finger property occurred entirely on the Rock Hill Road side of the ridge and did not extend over the ridge to the property in dispute, which is on the Clove Valley Road side of the ridge.

266. Mr. Fink and Mr. Oslen also logged the lands of Finger on the Northern side of Rock Hill Ridge in 1989 pursuant to an agreement with them. The Fingers received a percentage of the proceeds and all the scale slips for the timber taken and sold. That logging operation was conducted entirely on the North side of Rock Hill Ridge. The Fingers agreed with Mr. Fink that their lands stopped at the top of the ridge and this was consistent with Mr. Fink's understanding that his lands bounded the Fingers at the top of the ridge as shown by the survey of Robert G, Cross, P.L.S.

267. There is no access trail or road by which to access the lands in dispute from the Finger's land on the North side of the ridge except by foot through brush and other growth. The only access to the lands in dispute is through the other lands of Mr. Fink and Ms. Pardini.

268. When Mr. Fink logged the Finger property on the North side of the ridge in 1989 he pulled the logs out through the lands of Finger onto Rock Hill Road.

269. When the Finger property on the North side of the ridge was logged by David Waruch the logs were likewise taken out to the North onto Rock Hill Road and then to Lewis Waruch's lands.

270. When Smitty and Mr. Fink logged their lands that are now in dispute in the 1980's and 1990's respectively, they accessed the site by using the roadways leading across their other

lands into the lands in dispute, which is the only means of access into the lands in dispute, save for bushwhacking through brush.

271. The logs taken out by Smitty's loggers and Mr. Fink and his employee were pulled out by log skidder on the road through the land in dispute in a Southerly direction, down the hill onto adjacent lands of Smitty's, now Fink and Pardini, and were staged adjacent to the lands in dispute along Clove Valley Road.

272. Peter Landau, an expert arborist, identified scars and scrape marks on the trees along the logging road through the lands in dispute that were consistent with damage from the trees pulled behind the skidder in a Southerly direction.

273. Over 250 stumps of logged trees on the property in dispute were identified by Robert G. Cross, P.L.S. and Mr. Landau. These are stumps of trees logged by Mr. Fink for his own use and benefit.

274. In addition to the logging operations conducted for timber harvesting, Mr. Fink continuously cut and removed dying trees and downed trees for firewood which he sold and which he used to heat his home on the Ranch property, which is heated entirely by wood.

Other Use of the Property in Dispute as a part of the larger Smitty's Ranch Property

275. During Smitty's ownership Smitty's Ranch was operated as a bar, guest house, and dude ranch, replete with outdoor recreational activities from horseback riding, hiking, hunting, camping, swimming and sunbathing, among others.

276. Different portions of the Ranch lands were ideal for different activities. For example, the Ranch lands on the East side of Clove Valley Road housed the bar, guest house,

stables, and a stunning waterfall with multiple swimming and sunbathing areas.

277. The lands on the West side of Clove Valley Road, including the lands in dispute, with their internal roadway system leading up to and along the top of Rock Hill Ridge offered beautiful vistas and were used by Smitty and guests of his Ranch for horseback riding, hiking, rock climbing, and camping, in addition to the extensive hunting conducted on the lands in dispute.

278. Smitty was often seen patrolling these lands, including the lands in dispute, on horseback with a rifle in his hand. (Smith direct at p.439, lines 1-25)

279. Toby Stover went horseback riding with Smitty along the road through the lands in dispute. As they went up the trail Smitty told her the land was his and he pointed out his bounds which included the lands in dispute. (Stover direct at p,604, line 5 - p. 605, line 7) She observed horse droppings and hoof prints evidencing the trail use on other occasions. Ms. Stover became friends with Smitty and accompanied him on trips throughout the property on occasions. Many of these occasions included trips through the property in dispute during the years 1976 - 1986. Smitty always identified the land in dispute as his land and patrolled it together with his other lands as such. (Stover direct at p. 604, lines 13-25, p. 607, lines 7-15)

280. During Smitty's ownership the campers, hikers, and hunters he permitted on the property were regularly seen. (Stover direct at pp. 600-602, Gerhke direct at p.991, lines 18-25, Dowd direct at p. 813, line 23, p. 814, lines 5-8 , Smith direct at p. 435, lines 14-20, p. 441, lines 22-24, Roger Lapp direct at p. 1160, lines 1-25, p. 1161, lines 2-22, Richard Lapp direct at p. 516, line 722, p. 519, lines 13-23, Ron Lapp Jr. direct at p, 521, lines 3-12, p. 586, lines 10-19, p. 587, lines 8-17, Keith Douglas direct at p. 565, lines 4-17, David Douglas direct at p, 576, lines

5-20, Schoonmaker direct at p. 808, lines 8-25, line 809, lines 10-12, Fink direct at p. 1109, lines 16-25, p. 1122, lines 7-23, p. 1126, lines 10-17, p. 1127, lines 1-6, Pardini direct at p. 1034, line 17). Garbage, fire rings, and camping equipment left behind by the campers, hikers and hunters was visible throughout the portion of the Smitty's Ranch now in dispute.

281. Smitty's Ranch would be overrun with guests during summer months. They were directed to park their cars in the field just feet from the South bounds of the lands in dispute and the guests were charged a fee to park there. (Stover direct at p. 600, lines 18-21, p. 601, line 18, p. 602, lines 18-24, Gerhke direct p. 992, lines 1-3, 14, Smith direct at p. 436, lines 16-24, p. 437, lines 5-26, Roger Lapp direct at p.1162, lines 1-12, Ron Lapp Jr. direct at p.586, lines 10-19, Fink direct at pp.1109, lines 16-25, p. 1110, lines 9-16, , Pardini direct at p. 1040 lines 15-25, p. 1041, lines 1-25). Smitty's friend, Vic, a disabled New York City policeman, watched the cars park from the porch of the bar building across the street and collected the money for Smitty.

282. When Mr. Fink and Ms. Pardini purchased the land from Smitty in 1987 they spent months with the aid of friends and family removing loads of garbage and debris from the property in dispute and other Ranch lands that were remnants of the campers, hikers, and other guests of Smitty's Ranch. . (Stover direct at p, 613, lines 17-22, Gerhke direct at p.998, lines 8-15, Dowd direct at p.817, lines 1-5, Fink direct at p.1126, lines 10-17, Pardini direct at p.1034 at line 17, p. 1057, lines 1-25, p. 1058, lines 1-25)

283. They found campfire rings, remnants of tents and beer cans with brand logos used in the 1970's and 1980's.

284. When Mr. Fink and Ms. Pardini purchased Smitty's Ranch from Smitty in 1987 Smitty showed them and described the bounds of the property to them. His description included

the lands in dispute.

285. Mr. Fink and Ms. Pardini had hosts of friends and family regularly hike, run, and camp throughout the Ranch lands, including the lands in dispute. (Pardini, direct at p. 1061, lines 24-25)

286. Mr. Fink and Ms. Pardini maintained and improved the woods road leading through the lands in dispute. Maintenance of this road was an ongoing project since woods roads need constant clearing to remove storm blow down and other debris.

