To be Argued by:
SHARON A. GRAFF
Time Requested: 30 Minutes

Appellate Division - Third Department Case No.: 519815

New York Supreme Court

Appellate Division - Third Department

MOHONK PRESERVE, INC.,

Plaintiff-Appellant,

-against-

KAREN PARDINI and MICHAEL FINK,

Defendants-Respondents.

BRIEF FOR RESPONDENTS

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COUNTER STATEMENT OF THE NATURE AND FACTS OF THE CASE

This is an action to quiet title to 73+/- acres of property in the Town of Rochester, in Ulster County (hereinafter "the Property"). (RA 6-15). The Property is within a 101+/- acre parcel known as "Lot 1" of the Nineteen Partners' Tract. (Ex. K in Vol. 2 of Oversized Exhibits [hereafter referred to Ov. Exs.]). A prominent ridge known as Rock Hill Ridge runs Southwest through Lots 5, 4, 3, 2, and 1 of the Nineteen Partners Tract. (RA 1983). The Property in dispute is the 73+/- portion of Lot 1 that lay on the southeast side of Rock Hill Ridge, on the West side of Clove Valley Road. (Ex. K in Vol. 2 of Ov. Exs).

Appellant asserts its title to the Property derives from an 1881 tax deed into Martin Coddington for the King's Lane Lot. (App. Brief at Pg. 17). Appellant asserts the King's Lane Lot includes all but the 9 northernmost acres of Lot 1. (RA 436). Respondents conclusively proved that the King's Lane Lot is in fact a 26+/- acre lot in the North end of Lot 1, immediately North of the Property in dispute. (RA 2481-2482).

Appellant's theory of record title is built upon the flawed premise advanced by Appellant's expert title witness, Terrence Carle, that the lands of the easterly adjoiner, John Davis, lay on the southeast side of Rock Hill Ridge, in Lot 2 of the Nineteen Partners' Tract. (RA 1570). This theory was contradicted by Appellant's own expert survey witness, who acknowledged that the lands of John Davis were located entirely on the northwest side of Rock Hill Ridge, where both Respondents' expert surveyors located his lands. (RA 389, 393). What is more, in a protracted litigation entitled *Shawangunk Conservancy, Inc. v. Pardini and Fink*, the Ulster County Supreme Court twice determined, and this Court twice unanimously affirmed, that Respondents' held superior record title to the portion of Lot 2 on the Southeast side of Rock Hill Ridge, and Appellant's title expert witness *acknowledged* that John Davis is *not* in Respondents' chain of title. (RA 2113-2147). As noted by the trial court, the adjoiner descriptions for Lot 1 and Lot 2 are interdependent, and Appellant's claim of title to the southern 73+/- acres in Lot 1 based on the claim that John Davis's lands adjoin the property in dispute in the southern portion of Lot 2 was "partially, in effect, a retrial of those same facts." (RA 2431).

Appellant's theory of record title is also based upon the flawed premise that the call for William Chase as a southerly adjoiner of the King's Lane Lot in the 1876-1879 assessments for the King's Lane Lot, in the 1881 tax deed, and in the 1874 deed from Osterhoudt to Coddington, is an erroneous reference to other lands of William Chase that do not adjoin any part of the Property in dispute. (RA 1570). The very

deed Appellant's title expert pointed to in support of his opinion is the deed conveying William Chase lands *in* Lot 1 of the Nineteen Partners' Tract. (RA 1984-1985).

Respondents proved at trial the 1881 tax deed to Martin Coddington described the same lands, and no more, as were already owned by Martin Coddington by virtue of an 1874 warranty deed from David H.B. Osterhoudt. (RA 2418-2420). Respondents proved that these lands were located entirely on the northwest side of Rock Hill Ridge in the North end of Lot 1, and were formerly part of a 200 acre farm referred to throughout the trial as the "Curran farm." (Exs. AAA and BBB in Vol. 2 of Ov. Exs.).

Respondents proved their record title to the Property in dispute derived from an 1855 warranty deed from Catherine Stillwell. (RA 2488-2489). Stillwell conveyed an undivided interest in Lot 1 of the Nineteen Partners' Tract to Henry Harp, which interest was later to their predecessor William Chase, and has never been conveyed out of Respondents' chain of title. (RA 978, 1001). Unlike Appellant's theory, Respondents' ownership of the Property in dispute is consistent with and satisfies the deed calls the 1881 tax deed which identifies Respondents' predecessors, William Chase and Henry Harp as its southerly adjoiners, and is consistent with the calls in numerous deeds to owners of lands adjoining the Property in dispute during the years that preceded and followed the tax sale. (Exs. AAA and BBB in Vol. 2 of Ov. Exs.).

Respondents also proved their ownership on the fifty continuous years of constant, exclusive, open, notorious and hostile use, occupation, and possession of the Property by Respondents and their predecessor as a part of a known lot, namely Smitty's Ranch." (RA 2453-2475).

BACKGROUND

In 1799 the Commissioners of the Town of Rochester created a 19 lot tract known as the Nineteen Partners Tract. (RA 1983). 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. *Id.* The earliest history of Lot 1 is not in dispute. Lot 1 was first granted to John Depuy by the Commissioners of the Town of Rochester in 1799. (RA 2152). 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, one of whom was named Jane (Depuy) Alliger. (RA 2154 -2164). In 1855 Catherine Stillwell conveyed Jane Depuy's interest in Lot 1 by warranty deed to Respondents' predecessor in title, Henry Harp, which is Respondents' source of title to the Property in dispute. (RA 2165-2166).

Appellant's source of title for the King's Lane Lot is entirely separate and originates from an 1841 deed from Elijah Alliger to John Curran, conveying 200 acres on the northwest side of Rock Hill Ridge,

which included land in the Northern portions of Lots 1, 2, 3,4 and 5 of the Nineteen Partners Tract. (RA 2171-2174, 595,770-771, Ex. S in Vol. 2 of Ov. Exs.).

The Curran Farm was foreclosed upon in 1847 by the mortgagee, Richard Gilbert. (RA 2173-2174). 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". Id.* The language from the aforementioned 1851 deed from Gilbert is an express acknowledgment of Osterhoudt's claim to a portion of the lands of the Curran Farm that affected the boundaries thereof. *Id.*

The fact that Osterhoudt's claim reduced the Curran Farm by 55 acres is corroborated by the 1850 creditor's petition that Jordan Sahler filed against the Estate of John Curran. (RA 2264-2265). The petition called for "King's Lane" as the southeasterly boundary of the Curran farm and called for "Osterhoudt" as the Southerly adjoiner of the Curran farm. *Id.* 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 southeasterly boundary to be the ledge of high rocks that are much further East than King's Lane. (RA 2264, Ex. BBB in Vol. 2 of Ov. Exs.).

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. (RA 2264-2265).

While there is no instrument of record into Osterhoudt, the claim of Osterhoudt 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. (RA 2171-2172). As explained in detail below, the "King's Lane" is the dividing line between the 55 acres parceled off and the 145 acres remaining.

An 1851 deed into John Davis 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. 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." (RA 2175-2176). The sequence of events between 1841 and 1851 demonstrate that 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. (Ex. S in Vol. 2 of Ov. Exs., RA 783-785).

All expert surveyors agreed that the parcel acquired by John I. Davis lies on the Northwest side of Rock Hill Ridge. (RA 780-781, 863, 389, 393, Def. Ex. BBB in Vol. 2 of Ov. Exs.). This location places the John I. Davis parcel within the bounds of the Curran Farm as it was described in 1841. (RA 750, Def. Exs. S and BBB in Vol. 2 of Ov. Exs.).

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. (RA 784-785).

These recorded instruments all make clear that the phrase "King's Lane lot" relates specifically to a 26 +/- acre portion of the former 200 acre parcel of John Curran.

THE 1876 ASSESSMENT OF KING'S LANE AS 26 ACRES.

