Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Beningfield v. *Baxter, from the Supreme Court of Natal, delivered 7th December* 1886.

Present at the Hearing of the Appeal:

LORD CHANCELLOR HERSCHELL.
EARL OF SELBORNE.
LORD BLACKBURN.
LORD HOBHOUSE.
LORD JUSTICE COTTON.

Their Lordships, while they are of opinion that the Respondent (Plaintiff below) was entitled to a decree in her suit, think it impossible that the judgement appealed from should stand unaltered.

The learned Judges in the Court below appear to have considered that the Plaintiff, as sole legatee under her late husband's will, was entitled specifically to one third part of the Equeefa estate; and that the necessary effect of setting aside the sale impeached in this suit would be to remit her to what they so regarded as her original right. From this point of view, it was unnecessary for them to enter (and they did not enter) into any question as to the other two thirds of the Equeefa estate, or as to the rights of creditors, either of the partnership of Black, Baxter, and Beath, or of the Durban partnership of Black and Baxter.

But the Equeefa estate was the joint partnership property of the firm of Black, Baxter, and

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Beath, of which Beath was the surviving partner. The provisions of the partnership deed, under which the surviving partner might (if the firm had been solvent and the shares of the partners worth anything) have acquired the whole interest by paying off the representatives of the deceased partners, may be disregarded, because they were not and could not be acted upon, the firm being insolvent. Under these circumstances, the only interest which the representatives of the deceased partners (Black and Baxter), or either of them, had in the Equeefa estate, or in any other assets of that firm, was to have them applied towards the liquidation of the indebtedness of the firm in a due course of administration. Even if the Plaintiff had been her deceased husband's legal personal representative, she would not have been entitled, in that character or otherwise, to an undivided one third, or any other specific share, of the Equeefa estate. That office was held, not by the Plaintiff, but by the Appellant here, who was the Defendant below. The Plaintiff, as universal legatee under her husband's will, was entitled to nothing except the ultimate beneficial interest in such surplus (if any) as might remain of his estate after payment of all his debts, including the debts of the firms in which he was a partner.

The beneficial interest of the Plaintiff's husband in the Equeefa partnership was necessarily less than nothing, because that partnership was insolvent. But the Durban firm, in which he was also a partner, and the survivor of the two, was a creditor, and (as far as their Lordships can judge from the materials before them) the sole creditor of the Equeefa partnership; it having been agreed that the Durban firm should find all the funds necessary for carrying it on, and should have the disposal or sale of all the produce of the Equeefa estate. The debt,

so due to the Durban firm, was very large; and upon its payment, by realization of the Equeefa estate and the other assets of the Equeefa firm, the ultimate solvency of the Durban firm itself depended. If the debts of the Durban firm were paid in full, there might be something coming to the Plaintiff as her husband's legatee, but not otherwise. A large amount of capital had been sunk in the Equeefa estate; and, if that estate sold well, there might perhaps be a surplus.

Under these circumstances, it was the duty of the Defendant, as Baxter's executor, to take the proper measures for getting in the assets, and liquidating the debts, of both the firms in which his testator had been a partner; and it was the Plaintiff's right (her only right) to have that duty properly performed by him, so as to realize as much as possible for her husband's estate; and, in case of there being any ultimate residue, to have that residue paid over to her. Her complaint in this suit is (in effect) that, instead of properly performing that duty, he dealt with the Equeefa estate as if he had been a stranger, and assumed to purchase it for his own benefit, upon terms which left nothing to her as legatee; and the substantial object of this suit is to set aside that purchase.

The first question which arises is, whether the Plaintiff, not being executrix, and not having any specific interest in the Equeefa estate, could sue to set aside that purchase. Their Lordships have no doubt that she could. When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty (Travis *v.* Milne, 9 Hare, 150, &c.).

Has the Plaintiff then sued in proper form? Their Lordships think so; although, in those conclusions of her writ of summons and declaration which seek to have the Equeefa estate, and all its proceeds, transferred to or declared to be held in trust for herself, she has asked what she is not entitled to. Her prayer is wide enough to cover whatever she is really entitled to. She asks for a general account of her late husband's estate; for a particular account of the Defendant's dealings with the Equeefa estate; that the Defendant's purchase for his own benefit may be set aside; that the Equeefa estate may be sold; "and, generally, for such "other relief as to the Court shall seem fit."

