

CIRCULATE
7-4-2003

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 5. OF 1996



BETWEEN:

JUNE DIANE SMITH

As Administratrix of the Estate of Alvey Wilmington Smith (Deceased)

Plaintiff

And

ELERY ELROY SMITH

As Administrator of the Estate of Samuel Smith Jr. (Deceased)

Defendant

BEFORE: The Honourable Mr. Justice Sanderson.

Hearing on 4th and 5th November 2002

Appearances:

Mr. Peter Broadhurst and Mr. Kyle Broadhurst for the Plaintiff

Mr. William Helfrecht for the Defendant.

Reasons For Judgment

This is a land dispute between cousins. The property in dispute was originally owned by their grandfather Samuel Smith Snr, who died in 1927.

He had three children. Samuel Smith Jr., Alvey Smith Snr. and Clara Belle Smith. Samuel Smith Jr., being the eldest, inherited all of the real estate by virtue of the *primogeniture* rules, leaving Alvey Smith Snr. and Clara Belle without an inheritance.

It is not disputed that Samuel Smith Jr.'s brother, Alvey Smith Snr., and his sister Clara Belle Smith continued living on the land with their mother. On the 4th March 1944, Samuel Smith Jr. died intestate. He had three sons, Charles Smith, James Smith and Elery Smith. Under the previous *primogeniture* rules the property would have passed to Charles Smith, his eldest son but by 1944 he now had to seek Letters of Administration as the law had changed.

Charles Smith was granted Letters of Administration on the 25th April 1944. Sometime thereafter he left the Island. His aunt, Clara Belle (who was his father's sister), in his absence, and without legal authority, dealt with four parcels of the land which had originally belonged to her father.

Her dealings with the land were as follows:

- (1) PARCEL 70
On the 31st October 1955, she conveyed Parcel 70 of the land to Obadiah Wilks for the sum of £30.00.
- (2) PARCEL 66
On the 2nd September 1960, she conveyed Parcel 66 to Ester Smith for the sum of £120.00.
- (3) PARCEL 65
Parcel 65 was 'given' to her sister Coreen- in the same period.
- (4) PARCEL 63 (Later became PARCEL 80)
On the 15th July 1961, a fourth piece, Parcel 63 (now Parcel 80) was gifted to Alvey Smith Snr.

The present proceedings concern ownership of Parcel 80 (formerly Parcel 63).

Almost three years after Parcel 80 was given by Deed of Gift to Alvey Smith Snr., by his sister, he in turn, gifted the land to his son Alvey Smith Jr. This took place on the 20th February 1964 and was recorded in the Public Records Office of the Cayman Islands on the 26th February 1964.

Sometime in the 1960's Charles Smith returned to the Island and in carrying out his duty as administrator of his father's estate sought the Court's intervention in settling the claims on the four parcels which Clara Belle had disposed of. It is not clear whether it was by Court order or by mutual agreement but additional sums were paid for the four parcels.

In 1968, Parcels 66 and 70, became the subject of a Quit Claim after the payment of additional sums of money. Parcel 65, also for an additional sum, was sold. With respect to Parcel 80, Alvey Smith Jr. agreed to pay an additional sum but decided to pay it in installments, thus delaying the time when he would have absolute title to the land.

On the 18th June 1969, Charles Smith was removed as administrator and replaced by James Smith. The agreement between Alvey Smith Jr. and Charles Smith (former administrator) continued with the new administrator. As a result, on the 25th June 1970, Parcel 80 became the subject of a Quit Claim to Alvey Smith Jr.

It is useful to pause at this time to consider the legal ramifications of a Quit Claim. A Quit Claim releases unto the person receiving same, "all the right title, interest or claim whatsoever", that the true owner might have in the property. It is a legal document accepted and registered at the Public Record Office of the Cayman Islands. Section 11 of the Public Recorder Law (1996 Revision) provides:

Subject to this Law, the records of any letters patent enrolled and the records of any deed duly executed and proved or acknowledged and recorded in accordance with this Law, and the record of any last will and testament duly executed according to law and proved shall at all times be deemed sufficient evidence of the several persons' titles to any estate or interest in land claimed thereunder, and the same shall be read and allowed in every court within these Islands as if the original patent, deed conveyance or will were actually produced, proved and read in this court."