287. The land in dispute as well as other Ranch lands took on a "park like" appearance as a result of the care and maintenance of the same by Mr. Fink and Ms. Pardini.

288. Mr. Fink and Ms. Pardini removed a great deal of stone from the land in dispute, some of which they sold and some of which they used in the renovation of the buildings on their lands. The stone was taken out by a dump truck which they drove into the lands in dispute on the road they maintain on the lands. (Pardini, direct at p. 1060, lines 17-25, p. 1061, lines 4-6)

289. Stone was sold to a person named Steve Law and to other contractors and masons. The remainder of the stone was used by Mr. Fink and Ms. Pardini in the restoration of their buildings on Ranch lands on the East side of Clove Valley Road. Ms. Pardini and Mr. Fink continue to take stone out from the lands in dispute for sale and for their personal use. (Pardini, direct at p. 1061, lines 4-11)

290. Mr. Fink and Ms. Pardini and their guests patrolled the lands in dispute as well as the remainder of the Ranch lands regularly and posted the Ranch lands all along Clove Valley Road including the portion of Clove Valley Road adjacent to the lands in dispute.

291. In the mid 1990's Karen Pardini observed survey tape on a portion of the lands in

dispute and learned the surveyor who placed the tape was Norman Van Valkenburgh, who was surveying for Plaintiff. She contacted him and asked why his survey tape was on her land. Mr. Van Valkenburgh apologized and Mr. Fink removed the tape that same day. It never appeared again.

292. In the early 1990's the Westerly bounds of the lands in dispute were further confirmed when Mr. Fink was preparing to log his land and gave Plaintiff an opportunity to confer and confirm the line. Mr. Fink and Bob Larsen together tied survey tape all along Pardini and Fink's Westerly bounds of the lands in dispute. The line so marked corroborated and completely agreed with Mr. Fink and Ms. Pardini's understanding of where the Westerly boundary of their property was as shown to them by Smitty and as shown on the survey map of Robert G. Cross, P.L.S.

293. At one point just prior to the sale of land from Finger to Plaintiff, Gloria Finger and her husband Bud approached Mr. Fink to ask if he would sell them a right-of-way across his lands to their lands.

294. Mr. Fink met with Gloria and Bud Finger and walked them into the lands in dispute along his road. Well before they reached the summit Mr. Fink explained to them that the Fingers' lands did not begin until the top of the ridge. The Fingers expressed that it was much too far for an easement to make practical sense and thanked Mr. Fink for his time.

295. Gloria Finger did not rebut this testimony.

296. Shortly after Mr. Fink had this meeting with the Fingers and showed them his bounds went to the top of the ridge the Fingers sold a deed with a description based on the Van Valkenburgh survey to Plaintiff. The proceeds were used to defray the costs of a lawsuit between

the Fingers and a neighbor on Rock Hill Road over a right of way.

297. Mr. McGregor forcibly removed Norman Van Valkenburgh and Hank Alicandri from the property in 2004 when he observed these two men enter onto the land in dispute. Mr. Fink charged the two with trespass in the Town of Rochester Court based on the incursion.

298. In summary, Mr. Fink and Ms. Pardini's use and occupation of the lands in dispute has been open, notorious, hostile, continuous, and exclusive as was that of their predecessor, Wilbur Smith.

Demarcation of the Boundaries of the Lands in Dispute by Natural Features, Use, and Other Acts

299. The lands in dispute in this action were commonly referred to in these proceedings as "Lot 1".

300. Until the litigations challenging their ownership arose Mr. Fink and Ms. Pardini had never heard these designations and they and many others knew the property simply as "Smitty's Ranch". (Fink direct at p.1131 at lines 3-12, Pardini direct at p. 1044, lines 1-13). The deed into Pardini and Fink describe the multiple parcels making up Smitty's Ranch by reference to ancient owners and adjoiners and in part by metes and bounds. The notion that 71+/- acres of the Ranch was a separate, distinct parcel was a foreign concept to Pardini and Fink who had always occupied that land as a part of their Ranch.

301. Smitty and his guests and Ms. Pardini and Mr. Fink claimed ownership of and occupied the entirety of the land in dispute as a part of Smitty's Ranch.

302. The property in dispute is adjoined entirely along the South and East by other Ranch lands. The Southern and Eastern bounds of the portion of the Ranch lands now in dispute are

internal lines of old patent tracts that have been under one ownership and have been owned and occupied as one large ranch property since 1940. There is no reason or requirement for the owner of a large property to post the internal boundary lines of the smaller parcels that came into one ownership to form a single larger ranch, farm, or lot.

303. Smitty, and later Ms. Pardini and Mr. Fink did however post the bounds of their lands that fronted on the West side of Clove Valley Road and their postings continued down to the point on the road adjacent with the stone wall marking the Southeast corner of the lands in dispute. (Def. Ex. K)

304. The Western line of the lands in dispute was marked by Plaintiff in the late 1980's to delineate the boundary between the lands in dispute and the lands that Plaintiff owned to the West. This was done years before Plaintiff alleges to have acquired any interest in the lands in dispute and their posting merely confirmed Mr. Fink's and Ms. Pardini's understanding that the Westerly bounds of there lands ran North from the stone wall at the Southwest corner of the lands in dispute to the top of the ridge.

305. The Northern bounds of the property were defined by the ridge that ran along the entire Northern bounds of Ms. Pardini and Mr. Fink's lands on the West side of Clove Valley Road and were defined by the roads that lead up to and along the ridge.

306. Plaintiff's attempts to argue that the survey by Robert G. Cross, P.L.S. showing a 17 +/- acre portion of the lands in dispute is an admission by Ms. Pardini and Mr. Fink that they do not own all of the lands in dispute is rejected. Mr. Cross and Mr. Fink and Ms. Pardini all explained that the preliminary map was created for settlement purposes only and reflected one settlement proposal made while the parties to this action were engaged in settlement negotiations.

(Fink direct at p. 1182, line 25 - p. 1183, line 8, p. 1195, lines 9-25, p. 1196, lines 1-15, Robert Cross direct at p. 697, lines 18-19)

CONCLUSIONS OF LAW

I. The Land Acquired by Plaintiff's Predecessor is Outside the Bounds of the Lands in Dispute.

Application of the well settled principals of deed construction and interpretation, the rules pertaining to ancient documents and the recitations contained therein, and the laws governing the assessment and collection of taxes in place at the time compel the conclusion that Plaintiff does not have record title to the lands in dispute in this action.

A. Lot 1 Was Subdivided into a Northern 30+/- Acre Parcel and a Southern 71+/- Acre Parcel by the 1841 Alliger to Curran Deed.

