

**APPLICATION AND LIMITATIONS
OF THE RULE PROHIBITING MULTIPLE CONVICTIONS:
KIENAPPLE V. THE QUEEN TO R. V. PRINCE***
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I. Introduction

The principle or rule prohibiting multiple convictions proposes that an individual should not be subjected to more than one conviction arising out of the same "cause or matter" or the same "delict", consisting of a single criminal act committed in circumstances where the offences alleged are comprised of the same or substantially the same facts and elements. This principle was originally formulated by Mr. Justice Laskin, as he then was, in the Supreme Court of Canada decision of *Kienapple v. The Queen*,¹ amidst a strong dissenting opinion delivered by Mr. Justice Ritchie, with Chief Justice Fauteux and Messars Justice Abbott and Martland concurring.

The subsequent controversy surrounding the theoretical foundation for the proposed rule and the implications and limitations of its proper application has resulted in opposing viewpoints expressed by the various provincial Courts of Appeal and by the members of the Supreme Court of Canada itself.

Mr. Justice Monnin, as he then was, in delivering the dissenting opinion of the Manitoba Court of Appeal in *R. v. Hagenlocher*,² indicated that the decision in *Kienapple v. The Queen* has been afforded numerous and varied interpretations which, "unfortunately, has caused more confusion than enlightenment."³ In *R. v. Wildeman*,⁴ a judgment of the Saskatchewan Court of Appeal, Chief Justice Culliton acknowledged "that there has been a wide difference of judicial opinion as to the interpretation and application of a majority decision of the Supreme Court of Canada in *Kienapple v. The Queen*", and attributed such divergence of opinion to a confusion of "the principle which was applied with the reasons given by Laskin J., (as he then was), to support the position which he had taken".

It is the purpose of this discussion to attempt a reconciliation of such opposition and disagreement which has developed and, through examination of the theoretical basis for the rule prohibiting multiple convictions and relating it to decisions subsequent to *Kienapple v. The Queen*, to establish the appropriate limitation and application of the principle.

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1. [1975] 1 S.C.R. 729, (1974) 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 (S.C.C.).

2. (1981), 65 C.C.C. (2d) 101 (Man. C.A.).

3. *Ibid.*, at 103.

4. (1979) 42 C.C.C. (2d) 360, 3 C.R. (3d) 101, (1978) 5 W.W.R. 477 at 478 (Sask. C.A.).

II. Analysis of the Theoretical Basis for the Kienapple Principle

A. Pre-*Kienapple* authorities

In a determination of whether the pre-*Kienapple* decisions provide a sufficient foundation upon which to establish a principle or rule precluding multiple convictions, as proposed in the *Kienapple* case, a convenient starting point is with the decision in *Wemyss v. Hopkins*.⁵ *Wemyss*, the appellant, was convicted under the common law of driving a carriage on a highway in a negligent manner and, in so doing, struck a horse being ridden by the respondent, thereby causing injury to the respondent who was knocked to the ground. The appellant was subsequently convicted of a further offence, pursuant to the provisions of a statute, that he did "unlawfully assault, strike, and otherwise abuse the respondent". Both charges arose from the same incident.

On appeal, Mr. Justice Blackburn held that a conviction for what amounted to an assault under one statute constituted a bar to a conviction for the "same assault" under a different statute, and that a person cannot be twice convicted for the same offence nor punished again for the "same matter; otherwise there might be two different punishments for the same offence".⁶ This opinion must be viewed having regard to the concurring opinion of Mr. Justice Lush, wherein he stated:

I am also of the opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of the two statutes. The appellant was prosecuted for the assault, and convicted under one of the statutes . . . and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute.⁷

It is therefore contended that, in the context of *Wemyss v. Hopkins*, the terms "same matter", "same cause", and "same act" are synonymous with the term "same offence". Clearly, the indication from this decision is that an individual cannot be twice convicted for the same or substantially the same offence arising out of a single criminal act, and, it is further submitted, that such a proposition or principle cannot logically be extended so as to include a prohibition precluding convictions for dissimilar offences arising out of the same act. It is further suggested that such an interpretation is supported by the judgment of Lord Reading in *R. v. Barron*,⁸ who, commenting upon the observations of Mr. Justice Hawkins in *R. v. King*⁹ that an individual ought not to be placed twice in jeopardy upon the same facts, stated:

It is quite plain that the learned trial judge did not intend to lay and did not lay down a general principle of law that a man cannot be placed twice in jeopardy upon the same facts

5. (1875) L.R. 10 Q.B. 378.

6. *Ibid.*, at 381.

7. *Ibid.*, at 382.

8. [1914] 2 K.B. 570.

9. [1897] 1 Q.B. 214 at 218.

if the offences are different. The statement obviously refers to a case where the offences are the same . . .

Lord Reading concluded that the substantial identity of the offences is determined not by whether the facts relied upon are the same in the two trials but whether an acquittal on one offence necessarily requires an acquittal on the other.¹⁰

This view was further supported by the decision of the English Court of Criminal Appeal in *Llewellyn Winthorpe Kendrick and William Corbett Smith*,¹¹ wherein the accused had appealed their convictions for the offence of uttering "knowing the contents thereof any letter or writing demanding of any person with menaces and without any reasonable or probable cause any property or valuable thing", and, out of the same circumstances, the further charge of threatening to print or offering to print or offering to abstain from printing or publishing any matter or thing "with intent to extort . . . or induce". The offences arose out of a threat to publish photographic negatives with intent to extort money, such demand or threat having been made by letter.

In delivering the judgment of the Court, Mr. Justice Smith, referring to the previously mentioned observations by Lord Reading in *R. v. Barron*, observed:

I emphasize the words, "The test is not, in our opinion, whether the facts relied upon are the same in the two trials". The question is whether the appellant has been acquitted of an offence which is the same offence as that with which has been charged.¹²

Concluding that it was impossible to determine that the two offences were the same or substantially the same, the Court pointed out that the mere fact either the evidence or the facts proved were the same does not render the two offences identical.¹³

In *R. v. Thomas*¹⁴ the accused was convicted of wounding with intent to murder, and was subsequently indicted on a charge of murder following the death of his victim of the first offence. Mr. Justice Humphreys held that the two offences, while arising from the same act of wounding, were neither the same nor substantially the same, and expressed this opinion in the following terms:

It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case. . . . Not only is it not the law that a person shall not be punished twice for the same act, but it never has been the law. That it is not the law was expressly decided as far back as 1867 in *Reg. v. Morris* by the highest criminal court in the land then existing, the Court for the Consideration of Crown Cases reserved.

Lord Morris, in *Connelly v. Director of Public Prosecutions*,¹⁵ stated the position of the English Courts as follows:

10. *Supra* n. 8, at 576.

11. (1931) 23 Cr. App. R. 1 (C.C.A.).

12. *Ibid.*, at 5.

13. *Ibid.*, at 6.

14. [1950] 1 K.B. 26 at 31, referring to *R. v. Morris* (1867), 1 C.C.R. 90, 10 Cox C.C. 480 at 484.

15. [1964] A.C. 1254 at 1307-8.

The principle seems clearly to have been recognized that if someone has been either convicted or acquitted of an offence, he could not later be charged with the same offence or with what was in effect the same offence. . . . That, however, did not mean that if two separate offences were committed at the same time a conviction or an acquittal in respect of one would be any bar to a subsequent prosecution in respect of the other. It was the offence or offences that had to be considered. Was there in substance one offence or had someone committed two or more offences?

On the basis of the above discussion it can be concluded that there does not exist in England a rule prohibiting multiple convictions for the "same cause or matter", but "rather the rule is that a person may not be punished twice for the same offence".¹⁶

Upon examination of the relevant Canadian authorities one is necessarily drawn to the decision of the Supreme Court of Canada in *R. v. Quon*,¹⁷ wherein the Court considered an appeal by an accused convicted of committing robbery while armed with an offensive weapon, namely, a revolver, and, further, that he had upon his person a firearm, namely, the same revolver, while committing the offence of robbery. Mr. Justice Kellock took the position that Parliament may, if it sees fit, create two separate offences out of the same act or omission, or make a separate offence additional to that constituted by the complete act.¹⁸ In determining whether Parliament had demonstrated an intention to have the charge related to the firearm "constitute a separate and distinct offence" from that of the armed robbery offence, he held that the former offence comprised an essential part of the latter. He concluded, therefore, that it could not have been Parliament's intention that one aspect of the conduct, namely, possession of the firearm, in the offence of armed robbery, involving as one of the principle elements the presence of a weapon, could be made the subject of a separate charge.¹⁹ A conviction for armed robbery in these circumstances, therefore, prohibited a subsequent conviction for an offence contrary to then section 122 of the *Criminal Code*, as the possession of the firearm constituted an essential element of the offence of robbery. The robbery charge encompassed all relevant facts and elements. There was no additional relevant element capable of distinguishing possession of the weapon from the greater offence of robbery while in possession of the same weapon.

In *R. v. Siggins*²⁰ the accused was convicted of the theft of certain automobiles, and, additionally, possession of those same vehicles. Mr. Justice McKay, delivering the judgment of the Ontario Court of Appeal, held that there could not be convictions on both counts as the offence of theft necessarily involved taking possession of the stolen article. An individual found in continuous possession of an item which he himself had stolen could not be convicted on the possession charge as the single act constituting the theft included possession as an essential element, and, therefore, the principle formulated in *R. v. Quon* was applicable.

16. E.G. Ewashuk, "The Rule Against Multiple Convictions and Abuse of Process" (1975), 28 C.R.N.S. 28 at 31.

17. (1948), 92 C.C.C. 1, [1949] 1 D.L.R. 135, [1948] S.C.R. 508, 6 C.R. 160 (S.C.C.).

18. *Ibid.*, at 11.

19. *Ibid.*, at 16.

20. (1960), 127 C.C.C. 409 at 413-4, [1960] O.R. 284, 32 C.R. 306 (Ont. C.A.).

The Supreme Court of Canada, in *Cox and Paton v. The Queen*,²¹ considered an appeal from a judgment of the Manitoba Court of Appeal affirming the accused's conviction on one count of conspiracy to defraud and quashing his convictions on two counts of conspiracy to steal. In dismissing the appeal Mr. Justice Cartwright, for the Supreme Court of Canada, observed that the Crown had, in the course of its argument, conceded that the counts alleging conspiracy to commit fraud were "in effect alternative charges" to the remaining counts.²² In concluding that the convictions for conspiracy to defraud and conspiracy to steal could not both be supported he indicated that conspiracy consists of an unlawful agreement and there was, in effect, only one agreement and, therefore, only one conspiracy, albeit a conspiracy to commit more than one illegal act, and that it would be contrary to law to have the accused punished twice for the same offence.²³

It is submitted that the *Cox and Paton v. The Queen* decision is not one of multiple convictions for the "same matter", but rather is concerned with multiple convictions for the same offence. The accused having been charged with conspiracy to steal and conspiracy to defraud, where, in effect, there had been only one agreement to commit both fraud and theft, and, as the offence of conspiracy consists not of the substantive offence conspired to be committed but, rather, of the unlawful agreement, there was only one offence committed. The attempt to divide the single agreement or offence into separate agreements or offences for each substantive offence conspired to be committed does not create more than one offence, and is not to be permitted as it would result in multiple convictions for the same offence of conspiracy. There was only one matter, the conspiracy, as well as only one offence, and, as the Court indicated, the decision related to multiple convictions for the same offence and cannot lend support to a proposed rule precluding multiple convictions for the same cause or matter.

Mr. Justice MacDonald, for the Alberta Supreme Court in *R. v. Leier and Predy*,²⁴ considered an accused, charged with fraud under the *Criminal Code* who had previously been convicted of offences under the *Securities Act*²⁵ arising out of the same circumstances. The accused sought to plead *autrefois convict*, and moved for a stay of the indictment on the basis of *res judicata*, issue estoppel and double jeopardy.

The Court held that, on its face, the charges were entirely different, and consequently, the fraud charge under the *Criminal Code* cannot be said to have been an included offence to the *Securities Act* violation. Further, it was indicated that the Court was not faced "with two indictments alleging substantially the same offence but with charges alleging entirely separate and distinct offences". In refusing the motion to quash, he concluded:

The principle of double jeopardy does not prevent common evidence or common witnesses from being heard, nor is it based on an overlapping of facts.^{25a}

21. [1963] 2 C.C.C. 148, [1963] S.C.R. 500, 40 C.R. 52 (S.C.C.).

22. *Ibid.*, at 151.

23. *Ibid.*, at 165.

24. (1970), 74 W.W.R. 339 (Alta. S.C.).

25. 1955 (Alta.) Ch. 64.

25a. *Supra*, n. 24, at 344.

