SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 32 SUFFOLK COUNTY

INDEX NO.: 23198/2003

PRESENT:
HON. W. GERARD ASHER

DECISION AFTER TRIAL

Donald Schulz and Susan Schulz,
Plaintiffs,

-against-

Jean Gilmore and William Gilmore,
Defendants.

Ciarelli & Dempsey, Esqs.
Attorney for Plaintiffs
267 Carleton Avenue
Central Islip, NY 11722

Esseks, Hefter and Angel, Esqs.
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This lawsuit has a long and complicated history. Plaintiffs Donald Schulz and Susan Schulz commenced this action in 2003 pursuant to Article 15 of the Real Property Actions and Proceedings Law to compel a determination of claims to certain real property in South Jamesport, N.Y. The action was brought against neighbors Jean Gilmore and William Gilmore. The prayer for relief is a declaration that the plaintiffs be determined to be the lawful owners of parcels they described as Exhibits "B" and "C" to their complaint and award plaintiff absolute ownership of those parcels which include accreted land and a small triangle west of the 104.22 foot mark of the northerly side of Front Street as measured from Center Street. The plaintiffs and the defendants property are both contiguous to the Great Peconic Bay. The dispute centers

around ownership of accreted land which is at the southerly portion of the Gilmore property.

Accretion is a natural process. According to Section 90.17 of Warren's Weed on New York Real Property, accretion is defined as the process of gradual and imperceptible increase of riparian land caused by the deposit of earth, sand and sediment thereon by contiguous waters. The meaning of imperceptible, as used in this rule, means a process so gradual that no one can judge how much is added from time to time. Increasing land on the seashore is defined as where water recedes imperceptibly, leaving additional dry land on the seashore, the proprietor of the original upland will be entitled to the accretion. The doctrine of title by accretion rests upon an increase in the land through natural causes such as the ordinary action of the water. It does not apply to land reclaimed by filling in the water.

The defendants, Gilmore, allege an affirmative defense that they own all land south of the extended " Paper Street" of Front Street and demand that the complaint be dismissed and that they be declared the owner of the accreted land in question; and also in the alternative that they have obtained all land west of the Schulz property by acquiescence, practicality and adverse possession.

The defendants' motion for summary judgment was denied on October 9, 2012 by (this court) with dicta indicating that cogent points were made by the defendants, but not enough to warrant summary judgment inasmuch as plaintiff had no opportunity to challenge or cross-examine defendants' experts, Mason Haas and John T. Metzger.

A non-jury trial was held on June 23, 24, 25, 27 and July 1, 2014.

The plaintiffs submitted 26 exhibits, and the defendants submitted 30 exhibits admitted into evidence.

Witnesses for the plaintiff included Howard Young, a surveyor, Lance Pomerantz, an attorney, Donald Schulz, and William Gilmore. Witnesses for the defendant were Mason Haas, a title examiner, John Metzger, a surveyor, and Jean Gilmore.

Mr. Young was the plaintiff's first witness. He testified that he has been a licensed surveyor since 1970. He prepared a survey for the plaintiff dated October 17, 2001, Exhibit 3. Young also testified that the description in the Schulz deed, Exhibit 1, follows his Exhibit 3 survey. He also testified he never checked any Gilmore deeds before preparing Exhibit 3. He did not know of Justice Peter Fox Cohalan's decision in 1983 that Front Street ended 104.22 feet west of Center Street. Young also claims he never used Exhibit "N" and only used Exhibit "O" in part. Exhibit "N" is dated 1878, and refers to a street layout of 1838. Exhibit "O" is a document dated 1940 but purports to be a layout of streets and plots from 1930, prepared by Daniel Young, Howard Young's predecessor in business and grandfather. Exhibit "O" is particularly important because it was drawn by Daniel Young and shows that the portion of land of what would have been Schulz property is a small triangle with the westerly boundary being the Peconic Bay. Front Street is bounded on the West by the Peconic Bay in Exhibit "O" West Street terminates at the water and Front Street but does not go through to West Street. Justice

Cohalan's decision which is Exhibit "M" and " M1" concludes that Front Street ends 104.22 feet West of Center Street in his 1983 decision, in Gianelli vs. Gilmore.

