Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Crowly and another v. *Bergtheil, from the Supreme Court of Natal; delivered* 24*th February* 1899.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

This appeal relates to a plot of land containing 160 acres in the neighbourhood of Pietermaritzburg. In the year 1863 five lots numbered 35–39 were purchased for 364*l.*, and were registered in the name of Edward Smith. These constitute the plot in dispute. In the year 1882 Smith sold it to the Plaintiff, now Respondent, for 500*l.*; both parties being then resident in England. Smith received the purchase money, handed over the title deeds, and executed a power of attorney authorising the Plaintiff or his substitute to make the proper transfer in the Register. The Plaintiff appointed Mr. Behrens a resident in Natal and the Agent of the Natal Land and Colonisation Company to be his substitute, and transmitted all the documents to him. Behrens omitted to register the Plaintiff's title, and he handed all the documents over to Mr. Hoffmann who resided in Durban and who after that time acted on the Plaintiff's behalf. Behrens indeed paid the transfer duty due to the Government and lodged the declarations necessary for the transfer, but it seems that

the books were kept in such a way that no notice of these important matters appeared on the register of title. Hoffmann made no use of the land; his only instructions were to sell it; he put it into the hands of a caretaker, Foxon by name, and awaited his opportunity of selling when he could get an adequate price.

Such was the state of things in 1887 when Smith died. The power of attorney held by Behrens then became inoperative, but otherwise the situation was unaltered. Externally things remained just as before, and so they went on till the year 1893, when the Defendant Blackburrow, having found out that the land was still registered in Smith's name, employed a solicitor Mr. Gallwey with whom he was on terms of intimacy, to discover the owner and to buy the land for 160*l*. Gallwey put himself into communication with the Smith family and procured the appointment of the Defendant Crowly as executor dative, and also procured an Order of Court for sale by private contract. Under that order the land was sold to Blackburrow for 160*l*. and the sale was duly registered on the 22nd March 1895. In June 1895 the Plaintiff commenced this action to reclaim the land.

The Defendants rely on the registered title. The Plaintiffs seek to impeach it on two grounds. First, they say that Blackburrow knew of the Plaintiff's purchase from Smith. Secondly, they say that Crowly was a mere instrument in the hands of Gallwey; that Gallwey was in substance the executor of Smith; and that Gallwey not only sold to his own client but obtained the order for private sale by withholding material facts from the Court.

The four Judges of the Supreme Court were divided in opinion. The Chief Justice Gallwey considered that there was no ground either to impute to Blackburrow knowledge of

the sale to the Plaintiff or to hold that the Court's order was improperly obtained. The other three learned Judges, Mason, Wragg and Turnbull, held in substance that the order was improperly obtained and the sale improperly made, and that the Plaintiff had a right to impeach it. Two of them, Sir W. Wragg and Mason J. who delivered judgment for both, considered that Blackburrow knew of Hoffmann's position but that the evidence was not such as to bring home to him knowledge of the Plaintiff's title definite enough to justify them in setting aside the sale on the ground of *dolus malus.* Turnbull J. does not examine this part of the case but rests his judgment entirely on the impropriety of the Court's order.

On appeal the Plaintiff's Counsel have, besides urging the ground taken by the three Judges, contended very forcibly that their decree is maintainable also on the ground that Blackburrow knew quite enough of the Plaintiff's title to make it dishonest in him to take advantage of the omission to register. Their Lordships think that each of the two parts of the case throws light on the other and they have found it necessary to review the field of evidence as a whole.

Foxon and Blackburrow each owned a plot of land contiguous to the disputed plot, and each resided on his own land. They were therefore close neighbours and as late as the year 1893 were on very friendly and intimate terms. It was in 1893 that the two quarrelled, when Blackburrow resolved to get the disputed plot for himself. The exact amount of information given by Foxon to Blackburrow about the Plaintiff's title is disputed; but their Lordships agree with the Judges below in holding it abundantly proved that Blackburrow knew Hoffmann to be in control of the land of which Foxon was caretaker.

