Inquiries of the Ministry

Mr. Speaker: Order. The hon. member must put his question.

Mr. Nickle: I will come to the question then, sir. This woman was ordered deported after 24 hours in Canada, despite the fact that the Vancouver health authorities examined her—

Some hon. Members: Order.

Mr. Nickle: —and gave a written report that an arrested area of tuberculosis gave no grounds for deportation. The question, sir, is this. On what grounds was she deported, and will her case be re-examined by the minister to ensure that no grave injustice may be done to this woman?

Hon. W. E. Harris (Minister of Citizenship and Immigration): The hon. member for Calgary South was kind enough to telephone my office a few moments before we came into the house, and I have had an opportunity of getting a brief report from the department, as well as reading the newspaper clipping he sent me.

The facts are these. This mother did arrive in Vancouver and was deported because of a condition which was variously described as arrested tuberculosis, and by many similar medical terms. But the real facts, which do not appear in the newspaper report which I have read, are these. This lady applied in Australia for immigration to Canada. She was examined there. She was rejected because of her medical condition. She was informed that she ought to abandon her plans for coming to Canada. Despite that, she arrived without further notice on a ship in Vancouver and she was properly then rejected.

However, in view of the fact that her son is married and living in Canada I will have an examination made in the hope that we might have an opportunity to examine her again in Australia after a suitable interval to see if her condition has improved so that she may be admitted.

LABOUR CONDITIONS

INQUIRY AS TO NUMBER OF UNEMPLOYED ON JANUARY 10, 1954

On the orders of the day:

Mr. W. M. Hamilton (Notre Dame de Grace): Can the Minister of Labour give us the official figures of the number of unemployed in Canada on January 10, 1954?

Hon. Milton F. Gregg (Minister of Labour): Not today. I think those official figures will be released shortly.

Mr. Hamilton: I have a supplementary question. On what grounds does the government differ with the estimates recently made by two labour unions?

Mr. Gregg: I would refer my hon. friend to an attempt at explanation of that which I made in a statement not very long ago. If that is not complete, perhaps there will be an opportunity to discuss the matter at a later date.

CRIMINAL CODE

REVISION AND AMENDMENT OF EXISTING STATUTE

The house resumed, from Tuesday, January 19, consideration in committee of Bill No. 7, respecting the criminal law—Mr. Garson—Mr. Robinson (Simcoe East) in the chair.

On clause 120—*Public mischief.*

The Chairman: When the committee rose after its last sitting we were considering clause 120. Shall the clause carry?

Some hon. Members: Agreed.

Clause agreed to.

On clause 121—*Compounding indictable offence.*

Mr. Shaw: Would it be possible for the minister to move a little closer toward the centre of the chamber so that some of us may not feel so removed from him during the discussion? We would like to be closer to him.

Mr. Garson: I have no objection to doing that if you will give me a little time to move my impedimenta.

Clause agreed to.

On clause 122—*Corruptly taking reward for recovery of goods.*

Mr. Knowles: Had we dealt with clause 120 the last time or were we going to let it stand?

The Chairman: Clause 119 stood; 120 and 121 carried and we are now at 122.

Mr. Knowles: When was clause 120 carried, last time or just now?

Mr. Garson: Perhaps I had better put the information I have here on the record so we will know as we go along what sections have been allowed to stand and where we are, at the present time. According to my own records and those of the Clerk Assistant, the following clauses were allowed to stand: 16, 32, 33, 46, 47, 48, 50, 52, 57, 60, 61, 62, 64, 65, 66, 67, 68, 69, 88, 102, 116 and 119. All of the other clauses have been carried. When the committee opened today we were at clause

120, which was being considered when we last met. Clauses 120 and 121 were called and I think in the general confusion were passed. We are now at clause 122 unless there are some observations to be made with regard to clauses 120 and 121.

Mr. Knowles: Has the minister anything further to say with regard to the suggestion we were making with regard to clause 120 when the committee rose last time?

Mr. Garson: There was some discussion by the hon. member for Winnipeg North Centre and myself with regard to clause 120. If I understood him correctly he was afraid that a man innocent of any real criminal intent might perhaps be convicted under clause 120. I took the position that the use of the word "wilfully" indicated, as indeed the cases upon this offence show, that the crown in a prosecution must establish that the incorrect statement which the accused made was false to the knowledge of the accused and that he had made it deliberately or, as the section says, wilfully in order to mislead the police officers.

I indicated in my remarks when we were last discussing this matter that we do not think that there is any necessity to amend the wording of clause 120. All that we could do would be to spell it out and we think it is quite clear as it is. If the hon. member for Winnipeg North Centre is willing to accept it we are quite content to leave it.

Mr. Diefenbaker: How frequently have there been prosecutions under this section?

Mr. Garson: As is indicated on the opposite page, this is a new section.

Mr. Diefenbaker: Previously it was under the common law.

Mr. Garson: Yes. When we consulted the law officers of the provinces to find out what common law offences had been dealt with during the past sixty years we were told that sometimes they charged the offence of public mischief but in almost every case it was of the nature that we are discussing, that is, it was a case where false information had been given to the police of the commission of a non-existent crime which had caused them to go off on a wild goose chase. I would not say that there were frequent charges, but there have been a considerable number of them in most provinces.

Mr. Diefenbaker: I know of one or two. In one case the man who gave the statement was himself the murderer and as a result the law officers of the crown were going back and forth across the country for weeks on end. He made the statement in an apparent desire to assist them in locating and apprehending the murderer. This case happened in Saskatchewan. There was another case in Ontario some years ago, either in the county of Grey or in the county of Bruce. A similar state of affairs prevailed.

I am wondering whether the penalty is heavy enough. Five years is given as the maximum penalty. When an individual is endeavouring to saddle someone else with a murder, I do not think the penalty is heavy enough.