In August 1874, David H.B. Osterhoudt conveyed two parcels of land to Martin Coddington. The first parcel was described as a 4 acre parcel occupied by Osterhoudt at the time the deed was given. (RA 1554-1555). 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. *Id.* Martin Coddington did not record the deed from Osterhoudt until 1979. *Id.*

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. (RA 2193, 1008-1009). 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 "named tract", and states the owner is not known. (RA 2193). The assessment describes the lands as having the same adjoiners as the lands in the 1874 deed from Osterhoudt to Coddington, and states the parcel contains 26 acres of land. *Id.*

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. (RA 2193, 1011, 510-511). 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. (RA 2193). 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, as did William Chase, the record owner of the Property in dispute. (RA 2186, 2193, 2194, 2200, 2201, 2207, 2209, 2215, 2216).

When the assessment on the King's Lane Lot was again returned for non-payment in 1877, the parcel was described by the same adjoiners but the acreage the "2" was transposed to a "9" resulting in an erroneous entry of the acreage as "96" instead of "26", which error was carried forward on the 1878 assessment as well (RA 2200, 2207). The 1879 and 1880 assessments state the acreage as "92", although the adjoiner description remained the same throughout each of these years. (RA 2216, 2224)

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. The amount of unpaid taxes in 1879 amounted to $10.55, not including interest or penalties. (RA 2217). On October 7, 1879 Martin Coddington recorded the deed from Osterhoudt at the Ulster County Clerk's Office. (RA 1554-1555). 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. (RA 1955-1956). With the deed now recorded, the 1880 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." (RA 2224).

THE LOCATION OF KING'S LANE

"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. (Def Ex. BBB in Vol. 2 of Ov. Exs.). The location of this lane was established not only by the 1850 creditor's petition, but also by the un-controverted testimony of Respondents' expert surveyor, Robert James, P.L.S., who physically located the lane on the ground. (Def Ex. BBB in Vol. 2 of Ov. Exs., RA 783-784).

As noted above, "King's Lane" was first described in an 1850 creditor's petition filed by a creditor of John Curran. (RA 2264-2265). 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. (RA 1955-1956,783-784, Def. Ex. BBB in Ov. Exs.). 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 in Vol. 2 of Ov. Exs., RA 774-778).

In addition, lifelong residents of Rock Hill Road knew it as "King's Lane" and recalled a wooden

road sign reading "King's Lane" existing on that road up until the 1970's. (RA 1106, 1153-1154, 1086, 1370-1371). 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. (Def. Ex. S and BBB in Vol. 2 of Ov. Exs.). 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 Sheeley. (Def. Ex. S in Vol. 2 of Ov. Exs., RA 774-778).

Appellant 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. (RA 360, 432-434). Appellant offered no rebuttal evidence to Respondents' 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. The only offer of proof made by Appellant 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 and 10b in Vol. 1 of Ov. Exs.).

THE EASTERLY ADJOINER OF THE KING'S LANE LOT

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. 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 in Vol. 2 of Ov. Exs., RA 781-783). Respondents' expert surveyors, Robert G. Cross, P.L.S. and Robert James, P.L.S., both testified that John I. Davis' lands were located immediately southeast 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. (RA 780-783, 862-863).

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 Respondents' surveyor who testified that the lands of John I. Davis were located entirely on the Northwest side of the ridge. (RA 781, 1445). The lands in the 1874 deed from Osterhoudt to Coddington are served by a right-of-way, namely, King's Lane, that runs through the lands of John I. Davis and DuBois Coddington to the public road. (RA 1554, Def. Ex. S in Vol. 2 of Ov. Exs.).

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, who had never been on the land, 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. (RA 1571, 533-534). 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. (RA 533-534, Def Ex. S in Vol. 2 of Ov. Exs.).

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". (RA 2175-2175).

The only testimony Appellant 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, in Lot 2 of the Nineteen Partners' Tract. (RA 1574). Mr. Carle's opinion was contradicted by numerous deeds of record. (RA 1554-1555, 2175-2177, 518-519, 550, 2329-2330, 1484-1485). 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.

Lot 2 of the Nineteen Partners Tract is located immediately East of Lot 1. (RA 1983). During the 1870's, the portion of Lot 2 that adjoins the Property in dispute was owned by Respondents' predecessor in title, Jacob Roosa, not John Davis. (RA 2329-2330, 734-735, 830-831, 871-873). Roosa's ownership on the southeast side of Rock Hill Ridge in Lot 2 is further confirmed by the 1851 deed into John Davis, which identifies Roosa as as the southeasterly adjoiner. (RA 2175-76). As such, the Property in dispute is bounded on the East for 1,937 feet by Fink and Pardini's predecessor, Jacob Roosa. (Ex. 29 of Vol. 1 of Ov. Exs.).

As noted, Jacob S. Roosa is a predecessor in title to Respondents Karen Pardini and Michael Fink. (RA 734-735, 830-831, 871-873, 1491-1492). Pardini and Fink were adjudged the fee owners of that land in Lot 2 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).

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. (RA 193-195, 225-231). The surveyor who testified in opposition to Ms. Pardini and Mr. Fink in the prior litigation was Norman VanValkenburgh, L.S. *Id.* Mr. VanValkenburgh is the same surveyor who prepared and certified Appellant's survey of an adjoiner description in the case at bar, upon which Appellant bases its claims. (Ex. 29 in Vol. 1 of Ov. Exs.). Mr. VanValkenburgh admitted that he prepared the survey without ever locating any of the lands of the adjoiners called for in the King's Lane Lot description. (RA 2449-2450). The surveyor who *testified* for Appellant in the present case, Richard Brooks, L.S., based his opinions on the VanValkenburgh survey, not on his own independent work. (RA 375-376, 387). 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 Respondents' Karen Pardini and Michael Fink's chain of title. (RA 193-195, 225-231). The Honorable John G. Connor, JSC, in rendering his bench decision, found the deeds relied upon by the plaintiff in that case 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 instead of Jacob Roosa. (RA 200). The prior trial over Lot 2 was based on adjoiner descriptions. The two lots' adjoiner descriptions are interdependent. While the earlier Judgments of the Ulster County Supreme Court and this Court concerning title to Lot 2 are not binding in the case at bar, they should not be disregarded or treated lightly.

Mr. Carle's assertion that John I. Davis's lands were located on the Southeast side of Rock Hill Ridge cannot be reconciled with the fact that John Davis's lands adjoin the northernmost portion of Lot 1 and are burdened by rights of way, including King's Lane, located entirely on the northwest side of Rock Hill Ridge. (RA 533, 542-543). Mr. Carle's assertion relies entirely on parole evidence that, if true, would eviscerate the unambiguous language of not only the Davis deed, the Jacob Roosa deed for the southeast portion of Lot 2, and the earlier judgments of the Ulster County Supreme court as twice affirmed by this Court. (RA 533, 542-543, 567) In other words, Mr. Carle's theory is in conflict with every deed of record from 1847 to 1976.

Appellant's expert, Terrence Carle claimed that DuBois Coddington owned all the land on the Northwest side of the high rocks. (RA 509). Mr. Carle offered 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 and he knew his southerly adjoiner was Respondents' predecessor, William Chase. (RA 1554-1555).

THE SOUTHERLY ADJOINER OF THE KING'S LANE LOT

The King's Lane Lot assessments and deeds identify William Chase and Henry Harp as its southerly adjoiners. (RA 1554-1555, 1556-1565, 1566-1569). The only chain of title conveying any 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." (RA 2165-2166). Cornelius Alliger was the husband of Jane Depuy, one of the six grandchildren to whom John Depuy bequeathed Lot 1 in his Will[1]. These lands were subsequently conveyed, in 1873, to William Chase.

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. (RA 1017, 2167-2170, 1554-1555, 1566-1599). William Chase 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. *Id.*

Respondents' expert surveyors Robert G. Cross, P.L.S. and Robert Jones, P.L.S. opined that the undivided one sixth part of Lot One described in the 1855 Stillwell to Harp deed was the Property in dispute in this case. (RA 890-893, Def. Exs. S and BBB in Vol. 2 of Ov. Exs.). Appellant'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. (RA 512-513).

Appellant'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, which were northeast of Lot 2. (RA 1571). 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. (RA 437-438) When considered in conjunction with the 1855 warranty deed from Stillwell to Harp and later to William Chase, there is no factual support for the contention that the call for William Chase as a Southerly adjoiner of the Kings Lane Lot is in error. The deed upon which Plaintiff's title expert bases his opinion that the call for William Chase is in error is

[1]It was common in that era for a wife's property to be conveyed in the name of her husband. (RA 1006)

the very deed that explicitly conveys to William Chase the land *in* Lot 1.