It is clear that about the year 1885 Foxon began to exercise apparent acts of ownership over the land. At that time and for some years afterwards Blackburrow and Foxon were in the habit of discussing in a friendly way how the plot in question could be purchased and divided so as to benefit the property of both. During the same period Foxon was applying first to Behrens and afterwards to Hoffmann for purchase of the land. Five or six letters ranging in date from August 1885 to June 1890 have been put in to show what was going on. In them the land is spoken of as Bergtheil's, and Foxon purports to be making offers not only on his own behalf but on that of Blackburrow and of Blackburrow's father who lived in the same place. Blackburrow had no part in these letters, but there is not any dispute about the intimacy of the Foxon and Blackburrow families, and it has not been suggested that Foxon had or could during this period have any motive for making false statements about Blackburrow or his father or for concealing from Blackburrow what passed between him and Hoffmann.

Blackburrow swears that in all these communications Foxon spoke to him of dealing with Smith's Agent in Durban, that on one occasion Mrs. Foxon spoke of the land belonging to the Natal Land Company, and that he never heard the name of Hoffmann or of Bergtheil till this suit began. He also says that he looked on Foxon as a mere trespasser. But when after his purchase Blackburrow gave Foxon notice that he was proprietor and warned him not to trespass, Foxon at once wrote to him reminding him of the prior arrangements between them and proposing a continuance of them. That was on the 28th of March 1895 (Rec., p. 185) and on the 5th April following Foxon asked for explanation saying " the least you can do is to afford some " explanation as Mr. Bergtheil's agent in Durban

"disclaims all knowledge of lease or sale by "you" (Rec., p. 186). Blackburrow did not answer this letter. In the meantime Foxon had written to Hoffmann a very angry letter under the impression that Hoffmann had dealt with Blackburrow behind his back, and Hoffmann had answered that he knew nothing whatever about the matter (Rec., pp. 236, 237). It is very difficult to believe that the Plaintiff's name, mentioned apparently as a matter of course, was a novelty as between Foxon and Blackburrow. The indications of the correspondence are indeed all in favour of Foxon's assertions and not of Blackburrow's denials.

Their Lordships think that in the following passage of Mason J's judgment the effect of the evidence as regards Blackburrow's knowledge in the year 1893 is well summed up. He is speaking of a letter written by Foxon to Hoffmann on the 4th January 1886 (Rec., p. 145), which shows that Hoffmann and Foxon were widely at variance about the price of the land, and which makes a proposal to run a fence over it. The learned Judge speaks thus :—

"The next letter we have is 4th January 1886, Foxon to "Hoffmann, evidently declining to give the price asked, and "then asking permission to occupy the land and run a fence "down to the river between Lots 39 and 40, with the right to "remove the fence if the land were sold, and promising to "take care of the place.

"Hoffmann by letter of 21st January 1886 agreed to this. "The fencing was done in the early part of 1886, under an "arrangement with Blackburrow, his half cost of it being set "against a claim of his against Foxon for half cost of other "fencing, Blackburrow having then put up a fence along "Lot 40.

"Blackburrow admits that Foxon said he had permission to "fence, but alleges that in this and all subsequent conversation "Foxon spoke of Smith's land and Smith's agent in Durban, "and that he never until these proceedings heard of the name "of either Hoffmann or Bergtheil. Mr. and Mrs. Foxon both "declared that the contents of these and the subsequent letters "as to these lots were communicated to Blackburrow, and that "though they were positive Hoffmann's name was mentioned

" to him, they thought, but could not swear, Bergtheil's name
" was mentioned. As to the weight to be given to the
" evidence of these parties, it appeared to me that John
" Blackburrow's evidence was quite unreliable throughout;
" that Foxon's evidence, though not satisfactory, was credible
" on this point, and that Mrs. Foxon's evidence was very
" straightforward. Weighing the whole of the circumstances,
" carefully including the evidence of Blackburrow senior,
" which though very confused left the impression that
" Bergtheil's name was known before the sale, I have come
" to the conclusion that Blackburrow junior certainly knew of
" Hoffmann's name as agent for the land, and also in all
" probability of Bergtheil's name as the alleged owner."