Upon the merits, their Lordships agree, without hesitation, in the opinion of the Court below, that the sale was either voidable or void in equity. The doctrines and rules of equity recognized by the law of Natal do not appear to differ on this point from those of our own Courts. This sale (if it can be called at all by that name) was made in the first instance by the Defendant and Harry Escombe—both of them acting and selling in more than one fiduciary capacity—to themselves; and what (as between them) was regarded as Escombe's share of the bargain was afterwards transferred by him to the Defendant, Baxter's executor. Harry Escombe was the legal personal representative of Black, and also held a general power of attorney from the Plaintiff, and had acted as solicitor in the affairs of the partnership estates. On this point no more need be said. Unless the Plaintiff was estopped by some personal exception, she had a clear right to a decree for the usual accounts of her husband's estate, and to a declaration that, in respect of the transfer of the Equeefa estate to him, (in which Thomas Beath, by his attorney, had concurred,) the Defendant was accountable for that estate

and his dealings with it to all parties interested in its due and proper administration, according to their respective rights and interests; with all inquiries, accounts, and directions properly consequential thereon. The benefit of such a decree must necessarily, in their Lordships' opinion, enure first to the joint creditors of the Durban firm, if, as they assume, the Equeefa firm had no other creditor; though, on that point, inquiry ought to be directed by the decree. If the result is to realize more for the Durban firm than has already been applied in payment of dividends to its creditors, every creditor of that firm who has neither been paid in full nor has released the residue of his debt must be entitled to come in against the fund so made available. Those creditors have not, in their Lordships' opinion, so far as appears by the evidence now before them, done anything which, by estoppel or otherwise, can be held equivalent to a release of any part of their claims against such a fund. There was no bankruptcy, no legal liquidation, no legal representation of creditors. Some of those creditors acted as a committee for the rest; they knew that the Equeefa estate was put up for sale by auction; so much as that they authorized; and, out of the 7,500*l.* which Beningfield and Harry Escombe undertook to pay, the creditors received dividends. But it would not be safe to infer, from anything that appears in the evidence, that those who were not on the committee knew all the material facts; those who were on the committee probably did know, more or less; but they may not have known that the purchase was impeachable in equity; and, if they did, the most that can be inferred is, that they did not think it worth their while to incur the risk and expense of litigation. This (and the acceptance of the dividends which were

offered them) cannot, in their Lordships' opinion, estop them from claiming what otherwise might be their due (if the purchase is now set aside at the Plaintiff's suit), in priority to the Plaintiff, who is a mere legatee of their debtors. Their debts have been, of course, reduced by the dividends which they have received; and the Defendant will have credit in the account to be taken for the amount of all those dividends, as payments properly made out of the joint estate. It is scarcely necessary to add, that the opinion which their Lordships have expressed on this subject is entirely without prejudice to any question which may arise, on taking the accounts, out of any new or further evidence which may then be before the Court, as to the rights or position of any particular creditors or creditor.

The question whether the Plaintiff's right of suit is barred by her delay after she knew that the Defendant had purchased as for his own benefit, and had been advised that the purchase was impeachable, coupled with her acceptance of the sum paid to her by Harry Escombe, is, perhaps, more difficult than any other in the case; but their Lordships' opinion on that point is the same as that of the Court below. Considering the Plaintiff's position and circumstances, and the expectations which she had been led to form that she would have, or would participate in, the benefit of any such purchase if it should prove beneficial,—as to which her statements receive corroboration, not only from Harry Escombe's letters and evidence, but also from the evidence of the Defendant himself,—their Lordships do not think that either her delay or her acceptance of the money offered her can bar her suit, on the ground of *lâches*, or of acquiescence or ratification. But, in the event of there being any surplus coming to her after taking the accounts

directed by the decree, their Lordships think that she must give credit to the Defendant, as against that surplus, for the money which she received from Escombe.