Mr. Garson: Especially if it is his own crime.

Mr. Diefenbaker: Yes. I feel that the penalty is rather too low. As I recall the case in the province of Ontario, the penalty that was imposed there under the common law was seven years. In the case to which I have referred in the province of Saskatchewan, which occurred about 20 or 25 years ago, the actual murderer assisted the crown for a considerable time in their search for the murderer as designated by the person who in fact had committed the homicide. It is interesting to note that after this man was convicted and sentenced to a term in the Prince Albert penitentiary the crown was unable to obtain sufficient evidence to convict him of the murder even though he confessed, his confession being ruled out. On leaving Canada he went to Great Britain and there committed another murder for which he was executed three or four years ago.

I would suggest to the minister that five years' imprisonment is not a very heavy penalty to impose on one who, in order to mislead the police, and to remove the cloud of suspicion that may rest upon him, takes it upon himself to give information of a totally false nature against another, and innocent, person. I do not very often suggest that penalties under the code should be increased, but I do believe this is one penalty the minister should bring under consideration.

Mr. Knowles: I do not wish to comment on the suggestion made by the hon. member for Prince Albert as far as increasing the penalty is concerned, but it seems to me that his suggestion underlines the objection I have taken to the wording of clause 120. Even as the clause now stands the five year penalty is rather severe if the person who is guilty of an infraction according to the clause is in the position of not knowing whether an offence has been committed.

Mr. Diefenbaker: Does not the word "wilfully" cover that?

Mr. Knowles: That is a point that lawyers and non-lawyers can argue about, but my understanding of the wording makes me feel

that the word "wilfully" does not fully cover the situation. Perhaps the best way to get my point across is to read the clause as it now stands, and for my purpose I will read subparagraph (c) of clause 120, and then I will read it as I think it should be worded.

Subparagraph (c) of clause 120 reads as follows:

> Every one who causes a peace officer to enter upon an investigation by wilfully
> (c) reporting that an offence has been committed when it has not been committed,
> is guilty of an indictable offence and is liable to imprisonment for five years.

It seems to me that even with the five year penalty, let alone the higher penalty suggested by the hon. member for Prince Albert, it would be better if the clause read as follows:

> Every one who causes a peace officer to enter upon an investigation by wilfully
> (c) reporting that an offence has been committed when he knows that it has not been committed, is guilty of an indictable offence and liable to imprisonment . . .

—for whatever period the law might suggest. Perhaps it all turns on the different interpretation we place upon the meaning of the word "wilfully". The minister seems to feel that what I am suggesting comes under the term "wilfully", but when such cases go to court it will not be the minister's definition of the word, or my own definition, but rather the definition which the court places upon it which will be the important one.

In explaining my suggestion with regard to clause 120, I chose subparagraph (c) because that was the one I thought would better enable me to spell out the idea I had in mind; but the same wording could be incorporated into subparagraph (b), although it might perhaps require more extensive wording.

The Chairman: Shall the clause carry?

Some hon. Members: Carried.

Mr. Diefenbaker: Would the minister not care to comment on the question of penalty?

Mr. Garson: The difficulty with regard to the penalty is this, that under the new code we are now considering we have adopted a certain number of penalties, five years, 10 years and so on, and in order to follow that general plan as applied to this particular case, and if we did not adhere to the penalty of five years, we would have to increase it to 10 years. I believe my hon. friend will agree that the cases in which the police are misled by a false statement to the effect that a crime has been committed when it has not been committed, as a rule do not have associated with them the almost unique circumstances of the case which he mentioned, when the person who was misleading the police was trying to do so with the distinct ulterior motive in mind of leading them on a false trail away from his own guilt. In the great majority of cases that element is not present, and I would think that when that element is not present five years is adequate in the case of a man who has misled the police. Five years in the penitentiary is quite some time out of a man's life, and for the majority of offences of this kind I would think that such a penalty would be quite adequate.

Mr. Diefenbaker: I realize the trend today is in favour of lower maximum sentences.

Mr. Garson: Yes, that is correct. We can give consideration to the hon. member's suggestion but I would be inclined to think we would probably come to the conclusion that five years is adequate under this section in relation to the people who are likely to be convicted under it.

The Chairman: Shall the clause carry?

Mr. MacInnis: Mr. Chairman, I would like to say something on this clause along the lines taken by the hon. member for Winnipeg North Centre. The clause reads:

> Every one who causes a peace officer to enter upon an investigation by wilfully . . .

But surely anyone who goes to a police officer and asks him to make an investigation does so wilfully, unless he does it under duress, which is hardly possible. As the hon. member for Winnipeg North Centre has pointed out, a person might do such a thing wilfully and yet not do it with any evil intent. If the Minister of Justice thought something had been done and he went to a police officer and said, "I believe something has been done and I think you should investigate it," and he had no evil intention in requesting such an investigation, he is still doing it wilfully, but I do not believe he should be punished for what he has done. I believe the hon. member for Winnipeg North Centre has an important point here. Like him, I am not conversant with legal terminology—

Mr. Knowles: That is to our advantage.

Mr. MacInnis: Well, it may be, but if you are in the clutches of the law it is better if you have a knowledge of the law. I believe an amendment to subparagraph (c) of clause 120, along the lines suggested by the hon. member for Winnipeg North Centre, should be considered.

Mr. Garson: Mr. Chairman, as I have already stated, it has been the law, as established by decisions in the courts, that in cases of this kind on a charge for a common law offence, the crown has to prove two ingredients, first, it has to prove that the statements which the accused made to the police officer

were false; and second, that the accused made them with the wilful intent to mislead. The essence of the offence is the misleading of the police.

Mr. Diefenbaker: Would the minister mention a couple of those cases he has in which the court has so held?

Mr. Garson: One is the one which my hon. friend has mentioned, that of Rex *v.* Leffler. Is that the one?

