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interpretation. It is possible, however, that the novel language of "reasonable alternatives" has provided a method for carte blanche invalidation of state statutes, undercutting the time-honored formula of the *Cooley* case.[42] Even though the *Cities Service* case minimizes this possibility, a case with a fact situation similar to the *Dean* case might well attract the Court to utilize "reasonable alternatives," thereafter its expansion into doctrine being but a matter of judicial discretion. Such an eventuality would be a usurpation of legislative function by the judiciary.

William H. Parker

EFFECT OF RESPONSIVE VERDICT STATUTE—INDICTMENTS—FORMER JEOPARDY

On February 11, 1948, defendant was indicted for manslaughter. The following week a jury of twelve returned a verdict of negligent homicide, which was responsive to the charge of manslaughter at that time.[1] The conviction and sentence were set aside on June 15, 1948, and the case was remanded for a new trial.[2] Some twenty months later, on February 13, 1950, defendant was arraigned under the same indictment, but only on the charge of negligent homicide. His counsel objected to the arraignment, protesting that there was no written charge accusing him of negligent homicide for the reason that negligent homicide was no longer responsive to, nor included in, a charge of manslaughter.[3] This objection was overruled, along with the subsequent objections to the clerk's reading of the manslaughter indictment, with the negligent homicide verdict endorsed on the back, to the jury, and the court's permitting the jury to retire to the jury room with the indictment and prior conviction endorsed thereon. *Held*, that it was proper to arraign defendant under the original manslaughter indictment, and try him for negligent homicide. *State v. Crittenden*, 49 So. 2d 418 (La. 1950).

The appellant's contention that the use of the original indictment with the endorsement of the negligent homicide verdict

commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." (71 S. Ct. 215, 220.) This opinion was written by Mr. Justice Clark, as was that of the *Dean* case.

42. 53 U.S. 299 (1851).

1. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 147 of 1942.

2. State v. Crittenden, 214 La. 81, 36 So. 2d 645 (1948).

3. Art. 386, La. Code of Crim. Proc. of 1928, as amended by La. Act 161 of 1948.

was prejudicial to his case was not considered at length by the court. Although there may be merit in saying that a jury will be prejudiced by the knowledge that a prior jury has found the defendant guilty of the crime now charged against him,[4] it seems fairly well settled that this incidental knowledge of the former conviction is of no consequence, so long as the jury is properly instructed as to the true legal situation.[5]

The principal issue confronting the court in the instant case related to the appellant's contention that the original manslaughter indictment could not serve as a valid charge for the lesser crime of negligent homicide. The new responsive verdict statute[6] had eliminated negligent homicide as a responsive verdict of manslaughter, and at the time of the second trial a conviction of negligent homicide under a manslaughter indictment would not have been possible. Since Act 161 of 1948 had been recognized as a procedural statute which affected trials held after its effective date regardless of when the criminal act took place,[7] the defense counsel argued that only an indictment specifically charging negligent homicide could carry the charge of the offense at the time of the second trial. It was contended that the original indictment was no longer valid and that the negligent homicide charge given orally by the judge at the arraignment did not satisfy the statutory requirement that all criminal prosecutions be accompanied by a written charge.[8]

The supreme court, however, refused to be persuaded by this line of reasoning. Rather, it concluded that a scope of the manslaughter indictment, that is, whether it included a charge of negligent homicide, was to be determined by the law in effect when it was returned on February 11, 1948.[9] For proper under-

4. Art. 515, La. Code of Crim. Proc. of 1928, states: "The effect of granting a new trial is to set at large everything connected with the trial, and merely to grant a retrial of the case, with as little prejudice to either party as if it has never been tried."

5. State v. Wooten, 136 La. 560, 67 So. 366 (1915).

6. La. Act 161 of 1948.

7. State v. Williams, 216 La. 419, 423, 43 So. 2d 780, 781 (1949), in which it was stated, as to La. Act 161 of 1948, "Clearly this act has relation to nothing more than the course of the trial proceedings." And further, "It has long been established that statutes which make changes in matters relating merely to practice and procedure in the courts control trials had after the effective date thereof without regard to the date of the happening of the events which give rise to the proceedings." (216 La. 419, 422, 43 So. 2d 780, 781.)