Mr. Young professes to have never learned of the Cohalan decision until June 23, 2014, while he was on the witness stand. Exhibit 3, drawn by Young shows 220 feet on Front Street West of Center Street. The circles on course N 00° 49′ 30′ W are a line of cedar trees. Even though the N 00° 49′ 30′ W course has a line of cedar trees which separates 2 contiguous properties, Mr. Young still, for some reason indicates that Schulz owns the property west of the line of trees. The Gilmores claim otherwise and maintain that all property South of Paper Front Street belongs to them by deed.

Mr. Young also testified that he had no knowledge that the Gilmore deeds referred to their Southern boundary as the Peconic Bay. He testified that he never looked at the adjacent Gilmore deeds.

The survey drawn by Howard Young, Ex. 3 was done without checking any contiguous deeds, or prior surveys and maps that would be relevant.

Lance Pomerantz, an attorney and title expert testified as to the chain of title for the plaintiffs. He started a chain of title in 1839 with a conveyance Tuthill to Hawkins. Exhibit 6 is a conveyance by will, but Exhibits 5, 7, 8, 9 and 10 all have the same description of the subject property. The salient point is that the property is bound on the South and the West by the water of the Peconic Bay. Exhibits 11 and 12 are admitted. The descriptions are the same as Exhibits

5, 7, 8, 9 and 10. Mr. Pomerantz testified that the first deed with a metes and bounds description is Exhibit 13 dated January 30, 1987. The 1987 survey shows more land than had been historically conveyed. Pomerantz testified he had no way to know if the courses and distances were identical to previous deeds. Exhibits 14, 15 and 16 have to do with Tax deeds and redemptions, but the issue of the description of the subject property expands the metes and bounds description. On February 20, 2002, Front and Center Properties conveyed to Schulz.

Mr. Pomerantz testified that all deeds Exhibits 5 through 12, describe the parcel in question as bounded North by Front Street, East by Clinton Street and South and West by the Bay. Mr. Pomerantz agreed that a grantee can only receive what a grantor owns.

A discussion of what Mr. Schulz's title company insured was not answered directly by Mr. Pomerantz. Exhibit "Z", the Schulz title policy, admitted in evidence clearly indicates that the title company did not insure the description on the Schulz's deed Exhibit 1.

The Schulz title insurance policy states:

> "Although the description to be contained in the closing deed is for more premises than the insured description in schedule C herein, company will endorse its policy of insurance with the description in the closing deed upon proof that the possible rights of "Gilmore" have been resolved either by conveyance or by successful outcome to an action to quiet title against the interest of Gilmore."

Mr. Pomerantz gave business reasons for the title company's position, but did not offer an opinion as to why the company would not insure the description in Exhibit 1 based on the Exhibit 3 survey by Mr. Young.

Mr. Pomerantz also testified that the general rule is that accreted land goes to the upland owner.

Mr. Schulz testified that in 2002, he originally had a few cordial conversations with the Gilmores. He acknowledged that there was a fence put up by the Gilmores on the course known as N 00° 49′ 30′ W. Exhibits 19, 20 and 21 are photos showing the line between the properties. Schulz put up a fence on Front Street extended and Gilmore took it down immediately. Schulz claims he wasn't familiar with the area until he saw an advertisement. He says he believed he was getting property represented by Exhibit 3, but acknowledged that the title company did not insure the Exhibit 3 description.

It appeared that Mr. Schulz lacked an understanding of what he was purchasing. There is no question that Exhibit "Z" is specific about what is being insured. Mr. Schulz traced with a yellow marker the portion of his property that was insured by the title company on Exhibit "CC". Almost all the property to the West of the insured Western line marked by the cedar trees is what Schulz is claiming.