In *R. v. McKay*²⁶ the accused, having been convicted of operating a motor vehicle while having a blood-alcohol content in excess of the legal limit, contrary to section 236 of the *Criminal Code*, was acquitted by the trial court on a further charge of impaired driving, contrary to section 234, arising out of the same circumstances, on the basis of an application of the principle of *res judicata*. The Crown appealed the acquittal, contending that the special plea of *autrefois convict* was inapplicable as the offences charged are not sufficiently similar, and, further, that the defence of *res judicata* was unavailable as it could only arise from a previous decision in the respondent's favour. The Crown further contended that the offences charged were separate and distinct offences and, consequently, a conviction on one could not give rise to the defence of *res judicata* on the other.²⁷ Counsel for the accused argued that *res judicata* prohibits an accused from being convicted of two "essentially similar offences arising out of the same facts".²⁸

Mr. Justice Dryer, in delivering the judgment of the British Columbia Supreme Court, subsequently confirmed by the Court of Appeal which indicated its complete agreement with both the lower court's conclusions and reasons therefor,²⁹ concluded that the two offences were not sufficiently identical for *autrefois convict* to have application.³⁰ Further, he stated that these were two separate offences which merely possessed a common factor, namely, the driving of a motor vehicle, which is an essential ingredient to each offence. As well, there is an essential ingredient to each offence which is not common to the other.³¹

The Court referred to the judgment of Mr. Justice Schroeder in *R. v. Feeley, McDermott and Wright*³² as supporting the following proposition:

[I]f there is not sufficient identity between the offences charged in an earlier and later indictment for the pleas of *autrefois convict* or *autrefois acquit* to apply, the wider application of the defence of *res judicata* could assist an accused if, in the earlier proceedings, a question of fact vital to the later charge was determined in a way that was favourable to the accused in the later proceedings; and does not say that in the absence of such a determination of fact a defence of *res judicata* raised under a plea of not guilty has any wider application than the defences available under the special pleas.³³

Further, Mr. Justice Dryer directed the following comment to the suggestion in *R. v. Georgieff and Dickemous*³⁴ that the accused should not have been convicted of both charges before the court based on the same facts, as the obstruction of the police officer, forming the first count, also consisted of an assault on the officer, which formed the basis of the second count:

26. (1972), 21 C.R.N.S. 67 at 69 (B.C.S.C.). See also *R. v. Feeley, McDermott and Wright*, [1963] S.C.R. 539, 40 C.R. 261, [1963] 3 C.C.C. 201 at 202.

27. *Re Fluett* (1970), 12 C.R.N.S. 190 (Ont. S.C.), wherein it was held that ss. 234 and 236 were separate offences but that a conviction on one would give the accused a defence to the second on the basis of the principle of *res judicata*.

28. *Supra*, n. 26, at 69.

29. (1975) 24 C.R.N.S. 128 (B.C. C.A.).

30. *Supra*, n. 26, at 75.

31. *Ibid.*, at 79-80.

32. (1963), 1 O.R. 571, 38 C.R. 321, [1963] 1 C.C.C. 254, 38 D.L.R. (2d) 133, *affirmed* [1963] S.C.R. 539, 40 C.R. 261, [1963] 3 C.C.C. 201, 40 D.L.R. (2d) 563 (S.C.C.).

33. *Supra*, n. 26, at 75.

34. [1955] O.W.N. 148, 20 C.R. 142, 111 C.C.C. 3 (Ont. C.A.).

That comment, however, was based upon the rule applied in *Wemyss v. Hopkins* and I do not think that when it used the words "based upon the same facts" the court intended to rule that the mere fact that the two charges were "based on the same facts" was sufficient to provide a defence to one of them unless, of course, the two offences were the same.³⁵

The Court further stated:

I said before that the maxim *nemo debet bis vexari pro una et eadem* did not apply where the offences are distinct from each other. That maxim is often referred to as if it were identical in effect with the other maxim mentioned above, viz., *nemo debet bis puniri pro uno delicto*. I think that in some circumstances they may have a somewhat different application in cases where the offences are distinct but have some common ingredients. In cases of charges under s. 234 and s. 236 the maxim *nemo debet bis puniri pro uno delicto* should be kept in mind and applied if the charges arise out of the same facts, i.e., are, as is said to be the case here, "based on the same driving and the same alcohol". Under such circumstances any sentences, which may, of course, differ should be made to run concurrently with each other . . .³⁶

Clearly, these decisions suggest that in Canadian criminal law prior to *Kienapple v. The Queen* an individual could not be twice convicted for the same or substantially the same offences arising out of the same incident. Conversely, an individual could be convicted of two or more offences arising out of the same incident provided they were separate and distinct offences which, although sharing a common factor or ingredient, additionally possessed an essential distinguishing element which was not common to the other.

B. Principle of *res judicata*

This discussion of the principle of *res judicata* will commence with the suggestion that the maxim *nemo debet bis puniri pro uno delicto*, while forbidding a second verdict of guilty for the same offence,

. . . does not forbid a second prosecution for the same conduct, in cases where such conduct may amount to two separate crimes. Whether it is just to prosecute an accused again after one conviction, may be debated on the facts of the particular case; but the maxim will not forbid it. Neither will an exemption from criminal liability on the second charge follow from the application of the maxim *transit in rem judicatam*. What has passed into *res judicata* is the offence of which he was convicted, together with those other offences of which he could have been convicted on the same facts on the same indictment.³⁷

The Supreme Court of Canada, in *McDonald v. The Queen*,³⁸ apparently formulating a similar interpretation and application of the principle, confirmed a conviction on a charge of possession for the purpose of trafficking, following an acquittal for conspiracy to possess a narcotic for the purpose of trafficking. The Court held that the acquittal established innocence only in respect of the issue of conspiracy, not the substantive offence, notwithstanding that both offences related to the same narcotic.

Chief Justice Porter, for the Ontario court of Appeal in *R. v. Wright*,³⁹ considered an acquittal on a charge of conspiracy to commit bribery follow-

35. *Supra*, n. 26, at 81.

36. *Ibid.*, at 82-3.

37. Spencer-Bower and Turner, *Res Judicata*, (2nd ed., 1969) 391-2.

38. (1959) 126 C.C.C. 1 at 18 [1960] S.C.R. 186, 32 C.R. 101 (S.C.C.).

39. [1965] 3 C.C.C. 160 (Ont. C.A.).

ing the accused's conviction of the substantive offence of bribery. In concluding that the conviction for the substantive offence must be quashed, the Court held that an accused is entitled to demonstrate, by reference to the course of the trial of the first offence, that element with respect to which the jury found in his favour, being an application not of *autrefois acquit* but of *res judicata*.

Obviously, the principle of *res judicata* prior to the judgment of the Supreme Court of Canada in *Kienapple v. The Queen*, served only to prevent an issued which had been previously adjudicated in the accused's favour in an earlier proceeding from being subsequently relitigated, but did not preclude a subsequent conviction for a different offence arising from the same incident.

C. Section 11 of the *Criminal Code*

Section 11 of the *Criminal Code* provides:

Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of these Acts, but is not liable to be punished more than once for the same offence.

Section 52(1) of the *Constitution Act* will, subject to section 1 of the *Canadian Charter of Rights and Freedoms*, render the phrase "unless a contrary intention appears", as found in section 11 of the *Criminal Code*, "of no force or effect" as being inconsistent with the provisions of subsection 11(h) of the *Charter of Rights and Freedoms*, which provides:

11. Any person charged with an offence has the right

...

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again. . . .

The remainder of section 11 of the *Criminal Code*, however, will remain in full force and effect.

The issue for determination is whether the term "any", as found in the preceding section of the *Criminal Code* refers to "one indiscriminately"⁴⁰ of any of the Acts of Parliament under which an accused may be liable for prosecution, or is to be afforded its full force and effect of "every" or "all"⁴¹ Acts of Parliament under which he may be prosecuted. In *Epp School District v. Park*,⁴² Mr. Justice Gordon, for the Saskatchewan Court of Appeal, defined "any" as being all-embracing and which, in its natural meaning, excluded limitation or qualification.

Additionally, while the section indicates that an accused may be prosecuted under "any" Act of Parliament which renders him liable for his conduct, it further provides that he may be punished only once for his conduct. The obvious implication is that more than one conviction is possible

40. *Federal Deposit Insurance Corp. v. Winton C.C.A. Team* 131 F. (2d) 780 at 782.

41. *Glen Alden Coal Co. v. City of Scranton*, 282 Pa. 45, 127 A. 307 at 318.

42. [1936] 2 W.W.R. 331 (Sask. C.A.).

for the proscribed conduct under different statutes, but only one conviction where the offences are the same, otherwise the limitation as to punishment would be superfluous. It is a commonly accepted principle of statutory interpretation that, in theory if not in fact, Parliament does not enact in vain.

The effect of a similar section found in *The Interpretations Act (U.K.)*,⁴³ was interpreted by Mr. Justice Humphreys, in *R. v. Thomas*,⁴⁴ as providing that the law does not prohibit an accused from being twice punished for the same act, but that he "shall not be liable to be twice punished for the same offence".

The most reasonable interpretation of section 11 is that an individual may be prosecuted for all offences which are not the same or substantially the same under every and all of the statutes or Acts of Parliament which render an act or omission an offence, but may be convicted and punished only once for the same or substantially the same offence arising out of the proscribed act or omission.

III. Examination of *Kienapple v. The Queen*

The Supreme Court of Canada, in *Kienapple v. The Queen*, considered an appeal from a judgment of the Ontario Court of Appeal confirming an accused's conviction for unlawful sexual intercourse, contrary to subsection 146(1) of the *Criminal Code*. The accused has been charged in separate counts on the same indictment with rape, contrary to subsection 143(1) of the *Criminal Code*, and unlawful sexual intercourse with the same person being a female under the age of fourteen years, contrary to subsection 146(1). He was subsequently convicted on both counts and sentenced to two concurrent terms of imprisonment for ten years. His appeal against conviction on the count under subsection 146(1) was dismissed by an unanimous decision of the Ontario Court of Appeal, without expressed reasons for judgment.

The narrow issue for determination upon appeal to the Supreme Court of Canada was limited to whether the accused, having been convicted of rape, could, in respect of the single act of sexual intercourse with the same person, be convicted of the additional offence of unlawful sexual intercourse under subsection 146(1) of the *Criminal Code*.

Subsections 143^{44a} and 146(1) of the *Criminal Code* provide:

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife

- (a) without her consent, or
- (b) with her consent if the consent
 - (i) is extorted by threats of fear of bodily harm, or

43. (1891), c. 63, sec. 35.

44. [1950] 1 K.B. 26.

44a. Repealed S.C. 1980-81-82, c. 125, s. 6.

- (ii) is obtained by personating her husband, or
- (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

146(1). Every male person who has sexual intercourse with a female person who

- (a) is not his wife, and
- (b) is under the age of fourteen years, whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Mr. Justice Laskin, with Messars Justice Judson, Spence, Pigeon, and Dickson concurring, delivering the judgment of the Court, observed that it is common ground that unlawful sexual intercourse under section 146(1) is not an included offence in a charge of rape,⁴⁵ as the former offence embraces two situations, one of which includes all the elements of rape but is in respect of a female under the age of fourteen years, and the second being inconsistent with rape as consent has not been negatived. Further, where there has been sexual intercourse with a female under the age of fourteen years and the jury brings in a verdict of guilty on a charge of rape, there being only one act of sexual intercourse with the same female,

... it has perforce found that the sexual intercourse was without consent and there can be no finding of guilt on the second count on the basis of consent, albeit this is not a defence.⁴⁶

While acknowledging that Parliament had created two distinct offences, he suggested that there exists "an overlap in the sense that one embraces the other" when the sexual intercourse has been with a girl under the age of fourteen years without her consent. He expressed the opinion that when an accused is charged firstly with rape and then with an offence under subsection 146(1) within the circumstances of the *Kienapple* decision, and there is a verdict of guilty of rape, "the second charge fails as an alternative charge".⁴⁷ He attempted to justify his conclusion in the following terms:

The rationale of my conclusion that the charges must be treated as alternative if there is a verdict of guilty of rape on the first count, that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law. A convenient beginning is with the maxim expressed in *Hudson v. Lee* (1589), 4 Co. Rep. 43(a), 76 E.R. 989: "*nemo debet bis puniri pro uno delicto*", which although framed in terms of double punishment, has come to be understood as directed also against double or multiple convictions; in short, *nemo bis vexari*, as well as *nemo bis puniri*.⁴⁸

He professed to find support for this position in the following view expressed by Mr. Justice Blackburn in *Wemyss v. Hopkins*:

I think the fact that the appellant has been convicted by justices under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of *autrefois convict*, but on the well-established rule at common law, that where a person has been convicted and punished

45. See also *R. v. Marcus and Richmond* (1931) 55 C.C.C. 322 (Ont. C.A.), wherein it was held that unlawful carnal knowledge of a female under the age of fourteen years is not an included offence of rape.