Mr. Diefenbaker: Yes.

Mr. MacInnis: If this "wilful" means "wilful intent to mislead", that settles the point; that is satisfactory as far as I am concerned. However, it would mean more to me if it were in the section.

Mr. Garson: I think the only solution to the question posed by my friends the hon. member for Winnipeg North Centre and the hon. member for Vancouver-Kingsway would be to spell this out to an extent which is not usual in a code.

Mr. Fulton: How about substituting the word "maliciously" for "wilfully"?

Mr. Garson: No. I do not think that would do it. What might be done would be to make it read as follows. When I give this wording my hon. friends will see the awkwardness which arises when one attempts to spell it out. We could make it read in this way:

> Every one who causes a peace officer to enter upon an investigation by wilfully . . .
>
> (c) reporting that an offence has been committed which has not been committed when he knows that it has not been committed or when he does not have reasonable grounds to believe that it has been committed.

It is true that this wording is awkward, but if we start to spell it out and do not finish the job, in my judgment it is much better to leave the clause as it now is. If we do finish the job by spelling it out to the extent which I have indicated, it sounds pretty awkward. In connection with every one of these sections—

Mr. Knowles: How about allowing it to stand?

Mr. Garson: —I think it is important that we try to evaluate and act upon every worth-while suggestion that we can get from every member of the house in order to produce as good a code as possible. Perhaps if we were to let this section stand, and if my hon. friends who have made this suggestion are sufficiently interested, I should be glad to confer with them and to try to produce a wording which would meet their approval. Then we could bring it back and see whether it met with the general approval of the committee.

Mr. Knowles: That procedure would be quite satisfactory, Mr. Chairman.

Clause 120 stands.

Clause 122 agreed to.

On clause 123—*Advertising reward and immunity.*

Mr. Shaw: Under subsection (a) I take it that two things must occur at one and the same time before an offence has been committed, namely that the reward has been offered and that immunity has been guaranteed. Am I correct in assuming that the mere guarantee of immunity in itself would not constitute an offence?

Mr. Garson: I should not like to say that the guarantee of immunity would not carry the penalty or constitute an offence. The principle of this clause is that of discouraging practices which may tend to the compounding of crimes between the person who is advertising and the person who has committed the crime. Of course my hon. friend is right in saying that if the crown makes a charge under section 123 (a), the crown must prove all of the ingredients of that charge as stated in the subsection. But it might be that if a person offered immunity, the other circumstances of the case were such that, although an offence could not be charged under this section, it could perhaps be charged under some other section of the code.

Mr. Shaw: May I ask one other question in connection with this matter? The section refers to advertisement. What is the situation if one were to have a letter printed in a newspaper and in that letter offered a reward and also offered immunity? Could the person be charged? The section states specifically that it must be an advertisement.

Mr. Garson: In order to support a charge under this section—in my view my hon. friend is quite right—it has to be an advertisement. If you are going to prove an offence under section 123 (a), you have to prove that the accused publicly advertised a reward and used words to indicate that no questions would be asked. You have to bring him right under that section.

Mr. Winch: It is just in view of the statement made by the minister that I rise at this moment. A few moments ago he stated that the reason the provision is in here is that you would be compounding a felony if you offered a reward with no questions

asked. I can understand that you would be doing so if something had been stolen; but how do you compound a felony if you offer a reward, with no questions asked, for the return of something that is lost?

Mr. Garson: I am glad that my hon. friend has raised this point. Perhaps the infirmity of my language has misled him. I did not mean to suggest—and I was wrong if I did so, but I do not think that I did—that an offence under this clause would be the crime of compounding a felony, but that this clause was in principle like the crime of compounding a felony. In my view the essence of this clause here is that the accused deals with a criminal to relieve him of the consequence of his crime if he will just give back what he has taken. I am not suggesting that this is compounding a felony but what I am suggesting is that the crime of compounding and this crime here both have the same element of saying, in effect, to the criminal, "It is true you may have stolen this, but if I can get my money back, then we will just forget about it". That is the element actually in compounding and I think it is quite clear that it is the element in this section here.

Mr. Cameron (Nanaimo): Would a felony not be committed in certain circumstances even though an article had only been lost? Suppose, for instance, I were to pick up a $100 bill out here in front of the parliament buildings and were to shove it in my pocket. Is that an offence?

Mr. Garson: If I understand my hon. friend correctly, he is quite right in saying that this clause relates just to the advertisement. If he will look at the words in the last line of the section he will see that this is a relatively minor offence. It is punishable only upon summary conviction. The purpose is to discourage this type of advertising. The man is just brought, in a summary manner, into the magistrates court and the penalty is not very severe. However, the principle is much the same, as in the much more serious offence of compounding.

Mr. Johnston (Bow River): This only takes place where advertising is concerned.

Mr. Garson: Yes.

Mr. Hansell: My question may appear to be a bit far-fetched, but would the minister care to comment on what would happen if a case of kidnapping were involved rather than stolen property. It occurs to me that, comparatively speaking, quite a bit of advertising of this sort is done in the case of kidnapping. A mother will advertise and say that no questions will be asked, which of course might be a natural thing to do. I know that the section uses the words "anything that has been stolen or lost", and perhaps kidnapping would not be involved here.

Mr. Garson: This has no relation to kidnapping at all.

Mr. Shaw: What is to be gained by having a section in which it is stated that it is an offence to do a certain thing through advertising when exactly the same thing can be done by simply putting a letter in the same newspaper? What is the reason for this clause if it is so easily circumvented? What value has it?

Mr. Fulton: No newspaper would accept such a letter.

Mr. Garson: I am afraid I do not grasp my hon. friend's meaning. As I understood him, he was referring to this lady writing a letter to the newspaper.

