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Edward Sutherland

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DOUBLE JEOPARDY—THE "SAME EVIDENCE TEST" APPLIED

Defendant was convicted of simple battery¹ and was later charged with indecent behavior with a juvenile.² The state made no claim that additional evidence was available to support the charge of indecent behavior. The lower court sustained defendant's plea of double jeopardy, and the state appealed. The Louisiana supreme court *held* that the judgment of the trial court was correct and affirmed. *State v. Bonfanti*, 262 La. 153, 262 So.2d 504 (1972). In another case, the defendant was charged with simple robbery³ and theft.⁴ In a previous prosecution he had been convicted of malfeasance in office.⁵ The trial judge sustained the motion to quash the bill of information on the basis of double jeopardy. The Louisiana supreme court *held* that the trial judge was correct in holding that former jeopardy should bar the second prosecutions. *State v. Didier*, 262 La. 364, 263 So.2d 322 (1972).

Article I, section 9 of the Louisiana constitution states "nor shall any person be twice put in jeopardy of life or liberty for the same offense . . ." This language recurs in article 591 of the Code of Criminal Procedure,⁶ and the United States Consti-

1. LA. R.S. 14:35 (1950), *as amended by* La. Acts 1968, No. 647, § 1, reads in part: "Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon."

2. LA. R.S. 14:81 (1950), *as amended by* La. Acts 1968, No. 647, § 1, reads in part: "Indecent behavior with juveniles is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the persons or in the presence of any child under the age of seventeen, with the intention of arousing or gratifying the sexual desire of either person."

3. LA. R.S. 14:65 (1950) reads in part: "Simple robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, but not armed with a dangerous weapon."

4. LA. R.S. 14:67 (1950), *as amended by* La. Acts 1968, No. 647, § 1, reads in part: "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations."

5. LA. R.S. 14:134 (1950) reads in part: "Malfeasance in office is committed when any public officer or public employee shall: (1) Intentionally refuse or fail to perform any duty lawfully required of him, as such officer or employee; or (2) Intentionally perform any such duty in an unlawful manner; or (3) Knowingly permit any other public officer or public employee, under his authority, to intentionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner." *See State v. Didier*, 259 La. 967, 254 So.2d 262 (1971).

6. "No person shall be twice put in jeopardy of life or liberty for the same offense . . ."

tution contains similar protection.⁷ Thus, it is fundamental to the application of the concept of double jeopardy to define the "same offense."⁸ Although an exact rule has not been stated, the traditional formula used in Louisiana is essentially an adaptation of the "same evidence test."⁹ Under the original usage of the same evidence test, the conviction or acquittal on the first indictment would be no bar to the second conviction on another charge unless the facts contained in the second indictment were the same as those in the first.

The application of this test, however, has been less than consistent in Louisiana. In an early case the offenses were defined as being the same if they arose out of the same act.¹⁰ This position was soon abandoned, and in later cases¹¹ the court stated as the general principle that "a former trial is not a bar unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment."¹² The test, however, might be better defined in terms of elements as illustrated in *State v. Faulkner*.¹³ In that case, the court stated that "each indictment sets out an offense *differing in all elements* from that in the other, though both relate to the same transaction."¹⁴ (Emphasis added.) The conclusion reached was that a conviction for obtaining money by false pretenses did not preclude a second prosecution for embezzlement. The fact that different elements make different

7. See U.S. CONST. amend. V.

8. Two Comments in prior issues of the *Louisiana Law Review* generally concern the elusive definition of the "same offense." The latest, in 32 LA. L. REV. 87 (1972), deals with a general overview of the various standards employed throughout the United States to define the "same offense." An earlier comment, 21 LA. L. REV. 615 (1961), deals primarily with article 279 of the 1928 Code of Criminal Procedure and the various jurisprudential tests. Reference is made throughout this casenote to these articles in order to familiarize the reader with broadly related areas of double jeopardy not included in the narrow scope of this note.

9. This test was first stated in *Rex v. Vandercomb*, 168 Eng. Rep. 455, 461 (1796): "[U]nless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second." See LA. CODE CRIM. P. art. 596, comment (a). See also Comment, 32 LA. L. REV. 87, 90 (1972).

10. See *State v. Cheevers*, 7 La. Ann. 40, 41 (1852).

11. See, e.g., *State v. Williams*, 45 La. Ann. 936, 12 So. 932 (1893); *State v. Vines*, 34 La. Ann. 1079 (1882); *State v. Keogh*, 13 La. Ann. 243 (1858).

12. *State v. Faulkner*, 39 La. Ann. 811, 812, 2 So. 539, 540 (1887).

13. 39 La. Ann. 811, 2 So. 539 (1887).