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. 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. (RA 1554-1555, 983-985).

THE WESTERLY ADJOINERS OF THE KING'S LANE LOT

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. (RA 1556-1565, 1566-1569) Respondents' expert surveyors Robert G. Cross, P.L.S. and that the lands conveyed to John D. Sheely were placed to the West of Lot One north of the Curran Farm division line. (RA 871). Respondents' 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. (*Id.*, Ex. AAA in Vol. 2 of Ov. Exs.).

Respondents' 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 73 +/- acres in dispute in this case was Kortright, whose lands bounded the Southerly and Westerly portion of Lot 1. (RA 871-873). 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

The first reference to any acreage associated with the King's Lane lot appears in the 1876 assessment rolls, where the lot is described as containing 26 acres. (RA 2193). The assessment for 26 acres not only conforms with the adjoiner calls in the 1874 deed from Osterhoudt to Coddington, the adjoiners identified in the 1876-1879 assessments, and the adjoiners called for in the 1881 tax sale deed, but when combined with the 35 acres called for in the lands of John Davis, closely matches the 55 acres by which the Curran farm was reduced as a result of Osterhoudt's hostile claim. (RA 880) Respondents' 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. (RA 880).

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. (Ex. AAA of Vol. 2 of Ov. Exs.). Davis, Chase, and Sheeley were current owners of adjoining land and Henry Harp and Jacob Keator were former owners of adjoining lands. There are no missing adjoiners.

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. Moreover, the assessment explicitly states that the land is not in any "named tract." The assessor clearly did not intend to assess substantially all of a known patent lot.

To accept Appellant's argument that the King's Lane Lot was 92 acres, the court below would have had 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 Appellant's surveyor, and which was twice rejected by the Ulster County Supreme Court and unanimously rejected twice by the Appellate Division, Third Department;

(b) reject the proof that William Chase was the record owner of land in Lot 1 at the time of the assessments;

(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. Exs. AAA and BBB in Ov. Exs.); and

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

THE SURVEYORS' TESTIMONY

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. The 1841 deed from Alliger to Curran 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. (RA 2171-2172,797-799, 844-850). 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." (RA 2171-2172). 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.(RA 2171, Ex. BBB in Vol. 1 of Ov. Exs.).

The next courses and distances in Curran farm deed 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. (RA 1983, 2171-2172). 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. (RA 2171-2172). This call brings the Curran Farm squarely into the interior lines of Lot Five, of the Nineteen Partners Tract. (Def. Exs. S and BBB in Vol. 2 of Ov. Exs.).

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. *Id.* 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." (RA 2171-2172).

The high rocks forming Rock Hill Ridge are a prominent physical feature within the Nineteen Partners Tract that, of course, exists today. (RA 1983, 848-851). Rock Hill Ridge extends all the way through Lots 5, 4, 3, 2, and 1. (RA 1983). The Ridge line is the highest elevation point through these lots. (RA 793-794, Def. Ex. CCC in Vol. 2 of Ov. Exs.). 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. Exs. BBB, CCC, K, and S in Vol. 2 of Ov. Exs.). 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. *Id.* 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. Exs. BBB and CCC in Vol. 2 of Ov. Exs.).

The Curran Farm 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." (RA 2171-2172). 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. Exs. BBB and CCC in Vol. 2 of Ov. Exs.). The lands of Joseph Depuy were located immediately Southwest of Lot 1. *Id.* 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.

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 Southeast before they reach Lot 1. (RA 826-828, 850). 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. (RA 1446-1447).

Respondents' 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.

Appellant's surveyor, Richard Brooks, L.S. concurred that the edge of the high rocks does not continue to Lot 1. (RA 1440-1442). 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. (RA 1448-1449, 1441-1443). 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. (RA Ex. 113 in Vol. 2 of Ov. Exs.). 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.

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. 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. (RA 1447).

There is further substantial conflict between the sworn conclusions of Mr. VanValkenburgh 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. 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. On this issue, Mr. VanValkenburgh'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. (RA 2247-2248, Exs. 90 and 97 in Vol. 1 of Ov. Exs., Exs. S, AAA, BBB in Vol. 2 of Ov. Exs.). 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.

Mr. VanValkenburgh'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. (RA 29 in Vol. 1 of Ov. Exs.). Mr. Brooks, by contrast, first alleged in his Affidavit in opposition to Respondents' 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". (RA 2500). The trial correctly took court took judicial notice of that fact. Mr. Brooks abandoned that 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. (Ex. 113 in Vol. 2 of Ov. Exs.).

RESPONDENTS' RECORD TITLE

Respondents' predecessor in title, Wilbur Smith, and Respondents, have possessed the Property not as a squatters, but as an owner in full, peaceable possession of their lands based on the warranty deeds conveying the Property to their predecessors in title.

Respondents' source of title to the Property in dispute devolves from an 1855 deed from Catherine Stillwell to Henry Harp. (RA 1984-1985). The 1855 Stillwell deed contains an express statement of intent to convey two separate parcels of land. *Id.* The first parcel is identified as a 50 acre parcel and described by a metes and bounds description of a 50 acre parcel. *Id.* The second parcel, which is Respondents' source

of title to the Property in the present case was described as follows:

> "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, *emphasis added*)

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. (RA 1984-1985). Appellant's title expert witness conceded that the second parcel in the 1855 deed from Stillwell did convey an interest in the Property in dispute into Respondents' chain of title. (RA 512).

In 1862 Henry Harp assigned all of his lands to Lewis Hasbrouck, as general assignee, to satisfy his debts. (RA 1986-1989). Later that year Lewis Hasbrouck, as general assignee, conveyed the two parcels to Jacob Roosa and his wife, Catherine, utilizing the same description as the 1855 deed from Stillwell. (RA 1991-1992). Like the 1855 Stillwell deed, the 1862 deed from Hasbrouck to Roosa warranted the owner's full peaceable possession of both parcels conveyed. *Id.* This deed was recorded in the Ulster County Clerk's Office in Liber 121 of Deeds at Page 123. *Id.*

Daniel Lawrence acquired title to the Property from Jacob Roosa and his wife in 1865. (RA 1995-1997). The 1865 deed from Roosa to Lawrence specifically recites that the interests conveyed are "[a]ll those two certain lots" as were conveyed to them by Lewis Hasbrouck in 1862 by the deed recorded in Liber 121 of deeds at page 123. (RA 1996). The deed does on to describe the first 50 acre parcel and the interest in the Property was incorporated and conveyed by reference to the fact that the grantor is conveying "[a]ll those two certain lots" as were conveyed to them by Hasbrouck in 1862. (RA 1996, 981-986). While the 1865 from Roosa to Lawrence conveys a third unrelated parcel described as being 17 acres, it does not contain an language excepting or reserving any of the lands acquired under the 1862 deed, which include the Property herein. (RA 1995-1997).

In 1873 Daniel Lawrence conveyed all of the lands he acquired from Roosa to William Chase. (RA 1998-200). The deed from Lawrence to Chase reiterated the same exact language and reference to the two parcels described in Liber 121 of Deeds at Page 123, without exception or reservation. (RA 1998-2000).

The timing of the 1873 conveyance of an interest in Lot 1 is significant in that it was undisputed that prior to 1873, William Chase did not own any lands in Lot 1 of the Nineteen Partners Tract, and the very next year when Osterhoudt conveyed the King's Lane Lot to Coddington, Osterhoudt identified William Chase as a southerly adjoiner. It is not a coincidence that the year after Chase acquired title to the Property that Osterhoudt identified Chase as his southerly adjoiner. Rather, the reference to William Chase as a southerly adjoiner to the King's Lane Lot can only be a reference to Chase's ownership within Lot 1, since

Chase did not own any lands that adjoined Lot 1. Osterhoudt's identification of William Chase as his southerly adjoiner deserves a high degree of reliability since Osterhoudt recited in the 1874 deed that he lived on the lands he was conveying. (RA 154-1555).