With respect to the distinction between Hoffmann and the Plaintiff their Lordships think that the probability that Blackburrow knew of the Plaintiff's connection with the property is a very strong one. But it is not necessary to say more because the Plaintiff was in England, Hoffmann was his local agent, and for the purpose of testing the honesty of Blackburrow's purchase his knowledge of Hoffmann was tantamount to his knowledge of the Plaintiff. The least amount of knowledge which the evidence up to this point carries home to him is that he knew that the land was managed under the authority of an agent resident in Durban, that the agent's name was Hoffmann, and that there was no visible connection between him and Smith.

Their Lordships cannot find that there is much difference between the Roman-Dutch law which requires proof of *dolus* to set aside a later completed purchase in favour of an earlier contract, and the English law relating to similar questions in a locality where the system of registration prevails. If there are differences they do not affect this case. In *Le Neve* v. *Le Neve*, 2 W. & T. 175. Lord Hardwicke tests the case by the Roman definition of *dolus malus;* and the Natal Court has treated the judgment in *Le Neve* v. *Le Neve* as applicable in Natal.

The law of Natal is very clearly and fully stated by Mr. Justice Connor in the case of *Ross* v. *Van Veuren*, N. L. R. 96, p. 251. The learned Judges below have followed the lines of that judgment, and have held that the knowledge which Blackburrow is proved to have possessed was not sufficient to show the requisite amount of *dolus*. Looking only at the facts above detailed their Lordships might hesitate to differ from the Court below; but they do not find that the learned Judges have taken into account the strong light thrown by the sequel of the case upon the true state of Blackburrow's mind.

It has been said that after his quarrel with Foxon he determined to get the land for himself. When he first knew that Smith's name was in the Register is uncertain, but at all events he now searched the Register and found it there. Though he tells us that Foxon had constantly spoken of Smith's agent in Durban, he did not make any inquiry in that quarter. He now alleges that he thought Foxon was deceiving him, but he made no enquiry. What he did was to employ his intimate friend Gallwey to approach Smith's representatives in England. From this time forward the relations of principal and agent or client and solicitor must, though attempts have been made to dispute it, be taken to have subsisted between Blackburrow and Gallwey.

Having obtained a clue, Gallwey wrote to Smith's brother on the 8th January 1894 (Rec., *p.* 244). After stating that he should be glad to act in the realisation of the estate he added: —"There is need of haste in the matter as a "small farmer is to my knowledge enclosing "these lands, and under the laws of this Colony "will shortly acquire title to them by virtue of "his occupation thereof." That assertion has been repeated by Gallwey as his reason for both haste and secrecy, and indeed it is the only explanation of their conduct which either he or

Blackburrow has given, but there is no foundation for it. Foxon did not deal with the land till the year 1885; and when he did so he acted avowedly under the authority of Hoffmann and not on his own account. The time for prescription is one-third of a century. The fear of Foxon was a mere pretence, and has been justly treated as such by the learned Judges below.

Correspondence ensued between Gallwey and Mrs. Smith the widow of the registered owner and her solicitors Messrs. Mann and Crimp. On the 3rd November 1894 Gallwey wrote to the solicitors. In answer to their question whether he was in treaty with a purchaser and as to expenses he says :—

"3 (a). I had an offer of 160*l.* for the land if sold privately "but not if put up to auction.

"4 (a). The cost of sale privately would be from 3*l.* to 10*l.*

"5 (a). Cost of sale by public auction would be about 30*l.* "or more."

And in the same letter he adds :—

"I pointed out to Mrs. Smith in my letter to her of the "9th January 1894 that there was need of haste in this "matter. Will you please impress upon her that if corre- "spondence between us is treated in the leisurely manner "hitherto followed I shall not be answerable for the conse- "quences of the delay. Title to land in this Colony may "be acquired by possession alone. I send another power of "attorney to be inserted in place of the one previously sent "home as it is incorrect Mrs. Smith not being the universal "heiress.

"I require, in addition to the documents specified in the "accompanying schedule, instructions from you as to—

"1. Whether I am to sell publicly or privately; and

"2. Whether I am to take 200*l.* or less.

"Will you reply as early as possible in order to avoid "the contingencies of a lawsuit and its attendant heavy "expenses."