Mr. Shaw: I am not talking about what the hon. member for Macleod referred to. I originally brought up the question of there being no offence unless a reward and promise of immunity are contained in the advertisement in the newspaper, but the same thing can be done by means of a letter.

Mr. Garson: A letter in the paper?

Mr. Shaw: Yes.

Mr. Garson: The first question that would arise there would be as to what interpretation the magistrate was going to place upon the word "advertising."

Mr. Shaw: That is the point. Is there an interpretation?

Mr. Garson: I would think that the courts might interpret such a letter as advertising upon the ground that you do not have to pay for it in order for it to constitute advertising. But you will see the point here if you will look at paragraph (d). You will see that it is an offence to print or publish any advertisement referred to in paragraphs (a), (b) or (c). The primary purpose of the section as a whole is to prevent newspapers being used for this sort of thing by prohibiting people from making arrangements to have advertisements printed and also by prohibiting newspapers from publishing.

Mr. Hansell: What would be the effect of placing the responsibility and liability on the paper rather than on the person?

Mr. Garson: The responsibility is on the paper. "Every one who"—and then you have (a), (b), (c) and (d), and (d) is "prints or publishes any advertisements".

Clause agreed to.

Clause 124 agreed to.

On clause 125—*Escape.*

Mr. Regier: In the third line of subsection (c) appear the words "the proof of which lies upon him", and at the end of the section a penalty of two years is provided. In a country such as ours I can see that many situations may arise whereby a man may arrive two hours or a day late, and he may have considerable difficulty producing evidence. Is there a need for those words, "the proof of which lies upon him", in that particular section? I realize that no difficulty would be involved in an urban area because the minute the person failed to appear a warrant would be issued and he would be located. But Canada is a large country.

Mr. Garson: If my hon. friend will read the whole clause I think he will see that its meaning is pretty self-evident. It reads:

> Every one who . . .
> (c) having been charged with a criminal offence and being at large on recognizance fails, without lawful excuse, the proof of which lies upon him, to appear in accordance with the recognizance at the proper time and place for his preliminary inquiry, to stand his trial, to receive sentence or for the hearing of an appeal, as the case may be, is guilty of an indictable offence and is liable to imprisonment for two years.

This involves a man jumping his recognizance and going away. If he is caught he is guilty of this offence. I take it my hon. friend's objection is that the words "the proof of which lies upon him" involve a shifting of onus that is not fair to the accused. I see my hon. friend nodding his head in assent. If that is the point, then I would say that it is generally recognized in the law that it is not unreasonable or unfair to leave the proof upon the accused in a case like this where he is the only person who has the evidence that will discharge that onus. He is the only man who has the excuse, and if he has a lawful excuse—

Mr. Fulton: He is the only one who knows it.

Mr. Garson: Yes, he is the only one who knows it. There is no way at all that the crown can prove it. If he has an excuse all he has to do to meet the onus that is upon him is to say: "Well, Your Worship, I am sorry that I was late in turning up but the bus in which I was travelling broke down and I could not get any alternative transportation", or, "I had an airplane ticket and the planes were all grounded because of fog." This will clear him and it is no hardship to him to produce evidence like this which only he can adduce.

Mr. Fulton: That is the way this house is, quite often.

Mr. Garson: Cases of that sort arise frequently and the person involved, who is the only one who has the evidence, is asked to produce it in order to establish a lawful excuse.

Mr. MacInnis: I would agree that the hon. member for Burnaby-Coquitlam has not got a very good case here but I am glad he brought up the point because, as we go through the bill, I think we will find other cases where the onus of proof is on the accused and where it is not so well placed as in this instance. In this case something additional is given to the accused. He is already guilty of an offence but if he can prove a reason for his non-appearance then that mitigates the offence. While I would not agree that my hon. friend has anything in this particular case, I am glad he brought up the point.

Mr. Diefenbaker: I agree with the hon. member who has just taken his seat. As one looks over these amendments, and we will come to various onus sections a little later, one would almost conclude that a number of these new onus sections had their origin in the difficulty of crown counsel in establishing their cases with that ease that crown counsel sometimes like. That observation does not apply to this section, but as I see the situation it does apply to one or two others that we will be dealing with later. As far as this section is concerned, if that provision were not there I do not know what would happen to the accused. In other words, the crown can say to an accused: You were there and you should have been here; you are guilty. Then he has an opportunity to say: The reason I was not here was that I had a lawful excuse to be where I was. Certainly there is no onus placed on the accused in this section, although a reading of it would give that appearance.

Clause agreed to.

On clause 126—*Permitting escape.*

Mr. Ellis: There is one question I should like to ask on this clause. I presume this provision refers to a peace officer who allows a prisoner to escape. Is it necessary to prove any intent to allow the prisoner to escape? Say a policeman, through negligence, permits a prisoner to escape: is he liable under this clause?

Mr. Garson: I believe if the hon. member will read the wording of the provision he will see the answer to his question. Clause 126 reads:

Every one who
(a) Permits a person whom he has in lawful custody to escape, by failing to perform a legal duty,

In order to make the accused liable under that clause, the crown has to prove, not only that the prisoner was permitted to escape but that the escape was the result of the accused police officer, or whoever he might be, failing to perform a legal duty.

Mr. Ellis: Then, I gather it would be possible to prove negligence on the part of the policeman?

Mr. Garson: I should like to stick to the terms of the clause. It would be by his failure to perform his legal duty, and that would be the one point which the crown would have to prove before it could get a conviction.

Clause agreed to.

Clauses 127 to 129 inclusive agreed to.

On clause 130—*Public place.*

Mr. Cameron (Nanaimo): I should like to call to the minister's attention the definition of a "public place". It seems to me to be an extremely wide definition, and may very well affect the application of other sections of the act. I have been trying to think of some place that is not a public place within the terms of this definition, and I cannot think of one. I thought I had found it in this chamber, itself, but then I recalled that the public is occasionally invited in here. Perhaps I am reading it in a wrong manner, but it seems to me that any place to which the public has access as of right or of invitation, expressed or implied, is almost everywhere.