The Property was conveyed forward between 1874 and 1888 utilizing the same language and deed reference as was contained in the 1873 deed from Lawrence to Chase. (RA 2001-2009). The description was modified slightly in 1892 when William Bloomer and his wife, as successors to William Chase, conveyed the lands to Angelina and William Harp, by specifically referenced they were conveying "[a]ll those two pieces and parcels", being the same lands as they had acquired the same as the lands that were conveyed to them by William Chase. (RA 2010-2011). The 1888 deed from Chase to Bloomer expressly recites that it includes the lands described in Liber 121 of Deeds at Page 123. (RA 2007-2009).

The interest was thereafter carried forward through *mesne* conveyances, albeit more obliquely, by reference in the deeds' habendum clauses as conveying "those two pieces or parcels" and beings clauses that refer to the lands conveyed as being the same as were conveyed by Selig Brenner, a predecessor in Respondents' chain of title from 1892 until the 1958 conveyance from Ethel Anderson to Mary Lou Smith, when an attempt was made to simplify the deeds' numerous parcel descriptions and references. (RA 2074-2079). The simplified 1958 description was abandoned by Mary Lou Smith in 1965 when she reverted back to the more complicated description used in a 1951 conveyance from Ethel Anderson to Harry and Emma Anderson (RA 2063-2073, 2081-2087). Due to a scrivner's error, two pages were left off the 1965 deed from Mary Lou Smith to Ruby Smith when it was recorded. The missing pages 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", which Respondents' title expert opined was the beings clause that carried the interest in the Property in dispute. (RA 991-993).

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 and the deed and all subsequent conveyances, including the 1987 conveyance from Smitty's Ranch, Inc. to Respondents were reformed to specifically include the missing pages which included the reference to the lands "being the same as 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". (RA 219-224).

Respondents' expert 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. (RA 890-891, Def. Exs. S and BBB in Vol. 2 of Ov. Exs.). Their expert testimony was corroborated and supported by the fact that every deed the chain of title Appellant's rely on from 1881 until 1976, identified William Chase as a Southerly adjoiner to lands Appellant claims to have acquired. (RA

1566-1567, 1575-1576, 1579-1580, 1582-1583, 1585-1586, 1588-1589).

ADVERSE POSSESSION BY RESPONDENTS' PREDECESSOR, SMITTY'S RANCH, AND BY RESPONDENTS PARDINI AND FINK

From 1958 through 1987 Property in dispute was under the exclusive use and occupancy of Respondents' predecessor, Smitty, who operated a locally famous, if not infamous bar, rooming house, and dude ranch beginning in 1958 and continuing throughout the 1960's, 1970's and into the 1980's. (RA 1241-1256, 1369-1371, 1063-1066, 1167-1169, 1079-1081). Smitty's Ranch was located on both the East and West sides of Clove Valley Road. *Id.* The lands on the East were improved by a bar and rooming house and trailers. (RA 1241-1256, 1167-1169). A stream known as the Coxing Kill ran through the portion of the Ranch lands on the East side of Clove Valley Road, and were referred to by several witnesses as the "stream side" of the Ranch. The lands on the West side of Clove Valley Road ran to the top of Rock Hill Ridge and comprised the portions of Lots 4,3,2, and 1 of the Nineteen Partners' Tract on the southeast side of that Ridge. The Ranch lands on the West side of Clove Valley Road were improved by the house where Smitty lived, trailers located immediately adjacent to the Property in dispute, and a series of roads and horse trails that gave the only access to the Property in dispute. (RA 1244-1245).

Smitty's Ranch was renowned for the crowds of young people, free spirits, and ethnically diverse guests that congregated there in its heyday. (RA 1241-1256). Smitty openly and notoriously claimed the Property as part of Smitty's Ranch. He patrolled the Property on horseback with a rifle in hand. (RA 1198, 1243-1244, 1255, 1202-1206). He allowed members of Smitty's Ranch's hunting club, who local hunters recognized by the distinct bright colored jackets the club members wore, and/or because they were African American, to hunt on the Property. (RA 1060, 1150-1151, 1083). He gave permission for members of several local families to hunt on the Property, he logged the Property, he maintained horse trails and rode horses on the Property, and he taught his son to rock climb on the Property. (RA 1149-1154, 1080-1081, 1370, 1105-1108, 689). The Ranch lands immediately adjacent to the Property served as the parking area for Ranch patrons and were filled with cars during summer weekends. (RA 1246-1247). 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. (RA 1246-1247, 2269).

Paying guests of Smitty's Ranch were allowed to hunt, hike, camp, build campfires, ride horses, and engage in other recreational activity on the Property. Respondents and their friends spent several months removing the voluminous detritus from Smitty's Ranch's guests and invitees. (RA 1266-1267, 1410). The Property was littered with remnants, such as discarded tents, tarps, platforms, fire rings, bottles and cans, and garbage, the hallmarks of nearly thirty years of continuous, open, notorious, exclusive and hostile

occupation of the Property by Smitty that preceded his sale of the Property, as part of the Ranch, to Respondents in 1987. (RA 1242-1245, 1162-1164, 1318-1322).

Respondents, their siblings and significant others frequented Smitty's Ranch during the 1970's and 1980's. (RA 1242, 1257, 1197-2007, 1162). Respondents revered the land encompassed by Smitty's Ranch, which they knew to include the Property. (RA 1242-1257, 1260-1261). By 1987 Smitty was eager to sell the Ranch. (RA 1254-1260). Appellant's then president, Robert Andeberg, was a social acquaintance of Ms. Gerkhe's. Mr. Andeberg offered to pay Ms. Gerkhe a fee to act as a straw man to purchase Smitty's Ranch on Appellant's behalf, since, as Mr. Andeberg explained, Smitty would never sell his Ranch to Appellant. (RA 1203-1206). Ms. Gerkhe initially considered the offer, but ultimately decided she would not act as a straw purchaser since that would be a betrayal of her friendship with Smitty. (RA 1203-1206). When Mr. Anderberg was angry when he later learned that Mr. Fink and Ms. Pardini had purchased Smitty's Ranch lands. He told Ms. Gerkhe to warn her brother that he would do "everything in his power to take that land." (RA 1206).

When Mr. Fink learned Smitty's Ranch was for sale he jumped at the opportunity. (RA 2160). He and Ms. Pardini had just suffered the tragic death of Ms. Pardini's daughter, Onawa, who suffered traumatic injuries in a car accident, and died after being in a coma for six months. (RA 2160). The couple had moved from their home on Clove Road to Kingston, New York, to be close the hospital during her daughter's final months, but had loved living on Clove Valley Road. (RA 1332, 1260). Mr. Fink arranged for the purchase as a surprise meant to uplift to Ms. Pardini. (RA 1332). Smitty agreed to sell the Ranch lands to Mr. Fink and Ms. Pardini for $300,000.00. (RA 1332) Mr. Fink and Ms. Pardini took out 4 mortgages and his sister, Toby Stover, arranged for her mother in law to advance them additional money to finance the purchase. (RA 1174). Throughout his decades of ownership, Smitty consistently described the Ranch lands on the West side of Clove Valley Road as extending West to at a point where a stream and a stone wall meet the road. (RA 1325). Smitty consistently described his Ranch as running North from the stone wall to the top of the ridge, with the horse trail weaving through the Property and terminating near its northerly bounds. (RA 1149-1150, 1167-1169, 1203-1205, 1219, 1250-1251, 1325).

Mr. Fink and Ms. Pardini could not afford to have the land surveyed prior to their purchase, but Smitty had both described and pointed the boundaries out to them many times, including immediately prior to their purchase. (RA 1250-1251, 1327, 1362-1363). However, having been regular patrons of Smitty's Ranch, they were aware that the Property was a part of the Ranch and was actively used by Smitty and his patrons. In addition, Mr. Fink personally knew members of the crew that had logged the Ranch, including the Property for Smitty in 1982 or 1983 and had observed the byproduct of that logging operation on the Property. (RA 1320-1321). Mark Heinitz, the supervisor of that logging crew, testified at trial. (RA 1218)

Mr. Heinitz confirmed that prior to the logging job he walked the Property with Smitty to identify what to cut. (RA 1219). Mr. Heinitz recalled that the logging on started near the stone wall on the Southwest end of the Property and continued up the ridge. (RA 1220). A few years later Smitty asked Mr. Fink if he was interested in logging his Ranch, specifically including the Property and had Mr. Fink inspect the trees on the Property. (RA 1324-1326).