1. Rules of Construction

New York's Real Property Law provides that "[e]very instrument creating, transferring .... real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." New York's Real Property Law §240(3). In enforcing this proviso, the Third Department has made clear that "[i]f the intent of the parties can be discerned from the deed, then it must be construed and enforced without resort to extrinsic evidence *(See Wilshire Credit Corp. v. Ghostlaw, 300 A.D. 2d 971, 972, 753 N.Y.S. 2d 537, 539; see also Real Property Law §240 [3])*." Schrade v. CRDN Properties, Inc., 303 A.D. 2d 890 (3rd Dept. 2003)

The 1841 warranty deed from Elijah Alliger to John Curran included lands within the

Northern portion of Lots 1, 2, 3, 4, and 5 of the Nineteen Partners Tract. The deed, in pertinent part, calls for the boundary line to run "along the edge of the high rocks as they run southwesterly to a pine tree standing above Sanders Spring on the bounds of Joseph Depuy". The "edge of the high rocks" referred to in the 1841 deed runs through Lots 5,4,3, and partially through Lot 2, but does not continue through Lot 2 or into Lot 1.

It is clear that the parties to the deed intended, as stated, for the boundary line to follow the ridge line Southwesterly and continue across Lot 2 and Lot 1 to the bounds of Joseph Depuy as shown on the Survey Map of Robert G . Cross, P.L.S. The sequence of the calls in the phrase at issue are telling. The grantor first states that the boundary follows the "high rocks as they run" and follows this with the directional call to go "southwesterly" to the bounds of Joseph Depuy. Moreover, the "high rocks" that run through Lots 5,4,3, and into Lot 2 form a prominent ridge line known as "Rock Hill Ridge". Although the edge of the rocks peter out on Lot 2, the Rock Hill Ridge continues through Lot 2 and Lot 1 and bisects Lot 1 as shown on the survey Map of Robert G. Cross, P.L.S and on the map and topographic overlay by Robert James, L.S. The ridge was depicted as a shaded area bisecting Lots 5,4,3,2, and 1 on the original Nineteen Partners Tract Map. An old rock pile was found at this location on the bounds of Joseph Depuy which monumentation supported the survey of Robert G. Cross, P.L.S. and Robert James, L.S.

If one continues in a Southwesterly direction along the ridge line from the point in Lot 2 at which the cliffs peter out, the course will bring one across Lot 1 to the bounds of Joseph Depuy at virtually the same elevation as the cliffs in Lot 2. The description closes without the need to ignore the directional call to proceed "Southwesterly" or to add any additional directional calls, and the size of the parcel conforms to the stated acreage of 200+/- acres.

Plaintiff concedes that the boundary line in the 1841 Alliger to Curran deed follows the high rocks as they run (along Rock Hill Ridge) into Lot 2, and concedes when the high rocks break Southeast within Lot 2 the boundary line continues in a Southwesterly direction towards Lot 1. Plaintiff argues that instead of continuing on a Southwest bearing (along the actual ridge line) to the lands of Joseph Depuy, as stated in the deed, this Court should interpret the deed so that the boundary line makes an abrupt, uncalled for directional change at the easterly bounds of Lot 1 to proceed North and downhill for some 1100 hundred feet, away from the Ridge and the bounds of Joseph Depuy, and then to change direction again and head Southwesterly across Lot 1 at a location where there are no rocks, let alone high rocks.

Plaintiff's argument is convoluted and illogical. Plaintiff argued that the deed call for "along the high rocks as they run southwesterly" contains a conflict between a call for a natural monument, ie: "high rocks" and the directional call to go "southwesterly" and it is ignoring "to the bounds of Joseph Depuy" as called for in the deed. Plaintiff pointed to a general rule of land surveying that where a call for a natural monument is in conflict with a directional call, the call for the natural monument must be held over the directional call. Plaintiff argues that based on this general rule that the directional call for the boundary line to head southwesterly must yield to the call for the high rocks. This is incorrect. In fact, Plaintiff utterly ignores their own argument and depicts the boundary line as heading Southwest after the cliff ends to the bounds of Lot 1, then North, away from the ridge and the bounds of Joseph Depuy, not following any "high rocks as they run" and then heading Southwesterly across Lot 1 at a location where there are no rocks at all.

Plaintiff's survey expert conceded that if the 1841deed call to follow the high rocks was

to be held over the directional call, the description would never close or reach the bounds of Joseph Depuy. (Brooks, rebuttal cross at p. 1239, line 22 - p. 1240, line 23) There is no justification in this case to hold the call to follow the "high rocks as they run" over the directional call to continue "southwesterly" to the bounds of Joseph Depuy since the description cannot close if that is done. Plaintiff's argument is merely an effort to avoid the fact that the boundary line in the 1841 deed continues, after the high rocks break, in a southwesterly direction through Lot 2 and Lot 1, precisely where Defendants' expert surveyors have it located.

The 1841 deed call to continue "along the high rocks as they run southwesterly" to the bounds of Joseph Depuy has been shown on several surveys of adjoining lands located outside the bounds of Lot 1. These surveys date back to the late 1980's, long before this litigation was commenced and include surveys by Plaintiff's expert witness, Richard Brooks, L.S. and surveys by his former employee, Norman Van Valkenburgh, L.S., the surveyor who prepared the map upon which Plaintiff basis its claim in this case. Looking at each of these surveys, in the critical area in Lot 2, where the high rocks stop running southwesterly, each surveyor honored the deed call for the boundary to continue southwesterly, just as the deed indicates. Several of the surveys include shading continuing the ridge line into Lot 1 in the southwesterly direction called for in the deed. Every surveyor honored the 1841 deed call to continue Southwesterly after the high rocks ceased running in that direction. The fact that the boundaries shown on the Brandt survey did not bisect Lot 1 is not a rejection of the 1841 Alliger to Curran description as shown by Cross, but rather is an acknowledgment of the fact that the call to continue Southwesterly towards the bounds of Joseph Depuy after the high rocks terminated was held by each of these surveyors. All survey experts agree you must come off the high rocks called for in the 1841

deed where they break South in Lot 2. Every surveyor continued their line Southwest from that point as called for in the deed. The only calls remaining in the deed are direction and adjoiner and here there is no conflict.

The specific calls and distances in the 1841 deed must be honored since parole evidence "may not be used to vary a boundary description or a call set forth in a deed (*see, Cordua v. Guggenheim, 274 N.Y. 51, 57, 58, 8 N.E. 2d 274; 1 N.Y. Jur. 2d, Adjoining Land Owners, §155, at 649; 12 Am. Jur. 2d, Boundaries, §104, at 638).*" Schweitzer v. Heppner, 212 A.D. 2d 835 at 838 (3rd Dept. 1995).

The 1841 Alliger to Curran deed is highly specific and in each instance in the deed when a direction is changed or when a bounding owner is reached, the deed so states. Under Plaintiff's theory this Court would have to accept that the notion that when the parties to this detailed deed stated the line should run "along the high rocks as they run southwesterly" to the bounds of Joseph Depuy what they really meant was the line should continue "along the high rocks as they run southwesterly" and then, when the rocks end, to continue southwesterly until the east bounds of Lot 1, then North along the bounds of Lot 1 for some 1100 feet and then Southwesterly across Lot 1 to the bounds of Joseph Depuy at a location where there are no rocks at all. There is no basis to conclude that the parties intended the call to be interpreted in such a fashion, which, given the topography of the land, would be counterintuitive.