Mr. Garson: The purpose of this definition is, quite frankly, to overcome difficulties which have arisen as to whether stores, shops and other public places to which the public are invited by the owners, so that they can do business with them, are public places. I have argued myself, I must confess unsuccessfully, before the court of appeal of my own province, that an accused who was intoxicated in a country general store in the evening, although it was open at the time, was not intoxicated in a public place. This man worked on the railroad and was going to lose his seniority and his pension. There was not any question about his intoxication, and the only point upon which we could hope to have his conviction quashed was that this store was not a public place. The purpose of this clause is to put beyond any peradventure or argument what constitutes a public place for the purpose of part IV of the code. I believe it is a fair definition because it says:

"Public place" includes any place to which the public have access as of right or by invitation, express or implied;

Is it not true that such a place is, in fact, a public place? It is defined so there will not be any doubt about it.

Mr. Cameron (Nanaimo): The point is, if I had the temerity, I might invite you into my house. Would it then become a public place?

Mr. Garson: No; though I am a member of the public, I am not the public.

Mr. Diefenbaker: As the minister has said, this definition was to cover a case that took place in Saskatchewan, and which for years was the authority on the question of what was, in fact, a public place. As I recall, the case was Rex *v.* Benson, in 1928. I was counsel for the appellant in that case. The accused was charged with disorderly conduct in a public place, namely in a restaurant. He was convicted and we launched an appeal, and on appeal it was held that a restaurant was not a public place, in that the public did not have the inherent right of access to that place. This case was followed for many years, and resulted in many guilty persons being acquitted. Some years ago, I think around 1946, the difficulties of the prosecution for some 18 years were dissolved by an amendment that was introduced to cover the situation.

It actually means, as the minister has stated, that where a person goes into a place that is open to the public, that is now a public place. Prior to the amendment in 1946, a public place was a place where the public had an inherent right of access. I would be loath to see any change in the definition, if disorderly conduct is to be punished in this country.

Mr. Dupuis: Would the minister tell me if a private garage where I store my car and for which I pay rent would be considered as a public place?

Mr. Garson: I would not think so, because it is not a place to which the public have access as of right. They can go in, but they have no right to be there. Moreover, it is not a place to which you can give the public an invitation, express or implied. You would not be inviting the public to your private garage in the same way in which you would if you opened up a shop to which you impliedly invite the public to go in order that you might do business with them, or to which you would invite them expressly if you write them a circular letter saying, "Come down to our 50-cent sale".

Mr. Fulton: I should like to be clear on the question of whether or not there is a change in the definition of public place. I have the present code and the supplement before me, and it seems to me the new definition goes beyond the present one in that there is now included the possibility of an implied invitation. I am much less concerned about the express invitation, but the implied invitation does extend that definition of a public place rather beyond what it is now. I should like the minister to comment on that.

Mr. Garson: I doubt whether I have any comments in addition to the ones I have already expressed. I thought we might save time if I indicated right away that the new definition was inserted for the purpose I indicated. That is the answer, that it is considered, as the hon. member for Prince Albert has stated in a very useful contribution to the debate today, in the part of the code which deals with public morals and disorderly conduct, to be desirable not to have an unduly narrow definition of a public place.

Mr. Fulton: So, it does go beyond the present one?

Mr. Garson: Yes, it does. The hon. member has the present code there, and he can see it is changed.

Mr. Johnston (Bow River): The minister was pointing out that a public place is a place where the public is ordinarily invited, such as a clothing store, we will say. That is a public place, but does it cease to become a public place at six o'clock, the usual closing time, when the door is locked, or is it still considered a public place?

Mr. Garson: At six o'clock when the door is closed I would say that the invitation had been withdrawn. My difficulty in the case to which I referred was that this was a country general store, and they always stayed open in the evening. My task, which was an extremely difficult one, was to persuade the court that although it actually stayed open, in fact it was closed in law, but I did not succeed in persuading the court on this point.

Mr. Johnston (Bow River): In the minister's case it was supposed to be closed but was not. I am wondering—

Mr. Garson: No, it was not supposed to be closed; it always stayed open.

Mr. Johnston (Bow River): What I have in mind is a store such as a clothing store, or a grocery store, if you like. At six o'clock they lock the door, and then an offence is committed in that place. Is it then defined as a public place?

Mr. Garson: I would not think so, Mr. Chairman, because in most of these cases—this is not always so, but in most orderly communities there are municipal bylaws or other laws which say at what times a shop of that kind can remain open. Or, in the absence of such laws there may be a settled practice on the part of the proprietor to close his shop at six o'clock. The crown by the evidence that is available cannot establish that the place in question is a public place within the language of the section if it cannot prove that it is a place to which the public had access at that time. Well, if the public did not have access, because the door was closed, and the public were not there by invitation, because the door was locked and they had been excluded, and the public were not there by any implied invitation because the shop was actually closed—

Mr. Johnston (Bow River): It ceases to become a public place when the door is locked?

Mr. Garson: Yes, I would think so.

Mr. Power (St. John's West): Would the minister care to widen the definition of public place? "Place", to my mind, indicates some fixed portion of the surface of the globe, and I doubt whether this definition would include a moving vehicle.

Mr. Garson: Well, as we go on through the other clauses of this part of the code my hon. friend will see that in the case of which he speaks, the moving vehicle, if a person were disorderly there or committed an offence there, it might not be desirable to have them open to prosecution under this part of the code. In other words, if he will observe carefully as we go through this part IV of the code to see whether there is any other clause in which a reference is made to a public place which in his opinion should include a moving vehicle as being a public place in that clause, we might discuss then the point which he now raises.