The fact that the Property was a part of Smitty's Ranch was corroborated by the boundary postings of Appellant's predecessor in title, Gloria Finger. Ron Lapp, Jr., a 27 year veteran of the New Paltz police force, testified that he sought permission from the Fingers to hunt on their property during the late 1980's or early 1990's. (RA 1147-1148,1152). He testified that when he obtained permission from "Mr. Finger" who advised Mr. Lapp that his lands were clearly posted. (RA 1154). Officer Lapp testified that the Fingers' posted signs were located North of the Hemlock Knob. (1152-1153). The location of the Finger's posted signs Officer Lapp described agrees with Smitty's numerous statements that his lands extended North past the Hemlock Knob to the top of the Ridge.

The fact that the Property was a part of Smitty's Ranch was further corroborated by Appellant's boundary postings. In the early 1990's Mr. Fink was preparing to log his land and notified Appellant in advance to give Appellant opportunity to confer and confirm the location of the West bounds of the Property and Appellant's other lands to the West. (RA 1354-1355). Mr. Fink and Appellant's ranger, Bob Larsen together tied survey tape North along the West bounds of the Property. *Id.* The line corroborated and completely agreed with Mr. Fink and Ms. Pardini's understanding that they owned the Property. *Id.*

After their purchase in 1987 Mr. Fink and Ms. Pardini carried on the open, notorious, continuous and exclusive occupation of the Property as a part of the former Smitty's Ranch lands. They immediately recruited friends and employees to pick up the vast amounts of garbage and debris left over from Smitty's ownership from the entire Ranch property, including the Property. (RA 1410-1411, 1177, 1067, 1207, 1266-1267, 1338).

The Property in dispute does not front on any public road. (Ex. K in Vol. 2 of Ov. Exs.). The only roads giving access to the Property in dispute are the private logging roads and horse trails on Respondents' contiguous lands that connect to a private road on the Property. (RA 1244-1245). The private roads leading to and winding through the Property were created and maintained by Respondents' predecessor, Smitty, and later by Respondents who also widened the access roads and trails. (RA 1178, 1268, 1208-1209). There are no roads or trails from which to access the Property in dispute from the North. (RA 886-887). In fact, one would have to bushwhack on foot through dense Mountain Laurel to access the Property from the North. Pardini and Fink continuously maintained and improved the road system throughout their lands, including the road running through Property. *Id.* They posted the entire Ranch property where it fronted

on Clove Valley Road. (RA 1276-1277). They patrolled the Property and recruited their invitees to patrol the Property on their behalf. (RA 1131-1360). Pardini and Fink operate a logging company known as Wood Source, Inc. They harvested firewood from the Property 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. (RA 1268-1269, 1336-1344).

Mr. Fink and Ms. Pardini conducted a major logging operation on the Property in 1990 or 1991. (RA 1336-1345). Their employee, David Olsen, worked on the logging operation in 1991 for Mr. Fink and Ms. Pardini. (*Id.* 1408, 1409). The 1991 logging operation of the property in dispute encompassed hundreds of trees and was highly visible. The staging area for the operation was on the West side of Clove Valley Road, immediately adjacent to the property in dispute. *Id.* 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. *Id.* 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. (RA 1113-1120, 1126-1128, 1136-1141, 1158-1159, 1178-1181).

Mr. Fink was frequently heard and observed chain sawing trees on the portion of the lands in dispute. Keith Douglas, with the permission of Mr. Fink and Ms. Pardini, regularly hiked and hunted on the Property throughout the 1990's through 2005. (RA 1140-1143).

Mr. Fink and Ms. Pardini have continuously cut dead standing trees as well as downed branches, trees, and tree tops on the Property in dispute during their ownership for use as firewood. (RA 1268-1269, 1336-1344). 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. (RA 1268-1269).

Mr. Fink and Ms. Pardini continuously cleared the logging road that begins on their lands just South of the Property and ascends to the North end of the Property. 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.

Mr. Fink and Ms. Pardini harvested a large amount of stone from the Property, some of which they sold and some of which they used in the renovation of the buildings on their lands. (RA 1067-1069,) The stone was taken out by a dump truck which they drove into the Property on the road they maintain on the lands. (RA 1267, 1271, 1344-1345).

Mr. Fink has continuously hiked and run on the roads leading to and through the Property. Ms.

Pardini regularly hikes on the Property. She is an emergency responder and trains her K-9 rescue dogs on the Property. (RA 1279-1280).

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. (RA 1281, 1358-1359).

ARGUMENT

The trial court's determinations that Respondents are the owners the Property in dispute based on their superior record title and title by adverse possession is supported by the record and the weight of the credible evidence and represent a reasonable interpretation of that evidence and should not be disturbed. *Frampton v. Indelicato*, 144 A.D. 2d 880 (3rd Dept. 1988), *Schreiber v. Gallow*, 166 A.D. 2d 771 (3rd Dept. 1990). The decision and judgment were rendered by the Honorable Christopher E. Cahill, J.S.C., after an extensive bench trial involving the testimony of more than 30 witnesses and after consideration of more than 100 exhibits and review of nearly 1300 pages of trial testimony. (RA 19). At the conclusion of the testimony the trier of fact, at the parties' request, actually visited the Property in dispute and was able to observe the condition of the Property and its features in relation to the parties' claims and proofs. (RA 1508). The trial court's credibility determinations in this regard should be afforded great deference. *Arnold v. State*, 108 A.D. 2d 1021 (3rd Dept. 1985).

POINT I. THE KING'S LANE LOT IS NORTH OF THE PROPERTY IN DISPUTE.

Appellant based its claim of record title to the Property in dispute on the 1881 tax deed into Martin Coddington for the King's Lane Lot. It is well settled that a grantor can convey no more than the grantor owns. New York's Real Property Law provides, in pertinent part, that "[a] greater estate or interest does not pass by any grant or conveyance, than the grantor possessed or could lawfully convey, at the time of the delivery of the deed..." N.Y. Real Prop. Law §245. Tax deeds are no exception to this rule in that "title acquired by tax deed is no better than the title of the person who allegedly lost the title for nonpayment of taxes." *OBrien v. Town of Huntington,* 66 N.Y. 3d at 166 (2nd Dept. 2009). Respondents conclusively proved at trial that the lands assessed as the King's Lane Lot were the same lands that David H.B. Osterhoudt conveyed to Martin Coddington in 1874 and that those lands were contained within the bounds of the 200 acre Curran Farm in the North end of Lot 1, and North of the Property in dispute.

A. Appellant's Source of Title is Osterhoudt, Whose Lands Were Formerly Part of the Curran Farm.

The 1881 tax deed to Martin Coddington describes the bounds of the King's Lane Lot as being a lot of land bounded on the East by John Davis, on the South by William Chase and Henry Harp, and the West by John Sheely and Jacob Keator, and on the North by Martin Coddington and states a quantity of 92 acres. (RA 1566-1567). The lands described in the 1881 tax sale deed were identical to the lands described in the 1874 deed from Osterhoudt to Coddington. (RA 510,) It would be disingenuous to argue otherwise since the lands described in the 1874 deed from Osterhoudt and the 1881 tax deed have same adjoiner calls. Appellant understandably omits discussion of the 1874 Osterhoudt deed from its brief in an effort to avoid the inconvenient truth that the lands Osterhoudt's interest in the lands originated out of the Curran farm, which was North of the Property in dispute.

The chain of title for the Curran farm from 1841 through 1874 provide not only a cogent, but also the only explanation for Osterhoudts' 1874 conveyance to Martin Coddington. (RA 20). Respondents' 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. John Curran acquired the 200 acre farm from Elijah Alliger in 1841. (RA 1271-1272). 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. (RA 1273-1274). When David H.B. Osterhoudt sold 26+/- acres of the 55+/- acre exception, he recited that he lived on the land. (RA 1554-1555).

"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.

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

Appellant attempted to avoid the limiting impact of the lands in the 1874 Osterhoudt deed emerged form the Curran farm by arguing, unsuccessfully, that the southeasterly bounds of the Curran farm did not bi-sect Lot 1 along the top of Rock Hill Ridge as Respondents' expert surveyors established. Appellant's argument is undercut by the well settled rules of priority that govern deed interpretation and were properly rejected by the trial court.