46. *Supra* n. 1, C.C.C. at 534.

47. *Ibid.*, at 534-5.

48. *Ibid.*, at 535.

for an offence by a court of competent jurisdiction, *transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence . . . ; otherwise there might be two different punishments for the same offence.⁴⁹

Further, reference is made to the judgment of Mr. Justice Humphreys, in *R. v. Thomas*,⁵⁰ who, commenting on *R. v. Miles, infra*, observed that the court upheld the accused's informal plea of *autrefois convict* as the "evidence established that there was one offence only committed by the accused", for in three of the counts the same assault was merely being alleged to have been accompanied by circumstances of aggravation. Having taken this position, however, Mr. Justice Humphreys went on to indicate that where a person has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted, such a plea is not a good answer for the person who inflicted the wound to an indictment of murder. No mention of this portion of the judgment was made by the majority of the Supreme Court in rendering the decision in *Kienapple*.

Mr. Justice Laskin further indicated that, in *Connelly v. Director of Public Prosecutions*,⁵¹ Lord Pearce referred to *Wemyss v. Hopkins, supra*, for the proposition that "the court in its criminal jurisdiction retained a power to prevent a repetition of prosecutions, even when it did not fall within the exact limits of the pleas in bar." He further indicated that the above statement from *Wemyss v. Hopkins* was quoted with approval by Mr. Justice Kellock in a previous decision of the Supreme Court of Canada of *R. v. Quon*.

His Lordship found additional support for his proposition by reference to the following statement found in the judgment of Mr. Justice Cartwright as he delivered the unanimous judgment of the Supreme Court of Canada in *Cox and Paton v. The Queen*:

The reason that the convictions on count 1 and 3 cannot both be supported is not that they are "mutually destructive" as was said by the courts in *R. v. Mills, supra*, but rather that if both were allowed to stand the accused would in reality be convicted twice for the same offence. It is the same conspiracy which is alleged in the two counts and it would be contrary to the law that the accused should be punished more than once for the same offence.⁵²

He defined the term "offence", in the context of *Cox and Paton v. The Queen, as bearing a similarity to the sense attributed to it by Mr. Justice Pollock in R. v. Miles*.⁵³ That was a case wherein a charge of wounding was laid under the provisions of a statute following a previous conviction for assault of common law arising out of the same circumstances, and the Court expressed the following opinion:

[T]he first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called were the same as those to which the indictment referred. And, therefore, the rule of law *nemo debet bis puniri pro uno delicto*

49. *Supra* n. 5, at 381.

50. *Supra*, n. 14, at 29-30.

51. *Supra*, n. 15.

52. *Supra*, n. 21, quoting *Kienapple, supra* n. 1, at 535.

53. (1890) 24 Q.B.D. 423, [1886-90] All ER Rep. 715.

applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts with the addition of malice and design.^{53a}

Mr. Justice Laskin further suggested that the Court in *R. v. Miles* held that notwithstanding the offences were different the accused could not be convicted again for the same matter.⁵⁴ Further, that *Cox and Paton v. The Queen* was not a case of multiple convictions for the same offence, nor was the case at bar, but rather dealt with "multiple convictions for the same matter".⁵⁵

Mr. Justice Ritchie, in the dissenting opinion of *Kienapple v. The Queen*, interpreted the *Cox and Paton* case as not constituting authority for the proposition that an individual cannot be convicted for two separate offences when both offences have been committed by means of a single act.^{56a} This is certainly a most reasonable interpretation as the judgment only lends support to the position that when an accused conspires to commit two or more criminal offences and is subsequently charged with conspiracy than has, in effect, been only one agreement and, therefore, there should only be one conviction.⁵⁶

In addition to these authorities, Mr. Justice Laskin found support for his proposed rule prohibiting multiple convictions in the principle of *res judicata*, which he suggested "best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences".⁵⁷ He expressed this opinion in the following terms:

The relevant inquiry as far as *res judicata* is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences. Moreover, it cannot be the case that if an accused is tried on several counts charging different offences, he is liable to be convicted and sentenced on each count, and yet if he was tried and convicted on one only he would be entitled to set up the offence of *res judicata* as a defence to other charges arising out of the same cause or matter.⁵⁸

From his examination of the authorities and the concept of *res judicata* Mr. Justice Laskin extracted the following rule or principle:

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions.⁵⁹

The principle as formulated is acceptable; its application by the majority of the Court is unacceptable. Mr. Justice Laskin continued by suggesting that in the circumstances of the present case the additional or "superadded" element of age in subsection 146(1) "does not operate to distinguish unlaw-

53a. *Ibid.*, Q.B.D. at 436.

54. *Supra* n. 1, C.C.C. at 535-6.

55. *Ibid.*, at 535.

55a. *Ibid.*, at 528.

56. See also *R. v. Bloomfield, Cormier and Ettinger* (1973), 10 C.C.C. (2d) 398 at 400-1, wherein Limerick J.A., for the New Brunswick Supreme Court, Appellate Division, held that the fact the Crown prefers an indictment containing three counts of conspiracy where there was but a single agreement or conspiracy does not justify a dismissal of all charges against the accused. An indictment is not defective because it charges one offence in several counts, for the Court may find the accused guilty of one count, there being only one conspiracy, which would necessitate an acquittal on the other counts.

57. *Supra* n. 1, C.C.C. at 537.

58. *Ibid.*, at 538-9.

59. *Ibid.*, at 539.

ful carnal knowledge from rape” as such an element is only relevant where consent has not been negated.^{59a} Further, that where consent has been ruled out, age becomes “meaningless as a distinguishing feature between the two offences”.⁶⁰

Mr. Justice Laskin tested the application of his rule by two methods. First, an accused charged with two counts may properly be found guilty on each for the single act of sexual intercourse with the same female, and it would be open to the Crown to charge him successively in the same manner resulting in a conviction first for rape, followed by a subsequent conviction for unlawful sexual intercourse with a female under the age of fourteen years, and possibly resulting in consecutive sentences.^{60a} He suggested that, in such circumstances, it appears clear that on the second charge,

... *res judicata* would be a complete defence since all the elements and facts supporting the conviction of rape would necessarily be the same under 146(1)... In saying that *res judicata* ... would be a complete defence, I am applying the *bis vexari* principle against successive prosecutions, a principle that ... is grounded on the Court's power to protect an individual from an undue exercise by the Crown of its power to prosecute and punish.⁶¹

The second test employed to establish the applicability of his proposed principle to a given fact situation would be to reverse the charges, and if the jury brings in a verdict of guilty on a charge under subsection 146(1) it would be inconsistent to find an accused guilty of rape “because there may have been consent, and even if not, the considerations underlying *res judicata* would preclude a verdict of guilty of rape”.⁶²

On the basis of the qualifications pertaining to the above mentioned rule it is submitted that the full and proper principle which Mr. Justice Laskin was formulating is that where an individual has committed a single act giving rise to two or more charges, and there is a verdict of guilty on the first count, and the same or substantially the same facts and relevant elements comprise the offence in the second count, and where any additional or “superadded” elements capable of distinguishing the second offence are, in the particular circumstances, rendered irrelevant to a conviction, the situation invites application of the rule prohibiting multiple convictions.

Such an interpretation of the proposed rule precluding multiple convictions is supported by further reference to Mr. Justice Laskin's judgment wherein he indicated that on the facts of the particular case there was an “overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age 14 without her consent”.⁶³ His reference to the decision of *R. v. Thomas*⁶⁴ as representing a valid factual situation capable of supporting the subsequent conviction because there has been a new relevant element added lends support to such an interpretation. Such

59a. *Ibid.*, at 541-2.

60. *Ibid.*, at 542.

60a. *Ibid.*, at 539-40.

61. *Ibid.*, at 540.

62. *Ibid.*, at 540.

63. *Ibid.*, at 535.

64. *Supra* n. 14.

a relevant element would be capable of distinguishing the offence and could properly support a subsequent conviction. Further, he considered the element of age in *Kienapple v. The Queen* to be rendered irrelevant and, therefore, incapable of distinguishing the two offences.⁶⁵ It would follow logically that had he considered the additional element of age to have been relevant, as did those Justices who expressed the dissenting opinion, and not "meaningless as a distinguishing feature" between the two offences, a second conviction for the offence under subsection 146(1) would have been possible.

On the basis of such an interpretation it can be assumed that there may be two or more "delicts" arising out of a single incident or occurrence, each capable of independently supporting a conviction, as two or more "delicts" may occur contemporaneously. To interpret "same cause or matter" or "delict" as constituting the entire occurrence would lead to grave miscarriages of justice. In the circumstances of *Kienapple v. The Queen* Mr. Justice Laskin held that the single act of sexual intercourse with a female under the age of fourteen years without her consent constituted the "cause or matter" or "delict", and was capable of supporting only one conviction, namely, rape as there were no relevant elements in the offence under subsection 146(1) capable of distinguishing the offences which had not been previously dealt with under the conviction for rape.

If the accused, however, during a single act of sexual intercourse described in the circumstances of *Kienapple v. The Queen*, knowingly caused his rape victim to contract venereal disease, thereby constituting an offence under subsection 253(1) of the *Criminal Code*,⁶⁶ it is contended that neither the principle of *res judicata* nor the rule prohibiting multiple convictions, based upon the accused's conviction for rape, would preclude the Crown from prosecuting him for the additional offence relating to the spread of venereal disease as there undoubtedly exists a relevant element in this new offence capable of distinguishing it from rape. There would, in fact, be two concurrent "cause or matters" or "delicts", each capable of independently supporting a conviction.

Mr. Justice Martland, voicing a dissenting opinion in *Kienapple v. The Queen*, referring to *R. v. Siggins*,^{66a} expressed the view that the counts of unlawful possession were quashed because the Court had concluded that theft "necessarily involves the taking of possession", whereas, in the present case, rape did not necessarily involve an offence under subsection 146(1) of unlawful sexual intercourse.⁶⁷ One can only commit theft, in the particular fact situation, by taking possession of the item stolen, whereas one can

65. *Supra* n. 1, C.C.C. at 541-2.

66. The relevant provisions of this section are as follows:

253. (1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.

(2) No person shall be convicted of an offence under the section when he proves that he had reasonable grounds to believe that he did not have venereal disease in a communicable form at the time that the offence is alleged to have been committed.

66a. [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409 (C.A.).

67. *Supra* n. 1, C.C.C. at 532.

commit rape in relation to a female person who does not fall within the parameters of subsection 146(1).

He further suggested that the provisions of section 11 of the *Criminal Code*, having regard to the statements of Mr. Justice Humphreys in *R. v. Thomas*, are equally applicable to two sections of the same statutes as to offences created by two separate statutes, and concluded:

One act may thus be the subject of convictions under two sections of the *Criminal Code*, but only one punishment can be imposed for the same offence.⁶⁸

He further concluded that there is nothing in the *Criminal Code* to preclude convictions on both charges under consideration on the appeal before the Court, as the accused was not being convicted twice in respect of the same offence.⁶⁹

Mr. Justice Ritchie, in his dissenting opinion, perceived the provisions of section 11 of the *Criminal Code* as an indication of the recognition by Parliament of the possibility of more than one offence being committed as the result of a single act.⁷⁰

Mr. Justice Laskin acknowledged Parliament's power or authority to constitute two separate offences from a single matter, but concluded that,

... unless there is a clear indication that multiple prosecutions and, indeed, multiple convictions are envisaged, the common law principle expressed in the *Cox and Paton* case should be followed.⁷¹

He further observed that both England and Australia had enacted legislation making it possible for a jury to return a verdict of guilty of unlawful carnal knowledge of a female person under the age of fourteen years as well as a conviction for rape where the victim falls within this age category, but that such legislation has not been enacted in Canada, and, consequently, "we continue to be governed by the law as to included offences, which excludes a conviction under 146(1) on a charge of rape".⁷²

He concluded that in the present circumstances "[n]either the definitions of the respective offences nor their history" lends support to the view that the common law rule has been ousted.⁷³ From his examination of the predecessor of sections 143 and 146(1) he arrived at the following conclusion:

If any conclusion can be drawn from this short history, it is that carnal knowledge of a victim under age 10, and later under age 14 . . . was regarded as an alternative charge to rape, unnecessary where there was no consent (since age was not and is not a necessary averment in rape) but available where proof of want of consent could not be made or was doubtful.⁷⁴

The conclusion arrived at by Mr. Justice Laskin, in the circumstances of *Kienapple v. The Queen*, that there should not be multiple convictions

68. *Ibid.*, at 532.