William Gilmore was called by plaintiff and testified to photos in Exhibits 19, 20, 21 and 22. He testified that he put posts in on the east/west line of Schulz and Gilmore in 1980, and he's been caring for the Gilmore property since 1966, all the way down to the water.

After the plaintiff rested, the defense called Surveyor John Metzger. He has been working in the field since 1963 and was licensed in 1984. He drew the survey dated on June 1, 2001 and redated May 24, 2005. It was admitted as Exhibit "V" and purports to be the Gilmore

property consisting of approximately 1.247 acres and is bounded on the South by Great Peconic Bay. He referenced Exhibit "J" and Exhibit "K", deeds in 1966 and 1967 that show Gilmore as grantee. Metzger testified that his Exhibit "V" is what he maintains Gilmore owns. He relied on the deeds and the survey Exhibit "P" in evidence and "DD" in evidence. Exhibit "V" is signed and sealed by Mr. Metzger. Metzger did follow deed history of the Gilmore property. Exhibit "L" is a 2006 deed which follows the metes and bounds description of Exhibit "V."

Mason Haas testified that he has been in the land examining business for 27 years and worked for 2 companies, M & M, and Ace. He testified as an expert in title matters for real property. Exhibit "W" was admitted.

Haas testified that the Gilmore parcel goes back to October 16, 1837 and that the Southerly line is bounded by the Bay. Then there is a 1922 deed and other deeds in the 1920s. All deeds regarding the Gilmore property are defendants Exhibits "C, D, E, F, G, H, I, J, K and L." The descriptions are consistent in that they all state "Southernly by Front Street and the Great Peconic Bay."

Testimony centered on the Southern parcel of the Gilmore property, not the Northern parcel, Exhibit "V" was referred to as an inverted "L". Mr. Haas opined that the Tuthill to Hawkins deed ultimately was conveyed to Shulz. He follows Exhibits 5 through 12 until the Patchell to McAlpine deed. He believes that those descriptions are in error. He testified that the February 20, 2002 deed is a mistake and indicated the 220 feet on Front Street is much more property than can be conveyed by Front and Center properties. Haas refers to Exhibit "O", the

map, that shows only 103.45 feet on Front Street back in 1940. Again, Justice Cohalan previously found that Front Street ends 104.22 feet westerly of Center Street. Haas testified that Front Street was never 220 feet; it was 103.45 feet. Haas was shown Exhibit 3, and "V." He opined that Exhibit 3 is not accurate.

Mr. Haas marked on Exhibit "CC" in blue marker the area that he believes is the proper Schulz property. Since Mr. Schulz used yellow, there are some green lines, but the blue/green lines on Exhibit "CC." The blue and blue green lines is the property that Haas believes is proper description of Schulz property.

On cross-examination, Haas testified about tax maps in Riverhead. Exhibit 24 is a tax map for 1984. It shows Front Street going to the Bay, but the Cohalan decision changed that. Mr. Haas agreed that no one knows the extent of accretion or erosion until sometime in mid 20th Century.

Mr. Haas testified that accretion has no effect on assessed value for tax purposes. Haas testified that a tax map does not define the size of a plot, but does give some information about who is paying taxes on a particular plot. Exhibit 23 was admitted. So even though the tax maps show Front Street going to the Bay, it was later corrected according to Haas.