8. La. Const. of 1921, Art. I, § 9; Art. 2, La. Code of Crim. Proc. of 1928.

9. The court did not say this in so many words, but it merely disposed of the issue by stating that the principle of the case of State v. Smith, 49 La. Ann. 1515, 22 So. 882 (1897), offered a complete parallel and was ruling in the *Crittenden* case. In the *Smith* case the previous murder indictment was used

standing of the court's conclusion, two factors should be considered: (1) the status of the old manslaughter indictment at the time the 1948 responsive verdict statute became effective, and (2) the effect in general of procedural statutes.

Preceding the original trial, when defendant was arraigned for manslaughter, he was, in legal contemplation, also arraigned for the lesser and included offense of negligent homicide.[10] Although the district attorney attempted to prove the greater crime, he was proceeding under an indictment that was valid and sufficient for the charge of negligent homicide as well. When the verdict of negligent homicide was returned, the charge of manslaughter, in effect, was erased from the indictment, but a valid charge of negligent homicide remained pending.[11] This charge was no less valid than one which might have been returned by a grand jury immediately following the reversal. If the scope of the original indictment is to be governed by the law in effect when it was found by the grand jury, then it follows that the defendant still stood charged with negligent homicide at the time of the retrial. It is significant that Act 161 of 1948 did not become effective until several weeks after the reversal and remanding of the case. Consequently, since Act 161 of 1948 does not repeal the statute declaring negligent homicide to be a crime and is merely procedural in nature,[12] it should not operate retrospectively to the extent of affecting a valid charge (regardless of its source) pending at the time of its passage. Of course, it would govern the scope of all charges brought after its effective date. A hypothetical situation might here serve as an illustration. Suppose an indictment had been returned by a nine out of twelve vote of a grand jury. After the indictment, but prior to the trial, a statute was enacted requiring a unanimous indictment. Although it could not be denied that a defendant's chances of escaping indictment were greater under the new statute, it is offered that it would not have nullified the indictment then pending. Yet it would be obvious that at the time of the trial in the hypothetical case, an indictment returned by a nine out of twelve vote would be without legal efficacy.

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in the new trial for manslaughter, and the court said that "neither law nor jurisprudence requires that he could only legally be tried on a new indictment specially charging manslaughter." (49 La. Ann. 1515, 1520, 22 So. 882, 884.)

10. State v. Bourgeois, 158 La. 713, 104 So. 627 (1925).

11. State v. Dunn, 41 La. Ann. 612, 6 So. 176 (1889); State v. West, 45 La. Ann. 928, 13 So. 173 (1893); State v. Smith, 49 La. Ann. 1515, 22 So. 882 (1897); State v. Wooten, 136 La. 560, 67 So. 366 (1915); State v. Harville, 171 La. 256, 130 So. 348 (1930).

12. State v. Williams, 216 La. 419, 43 So. 2d 780 (1949).

While the problem presented to the court in the *Crittenden* case as to the effect of Act 161 of 1948 upon a pending indictment was unique and without judicial precedent, it is not of great importance because of the slight possibility of its recurrence. Of more significance is the question (not raised in the *Crittenden* case) as to the double jeopardy aspects of the new responsive verdict statute. For example, if the *Crittenden* trial were held today and the jury should find the defendant "not guilty" of manslaughter, would a subsequent trial for negligent homicide be barred by a plea of former jeopardy?