Plaintiff's title expert argues that the 1841 Alliger to Curran deed should not be interpreted to continue Southwesterly from the end of the high rocks and across Lot 1 as shown on the survey map of Robert G. Cross, P.L.S. because there is no deed of record into Elijah Alliger for that particular portion of the 200 acre parcel. This Court gives little weight to the

contention that some defect in the deed should be found based on the fact that there is no deed of record into Elijah Alliger for that portion of Lot 1. This Court credits the testimony of Arthur Freer and Christopher McGregor establishing that Lots 1-5 of the Nineteen Partners Tract all had gaps in their chain of title in the early to mid 1800's, as was common for the era. This Court also credits the testimony of Mr. Freer and Christopher McGregor, both of whom testified that there were gaps in the chain of title into Elijah Alliger for several other portions of the 200 +/- acre parcel he conveyed to John Curran. This Court credits the testimony of Robert G. Cross, P.L.S., Robert James, P.L.S. and Robert Cross, Jr., all of whom pointed to subsequent conveyances of the Curran farm and other filed documents of record and were able to show based upon these record conveyances that the *26+/-* acres of Lot 1 described in the 1841 Alliger to Curran deed were the same lands later held hostilely by "Osterhoudt" and then conveyed by Osterhoudt to Coddington in 1874.

These deeds are prima facie evidence of these facts. "Recitals in deeds are deemed to be effective and binding upon the parties thereto upon the principal of estoppel. Devlin on Deeds (2d Ed. §§995, 997; Tiedman on Real Property (3d Ed.) §§511, 513; Demeyer v. Legg, 18 Barb. 14, 20. It is also true that an ancient deed in a chain of title is admissible in evidence, even against a stranger to the title, without proof of contemporaneous possession in the grantor, when the deed is of so remote a period in the past that living persons cannot be found who can testify to actual possession. Young v. Shulenberg, 165 N.Y. 385, 388) In Re Marsh, 152 Misc. 2d 454 (Kings Co. 1954). The description of the Curran farm created in the 1841 deed from Alliger to Curran, the subsequent deeds reciting the hostile claims of Osterhoudt, the locations of the rights-of-way, the creditor's petition describing King's Lane, and the countless recitations calling for

William Chase as the southerly adjoiner in Lot 1 all confirm that the lands conveyed by Osterhoudt to Coddington in 1874 were the 26+/- acres in the Northern end of Lot 1, and were the same lands described in the tax assessments and sale and are not located within the bounds of the lands in dispute.

2. Defendants' proof established David H.B. Osterhoudt's source of title to the 26+/- acres in the North end of Lot 1 was John Curran.

Defendants' expert surveyors and title expert testified and opined that the lands conveyed by Osterhoudt to Coddington in the 1874 warranty deed were a portion of the 55 acres carved out of the 200 acre parcel conveyed by Elijah Alliger to John Curran in 1841. There is no recorded conveyance from John Curran to Osterhoudt for the 55 acres, but the absence of a recorded instrument is overcome in the present case by the presumption of a lost grant. The doctrine of the presumption of a lost grant applies where there is proof of adverse possession and recitals in deeds or other instruments suggest the possibility of a conveyance, and such recitals are "accompanied by proof of actual or constructive possession characterized by claims and acts of ownership during the period required by law.'" Kellum v. Corr, 209 N. Y. 486, 495, 496, 103 N. E. 701, 703. The presumption of a lost grant "operates where there is proof of adverse possession and the circumstances indicate a possibility of a grant" (*People v. Helinski,* 222 A.D.2d 788, 790, 634 N.Y.S.2d 837; *see,* 4 Warren's Weed, New York Real Property, Presumptions, 1.07 [4th ed])." Lobdell v Smith, 261 AD2d 675, 676 (3d Dept 1999).

These elements are both present in this case. As noted in the findings of fact, John Curran acquired the 200 acres in 1841 and he died in 1843. The property was acquired by the

mortgagee, Richard Gilbert in 1847 and when Gilbert sold the property a few years later to Robert Carpenter he acknowledged that a "___ Osterhoudt" asserted a claim to a portion of the lands that left the boundary of the lands with Osterhoudt unsettled. When David H.B. Osterhoudt sold 26+/- acres of the 55+/- acre exception, he recited that he lived on the land.

II. The 1881 Tax Deed to Martin Coddington Was Invalid and Did Not Create a New Chain of Title or Otherwise Extinguish the Interest of William Chase in the Lands in Dispute.

The genesis of the Mohonk's title was a tax sale that did not relate to the lands in dispute and, in any event did not extinguish the interest of Pardini and Fink's predecessor in title to the lands in dispute since the acquisition of the tax deed by Martin Coddington was a redemption by owner, not a sale.

(A) The 1879 Tax Sale was invalid and the 1881 Tax Deed was void.

A valid tax deed conveys a new and complete chain of title. Melahn v. Hearn, 60 N.Y. 2d 944 (1983). An invalid tax deed conveys nothing. A tax deed can be rendered invalid to convey title for several reasons, including, *inter alia,* inadequate descriptions, double assessments, and redemption of the property by the owner. *See, e.g.* Goff v. Shultis, 26 N.Y. 2d 240; Joslyn v. Rockwell, 128 N.Y. 334; Thurlow v. Dunwell, 100 A.D. 2d 511 (2nd Dept. 1984); Satterlee v. Senter, 60 Misc. 2d 928 (Rensselaer Co. 1969).

(1) The assessment and sale procedure from 1876-1881.

The procedure for assessing, levying and collecting taxes on the lands in New York State

during the years 1876 - 1879 was set forth in New York's Sessions Laws of 1855 at Chapter 427, entitled "An Act in Relation to the Collection of Taxes on Lands of Non-Residents, and to Provide for the Sale of Such Lands for Unpaid Taxes." Under Title I, §5 of that Act, when the taxes on "any farm or lot of land shall be returned as unpaid, in consequence of such premises becoming vacant by the removal of the occupant, before the collection of the tax imposed thereon..., the supervisor of the town in which such land was assessed, shall add a description thereof to the assessment roll of the next year in the part appropriated to taxes on the lands of non-residents, and shall charge the same with the uncollected tax of the preceding year; and the same proceedings shall be had thereon, in all respects as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so added." NY Sess. 1855, Title I, §5 at p. 782.

The tax assessment that gave rise to the tax sale first appeared on the tax rolls in 1876. It was an assessment of non-resident lands against unknown owners. The amount of taxes assessed was $1.72. In August of 1874, David H.B. Osterhoudt conveyed the land described in the 1876 assessment for the King's Lane lot to Martin Coddington, one parcel of which was occupied by Osterhoudt at the time the deed was given. As noted, Coddington did not record this deed for several years. The tax assessment rolls were completed on July 1st of each year, and thus transfer of ownership that took place after July 1st, 1874 would not alter the assessment rolls until the following year, 1875. In addition, where the tax on a resident's land was not paid by reason of the occupant vacating the property, it could not appear on the assessment rolls as non-resident lands for an additional year, 1876. The timing of the first appearance of the non-resident, unknown owner assessment on the Town of Rochester assessment rolls is not a coincidence, and

it is clear the assessment is for the lands conveyed by Osterhoudt to Coddington in 1874 and nothing more. Therefore, all that could have been conveyed at the tax sale in 1879 was whatever title Martin Coddington held under the 1874 deed from Osterhoudt. This fact is further confirmed by the notation contained in the 1880 assessment roll, which cancels the assessment of the lands in the non-resident portion of the roll as "error - assessed to Martin Coddington in resident lands".

