PROVINCE OF NOVA SCOTIA
COUNTY OF SHELBURNE SS

S.SB. 2662

IN THE COUNTY COURT
OF DISTRICT NUMBER TWO

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

SEAN CONNERY HERSEY

RESPONDENT

BEFORE: The Honourable Judge G. B. Freeman

PLACE HEARD: Shelburne, Nova Scotia

DATE HEARD: January 13, 1989.

COUNSEL: James Burrill, Esq. for the Appellant
Robert Forbes, Esq. for the Respondent

DECISION ON APPEAL

FREEMAN, C.C.J.

This is a crown appeal from a decision of His Honour Judge P.R. Woolaver that the plea of **autrefois acquit** was available to an accused on a charge under Section 258 (2) of the Motor Vehicle Act after he had been acquitted on a charge under Section 242 (4) (b) of the Criminal Code.

The facts are set forth in the Crown brief as follows:

> "The accused, Sean Connery Hersey, was originally charged in an information sworn to on the 28th day of April, 1988 that he, on or about the 23rd day of April 1988;
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> > "did unlawfully operate a motor vehicle in Canada while disqualified from doing so, contrary to Section 242 (4) (b) of the Criminal Code of Canada and amendments thereto."
>
> "On June 30, 1988 when the accused appeared in Provincial Court he faced an additional charge sworn to on the 21st day of June 1988 that he, on or about the 23rd day of April;
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> > "did drive while the privilege of obtaining a licence revoked contrary to Section 258(2) of the Motor Vehicle Act."
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> "The defence was not prepared to deal with that charge on June 30, 1988 and by motion the matters were set over to August 18, 1988.
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> On August 18, 1988 after His Honour Judge Woolaver ruled that the Crown must proceed firstly with the prosecution under Section 242 of the Criminal Code the Crown offered no evidence on that charge and the matter was accordingly dismissed.
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> Prior to proceeding with the trial under Section 258(2) of the Motor Vehicle Act the defence entered a plea of **autrefois acquit** and on October 14, 1988 after considering written arguments Judge Woolaver

allowed the plea of **autrefois acquit** saying:

> "It's the view of the Court that the plea of **autrefois acquit** ought to stand and prevail based on the test of the facts having substantial identity with the offence of which the accused was found not guilty by virtue of the previous acquittal".

The appeal is brought on the ground "that the learned Trial Judge erred in law in holding that the plea of **autrefois acquit** was available to the accused in this case.

I accept the following statement of the law as it appears in the Crown submission:

> "The special pleas of **autrefois convict** and **autrefois acquit** are based upon the Latin maxim "nemo debet bis vexari pro una et eaden causa". This maxim constitutes one of the basic doctrines of Criminal Law, namely, that no person shall be put in jeopardy twice for the same matter.
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> In determining the issue in this case the question to be resolved is whether or not the two charges deal with the same "matter".
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> "As alluded to in the brief filed on behalf of the accused at trial, the word "matter" has been interpreted to refer not to the facts supporting the charges, but to the similarity of the charges themselves. Authority for this proposition can be found in the case of **R. v. LeRoy** (1978), 7 C.R. 262 (N.S.S.C.A.D.) at page 265 where Mr. Justice MacDonald quotes with apparent approval the headnote to the case of **R. v. Lamontagne,** (1945) O.R. 606 (C.A.);
>
> > "The foundation of a plea of **autrefois convict** lies in the similarity of the offence of which the accused was previously convicted or in peril of being convicted and the offence with which he is presently charged, and not in the similarity of the facts which support the charges..."

In the case **R. v. Anthony** (1982), 52 N.S.R. (2d) 456 (N.S.S.C.A.D.) Mr. Justice MacDonald in speaking for the court stated that the special plea of **autrefois** is only available in special circumstances. At page 467 he said;

> "The plea of **autrefois** is applicable only where [(s. 537(a) and (b)] the charges are the same in whole or in part and where the accused on the former trial, if all proper admendments had been made that might have been made, might have been convicted of all the offences of which he may be convicted on the count to which the plea of **autrefois acquit** or **autrefois convict** is pleaded."

. . ."As Mr. Justice Robson said in the case of **R. v. Kissick** (1942), 78 C.C.C. 34 (Man. C.A.) at page 43 where the accused was charged under the Federal Excise Act of 1934 with possession of unlawfully manufactured liquor and on the same evidence under the Liquor Control Act of Manitoba for possession of such liquor;

> "...here are two authorities, each acting within it's own jurisdiction, taking cognizance of the same facts which violate the law of each. It cannot be said that an acquittal or conviction under one ousts the jurisdiction of the other or expiates the offence against it. Jurisdiction is not to be held to be exclusive according to the order of time in which proceedings are commenced and concluded. The facts may be the same, but the offence is against a different law of a different origin. Each law was passed by it's own enacting authority for it's own purpose within it"s own field".

"emphasis added"

In the **Anthony** case Macdonald, J.A. said:

> "The issue whether Mr. Anthony's driving violated Code s. 233(4) can hardly be said to have been decided by the Crown's withdrawal of the careless and imprudent driving charge."