69. *Ibid.*, at 532-33.

70. *Ibid.*, at 528-9.

71. *Ibid.*, at 540.

72. *Ibid.*, at 541.

73. *Ibid.*, at 540.

74. *Ibid.*, at 541.

for the same delict, extended the maxim *nemo debet bis puniri pro uno delicto* to include *nemo bis vexari* as well as *nemo bis puniri*.⁷⁵ This would appear to be a co-mingling of the previous maxim with *nemo debet bis vexari pro eadem causa*,⁷⁶ to produce an entirely new hybrid principle of *nemo debet bis vexari pro uno delicto*.⁷⁷ As one author suggested, Mr. Justice Laskin "not only gives *res judicata* a new meaning, he also creates a new defence".⁷⁸ This conclusion appears to be correct as the principle extracted from *Kienapple v. The Queen* apparently had no previous existence in the common law, neither is it founded upon statutory provisions nor the previously accepted understanding of the principle of *res judicata*. The only conclusion which logically follows is that the *Kienapple* principle was derived from a co-mingling or extension of pre-existing common law principles to create an entirely new defence hitherto unknown to Canadian criminal justice.

As was indicated by Mr. Justice Ritchie, the accused was not being convicted twice for the same offence, and, consequently, the decisions relating to double punishment were irrelevant as the issue of law with which the Court was concerned dealt not with the question of sentence but the authority to convict in respect of two offences. He further expressed his opinion that the act of sexual intercourse which resulted in the conviction for rape also constituted the additional offence provided for under subsection 146(1) of the *Criminal Code*. He indicated that the purpose and effect of subsection 146(1) was to protect females under the age of fourteen years from experiencing sexual intercourse with males over that age, and concluded:

... I cannot subscribe to a result which relieves an assailant from the consequences of violating a child on the ground that his act also constitutes the offence of rape.

Under these circumstances I am unable to see how it can be said that the appellant did not commit both offences.⁷⁹

It is contended that the view expressed by Mr. Justice Ritchie, in dissent, was in keeping with the authorities, relevant statutory provisions, and the principle of *res judicata* which existed prior to the *Kienapple* decision. However, the new defence proposed by Mr. Justice Laskin was narrowly upheld by the majority of the Supreme Court of Canada and, as one author stated, "it seems clear that the *Kienapple* principle is firmly established in Canada",⁸⁰ and it therefore becomes necessary to establish the limitations to its proper application.

IV. Application of the Kienapple Principle

In *Dore v. The Attorney-General of Canada (No. 1)*,⁸¹ a concurrent decision to *Kienapple v. The Queen*, the Supreme Court of Canada considered an accused charged with three counts each of accepting money in his capacity as an official of the Government of Canada without first obtain-

75. *Ibid.*, at 535.

76. "No one should be twice harrassed for the same cause."

77. "No one should be twice harrassed for the same offence."

78. Kenneth L. Chasse, "A New Meaning For *Res Judicata* and Its Potential Effect on Plea Bargaining, Part I", Annot. (1974), 26 C.R.N.S. 20 at 21; see also Part II at 48, and Part III at 64.

79. *Supra*, n. 1 at 528.

80. *Supra* n. 16, at 36.

81. (1974), 27 C.R.N.S. 237, 15 C.C.C. (2d) 542, 44 D.L.R. (3d) 370 (S.C.C.).

ing consent from the head of his department, accepting benefits in consideration for the exercise of influence, and breach of trust, contrary to the *Criminal Code*. Each set of three charges was based upon the same acts by the accused of receiving sums of money over a period of time as payment for the selection of the payee's films, while a supervisor with the Canadian Broadcasting Corporation responsible for programming.

On first hearing by the Supreme Court of Canada, Chief Justice Fauteux, with Messars Abbott and Ritchie concurring, concluded:

It was correctly held that the mere fact that two offences resulted from the same act or acts, and that *Lavoie* was found guilty of both offences, did not mean that he was being punished twice for the same offence.⁸²

The Court declined to follow the *Kienapple* decision, and attempted to distinguish it by indicating:

Indeed, all that is decided by the judgment to be rendered in the *Kienapple* case, and consequently the only question of law as to which that judgment can be authority on the aspect which concerns us, is that a case in which the accused is tried concurrently for having had sexual intercourse with a girl under the age of 14 years, and having also, in the circumstance, raped the girl, will fall, if all these facts are established, under s. 143 and not under s. 146(1) of the *Criminal Code*, which would then not be applicable. The fundamental premise of such a decision lies essentially in the interpretation given to the intent of Parliament with respect to these provisions of the *Criminal Code* the effect of which, in the circumstances stated, is to wholly merge the offence specified in s. 146(1) with that of rape.⁸³

Mr. Justice Pigeon, in delivering a dissenting opinion, expressed the view that the one act of accepting money was merely being characterized differently in the three charges, with the first count focusing on the influence, the second count on the absence of consent and the final count on the breach of trust, whereas, in substance, there was only one matter involved and only one conviction should have been entered in respect of each amount of money received.⁸⁴

Upon rehearing by the full Court⁸⁵ on the issue of whether multiple convictions had been entered for the "same cause or matter", contrary to the *Kienapple* principle, Chief Justice Laskin, in delivering the judgment of the Court, held that the rule in *Kienapple* was applicable and the appeal should be allowed, although failing to elaborate on his reasons for the application of the principle to the particular circumstances.

Mr. Justice Ritchie, in a separate opinion concurring with the majority, indicated that he was of the same mind as expressed at the original hearing by the Supreme Court of Canada on the matter. However, having regard to the concession by counsel for the Attorney-General of Canada that the circumstances were governed by the rule in *Kienapple*, he was prepared to agree with Chief Justice Laskin's disposal of the matter.⁸⁶ This amounted

82. *Ibid.*, at 549.

83. *Ibid.*, at 550-1.

84. *Ibid.*, at 560.

85. *Dore v. Attorney-General of Canada (No. 2)* (1974), 17 C.C.C. (2d) 359 at 359 (S.C.C.).

86. *Ibid.*, at 360.

to an unusual abdication of the judicial function to the representative of the Federal Attorney-General.

Notwithstanding the reversal of Chief Justice Fauteux's attempt to limit the principle formulated in the *Kienapple* decision to its particular facts, the rule has since been developed and limited by subsequent decisions of the Supreme Court of Canada and various provincial appellate courts. It becomes necessary to examine these authorities with a view to ascertaining the appropriate application and limitations of the principle.

Of central importance in resolving this issue is a determination of the appropriate meaning which has been attributed to the term "same cause or matter" or "same delict", as referred to in the majority judgment in *Kienapple*. Mr. Justice Jessup, for the Ontario Court of Appeal in *R. v. Schilbe*,⁸⁷ considering an appeal against conviction on a charge of refusing to provide a breath sample, contrary to subsection 235(2) of the *Criminal Code*, following a conviction for an offence of impaired driving under section 234 arising from the same circumstances, expressed his agreement with the position of the lower court that a refusal to provide a breath sample and driving a motor vehicle while impaired by alcohol do not constitute the "same delict". He adopted as correct the following statement of County Court Judge Carter:

I do not believe that, by the phrase "the same cause or matter" Laskin, J., intended to comprehend two different occurrences, separated in time and place such as we have here, one being the discovery of the appellant in an impaired condition in Clinton, the other the appellant's refusal to provide a breath sample sometime later in Goderich. To my mind, to give the meaning to "same cause or matter" implicit in the appellant's argument would mean that anything the accused did during this time period, such as an assault on the police or an escape from custody, could not form the basis for a separate charge and conviction, which would be an unwarranted application of the *Kienapple* decision.⁸⁸

A similar conclusion was arrived at by the Nova Scotia Court of Appeal, in *R. v. Jenkins*,⁸⁹ as articulated in the judgment of Mr. Justice MacKeigan:

Despite that partial similarity, we are impressed that the essential elements of the charge under s. 235(2) are the demand and the refusal by the accused to take the breathalyser test. That refusal is a vital and important element which does not exist on a charge under s. 234, and which only occurs in a s. 235 case after all impaired driving has ceased. This distinguishes the s. 235 charge and makes the elements under it not substantially the same as those on a charge under s. 234.

87. (1976), 30 C.C.C. (2d) 113 (Ont. C.A.). See also *R. v. Jenkins* (1977) 19 N.S.R. (2d) 1 (N.S. C.A.).

88. *Ibid.*, at 117. See also *R. v. Mazurek* (1978) 6 Alta. L.R. (2d) 273 (Alta. Dist. Ct.), wherein the accused contended that the reliance by the trial judge upon the adverse inference as a result of the refusal to comply with the breath demand in convicting the accused of an offence under s. 234 precluded a subsequent conviction for the offence charged under s. 235(2) as it infringed the *Kienapple* principle. MacFayden D.C.J., in dismissing the appeal, held that the evidence of a demand under s. 235(1) and a refusal to comply on the part of the accused is only one of the factors to be considered in a prosecution under s. 234, and that the refusal is not an essential element in a prosecution under s. 234. He concluded:

The learned trial judge drew an inference adverse to the accused. This was one of several facts proven by the Crown and considered by the trial judge on the charge under s. 234 of the *Criminal Code*. The accused was, in my view, not placed in "jeopardy" on the matter of the refusal to comply with the demand when the evidence was tendered for the purposes of s. 237(3) of the *Criminal Code*. This was merely some of the evidence considered at trial. . .

It is my view that the convictions in this matter do not infringe the principles against multiple convictions as stated by Laskin J. in *Kienapple v. R.* It is my view that the evidence of the refusal and the demand may be admitted and considered as one of the facts in proving the offence under s. 234.

89. (1977), 19 N.S.R. (2d) 1 at 2 (N.S. C.A.).

Upon the basis of these authorities it is possible to conclude that the "same cause or matter" or "same delict" may consist of facts capable of constituting one or more offences, provided that there does not exist a fact or element, relevant to one of the offences, capable of distinguishing it from the other offence. If such a relevant distinguishing feature is present there will exist more than one "cause or matter" or "delict", and, consequently, more than one conviction can be supported without violating the rule formulated in *Kienapple*.

This interpretation is further supported by the decision of the British Columbia Court of Appeal in *R. v. Houchen*,⁹⁰ wherein the Court considered an appeal from conviction for offences under sections 234 and 236 of the *Criminal Code*, arising out of the same incident. The question for determination was whether both convictions could be said to have arisen from the "same cause or matter", and it was held by the majority of the Court that the issue should be resolved in the affirmative. However, Mr. Justice Farlane, in dissent, expressed his view of the proper interpretation of "same cause or matter", in the following terms:

In my opinion these words were not used in the sense of the facts, circumstances or transaction involved unrelated to the nature of the offences charged and under consideration . . . the convictions in the *Kienapple* case were for (1) rape and (2) sexual intercourse with a female admittedly under the age of 14 years. The jury's verdict of rape necessarily involved all the elements of the second offence since consent was no defence to that charge.

In my opinion, the correct meaning to be applied to the words "the same cause or matter" as used by Laskin, J., is found in his reference to the elements of the offences charged. Commenting on *R. v. Thomas* . . . he said . . . "*The ensuing death brings into view a new relevant element not present when the first conviction occurred. That is not so in the case at bar.*"⁹¹

He found further support for his interpretation in the penultimate paragraph of Mr. Justice Laskin's judgment in *Kienapple*:

In the circumstances of the present case, the superadded element of age in s. 146(1) does not operate to distinguish unlawful carnal knowledge from rape. Age under 14 years is certainly material where consent to the sexual intercourse is present; but once that is ruled out, as it is in the present case, it becomes meaningless as a distinguishing feature of the offence of rape and unlawful carnal knowledge.⁹²

Clearly this decision lends impetus to the proposition that the "same cause or matter" or the "same delict" does not consist merely of facts, circumstances or transactions. Rather, consideration must be granted to the facts as related to the elements of the offences charged, and, if, in the circumstances, there is a relevant distinguishing feature, the principle in *Kienapple* has no application.

Further, the reference to the "superadded element" as being incapable of distinguishing the offences, implies that it is only those elements of an offence, in the particular circumstances rendered relevant to establishing criminality, which are to be considered in a determination of whether the

90. (1977), 31 C.C.C. (2d) 274 at 276 (B.C. C.A.).

91. *Ibid.*, at 278.

92. *Supra*, n. 1, at 541-2.

offences arise from the same "cause or matter" or "delict". Where a "super-added element" is rendered irrelevant to a conviction, in the particular circumstances, such element becomes "meaningless as a distinguishing feature" of the offences, and, consequently, there is only one "cause or matter" or "delict" capable of supporting a single conviction.