At all times prior to the 1881 tax sale deed, the residents of the Town of Rochester were assessed by name. The assessment rolls did not set forth the bounds or bounding owners of the property assessed to residents of the town. The assessment rolls confirm these residents paid the taxes assessed against them. Plaintiff, through its title expert, Terence Carle, could offer no evidence to support the conclusion that the lands in dispute were not being assessed against residents of the Town. Defendants' title expert, Arthur Freer, testified to the fact that during the years 1876 through 1881 David H,B. Osterhoudt, Martin Coddington, William Chase, and several children of Moses Depuy were assessed by name as residents of the Town of Rochester and paid their assessments. Based on all of the evidence Mr. Freer opined the 1876 - 1879 assessment of the King's Lane Lot was not an assessment against the lands in dispute. This Court concludes the 1881 tax deed to Martin Coddington was not merely voidable, but was void, because it was a redemption by the owner. Furthermore, the assessment did not affect the lands in dispute in this case.

"There is a vast difference between a tax deed voidable for irregularity in the proceedings and a tax deed void because the proceedings were a nullity due to prior payment of the tax. A Statute of Limitations ordinarily does not start to run until the right sought to be barred has accrued,**624 Lawrence v. Trustees of Leake & Watts Orphan House, 2 Denio 577, or in a situation like the present, when the party has a right to apply to the proper tribunal for relief, Halsted v. Silberstein, 196 N.Y. 1, 89 N.E. 443; 53 C.J.S., Limitations of Actions, s 4, par. g.

[2][3][4][5] Here the right to sell the plaintiff's property in foreclosure proceedings for nonpayment of the taxes never existed. Delinquency in payment of the taxes is a condition precedent to the commencement of such a proceeding and when paid, the right to foreclose for nonpayment ceases. Joslyn v. Rockwell, 128 N.Y. 334, 28 N.E. 604. The plaintiff was not made a party to such wrongfully taken proceeding and may not now be penalized for failing to ***31** assert his true ownership within six years from the recording of the void tax deed. Such recording was a nullity and did not set the statute running at all. People v. Inman, 197 N.Y. 200, 90 N.E. 438. The holding in Bryan v. McGurk, 200 N.Y. 332, 93 N.E. 989, relied on in the Appellate Division, as we read it, was wrongly applied when they held that the limitation of section 53 related to void deeds. A Statute of Limitations is one of repose designed to put an end to stale claims and was never intended to compel resort to legal remedies by one who is in complete enjoyment of all he claims, Cooley on Constitutional Limitations, p. 366, nor may it be used to transfer property from the true owner to a stranger simply because the void tax deed was not challenged within six years from the date of recording. Cromwell v. MacLean, 123 N.Y. 474, 25 N.E. 932. Courts in sister States have applied the same principle, Campbell v. City of Plymouth, 293 Mich. 84, 291 N.W. 231; Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399, which is reflected by leading text writers. 3 Cooley on Taxation (4th ed.), s 1382; Blackwell on Tax Titles (5th ed.), s 155, and Burroughs on Taxation, p. 301.
[6] The logic of such a view is inescapably correct, for otherwise the recording of the deed resulting from such a proceeding would transform the owner's absolute title in fee simple into a right of action only, the exercise of which is subject to time limitation. The tax deeds constituted a cloud on plaintiff's title which should be removed. When void tax deeds are attempted to be made prima facie evidence of the regularity of the proceedings, equity will interfere to permit removal as a cloud on title, Rich v. Braxton, 158 U.S. 375, 15 S.Ct. 1006, 39 L.Ed. 1022; Clark v. Davenport, 95 N.Y. 477; Trumbull v. Palmer, 104 App.Div. 51, 93 N.Y.S. 349, which right may be invoked by the owner in possession at any time as 'such a right is never barred by the statute of limitations. It is a continuing right which exists as long as there is an occasion for its exercise.' Ford v. Clendenin, 215 N.Y. 10, 16, 109 N.E. 124, 126.
Nonpayment being of the essence for the invoking of tax sale proceedings, no one can quarrel with the rationale of the Kantor case, supra, but as we have said, there is a difference between giving effect to the presumption created by section 53 to a tax deed voidable for failure to comply with mandatory procedural requirements in a properly initiated proceeding, cf. Seafire case, supra, and a tax deed that is wholly void because the right to initiate the proceeding never existed." Cameron Estates, Inc. v. Deering, 123 N.E. 2d 621 (1954).

Plaintiff argues that the prior record interest in the land in dispute that appears in the Pardini and Fink chain of title from 1855 was extinguished by a tax sale that occurred in 1879 and the subsequent tax deed issued to Martin Coddington in 1881. However, the 1881 tax deed did not establish a valid chain of title to the lands in dispute for several reasons. First, the

assessment upon which the tax sale deed was based was a void, invalid assessment, by the tax assessor's own admission. The undisputed proof adduced at trial is that the lands described in the tax sale arose from assessments between 1876 and 1878 as "non-resident lands" assessed against "owners not known". This is fatal to Mohonk's claim. During the years of these "non-resident" assessments against an "owner not known" the record holder of an interest in the lands in dispute, William Chase, was a taxed resident of the Town of Rochester, as was David H.B. Osterhoudt, who recited that he lived on the Northernmost portion of the property and was also a taxed resident of the Town of Rochester. The assessment rolls received in evidence demonstrate that William Chase, David H.B. Osterhoudt and Martin Coddington paid all assessments against them during the relevant years. Under the real property tax laws in existence at the time, property could be assessed either against the owner or the occupant. See Tax Law of 1855, Ch. 427 §68. The assessment against these lands as "non-resident" and "owner not known"was either a duplicate assessment against the resident owner or owners or void ab initio and "tantamount to no assessment at all." Union & New Haven Trust Company v. New York, 26 Misc. 2d 861 (Ulster Co. Sup. Ct. 1960). See also, People ex rel. Boenig v. Hegeman, 220 N.Y. 118, 115 N.E. 447; Joslyn v. Rockwell, 128 N.Y. 334, 28 N.E. 604; People ex rel. Barnard v. Wemple, 117 N.Y. 77, 22 N.E. 761; Clark v. Kirkland, 133 App.Div. 826, 118 N.Y.S. 315,affirmed 202 N.Y. 573, 96 N.E. 1112; Hagner v. Hall, 10 App.Div. 581, 42 N.Y.S. 63,affirmed 159 N.Y. 552, 54 N.E. 1092; People v. Durey, 126 Misc. 642, 214 N.Y.S. 418; People v. Faxon, 111 Misc. 699, 182 N.Y.S. 242.