Mr. Johnston (Bow River): Is this section the same as it was before, or is there a new interpretation?

Mr. Garson: No; as I indicated when I began my remarks in response to questions asked by the hon. member for Nanaimo and again in response to the hon. member for

Kamloops, there is a change in the wording. The wording in the present code is as follows:

"Public place" includes any open place to which the public have or are permitted to have access and any place of public resort, . . .

Mr. Ellis: I have one point. Would a piece of property, for example, a vacant lot, be considered a public place if it were trespassed upon, that is, if the people who were on the lot were there without the owner's permission? It is private property. Those who are on that property at that time are not there with the express permission of the owner.

Mr. Garson: No; I think not, because it would not be a place to which the public have access as of right.

Mr. Fulton: Or by invitation.

Mr. Garson: Or by invitation. My hon. friend says it is a place privately owned. I do not think it should be a public place, because if a gentleman or lady wishes on occasion to be disorderly on their own property and not disturbing others—

Mr. Fulton: There is a limitation to the present definition, because although it does seem to me the new one goes beyond the old one in its reference to implied invitation, yet, if the minister is correct, a vacant lot in or near a city, upon which in fact a trespass was committed by an individual going there without consent, would not now be regarded as a public place for the purposes of the act. I think that is a limitation on the present definition which says that a public place includes any open place to which the public have or are permitted to have access. Therefore if a vacant lot near a city is one which was not fenced and it was the custom of the people to cross there, to take a short-cut, and the owner never objected, never put up a fence and made no effort to keep them out, then it seems to me the definition of that property in the present code would be a public place. I rather doubt whether, under the new one, that is so, unless we get into this business of the quite complicated matter regarding implied invitation. You would have to hold that there was there that implied invitation merely by the absence of a fence, would you not, in order to hold it a public place under the new section?

Mr. Diefenbaker: Is not that situation covered by section 160 (1)? Section 160 reads:

Every one who
(a) not being in a dwelling house causes a disturbance in or near a public place,
(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

And so on:

is guilty of an offence . . .

The essence of the offence is not being in the public place. The essence of the offence is creating the disturbance.

Mr. Fulton: That is right.

Mr. Diefenbaker: If a disturbance were created on a vacant lot, so long as nobody was disturbed, there would be no offence. If there were a highway adjacent to the lot or a street adjacent to it where people ordinarily congregate, there would be no offence. You can howl to high heaven so long as nobody hears you. You can participate and make all the noise you may on a lot or in any other place provided there is nobody in the neighbourhood who actually overhears you, or is disturbed by what he sees or shocked by what he imagines.

Mr. Garson: Yes. In other words, as I indicated to the hon. member for St. John's West, the definition of public place here has to be read in conjunction with the sections in which that term occurs in the manner in which the hon. member for Prince Albert has just suggested.

Clause agreed to.

Clauses 131 to 133 inclusive agreed to.

On clause 134—*Instruction to jury.*

Mr. Diefenbaker: This section is really the incorporation of the rule of procedure that has been in effect throughout the years since 1870, whereby a jury is warned that it would not be safe to convict in the type of case referred to, and in particular rape, attempted rape, and the like. Will the minister say why it was considered necessary to incorporate this section in the code as actually substantive law?

It has been in force throughout the years as a necessary and requisite course to be followed. It has occurred to me as being rather anomalous that a judge tells a jury that it is not safe for them to convict, that it is dangerous. Today under the rule of procedure the judge usually says that it is dangerous to convict of rape or attempted rape on the uncorroborated evidence of the prosecutrix, and then ends up by saying that the jury is entitled to find the accused guilty if it is satisfied beyond reasonable doubt that the evidence is true.

Why was it considered necessary that such an anomalous rule of procedure be incorporated into the law? It was accepted by the courts that it was requisite, that it was necessary even though it was not part of the law.

Mr. Garson: My hon. friend's question is a very good and penetrating one, if I may say so, because it does seem on the face of it that there is no particular reason for incorporating in the code what has been a well-settled practice which judges have followed. My hon. friend will recall that in the case of rape, the judge was required to warn the jury that it was not safe to convict on the uncorroborated evidence of the female victim unless they were satisfied beyond a reasonable doubt that her evidence was true. Corroboration was not required in the case of rape but it was required in the case of carnal knowledge. We thought that there was no way in which we could justify the requirement of corroboration in the case of carnal knowledge when it was not required in the case of rape.

If my hon. friend will follow this as we go on he will see that what we have done here is to apply this section 134 to both rape and carnal knowledge and also remove the necessity for corroboration in the case of carnal knowledge. I think that with his experience in this branch of the law he will agree that that is proper, that if corroboration is not required in the case of rape it should not be required in the case of carnal knowledge.

Mr. Nowlan: The minister is quite right in saying that it was not required in the case of rape and it was in the case of carnal knowledge, but the courts generally had that in mind and I think they dealt with the situation on a fair basis. I am thinking of clause 142 covering incest, which involves an element of carnal knowledge. I am sure that if this had not been made statutory many judges would have drawn to the attention of the jury that it was dangerous to convict on the evidence.

I had a case last fall where it developed afterward that the girl had been threatened by her mother and made to give evidence against her father so he would be sent to the penitentiary and she could take on somebody else. The girl committed perjury and it was not too easy to break her down actually. The judge warned the jury that they should not convict on the evidence of that girl.

If you make it statutory, will we not find ourselves in a situation where the judge will look at section so and so and will say that under that section he has to give a warning? He will decide that this applies only to sections X, Y and Z, it does not apply to incest or to this particular case, and that the parliament of Canada must have decided that a warning should not be given in that particular case.

Although I follow the reasoning of the minister I think that unless it is provided for in other ways we may be creating an injustice by freezing it by statute instead of leaving it to the jurisdiction of the court as it has been heretofore.

