[HIGH COURT OF AUSTRALIA.]

Ex parte SPENCER AND OTHERS.

SHERWOOD . . . . . COMPLAINANT;

SPENCER AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *April* 4.

Griffith C.J., Barton and O'Connor JJ.

Autrefois convict—Test to be applied where such a plea is raised—Being found in gaming house without lawful excuse—Assisting in conducting business of such house—Games, Wagers and Betting Houses Act (*N.S.W.*) (*No.* 18 *of* 1902), sec. 19 (1), (2).

The applicants were convicted, under sec. 19, sub-sec. (2) of the *Games, Wagers and Betting Houses Act*, 1902, of having been found in a common gaming house without lawful excuse. They were then charged at the same Court under sub-sec. (1) of the same section, with having assisted the keeper of the house in the betting business that was there carried on. They pleaded *autrefois convict*, but the magistrate, after hearing the evidence, which was practically a repetition of that given in the previous case, again convicted and fined them.

The Supreme Court having decided, on a motion by the applicants for a prohibition, that the magistrate was right, and that the plea of *autrefois convict* was not made out, the High Court, seeing no reason to doubt the correctness of that decision, refused to grant special leave to appeal.

The test to be applied where the plea of *autrefois convict* is raised is to consider whether the evidence that was necessary to support the second charge would have been sufficient to procure a legal conviction on the first charge.

R. v. *Bingham*, 2 N.S.W. L.R. (L.), 90, approved.

Special leave to appeal to the High Court from the decision of the Supreme Court (22 N.S.W. W.N., 40, refused.

MOTION for special leave to appeal.

The defendants were convicted and fined on an information laid by the complainant under sec. 19 (2) of the *Games, Wagers and Betting Houses Act*, 1902, of having been found in a common gaming house without lawful excuse. They were then charged

at the same Court under sub-sec. (1) of the same section, with having assisted the keeper of the house in the betting business that was there carried on. They pleaded *autrefois convict*, but they were again convicted and fined on evidence which was practically a repetition of that given in the previous case. They then obtained a rule *nisi* for a prohibition restraining the complainant and the magistrate from further proceeding upon the order and conviction in the second case, on the ground that the defendants had already been convicted and fined for the same offence in the first proceeding. The Full Court, after argument, discharged the rule *nisi* with costs (1).

The defendants now moved for special leave to appeal.

Lamb for the applicants. The defendants, having been convicted and fined for one offence upon certain facts, should not have been convicted of another offence upon evidence of the same facts. The whole of the evidence which went towards proof of the assisting in the second case, was material on the first charge, and had been given on that charge. The defendants were therefore entitled to plead *autrefois convict*: *Broom's Legal Maxims*; *Reg.* v. *Miles* (2); *R.* v. *Bingham* (3); *R.* v. *King* (4); *Wemyss* v. *Hopkins* (5).

GRIFFITH C.J. There is no doubt as to the principle which is relied upon by Mr. Lamb, or which he professes to rely upon. He contends that the defendants, when they were charged upon the second occasion, had already been convicted of another offence upon substantially the same facts. The test to be applied in such cases has been laid down in old authorities, cited in *Archbold* (*Criminal Pleading, Evidence and Practice*, 22nd ed., p. 159), and also in the Supreme Court of New South Wales, by *Martin* C.J. in the case of *R.* v. *Bingham* (6). It is this: Would the evidence that was necessary to support the second charge have been sufficient to procure a legal conviction on the first? That test has only to be applied to the facts of the present case to dispose of the matter.

(1) 22 N.S.W. W.N., 40.
(2) 24 Q.B.D., 423.
(3) 2 N.S.W. L.R. (L.), 90.
(4) (1897) 1 Q.B., 214.
(5) L.R. 10 Q.B., 378.
(6) 2 N.S.W. L.R. (L.) 90, at p. 92.

H. C. OF A. 1905.

EX PARTE SPENCER AND OTHERS.

Griffith C.J.

The applicants were charged with being found in a common gaming house without lawful excuse, and were convicted and fined. Afterwards they were charged with assisting the keeper of the house in conducting the business of betting that was carried on there. All that was necessary to support the second charge was to prove that the house was kept, by the person who kept it, for the purpose mentioned, and that the defendants assisted him. Now, on the proof of those facts, could they have been convicted on the first charge? Clearly not. If that had been all the evidence given on the first charge, the case must have been dismissed. That is sufficient to dispose of the application.

The decision of the Supreme Court, so far from being open to doubt, appears to be obviously right, and this application therefore should be refused.

BARTON J. and O'CONNOR J. concurred.

Leave refused.

Solicitors for applicant, *Crick & Carroll.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

LUKE AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

WAITE . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1905.

MELBOURNE, *March* 7, 8, 9, 10, 18.

Griffith C.J., Barton and O'Connor JJ.

Gift—Subscriptions—Failure of purpose—Resulting trust for donors—Contract to repay subscriptions—Consideration—Option to have money applied towards payment for shares in a Company—Appeal to High Court—Reversal of judgment on question of fact—Inference to be drawn from undisputed facts.

Money was subscribed by certain persons in Wilcannia in the form of deposits on applications for shares, at the rate of 1s. per share, in a proposed company, whose object was the locking of the river Darling. The greater