He does not mention that it was his own client who was seeking to purchase for 160*l.* There was no pretence whatever for the assertion that a lawsuit was to be expected. Blackburrow and Gallwey were asked for explanation of the threat so held out, but they failed to give any.

It is hardly necessary to distinguish between the acts of Gallwey and those of Blackburrow, but in point of fact Blackburrow tells us that this correspondence was framed under his instructions.

Having got the requisite documents Gallwey procured the appointment of his clerk Crowly as executor dative on the 14th January 1895. There would have been nothing wrong in this appointment considered by itself, and if all matters necessary for the Court to know had been duly disclosed to it, but the result was that Gallwey and not Crowly was for all substantial purposes the executor, and that the identity of solicitor and executor favoured the secrecy which Gallwey and Blackburrow desired. Apparently the only act of personal judgment which was exercised by Crowly was in February 1895 when some persons made inquiries of him about the land saying they understood it was in the market. Then he thought it desirable to keep silence. He told them he knew nothing about it. He did not report their inquiries to the Court or even as he says to Gallwey, nor did he trouble his head about them any further. In fact by the judgments below and throughout the arguments at this bar on both sides, Gallwey has been treated as executor, and Crowly only as a phantom ; though it is remarkable what pains the two have taken to keep up an appearance of independence.

The next step was to obtain substitutes for the lost title deeds, as shown by the two following letters between Gallwey and Crowly written as if the two were really conveying instruction and information to one another.

" W. J. Gallwey, Esq.,
" Solicitor. Pietermaritzburg,
" Dear Sir, 18th January 1895.
" Please proceed for obtaining new title deeds of the
" property of Edward Smith's estate, Lots 35, 36, 37, 38 and
5505.

" 39 of Little Bushman's River. I propose to ask for private
" offers in the matter.

" Yours faithfully,
" (Signed) EUGENE BERND. CROWLY,
" Exectr. Dative."

" E. Crowly, Esq., 245, Church Street,
" Execu. Dat. Est. Smith. Pietermaritzburg,
" Dear Sir, Natal, 19th January 1895.

" Your favour to hand. I shall be glad to proceed for
" new deeds herein, but would suggest waiting in reference
" to obtaining order until more is ascertained from home
" regarding the alleged insolvency.

" I am as you are doubtless aware acting in the interest of
" the widow under power of attorney.

" Yours faithfully,
" (Signed) W. J. GALLWEY."

Accordingly on the 25th January Gallwey applied for an order upon the Registrar of deeds, stating in his affidavit that he was acting under the instructions of the executor dative, and that diligent search and enquiry had been made by the widow for the title deeds without any result. The only foundation for this statement is that Smith's widow had written on the 13th July 1894 as follows:—" He bought it in 1863 but I " cannot find among his papers the required title " deeds." Gallwey himself made no enquiry of the man in possession of the land, nor did he inform the Court that there was a person so dealing with the land.

On the 26th February 1895 Gallwey applied for an order for private sale. The matter was referred to Master Broome who reported on the 9th March not giving any definite opinion but suggesting rather that the sale should be by public auction (Rec., p. 173).

The next step was to make a private contract for sale and this was done by the following letters written between Crowly and Blackburrow as if the affair were wholly new to them: —

" To E. B. Crowly,
" Exor. Mr. Smith's estate.

" Dear Sir,

" I believe you have for sale Lots 35, 36, 37, 38, and " 39 of Little Bushman's River in extent 160 acres. Part of " the land is very stony and unfit for any use except grazing.

" I will give you 160*l.* for the land if you will let me have a " reply within a week, transfer to be given within one month, " and I will pay the cash on transfer to me being ready. I can " give you security if you like.

" Yours truly,
" J. BLACKBURROW.

" Broadleaze, 4th March 1895.

" J. Blackburrow, Esq.,
" Broadleaze.

" Pietermaritzburg,
" Dear Sir, " 7th March 1895.
" *Re* Land Est. E. Smith.

" In reply to your letter of 4th inst. I beg to state that " I accept your offer provisionally for the 160 acres of land " situate at or near the Little Bushman's River subject how- " ever to the decision of Sir Walter Wragg as to whether the " sale of the land can be made privately or to be put up for " public competition.

