

NOVA SCOTIA COURT OF APPEAL  
**Cite as: Herbst v. Seaboyer, 1994 NSCA 210**

**Hallett, Matthews and Chipman, JJ.A.**

**BETWEEN:**

RICHARD T. HERBST	)	John R. Cameron
	)	for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	Clare H. Durland, Q.C.
	)	for the Respondents
	)	
ANN ELIZABETH SEABOYER, ALBERT	)	
LEO SEABOYER, MARGUERITE	)	
SEABOYER and DANIEL JAMES	)	
SEABOYER	)	
	)	
	)	
Respondents	)	Appeal Heard:
	)	November 15, 1994
	)	
	)	
	)	Judgment Delivered:
	)	December 6, 1994
	)	
	)	
	)	

**THE COURT:** Appeal allowed in part per reasons for judgment of Hallett, J.A.;  
Matthews and Chipman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of Haliburton J. arising out of a boundary line dispute. There are four points raised on the appeal; one has merit.

The appellant acquired two contiguous parcels of land by separate transactions in the early 70s. The first lot he acquired is known as the Brooks Lot and is described as follows:

" BEGINNING at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;  
THENCE turning and running in a Southerly direction along the East boundary line of said lands of the said Cecil Young a distance of three hundred feet to a point;  
THENCE turning at right angles to the hereinbefore (sic) mentioned line and running in an Easterly direction along lands of Malcolm R. Healy to the centre of a brook;  
THENCE turning and running along the centre of the said brook in a Northerly direction following the various courses thereof to the shore of the Bay of Fundy;  
THENCE turning and running in a Westerly direction following the various courses of the shore of the Bay of Fundy to the Place of Beginning.  
BEING the same lands and premises conveyed by Malcolm R. Healy to Arthur E. Brooks by Deed dated the 25th day of July, A.D. 1969."

The second lot was acquired from Mr. Malcolm Healy in 1974 and it is described as follows:

" All that certain lot, piece or parcel of land and premises situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, more particularly bounded and described as follows:

COMMENCING at a point where the East boundary line of lands now or formerly owned by Cecil Young intersects with the North side line of the Old Main Phinney Cove Highway;  
THENCE running in an Easterly direction along the North side line of the Old Main Phinney Cove Highway, a distance of Three Hundred and Eighty Feet (380') to a point;  
THENCE turning and running in a Northerly direction on a line parallel with the East boundary line of the said lands of the said Cecil Young to the South boundary line of lands conveyed by Malcolm R. Healy to Gordon Cobham and Rachel Cobham by Deed dated August 5th, 1970 and recorded in the Registry of Deeds for the county of Annapolis on August 7th, 1970 in Book 236 at Page 531;  
THENCE turning and running in a Westerly direction along the South boundary line of said lands conveyed by the said Malcolm R. Healy to the said Gordon Cobham and Rachel Cobham by Deed dated and recorded as aforesaid, and continuing in a Westerly direction along the South boundary line of lands owned by Richard T. Herbst, the Grantee herein, a total distance of Three Hundred and Eighty Feet (380') more or less to the East boundary line of said lands of the said Cecil Young;  
THENCE turning and running in a Southerly direction along the

East boundary line of said lands of the said Cecil Young to the Place of Beginning.  
SAVING AND EXCEPTING THEREOUT AND THEREFROM  
the Old Shore Road where the same crosses the lands herein described."

The respondent Albert Seaboyer acquired a parcel of land known as the Cobham Lot. It is to the east of and adjacent to the Brooks Lot and was subsequently conveyed to the respondent Ann Seaboyer. It is described as follows:

" COMMENCING at a point in the centre of a brook at the Southeast Corner of a lot of land conveyed by Arthur E. Brooks et ux to Shirley Ritchie by Deed dated the 26th day of June, A.D., 1970 and recorded in the Registry of Deeds for the County of Annapolis on the 15th day of July, A.D., 1970 under Recording No. 77922;  
THENCE running in a Northerly direction along the centre of the said brook following the various courses thereof to the shore of the Bay of Fundy;  
THENCE turning and running in an Easterly direction along the shore of the Bay of Fundy a distance of Four Hundred (400') feet to a point;  
THENCE turning and running in a Southerly direction in a straight line along lands reserved by Malcolm R. Healy, the Grantor herein, a distance of Three Hundred (300') feet to a point;  
THENCE turning and running in a Westerly direction along lands reserved by Malcolm R. Healy, the Grantor herein, a distance of Four Hundred (400') feet to the Place of Beginning."

In 1984 Albert and Marguerite Seaboyer obtained another parcel of land from Mr. Malcolm Healy; it was subsequently conveyed to Ann Seaboyer and is contiguous to the Cobham Lot.

