C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

To wit: C.H. 43387

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN, on the information of Colin Finley, Constable,

Respondent

- and -

DONALD KENNETH DEMPSEY,

Appellant

James M. O'Neil, Esq., for the appellant.
Adrian C. Reid, Esq., for the Attorney General of Nova Scotia.

1984, May 1, O Hearn, J.C.C.:- The defendant was charged in the one information with offences against ss.234 and 236 of the Criminal Code. The defendant, Mr. Dempsey, was driving his truck home when a mechanical defect caused it to go out of control and he collided with the side of a house. When his breath was submitted to a Breathalyzer test it indicated a blood-alcohol level of 160 milligrams of alcohol per 100 millilitres of blood, which is twice the statutory limit.

The defence consisted of evidence that the defendant had consumed only two pints and one draft glass of beer previous to the collision, that he was suffering from cirrhosis of the liver and chronic bronchitis and was taking medication. Dr. G. MacKenzie, called for the defence as an expert in pharmacology and toxicology, calculated that a person of Mr. Dempsey's weight and physical characteristics and with a normal metabolism would have had a blood alcohol concentration at the relevant time of 40 milligrams of alcohol per 100 millilitres of blood. He also testified, however, that cirrhosis of the liver tends to delay metabolism of alcohol in the blood, so that the reading could be as high

as 72 milligrams of alcohol per 100 millilitres of blood.

Dr. MacKenzie also testified that in cases of chronic bronchitis the interface between the area of the interior surface of the lungs profused by blood and the ventilating air would tend to be smaller than normal. This leads to the rational consequence that an air sample taken from the defendant might have a smaller alcoholic content than in the normal case. Dr. MacKenzie's evidence was to the effect that in any event the reading of 160 milligrams of alcohol per 100 millilitres of blood could not be attained on the basis of the facts from which he drew his conclusions.

These facts, of course, were either what he had been told by the defendant or what appeared in evidence and depended entirely upon the credibility of that evidence.

The learned trial judge must have rejected the evidence because he convicted the defendant of an offence under s.236, and in accordance with the practice laid down by the late Chief Justice in *Loyer*, [1978] 2 S.C.R. 631, 3 C.R. (3d) 105, 40 C.C.C. (2d) 291, 21 N.R. 181, 85 D.L.R. (3d) 101, he dismissed the other count upon the principles of *Kienapple* (1974), 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, S.C.C.

It is at least doubtful that *Kienapple, supra*, applies to counts laid under ss. 234 and 236 based on the same facts. Each offence as described in the enactment contains elements that are not necessarily present in the other. Thus in cases under s.234 it is not necessary although quite usual that the defendant had a blood-alcohol level exceeding the statutory limit, but under s.236 the defendant may have had a reading exceeding the statutory limit without necessarily having been impaired in his ability to drive a motor vehicle by alcohol or a drug. Where separate delicts are committed on the basis of the same set of facts, it would

appear more reasonable to enter convictions on both, and take that into account in sentencing. This, of course, does not apply where one offence is necessarily involved in the commission of the other, as in the case of common assault and assault causing actual bodily harm.

There was obviously evidence upon which the learned trial could convict, and he just as obviously rejected the credibility of the witnesses with respect to the quantum of alcohol consumed. In summing up, however, the trial judge made a serious verbal error in the test he applied. He said (Tr. 65):

> But on the first count, following the issue throughout, and having regard to the *Rafuse* case, the Defence has not shown me <u>on the balance of probabilities</u> that the reading was below point zero eight (.08) that the machine was that inaccurate or it wasn't point zero eight (.08) or below. (Emphasis added.)

This is a serious error, at least in words, because the only burden on the defence is to raise a reasonable doubt as to the accuracy of the Breathalyzer reading. Does this error require a new trial?

I have come to the conclusion that there was no miscarriage of justice here. The weight of the evidence against the defendant was quite strong, especially taking into account the description of his condition at and after the collision, which would indicate a considerable state of intoxication. Accordingly, the appeal will be dismissed with the usual order as to costs.

A Judge of the County Court of
District Number One