

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Bernard
Duff v. James Duff, from the Supreme Court
of Western Australia; delivered the 5th May
1904.*

Present :

THE LORD CHANCELLOR.

LORD LINDLEY.

LORD KINROSS.

SIR ARTHUR WILSON.

[Delivered by The Lord Chancellor.]

THEIR Lordships are of opinion that this Appeal should be allowed. It is not necessary to enter very minutely into the discussion of the question in dispute. The parties in this case owned, subject to certain liabilities, a very considerable amount of property in partnership. As to that there is no controversy between them. It is not necessary to insist upon the difference in intelligence and education between the partners, because probably their Lordships would make the same observations if the parties were more equally matched than they are. But the facts are that a very large property being admittedly owned in moieties by two parties one of them is induced to sign an agreement, by which the whole of his half-share is transferred to the other. The recital in the deed now in question is as follows:—“Whereas an account of all the rents
“ profits expenses and liabilities of the said
“ partnership was duly had and taken, and it
“ was found by such accounts that the said
“ Bernard Duff was indebted to the said partner-
“ ship in large sums of money beyond the then
“ value of his said share, and in order to close
“ such accounts a sale of the said properties

“ would have to be had. And whereas in conse-
“ quence of the present depreciation in the value
“ of the properties the said lands if sold at the
“ present time would not realise sufficient to pay
“ the claims of the said James Duff against the
“ said partnership. And whereas it has been
“ agreed between the parties hereto that the
“ partnership existing between them shall be
“ dissolved and that in consideration of the pay-
“ ment to the said Bernard Duff of the sum of
“ £40 and of the mutual releases herein-after
“ contained he the said Bernard Duff shall
“ transfer and assign to the said James Duff all
“ his right, title, and interest in and to the said
“ lands and partnership assets.” That is the
recital. It is to be observed that the whole of
the bargain between the parties is rested on this
deed itself, on the truth of the allegations just
mentioned; and it is not now denied that that
which is of the essence of the bargain between
the parties,—namely, the recital that an account
had been settled between them showing the state
of the balance on what the agreement alleges to
be the final dissolution of the partnership
between them—it is not now denied that that
recital is not true: that no such account was
ever taken; and it is almost burning daylight to
say that with that fact goes almost the whole
importance of the question between the parties.
There seems to be some misapprehension, their
Lordships think, in the minds of the learned
Counsel as to the importance of the evidence,
and as to the importance of that question being
submitted to the jury. The important thing to
submit to the jury was, whether or not, the party
who executed this deed, and against whom this
deed is pressed, was aware of that recital, and
whether he assented to its truth. The jury have
found that he did not know it, and, if it may be

said without offence to the Chief Justice, probably none of their Lordships but would have found the same verdict as the jury. But it is not necessary to go to that extent here, because, unless their Lordships are brought to the conclusion that no reasonable man could have arrived at that conclusion on the evidence, a new trial should not be ordered. This question has been brought before the jury, and it is one which depends in a great measure on the credit to be given to the witnesses on the one side and the other. The jury had the opportunity of seeing the witnesses and hearing them and forming a judgment as to whether they were deserving of credit or not. They have come to the conclusion that the Plaintiff was right in his allegation that he did not know of that recital, and that the Defendant did, and once that fact is established (remembering that these recitals go to the whole essence of the bargain between the parties), it is absolutely impossible to say—at least it is to be hoped so, because otherwise their Lordships would have to come to the conclusion that they are not reasonable men—that no reasonable man could have come to that conclusion.

The result is that their Lordships will humbly advise His Majesty that the Appeal ought to be allowed, that the Judgment of the Full Court ought to be reversed with costs, and the Judgment of the learned Chief Justice upon the trial by jury of the 14th July 1902 restored. The

Respondent ~~Appellant~~ will pay the costs of this Appeal.

