1904

*Oct. 17, 18, 19.

Nov. 21.

JOSEPH COOTE (DEFENDANT) .....APPELLANT;

AND

JAMES BORLAND (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Agreement for the sale of land—Falsa demonstratio—Position of vendor's signature—Specific performance.

On the conclusion of negotiations between between C. and B. as to the sale of two city lots on the corner of Hastings street and Westminster avenue, in Vancouver, B.C., C. signed a document as follows:—

"VANCOUVER, June 28th, 1902.—Received from James Borland the sum of ten dollars being a deposit on the purchase of Lots No. 9 & & 10 Block No. 10 District Lot 196, purchase price twenty thousand dollars ($20,000.00), the balance to be paid within (10 July) days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances.

(Sgd.) JOS. COOTE,
N. W. Cor. Hastings & Westr. Ave."

The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and were the only lots owned defendant; the trial judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:

Held, affirming the judgment appealed from (10 B. C. Rep. 493), Killam J. dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy which should be disregarded and the decree made for specific performance in respect of the lots actually bargained for between the parties.

APPEAL from the judgment of the Supreme Court of British Columbia, (1), affirming the judgment

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 493.

at the trial maintaining the plaintiff's action with costs.

The action was brought by the plaintiff to enforce specific performance by the defendant of an alleged agreement for the sale of lands as evidenced by a verbal agreement between them and reduced to writing in the form of the receipt recited in the head-note with a discrepancy, merely, as to the block of the subdivision in which the lots were situated. The defence was that it was intended to make a sale of lots 9 and 10, in block 10, which were on the north-east corner of Hastings street and Westminster avenue, while the plaintiff contended that the lots he purchased were on the north-west corner of those streets, viz., lots 9 and 10, block 9. The defendant also claimed that the words "N. W. Cor. Hastings & Westr. Ave." at the bottom of the receipt were written there after he had signed it.

On the facts, the Chief Justice, at the trial, held in favour of the contentions of the plaintiff on both points, and made a decree in his favour which was affirmed by the judgment of the full court, on appeal (1), Irving J. dissenting.

The same questions were raised on the present appeal and are more fully stated in the judgments now reported.

Joseph Martin K.C. for the appellant.

Davis K.C. for the respondent.

SEDGEWICK J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—The principle on which I reach the conclusion to dismiss this appeal is that the signature of the vendor authenticates the entire document and this under the findings of the trial judge, on evidence

(1) 10 B. C. Rep. 493.

1904

COOTE v. BORLAND.

Davies J.

which I think under the circumstances admissible, confirmed by the Supreme Court in British Columbia, covers the words at the foot of and below the vendor's signature. The findings were that the appellant placed his signature to the document at a time when he saw the words below where he signed and that he signed seeing them there and intending to authenticate them as part of the memorandum or receipt. That being so and these words being written into the document must, I think, to have their natural and reasonable meaning, be read into the description of the property contracted to be sold and so that description would read "the north west corner Hastings and Westminster Avenues, being Lots 9 and 10, Block 10, District Lot 196," or "Lots 9 and 10, Block No. 10, District Lot 196, being the north-west corner Hastings and Westminster Avenues." Read into the description in any way the latter would then only apply to and describe one property, namely, that owned by the vendor, although the number of the Block (No. 10) would be at variance with the rest of the description. The whole description then obviously would not accurately apply in all its parts to both corner lots. But with the exception of the block number it would so apply accurately in all its parts to the only lands defendant owned. And I think, that being so, the written part of the description of the lands must prevail and the number of the block, either fraudulently or by mistake inserted, be rejected as *falso demonstratio*. And this not only on the ground that where the written words of a document are at variance with the figures used therein the former must in the absence of other determining evidence prevail, but also in my opinion because the words and letters "N. W. Cor. Hastings and Westr. Ave." are the controlling words and must be held to describe the lands so definitely as to over-ride a mere conflicting number

1904

COOTE v. BORLAND.

Davies J.

of a lot contained in the description of which the said controlling words form part.

I adopt the language used by Lord Cairns in the case of *Charter* v. *Charter* (1), at p. 377, as to the class of cases where extrinsic evidence is receivable to enable the court to understand the language used by the parties. His Lordship was speaking of testamentary dispositions it is true. But I apprehend that the same principle there enunciated by him is equally applicable to contracts between parties. When so applied the language of the learned Chancellor would read: The court has a right to ascertain all the facts which were known to both parties at the time they entered into the contract and thus to place itself in their position in order to ascertain the bearing and application of the language they used and in order to ascertain whether there exists any land to which the whole description given in the contract can be reasonably and with sufficient certainty applied.

Applying then this principle and reading into the description the words at the foot of the signature we find only one piece of land to which the whole description in the contract can reasonably and with sufficient certainty be applicable, and we reject either as surplusage or as *falso demonstratio* the number of the block either fraudulently or erroneously inserted leaving the description with this number rejected perfectly good and sufficient and applicable in all its parts to the lands in question.

GIROUARD J. concurred in the dismissal of the appeal for the reasons stated by Nesbitt J.