These four parcels of land were part of two parcels of land that had been acquired by Malcolm Healy and described as follows:

" All that certain piece or parcel of land situate, lying and being at Phinney Cove, in the County of Annapolis, Province of Nova Scotia, bounded and described as follows:

BEGINNING at the Bay of Fundy shore at the Northeast corner of lands of Cecil Young;  
THENCE running Eastwardly the course of the Bay of Fundy shore until it comes to the West line of lands of Martin Boudreau;  
THENCE turning and running Southwardly along Boudreau's West line sixty-six (66) rods, or until it comes to the pasture fence at the North of the fields;

THENCE turning at right angles and running Westwardly along said pasture fence until it comes to the East side of the Old Shore Road running from the Phinney Cove Highway to the Bay of Fundy;  
THENCE turning and running Southwardly along the East side of the said Shore Road until it comes to the North boundary line of the main Phinney Cove Highway;  
THENCE turning and running Westwardly along the North boundary line of the highway until it comes to the East line of the aforesaid lands of Cecil Young;  
THENCE turning and running Northwardly along Cecil Young's East line to the Place of Beginning...

COMMENCING at that point where the Southwest corner of land now or formerly owned by Martin Boudreau abuts on the North side of the main highway;  
THENCE running Northerly along said Boudreau's West line until it reaches the South line of land now owned by Malcolm R. Haley (sic);  
THENCE running Westerly along said Haley's South line, which is marked by a pasture fence, until it reaches the East side of the Old Shore Road which runs from the Phinney Cove Highway to the Bay of Fundy;  
THENCE turning and running Southerly along the East line of said Shore Road until it comes to the North line of the main Phinney Cove Highway;  
THENCE turning and running Easterly along the North side of the highway to the Place of Beginning..."

These two descriptions are relevant with respect to the fourth issue raised by the appellant. As found by the trial judge these two conveyances to Malcolm Healy taken together comprise all the lands lying between the Bay of Fundy Shore on the north, the main Phinney Cove Highway on the south, the lands of Martin Boudreau on the east, and the lands of Cecil Young on the west. The property was rectangular in shape.

The boundary line dispute erupted essentially as to the location of the boundary between the Brooks and Cobham lots. There were assertions that the appellant had altered the location of the brook marking the Eastern boundary of the Brooks property by moving it to the east. The matter came to a head when the respondent Ann Seaboyer built a cottage on what she considered to be part of the Cobham lot but which the appellant considered to be part of the Brooks lot. Each of the parties eventually engaged surveyors; Mr. McBurney for the respondents and Mr. Hicks for the appellant. Plans were prepared and the matter went to trial.

The learned trial judge accepted the opinion of Mr. McBurney as to the location of the boundaries of the various parcels of land. Accordingly he dismissed the appellant's action. The appellant has raised four points on the appeal described in the appellant's factum as follows:

" ISSUE #1.

What is meant by "shore", mean high water mark or the edge of vegetation? That is, what is the starting point of the Herbst deed (formerly Healy to Brooks) at "the shore of the Bay of Fundy"?

ISSUE #2.

Was the court below justified in ignoring deed distances in determining the location of the Cobham lot? That is, how should the Cobham lot be laid out on the ground, and do the deed distances govern?

ISSUE #3.

Which watercourse is the east boundary of the original Herbst lot? That is, which of the watercourses described in the evidence is meant in the phrase "thence at right angles to a brook"

ISSUE #4.

Is there a road or right of way across the second Herbst lot? That is, what is the meaning of the phrase "saving and excepting thereout and therefrom the Old Shore Road where it crosses the land above described" in the description of that lot?"

The learned trial judge accepted the evidence of the witnesses called by the respondents over the evidence of the witnesses called for the appellant as to the location of the lines of the properties and, in particular, the location of the brook as described in the Brooks deed. The trial judge did not find the appellant credible. At p. 11 of his decision, after reviewing conflicting evidence, he stated:

" I find I have very limited confidence in the ability of the Plaintiff to be objective about any aspect of the dispute between him and his neighbours. It appears that he initially took no interest at all in the location of the boundary lines of the lot he was acquiring and then subsequently decided unilaterally what those boundary lines should be. Having exercised possession of the property he claimed for some 13 years in spite of the objections of his adjoiningers, he is absolutely determined to retain the rights he has exercised."

The learned trial judge took a view of the lands in dispute.

The evidence supports the findings of the learned trial judge that (i) the shore line of the Brooks Lot and Cobham Lot were properly located by Mr. McBurney; (ii) that the brook referred to in the description of the Brooks Lot is the so-called western brook rather than the eastern brook as claimed by the appellant; and (iii) the descriptions of the lands conveyed to Malcolm Healy and the *viva voce* evidence given at trial support a finding that the Old Shore Road referred to in the deeds and in particular in the conveyance to Mr. Herbst of his second parcel of land is not the same road described as the Phinney Cove Highway as contended by the appellant but a road running from the Phinney Cove Highway northerly to the shore. Therefore issues #1, 3 and 4 cannot be sustained.