Such a view is supported by the decision of the Supreme Court of Canada in *Côté v. The Queen*,⁹³ wherein the Court considered an appeal from a judgment of the Quebec Court of Appeal allowing the Crown's appeal from an acquittal on a charge of possession of stolen property, being the proceeds of a robbery for which the accused had been convicted approximately three years previous. The question of law for consideration was whether the appellant, having been previously convicted of robbery, could, in the circumstances, be convicted of unlawful possession of the same property stolen by him and remaining in his possession continuously for the three years. Chief Justice Fauteux, in rendering the judgment of the majority of the Court, stated:

The fact that his possession is a common ingredient of both offences is no reason to exclude or ignore what is actually the criminal factor distinguishing one from the other, and is of the essence of their respective nature. In the commission of theft this crucial characteristic consists in the fact of the taking or in the fact of conversion or constructive taking, two facts having a defined basis in time and place. In the case of unlawful possession this crucial characteristic consists in the fact that the offence can chronologically only be committed after that of theft, and that it is the guilty knowledge of the unlawful origin of the thing which then constitutes the offence, . . .⁹⁴

Mr. Justice Pigeon, with Mr. Justice Martland concurring, expressed the opinion that the question for consideration was whether a conviction for an offence in circumstances where the subject matter of the offence is a continuing state of affairs, such as unlawful possession, could constitute a bar to a second conviction if the state of affairs subsequently continued to exist. He suggested that, at a later date, the situation is different as a conviction does not relate to the future and an accused does not become entitled to continue breaking the law merely because he has been once convicted, and concluded:

The rule that charges must not be multiplied applies to that offence as to any other; but there is no undue multiplication of charges when another information is laid after the first conviction, if the violation continues.⁹⁵

Mr. Justice Laskin, in a sole dissenting opinion, found it impossible, "both as a matter of logic and legal principle", to appreciate how the fact of an accused being in continuous possession of stolen articles can form the basis of a separate offence merely because the charge of the latter offence

93. (1974), 26 C.R.N.S. 26, [1975] 1 S.C.R. 303 (S.C.C.).

See also *R. v. Van Dorn* (1956), 116 C.C.C. 325, 25 C.R. 151 (B.C. C.A.), wherein it was held that an accused could be convicted on both possession of stolen property and theft where the "possession charged is so removed in time and place from the actual offence of theft as not to be or form a part of the theft, or is not so intimately identified in time and place with the theft as to form a part of it, that it is then a distinct and separate offence for which the person may be convicted". In *R. v. Siggins* (1960), 127 C.C.C. 409, [1960] O.R. 284, 32 C.R. 306, the Ontario Court of Appeal held that an accused could be convicted of both unlawful possession and theft. Fauteux C.J.C., in *Côté, supra* was of the view that the Court of Appeal in *Siggins* "rendered a decision limited to the specific case under consideration", (at 312).

94. *Ibid.*, at 310.

95. *Ibid.*, at 319.

relates to possession at a different time and place than that of the earlier robbery conviction. He suggested that to convict an accused of unlawful possession in the present case is to convict him because he was able to conceal the stolen articles following the robbery, and that no such offence is defined in the *Criminal Code*.⁹⁶ Further, that continued possession was merely the continuance of the act of theft, of which the obtaining possession was an essential ingredient,⁹⁷ and concluded:

I am of the opinion that the judgment of this Court in *Kienapple* should govern here so as to prevent multiple convictions for the same matter. . . . I am content to apply the principle of *res judicata* as precluding successive prosecutions for different offences with a substantial common element where there has been, as here, a conviction on the first prosecution. In short, this case does not fall to be decided whether or not *autrefois convict* was technically the proper plea or whether *res judicata* should have been pleaded alone or in the alternative. The merits of this appeal are with the accused under the broad principle adopted in *Kienapple*.⁹⁸

Unlawful possession constitutes an essential ingredient of theft and theft related offences, such as robbery, where the possession occurs sufficiently close in time to the theft and where the possession is continuous. Under such circumstances, there is an absence of relevant facts or elements capable of distinguishing the charge of unlawful possession from that of theft, and, therefore, invites application of the principle in *Kienapple*.

The British Columbia Supreme Court, in *R. v. Wozny*,⁹⁹ considering the appropriate interpretation to be afforded the phrase "same cause or matter", as found in *Kienapple*, proposed that the term was not limited in meaning to the "same facts", but comprehended "all the substantial elements of the charges as well as the facts". Relating this proposition to the offences contained within sections 234 and 236, the Court concluded that the manner of driving, although relevant to section 234, was irrelevant to section 236, and, additionally, the alcohol content of the accused's blood was only relevant to section 236. Therefore, the Court held that these "substantial elements distinguish the two offences and produce separate causes although arising from one and the same transaction". Where the Court erred was in failing to recognize that, in essence, the offences were substantially the same.

This view was corrected by Mr. Justice Prowse, who, speaking for the Alberta Court of Appeal in *R. v. Casson*¹⁰⁰ made the following *obiter dicta* comments:

Turning now to the issue in the present case, I am of the view that the charge under s. 236, that is, under the second count, is *substantially the same* as the second charge under s. 234. In essence both offences deal with a person driving a car with alcohol in his blood stream. Under s. 234 the offence is established if the court determines that as a result of the consumption of liquor the accused's ability to drive is impaired. Under s. 236 the offence is

96. *Ibid.*, at 323.

97. *Ibid.*, at 326.

98. *Ibid.*, at 326-27. See also *Hewson v. The Queen* (1979), 5 C.R. (3d) 155 (S.C.C.), wherein the Supreme Court of Canada held that a conviction for theft and an acquittal for unlawful possession was appropriate in the circumstances, as the unlawful possession was included in a time in which the theft was alleged to have occurred.

99. (1976), 26 C.C.C. (2d) 251 at 256, [1975] 5 W.W.R. 692 (B.C. S.C.).

100. [1976] 4 W.W.R. 561 at 567 (Alta. S.C., App. Div.).

established if the court determines that the percentage of alcohol in his bloodstream reaches a certain level.

As set out above the question of multiple convictions is not in issue and if it was I am of the view that the principle set out in the *Kienapple* case would apply.

Although, in certain circumstances, there may exist an "overlap" between two offences charged in the sense that both involve a common element, such as the operation of a motor vehicle where the offences charged are under sections 234 and 238, the question for determination is whether there exists a relevant distinguishing element rendering the offences separate and distinct, and thereby capable of supporting more than one conviction. As indicated in the previous examination of *R. v. Wozny*, there appear to exist features or elements of sections 234 and 236 which are capable of distinguishing one from the other. On such an interpretation of the sections, a strict application of the *Kienapple* principle could well result in convictions being entered on both charges, notwithstanding they arose from the same incident. It has been suggested¹⁰¹ that it is readily understandable that Mr. Justice McFarlane, in the British Columbia Court of Appeal decision in *R. v. Houchen*,¹⁰² in dissent, rejected the now prevalent view that the principle in *Kienapple* prohibited simultaneous convictions for offences under both sections 234 and 236, for "certainly it is arguable that these offences contain substantially different elements".¹⁰³

The more acceptable position is related to the qualification stated by Mr. Justice Laskin in *Kienapple* that the two offences must be the same or *substantially* the same. Where the accused's ability to operate a motor vehicle was impaired by alcohol which exceeded the legal limit and which same alcohol resulted in the impaired ability to operate a motor vehicle, it may be said that the same or *substantially* the same facts and elements comprise both offences. This was recognized by Mr. Justice Prowse, in *R. v. Casson*, wherein he observed that "in essence both offences deal with a person driving a car with alcohol in his blood stream".^{103a}

One of the more recent judicial considerations of the *Kienapple* principle is found in the Manitoba Court of Appeal decision in *R. v. Hagenlocher*. The appellate court decision will be dealt with in detail as the Supreme Court of Canada unanimously held, without stated reasons, that "the conclusions reached by the majority judgment of the Manitoba Court of Appeal in applying the *Kienapple* principle . . . were correct".¹⁰⁴ The issue before the provincial appellate court was whether the principle formulated in *Kienapple* would permit a conviction for unlawfully setting fire to a substance, contrary to the *Criminal Code*, to stand simultaneously with a conviction for manslaughter arising out of the same single act of setting fire. The charges arose from the accused intentionally igniting vodka soaked bed sheets in a room in the Winnipeg Holiday Inn, which fire, upon spreading,

101. Donald R. Stuart, "Criminal Law and Procedure" (1977), 9 Ottawa L. Rev. 568.

102. *Supra*, n. 90.

103. *Supra*, n. 101, at 662.

103a. *Supra*, n. 100.

104. (1982), 70 C.C.C. (2d) 41 (S.C.C.).

caused the death of one person and resultant damages in excess of one and a half million dollars to the hotel. In allowing the appeal and quashing the conviction for unlawfully setting a fire, Mr. Justice Huband, with Chief Justice Freedman concurring, held that while there were two offences there was but a single act, and, consequently, was a proper case for the application of the *Kienapple* principle.¹⁰⁵

Although it is agreed that, upon the particular facts of the case, the decision was correct, it is contended that it was an unfortunate choice of words when the Court referred to a single act rather than a single "delict" or "cause or matter". It becomes necessary to apply the principle as defined in *Kienapple*, and interpreted in subsequent decisions, to the facts in *Hagenlocher* to determine whether the offences of unlawfully setting a fire and of manslaughter arose from the same "delict" or "cause or matter". It appears obvious that, having regard to the fact that the accused committed a single act of setting fire to a substance, being an illegal act, and which illegal act resulted in the death of a human being, thereby constituting manslaughter, that a conviction for manslaughter comprises all relevant elements of both offences. There are no relevant facts or elements capable of distinguishing unlawfully setting a fire from the offence of manslaughter.

This interpretation is supported by a comparison of the decision of the Ontario Court of Appeal in *R. v. Boyce*¹⁰⁶ and that of the Manitoba Court of Appeal in *R. v. Ross*.¹⁰⁷ In *Boyce*, the accused was convicted at trial of rape and the additional charge of choking a person to assist in the commission of an indictable offence, namely, rape, contrary to subsection 230(a) of the *Criminal Code*. Mister Justice Martin correctly held that, upon affirming the conviction for rape, the conviction under subsection 230(a) should be quashed. However, he justified his conclusion by an unfortunate phrasing that "both convictions arise from the same transaction".¹⁰⁸

A somewhat similar situation was found in *Ross*, wherein the Manitoba Court of Appeal considered an appeal against conviction for attempted rape and for the additional charge of assault causing bodily harm with intent to wound, arising out of the same incident. Mr. Justice Monnin, with Messars Justice Hall and Matas concurring, held that out of the single incident two distinct offences had occurred and the accused had been properly convicted of both offences.

The issue for determination, therefore, is whether the charges arose from the same "cause or matter" or "delict", which can be determined by ascertaining whether the same or substantially the same facts and elements comprising the second count also comprise the first count for which a conviction has been entered, in which case, having regard to the particular facts and barring any relevant distinguishing element, the rule precluding multiple convictions is applicable.

105. *Supra* n. 2, at 106.

106. [1976] 23 C.C.C. (2d) 16 (Ont. C.A.).

107. (1979), 1 Man. R. (2d) 242 (Man. C.A.).

108. *Supra* n. 106, at 37-8.

It is this author's opinion that the principle enunciated in *Kienapple* does not prohibit multiple convictions for the same transaction as expressed in *Boyce*, but rather for the same "cause or matter" or "delict". An examination of the relevant statutory provisions reveals that in *Boyce* the indictable offence of rape is established when it is proven that the accused had sexual intercourse with a female person other than his wife without her consent, which naturally implies the use of force, and, in the particular circumstances of the case, the force employed to assist in committing the rape was the act of choking. The offence under subsection 230(a) is committed when an accused chokes another person to assist in the commission of an indictable offence, in this case, rape. Although there are numerous other means of committing either offence, the method by which both offences were committed in this particular case rendered such other elements "meaningless as distinguishing features". There are no relevant facts or elements capable of distinguishing the latter offence from that of rape having regard to the circumstances. Consequently, the *Kienapple* principle was properly applied, although perhaps based upon improper reasoning as Mr. Justice Martin applied the principle on the basis that both offences arose "from the same transaction". As was previously indicated, such is not a proper application of the rule prohibiting multiple convictions as a single transaction may contain one or more concurrent delicts.

However, in *Ross* there were, as the majority of the Manitoba Court of Appeal indicated, two distinct "delicts" arising out of the single transaction or occurrence, each capable of supporting a conviction. Section 143 provides that the sexual intercourse must be without the consent of the victim, which necessarily implies the use of force or threats with the *intention of committing the rape*. By virtue of the trial court's finding of guilt on the second offence of wounding with *intent to cause bodily harm* there must necessarily have been a finding of fact that the accused committed the assault with an intention that he cause the victim bodily harm rather than with an intention to facilitate the commission of the rape.