Mr. Diefenbaker: The hon. gentleman has raised a very pertinent point there and perhaps the minister would be able to explain.

Mr. Garson: I do not think I can give any further explanation than what I have given already.

Mr. Nowlan: What would happen under clause 142, the incest section, if that is not included in the statutory provision?

Mr. Garson: If my hon. friend is of the opinion that 142 should be included, it would be a simple matter to add the figures "142" to clause 134. Will my hon. friend not agree that in all cases of the character of those we have been discussing, where the nature of the offence indicates an absence of witnesses as a rule and where therefore the accused is in a very awkward position indeed if the lady in the case has any reason to try to point to him untruthfully as the guilty person, in such a case it is her evidence against his evidence? The royal commission, the Department of Justice, the other place and the committee of this house which examined this provision during the last term of parliament all felt that by their approval of this clause 134 in all these cases, rape and carnal knowledge alike, the practice as indicated in 134 should be uniform, and that there should not be one practice for carnal knowledge and another one for rape.

If my hon. friend thinks that this provision should apply also to incest, perhaps when we come to clause 142 dealing with incest we could revert to 134 and consider including incest among the offences covered by clause 134. In my opinion, however, incest is in a somewhat different category because those who are concerned are bound together by familial connections and it would seem less likely that the accused would be falsely charged.

Mr. Nowlan: That is the very reason why I brought up this point. My experience may have been unfortunate, but I happen to be mixed up in three defences of that charge. One does not want to even suggest that there might be extenuating circumstances; but, as the minister said a moment ago, there are opportunities for pressure to be exerted in a family. As I say, I have seen a case where through intimidation a little girl went on the stand and gave evidence which was absolute perjury. Of course, this sort of thing happens in families of a rather poor type and where other elements enter into

the question. In one case the woman wanted to get a divorce; in the other case the woman wanted to send her husband to the penitentiary in order to get rid of him.

I feel quite strongly that it should be included in the provision because I am afraid that otherwise the courts will say that up to now it has been the practice. Within the last few months I have heard a judge tell a jury that they should not convict, that it was dangerous to do so. But I am afraid that with this provision the judge will say, "Under the old law I would have told you not to convict, but since the parliament of Canada has expressly taken out that section, you do what you like".

Mr. Diefenbaker: In support of what my hon. friend has said, may I direct the attention of the minister to the fact that this general rule applies to all sexual offences except those that require specific corroboration. In other words, it was a requisite for a judge to warn the jury of the fact that it was unsafe to convict, that they ought not to do so, but that if they registered a conviction, the conviction was a proper one. Parliament, having chosen to apply this general principle to clauses 136 and 137, and subsections 1 and 2 of section 138, would not a judge be justified in concluding that thereby parliament in its wisdom had decided, in the case of offences covered by section 142, that such a direction was unnecessary?

I feel the department should have given consideration to the point raised, because unless consideration is given by parliament we will find ourselves in a position where the court in one province will have decided that a warning is necessary, and the courts in other provinces will decide the warning is not necessary, and before the question is determined it will finally have to go to the Supreme Court of Canada.

If we want to preserve the benefit of the rule which experience has shown is necessary in order to protect an accused who is innocent from being convicted by those who by design invent a story, which is simple to invent and difficult to rebut, surely we do not want to remove that protection which the accused who is innocent has under the rule of practice in effect today.

The Minister of Justice says, "Well, the commission did not refer to that and it was not referred to in the examination made by a committee of this house or the committee of the other place". That may be so, but it is in circumstances such as that that lawsuits are created, and certainly I do not believe parliament intends to take away that element of protection against the kind of unfounded charges frequently to be found in families when wives decide that they wish to dissociate themselves from their husbands, and, as a result of direct or indirect influence, children in that family develop antipathy toward their fathers which ultimately finds them making allegations which they swear to but which later on they regret.

I feel the minister might give consideration to the point raised by my hon. friend, for certainly I would be loath, while not desiring in any way to defend individuals who commit these terrible offences, to allow the bulwarks of the law to be broken down and an innocent man convicted because of the absence of the warning which experience over 100 years under British law has shown to be necessary and which should be thrown around the accused.

Mr. Garson: We would be very glad to consider that. There is one difficulty of course. What we have been discussing are matters which include incest, which is dealt with in clause 142. I believe my hon. friend, upon reflection, will recall that incest, at least as between adults, differs from rape and some types of carnal knowledge in that it implies consent upon the part of both parties and therefore the lady in the case, who is giving evidence against the gentleman, will be an accomplice, because in most cases the offence of incest could not be committed without her voluntary participation. The general rule would then apply that evidence of an accomplice could not be used unless it was corroborated. I think that is one of the difficulties.

Mr. Nowlan: But surely the minister is up against the same thing under clause 131, which makes statutory provisions with respect to evidence of an accomplice. It does not include incest, though I would be perfectly happy to see it included in clause 131.

Mr. Garson: Which subsection is my hon. friend referring to? Would it meet my hon. friend's wishes if clause 142 were included in clause 131?

Mr. Nowlan: I have not thought it all through, but I think it would be better that way. There is no doubt she would be an accomplice, if she were old enough, mature enough, or had reached the age of consent, but you would not have the protection you have now because it is barred under the other section.

Mr. Garson: I am quite agreeable to allowing this present section to stand. I know we would all want to have it in as good shape as possible, and if any other ideas

occur to either the hon. member for Prince Albert or the hon. member for Digby-Annapolis-Kings, and they will be good enough to pass them on to me, I shall be glad to have them. I believe if incest is taken care of in clause 134, that clause will then be adequate.

The Chairman: Shall clause 134 stand?

Some hon. Members: Stand.

Clause stands.