The prohibition against one's being placed twice in jeopardy for the same offense first appeared in Louisiana in statutory form in 1864, although the concept had been borrowed from the common law prior to that time. The present Constitution of Louisiana provides, "nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."[13]

The jurisprudence of this state has failed to contribute any inclusive and easily applied formula which may be used to determine the issue of former jeopardy. Instead, a number of tests or rules have been advanced in the cases. In the leading case of *State v. Foster*,[14] three different tests were stated with approval. The "same evidence" formula was set forth with the declaration that " 'The test whether the plea of autrefois acquit is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to have procured a legal conviction on the first.' "[15] The "substantial identity" test was expressed in the following manner: " 'To render the plea of a former acquittal a bar, it must be a legal acquittal . . . for substantially the same offense. . . .' While formal, tech-

13. La. Const. of 1921, Art. I, § 9. The similar provision found in the Federal Constitution does not apply to prosecutions under state laws. Palko v. Connecticut, 302 U.S. 319 (1939).

This constitutional guarantee is restated in Art. 276, La. Code of Crim. Proc. of 1928. The facts required to constitute former jeopardy are outlined in Art. 279, La. Code of Crim. Proc. of 1928, which states: "To constitute former jeopardy it is necessary . . . that the offense formerly charged and that presently charged are either identical, or different grades of the same offense, or that the one is necessarily included in the other."

Art. 5, La. Crim. Code of 1942, states that the "offender who commits an offense which includes all the elements of other lesser offenses, may be prosecuted for and convicted of *either* the greater offense or one of the lesser and included offenses." (Italics supplied.) It is to be noted that this article does not provide for dual prosecutions in such cases.

14. 156 La. 891, 101 So. 255 (1924).

15. 156 La. 891, 897, 101 So. 255, 258.

nical, and absolute identity of the offenses is not necessary, yet substantial identity is an essential element in support of the plea of autrefois acquit."[16] The court's opinion also approved a further test, being " 'whether on the former trial the accused could have been convicted of the crime charged against him on the second.' "[17] Different approaches have been taken by other jurisdictions and text writers.[18]

In dealing with lesser and included offenses, such as those covered by Article 5 of the Criminal Code, it would probably be most appropriate to apply the "same evidence" test, or the test of "whether, on the first trial, there could have been a conviction of the offense prosecuted in the second." Both of these tests were relied upon by the Pennsylvania court when, in the early case of *Hiland v. Commonwealth*,[19] it was confronted with a plea of former jeopardy arising from an acquittal of manslaughter and a subsequent indictment and trial for involuntary manslaughter. In that case, it was said,

> "The first indictment charged murder. Under it he [the defendant] might have been convicted of murder of the first or second degree, or of voluntary manslaughter, but not of involuntary manslaughter. The latter offense is a misdemeanor. It must be charged as such, and cannot be included in an indictment charging felonious homicide excepting in the case of an indictment for voluntary manslaughter, where it may be joined. . . . It follows that when the defendant was put upon his trial for murder, he was placed in no jeopardy of a conviction for involuntary manslaughter."[20]

A similar situation in Louisiana, where a trial for a lesser and included offense was held not to be barred by the former acquittal of the greater offense, is presented in the case of *State v. Neal*.[21] The defendant, a delinquent juvenile, had been tried and ac-

16. Ibid.
17. 156 La. 891, 898, 101 So. 255, 258.
18. Archbold, Pleading, Evidence and Practice in Criminal Cases 145, 146 (29 ed. 1934): "The principle on which the right of *autrefois acquit* . . . depends is that a man shall not be put twice in jeopardy for the *same matter*." (Italics supplied.) Also, in the same text, the following appears, "Whether the facts are the same in both trials is not a true test: the test is rather whether the acquittal on the first charge necessarily involves an acquittal on the second charge."
19. 114 Pa. St. 372, 6 Atl. 267 (1886). The reasoning of the *Hilands* case was followed in the more recent case of Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A. 2d 235 (1946).
20. 114 Pa. St. 372, 380, 6 Atl. 267, 268.
21. 169 La. 441, 125 So. 442 (1929).

quitted of assault with intent to commit rape, which crime was a felony and therefore subjected the youth to the jurisdiction of the criminal court. Later, upon being tried in the juvenile court for mere assault, defendant pleaded *autrefois acquit*, which was overruled, the supreme court affirming the ruling on appeal and saying:

> "the acquittal of the defendant of the crime of assault with intent to commit rape was a valid acquittal, because the indictment for that crime was a valid indictment, but the conviction of the mere assault, without intent to commit rape, was not a valid conviction, because the defendant was not subject to indictment for that offense. The subsequent trial and conviction of the defendant in the juvenile court, as a delinquent juvenile, for having committed the assault upon the girl, were valid, notwithstanding the assault was the same assault for which the defendant was legally indicted and tried and acquitted of the crime of assault with intent to commit rape."[22]

Here a second trial was permissible for the "same assault" because the court lacked jurisdiction in the first instance to return a conviction of the included and lesser offense of simple assault charged in the second.