Haas also referenced a deed from Tuthill to Cleeves dated October 16, 1937. Tuthill is the source back in the 1830s for both the Gilmore property and the Schulz property, and Haas bases for this opinion is the 1878 map #415 that refers to the 1830s layout streets and plots in this area. The 1878 map is Defendant's "N" in evidence. Haas makes specific reference to the

language at the bottom right hand corner of "N" which has language about no dwellings in 1833, but 40 erected by 1838. Haas testified that the 1837 deed makes reference to a map and Haas believes that the map did exist such as it was then, prior to it being filed. Of course, it would have to have been in existence prior to 1837. Exhibit 24 is a portion of Exhibit "N", the 1878 map, and purports to have some more information on it then Exhibit "N". The map makes reference to the year 1838 more clearly than "N." The question then is if the map is dated 1838, relying on the map would not be possible for a 1837 deed, but Haas testified that the year 1833 is also referenced and that means to Haas that there was something of a map prior to 1838, and that possibly the map was not completed until 1838. Haas referred to lot numbers and opined that the map is referenced in Tuthill to Cleeves deed, a Gilmore forerunner. Haas testified that there is enough evidence on Exhibit 24 and Exhibit "N" to substantiate a deed to a title company. Even if the Cleeves deed was not recorded until after the Tuthill to Hawkins deed that a post recorded deed was not uncommon. He offered and opined that Tuthill to Hawkins follows ultimately to Schulz and Tuthill to Cleeves follows to Gilmore. Haas was shown Exhibit "P", the 1966 Kart survey and makes reference to dates September 7, 1966 and September 19, 1966. Exhibit "P" is compared to Exhibit "K"; a deed from Olesewski to Gilmore. Both Metzger and Haas were credible witnesses for the defense.

Defendant Jean Gilmore, testified that she purchased the property in 1966 with her husband. This property description followed a survey drawn by Kart, which is in evidence as Exhibit P.

The main house is on the northern portion of the Gilmore property and a cottage is on the southern portion of the property. Shortly after the 1966 Deed, there was a Correction Deed. The Correction Deed is admitted as Exhibit "K".

John Metzger testified that he drew Exhibit "V", a survey, which is a survey of the entire Gilmore property, and, as described, with a metes and bounds description. The description is the description in deed of Exhibit "L".

Miss Gilmore testified that she believes that her entire property is represented by the survey drawn by Metzger dated June 1, 2001 and redated May 24, 2005. This survey shows the eastern portion of the Gilmore property to be a course S 00 degrees 49 minutes 30 seconds east. This line purports to be the westerly line of both land now or formerly of Kirk, and Front Street and land now or formerly of Front and Center Properties Inc., and Schulz. Exhibit "V" shows that the southerly portion of the Gilmore property is bounded by the Great Peconic Bay. The westerly portion of the Gilmore property is bounded by West Street.

Miss Gilmore also testified that Exhibit "A", an aerial map dated the spring of 2013, is an accurate view of the area, it shows a demarcation between the Schulz and Gilmore properties, a clear east/west line. The Schulz property and the Gilmore property are easily discerned on this aerial photograph. There is a line of trees and/or a fence separating the Gilmore property and the Schulz property. Front Street terminates at the fence line, which is 104.22 feet from Center Street. The southerly portion of the Gilmore property is bounded by the Great Peconic Bay. Exhibit "A" is consistent with Exhibit 2, which is another aerial map dated 1976.

Miss Gilmore testified that as soon as she moved into the house in 1966, that she noticed a lengthy platform and pier extending from land now or formerly of Kirk, through the southerly portion of what she perceived to be her own property. Her husband and her son removed the entire pier and platform within months of taking possession. No complaint was ever made for their activities or action. She also testified that she caused, through her son, a fence to be erected on their easterly line, which was exactly at the spot where Front Street terminated. After the removal of the platform and the pier, over time, there was more sand accretion on the southerly side of the property. In addition to the fact that her son planted a line of cedar trees on the eastern property line, he also put up a snow fence. The line extended from the end of Front Street south to the water.

Multiple photographs were admitted into evidence such as R, S and T. Those photographs show the line of trees and the snow fence and other objects that William Gilmore put on the property line to show the separation between the Gilmore and Shulz properties.