Thus once the Quit Claim has been accepted by the Public Recorder, it is irrefutable evidence of ownership. Therefore on the 25th June 1970, Alvey Smith Jr. became the absolute owner of Parcel 80.

In evidence, it was stated that James Smith died the very night the quit claim was granted although his death certificate shows that he was killed in an accident on the 19th February 1971. I do not think that this is important to the adjudication of this case. In any event, James Smith's signature is on the Quit Claim and title had therefore passed to Alvey Smith Jr.

The significance of James Smith's death is that a new administrator had to be appointed. Thus in May 1972, Elery Smith, the present administrator was appointed.

In January 1974, Parcel 80 became part of an application in the on going Land Adjudication process. Elery Smith claimed the land on the basis of long possession of the estate. As a result, the land, (Parcel 80) was registered with provisional title in Elery Smith's name. Adjudication Record No. 3955 shows that no documents were produced by Elery Smith and that the Provisional Title granted was "Subject to satisfactory documentary evidence of title being produced to Registrar of Lands", before it could be registered with absolute title.

Ten years after the application for title was made by Elery Smith under the Land Adjudication process and 13 years after the Quit Claim to Alvey Smith Jr., an agreement was signed on the 14th June 1984 between Alvey Smith and Elery Smith. In it Alvey Smith Jr. agreed that he has no claim to the land and recognises Elery Smith as the undisputed owner of the estate. Further, he agreed that he was encroaching on the land by building a house on it without the owner's consent. In the document, Elery Smith promised \$30,000.00 to Alvey Smith on sale of the land "out of the goodness of his heart" and \$3000.00 for rent to vacate the land.

The evidence shows that Alvey Smith Jr. accepted one amount of \$200.00 on the same day that he signed the 1984 document signing over his rights to Elery Smith. The notation on the receipt reads as follows: "For Loan to be deducted from any payment to be made by Elery in the future". There are two further cheques. One in the amount of \$300.00 paid on 8th July 1985, the other in the amount of \$25.00 paid on the 25th April 1987. The total amount that Alvey Smith Jr. received from Elery Smith was therefore \$525.00.

In November 1987, rumours that the land was not owned by Alvey Smith Jr. prompted his daughter, Julie Smith to investigate title documents on Parcel 80. She recovered the Deed of Gift and Quit Claim. Alvey Smith then made an application to the Registrar of Lands to have himself registered as proprietor with absolute title. He produced to the Registrar:

1. An original indenture recorded at the Public Records Office and dated 26th February 1964.
2. Quit claim by James Smith, dated 25th June 1970.
3. Affidavit from himself, (Alvey Smith Jnr.) dated 4th January 1988.