14. *Id.* at 812, 2 So. at 540. (Citations omitted.)

crimes seemed to be the crucial issue in this application of the test of double jeopardy.¹⁵

Two later cases are cited most often as manifesting the present Louisiana position on defining the same offense. In *State v. Roberts*,¹⁶ the court adopted the rule requiring substantial identity of offenses.¹⁷ It was also said that the evidence necessary to support the second indictment had to be sufficient for the first before double jeopardy could apply.¹⁸ *State v. Foster*,¹⁹ restated these rules. However, the court went further and held that independent crimes could be proved at the first trial as matters of evidence to show that the defendant's act was committed willfully or maliciously and that this did not make these independent crimes elements of the offense charged. The test stated in *Foster* was whether at the first trial there could have been a conviction for the offense prosecuted at the second.²⁰ In *Foster*, acquittal for attempted arson did not preclude a later trial for assault and battery, even though evidence proving the commission of assault and battery was introduced at the trial for attempted arson. These cases prescribe no clear rule, for even though the court used language equivalent to the same evidence test,²¹ it would seem that the evidence being presented on the first trial was disregarded and reliance was placed on the fact that the crimes were comprised of different elements; substantial identity of offenses was the controlling consideration in ruling on the plea of double jeopardy.

15. In *Faulkner* the court further stated: "It has been held in numerous cases that, where a particular act is of such a character as to constitute two distinct crimes, conviction for one will not bar prosecution for the other." *Id.* The court listed other examples of cases which would not be double jeopardy. One of these was "keeping a drinking-house" and "being a common seller of intoxicating liquors." This further illustrates the court's reliance on the fact that the elements of the crimes are different in making their determination.

16. 152 La. 283, 93 So. 95 (1922).

17. The court stated that the rule is not "formal, technical, absolute identity; the rule is that there must be only substantial identity, that the evidence necessary to support the second indictment would have been sufficient for the first." *Id.* at 287, 93 So. at 96. For a discussion of this test see Comment, 21 LA. L. REV. 615, 622 (1961).

18. 152 La. at 287, 93 So. at 96.

19. 156 La. 891, 101 So. 255 (1924).

20. *Id.* at 898, 101 So. at 258.

21. See *State v. Roberts*, 152 La. 283, 287, 93 So. 95, 96 (1922): "that the evidence necessary to support the second indictment would have been sufficient for the first."

Article 279 of the 1928 Code of Criminal Procedure²² did little to clarify the definition of the same offense; the Louisiana courts continued to apply the principles of *Roberts* and *Foster* in later cases such as *State v. Calvo*²³ and *State v. Comeaux*.²⁴ In *Calvo* the court restated the same evidence formula of the earlier cases, but explained in depth that the true test to be applied was whether the offenses were of substantial identity. The defendant had not been charged with conspiracy or simple robbery on the first trial, and neither conspiracy nor simple robbery were responsive verdicts to murder.²⁵ For these reasons the defendant in *Calvo* could not have been convicted of those crimes at the trial for murder, even though evidence substantiating the commission of robbery and conspiracy was presented.²⁶

In *Comeaux*, the court cited *Roberts* and *Calvo* as authority for the requirement that the offenses must be the same both in law and in fact.²⁷ It was found that the second charge arose out of the same set of facts but that simple battery and attempted murder were not the same in law, chiefly because of the different intent requirements for those crimes. Significantly, the same evidence test was found not to be enough in itself to sustain a plea of double jeopardy.

Article 596 of the 1966 Code of Criminal Procedure²⁸ provides a general statement of the scope of double jeopardy, but it reaffirms the basic 1928 test and offers little assistance in de-

22. See LA. CODE CRIM. P. art. 279 (1928): "[T]hat 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." See also Comment, 21 LA. L. REV. 615, 622 (1961), for a discussion of this statute.

23. 240 La. 75, 121 So.2d 244 (1960).

24. 249 La. 914, 192 So.2d 122 (1966).

25. The "responsive verdict" test was a court-announced requirement which was also implicit in the 1928 Code of Criminal Procedure. For a discussion of this test see 21 LA. L. REV. 615, 621-23 (1961). The responsive verdict requirement was removed by LA. CODE CRIM. P. art. 596.

26. *State v. Calvo*, 240 La. 75, 91-92, 121 So.2d 244, 248 (1960).

27. 249 La. 914, 920, 192 So.2d 122, 124 (1966).