Their Lordships will therefore humbly advise Her Majesty to discharge the judgment appealed from, and to remit this case to the Court below, with declarations to the following effect:—

1. That a decree be made for a general administration and account as against the Defendant Beningfield, the executor of William Black Baxter, deceased, of William Black Baxter's estate, including the payment of all debts now remaining due from him, either separately or jointly with Robert Black, deceased, or with Robert Black, deceased, and Thomas Beath, in a due course of administration.

2. That it be declared that the purchase of the Equeefa estate in the pleadings mentioned by the Defendant Beningfield and Harry Escombe respectively was voidable in equity and ought to be set aside in manner hereinafter directed, and that any moneys arising from the resale of the Equeefa estate, if made under the directions herein contained, or ordered to be made good by the Defendant Beningfield, ought to be applied for the payment (in the first place) of the joint debt due from the partnership firm of Black, Baxter, and Beath to the partnership of Robert Black and William Black Baxter trading under the firm of Black, Baxter, and Company, and of all other joint debts (if any such there were) due from the said firm of Black, Baxter, and Beath; and subject thereto, and in the event of there being any ultimate surplus of the moneys above mentioned, for the partners in the said last-mentioned firm, or the persons now entitled in their right, respectively, according to their respective interests therein.

3. That it be further declared, that such

amount as may have been or may become applicable to or towards the payment of the joint debt, due from the said firm of Black, Baxter, and Beath to the said firm of Black, Baxter, & Co., ought to be applied by the Defendant, as executor of the said William Black Baxter, towards the payment (in the first place) of all such joint debts and liabilities of the said firm of Black, Baxter, & Co. as now remain due and unpaid, and as to the residue or surplus (if any) which may remain after payment of all such debts and liabilities, for the benefit of the separate estate of the said William Black Baxter and of the legal personal representative or other person or persons now entitled in right of the said Robert Black respectively, according to their respective interests therein.

4. That all such accounts be taken, inquiries made, and directions given, as to the debts of the aforesaid firms, and as to the proceeds and produce of the said Equeefa estate, and the dealings of the Defendant therewith, as may be necessary or proper to give effect to the declarations aforesaid, or otherwise for the due administration of the said Equeefa estate, and of the proceeds and produce thereof; and that, in taking such accounts, all just allowances be made to the Defendant; and in particular that an account be taken of the receipts and payments of the Defendant Beningfield in respect of the Equeefa estate, and that it be ascertained what is due to or from him on such account, and declare that in taking this account the Defendant Beningfield is to have credit for the sums paid by him, or by him and Harry Escombe, as the purchase money of the estate (but not including anything paid by the Defendant to Harry Escombe for the purchase of his interest), and for the two sums of 1,000*l.* each paid to Robertson and Turton, if and so far as such sums may have been payable by the

Defendant according to the terms of the two letters of the 28th August 1879; and that the said Thomas Beath and the legal personal representative of the said Robert Black do respectively have notice of the decree, and be at liberty to attend the taking of such accounts and other proceedings under the decree as they are respectively interested in, and to take part therein, in the same manner as if they had been parties to this suit.

5. That if on taking the said accounts nothing shall be found due to the Defendant Beningfield, the said Equeefa estate, and all the rolling stock, crops, and produce now belonging thereto, be ordered to be sold under the direction of the Court, at such time and in such manner, and with such reserved prices or price (if any), as to the Court shall seem fit; but that if on taking the accounts herein-before directed with reference to the purchase and proceeds of the Equeefa estate a balance be found due to the Defendant Beningfield, the Equeefa estate be put up for sale at a reserved price not less than the amount of such balance, and that if it does not realize that sum the estate be retained by the Defendant Beningfield.

6. That the Plaintiff be ordered, if it shall appear on taking the said accounts that anything is coming to her from the estate of the said William Black Baxter, to give credit to the Defendant, as against such amount, for the sum received by her from Harry Escombe out of the money paid to Harry Escombe by the Defendant, as in the pleadings and evidence appears.

7. That the decree is to be without prejudice to any question between the Defendant and any person not a party to the suit.

With regard to costs, their Lordships think that the costs in the Court below ought to be paid by the Defendant; and that the taxed costs

of this appeal, of both parties, should be costs in the cause, and should be provided for accordingly whenever the costs of the cause are finally disposed of by the Court below.