NESBITT J.—The trial judge found that the defendant signed the following receipt:

(1) L. R. 7 H. L. 364.

1904

COOTE v. BORLAND.

Nesbitt J.

"VANCOUVER, June 28th, 1902.

"Received from James Borland the sum of ten dollars being a deposit on the purchase of lots 9 & 10 Block No. 10 District lot 196, purchase price twenty thousand dollars ($20,000.00), the balance to be paid within (10 July) days when I agree to give the said James Borland a deed in fee simple free from all incumbrances.

JOSEPH COOTE,
N. W. Cor. Hastings & Westr. Ave."

and that the words following the signature were on the receipt at the time of signing. He admitted parol evidence to show that the parties were dealing about the lots on the north-west corner of the streets mentioned, the defendant being the owner of the same, and that the defendant had furnished the plaintiff with a list showing the names of the tenants and the rents paid, and on his findings there is no doubt the parties were negotiating about the sale of the lots on the north-west corner and no other. Curiously enough the lots on the north-west corner are 9 and 10, Block 9, District lot 196, and so if you substitute 9 for 10 in the block number, the two descriptions are the same property. It also happens that the lots on the north-east corner are actually described as lots 9 and 10, Block 10, District lot 196, and so on the argument I thought it was a case of two specific properties described in the receipt, that is the north-east corner by proper lot and block description and the north-west corner as such, and, therefore, contradictory descriptions or rather two specific properties receipted for in which case no parol evidence would be admissible to shew as an independent fact what the intention of the parties was. See remarks of Coleridge J. in *Lobb* v. *Stanley* (1), at page 582,

(1) 5 Q. B. 574.

In my view the trial judge's findings make it plain we must treat the whole receipt as authenticated by the signature; see *Johnson* v. *Dodgson* (1); *Evans* v. *Hoare* (2); *Caton* v. *Caton* (3); and in that case the receipt is not to be held void if by any reasonable construction it can be made available, and it therefore would seem to be the case that you then have a description applicable to the property owned by the vendor with "10," by error, used for "9" in the block number. If you try to make the words available it must be as a part of a description of property and so reading them they do describe the property in the north-west corner saving only an error in the block number; in fact, make a perfect and true description of the only property owned by the vendor.

I have read all the numerous cases cited and many others, but in none of them do you find the singular state of facts which exist here, viz., both properties being aptly described so as to raise an apparent case of two specific properties being bargained for and yet the last description being read into the document properly filling in and completing the description of the first when read along with it, saving an error in the block number only. I think the doctrine to apply is that of *falsa demonstratio non nocet.*

I have had the advantage of reading the judgment of my brother Killam. The evidence was clearly admissible to show what the parties were dealing about, what was covered by N. W. corner, Westminster and Hastings Avenues, that such property was the only property owned by the vendor and therefore the only property he could sell or can be supposed to have intended to sell, and, therefore, it becomes a case of what is to be taken as the leading feature in

(1) 2 M. & W. 653 at p 659. (2) [1892] 1 Q. B. 593.
(3) L. R. 2 H. L. 127.

1904

COOTE v. BORLAND.

Nesbitt J.

the document as a description of the property bargained about. It is as if I sold lot 8, block 6, etc., and below my signature put "Montagu House in which I live." Surely, on its being shown that the particular description was inaccurate, the inaccuracy would be treated as surplusage and a decree made for what I owned and was bargaining to sell. It is a case simply of identifying the property being bargained about.

I would refer to Washburn on Real Property (6 ed.), 2316-2321; Hunt on Boundaries and Fences (5 ed.), 220-1; *Loomis* v. *Jackson* (1); *Glass* v. *Hulbert* (2); *Plant* v. *Bourne* (3); *Shore* v. *Wilson* (4); *Cowen* v. *Truefitt* (5); *Hutchins* v. *Scott* (6).

The judgment should be affirmed with costs.

KILLAM J. (dissenting).

Three questions arise in this case:—

1. Were the words below the defendant's signature part of the receipt signed by him?

2. Are those words to be incorporated by construction into the description of the property referred to in the receipt?

3. What was the land to which, upon a proper construction, the receipt referred?

The first and third of these are questions of fact; the second is a question of law. It is necessary to thus distinguish in order to determine properly the evidence which should be considered upon these different questions.

As a matter of abstract law it is quite clear that a signature, in order to be a signature within the Statute of Frauds, may be written upon any part of an agreement or memorandum. But when we come to consider

(1) 19 Johns. 449.
(2) 102 Mass. 24.
(3) [1897] 2 Ch. 281.
(4) 9 Cl. & F. 355.
(5) [1899] 2 Ch. 309.
(6) 2 M. & W. 809.

the question of fact, as to whether all the words upon a particular piece of paper bearing a person's signature are to be taken as a part of the agreement or memorandum signed by him, the position of the signature may be of great importance.

In the present case I accept the findings upon this point of the courts below and treat the words and letters below the signature as a portion of the receipt to which the signature relates.