28. LA. CODE CRIM. P. art. 596: "Double jeopardy exists in a second trial only when the charge in that trial is: (1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial; or (2) Based on a part of a continuous offense for which offense the defendant was in jeopardy in the first trial."

fining the same offense.²⁹ As recently as March, 1972, the Louisiana supreme court indicated an adherence to the mixed modifications as applied in the above cases, with emphasis on the identity aspect. In *State v. Thames*,³⁰ a per curiam decision, acquittal of the crime of criminal damage to property³¹ did not preclude prosecution for battery.³² The crimes were found not to be the same or "identical" offenses even though they arose from the same transaction.³³

In the instant cases the supreme court found that double jeopardy constituted a bar to prosecutions for a second offense. In a per curiam opinion, the court in *Bonfanti* based its holding that there could not be consecutive prosecutions for battery and indecent behavior with a juvenile on an application of the same evidence test as stated in *Roberts* and *Foster*; it also cited official revision comment (d) to article 596 of the Code of Criminal Procedure.³⁴ It was specifically pointed out that the evidence was the same for both prosecutions, that no new evidence was introduced in support of the second indictment, and that the defendant had been convicted of the same conduct, the unlawful touching, in the first trial that he was charged with in the second. In *Didier*, where prosecution was not allowed for theft and simple robbery following a conviction for malfeasance in office, the problem of how to define the same offense received more comprehensive treatment. The same evidence test of *Roberts* was cited as the rule in Louisiana, and the court held that the second charge was for a portion of the same crime for which the defendant was convicted in the first trial. The majority

29. Article 596 did, however, remove the responsive verdict requirement. See note 24 *supra* and LA. CODE CRIM. P. art. 596.

30. 261 La. 96, 259 So.2d 26 (1972).

31. BATON ROUGE, LA. CITY CODE 13:20 (1951) reads in part: "Whoever intentionally damages, injures, or defaces any property of another or any public property, without the consent of the owner, shall be fined . . ."

32. LA. R.S. 14:34 (1950) reads in part: "Aggravated battery is a battery committed with a dangerous weapon."

33. *State v. Thames*, 261 La. 96, 99, 259 So.2d 26, 27 (1972) (Barham, J., concurring opinion): "Double jeopardy per se cannot be pleaded since the two offenses charged . . . are not the same and do not require the same elements."

34. LA. CODE CRIM. P. at 596, comment (d): "Clause (2) of the above Art. 596 is necessary to prevent multiple prosecutions for continuous offenses. For example, possession of stolen goods or narcotics may continue over a long period of time and may involve more than one object. Yet, obviously there should be only one prosecution for what is in effect one criminal course of conduct."

stressed the fact that the foundation for the malfeasance conviction and the prosecution for theft and robbery was the same evidence, stipulated to be the same, formed from the identical conduct of the defendant. The use of the sheriff's office to further the theft, making the defendant a principal to the theft, was the identical conduct charged when the defendant was convicted of malfeasance.

The court seemed compelled to illustrate what it was *not* holding in its disposition of the *Didier* case. It was emphasized that the "same transaction test,"³⁵ requiring all crimes charged arising out of one "criminal episode" to be tried together, had not been adopted by the United States Supreme Court,³⁶ or by the Louisiana courts or statutes.³⁷ Also stressed was the fact that on the face of the respective indictments the second offense was not included in the first because the elements of the two crimes were not the same.³⁸ *Calvo* and *Comeaux* were distinguished on the grounds that, although those decisions nominally rested on the elements of the crimes being the same, the issue in those cases was raised prior to trial. This, according to the court, excluded the possibility of applying the same evidence test since there had not been a second trial at which to present the same evidence.³⁹ For that reason, whether the plea of double jeopardy was to be sustained in those cases had to rest on whether the crimes were comprised of different elements. It is submitted that

35. See Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 527, 534 (1949); Comment, 75 YALE L.J. 262 (1965); Note, 7 BROOKLYN L. REV. 79, 84 (1937). But see *Ashe v. Swenson*, 397 U.S. 436 (1970), holding a theory of collateral estoppel to be binding upon the states. See also Note, 31 LA. L. REV. 540, 546 (1971).

36. See *Ashe v. Swenson*, 397 U.S. 436, 448 (1970) (Harlan, J., concurring opinion): "I wish to make explicit my understanding that the Court's opinion in no way intimates that the Double Jeopardy Clause embraces to any degree the 'same transaction' concept reflected in the concurring opinion of my Brother BRENNAN."

37. See LA. CODE CRIM. P. art. 596, comment (a). See also Comment, 32 LA. L. REV. 87, 92 (1972).

38. Authority was also cited to support the proposition that evidence of the second crime could be introduced in the trial for the first crime for the limited purpose of proving the guilt of the offense charged. See *State v. Boudoin*, 257 La. 583, 243 So.2d 265 (1971). See also *State v. Foster*, 156 La. 891, 101 So. 255 (1924).