> "When void tax deeds are attempted to be made prima facie evidence of the regularity of the proceedings, equity will interfere to permit removal as a cloud on title, Rich v. Braxton, 158 U.S. 375, 15 S.Ct. 1006, 39 L.Ed. 1022; Clark v. Davenport, 95 N.Y. 477; Trumbull v. Palmer, 104 App.Div. 51, 93 N.Y.S. 349,

> which right may be invoked by the owner in possession at any time as 'such a right is never barred by the Statute of Limitations. It is a continuing right which exists as long as there is an occasion for its exercise." 308 N.Y. at page 31, 123 N.E.2d at page 624; see, also, Gifford v. Whittemore, 4 A.D.2d 379, 385, 165 N.Y.S.2d 201, 207, motion for reargument denied 4 A.D.2d 843, 168 N.Y.S.2d 928; Ford v. Clendenin, 215 N.Y. 10, 16, 109 N.E. 124, 126; Greenberg v. Schwartz, 273 App.Div. 814, 76 N.Y.S.2d 95."

Union & New Haven Trust Company v. New York, 26 Misc. 2d 861 (Ulster Co. Sup. Ct. 1960). That the assessment was either invalid or duplicate or both is only confirmed by the notations in the 1880 assessment rolls where the assessor noted that the non-resident assessment was "Error" and that the lands were "taxed in resident lands to Martin Coddington".

Second, for a tax deed to extinguish all prior claims and form a new chain of title it must not only be premised upon a valid assessment, the tax deed must also be the product of a bona fide tax sale purchaser, not a redemption by the owner. The tax deed at issue in this case purports to convey a parcel described by adjoiners. While Mohonk's title expert vacillated when pressed as to explain whether the 1876-1879 assessments described the same lands as were described in the 1874 deed from Osterhoudt to Coddington, this Court agrees with Pardini and Fink's title and survey experts that the assessment and later tax deed describe the same lands as were described in the 1874 deed from Osterhoudt to Martin Coddington. The record further establishes that Martin Coddington recorded his deed in 1879, prior to the issuance of the tax sale deed in 1881, and that Martin Coddington was the tax sale purchaser. Under the Tax Laws in existence at the time, any parcel sold at tax sale was subject to a mandatory two year redemption period following the tax sale wherein the owner could redeem the property. See Tax Law of 1855, Ch. 427 §68. The Tax Law went on to provide that the tax sale purchaser had to pay all outstanding taxes at the time of the tax sale purchase. Id. Martin Coddington's act of paying the

taxes at the time of the tax sale was therefore a redemption by the owner of the property, not a purchase by a bona fide purchaser and thus did not create a new chain of title for the property described therein, notwithstanding that the property described in the tax sale deed described property north of the lands in dispute in this case. In any event the tax deed could not give more land to Martin Coddington that what was conveyed to him by David H.B. Osterhoudt in 1874. Title acquired by tax deed is no better than the title of the person who allegedly lost the title for nonpayment of taxes." O'Brien v. Town of Huntington, 66 A.D.3d 160, 167, 884 N.Y.S.2d 446, 451 (2009) leave to appeal dismissed, 14 N.Y.3d 935, 931 N.E.2d 541 (2010).

III. The 1855 Deed from Stillwell to Harp Was a Valid Conveyance of an Interest in the Lands in Dispute That Was Never Conveyed Out of Their Chain of Title and As Such Defendants Established Superior Record Title to the Lands in Dispute by A Preponderance of Evidence.

Defendants acquired a valid interest in the lands in dispute by virtue of the 1855 warranty deed from Catherine Stillwell to Henry Harp, which interest was never conveyed out of Defendants' chain of title and thus remained in their chain from 1855 through the present. As such, Defendants' record interest in the lands in dispute entered their chain 26 years prior to the 1881 tax sale deed by which Plaintiff's assert title. While there is no recorded deed from the heirs of Moses Depuy into Defendants' predecessor, Catherine Stillwell, there is a preponderance of evidence that the interest conveyed by Stillwell was valid.

The 1855 deed from Stillwell to Harp is an ancient deed, and is admissible in evidence even against a stranger to the title. Young v. Shulenberg, 165, N.Y. 385 (1901). The deed itself

is a warranty deed and contains the representation that Stillwell is in full, peaceable possession of the premises at the time of the conveyance. The evidence at trial established that Catherine Stillwell had other real estate transactions with the heirs of Moses Depuy and it also established that the subsequent owners including William Chase, Smitty, and Ms. Pardini and Mr. Fink, remained in physical possession of the land under the Stillwell deed. Schemerhorn v. Negus, 2 Hill, 335 (1842). The ownership and possession of the land in dispute by Defendants' predecessors in title was acknowledged repeatedly by Plaintiff's predecessors, who identified William Chase as their bounding owner. The calls in Plaintiff's chain of title for William Chase as a bounding owner are admissions against Plaintiff's claim of ownership of the land in dispute.

The inability of Mohonk's title expert to offer any evidence in support of his opinion that the lands described in the 1874 deed or the 1881 deed related to the interests of the heirs of Moses Depuy was fatal inasmuch as it is based on a paper title, not possession. The Second Department noted in a similar case:

"[s]uperior title claim cannot be proven merely by pointing to weaknesses in the opposing party's title (*see* *Town of N. Hempstead v. Bonner*, 77 A.D.2d 567, 429 N.Y.S.2d 739). Here, the defendants met their burden by submitting proof of superior title via the colonial land grant patents. Therefore, in order for the plaintiffs to be successful in this action, they had the burden of proving title which was superior to the sovereign title asserted by the defendants, as well as of proving the location of the parcels with common certainty (*see* RPAPL 1515[2]). The plaintiffs failed to meet this burden.

Plaintiff's experts did not trace title back to the sovereign source or the Board of Trustees. Instead, the plaintiffs' titles are based upon deeds from the nineteenth century. The plaintiffs argue that it was not necessary for them to go back to colonial times in order to prove superior title. However, the plaintiffs' argument in this regard, and their concomitant claims to the property based upon nineteenth-century documents, would only be successful if the defendants had been unable to carry their burden as to sovereign title (*cf.* *LaSala v. Terstiege*, 276 A.D.2d at 530, 713 N.Y.S.2d 767)"." O'Brien v. Town of Huntington –N.Y.S. 3d – (2nd Dept, 2009).

IV. Karen Pardini and Michael Fink established, by clear and convincing evidence, their claim of title to the lands in dispute by adverse possession.

Ms. Pardini and Mr. Fink established, by clear and convincing evidence, that they also acquired title to the parcel in dispute by adverse possession. Adverse possession is established by showing possession of a parcel "(1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for 10 years (*see,* RPAPL 511; *Brand v. Prince,* 35 N.Y.2d 634, 636, 364 N.Y.S.2d 826, 324 N.E.2d 314; *Armour v. Marino,* 140 A.D.2d 752, 753, 527 N.Y.S.2d 632; *see also, Castle Assocs. v. Schwartz,* 63 A.D.2d 481, 487, 407 N.Y.S.2d 717)" Woodrow v. Sisson, 154 A.D. 2d 829 (3rd Dept. 1989). A party occupies land under a claim of right even where the party's deed does not explicitly describe the lands, but the party relies on oral descriptions of the bounds and occupies and possesses the lands on that basis. Woodrow v. Sisson, 154 A.D. 2d 829 (3rd Dept. 1989). As noted by the Third Department "Plaintiffs believed they owned the parcel in question and claimed and maintained it as their own even though it was not included in the description in their deed. Moreover, in view of defendants' failure to present any credible evidence that plaintiffs did not claim the parcel as their own, plaintiffs' claim of right was not required to be a valid or rightful claim under plaintiffs' deed (*see,* 2 NY Jur2d, Adverse Possession, § 20, at 327-328)." Id.