This interpretation is supported by the extreme seriousness of the assault which extended far beyond that which would have been necessary to render the elderly victim incapable of resistance. The wounding, on the facts, revealed a sadistic element which was relevant in establishing the intent to cause bodily harm and distinguish the offences. Consequently, there were two distinct delicts and the principle in *Kienapple* was inapplicable.

In a dissenting opinion in *Hagenlocher*, Mr. Justice Huband predicated his conclusion upon a misapplication of the Court's earlier decision in *Ross* by indicating that the court had concluded there were two crimes but a single delict.¹⁰⁹ This was, in fact, the view expressed in the dissenting opinion of the Court. The majority judgment had concluded that there was one incident capable of supporting convictions for two distinct offences, namely, attempted rape and wounding with intent.

It has been contended that the principle in *Kienapple* is only applicable where the offences charged can be said to be alternative to one another.

109. *Supra* n. 2, at 106.

This view was expounded in the Alberta Supreme Court decision in *R. v. Skrepnyk*,¹¹⁰ which considered convictions under sections 234 and 236 of the *Criminal Code*, arising out of a single incident. Mr. Justice Bowen, delivering the judgment of the Court, supported his position by reference to the comments of Mr. Justice Laskin in *Kienapple* to the effect that where there is an "overlap in the sense that one embraces the other", and, if there is a conviction on the first count, "the second count falls as an alternative charge". Further reference was made to Mr. Justice Laskin's comment that where there is a verdict of guilty on the first count "and the same or substantially the same elements make up the offence charged in the second count" the rule against multiple convictions is applicable,¹¹¹ and that *res judicata* would constitute a complete defence on the second count "since all the elements and facts supporting the conviction" for the first count would necessarily be the same under the section creating the offence constituting the second count.¹¹² He concluded:

I consider the opinion of Laskin J., in that case to be not only analagous to the present problem but that it is binding and particularly applicable to a decision here. I have no doubt that charges under s. 234 and s. 236 should be treated as alternative charges rather than distinct and separate if the same cause or matter gives rise to the charges in question. In this case they both arise from the same cause or matter.¹¹³

In the subsequent decision of the Alberta Court of Appeal in *R. v. Schell*,¹¹⁴ however, Mr. Justice Clement, speaking for the Court, rejected the conclusion in *Skrepnyk* that sections 234 and 236 are alternative modes of expressing the same offence. He adopted the conclusions arrived at in *R. v. McKay*¹¹⁵ and *R. v. Casson*¹¹⁶ that these constituted separate and distinct offences.

An opposing opinion is found in the Saskatchewan Court of Appeal decision in *R. v. Wildeman*,¹¹⁷ wherein the Court considered the issue of whether an accused could properly be convicted for an offence of dangerous driving, contrary to subsection 233(4) of the *Criminal Code*, when he had previously been convicted of an offence under section 236, arising out of the same occurrence. Chief Justice Culliton concluded that the majority decision in *Kienapple* was predicated upon the rationale that to convict on charges of rape and unlawful sexual intercourse with the same female under the age of fourteen years would, in effect, amount to entering convictions on two charges which were alternative to one another, resulting in the accused being twice convicted for the same wrong. He concluded:

Thus the principle applied was not a new one but one long recognized in the law. The problem which the Supreme Court had to decide was whether the two charges were alternative to one another so that convictions on both would be contrary to the maxims, *nemo*

110. [1976] 1 W.W.R. 88 (Alta. S.C.).

111. *Ibid.*, at 90, quoting *Kienapple* at 362 and 367.

112. *Ibid.*, at 91, quoting *Kienapple* at 367.

113. *Ibid.*, at 91.

114. (1979), 11 Alta. L.R. (2d) 62 (Alta. C.A.).

115. *Supra* n. 26.

116. *Supra* n. 100.

117. *Supra* n. 4.

debet bis vexari pro uno et eadem causa (no one should be charged twice for the same cause) and, *nemo debet bis puniri pro uno delicto* (no one should be twice punished for the same offence). Having decided that the charges were alternative, the Court had no choice but to quash one conviction.¹¹⁸

In concluding that sections 233(4) and 236 cannot be said to be alternative to one another, nor would convictions on both offences result in multiple convictions for the same delict, he indicated:

In my view, it is only when the two charges arising out of the same circumstances can be said to be alternative to one another so that the conviction on both would result in being twice convicted for the same offence that the principle in *Kienapple* applies. If the offences cannot be said to be so alternative to one another, convictions may be registered in respect of a number of charges although they arise out of the same incident. When *Kienapple* is so construed its application is limited and can be applied without difficulty and confusion.¹¹⁹

If, as was indicated in *R. v. Casson*¹²⁰ in reference to sections 234 and 236, the essence of these two offences is driving with alcohol in the blood, then, obviously, offences related to the *manner* of operating a motor vehicle could not be considered to be part of the same "delict". Notwithstanding that evidence of the manner of driving may be adduced to establish the accused's inability to operate a motor vehicle as the result of his consumption of alcohol, it is the accused's *ability* to operate the motor vehicle which is essential to criminality. Offences such as criminal negligence in the operation of a motor vehicle and dangerous driving, although sharing the common element with the alcohol related driving offences of the operation of a motor vehicle, additionally possess the relevant "superadded" element of a wanton or reckless disregard for the lives and safety of other persons, which is capable of distinguishing these as separate and distinct offences.

Although the decision of the Saskatchewan Court of Appeal was correct in the result, it is this author's opinion that the basis for Chief Justice Culliton's conclusion in *Wildeman* constituted a misinterpretation of the *Kienapple* principle. Notwithstanding that the offences in *Kienapple* are clearly alternative to one another or that Mr. Justice Laskin indicated the second charge "falls as an alternative charge", the Saskatchewan Court interpreted too narrowly the principle expressed by the majority in *Kienapple*. Certainly alternative charges may be one aspect of the application of the rule, but it is not restricted *solely* to situations where the Court is faced with such charges. The actual limitation of the principle can be found in the instruction of Mr. Justice Laskin that the rule is applicable to all situations where the facts and elements are the same or substantially the same for both offences charged, and where there exists no relevant "super-added" facts or elements which, in the particular circumstances, are capable of distinguishing the offences one from the other. Although such an interpretation may include alternative charges, it is not so limited.

Mr. Justice Huband, in *Hagenlocher*, expressed the opinion that the decisions in *R. v. Wildeman* and *R. v. Haubrich*¹²¹ constituted an unwarranted departure from the principle formulated in *Kienapple*, and concluded:

118. *Ibid.*, at 362.

119. *Ibid.*, at 363.

120. *Supra* n. 100.

121. (1978), 43 C.C.C. (2d) 190, 5 C.R. (3d) 221, [1978] 5 W.W.R. 481 (Sask. C.A.), wherein Culliton C.J.S., considering the applicability of the *Kienapple* principle, held that "it cannot be said that the two charges under sec. 233(4) and 234 . . . are alternative to one another so as to make conviction on both a conviction twice for the same offence".

I find nothing in the majority judgment in *Kienapple* to limit its application to the kinds of situations described by Culliton, C.J.S.. To so construe the *Kienapple* case may eliminate difficulty and confusion, but only at the possible price of permitting multiple convictions for the same act. To employ the phrase used by Laskin, J., in the *Kienapple* case, itself, there should not be two or more convictions where they would be supported by the same "elements and facts".¹²²

He further indicated:

I see nothing in the judgment of *Loyer, supra*, to indicate that the offences must be alternative offences, in the sense suggested by Culliton, C.J.S., before the *Kienapple* principle would have application.¹²³

One of the clearest statements of the proper application of the principle precluding multiple convictions is found in *R. v. Hedric*,¹²⁴ wherein the Alberta Supreme Court considered a Crown appeal against the dismissal of an information alleging an offence under subsection 238(3) of the *Criminal Code*, following a conviction for an offence under section 234 arising out of the same circumstances. The appeal was advanced upon the argument that subsection 238(3) "arose out of the same delict or transaction as contemplated in *Regina v. Kienapple*".¹²⁵ In granting the appeal, Mr. Justice MacDonald held that the principle precluding multiple convictions was inapplicable in the present circumstances, and concluded:

The totality of the facts which the Crown must assert in order to obtain a conviction under s. 238 cannot be said to constitute "the same delict" as that which gave rise to the conviction under s. 234. They do not constitute the "same offence" in the sense that they are not "the same matter" or "the same cause". There is a "relevant element" in a prosecution under s. 238, viz., the accused's disqualification from driving, which was not an element in any way relevant to the charge under s. 234; indeed any evidence rendered by the Crown at the trial under s. 234 to the effect that the accused was disqualified from driving would have been inadmissible. The offence charged under s. 238 is not made up of "the same or substantially the same elements" as the offence for which the accused was convicted under s. 234. All elements and facts supporting the conviction under s. 234 are not the same as those which would have to be proved in order to obtain a conviction under s. 238.¹²⁶

The Supreme Court of Canada, in *Elliot v. The Queen No. 2*,¹²⁷ considered an appeal from a decision of the British Columbia Court of Appeal quashing an acquittal for possession of a narcotic for the purpose of trafficking, following convictions for conspiracy to traffic and trafficking in the same narcotic. In delivering the majority decision of the Court, Mr. Justice Ritchie, observing that the gravamen of the first offence being unlawfully trafficking in a restricted drug, and of the second offence being unlawful possession of the restricted drug for the purpose of trafficking, concluded:

The case of *Kienapple, supra*, does not appear to me to have any application to this situation as that case was concerned essentially with the proposition that an accused cannot be convicted twice for the same offence.¹²⁸

122. *Supra* n. 2, at 107.

123. *Ibid.*, at 108.

124. [1978] 4 Alta. L.R. (2d) 94 (Alta. S.C.).

125. *Ibid.*, at 95.

126. *Ibid.*, at 95-6.

127. (1977), 38 C.C.C. (2d) 177, [1978] 1 W.W.R. 481 (S.C.C.).

128. *Ibid.*, at 202.

The Supreme Court of Canada, in *Sheppe v. The Queen*,¹²⁹ considered the question of whether the *Kienapple* principle applied to preclude a conviction for trafficking in a narcotic when the accused had previously been convicted of conspiracy to traffic in a narcotic, where the substantive offence occurred within the conspiracy period. Chief Justice Laskin observed that the essence of conspiracy is an unlawful agreement. Overt acts are inadmissible to support a charge of conspiracy but this "does not, however, mean that the acts merge into the conspiracy so as to lose their independent character".¹³⁰ Acknowledging that the substantive offence is not an included offence in conspiracy, he interpreted the *Kienapple* decision in the following manner:

In *Kienapple v. The Queen*, *supra*, this court was concerned with a single act which gave rise to two different offences, and it held that multiple convictions could not be supported for the same delict or for the same cause or matter or where the same or substantially the same elements entered into two different offences.

...
The trafficking transaction had no element of culpability that was in any way common with the charge of conspiracy which depended on proof of a prior illegal agreement and, as I pointed out earlier, transcended any dependence on the trafficking transactions.¹³¹

In the recent Supreme Court of Canada decision in *McGuigan v. The Queen*,¹³² the significance of the additional "superadded" element as a distinguishing feature was emphasized. The situation which gave rise to consideration of the issue involved an appeal from a conviction for the offences of attempted armed robbery and the use of a firearm while attempting to commit an indictable offence, namely, armed robbery, contrary to section 83 of the *Criminal Code*. Mr. Justice Dickson, delivering the judgment of the Court, considered whether the principle prohibiting multiple convictions constituted a bar to a conviction for the subsequent offence under section 83 as the same weapon was involved in both counts. Distinguishing *R. v. Quon*, *supra*, on the basis of substantial changes in the relevant provisions of the *Criminal Code* since the rendering of that decision, he expressed agreement with the judgment of the Ontario Court of Appeal in *R. v. Langevin*,¹³³ referring to the following statement of Mr. Justice Martin in that decision:

Notwithstanding that in most cases of "armed robbery" the offender will have used the weapon, nonetheless s. 83(1), by making the *use of a firearm an essential element of the offence* created by the subsection, unlike s. 122 which required only that the offender have a firearm on his person, imports a further element in addition to those which suffice to constitute theft while armed with a firearm.

Mr. Justice Dickson further indicated that in the case of armed robbery the offence is completed if the accused is "armed with" an offensive weapon, which need not be used. Section 83 was, therefore, concerned with the

129. (1980), 51 C.C.C. (2d) 481 (S.C.C.).

130. *Ibid.*, at 483.

131. *Ibid.*, at 484-5.