39. The application of the same evidence test in this manner could be styled the so-called "backwards test." For a discussion of this version of the same evidence test see Comment, 32 LA. L. REV. 87 (1972). See also Comment, 75 YALE L.J. 262, 273 (1965); Note, 7 BROOKLYN L. REV. 79, 83 (1937).

the distinguishing of these two cases on the grounds given is somewhat tenuous, considering the method by which the instant cases came before the supreme court for review. *Bonfanti* was an appeal by the state from a sustained plea of double jeopardy in the district court and *Didier* an appeal by the state from the sustaining of a motion to quash by the trial court. The dissenting opinion in *Didier* relied heavily on *Calvo* and *Comeaux* explaining that these cases stand for the proposition that the test is whether the offenses, not the acts, are the same. The dissent urged that the in law and in fact test should be applied to define the same offense rather than the same evidence approach of the majority.

A majority of Louisiana double jeopardy decisions have indicated an adherence to a loosely stated same evidence test.⁴⁰ However, so many other tests, or combinations of tests, have been applied that it is impossible to state with certainty the Louisiana formula for defining the same offense.⁴¹ The holdings in *Bonfanti* and *Didier* should provide much clarification in this area. In these decisions the court was consistent in not applying the in law and in fact test of *Calvo* and *Comeaux*. In *Bonfanti*, the court gave great weight to the fact that the *same act* of the defendant had been charged as criminal in both the first and second prosecutions. Likewise, in *Didier*, it was the *same conduct* of the sheriff which had been twice put on trial. It might appear that the court applied some form of the same transaction test, but it is explicitly stated that the same transaction test is not applicable in Louisiana law. The same evidence test was reaffirmed as the true test in Louisiana, but *Calvo* and *Comeaux* were distinguished rather than overruled.⁴²

It is clear that the emphasis will no longer be on the mere definition of crimes contained in the statutes. What will be considered is the conduct of the defendant upon which the dual charges are based. If there is more than one act violating more

40. See LA. CODE CRIM. P. art. 596, comment (a). See also Comment, 32 LA. L. REV. 87, 90 (1972).

41. See LA. CODE CRIM. P. art. 596, comment (b).

42. One conclusion which could be drawn from this is that the court might adhere to a dual standard. The in law and in fact test would be applied if the court were faced only with the separate indictments; the same evidence test if the evidence for the second trial were available. This, however, would be an artificial distinction. Production of the evidence could then be required, thus making it available, on a motion to quash on the grounds of double jeopardy.

than one statute, as in *Thames*, the second prosecution will be allowed. But, if more than one statute is violated by the same act or conduct, as in *Bonfanti* and *Didier*, the court will use the same evidence test and the second prosecution will be barred. Criminal conduct may often give rise to two or more possible charges,⁴³ but the constitutional and statutory rights of the defendant to protection against double jeopardy must be safeguarded. A crucial factor in insuring this protection is a workable standard for defining the same offense. The standard is substantially clarified by the stress on both the same evidence and same act or conduct in the instant cases.

Edward Sutherland

FORUM SELECTION CLAUSES IN MARITIME CONTRACTS

Respondent, an American corporation, contracted with petitioner, a German firm, for the towing of respondent's drilling rig from Louisiana to the Adriatic. The contract contained provisions relieving petitioner from liability for damages suffered by the tow,¹ and a clause stating: "Any dispute arising must be treated before the London Court of Justice." While in tow the rig was damaged, and respondent libelled petitioner in personam and petitioner's tug *Bremen* in rem. Petitioner's motion to dismiss or stay the action pending adjudication in London, where the exculpatory provisions would be enforced, was denied.² The Fifth Circuit affirmed on appeal,³ relying on an earlier decision that jurisdictional clauses providing for an exclusive forum were contrary to public policy and hence un-

43. See LA. R.S. 14:4 (1950) which reads in part: "Prosecution may proceed under either provision, in the discretion of the district attorney, whenever an offender's conduct is: (1) Criminal according to a general article of this Code or Section of this Chapter of the Revised Statutes and also according to a special article of this Code or Section of this Chapter of the Revised Statutes; or (2) Criminal according to an article of the Code or Section of this Chapter of the Revised Statutes and also according to some other provision of the Revised Statutes, some special statute, or some constitutional provision."

1. The contract contained the following provisions: "1. . . . Unterweser and its masters and crews are not responsible for defaults and/or errors in the navigation of the tow. 2. . . . b) Damages suffered by the towed object are in any case for the account of its owners."

2. *In re Unterweser Reederei, GMBH*, 296 F. Supp. 733 (M.D. Fla. 1969).

3. *In re Unterweser Reederei, GMBH*, 428 F.2d 888 (5th Cir. 1970), *aff'd mem.*, 446 F.2d 907 (5th Cir. 1971).