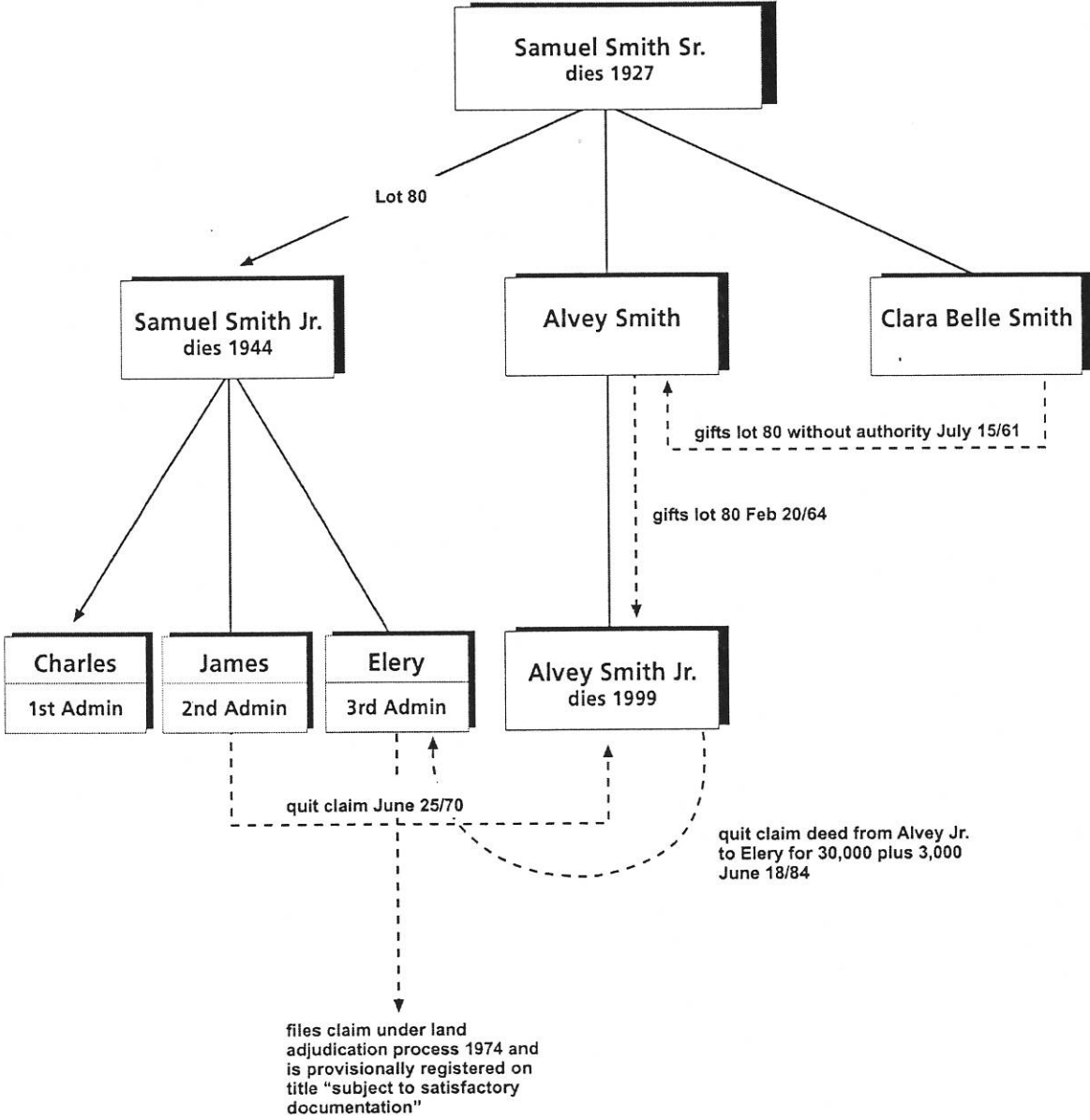
As a result, in February 1988, a restriction was placed on Parcel 80 “to endure until final determination of the matter can be reached or so ordered by the Court unless previously removed in compliance with section 134”. (Instrument 784/88).

In July 1988, Steve McField, legal representative of Elery Smith wrote to Alvey Smith concerning his occupation of Parcel 80 and demanded possession of the land. In the letter reference is made to the 1984 agreement.

In 1994, the owners of Zephyr House showed an interest in purchasing Parcel 80 for parking purposes. The sale of the land was defeated by the discovery of the 1988 restriction.

Finally, in January 1996, Alvey Smith Jr. commenced these proceedings seeking rectification of the Register. He died in February 1999 and the action is continuing in the name of June Diane Smith, who in 2000, became the Administrator of her father’s estate.

The following chart and summary identify the key transactions.



1. Samuel Smith Sr. died in 1927 and ownership of parcel 80 passes to his son Samuel Smith Jr.
2. Samuel Smith Junior died in 1944.
3. Samuel Smith's sister, Clara Belle Smith, without any authority, gifts the property to her brother, Alvey Smith on July 15, 1961.
4. Alvey Smith purports to gift the property to his son, Alvey Smith Jr., on February 28, 1964.
5. On June 25, 1970 James Smith (the second administrator for Samuel Smith Jr.'s estate) quit claims the property to Alvey Smith Jr. He then becomes the legal owner.
6. In June 1974 Elery Smith, (the third administrator to the estate of Samuel Smith Jr.) files a claim under the land adjudication process and has provisional title registered in his name "subject to satisfactory documentary evidence".
7. On January 18, 1984 Alvey Smith Jr. signs a quit claim in favour of Elery Smith. Elery agrees to pay \$33,000. A total of \$525 is paid before Alvey dies in February 1999.