" Yours truly,
" (Signed) EUGENE BERND. CROWLY,
" Extr. Dative Est. E. Smith."

It is hardly necessary to add that the proposal to ask for private offers made in the letter of the 18th January which was signed by Crowly began and ended with this acceptance of Blackburrow's original design.

On the 8th March Mr. Broome made some enquiries of Gallwey (Rec., p. 187) which were answered in the name of Crowly as follows :—

" Master,
" Supreme Court. Pietermaritzburg,
" Sir, 8th March 1895.
" *Re* Estate Smith.

" I have received an offer of one hundred and sixty " pounds (160*l.*) sterling for the five lots in the above estate " together 160 acres.

" As far as I am aware the land is unproductive of any rents " or other income.

" The land is not likely to increase in value during the " minority of the children.

" A condition stipulated in the above offer is that transfer is " to be given within one month from the date of its acceptance. " I am limited to Monday next to accept or refuse.

" Yours obediently,

" EUGENE BERND. CROWLY,

" Exectr. Dative.

" P.S.—Mr. Gallwey referred your letter to me to which " the above is my reply."

On the same 9th of March the case was carried before Sir W. Wragg in Chambers who made a formal order for a private sale (Rec., p. 170). On the same day a formal acceptance of Blackburrow's offer was sent in the name of Crowly (Rec., p. 185) and the formal acts of transfer were completed by the 22nd of March.

So ended the long drama which was enacted between the end of 1893 when Gallwey was first employed by Blackburrow to get the land, and the 22nd March 1895 when, having made himself executor through his nominee Crowly, he sold it to his client for the price which his client had originally told him that he would give (Rec., p. 26). From first to last their Lordships cannot find any ingenuous statement of the known facts made to those who were concerned to learn them.

As regards the Smith family Gallwey's letters never mentioned that the man who was occupying the land alleged that he was doing so under the authority of an agent in Durban. For this purpose it did not signify much whether the agent had been mentioned by Foxon as Smith's agent which is the Defendant's account of the matter, or as the Plaintiff's agent. If it had been disclosed that the occupier asserted that he held under any local agent for the owner, it is very unlikely indeed that Mrs. Smith's solicitors would without enquiry have advised her to deal with the estate in a way, which on the supposition that the land was vacant and open to the first trespasser would seem reasonable, but on

the supposition of an ownership by somebody else would be a wrong to him and a disaster to her. But the fact of an alleged lawful possession was suppressed; haste was urged on grounds which will not bear examination; and though Gallwey's letters did not advise a private sale they made statements which led up to it, and they did advise the appointment of Gallwey's clerk as executor.

The Court itself was treated no better. A private sale by an executor is only authorised in exceptional cases and it is the executor's duty to give the Court the fullest information of everything bearing on the question. That Blackburrow was Gallwey's client was a very material circumstance. That he had a formal provisional contract with Crowly was material. The occupation of Foxon under allegation of lawful title was a very important circumstance. His statement persisted in for several years that there was a person in Durban professing to be agent whether of Smith or of another was a very important circumstance. It was very important for the Court to know that no search whatever had been made for the title-deeds except in a place where on the supposition of a transfer they would not be; but the Court was told that the widow had made diligent search and enquiry. The enquiries which Crowly says were addressed to him were material, as showing that there was some interest taken by others in the land. If the true relations between Gallwey and Crowly were not disclosed to the Court (and the letters above quoted are certainly calculated to throw a veil over them) that was a material concealment. Is it to be supposed that the Court if it had known such things would not have directed enquiries to be made about Foxon either as representing a lawful interest or

as a probable bidder? Would not the Court have surmised that the missing title deeds might be with the person mentioned as agent, and that no proper search had been made till that clue had been followed up? Would it have proceeded without advertisement and without public intimation of Crowly's appointment? It is not for those who kept the Court in ignorance to answer these questions favourably to themselves.