Pardini and Fink offered clear and convincing evidence in the form of witness testimony and photographs to establish that they and their predecessor had entered into and occupied the 71+/- acres under their deed and they exclusively used, occupied, and maintained it for in excess of 40 years as part of a single farm or lot commonly referred to as "Smitty's Ranch". The use and occupation testimony ranged from neighboring landowners who hunted, hiked, and camped

on the land as guests of Smitty's since the early 1970's and who made regular observation of the vast numbers of guests Smitty had on the property in dispute and elsewhere. The entire property in dispute was extensively and continuously logged for timber and firewood both for sale and for use by the occupants, Pardini and Fink. Received in evidence were photographs depicting a mobile home in the 1970's and 1980's immediately adjacent to the property in dispute, patrons immediately across the street from the property in dispute, and photographs and surveys showing the only means of vehicular access to the property in dispute ran through other lands of Smitty's Ranch. By contrast, scant testimony was offered by Mohonk as to any presence on the property prior to their acquiring a deed in 1994, and the limited testimony of their predecessor in title that logging was conducted on the property, which was flatly contradicted by Pardini and Fink who called the actual logger, Randy Winne, who confirmed that he never logged any of the property in dispute.

The Third Department held in an analogous case with similar facts that adverse possession is established under these circumstances. Beddoe v. Avery, 145 A.D. 2d 818 (3rd Dept. 1988). In reaching its conclusion the Third Department observed:

> "the evidence is that plaintiffs alone cared for and improved the disputed property, believing it to be their own. Beddoe testified that he ejected four adults who were fishing from the dock between the boathouse and the land in question and that on another occasion defendant asked him for permission to allow his children and their guests to use the dock and beach in issue. Plaintiffs' daughter testified that she had never seen defendant's children use the disputed wedge of property. Defendant himself testified that the only route he used to the waterfront was the right-of-way road. Thus, plaintiffs' possession was not merely inconsistent or hostile to the rights of defendant, but also exclusive of any possession by defendant. That defendant may have crossed the tract in the course of hunting or ice fishing, as he avers, is not enough to undermine plaintiffs' clear dominion over the property, especially in light of the evidence that defendant was unfamiliar with the location of his southerly lot line and believed the land he had purchased was north of the access right-of-way."

Beddoe v. Avery, 145 A.D. 2d 818 at 819 (3rd Dept. 1988). See also, Shawangunk Conservancy v. Pardini and Fink, (3rd Dept. 2003);

Pardini and Fink also offered detailed proof as to the continued and extensive use of all of the lands in dispute as being commonly known and used as Smitty's Ranch from the 1950's through their purchase in 1987, and continuously occupied, logged, and cultivated at all times thereafter. It has been long held that parcels of land used as a continuous tract are considered a single lot, and that occupancy of a portion of that lot should be deemed occupancy of the whole lot for purposes of adverse possession. Northport Real Estate and Improvement Co. v. Hendrickson, 139 N.Y. 440 190 (1893). The Court of Appeals set forth a long established criteria for a known farm or lot in holding

> Suppose a farmer buys a lot of one hundred acres for a farm and subsequently adds to his farm one hundred acres by purchases from adjoining lots, and then for long years holds, occupies and uses the two hundred acres as one farm; and suppose further that it is conveyed from time to time as one farm, describing it as such, can it be doubted that, within the meaning of those sections, it is to be treated as a known farm and single lot, so that the actual possession of a part under a deed of the whole will give the claimant the constructive possession of the whole? In the case supposed, the farm has ceased to be divided into lots, and lot divisions no longer exist ... we are satisfied that the whole tract described in the deeds constituting the defendant's chain of title is a single lot. Northport Real Estate and Improvement Co. v. Hendrickson, 139 N.Y. 440, 444-445 (1893).

The use of the wooded areas for recreational purposes as well as for the improvement and upkeep of the parcel as a whole were "with or subservient to that actually possessed, and have some necessary connection therewith." Thompson v. Burhans, 79 N.Y. 93 at 100 (1879).

V. Pardini and Fink are entitled to a negative inference against Mohonk for its failure to call its land surveyor, Norman Van Valkenburgh, who performed the survey of the lands in dispute and the adjoining lands, and who was present in Court throughout the trial.

The Court concludes that Plaintiff failed to meet its burden of establishing, by a preponderance of the evidence, superior record title or title by adverse possession of the lands in dispute. The Court further concludes that Plaintiff failed to rebut the prima facie showing made by Pardini and Fink of superior record title and title by adverse possession to the portion of Smitty's Ranch lands in dispute in this case.

On the issue of record title, the opinion of Plaintiff's title expert was dependent upon two assumptions: (1) That the calls in the deeds and tax assessments for William Chase as a Southerly adjoiner did not refer to William Chase's ownership in Lot 1 and (2) That the lands owned by John I. Davis were located on the Southeast side of Rock Hill Ridge, adjacent to the lands in dispute in this case. The survey witness called by Plaintiff, Richard Brooks, L.S., did not offer any opinion testimony during his direct examination as to the location of lands owned by John I. Davis, the easterly adjoiner identified in the deeds and assessment rolls Plaintiff relied upon as its source of title. This omission was discrediting since the lands in dispute were described entirely by adjoiner description, meaning the location of the lands in dispute could only be determined by locating the lands and bounds of the adjoiners called for. During cross-examination by defense counsel Mr. Brooks conceded that John I. Davis' lands were located entirely on the Northwest side of Rock Hill Ridge, contrary to the assertion of Plaintiff's title expert.

Mr. Brooks further conceded during cross-examination that he had not performed the

survey upon which he was offering his opinions and that he was relying almost entirely upon the 1994 survey by his former employee, Norman Van Valkenburgh, and upon Mr. VanValkenburgh's field notes, research, and reports. Mr. Van Valkenburgh was present in court during each day of the trial and assisted Plaintiff's counsel in an advisory capacity throughout the trial. Given the lack of any survey testimony as to the location of the lands of William Chase, the Southerly adjoiner called for in the deeds and assessments relied upon by Plaintiff as its source of title, and as to the location of the lands of John I. Davis, the easterly adjoiner called for in the deeds and assessments relied upon by Plaintiff as its source of title, Plaintiff's decision not to call the surveyor who actually did the deed and field research and survey upon which Plaintiff claimed ownership of the lands in dispute warrants a negative inference.