In addition, Miss Gilmore testified about the tax bills from 1966 to 1979. Those bills were admitted in evidence as Exhibit "U" and Exhibit "U-1." In reference to Exhibits "U" and "U-1", there was testimony about whether or not the tax bills are representative of the exact dimensions of the property. The Court notes that tax bills don't always show the exact area of property, and sometimes can be different from what a survey or deed would show; however, they do count for some weight with regard to the fact that the municipality taxed the owner of that property, and represented that to be the size of the property. The tax bills, although not

dispositive of property dimensions, identify the person who is paying taxes on the property that is assessed and billed. All bills were paid by Gilmore. Those tax bills indicate that the Gilmore property is bounded on the south by Peconic Bay, and on the west by West Street.

Exhibits "U" and "U-1" sets forth the general layout and nature of the property that the Gilmores own according to the Town of Riverhead's tax department.

On cross-examination, Miss Gilmore admitted that she did not ask permission to remove the pier and platform that ostensibly had been built by Kirk, but that they just did it because their lawyer told them to do it. Nobody went to court, nobody asked permission, and nobody complained.

Miss Gilmore had also looked at an aerial photograph Q and R. The aerial photograph represented by Q is dated April 23, 1980. The cottage is marked on the aerial survey, and there is a discernable line of trees on the Gilmore easterly property from land now or formerly of Kirk, passed the Front Street terminus and into the sand area which would be the easterly Gilmore boundary of the Schulz property, westerly boundary for Schulz.

A further aerial survey which is represented by Exhibit "R" dated April 5, 1993, also shows a demarcation line of a fence throughout most of the easterly property on the southern parcel of the Gilmore property passed land now or formerly of Kirk; passed Front Street and down to the beach.

Exhibit "S" consists of a photograph taken of the property in May of 2000. Exhibit "S" and "T" are in evidence, both show the cottage it also shows the beach, and a demarcation line

between the Schulz and Gilmore properties. Both Exhibits show the demarcation line of the east/west boundary between Gilmore and Schulz all the way to the water of the Great Peconic Bay. Both exhibits are dated May 3, 2000.

On cross-examination, Gilmore confirmed that she did not seek permission to remove the platform and the pier, and indicated that she never intended to go to court to ask for permission for any of it because it was her property.

In sum, Miss Gilmore was a credible witness who understood exactly what she was purchasing in 1966 and 1967, and has always cared for the property on the western side of the east/west border between Schulz, Kirk and Front Street. In addition, she and her family members put a fence line up and a tree line up and other demarcations to show that this property belonged to them and no one else. Miss Gilmore testified that family members used it, but no one else did. They are the only ones that used it.

Plaintiff requested rebuttal witnesses, Lance Pomerantz and Howard Young to testify.

Mr. Pomerantz testimony was unnecessary. The court accepted a Deed from Tuthill to Hudson which predated a Deed from Tuthill to Cleeves. The Certified Deed is dated January 18, 1837, and purports to be a conveyance prior to the deed of Tuthill to Cleeves that was referenced by Mr. Haas.

The Court accepted it, and for the purpose of adding more information as to whether these Deeds were done according to a map layout, which is referenced in Exhibit "N", an 1878 map referring to dwellings built after 1833. Schulz' property goes back to Tuthill, as does Gilmores.

Howard Young was permitted to take the stand as a rebuttal witness after the Gilmore defense rested. Mr. Young prepared a new survey map different from ones already in evidence. This one is dated June 24, 2014 prepared as the case was being tried. Mr. Young claims that this survey had to do with the language historically on the Schulz property of being, approximately, a quarter acre more or less – "Be it more or be it less." Mr. Young agreed that there were no surveys prior to 1930. In preparing Exhibit 26, Mr. Young testified that he did it on the basis of "a call." And the "call" in question was the general idea of the property being, approximately, one quarter acre.