In the present case the charge was not withdrawn. The Crown offered no evidence and the accused was acquitted. Madonald, J.A. also said:

> "I would but add that I have been unable to find any case supporting the contention that a special plea in bar of trial can prevail as between federal and provincial offences or that the defences of **res judicata** and **issue estoppel** apply in such circumstances."

Section 242 of the Code may be a bridge between jurisdictions for **res judicata** or **issue estoppel** if not for special pleas.

Section 242 (4) (b) is a follows:

> "Everyone who operates a motor vehicle, vessel or aircraft in Canada while he is disqualified from doing so...is guilty of an offence punishable on summary conviction."

The portion of Section 242 (5) relevant to that charge reads as follows:

> "For purposes of this section, 'disqualification' means...a disqualification or any other form of legal restriction of the right or privilege to operate a motor vehicle, vessel or aircraft imposed in the case of a motor vehicle under the law of a province in respect of a conviction of any offence referred to in subsection (1) or (2)."

The convictions referred to in ss. (1) or (2) are motor vehicle offences committed under the Criminal Code.

Section 258 (2) of the Motor Vehicle Act says:

> "A person shall not drive a motor vehicle while his license or privilege of obtaining a license is cancelled, revoked or suspended under this Act."

A license or the privilege of obtaining one can be cancelled, revoked or suspended under the Act for driving or other infractions not included in subsections (1) and (2) of s. 242 of the Code.

Ss. 242(4) and (5) may be unique among the provisions of the Criminal Code in that they are not free-standing, independent enactments but incorporate part of the laws of provinces passed for regulation of highway traffic. Their effect is to invoke the federal criminal-law-making power to give extra-provincial application to provincial disqualifications. If an alleged offence arises from a provincial disqualification included in the s. 242 definition and occurs within the province of disqualification a charge could be brought under either s. 242 or the equivalent provincial section, s. 258 (2) in the present case, and it is difficult to find a rationale for distinguishing two separate "matters" or delicts. The only distinction appears to lie in the Canada-wide scope of the Criminal Code.

The analysis in **O'Grady v. Sparling** (1960) S.C.R. 804; 128 C.C.C. 1; 3 C.R. 29 and the resulting line of cases related to separate but similar federal and provincial enactments for valid but different legislative purposes and has little bearing in the present situation. Here the issue is not separate federal and provincial enactments for valid federal and provincial purposes, but a provincial enactment that has been given federal application.

In reviewing what has been called the Kienapple principle (after Kienapple v. The Queen (1975) 1 S.C.R. 729)

in R. V. Prince (1986) 2 S.C.R. 480, Dickson, C.J.C. said:

> "...What was also new was an express recognition that the test for the application of the rule (against multiple convictions) had to be framed not in terms of whether the offences charged were the "same offences" (or "included offences"), but in terms of whether the same "cause", "matter" or "delict" was the foundation for both charges."

He held that for the principle to apply the offences must not only arise from the same act, but "there must be a relationship of sufficient proximity firstly as between the facts, and secondly as between the offences, which form the basis of two or more charges for which it is sought to invoke the rule against multiple convictions."

I have found that s. 242 (5) (b) infringes on s. 15 of the Charter of Rights in R. v. Buchanan (C.B.W. unreported) but that case has recently been overturned on appeal. An accused is in jeopardy when charged under section 242 (4).

Until evidence is heard on the charge under s. 258 (2) it cannot be determined whether the driving disqualification alleged against the accused occurred as a result of a Code violation or a provincial infraction. Therefore, it is not apparent on the face of the information that the offence with which the accused is charged is the same matter, cause or delict of which he was acquitted. If it appears from the evidence that the provincial disqualification was within the definition in s. 242 (5) the defence of **res judicata** or **issue estoppel** might have to be considered, but the plea of **autrefois acquit** is not available.

The special pleas of **autrefois acquit** and **autrefois convict** are governed by s. 537 of the Criminal Code:

> "537. (1) Where an issue on a plea of **autrefois acquit** or **autrefois convict** to a count is tried and it appears:

> (a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
>
> (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of **autrefois acquit** or **autrefois convict** is pleaded,
>
> the judge shall give judgment discharging the accused in respect of that count."

The gulf between provincial and federal jurisdictions is sufficiently wide that even if all proper amendments are made, a charge under s. 242 of the Criminal Code will not support a conviction under s. 258 of the Motor Vehicle Act and vice versa.

Accordingly, I allow the appeal and remit the matter to be heard by another Judge of the Provincial Court for trial of the issues.

JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER TWO

IN PROVINCIAL COURT

ON APPEAL FROM

COUNTY COURT DISTRICT NUMBER TWO

BETWEEN:

HER MAJESTY THE QUEEN, APPELLANT

VERSUS

SEAN CONNERY HERSEY, RESPONDENT

HEARD BEFORE: His Honour Judge P. R. Woolaver, J.P.C.

DATES HEARD: Plea: August 18th, 1988
Decision October 14th, 1988

PLACE HEARD: Shelburne, Nova Scotia

CHARGE: That at or near Clyde River, in the County of Shelburne, Nova Scotia, on or about the 23rd. day of April,1988 did drive while privilege of obtaining license revoked, contrary to Section 258 (2) of the Motor Vehicle Act.

COUNSEL: James Burrill, Esq., Prosecutor

Robert Forbes, Esq., Defence

CASE ON APPEAL