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). The rules of deed construction further provide where there is any discrepancy in a deed call, that priority be given first to calls for natural objects, second to artificial objects, third to adjacent boundaries, fourth to courses and distances and last to quantity. *Thomas v. Brown*, 145 A.D.2d 849 (3rd Dept. 1988)

A detailed summary of the Curran farm, King's Lane Lot, and adjoining owner deeds as well as the survey testimony at trial is set forth on pages 3-17 of this brief and is incorporated here by reference to avoid repetition. The substantial survey testimony concerning the deed language and the actual physical features and owners referred to in the deeds and maps received in evidence demonstrated the parties to the 1841 Curran farm 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. , thereby bisecting Lot 1 into a 30+/- acre northern portion and

the 73+/- acre southern portion in dispute. (Ex. S in Vol 2 of Ov. Exs.). When placed in this location the southwesterly line of the Curran farm in a Southwesterly direction along the ridge line from the point in Lot 2 at which the cliffs peter out, across Lot 1 to the bounds of Joseph Depuy at a point with virtually the same elevation as the cliffs in Lot 2 and where an ancient stone pile was located. (CCC in Vol. 2 of Ov. Exs.). 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. (RA)

Appellant 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. (Ex. 113 in Vol. 2 of Ov. Exs.)

Appellant's argument is convoluted and illogical. Appellant 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. Appellant 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, Appellant 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.

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. Appellant'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 Norman VanValkenburgh, L.S., the surveyor who prepared the map upon which Appellant basis its claim in this case, and Gerald Brandt. (Ex. 29, 91 in Vol. 1 of Ov. Exs.). 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. (Id.) The VanValkenburgh survey even includes shading continuing the ridge line into Lot 1 in the southwesterly direction called for in the deed. (Id.) In short, every surveyor until Mr. Brooks honored the 1841 deed call to continue Southwesterly after the high rocks ceased running in that direction. 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). Under Appellant'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.

Appellant'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. The trial court correctly credited 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. (RA 2451-2452) The trial court correctly credited 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. (Id.) The trial court correctly credited 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. (RA 2421-2424)

C. The King's Lane Lot Adjoiner Description Does Not Describe the Property in Dispute.

The unambiguous adjoiner calls in the 1874 Osterhoudt deed and the 1881 tax deed are satisfied by the location of the King's Lane Lot as the 26+/- acres of Lot 1 immediately North of the Property in

dispute. Respondents' expert surveyors actually located the bounds of the lands of these adjoiners. (Ex. BBB in Vol. 2 of Ov. Exs.). Respondents' expert surveyors also actually located the roads and rights of way serving the lands described in the 1874 Osterhoudt deed and the 1851 John Davis deed, including King's Lane, from which the King's Lane Lot takes its name. *Id.*

The proof at trial established that from 1874 through 1881 the Property in dispute was adjoined on the East by Jacob Roosa, on the South by Harp, on the Southwest by Kortright, on the West by Keator, and on the North by the King's Lane. (Exs. AAA and BBB in Vol. 2 of Ov. Exs.).

D. The 1881 Tax Deed to Martin Coddington Did Not Extinguish the Interest of William Chase in the Lands in Dispute.

The 1881 tax deed Appellant relies on as its source of title did not relate to the lands in dispute and, in could not have extinguished the interest of Pardini and Fink's predecessor in title, William Chase. 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).

"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).

The adjoiner description the 1881 tax deed is insufficient and invalid as against the Property in dispute since it does not describe the Property in dispute, but rather describes the 26+/- acre parcel lying immediately to the North. In fact, it is Appellant, not Respondents, who are making an untimely challenge to the validity of the tax deed which does not describe the property in dispute having waited

124 years to assert the deed should have conveyed some greater title than to the 26+/- acre King's Lane Lot. *Bryan v. McGurk*, 200 NY 331 (1911).

POINT II. APPELLANT FAILED TO PLEAD AND FAILED TO PROVE THE ELEMENTS NECESSARY TO ACQUIRE TITLE UNDER THE DOCTRINE OF PRACTICAL LOCATION.

The court below correctly determined that the doctrine of practical location did not apply to the case at bar. (RA 21). Appellant failed to raise the claim of practical location in any of its pleadings (RA 22-29, 247-249) and the proof at trial demonstrated the elements necessary to establish title under the doctrine of practical location were not present.

A. Respondent Waived Any Claim of Boundary by Practical Location.

A claim of boundary by practical location is a claim of estoppel. Adams v. Warner, 209 A.D. 2d 394 (3d Dept. 1924). As such, a party must affirmatively raise the doctrine in its pleadings in order to avoid surprise and prejudice to the opposing party. New York Civil Practice Law and Rules 3018(b). A failure to plead the doctrine constitutes a waiver of the same by that party. *Andersen v. Mazza*, 258 A.D. 2d 726 (3rd Dept. 1999), *Id.*, *Kaneb v. Lamay*, 58 A.D. 3d 1097 (3d Dept. 2009).

In the case at bar, Appellant's initial complaint and reply did not include any cause of action or affirmative defense based upon a claim of boundary by practical location. (RA 22-29, 247-249). Appellant did not plead any of the facts to suggest or support a claim of boundary by practical location. *Id.* Appellant's trial counsel made no reference of the doctrine in his opening statement. (RA 250-257). Appellant did not assert a claim of title by practical location until the time of the parties' simultaneous post-trial submissions were made. (RA 260-269). As such, Appellant's assertion of a claim of boundary by practical location was untimely. Kaneb v. Lamay, 58 A.D. 3d 1097 (3d Dept. 2009).

B. The Trial Court's Determination That the Doctrine of Practical Location Did Not Apply Was Supported by the Weight of the Credible Evidence.

The requirements of establishing a boundary by practical location have been well settled since the 1800's. *Adams v. Warner*, 209 A.D. 394 (3d Dept. 1924). To succeed on such a claim, a party must first establish the existence of a dispute between adjoining owners as to the location of the boundary, and then must tender "convincing proof of an express agreement made between the owners of the adjoining lands, deliberately settling the line between them and proof of an acquiescence therein for a considerable time." *Adams v Warner*, 209 AD 394, 397-98 (3d Dept 1924). *See also*, *Adams v. Rockwell*, 16 Wend.

285 (1836); Robert v. Shaul, 62 A,D, 3d 1127 (3d Dept. 2009); *Kaneb v. Lamay*, 58 A.D. 2d 1097 (3d Dept. 2009). Under the well settled principles of this doctrine, the absence of any dispute as to a boundary line is fatal to a claim of boundary by practical location since the existence of a dispute over a boundary is a pre-requisite of any such claim. Adams v Warner, 209 AD 394, 397-98 (3d Dept 1924). Without an initial dispute over the location of a boundary line there can be no mutual act to deliberately settle the line in a manner that affects both parties, nor can there be any acquiescence. *Id.* In the case at bar, Appellant failed to establish the first element in that it failed to offer any proof at trial as to the existence of an underlying dispute between its predecessor in title and Respondents or their predecessors in title.

As noted by the trial Court, Appellant's practical location claim is likewise fatally flawed by the extensive proof at trial that Respondents' predecessor, Smitty, and Respondents continuously claimed and actually occupied the Property in dispute as their own. (RA 20-21). Acquiescence, to be effectual, "'must be an act of the parties, either express or implied; and it must be mutual, so that both parties are equally affected by it. It must be definitely and equally known, understood, and settled. If unknown, uncertain, or disputed, it cannot be line practically located.' *Hubbell v. McCulloch*, 47 Barb. 287, 299." Adams v Warner, 209 AD 394, 397 (3d Dept 1924), quoting *Hubbell v. McCulloch*, 47 Barb 287, 299 (1924).

Appellant wholly disregards its failure of proof concerning any underlying boundary dispute and attempts to overcome the absence of any mutual acquiescence by arguing that the existence of un-filed maps, filed maps of other lands e bounds of the Property in Dispute, public hearing notices relating to its predecessor's subdivision application, Respondents' earlier survey of a portion of their adjoining lands, and an excerpted portion of testimony given by Mr. Fink during his examination before trial, demonstrate a settled boundary. *See Brief of Appellants at pp.23-27.* In fact, the full statement made by Mr. Fink concerning the Brandt map was that the Brandt depiction of the cliff line extending southwest from the high cliffs and along the top of Rock Hill Ridge confirmed his understanding that his North bounds continued across the top of the ridge. (RA 1356-1357) The trial court correctly rejected these arguments in determining the element of acquiescence was missing. (RA 20-21).