In using the Deed description of 1861, Young admitted that it is strictly based on the concept that the property is a quarter acre; "be it more or be it less," because that Deed indicated that the westerly portion of that conveyance was bounded by the Great Peconic Bay.

The ultimate testimony by Young is that he is interested in showing that a small triangle that would be located west past the east/west line between Schulz and Gilmore and the small triangle which is similar to the parcel contained in the original complaint and referred to as the red parcel.

Young indicated that the square footage of Exhibit 26 attributed to Schulz, is 10,890 square feet; more than a quarter acre. Even if you take away the small triangle, which is westerly of the east/west Gilmore/Shulz line, Mr. Young conceded that the remaining property shown in Exhibit 26 would still be a quarter acre.

Under cross-examination, Young admitted that Exhibit 26 is not a survey. A discussion ensued on cross-examination that the map drawn by Daniel Young still had monuments set, and Howard Young admitted that, that was true. And the monuments indicated that Front Street was only 103.45 feet from Center Street. It gives more credence to the fact that Front Street ended in its current configuration at 104.22 feet from Center Street.

On cross-examination, Young admitted that he was using the "call" issue based on the 1861 Deed, and disregarded other language. He used the quarter acre theory in determining how big to make Exhibit 26. He also was challenged as to whether or not he used any theory of accretion and erosion from 1861 to the current date, and, ultimately, admitted that it was impossible to know.

Exhibit "O" indicates that the size of the parcel would probably be less than 4,000 square feet but has limited values as all parties have admitted. It could be greater than 4,000 square feet.

Even though Exhibit "O" shows a small square footage of the property later to be owned by Schulz, it doesn't mean that Exhibit "O" is, specifically, accurate as to the reality as to what the square footage was at that time, i.e. 1930.

On cross-examination, Young admitted that the call system is at the bottom of the hierarchy of how to describe property.

Mr. Young was asked whether or not the descriptions in the Deeds from 1861 all the way through to 1930 consistently stated that the Schulz property was bounded on the north by Front

Street; on the east by Center Street; by the south by Peconic Bay, and the west by Peconic Bay. And Mr. Young admitted that was true.

When Mr. Young was asked whether or not that was consistent with the triangle that is represented on the map dated 1940, but recorded 1930, he indicated that the entire south westerly side was bounded by the water. According to Young the only issue is that it would be less than a quarter acre.

Mr. Young was asked to compare Exhibit "O" with Exhibit "N". Exhibit "N" dates back to 1878. But the area in question, which, ultimately, became the Schulz property, is relatively consistent with Exhibit "N" and "O".

Mr. Young's rebuttal testimony with Exhibit 26 is, essentially, based on the concept that the Schulz property, ultimately, would be a quarter acre, more or less. Superimposed on Exhibit 26 is a portion of the Kart Survey dated 1966; showing the platform and pier emanating from Front Street and the Kirk property which was removed by Gilmore in 1967.

At the conclusion of Mr. Young's testimony, the plaintiff rested and the defense rested.

Subsequent to the trial, both attorneys submitted post trial memoranda of law, and the Court also entertained oral argument on February 19, 2015.

As stated above, accretion is a natural process. According to Section 90.17 of Warren's Weed on New York Real Property, accretion is defined as the process of gradual and imperceptible increase of riparian land cause by the deposit of earth, sand and sediment thereon

by contiguous waters. The meaning of imperceptible, as used in this rule, means a process so gradual that no one can judge how much is added from time to time. Increasing land on the seashore is defined as where water recedes imperceptibly, leaving additional dry land on the seashore, the proprietor of the original upland will be entitled to the accretion. The doctrine of title by accretion rests upon an increase in the land through natural causes such as the ordinary action of the water. It does not apply to land reclaimed by filling in the water.

In this case, no land is filled in, and accretion has taken place over a long period of time, although the parties have agreed that they were not able to see or discern accretion until mid 20th Century on the properties in question in this case.