With respect to Issue #2, that is, whether the learned trial judge was justified in ignoring deed distances in locating the eastern and southern boundaries of the Cobham lot, I am of the opinion that the trial judge erred in accepting Mr. McBurney's opinion on this issue. There are no monuments, natural or otherwise, referred to in the description of the Cobham Lot. Apart from the brook and the shore line there are no monuments or fences on the ground. The description starts at the southeast corner of the Brooks lot and runs northerly along the centre of the brook to the shore of the Bay of Fundy. The description then goes along the shore in an easterly direction "400 feet to a point" and thence "southerly 300 feet to a point" and thence running "in a westerly direction along lands reserved by Malcolm R. Healy a distance of 400 feet to the place of beginning." The description is not ambiguous. The evidence of Eva Gale that she walked with Malcolm Healy when he paced off the north line of the Cobham Lot and that he stopped short of the fish houses and stated to her that he was retaining the land to the east of the fish houses on the shore cannot, in the absence of some reference in the description of the Cobham lot to the fish houses, alter the plain meaning of the words of the description of the Cobham lot. The description called for 400 feet on the shore by 300 feet on the east and 400 feet on the south. The McBurney plan results in a shore frontage of about 360 feet and an east line of 427 feet. There is no evidence on the ground that the east line was established at a point about 360 feet from the northeast corner of the Brooks lot. There is no

evidence that would support Mr. McBurney's speculation that the original grantor of the Cobham Lot, Mr. Malcolm Healy, intended to convey rectangular lots. It was this conclusion that led Mr. McBurney to fix the east line as being 427 feet in length. The Cobham Lot is essentially rectangular in shape whether one uses the distances called for in the deed for both the north and east lines or Mr. McBurney's speculation. There are no words in the description of the Cobham Lot which indicate that the original grantor, Malcolm Healy, intended that the south line be a straight line as speculated by Mr. McBurney.

Counsel for the appellant relies on **McPherson et al. v. Cameron** (1974), 7 N.S.R. 208 to support an argument that the evidence of Eva Gale that Malcolm Healy did not intend to convey any land to the east of the fish houses when pacing off the Cobham Lot dictates such a finding. This is the rationale for Mr. McBurney's opinion that the east line of the Cobham Lot be located 360 feet from the northeast corner of the Brooks lot rather than the 400 feet called for in the deed.

There is a fundamental difference between the nature of the description of the Cobham Lot and the lot in question in **McPherson et al. v. Cameron**. The north line, that is the line along the shore of the Cobham Lot, proceeds easterly "400 feet to a point"; an undefined and unidentified point. In **McPherson et al. v. Cameron** the line in question went to a corner of an adjacent Grant, the location of which was known to be at a beech tree which many witnesses testified to. In other words, the questionable boundary line in the **McPherson et al. v. Cameron** went to an identifiable point and that point prevailed as to the location of the corner of the land over a corner that would be determined if one were to use the distance called for in the deed. The north line of the Cobham Lot proceeds 400 feet to a point that cannot be identified. Therefore the distance called for in the Cobham deed must prevail rather than the extrinsic testimony of a person who was with the grantor when he paced off the lot. Malcolm Healy's intention must be taken from the words of the description as there is no ambiguity in the description as was the situation in **McPherson et al. v. Cameron**.

The law applicable in this case is clear. The intention of the parties to a deed is to be determined by the words used in the deed and effect should, if possible, be given to the words. (**Saueracker et al. v. Snow et al.** (1974), 14 N.S.R. (2d) 607 at paragraph 20) The well-known rules that are applied to find the intent of a grantor where there is an ambiguity as recited by Dodd J. in **McPherson et al. v. Cameron** at p. 212 have no application whatsoever with respect to determining the location of the north and east lines of the Cobham Lot as there is no ambiguity in the description nor any ambiguity when the description is applied to what is on the ground.

The learned trial judge erred when he concluded that he should determine the intention of the original grantor Malcolm Healy as to the location of the Cobham Lot based on the evidence of Iva Gale and the speculation of Mr. McBurney. The intention of the original grantor must be determined by the clear words used in the deed. Therefore the McBurney plan with respect to the Cobham Lot should be altered (i) to extend the northern line easterly the distance called for in the deed, namely, 400 feet from the brook; and, (ii) to limit the east line to a distance of 300 feet to a point that would be approximately 400 feet from the southeast corner of the Brooks lot being the place of beginning. These changes would not be inconsistent with the descriptions contained in the conveyance of the second lot to Herbst and the conveyance in 1984 from Malcolm Healy to Albert Seaboyer and Marguerite Seaboyer.

The appeal has failed in the main, particularly when one realizes that the alteration of the boundaries of the McBurney plan do not significantly affect the lands owned by the respective parties and that the main point of contention was the location of the west boundary of the Cobham Lot. I would award costs on the appeal to the respondent at 40% of the costs awarded at trial plus disbursements.

Hallett, J.A.

Concurred in:



Matthews, J.A.

Chipman, J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

RICHARD T. HERBST

Appellant

- and -

ANN ELIZABETH SEABOYER,  
ALBERT LEO SEABOYER,  
MARGUERITE SEABOYER and

DANIEL JAMES SEABOYER

Respondents

REASONS FOR  
JUDGMENT BY:

HALLETT, J.A.