POINT III. THE TRIAL COURT CORRECTLY DETERMINED THE RESPONDENTS HOLD SUPERIOR RECORD TITLE TO THE PROPERTY.

Respondents satisfied this burden at trial by proving their predecessors acquired title to the Property in dispute by a full warranty deed in 1855 which interest was never conveyed out of

Respondents' chain of title, but rather was validly carried forward to Respondents by reference in *habendum* clauses, and other expressions of intent. Unlike Appellant's theory of title, Respondents' record title to the Property in dispute is supported by and consistent with the applicable rules of deed construction and interpretation, satisfies the adjoiner calls in the deeds for the lands bounding the Property in dispute, including Appellant's predecessor, and is corroborated by parole evidence.

Respondents traced their source of title to the Property in dispute to an 1855 conveyance from Catherine Stillwell to Henry O. Harp, which deed was duly recorded in the Ulster County Clerk's Office in Liber 93 of deeds at Page 107. (RA 1801). By express statement of intent, the Stillwell deed conveyed two parcels: the first parcel a fifty acre parcel with a metes and bounds description. (RA 1801). The second parcel was described as follows:

> "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" (RA)

The second parcel in the 1855 Stillwell deed, by express terms, conveyed an undivided interest in Lot 1 of the Nineteen Partners Tract. *Id.* Respondents' expert title and survey witnesses each opined that the second parcel in the 1855 deed conveyed a interest in the Property in dispute, which is within Lot 1 of the Nineteen Partners Tract. Appellant's title expert *conceded* that the 1855 deed conveyed an interest in the Property in dispute into Respondents' title chain and conceded the interest was carried forward in subsequent conveyances in Respondents' chain of title.

It was thus undisputed at trial that the 1855 Stillwell deed conveyed an interest in the Property in dispute. Nevertheless, Appellant argues strenuously on appeal that the description in 1855 Stillwell deed is insufficient to convey an interest in the Property in dispute. *See Brief of Appellant at p.47.* Appellant advances the argument that the second parcel in the 1855 Stillwell may refer to other lands owned by John Depuy outside the Nineteen Partners Tract. This argument should be dismissed out of hand in that while John Depuy, the original grantee of Lot 1 of the Nineteen Partners' Tract, did own other lands besides Lot 1 of the Nineteen Partners' Tract, there is only one parcel known as Lot 1 of the Nineteen Partners' Tract. The parcel described in the 1855 Stillwell deed as being in "Lot No. one in a tract commonly called the nineteen partner tract which said lot No. One was allotted to John Depuy" can only be in Lot 1 of the Nineteen Partners Tract, not some other unidentified tract or parcel previously owned by John Depuy. (RA 1801).

The trial court's determination that Respondents acquired valid and superior record title to the

Property in dispute by virtue of the 1855 Stillwell deed is consistent with the well settled principle that "[a] deed description is adequate so long as it allows the property to be located, even if an actual survey is required in order to do so (Pope v. Levy, 54 App.Div. 495, 66 N.Y.S. 1028). The question is not whether there are errors in the description, but whether the land can be identified with reasonable certainty notwithstanding the errors (Goff v. Shultis, 26 N.Y.2d 240, 309 N.Y.S.2d 329, 257 N.E.2d 882)". *Town of Brookhaven v. Dinos*, 76 A.D.2d 555, 561 (2nd Dept. 1980), *aff'd,* 54 N.Y.2d 911 (1981).

Appellant relies heavily on the Second Department's decision in the *Town of Brookhaven* case for its proposition that the description in the 1855 Stillwell deed is insufficient to convey a valid interest in the Property in dispute. However, Second Department's decision in the Town of Brookhaven case, the Second Department recognizes the principle that "a deed is void for lack of proper description *only* when it is so inaccurate that the identity of the property is wholly uncertain (6 N.Y.Jur., Boundaries, s 94) and that this general rule is to be applied with the utmost liberality in order to determine the intention of the parties (Peck v. Mallams, 10 N.Y. 509; People v. Call, 129 Misc. 862, 223 N.Y.S. 257)." *Town of Brookhaven v. Dinos*, 76 A.D.2d 555, 561 (2nd Dept. 1980) (*emphasis added*), aff'd, 54 N.Y.2d 911 (1981) .

The Second Department's decision in *Town of Brookhaven* to recognize the principle that a deed is not void for uncertainty where the exact boundaries are not described so long as it is "possible by *any* rule of construction to ascertain what property is being conveyed (Wendell v. Jackson, 8 Wend. 183; see, also, People ex rel. Myers v. Storms, 97 N.Y. 364). Since a description is to be considered certain if it can be made certain (Wendell v. Jackson, supra), parol evidence may be introduced to identify the property intended and its exact boundaries (Mullen v. Washburn, 224 N.Y. 413, 121 N.E. 59; Cordua v. Guggenheim, 274 N.Y. 51, 8 N.E.2d 274; Orvis v. Elmira Cortland & Northern R.R. Co., 172 N.Y. 656, 65 N.E. 1120; Ambler v. Cox, 13 Hun. 295; Terry v. Chandler, 16 N.Y. 354)." *Town of Brookhaven v. Dinos*, 76 A.D.2d 555, 561 (2nd Dept. 1980) (*emphasis added*), aff'd, 54 N.Y.2d 911 (1981) .

In the case at bar, it was undisputed that the second parcel in the 1855 Stillwell deed described land located in Lot 1 of the Nineteen Partners' Tract and conveyed an interest in the Property in dispute. Respondents offered the testimony of two expert surveyors, both of whom testified, opined that the bounds of the lands described in the 1855 Stillwell deed could be ascertained and located with certainty by survey, based not only on the language in the instrument itself, but also by the location and corroborating adjoiner calls contained in the deeds for the properties adjoining the disputed lands. Both surveyors were able to depict the bounds of the lands Respondents' acquired by virtue of the 1855 Stillwell deed on survey maps which were received in evidence (Ex. S, AAA, BBB in Vol.2 of Ov. Exs.).

As such, the weight of the credible evidence demonstrated that the 1855 Stillwell deed conveyed, by sufficient description, a valid interest in the Property in dispute, the bounds of which could be located by survey. Inasmuch as the proof at trial established the lands conveyed in the 1881 tax deed were located North of the Property in dispute, the trial court correctly determined Respondents are the owners of the Property in dispute by superior record title.

POINT IV. RESPONDENTS' INTEREST IN THE PROPERTY IN DISPUTE IS CARRIED FORWARD IN THEIR CHAIN OF TITLE BY EXPRESS REFERENCE AND EXPRESSIONS OF INTENT

The trial court's award determination that Respondents hold superior record title to the Property in dispute should not be disturbed since the weight of credible established the interest conveyed into Respondents' early predecessor by the 1855 Stillwell deed was carried forward in Respondents' chain of title by express reference and expressions of intent. Combined with the undisputed fact that the interest was never conveyed out of Respondents' chain of ittle and that Respondents and their predecessors have been in continuous possession of the Property in dispute, and substantial parole evidence, the trial court's finding that Respondents presented a "more cogent theory" and determination that Respondents' hold superior record title to the Property in dispute was supported by ample evidence.

Section 240(3) of New York's real Property Law provides that "[e]very instrument creating, transferring, assigning or surrendering an estate or interest in real proeprty must be construed according to the intent of the parties, so far as the same can be gathered from the whole instrument, and is consistent with the rules of law." RPAPL sec. 240(3), *328 Owners Corp. v. 330 West 86 Oaks Corp.*, 8 NY3d 372 (2007). In construing the parties' intent, courts must consider the instrument as a whole and the language of the deed must be "interpreted and applied as to be meaningful and valid, and the intent of the parties, as evinced by the deed and the circumstances surrounding the making thereof, must be given expression wherever it is possible to do so without violating law and reason." *328 Owners Corp. v. 330 West 86 Oaks Corp.*, 8 NY 3d 372 at 381 (2007). In applying this principal, the Court of Appeals held that restrictive covenants that only appeared in the recital portion of a deed, and were not included with other restrictions set forth in the deed's *habendum* clause, were nevertheless enforceable when the deed was viewed as a whole and based on the circumstances surrounding the transaction. *Id.* at 380-383.