The issue is who should have title. Elery claims that by virtue of:

1. the application made under land adjudication process registering provisional title in his name, in September 1974;
2. the quit claim deed dated June 18, 1984 from Alvey Smith Jr. to Elery Smith.

Alvey Smith Jr. claims title by virtue of the quit claim deed dated June 25, 1970 and says his quit claim deed to Elery dated June 18, 1984 is not binding because he was drunk when he signed it.

ANALYSIS:

It is agreed by both sides that Clara Belle had no legal authority to deal with the lands left as part of her father's estate.

The Plaintiff submits that the fact that Clara Belle Smith had no legal authority to convey the land does not matter as the Quit Claim by James Smith, second administrator of the estate, the beneficiary being Alvey Smith Jr., "perfected" the earlier gift from Clara Belle to Alvey Smith Snr. and from Smith Snr. to Alvey Smith Jnr.

The Plaintiff further argues that the 1984 agreement between Alvey and Elery Smith must have been signed when Alvey was drunk and did not appreciate the significance of the document that he was signing. The claim of *non est factum* is employed.

The Plaintiff seeks rectification of the Land Register as per the provisions of S.24 of the Registered Land Law (1995 Revision), with Alvey Wilmington Smith as the proprietor of the said land with absolute title.. The Plaintiffs say that since the title is provisional only the Court has jurisdiction to rectify same.

The defendant argues:

1. That a quit claim has no relevance to the issues since it was signed by James Smith *before* the land had been paid for. In the alternative, that in instances where quit claims were granted, conventional conveyances were presented to the Registrar of lands.
2. That even assuming that the quit claim had the power of transferring title, Alvey Smith never came forward during the adjudication process to register a claim. Accordingly, the Court does not have the power to rectify the Register after the Adjudication process is complete unless there is evidence of fraud or mistake and relies on S.140 Registered Land Law (1998 Revision).
3. The existence of the 14th June 1984 agreement, was signed in good faith and is binding on the parties.

The relief claimed by the defendant is the removal of the restriction placed on the Register in order to enable Elery Smith to deal with the land. If this is

granted, there will be no need for an order that the 1984 agreement be enforced.

In support of its first argument, the plaintiff relies upon the fact that the quit claim was recorded pursuant to the Public Recorder Law (1996 Revision) and that this deed was sufficient to pass title. Section 11 provides:

“Subject to this Law, the records of any letters patent enrolled and the records of any deed duly executed and proved or acknowledged and recorded in accordance with this Law, and the record of any last will and testament duly executed according to law and proved shall at all times be deemed sufficient evidence of the several persons’ titles to any estate or interest in land claimed thereunder, and the same shall be read and allowed in every court within these Islands as if the original patent, deed, conveyance or will were actually produced, proved and read in such court.”

In Plaintiff 19/73, Elery Smith v Esther Milbourne, Horsfall J., states in the Court’s reasons for judgment that:

In order to give the defendant a good title, the then administrator of the estate of Samuel Smith junior, Charles Alanzo Smith, by the document made in 1968 (Exhibit B) released and quit claimed to the defendant in consideration of the sum of £140.00, all right title, interest or claim he had in the piece edged green as personal representative of Samuel Smith junior.”

The Court has therefore in the past accepted that good title may be passed by way of a Quit claim.

It was also pointed out that the quitclaim deeds of Parcels 70 and 66 were presented to the Registrar of Lands in the Adjudication process and were instrumental in obtaining absolute titles to these properties.

The defendant, submits that a quit claim cannot convey good title and further argues that where quit claims were granted, conventional conveyances were presented to the Registrar of Lands. While this may be so it is clear from s. 11 of the Public Recorder Law (1995 Revision), and the ruling of the Court in Milbourne(supra) that a Quit claim deed is sufficient to pass title.