132. (1982), 26 C.R. (3d) 289 (S.C.C.).

133. (1979), 10 C.R. (3d) 193, 47 C.C.C. (2d) 138 at 145 (Ont. C.A.) as quoted by Dickson J. in *McGuigan* at 315.

additional element of the *use* of a firearm during the commission of an indictable offence.¹³⁴

Chief Justice Laskin, voicing a dissenting opinion, with Mr. Justice Pigeon concurring, expressed the view that *R. v. Langevin* had been wrongly decided and that the decision in *R. v. Quon* was still applicable, as, he observed, there was no "material difference" between the two situations, both of which were involved with the use of a firearm during the commission of an offence. However, the difficulty with Chief Justice Laskin's reasoning is that the factual situation may involve the use of a firearm in both instances, but section 122, the predecessor to section 83, prohibited the possession of a firearm during the commission of an indictable offence, whereas section 83 refers to the "use" of a weapon.

Mr. Justice Dickson's interpretation of the principle is preferable as the offence of armed robbery merely requires that the accused be armed with an offensive weapon, which is similar to the requirement under the earlier section 122 that the accused shall be convicted if he had "possession" of the weapon at the time of the offence. However, under section 83 Parliament inserted the additional element that the accused "uses a firearm" during the commission of an indictable offence. This constitutes an essential ingredient necessary for a conviction which is neither present nor relevant to a conviction for armed robbery, as mere possession will suffice. Clearly, the additional factor of use of the firearm is a relevant element capable of distinguishing one offence from the other.

Additionally, Parliament has indicated, by enacting the amendment to section 83 requiring use instead of possession of a firearm as constituting the offence, and, further, by indicating that any sentence imposed arising out of the same event is to be served consecutively to any other sentence imposed, a clear intention that the accused be convicted of both the firearms offence and that of armed robbery, upon the Crown establishing "use" of the firearm during the commission of an indictable offence.

The proposition that two or more "delicts" may exist contemporaneously within a single incident or occurrence was dealt with by the Manitoba Court of Appeal in *R. v. McKinney*,¹³⁵ wherein the Court considered an appeal by an accused against his convictions for hunting out of season, contrary to subsection 16(1) of the *Wildlife Act*,¹³⁶ and night time hunting with the aid of a light, contrary to subsection 19(1) of the same *Act*. Mr. Justice Monnin, in dissent, suggested that the principle in *Kienapple* was applicable as the sole purport of that decision was that a single act cannot

134. *Supra* n. 132, at 320. See also *R. v. Langevin*, *supra*; *R. v. Matheson* 111, reversed 22 C.R. (3d) 289, [1981] 6 W.W.R. 227, 59 C.C.C. (2d) 289, 124 D.L.R. (3d) 92 (S.C.C.); *R. v. Nicholson*, *R. v. Eloy* 24 C.R. (3d) 284, [1982] 1 W.W.R. 385 (S.C.C.); and *R. v. Pinneault*, *R. v. Berule* (1979), 12 C.R. (2d) 129, 55 C.C.C. (3d) 328 (Que. C.A.), all of which held that the *Kienapple* principle was not applicable and that an accused could be convicted of both armed robbery and a weapons offence under s. 83. As Dickson J. pointed out in *McGuigan* at 318, "Four Courts of Appeal which have considered the matter have agreed in six different cases upon an important point of criminal law. Although not unheard of, it is a sufficiently rare occurrence as to merit attention. It suggests that the point is reasonably clear, and one should be cautious at arriving at a different conclusion".

135. (1979), 46 C.C.C. (2d) 566 (Man. C.A.).

136. R.S.M. 1970, c. W140.

"heap unto an accused two convictions".¹³⁷ This view was rejected by Mr. Justice O'Sullivan in delivering the judgment of the Court, with Mr. Justice Hall concurring.

Upon this interpretation he concluded that where there was a single "delict" forming the basis of two separate offences there should only be one conviction recorded, even though the offences were not alternative to one another. However, in the present case, there were two "delicts", the hunting out of season and the hunting at night with a light, both occurring simultaneously. He expressed this view by stating that the charges consisted of "two different matters totally separate one from the other" and, further, that one "can perform both acts and commit both offences during the same shooting incident", and, consequently, the accused were properly convicted of both offences.¹³⁸

The obvious conclusion drawn from this decision is that the principle in *Kienapple* is inapplicable to circumstances wherein two or more "delicts" occur contemporaneously in a single incident. An accused may be properly convicted of two or more offences arising from that single incident where the offences are separate and distinct as the result of a relevant element capable of distinguishing one from the other.

Returning to *Hagenlocher*, in that decision Mr. Justice Huband expressed the opinion that, although a single "delict" gave rise to a complaint from two separate sources, the rule prohibiting multiple convictions for a single criminal act could not be defeated on the basis of there being more than one complaint.¹³⁹ Further, that there should not be two or more convictions where they would be supported by the same "elements and facts", and concluded:

In the present case the same "elements and facts" underly both the charge of manslaughter and in the charge of unlawfully setting fire to a substance.¹⁴⁰

On the basis of this interpretation the *Kienapple* principle would be applicable where the factual situation and elements giving rise to the first charge are either the same or substantially the same as those giving rise to the second charge. The difficulty arises from the suggestion that a single act giving rise to two separate complaints would not defeat the rule. Certainly an accused who causes the death of two separate persons as the result of unlawfully setting a single fire could properly be convicted of two separate counts of manslaughter. Mr. Justice Huband must have intended to imply that two separate complaints could not defeat the rule in *Kienapple* except in circumstances where the facts and elements underlying both offences are the same or substantially the same.

Mr. Justice Monnin, in dissent, voiced the opinion that the offences of manslaughter and unlawfully setting fire to a substance are two different

137. *Supra*, n. 135, at 568.

138. *Ibid.*, at 569.

139. *Supra*, n. 2, at 106.

140. *Ibid.*, at 107.

matters which are separate and distinct from one another. Indicating that there is no common element between the two offences with the only common fact being that one match caused a fire from which two distinct offences arose, he concluded:

One person can commit both offences during the same episode or during the same time sequence. Setting fire to a substance and causing physical damage in excess of 1.5 million dollars is one thing; setting the same substance on fire and causing the death of a human being is another thing, and both offences stand up independently one of the other though the same match . . . was used to light the vodka.¹⁴¹

This author cannot agree with the above conclusion arrived at by Mr. Justice Monnin. The relevant provisions of the *Criminal Code* are as follows:

205. (1) A person commits homicide when directly or indirectly, by any means, he causes the death of a human being.

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act. . . .

217. Culpable homicide that is not murder or infanticide is manslaughter. . . .

390. Every one who

(a) willfully sets fire to anything that is likely to cause anything mentioned in subsection 389(1) to catch fire . . . is guilty of an indictable offence. . . .

The accused was convicted of culpable homicide, being manslaughter, for causing the death of a human being by means of "an unlawful act", namely, setting fire to a substance contrary to section 390 of the *Criminal Code*. A conviction for manslaughter committed by means of the aforementioned unlawful act must necessarily preclude a further conviction for the unlawful act itself, for such a subsequent conviction would amount to the accused being convicted and punished twice for the same unlawful act of setting the fire.

The final situation for consideration is illustrated by the recent decision in *R. v. Prince*,¹⁴² wherein the Manitoba Court of Appeal, following an accused's acquittal for wounding with intent, granted an application for certiorari to quash an indictment for manslaughter arising from the same incident. The charges resulted from the accused stabbing a pregnant woman in the abdomen, penetrating the amniotic sac, and thereby causing the premature birth of an infant six days after the assault. The infant, as a direct result of its insufficient development, died nineteen minutes following birth.

The accused was convicted of causing bodily harm with intent to wound, maim or disfigure, and acquitted of attempted murder. She was subsequently charged with manslaughter of the infant which resulted in the order for certiorari to quash the indictment. The Court based its decision on an interpretation of the *Kienapple* principle as applied in *Hagenlocher*, and concluded:

141. *Ibid.*, at 105.

142. [1984] 2 W.W.R. 114 (Man. C.A.).

... we are all of the opinion that on any view of the evidence, a lawful conviction could not be entered against Ms. Prince on the later indictment for manslaughter in light of her conviction on 4th January 1983, for causing bodily harm to Bernice Daniels by the same act founding the manslaughter charge.¹⁴³

Mr. Justice Humphreys of the English Court of Criminal Appeal in *R. v. Thomas*,¹⁴⁴ cited by Mr. Justice Laskin in the *Kienapple*¹⁴⁵ decision, held that in circumstances where an accused has been convicted of wounding with intent to murder and the person wounded subsequently dies of the wounds inflicted the previous conviction is not a good answer by the person who inflicted the wound to an indictment for murder. Mr. Justice Humphreys held that the two offences of wounding with intent to murder and murder, while arising from the same act of wounding, was neither the same nor substantially the same offence. Mr. Justice Laskin, in *Kienapple v. The Queen*, referred to *R. v. Thomas* as representing a valid factual situation capable of supporting the subsequent conviction as the "ensuing death brings into view a new relevant element not present when the first conviction occurred".¹⁴⁶ This is not the situation in the *Prince* case as the death of the infant occurred prior to the laying of the indictment leading to the first conviction for wounding with intent. It would have been open to the Crown to proceed on the manslaughter charge prior to any conviction having been entered on the lesser offence. Having taken this position, Mr. Justice Laskin further indicated that where "manslaughter and assault were charged in the same indictment the accused could not be convicted of both because of the included offence rule".¹⁴⁷

The question for consideration, therefore, must be whether the single act of wounding the mother, directly resulting in the subsequent death of her child, is capable of constituting more than one "cause or matter" or "delict". The decision in *Kienapple* indicated that the same "cause or matter" or "delict" consist of a single criminal act committed in circumstances where the offences alleged are comprised of the same or substantially the same facts and elements. The two charges are clearly distinct offences arising out of the same act. Applying the reasoning in *Hagenlocher*, it would appear that the accused committed the offence of manslaughter of the infant when, contrary to paragraph 205(5)(a) of the *Criminal Code*, she caused the death of a human being by means of an unlawful act, namely, the wounding of the mother. There exists an "overlap" between the two offences in the sense that "one embraces the other". The offence of manslaughter, in the circumstances, encompasses all relevant facts and elements. A conviction on the charge of wounding with intent must necessarily preclude a subsequent conviction for manslaughter in these peculiar circumstances. There exist no relevant "superadded elements" capable of distinguishing the offences in such a manner as to render the *Kienapple* principle irrelevant.

143. *Ibid.*, at 117.

144. *Supra* n. 14.

145. *Supra* n. 1, at 539 (per Lastin J.).

146. *Supra* n. 1, at 538.

147. *Ibid.*, at 538.

V. Procedural Application of the Kienapple Principle

This discussion will briefly examine the procedural application of the *Kienapple* principle developed by the courts. In *R. v. Kehoe*¹⁴⁸ the Ontario Provincial Court refused to apply the rule in *Kienapple* where an accused had been charged with the abduction of his child, following a court award of custody to his wife, and for which act his wife had initiated civil proceedings for contempt. It was correctly contended¹⁴⁹ that the court acted properly in its rejection of the defence *res judicata*, relying upon the *Kienapple* decision, as the offence of contempt was neither criminal nor quasi-criminal, but rather a civil matter.

The British Columbia Provincial Court, in *R. v. Heric*,¹⁵⁰ considered an accused acquitted of an offence under section 234 of the *Criminal Code* who was subsequently charged under section 236 arising out of the same incident. The Court held that the rule in *Kienapple* was authority that not only may a person not be convicted of two offences arising out of the same incident, but that he may not be convicted of an offence if he has previously been acquitted of an offence based upon the same act, based on the maxim *transit in rem judicatam*.¹⁵¹ It is this author's opinion that such was not a proper application of the principle in *Kienapple* as it was clearly indicated by Mr. Justice Laskin in that decision that if the jury fails to convict on the first offence it is still open to them to consider the question of guilt on the second count.

The Alberta Supreme Court, in *R. v. Casson, supra*, expressed a similar position when considering circumstances wherein the trial judge acquitted an accused of an offence under section 234 and convicted him of an offence under 236, arising out of the same incident. The accused appealed his conviction for the latter offence on the question of whether the trial judge erred in rejecting the defence of *res judicata* following a previous acquittal on the former charge. Mr. Justice Prowse, speaking for the Court, stated that the principle articulated in *Kienapple*,

... is not authority for the proposition that an acquittal on one charge necessarily affords a defence to a second charge even if both charges arise out of the same cause or matter, and this is made clear by Laskin, J., in the *Kienapple* case. ... "[T]he jury should also be directed that if they find the accused not guilty of rape they may still find him guilty under s. 146(1). ..."¹⁵²

In *R. v. Loyer and Blouin, supra*, the Supreme Court of Canada had occasion to consider the proper application of the *Kienapple* principle in circumstances where the accused were charged with attempted armed robbery by use of a knife, contrary to sections 302 and 421 of the *Criminal Code*, and with possession of a weapon, namely, the same knife, for the purpose of committing the indictable offence of robbery, contrary to section 83. The accused pleaded guilty to the latter lesser offence and not guilty to

148. (1974), 21 C.C.C. (2d) 544 (Ont. Prov. Ct.).

