

IN THE HIGH COURT OF AUSTRALIA.

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*Lavis*

v.

*Bunn*

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**REASONS FOR JUDGMENT.**

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Full Court

Rich, A.C.J.

Starke, McTiernan

and Williams JJ.

No. 12 of 1941

C.11235

H. J. Green, Govt. Print., Melb.

Judgment delivered at *Sydney.*  
on *30th July 1941*

ON APPEAL from the Supreme Court of New  
South Wales in its Equitable Jurisdiction

BETWEEN THOMAS DAVIS  
(Defendant) APPELLANT

A N D EDWARD ALFRED BUNN  
(Plaintiff) RESPONDENT

Before Their Honors the Acting Chief Justice,  
Mr. Justice Starke, Mr. Justice McTiernan and  
Mr. Justice Williams.

WEDNESDAY the 30TH DAY OF JULY, 1941.

WHEREAS by Statement of Claim filed on the 4th day of September the  
1940 the Respondent commenced a suit number 960 of 1940 in the  
Supreme Court of New South Wales in its Equitable Jurisdiction  
against the Appellant AND WHEREAS the said suit came on to be  
heard before the Honourable Harold Sprunt Nicholas Chief Judge  
in Equity of the said Supreme Court on the 18th, 19th and 21st  
days of March, 1941 AND WHEREAS by an order dated the 21st day  
of March, 1941 the said Court did grant leave to the Respondent  
to amend his replication filed in the said suit by adding thereto  
paragraph 2 as follows :

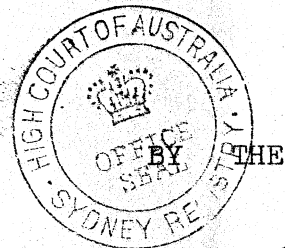
"2. And for a second replication the Plaintiff says that on  
the hearing of suit No. 653 of 1940 in which said suit  
John Kidd Greig referred to in paragraph one of the  
Statement of Claim herein was Plaintiff and the Plaintiff  
in this suit, the Defendant in this suit and one John  
Reddon Cameron were Defendants, it was on the eighth day  
of August last held by this Honourable Court that Ticket  
No. 32837 in State Lottery No. 686 was purchased by the  
Defendant on behalf of himself, the said John Kidd Greig  
and the Plaintiff and that the said three named persons  
were entitled to equal shares to the sum of Five thousand  
Pounds (£5,000) being the prize money payable in respect  
of the said ticket and in the said suit a final decree

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" was on the said eighth day of August last made by this Honourable Court in favour of the said John Kidd Greig against the Defendant in this suit for the payment to the said John Kidd Greig of a one third share of the said sum of Five thousand pounds (£5,000) and no appeal against or in respect of the said decree was or has been made or instituted. The Plaintiff ~~craves~~ <sup>were</sup> leave to refer to the pleadings, judgment and ~~decree~~ <sup>in the</sup> in the said suit when produced to the same extent as if they ~~set~~ <sup>were</sup> forth at length herein and submits that by reason of the foregoing the Defendant is estopped as against the Plaintiff from denying the matters alleged in paragraphs one, two, three, four and six of the Statement of Claim herein "

AND did overrule the objection of Counsel for the Appellant to the admissibility of the documents tendered in evidence by Counsel for the Respondent being the pleadings, the decree and the reasons for judgment in suit No. 653 of 1940 AND did admit the same and also the evidence of the Respondent on the interlocutory application in the said lastmentioned suit and on the hearing thereof did order that the argument on the question of estoppel based upon the said documents admitted in evidence be treated as an argument on demurrer to the said amendment to the replication AND thereupon did order that such demurrer be overruled AND did further order that the costs of the said suit up to and inclusive of this order of the 21st day of March 1941 be reserved AND WHEREAS on the 9th day of April, 1941, the Appellant pursuant to leave granted by this Court filed a notice of appeal in this Court from so much of the said order of the said Supreme Court dated the 21st day of March, 1941, in Suit No. 960 of 1940 as overruled the said demurrer AND the said appeal coming on to be heard before this Court this day WHEREUPON AND UPON READING the certified copy of the documents transmitted by the Master in Equity of the said Supreme Court to the New South Wales Registry of this Court AND UPON HEARING what was alleged by Mr. Mason of King's Counsel with whom was Mr. Wickham of Counsel for the Appellant and by Mr. Hardie and Mr. E.N. Dawes of Counsel for the Respondent THIS COURT DOTH

ORDER that this Appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the order of the said Supreme Court dated the 21st day of March, 1941 so far as it relates to over-ruling the demurrer and to costs be and the same is hereby discharge<sup>d</sup> and in lieu thereof that the said demurrer be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the evidence tendered in support of the said second replication be and the same is hereby rejected AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Appellant of and incidental to this appeal and to the proper officer of the said Supreme Court to tax and certify the costs of the Appellant in the said Supreme Court of and incidental to the said demurrer AND THAT the said costs of the Appellant when so taxed and certified be paid by the Respondent to the Appellant after service upon the Respondent of office copies of the respective Certificates of Taxation AND THIS COURT DOTH DECLARE that the sum of Fifty pounds (£50) paid into the said Supreme Court by the Appellant by way of security for the costs of this appeal should be paid out of Court to the Appellant or to Mr.T.J. Purcell his Solicitor.



THE COURT  
*J. G. Harman*  
DISTRICT REGISTRAR

Order. Appeal allowed. Discharge the order of the Court below so far as it relates to overruling the demurrer and to costs and in lieu thereof allow the demurrer and reject the evidence tendered in support of the second replication. Order plaintiff to pay the costs of the demurrer and of this appeal.

DAVIS V. BUNN.

The Acting Chief Justice delivered the judgment of the Court -

This is an appeal from an order made on what was deemed to be a demurrer to the plaintiff's second replication in a suit in which the plaintiff claims to be entitled to a one third interest in a certain ticket in a State Lottery and in the prize money won by this ticket and asks for consequential relief. The basis of this replication is that the same Lottery ticket and prize money were the subject of a previous suit. In that suit one Greig was plaintiff and the present plaintiff and the defendant were co-defendants. The defendant Davis defended the suit. The present plaintiff did not enter an appearance in the suit and made no claim to a share in the prize money. The plaintiff Greig claimed a one third share therein. In support of the replication the record in the previous suit was tendered. On objection to the evidence it was argued that the replication was bad in law and that what was therein alleged to be the basis of the decision in the previous suit viz.; that these three persons were interested in the winning ticket in equal shares did not operate as an estoppel in the present suit.

2.

The only issue of fact litigated and decided in the previous suit or which it was necessary to litigate or decide as a foundation for the decision on this issue was whether Greig was entitled to one third of the proceeds of the winning ticket. There was no issue in that suit between Bunn and Davis as to their respective rights in the remaining two thirds. At that stage Bunn said this was an issue he did not desire to litigate and it was in fact unnecessary to determine it in order to give the plaintiff the relief he claimed because any conflict between Bunn and Davis whether Bunn was entitled to one half of the two thirds, or Davis was entitled to the whole thereof could still be left undetermined while giving full effect to Greig's claim. The principles of the estoppel in question are explained in the judgments of Starke and Dixon JJ. in Blair v. Curran 62 C.L.R. 464 at 510 and 531 to 533. Applying the principles there stated it is clear that a decision that Bunn took a one third share of the proceeds of the winning ticket <sup>was</sup> ~~was~~/not "cardinal" to the decree.

Appeal allowed.