That orders obtained as were the orders of the 25th January and the 9th March can stand as against any person entitled to complain of them is a proposition which has not been maintained in argument here. But how do these transactions bear on the question what was in the minds of Blackburrow and Gallwey when they conducted the correspondence and the legal proceedings above detailed? It is impossible to separate the two as regards this question. Their Lordships ask why was all this studious concealment of the truth from the Smith family and from the Court practised? The only reason assigned is that it was desirable to keep Foxon in the dark. But why? The suggestion of his giving trouble by adverse title is purely frivolous. Only two substantial motives can be suggested for keeping Foxon in the dark. One is to prevent his bidding so that Blackburrow may get the land cheaper. That involves such a gross and glaring betrayal of his post of trust for the Smiths which Gallwey had solicited and obtained from them that their Lordships are not disposed to believe it. If Mr. Justice Mason had believed it he would not have confined himself to charging Gallwey with grave error of judgment. That one of the learned judges, Turnbull J. who did believe it, speaks of Gallwey's conduct in harsher terms. The other possible motive is to prevent the true state of the title from becoming known.

That is not creditable, but of the two motives it is the least discreditable. To effect this concealment the parties entered into the long course of suppression of truth with occasional suggestion of falsehood which has been stated. That is hardly explicable unless they were convinced that the rightful claim was not at one with the registered title. Coupling this course of conduct with the knowledge of Hoffman's position, denied by Blackburrow but brought home to him by clear evidence, their Lordships conclude that though very likely he did not know the exact mode in which Hoffmann or the Plaintiff became interested, he did know perfectly well that they represented a lawful interest.

If this is too harsh a conclusion Blackburrow and Gallwey have only themselves to thank for it. Their own case is that they were trying to hoodwink Foxon; and this they did effectually, though by methods that cannot be justified in law or in honour. That object of their circumvention was too small a matter to call for so much *dolus*. It is incredible that for so unsubstantial a reason Blackburrow would suggest and Gallwey write misleading letters to the Smiths, and that Gallwey would have taken the dangerous course of placing a delusive case before the Court to obtain an *ex parte* order. Their Lordships think that what they were trying to circumvent was the more substantial obstacle of the interest represented by Hoffmann: viz. the Plaintiff's claim to have the land as against the heirs of Smith. That will fall within the narrowest definition of *dolus malus*.

As regards the second question the defence is of a purely technical nature. It is impossible to contend that the sale to Blackburrow can stand against any one entitled to complain of it. Who then is to set it aside? It would be the

executor's duty to do so, but that cannot be because he himself has brought it about. The case therefore is one in which a person interested in the property wrongfully sold can maintain a suit. The Defendants' counsel argue that though the heirs of Smith might set the sale aside the Plaintiff, not having any specific property in the land but only contractual rights against Smith, has no such *status* as entitles him to sue. This however is a misapprehension of the Plaintiff's position.

It is true that by the law of Natal a purchaser of land, though he may have paid the price, is not until regular legal transfer the owner of the land, but is only one who has a claim against the vendor. To speak of him as the true owner in the language of an English Court of Equity though the expression may be used in speech for brevity's sake is not correct, and if there were other claimants against Smith or his estate it would be misleading; but the Plaintiff's claim against Smith is beyond dispute, so that as between those two the Plaintiff might have become the owner of the estate at his own will and at any moment. And as in this case it has been found that there are no adverse claims against Smith's estate, the Plaintiff's legal right against his executor is the same as against himself; only that owing to the expiry of Smith's power of attorney fresh formalities became necessary. Therefore at the date of the sale the Plaintiff was as between him and Crowly the person indisputably entitled to have the transfer made to him. Their Lordships are by no means clear that if the Smiths came to set aside the sale it would not be a good answer to say that they had no interest in it because they could not retain the estate for a moment against the Plaintiff. However that may be, they could

have no motive to promote such a suit, nor is it easy to see how the Plaintiff could compel them to do so.

Moreover it is clear that on a sale the Plaintiff would be entitled to the purchase money and he has a direct interest to complain that the course taken by the executor has damaged the price. The Court below treated him as a creditor entitled to sue because the executor is disabled from suing. He is that according to Natal law. But he is more than that; he is a creditor of a very special kind; one who in the absence of other claimants has a right to demand the very property in dispute. Not only has he a position which enables him to maintain this suit, but he is the only person who has a motive to maintain it, and perhaps the only person who could do so.

Their Lordships will humbly advise Her Majesty to dismiss this appeal and the Appellants must pay the costs.