The defendant also argues that even if a Quit claim is sufficient to pass title, the more important consideration is that the plaintiff did not participate in the 1974 land adjudication process. Since the Court's power to rectify a first registration is limited to cases of fraud or mistake which occurred *after* the adjudication process, the Plaintiff is thereby denied the remedy of rectification.

The defendant has relied heavily upon Cook-Bodden v Kirkconnell [1992-1993] CILR 89. In this case the Grand Court determined as a preliminary issue whether it had the power to order the rectification of the Land Register when such rectification was sought under the provisions of s. 140(1) of the Registered Land Law (Revised) on the ground of mistake arising during the course of the adjudication process under the Land Adjudication Law 1971 and subsequently reflected in the first registration in the Land Register. The Court held that it had no power to grant rectification in these circumstances as the adjudication process was final and, under s.140(1), rectification of a first registration was available only in circumstances where a mistake, fraud or omission had occurred subsequent to the adjudication.

The Court of Appeal concurred with these findings. In Cook-Bodden (supra) the appellant was appointed in 1979, as the Personal Representative of the estate of William Eden, some 54 years after the previous administrator. Proceedings were brought in 1986 against the respondents asking for rectification of the Register claiming that the land registered in their names had been mistakenly registered pursuant to the adjudication process.

In Ebanks v Clarke[1992-93] CILR 33, the Court distinguished the circumstances of Cook-Bodden (supra). Even though a fraud had been perpetrated during the adjudication process and not subsequent to it, the Court was obliged to rectify the Register. It said at page 43:

“ Certainly the [provisions of s. 140 are declared to be
“ subject to any provisions of the Land Adjudication Law 1971...”
Respect must be given to that Law and the procedures laid down by it.
It would not be right for issues which have been determined by the
adjudicator, which had gone through the review and appeal process
provided for under the Law of 1971 and had been there determined

upon, to be re-opened by means of an application for rectification of the register. There must be an element of finality about the adjudication and registration process. But the Court could never in its desire to bring finality into a process, permit fraud to prevail. A fraud upon the adjudication process itself must always be open to review. In a desire to sanctify the Land Register we must be careful not to sanctify the results of fraudulent or dishonest actions.

There was no proof of fraud in the case at bar. However what is notable in the cases in which rectification has not been allowed has been an element of neglect by the interested parties and secondly, that titles so registered were absolute as opposed to being provisional titles.

Section 140(1) of the Registered Land Law provides:

“ Subject to the Land Adjudication Law 1971 and to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.”

Since the Registered Land Law 1971 was made subject to the provisions of the Land Adjudication Law 1971, it will therefore be necessary to examine some of the provisions of the Land Adjudication Law 1971, which led to land being placed on the Land Register.

Section 16. (1) states:

“In preparing the adjudication record-

- (a) if the Records Officer is satisfied that a person-
 - (i) is in open and peaceful possession of a parcel and has been in such possession by himself or by his predecessors in title for an uninterrupted period of 12 years or more; or
 - (ii) has a good documentary title to the land and that no other person has acquired a title thereto under any law relating to prescription or limitation, and that he would succeed in maintaining or defending such possession or title against any other person claiming the land or any part thereof,

the Records Officer shall record that person as the owner of the parcel and declare his title to be **absolute**; (Emphasis added)

(d) if the Records Officer is satisfied that a person is in possession of, or has a right to a parcel but is not satisfied that such person is entitled to be recorded under paragraph (a) of this subsection as the owner of the parcel with absolute title, the Records Officer may nevertheless record that person as the owner of the parcel and declare his title to be **provisional** and shall record –

- (i) the date on which the possession of that person shall be considered to have begun;
- (ii) particulars of any deed, instrument or other document by virtue of which some estate, right or interest adverse to or in derogation of the title of that person may exist; or
- (iii) any other qualification which affects the title;”

Section 24 of the Registered Land Law (1995 Revision) reads as follows:

“Subject to section 27, the registration of any person as the proprietor with a **provisional title** of a parcel shall not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of that proprietor arising before such date or under such instrument or in such other manner as is specified in the register of that parcel; but save as aforesaid, such registration shall have the same effect as the registration of a person with absolute title.” [Emphasis added]

Thus, both in the Land Adjudication Law and the Registered Land Law provision is made for the registration of land with provisional title. The Land Adjudication Law clearly contemplates future occurrences that might ultimately affect provisional title. It is then clearly stated in the Registered Land Law that any right or interest **shall not be affected or prejudiced** by registration of land with a provisional title.