Prior to 1948 all lesser and included offenses were responsive verdicts. The courts were charged with the responsibility of deciding the question in each case, and considerable difficulty was frequently encountered in determining whether a greater offense "necessarily included all the elements of the lesser."[23] The 1948 responsive verdict statute eliminated this confusion by a legislative determination of the appropriate responsive verdicts. Thus, a defendant on trial for manslaughter can no longer be convicted of negligent homicide. If our courts follow the test applied by the Pennsylvania court in the *Hiland* case, and also stated by the Louisiana Supreme Court in the *Neal* case, the defendant may be subsequently charged with negligent homicide and will be unable to validly plead former jeopardy. He has never been on trial or subject to possible conviction of that crime.[24]

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22. 169 La. 441, 445, 125 So. 442, 443.

23. See State v. Murphy, 214 La. 600, 38 So. 2d 254 (1948); State v. Poe, 214 La. 606, 38 So. 2d 359 (1948). For an interesting discussion on this problem, see Comment, 5 LOUISIANA LAW REVIEW 603 (1944).

24. It is submitted that Art. 5, La. Crim. Code of 1942, and Art. 279, La. Code of Crim. Proc. of 1928, are modified to this extent.

However, it should be recognized that this application of the responsive verdict statute subjects a defendant to the possibility of two trials for a single homicide, and it may be argued that the second posecution is contrary to the real spirit of the constitutional guarantee against double jeopardy. Had there been a conviction of manslaughter, surely the defendant could not have been subsequently tried for negligent homicide. Thus it is apparent that two distinct offenses have not been committed in the same act—either there has been a manslaughter *or* a negligent homicide. In the early Louisiana case of *State v. Cheevers*,[25] it was stated that "no man shall be punished twice for the same criminal act." If this test is to determine the scope of the constitutional prohibition against double jeopardy, then it logically follows that this right should not be restricted by the new statutory responsive verdict limitations. This approach, however, is somewhat weakened by the court's holding in the recent case of *State v. Mitchell*.[26] In that case the defendant was convicted of simple assault, and subsequently tried and convicted of cruelty to juveniles, both convictions being predicated upon the same attack upon a sixteen year old boy. The *Mitchell* case was not argued on appeal and may not be entitled to any great weight,[27] but it at least casts a doubt upon the rule stated in the *Cheevers* decision that there shall be only one trial for a single criminal act.

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LABOR LAW—STATE COMPULSORY ARBITRATION ACT INVALID FOR CONFLICT WITH NATIONAL LABOR RELATIONS ACT

Transit workers were fined for disobeying an anti-strike restraining order obtained by the Wisconsin Employment Relations Board, under the Wisconsin Public Utility Anti-Strike Law.[1] This law substitutes for collective bargaining, compulsory arbitration upon order of the Wisconsin board whenever an impasse is reached in disputes between employees and management of public utilities. It prohibits strikes in public utilities and makes disobedience of restraining orders punishable by fine. *Held*, the Wisconsin act conflicts with Section 7 of the National Labor Relations Act of 1935 as amended by the Labor Management Act of

25. 7 La. Ann. 40, 41 (1852).
26. 210 La. 1078, 29 So. 2d 162 (1946).
27. The *Mitchell* case was discussed in The Work of the Louisiana Supreme Court for the 1946-1947 Term—Criminal Procedure, 8 LOUISIANA LAW REVIEW 290 (1948).
1. Wis. Stat. (1947) § 111.50 et seq.