There are several cases that address accreted land, but the seminal case is In the Matter of the Application of the City of Buffalo and the New York Central and Hudson River Railroad Company v. Henry D. Kirkover, 206 NY 319; decided by the Court of Appeals on October 22, 1912. The basic holding and decision by the Court of Appeals in that case set the standard that when there are accreted lands, those accreted lands go to the upland owner, and wherever possible, to follow straight lines to the area at the edge of the water from one contiguous owner to the other. In the City of Buffalo case, the Court of Appeals applied the upland rule and the straight line rule to accreted land.

Any litigant who has searched title to property under Article 15 of the RPAPL, has the burden of proving that their claim is appropriate to show entitlement on that issue. Town of North Hempstead v. Bonner, 77 A.D.2d 567 1980.

The plaintiff, Schulz, has relied on speculation and inconsistent description of the properties

from prior owners Shout, Patchell, McAlpine and Front & Center Properties. It is clear that Defendant's Exhibit "Z", the title insurance policy for Schulz, does not insure the area of land claimed by Schulz in his Complaint. That there were no metes and bounds descriptions regarding the Schulz property until 1987, and this Court finds those surveys are unavailing.

The Survey and Deed for 1987 shows 180.79 feet on Front Street west of Center Street with no rationalization. Young was unaware of Justice Cohalan's decision of 1983 regarding Front Street. If Mr. Young had looked at the Gilmore Deeds from 1966 and 1967 they would have put him on notice that the Gilmores owned the property west of the 104.22 - foot line on Front Street.

Schulz attempted to justify some of the extra footage westerly from the Front Street line for Schulz on the basis of the quarter acre call; referring to the 1861 Deed ex. of a quarter acre, more or less.

Young also admitted that with respect to the proper description of a property, that the appropriate way to do it is by: (1) natural objects, (2) artificial objects, (3) adjacent boundaries, (4) courses and distances, (5) a call. This means, in effect, that the least effective way to describe any parcel of property is by a call. And yet, that is the standard that Young used in his attempt to show that the so-called red parcel, the small triangle, should be determined to belong to Schulz by this Court.

The leading case on this hierarchy is Macklowe v. Trustees of Free Holders and Commonalty of the Town of East Hampton, 34 MISC. 3RD 1237 Suffolk County Supreme Court 2012.

In Macklowe the Court observed that where there is a discrepancy in Deeds, the rules of

construction require that resort be had first to (1) natural objects, (2) artificial objects, (3) adjacent boundaries, (4) courses and distance, and (5) the last to the "call." The "call" of one quarter acre is unavailing with regard to this matter.

There are several other cases following the Buffalo case supra, including Cramer v. Perine 251 NY 177 1929, and Ludington v. Marsden 181 A.D.2d 176 1992, July 14, 1992.

The Court in Ludington indicated that the precise method of apportionment of accreted land does vary from case to case, depending on the size and configuration of the properties in relation to the body of water.

In the case at bar, there is no issue regarding how to determine accretion. The upland owner is entitled to the accreted property, and the courses and distances that run north and south are close to parallel even though not precisely parallel.

Schulz may have a claim for accreted land that is directly south of his property, but no claim to any accreted land that is west of the north/south course of N 00° 49′ 30" W on Exhibit 3. Using the same north/south course as above, all accreted land west of that course line belongs to Gilmore. On Exhibit "V," the southerly boundary distance on the beach is 140.99 feet, the Gilmore property.

All of the exhibits and all of the testimony was considered by the Court, but the ones that are particularly cogent and important include Defendant's Exhibit "Z", the title insurance policy for Schulz; the photographs of Plaintiff's Exhibits 19, 20, 21 and 22 showing the fence lines; aerial photographs of plaintiff's Exhibit 2 dated April 6, 1976; defendant's Exhibit "A" dated

2013; Exhibit "Q" aerial photo of 1980. Defendant's Exhibit "K", a Correction Gilmore Deed, and "L", a more recent 2006 Gilmore Deed. Defendant' Exhibit "V", a Survey by Metzger; Defendant's Exhibits "N", "O", "P" and "DD". Defendant's "M", Justice Cohalan's lengthy decision with regard to a similar case, and defendant's Exhibit "CC."