"A party is entitled to such a charge where an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under control of and available to that party (*see, Smith v. Lebanon Valley Auto Racing*, 194 A.D.2d 946, 949, 598 N.Y.S.2d 858; *Leven v. Tallis Dept. Store*, 178 A.D.2d 466, 577 N.Y.S.2d 132)." Savage v. Thomas Shae Funeral Home, 212 A.D. 2d 875 at 876 (3rd Dept. 1995).

It cannot be argued that Mr. VanValkenburgh was not within Plaintiff's control, he was present in court each day during the trial and actively aiding Plaintiff's counsel throughout the trial. His testimony would not have been cumulative since Plaintiff did not offer any other survey expert to opine as to the locations of the lands and bounds of the adjoiners. The decision to call Mr. Brooks to provide opinions and not to call Mr. Van Valkenburgh, who actually performed the survey when the adjoiner locations were a central, material issue to the case, gives rise to a

negative inference that his testimony would not have been helpful to Plaintiff.

The negative missing witness inference is particularly appropriate where there is a sharp dispute regarding a particular fact or event. Jackson v. County of Sullivan, 232 A.D. 2d 954 (3rd Dept. 1996). In affirming the trial court's missing witness instruction in the *Jackson* case, the Third Department noted:

> "A party is entitled to a missing witness charge when an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party (*see, Savage v. Thomas J. Shea Funeral Home*, 212 A.D.2d 875, 876, 622 N.Y.S.2d 363; *Smith v. Lebanon Val. Auto Racing*, 194 A.D.2d 946, 949, 598 N.Y.S.2d 858). Here, there is no dispute that plaintiff's cousin was available, as a relative is generally considered under the control of the party (*see, Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 A.D.2d 43, 48, 511 N.Y.S.2d 919, *lv. denied* 70 N.Y.2d 610, 522 N.Y.S.2d 110, 516 N.E.2d 1223). The question distills to whether the testimony of plaintiff's cousin would have been noncumulative.
>
> The trial testimony regarding the circumstances surrounding the assault varied with plaintiff testifying that she and her boyfriend argued in a loud manner for about 3 to 10 minutes before he struck her three times over the span of three minutes. The Sheriff's Deputies contradicted plaintiff's testimony,****810** recalling that upon hearing a sudden disturbance in the visiting room, they checked their monitor and saw plaintiff slumped down on a table. Two or three seconds later, they entered the room by which time the altercation had ended.
>
> Given this record showing a sharp dispute regarding the circumstances surrounding the assault, the eyewitness account of plaintiff's cousin would not have been cumulative (*compare, Arpino v. Jovin C. Lombardo P.C.*, 215 A.D.2d 614, 615-616, 628 N.Y.S.2d 320). Therefore, as plaintiff concedes that her cousin's testimony would have been material and having failed to demonstrate that the testimony would be cumulative, Supreme Court did not err in giving the missing witness charge (*see, Matter of Ismael S.*, 213 A.D.2d 169, 173, 623 N.Y.S.2d 571; *Leven v. Tallis Dept. Store*, 178 A.D.2d 466, 577 N.Y.S.2d 132)."

Jackson v. County of Sullivan, 232 A.D. 2d 954 at 955 (3rd Dept. 1996).

In addition to the negative inference drawn from Plaintiff's failure to call Norman Van

Valkenburgh, L.S. as a witness in this action, the Court, as stated earlier, takes judicial notice of Mr. Van Valkenburgh's prior testimony and prior determinations of the Ulster County Supreme Court and Appellate Division Third Department that have both twice ruled that Mr. Fink and Ms. Pardini are the record owners of the Southeast portion of Lot 2, and that title to these lands based upon the John I. Davis deed is void.

As recently stated by the Third Department:

" [A] court is empowered to take judicial notice of its own records as well as those of the same court in another action (see Matter of Ordway, 196 N.Y. 95, 97, 89 N.E. 474 [1909]; Chateau Rive Corp. v. Enclave Dev. Assoc., 22 A.D.3d 445, 446, 802 N.Y.S.2d 366, 622 [2005]; Matter of Bracken v. Axelrod, 93 A.D.2d 913, 914, 461 N.Y.S.2d 922 [1983], lv. denied 59 N.Y.2d 606, 466 N.Y.S.2d 1025, 453 N.E.2d 550 [1983]), Justice Sherman cannot be considered a material witness for the mere purpose of testifying to the contents of court documents."

Oakes v Muka, 56 AD3d 1057, 1059 [3d Dept 2008]. See also, New York State Dam Ltd. Partnership v Niagara Mohawk Power Corp., 222 AD2d 792, 793-94 [3d Dept 1995].

CONCLUSION

Plaintiff failed to establish by a preponderance of evidence that it obtained title to the lands in dispute. The 1881 tax deed and its progeny did not describe any of the lands in dispute, but rather described lands lying immediately North of the lands in dispute. Defendants did establish, by a preponderance of the evidence that they have record title the 71+/- acres of land in dispute in this action and also established, by clear and convincing evidence, their title to these lands by adverse possession.

ENTER!

Valkenburgh, L.S. as a witness in this action, the Court, as stated earlier, takes judicial notice of Mr. Van Valkenburgh's prior testimony and prior determinations of the Ulster County Supreme Court and Appellate Division Third Department that have both twice ruled that Mr. Fink and Ms. Pardini are the record owners of the Southeast portion of Lot 2, and that title to these lands based upon the John I. Davis deed is void.

As recently stated by the Third Department:

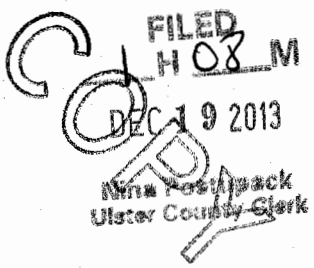
" [A] court is empowered to take judicial notice of its own records as well as those of the same court in another action (see Matter of Ordway, 196 N.Y. 95, 97, 89 N.E. 474 [1909]; Chateau Rive Corp. v. Enclave Dev. Assoc., 22 A.D.3d 445, 446, 802 N.Y.S.2d 366, 622 [2005]; Matter of Bracken v. Axelrod, 93 A.D.2d 913, 914, 461 N.Y.S.2d 922 [1983], lv. denied 59 N.Y.2d 606, 466 N.Y.S.2d 1025, 453 N.E.2d 550 [1983]), Justice Sherman cannot be considered a material witness for the mere purpose of testifying to the contents of court documents."

Oakes v Muka, 56 AD3d 1057, 1059 [3d Dept 2008]. See also, New York State Dam Ltd. Partnership v Niagara Mohawk Power Corp., 222 AD2d 792, 793-94 [3d Dept 1995].

CONCLUSION

Plaintiff failed to establish by a preponderance of evidence that it obtained title to the lands in dispute. The 1881 tax deed and its progeny did not describe any of the lands in dispute, but rather described lands lying immediately North of the lands in dispute. Defendants did establish, by a preponderance of the evidence that they have record title the 71+/- acres of land in dispute in this action and also established, by clear and convincing evidence, their title to these lands by adverse possession.

ENTER!



THE HONORABLE CHRISTOPHER E. CAHILL, JSC