Parcel 80 was registered with a provisional title. The Land Adjudication Record, Claim No. 3955, Number 14BG63, shows that no documents were produced and that under 6(iii) title was “subject to satisfactory documentary evidence of title being produced to the Registrar of Lands.” Mr Elery Smith

was registered as provisional owner being the administrator of the estate of Samuel Smith. He had applied on the Adjudication Claim Form 14th January 1974, on the basis of "mostly long possession by the estate."

The Memorandum of Objects and Reasons to the Land Adjudication Law, 1971 states that "proof of uninterrupted possession for 12 years or more, or production of documents more than 12 years old establishing ownership of land in fee simple will entitle a person to be recorded as the owner of the land with an absolute title.

The estate had up to January 1974 held the land since 1944, a total of 30 years. Yet the Adjudicator declined to give absolute title because no documentary evidence of title was produced to the Registrar of Lands at that time and the Registrar was not satisfied that Elery Smith was entitled to be recorded with absolute title.

Having examined the relevant sections of the Law, I have come to the conclusion that the Kirkconnell (*supra*) case does not apply in these circumstances because in that case the title had been registered as absolute. Further, I conclude that the Court may rectify the Register pursuant to S. 24 Registered Land Law (1995 Revision) and that the Court has no discretion as to whether or not any right or interest adverse to or in derogation of a provisional title will be rendered unenforceable. Registration with a provisional title is as good as registration with an absolute title except where there is a prior right or interest.

The matter is then further complicated by the existence of a purported agreement dated 14th June 1984 between Alvey Smith Jnr. and Elery Smith. In this document, Alvey Jr. acknowledges Elery Smith as "undisputed legal owner" of the land and that he would vacate the premises within 20 days of receiving notice stating that the premises must be vacated. It also states that Elery Smith will "out of the goodness of his heart" promises to pay to Alvey Jr. The sum of \$3,000 to be used to rent another place to live. Additionally, upon Alvey Jr. giving Elery written notice that he has vacated the premises, Elery would pay Alvey Jr. \$30,000.

In his affidavit filed before his death, Alvey Smith Jr. deposed:

"I do not remember signing this document but it does bear my signature. I used to drink heavily in those days and Elery Smith

must have got me to sign this document without me really understanding what it meant or knowing what it was. I have no recollection whatsoever of this document at all.”

Alvey Jr. was not cross examined on this affidavit. I attach very little weight to it because (1) he was not cross examined and (2) his statement is vague. He did not say he was drunk or that he can recall anything about it.

On a close examination of the document it is clear that there was also another witness to the deed, a Mr. Carlyle Ebanks. The Court of its own volition has attempted to have Mr. Ebanks come to Court to testify to the circumstances surrounding the signing of this document but was unable to since he has been off Island for months now.

In an early decision relating to an application to strike out the action, the Chief Justice, Anthony Smellie, said that the defendant's conduct weighed heavily against the defendant's application. The Chief Justice said:

" it is clear that when the defendant Elery Smith (in his capacity then and now as administrator) moved under the cadastral process to obtain provisional title in 1970, he was aware that Alvey Smith Jr. was, and had for many years been, in possession and had built a house on the land. He must also have been aware of the quitclaim - or so it is urged to be inferred - which had been issued by his predecessor in title, James to Alvey Smith Jr."

The fact is that Elery Smith makes application under the Land Adjudication process in 1970 using "mostly long possession of the estate" knowing that Alvey Jr. had been in possession at that time for over 12 years.

There are also other troubling features of this case. The first is that Alvey Smith Jr. only collected a total of \$525.00 between 1985 and 1987 on the "loan" from Elery Smith Jr. Only one payment of \$300.00 actually refers to any loan. I am urged to assume that the loan was that of the \$3000.00 promised when written confirmation was received from Alvey Jr. that he had vacated the land.