In addition, Defendant's Exhibit "U-1", the tax bills reiterate that the Gilmore property is bounded on the south by the bay and the Gilmore's evidence of payment of all tax bills.

All those exhibits give credence to the Gilmore claim that they owned the property by Deed.

The Schulz history with Exhibits 5, 7, 8, 9, 10, 11 and 12 are all Schulz predecessors in Deed, and they all indicate that the south westerly property is bounded by the Bay. These do not support Schulz's claim.

More recent Deeds from 1987 have no explanation as to why the 104.22 feet emphasized throughout the trial was not followed in 1987 and 1994 and in 2000 and 2002, especially since Exhibit "M" is dated 1983.

None of those exhibits and surveys are persuasive in light of all the other evidence in this case.

The plaintiff's request that the red parcel and other accreted lands claimed by the plaintiff to be west of their course and distance property line are without merit.

The Gilmore's proof is more persuasive and following the 1920s Deeds in Exhibits "C", "D", "E", "F", "G", "H" and "I" all state that the southerly boundary of the Gilmore property is bounded by Front Street and the Great Peconic Bay.

The Court finds that Front Street south of the Gilmore property, does not exist and has never existed, and has always been what is known as a paper street; therefore, it must be conclude that the southern boundary of Gilmore's property is the Bay.

The Court also notes that plaintiff, Schulz, offered no testimony and no evidence, documentary or otherwise, to contradict defendant Gilmore's representation about the use of their property; neither did the plaintiff, Schulz, challenge the fact that the Gilmores immediately removed a fence placed on the southerly portion of the Gilmore property by Schulz. Schulz never permanently removed any artificial barriers or tree barriers along the east/west line placed there by the Gilmores. In addition, the Gilmores have lived on their property from 1967 to current date. Schulz did not obtain title to his property until 2002.

Since none of the Gilmore uses was ever contested by Schulz or any of Schulz's predecessor in title, Gilmore's additional claim that they are entitled to the accreted land on their southern boundary is supported by the facts of the practical location of their property; the acquiescence of Schulz' predecessors in title and adverse possession claims that Gilmore has made in his Answer, Affirmative Defense and at trial.

Gilmore's use of this property has fit the description of open, hostile and notorious for every year from 1967 to 2002 when Schulz obtained title, and even to current date.

This Court finds that the plaintiff, Schulz, has not met their burden to prove their allegation of an entitlement to accreted lands west of their property. The 00° 49' 30' north south course.

On the other hand, the Gilmores have shown this Court that all their Deeds and Surveys, tax bills and other documentary evidence, proves that their southerly boundary line was always the Great Peconic Bay.

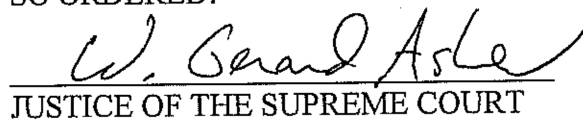
All the documentary evidence referred to above, substantiates the Gilmore's claim for their property. The Court makes a finding that the Gilmores own all property represented by defendant's Exhibit "V", and "L". The Court also makes a finding, specifically that the Gilmores are entitled to the property of Exhibit "V" by practical location, acquiescence and adverse possession.

Therefore, the plaintiff's complaint is dismissed with prejudice and without costs, and the Court finds that the property in question is owned outright by Jean Gilmore and William Gilmore by documentary proof and evidence adduced at trial and by adverse possession.

The foregoing is the Decision and Order of the Court.

Submit Judgment.

SO ORDERED:



JUSTICE OF THE SUPREME COURT

December 19, 2017