The court in British Columbia has read the receipt as if it described the property referred to therein as being situated at the north-west corner of Hastings and Westminster Avenues. It determined, as a matter of fact, that the land therein described was a parcel so situated and was composed of lots numbered 9 and 10 in a block numbered 9, in a certain district lot in the City of Vancouver, according to a known survey or plan.

The distinction between the questions of the construction of a document and the identification of what is therein referred to was clearly made in *Lyle* v. *Richards* (1).

Lord Cranworth L.C. there said (page 229).

> Parcel or no parcel is a question for the jury, and it was properly left to them. But the judge was bound to explain to the jurymen for their guidance, what was the true construction of any documents necessary for the decision of the question "parcel or no parcel." * *
>
> It was the duty of the judge to decide what was the true meaning of the language there used for describing the boundary line. But in order to adapt the description, contained in a lease or other instrument, of a boundary line (whether expressed by words or by a diagram) to the line in nature meant to be designated by the description, it is necessary to have recourse to parol evidence. The description in the deed cannot otherwise be identified with the thing intended to be described.

And Lord Westbury (page 239) :—

(1). L. R. 1 H. L. 222.

1904

COOTE v. BORLAND.

Killam J.

In my opinion the evidence was clearly admissible. Upon a question of parcel parol evidence is always received. The error here is latent, not being discovered until it is shewn by extrinsic evidence what was the true site of the house incorrectly laid down on the map, and on a question of the extent or correctness of the parcels in a deed (which are a description of external objects) parol evidence, for the purpose of ascertaining the thing so described or referred to, is admissible.

The principle upon which extrinsic evidence is receivable for such purpose was shown in *Charter* v. *Charter* (1), and by the language of Tindal C. J in *Shore* v. *Wilson* (2) at pp. 565-6; and of Parke B., in the same case at pp. 556-8.

Under the interpretation which it placed upon the receipt, I should have little difficulty in accepting the court's conclusion of fact. In that view the case was one for the application of the maxim *falsa demontratio non nocet*, and the conclusion was supported by such cases as *Blague* v. *Gold* (3); *Shore* v. *Wilson* (2); *Miller* v. *Travers* (4); *Hutchins* v. *Scott* (5); and *Doe d. Dunning* v. *Cranstoun* (6).

It is, however, upon the question of construction that, to my mind, the real difficulty of the case arises. Upon that question the oral evidence of the negotiations should not be considered. It must be decided upon the language of the document itself and evidence of the surrounding circumstances.

In both *Shardlow* v. *Cotterell* (7) and *Plant* v. *Bourne* (8), to which reference has been made, the oral evidence of the property to which the negotiations had related was held to be receivable for the purpose of identification but not for the purpose of construction.

(1) L. R. 7 H. L. 364.
(2) 9 Cl. & F. 355.
(3) 2 Cro. Car. 473.
(4) 8 Bing. N. C. 244.
(5) 2 M. & W. 809.
(6) 7 M. & W. 1.
(7) 20 Ch. D. 90.
(8) [1897] 2 Ch. 281.

Among the surrounding circumstances may be taken, I think, the facts that, according to the only known survey or plan, lots 9 and 10, in block 10, were at the north-east corner of Hastings and Westminster Avenues; that the parcel at the north-west corner was in block 9; that, after oral negotiations between the plaintiff and the defendant, the former went away and reported to one Dawson, on whose behalf the plaintiff was acting; that Dawson drew up the receipt, putting at the bottom the letters and words "N. W. Cor. Hastings and Westr. Ave." and leaving blanks for the numbers of the lots and block; and that it was taken in this condition to the defendant who filled in the numbers as they now appear and placed on it his signature where it now is.

The letters and words below the signature are not connected in sense with the language above. Upon the face of the paper there is nothing to indicate that they have any reference to the description of the property from which they are separated by mention of the price, the time of payment and the agreement to convey. In order to make them applicable to any part of the receipt some connecting words must be understood or supplied.

And when we find that the defendant inserted the figures in the body of the receipt for the evident purpose of describing the property, paying so little attention to the bottom line as to write his signature above it, and that the figures do not describe the property at the north-west corner of the avenues named, it does not appear to me possible to read the bottom line as a portion of the description, to the other portion of which, expressly inserted by the signer, it would be directly contradictory. To thus make a description which involves the rejection as surplusage or *falsa demonstratio* of the very numbers inserted by the signer

1904

COOTE v. BORLAND.

Killam J.

seems more unwarrantable than to treat the portion below the signature as not materially affecting or qualifying any part of the receipt.

The circumstances of ownership and the handing to the plaintiff of certain papers bearing memoranda apparently relating to the north-west corner property do not seem to me to supply the defect.

I do not think that the court can direct an amendment or alteration of the receipt so as to make it evidence of an agreement to sell the lands in block 9. Upon my interpretation the defendant, whether fraudulently or carelessly or otherwise, never signed any such agreement or any memorandum or note thereof, and the court cannot sign one for him or make him do so. As this point was not insisted upon by the respondent's counsel I do not discuss it further.

In my opinion the appeal should be allowed and the action dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Martin & Weart.*

Solicitors for the respondent: *Bowser & Wallbridge.*