As noted above, when the Property in dispute was conveyed into Respondents' early predecessor in title in 1855, the deed made express the intent to convey two distinct and separate parcels, the first bearing a metes and bounds description, and the second being described as an undivided interest in Lot 1 of the Nineteen Partners' Tract. The next two deeds in Respondents' chain of title use the same

description. Every deed thereafter between 1873 and 1922 continued to expressly reflect the grantor's intention to convey those two parcels as were originally described in the 1855 Stillwell deed. (RA 1998-2028). Although the actual description of the second parcel was not set forth, the instruments specifically indicated the respective grantors' intent to convey "[a]ll thos two certain lots" originally conveyed in the 1855 Stillwell deed and were further incorporated in the conveyances by reference to the lands being the same as those conveyed by Liber 121of Deeds at Page 123. William Chase eventually conveyed the two parcels to Respondents' predecessor, Selig Brenner and the deeds in Respondents' chain of title from 1922 until 1958, reflect the grantors expressed their intent to convey the lands that were acquired by Selig Brenner, again by referencing the deed into Selig Brenner by liber and page. (RA 2024-2073). Moreover, when Albert Smiley conveyed the lands to Respondents' predecessor Thirzy Harp, not only did the deed expressly refer to the lands acquired by Selig Brenner by reference to the liber and page, the deed further expressed the intention that Smiley was conveying "all the lands on the West side of Clove Valley Road" and excepting only those lands that lay on the East side of Clover Valley Road. (RA 2039-2043).

When viewed as a whole and when the circumstances surrounding the conveyances are considered, the language in the deeds in Respondents' chain of title evince the parties' intention to carry in the interest in those two parcels, including the interest in the Property in dispute forward in Respondents' chain of title. *328 Owners Corp. v. 330 W. 86 Oaks Corp.* 34 AD 3d 108 (2007).

POINT V. THE TRIAL COURT CORRECTLY DETERMINED THAT RESPONDENTS' ACQUIRED TITLE TO THE PROPERTY IN DISPUTE BY ADVERSE POSSESSION

In addition to the fact that Respondents have superior record title to the Property in dispute, Respondents established, through their own testimony, the testimony of twelve non-party witnesses, expert testimony, photographs and survey evidence that both Respondents and their predecessor, Smitty, had perfected title to the Property by adverse possession.

Title by adverse possession is acquired when a party possesses property in an open and notorious, hostile and under a claim of right, and exclusively for ten continuous years. New York Real Property Actions and Proceedings Law §511, 512; *Brand v. Prince*, 35 NY 2d 634 (1974). Hostility is presumed when the other elements of adverse possession are present. *Farley v. Nilsen*, 192 A.D.2d 848 (3rd Dept. 1993). The acts necessary to establish adverse possession vary depending on the nature of the property. *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1394-95 (3d Dept 2009). *Ray v. Beacon Hudson Mountain Corp.*, 88 N.Y.2d 154 (1996). Mountainous lands, such as the Property in dispute here, does not require the same quality of possession as "residential or arable" land. *Ray v. Beacon Hudson Mountain Corp.*, 88 N.Y.2d 154 at 160 (1996). Rather, the touchstone of adverse possession

being a presence on the land sufficient to place the owner on notice of a hostile claim, "the actual possession and improvement of premises, as owners are accustomed to possess and improve their estates, without any payment of rent, or recognition of title in another, or disavowal of title in oneself, will, unless rebutted by other evidence, establish the fact of a claim of title" *Birkholz v. Wells*, 272 A.D.2d 665 at 666. (3rd Dept. 2000) (*citations omitted*).

A detailed summary of the continuous acts of adverse possession by Respondent's predecessor, Smitty, and Respondents is set forth in pages 21-26 of this brief and are incorporated but not reiterated here to avoid repetition. The proof at trial clearly and convincingly proved that the Property in dispute, as with the adjoining Smitty's Ranch lands, are particularly well suited recreational activities, such as hunting, camping, hiking, horseback riding, and other recreational activities. The un-refuted testimony and proofs at trial clearly convincingly established that the Property in dispute had been under the actual, open, notorious, hostile, continuous and exclusive occupation of Respondents and their predecessor in title, Smitty, from the late 19850's until 1987, who used, cultivated and improved as a part of Smitty's Ranch, in the manner best suited for the Property.

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 73+/- 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". 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 <u>never</u> logged any of the Property in dispute on behalf of Appellant's predecessor in title. (RA 1367-1368).

Respondents' proof at trial satisfied the requirements of adverse possession Real Property Law §§510, §511, 521 and 522. A party claiming adverse possession under a written instrument need not show good title under the instrument. *Goff v. Shultis*, 26 NY 2d 240 at 248 (1970). Possession based upon a written instrument that is relevant to the land in dispute and which can be located with certainty as the disputed land qualifies as possession under a written instrument. *Id.*

Respondents' and their predecessor, Smitty's actual use and occupation of Premises as a part of Smitty's Ranch is precisely the type of customary cultivation and improvement that the courts of this State have consistently held to vest title by adverse possession. *Ray v Beacon, Hudson Mountain Corp.*, 88 N.Y.2d 154(1996), *Goff v. Shultis,* 26 NY 2d 240 (1970), *2 N. St. Corp. v Getty Saugerties Corp.*, 68 AD3d 1392, 1394-95 (3rd Dept 2009), Camfield v. Luther Forest Corporation, 75 A.D. 2d 671 (3rd

Dept. *1980), Gorman v. Hess*, 301 A.D. 2d 683 (3rd Dept. 2003), *Bassett v. Nichols*, 26 A.D. 2d 569 (2nd Dept. 1966).

Appellant relies on this Court's decision in *Goff v. Princeton Ski Bowl, Inc.*, 61 A.D. 2d 1103 (3rd Dept. 1978), in support of its argument that the trial court's award of title by adverse possession should be reversed. Appellant's reliance is misplaced in that the facts in *Goff v. Princeton Ski Bowl, Inc.* are readily distinguishable from the facts in this case. Unlike the present case, the defendants in Goff, did not offer any evidence they cultivated or improved the property, and thus could not satisfy the statutory time period for adverse possession. *Goff, supra* at 1103. In the present case, not only did Respondents offer extensive proof of their predecessor's cultivation and improvement of the Property for well in excess of the full statutory period, Respondents' themselves adversely occupied the Property in dispute for seventeen years before Appellant sought to quiet title in 2004.

Appellant reliance on this Court's decision in *Shawangunk Conservancy, Inc. v. Pardini and Fink,* 305 A.D. 2d (3rd Dept. 2003), is also misplaced. In the *Shawangunk* case this Court noted that although the Shawangunk plaintiff's predecessors offered testimony that they, *inter alia*, seasonally logged and hunted, and maintained a roadway on the disputed lands, the evidence was not clear and convincing because the defendants' witnesses, who this Court credited, " directly disputed these facts". *Shawangunk Conservancy, Inc. v. Fink*, 305 A.D.2d 902, 904, 762 N.Y.S.2d 109 (App. Div. 2003) In addition, a letter from plaintiff's attorney was introduced which extended an offer to purchase the property, which acknowledged defendants' ownership of the land and defeated the element of hostility. *Id.*

Moreover, the proof at trial established that Smitty's Ranch was a known farm or lot. Parcels of land used as a continuous tract are considered a single lot, and "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 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). Smitty's Ranch lands meets these criteria, in the Property in dispute was used in tandem with the other portions of the Ranch which are improved by residences and other structures. As such, Respondents' and their predecessor's use occupancy of the portions of the Ranch lands constitutes possession of the whole Ranch, including the Property in dispute.

CONCLUSION

The trial court's findings and conclusions that Respondents established title to the Property in dispute by a preponderance of the evidence and that Respondents established title to the Property in dispute by adverse possession by clear and convincing evidence is amply supported by the record and should not be disturbed.

Respectfully submitted,
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