149. A. F. Sheppard, "Criminal Law — Rule Against Multiple Convictions" (1976), 54 *Can. Bar Rev.* 627 at 649.

150. (1975), 4 W.W.R. 422.

151. Reference was here being made to the maxim as employed in *Wemyss v. Hopkins, supra* n. 5 at 382.

152. *Supra* n. 100 at 562.

the former offence. The trial judge found that the Crown had established culpability on the charge of armed robbery, but concluded that the accused was entitled to an acquittal on the basis of *res judicata*, as interpreted in *Kienapple*. The issue of law for determination by the Supreme Court of Canada was whether a plea of guilty to a lesser offence constituted a bar to a conviction for a greater offence arising out of the same incident.

Chief Justice Laskin, delivering the judgment of the Court, observed that the quashing of one of the convictions in *Kienapple* was on the basis "that there was one act of intercourse that underlay both charges, which should therefore be considered as alternative."¹⁵³ However, in the present case, the two offences were not of equal gravity and, consequently, it was held that the rule in *Kienapple* could not constitute a bar to the more serious charge simply by having the accused enter a plea of guilty to the less serious offence and having the plea accepted.¹⁵⁴ He then proceeded to establish procedural guidelines for the proper application of the *Kienapple* principle, where the facts justify its invocation, as follows:

Where a trial . . . proceeds on two or more offences of different degrees of gravity, and the same delict or matter underlies the offences in two of the counts, so as to invite application of the rule against multiple convictions, the trial judge should direct himself or direct the jury that if he or they find the accused guilty of the more serious charge there should be an acquittal on the less serious one; but if he or they should acquit on the more serious charge the question of culpability on the less serious charge should be persued and a verdict rendered on the merits.

Again, if at the trial there is a plea of guilty to a more serious charge, and a conviction is registered, an acquittal should be entered or directed on the less serious, alternative charge. However, if, as was the case here, the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending the trial of the more serious offence. If there is a finding of guilt on that charge, and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal entered.¹⁵⁵

The Alberta Court of Appeal, in *Duhamel v. R.*,¹⁵⁶ considered an accused charged with two counts of armed robbery, involving two separate trials and where, on the first trial, a statement of the accused was ruled inadmissible, whereas on the second trial the Court permitted the Crown to re-litigate the question of voluntariness, with the result that the statement was ruled admissible and the accused was convicted on the latter charge.

The Alberta Court of Appeal held that it is proper for a trial judge to determine admissibility on the evidence before him and he is not bound by an interlocutory ruling made at an earlier trial concerning the same evidence, and concluded:

The substantive decision is the verdict of acquittal. The interim ruling merely decided that the statement was not admissible. It did not decide any substantive rights. It did not decide

153. *Supra* n. 1, at 294.

154. *Ibid.*, at 294.

155. *Ibid.*, at 294-5. See *R. v. Cole*, [1965] 2 Q.B. 388, wherein an accused, charged with armed robbery, conspiracy and receiving, plead guilty to receiving and contended that, having plead guilty to an alternative offence the plea must stand and, consequently, he could not be convicted of the remaining offences. It was held that a plea of guilty did not constitute a conviction until the passing of sentence and the trial judge had a discretion to refuse to accept the plea to the lesser offence. It was further held that in such circumstances the plea of guilty should stand and the accused be tried on the more serious offence. If acquitted, he should be sentenced on the count to which he plead guilty.

156. (1981), 25 C.R. (3d) 53 (Alta. C.A.).

an issue of fact or law fundamental to the guilt or innocence of the appellant on the first robbery charge. . . . The ruling of admissibility was merely collateral to and was not fundamental to the verdict.¹⁵⁷

In *R. v. Letendre*,¹⁵⁸ an accused was convicted of breaking and entering with intent to commit an indictable offence and breaking and entering and therein committing theft. A third charge of possession of stolen property, being the same property in the previous offence of breaking and entering and committing theft, was dismissed on an application of the rule in *Kienapple*. The accused subsequently successfully appealed his conviction on the charge of breaking and entering and committing theft.

Mr. Justice Aikins, with Mr. Justice Lambert concurring, delivering the judgment of the British Columbia Court of Appeal, held that, notwithstanding that there had not been an appeal by the Crown against the accused's acquittal on the charge of unlawful possession, the acquittal should be set aside and a new trial ordered. He observed that,

. . . the justice of the case requires that the acquittal on the third count be set aside so that the Crown will be put in the same position that it was in initially on the retrial of the appellant on the second count.¹⁵⁹

The Supreme Court of Canada, in *R. v. Hammerling*,¹⁶⁰ considered an accused convicted of seven counts of theft and acquitted on nine counts of criminal breach of trust. The Manitoba Court of Appeal had ordered an acquittal to be entered on the charges of theft. However, the provincial appellate Court allowed the Crown's appeal and ordered the acquittals on the charges of criminal breach of trust to be set aside and convictions entered. Chief Justice Freedman indicated that the circumstances were such that the rule in *Kienapple* was applicable and, further, although criminal breach of trust and theft had been established and the accused's appeal was not entitled to succeed on its merits, it was allowed by the operation of the *Kienapple* principle. Consequently, acquittals were entered on the charges of theft.

The appeal to the Supreme Court of Canada was dismissed on a determination of a proper application of principle by the Manitoba Court of Appeal. However, Mr. Justice Lamer, in a separate decision concurring in the result, provided the following procedural direction for the proper future application of the *Kienapple* principle:

But as regards the future, this Court's decision in *Kienapple v. The Queen* . . . should be reconsidered and modified to the following extent: whenever a court is of the view that the principles laid down in *Kienapple* should be applied, the court should enter a stay of proceedings, in the stead of entering the acquittal.

This way of proceeding has two advantages. First, it avoids situations such as that which we are facing in the present case where a Court of Appeal is being ordered to reconsider an acquittal though no appeal was taken from that decision, and understandably so. But, sec-

157. *Ibid.*, at 66. See *R. v. Hilson*, [1958] O.R. 665, 28 C.R. 262 at 266, 121 C.C.C. 139 (Ont. C.A.), wherein it was held that the ruling of one trial judge cannot bind another when a new trial has been ordered.

158. (1979), 46 C.C.C. (2d) 398 (B.C. C.A.).

159. *Ibid.*, at 413.

160. [1982] 2 S.C.R. 905.

only, the more fundamental reason is that, whilst a person should not be convicted more than once for essentially the same conduct, such a principle does not of necessity have as a corollary, when multiple charges are laid and a conviction entered on one of them, his right to acquittal on all others. A stay fully accommodates the policy consideration underlying this Court's decision in *Kienapple* whilst avoiding entering an acquittal notwithstanding proof beyond a reasonable doubt of conduct that constitutes guilt of a crime.¹⁶¹

In *R. v. Terlecki*,¹⁶² the accused was convicted of charges under sections 234 and 236 of the *Criminal Code*, arising from the same circumstances. However, the court entered a conviction only for the section 236 offence on the basis of the rule in *Kienapple*. On appeal against conviction for the section 236 offence the Alberta Court of Queen's Bench allowed the appeal and the conviction was quashed. The Crown subsequently appealed to the Court of Appeal arguing that the Court of Queen's Bench erred in law in failing to enter a conviction for the offence under section 234 after having set aside the conviction on the section 236 offence.

It was contended by the accused that the Court of Appeal could not, on appeal from disposition at trial on one count, alter the disposition at trial on another count which no appeal had been taken. The Court of Appeal responded in the following manner:

As a general rule that cannot be gainsaid. But the situation created by the rule in *Kienapple* affords a fit occasion for an exception to the general rule and s. 613(8) authorizes this suitable approach.¹⁶³

The Court further proposed that the proper procedural application of the *Kienapple* principle is as follows:

Therefore, unless there is reason to the contrary, the court should indicate whether the accused is guilty of both charges. If found guilty, then a conviction should be entered on the more serious charge and a conditional stay on the less serious charge. If both charges are of equal seriousness then a conviction should be entered on one and a conditional stay on the other. We say a conditional stay for the condition should be that the stay is only for the period that the charge on which the accused has been found guilty is finally disposed of on appeal or by the expiration of time for appeal. Ultimately if the conviction becomes final the accused should be entitled to a certificate of acquittal on the other charge.¹⁶⁴

The Court observed that it was understandable the Crown did not appeal in the present case as they had nothing to appeal, but suggested that,

... whenever possible the Crown should serve notice on the accused that if the accused succeeds on his appeal the Crown will seek to have a conviction entered on the count that has been stayed owing to the *Kienapple* rule. ... If the accused is not served with such a notice before the appeal it would be sufficient to serve him at the appeal hearing though he would then be entitled to an adjournment if he required it in order to prepare his argument as to why he should not have been found guilty on the charge which was stayed owing to the *Kienapple* rule.¹⁶⁵

161. *Ibid.*, at 910 of the judgment of Lamer J.

162. (unreported — Alberta Court of Appeal No. 14559 — March 1, 1983).

163. *Ibid.*, at 9.

164. *Ibid.*, at 10.

165. *Ibid.*, at 10. See *R. v. Boyer* (unreported — Alberta Court of Appeal — Jan. 18, 1982), wherein the accused was convicted of charges under both ss. 234 and 236 of the *Criminal Code*, arising out of the same circumstances, but a conviction was entered only on the charge under s. 236 owing to the *Kienapple* rule. On appeal to the Court of Queen's Bench the conviction was upheld. On further appeal to the Court of Appeal the conviction under s. 236 was quashed and the Court then entered a conviction for the charge under s. 234.

VI. Conclusion

It has been contended by one author¹⁶⁶ that there may be many instances wherein an accused might act once and, as a result thereof, have breached more than one provision of the *Criminal Code*. He proposed that, in the *Kienapple* decision, two of the elements necessary under the second count have become "*res Judicata*" in so far as "They are used up, leaving on count 2 only the third element dangling in the air." He further suggested that the acts of the accused,

... caused by his acting can only be used once — either for count one or for count two but not for both. Any acts not previously adjudicated remain, but, detached from the now adjudicated other acts, could not support a conviction.¹⁶⁷

In support of his analysis he provided the example of an individual convicted of an offence under section 234, for impaired driving, who has been simultaneously charged with an offence under section 236, arising out of the same incident. There is, therefore, only one act of driving which may be used up in either the first or second count, but not in both. If the fact of driving were used up in the offence under section 234 then the remaining element in section 236 of having a blood alcohol content in excess of the legal limit would be left "dangling" and would be unable to support a conviction by itself.

It is this author's contention that this suggested analysis of the *Kienapple* decision is inaccurate as it could not properly account for those decisions wherein the courts have convicted an accused of both driving while impaired and driving while disqualified, or dangerous driving and driving while having alcohol in the blood in excess of the legal limit, or hunting out of season and hunting at night, when each set of charges arose out of a single incident. Nor is it in keeping with the limitations and qualifications to the principle enunciated by Mr. Justice Laskin in the *Kienapple* decision, and previously set out in this discussion.

The majority decision in *Kienapple* articulated the proposition or principle that where an individual has committed a single act giving rise to two or more charges, and there is a verdict of guilty on the first count, and the same or substantially the same facts and relevant elements constitute the offence charged in the second count, and where any additional or "super-added" elements capable of distinguishing the second offence from the first are, in the particular fact situation, rendered irrelevant to a conviction, the situation invites the application of the rule prohibiting multiple convictions.

This interpretation is supported by reference to the judgment of Mr. Justice Laskin in *Kienapple*, wherein he observed that there is an "overlap" between the two offences in the sense that "one embraces the other" and where the "superadded" element of age in subsection 146(1) "does not operate to distinguish unlawful carnal knowledge from rape", and where the element of age has become "meaningless as a distinguishing feature"

166. Alan W. Mewett, "Nemo Bis Vexari" (1973-4), 16 *Crim. L.Q.* 382.

167. *Ibid.*, at 384.

then the rule precluding multiple convictions is applicable. Further support is found in the Supreme Court of Canada decision in *Côté v. The Queen*,¹⁶⁸ wherein the Court indicated that the fact there is a common ingredient in both offences is no reason to exclude or ignore what is actually the “criminal factor distinguishing one from the other.”