From the evidence of Alvey Smith's wife and daughter is clear that this parcel of land was very dear to Alvey Smith Jr.. June Smith testified that she was raised on Parcel 80 and that her father always spoke of papers that

were given to him by his father. She testified that her father was a very heavy drinker and that her father kept his land papers in his back pocket. She said that she did not know about the document signed with Elery Smith.

Mrs. June Smith, widow of Alvey Smith Jr., met Alvey Jr. when the house was unfinished. She helped him finish the house. She knows that there were conversations with Elery Smith but she was not aware of the 1984 document. She said that Alvey Jr. drank most of the time but he still was able to hold down a job. She said that Alvey Jr. had land papers and that she had held them in her hands.

Another daughter, Julie Rena Smith-Range, spoke about how her father drank heavily. She said that he worked enough to pay for drinks. Her evidence was that he carried around his papers with him at all times and that he was under the impression that the land was worth a great deal and certainly even more than its value today.

Mr. Dell Seymour, witness to the document does not remember signing the document but identified his signature. In his evidence in chief he said that both he and Alvey Smith were drunk when the document was signed. However, in cross examination he admitted that he could not remember anything about signing the document. I conclude that there is no reliable evidence from Mr. Seymour that Alvey Smith Jr. was drunk when he signed it.

The Latin phrase *non est factum* means literally: it is not my deed. As a rule of contract law, it affords a defence to a party against whom action is brought in reliance upon a signed written agreement, where that party is able to show that he was unaware of the true meaning of the document when signing it. It is a very limited exception to the rule that a person's signature on a document irrevocably binds a person to its contents. The rule was established at a time when education and general adult literacy was not universal. With the advent of the former, the rule was placed in doubt.

However, the House of Lords declined to abolish the rule in a 1971 decision. The matter came before the House in **Saunders v Anglia Building Society (aka Gallie v Lee)** [1971] AC 1004. The facts were as follows:

An elderly aunt intended to give her house to her nephew, so that he could use it as security for a loan, on condition that she be

allowed to remain living there. A friend of the nephew, known to be assisting him to obtain a loan, asked her to sign a document, said to be relevant to the transfer of the house to the nephew. She had broken her glasses, and so signed without reading the document, which turned out to be a deed conveying the house to the friend. The friend then mortgaged the property, without paying either the aunt or the nephew. The aunt's plea of *non est factum* failed.

The narrow *ratio* of their Lordships' decision is that the difference between what the aunt signed and what she thought she was signing was not so great as to establish beyond doubt that she did not consent to it. She thought she was signing a document transferring ownership of the house, though not to the friend, and that is precisely what she did. Thus, the *non est factum* defence is not available except in cases where 'the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended' per Lord Wilberforce at page 1026A-B.

I have no evidence before me that would indicate that what Alvey Smith Jr. put his signature to is essentially different from in substance or in kind from the transaction intended. I accept that he was a notorious drunk but there is no clear evidence that he was drunk at the time of signing this document such, that he cannot be held legally responsible for it.

Conclusion

1. Alvey Smith Jr. acquired good title to lot 80 by virtue of the quit claim deed dated June 25, 1970 from James Smith.
2. Elery Smith is entitled to ownership of lot 80 by virtue of the quit claim deed from Alvey Smith Jr. dated June 18, 1984. However, in order for that transaction to be completed, Elery Smith must pay the amount of \$33,000 less the \$525 that was previously paid. The question of whether the estate of Alvey Smith Jr. is entitled to interest on the amount of \$32,475 was not argued. If the parties cannot agree, it may be spoken to.
3. Elery Smith's claim based upon section 140 of the Registered Land law (1998 Revision) is dismissed.

3. Although Elery Smith is legally entitled to obtain title to the land, he did not pay Elvey Smith Jr. for the \$32,475 owing to him. Absent a payment into Court or a Calder Bank letter in suitable terms, I would award the costs of these proceedings to the estate of Alvey Smith, Jr.

Mr. Justice Sanderson
Judge of the Grand Court

DG Sanderson

Dated the 7th day of April 2003