On clause 135—*Rape.*

Mr. Nesbitt: Mr. Chairman, the remarks I am about to make regarding this clause also apply to clauses 136 to 149 inclusive. The minister is planning to set up a royal commission to study the question of insanity, and my suggestion, which I have discussed with many other hon. members in this house, is that this same royal commission might very well make a study of the various sexual offences covered in clauses 135 to 149. My reason for making this suggestion is that when persons accused of such sexual offences come up before either the police court, the county court, or the Supreme Court of Canada, they invariably present a great problem to law enforcement officers and judges in regard to sentence.

I have had some little experience in this matter, having been connected with them in the past as a crown attorney, and repeatedly, every time anyone is charged with any of these unpleasant sexual offences, the defence has been submitted that they cannot help what they are doing; that they are really nice people who have this aberration and they cannot control themselves. I know quite well that many judges and magistrates are loath to use extreme penalties when they feel the person before them may be sick in some way. On the other hand, many other judges will, to use the vernacular, go to town on them and mete out a very heavy sentence.

I do not believe there are many hon. members in this house who know anything about this subject. It is a matter which only doctors and psychiatrists know anything about, if they do, and I believe all these clauses should be referred to this royal commission.

The royal commission would of necessity be composed of the same people, but if they are looking into the matter of insanity I believe they should at the same time look into these sexual offences which concern people who are mostly emotionally unbalanced or emotionally unstable.

I believe it would be of considerable assistance to us if we knew more about these offences. These clauses as they now stand were taken mostly from the old code which derived originally from the old ecclesiastic code of the Middle Ages.

According to reports we read in newspapers and periodicals, these sexual offences are being given a great deal of study, and it seems to me that this whole matter ought to be considered by this royal commission because we would then have more knowledge of the facts than any hon. member now possesses. These offences, which we sometimes read about in newspapers and periodicals, occur much more frequently than many hon. members are aware, and anyone who has ever been connected with law enforcement at one stage or another will agree that a great many of these offences are hushed up, or something of that nature, and do not even appear in the press. For that reason, and because of the rather offensive nature of most of these offences, I think that we ought to have a little bit clearer knowledge of what should be done about the matter. Should these people have more severe penalties in order to put them out of circulation? I fully realize that at the end of the code there is a new section which calls for preventive detention for people of this nature. But on the other hand, if these people can receive some type of medical treatment which might prevent them from committing offences like this in the future, should such treatment be prescribed by law? If they can be cured—it may not be possible; I do not know—should that course not be followed? I think the matter ought to be looked into by this royal commission. I was wondering whether the minister would take it under consideration?

Mr. Garson: I think my hon. friend's remarks might be more pertinent when we get to the section towards the latter part of the code—if I remember rightly it is section 661—which deals with criminal sexual psychopaths. From his experience I think he will agree with me that many of the cases of rape do not present any evidence at all of insanity. The accused are not criminal sexual psychopaths. They are just rapists or criminals in the ordinary sense. When we set up a royal commission to consider insanity as a defence to a charge for criminal responsibility, I would take it that we are not confining it to charges involving criminal responsibility for any specific crime but that it is criminal responsibility generally, and would include particularly charges of the nature of the one he has described. They are sexual in nature but of such a character that there is indication of more than normal sexual excess. It is excess to the point of insanity. While I think the commission would

do it in any event, it would be quite worth while to follow his suggestion to make sure that the commission will consider insanity as a defence to criminal responsibility for sexual offences and in relation to sexual offences.

Mr. Winch: I completely agree with the suggestion that this entire section could very beneficially be referred for study to a royal commission or to one of the commissions or committees that have already been established. I sincerely hope that the minister will give some more thought to this matter and see whether he could not possibly do that at this time. I do not think that a great many changes have been made, and that fact at least leads me to the belief that perhaps all the thought that should be given to this most serious problem has not yet been given to it. However, in dealing in particular with section 135, as it may be a long time before we again see the Criminal Code up for amendment, I feel that we should have a thorough knowledge of each section and that, if we have any doubts, we should ask the minister to explain. I have one with respect to section 135, and I may tell the minister that I am not being facetious. The section reads:

> 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 or fear of bodily harm. . . .

That is rape, according to the section, and the man is liable to imprisonment for life and to be whipped. May I say, Mr. Chairman—and through you to the minister—that it is rape if a man holds a gun or a knife on a woman and demands and takes sexual relations. What is it if a female holds a knife or a gun on a man and demands sexual relations? Is that also rape? If so, how is it covered? I do not see how it is covered under section 135.

I said, Mr. Chairman, that I was not being facetious, and I am not. I am very serious. I have never heard of any such incident in Canada but in the United States, within the past 12 months, there has been case after case—and in the courts the matter has come up—where a young man in a car stopped and picked up girls. I am thinking of two cases now, one where two girls were hitchhiking and one where there were three girls. One of the girls drew a gun, held the gun on him and said, "Sexual relations or we blow your head off". Those are matters of fact and of record. Is that rape? I think it is a question that should be raised here and one on which we should have some information, namely as to whether it is rape on one side and is not rape on the other. If we had—and I hope we never shall—any such crime in Canada, how would it be handled? I do not see how it could be handled under the sexual offence sections from section 135 on, because all the reference is to a male and not a female. Would the minister comment on that matter?

Mr. Garson: I can quite appreciate the fact that my hon. friend is not facetious in the matter at all. However, I must say that I have reached the years of discretion in Canada without ever having heard of such a case as this until this very minute.

An hon. Member: Oh, that kind of case is restricted to British Columbia.

Mr. Garson: I did not think this type of case had occurred in Canada. I understood the ones referred to were in the United States.

Mr. Winch: I said I did not know of any such cases in Canada, but there have been numerous newspaper reports of such cases in the United States.

Mr. Garson: If we had a case of that kind in Canada I think we might well consider amending our code. But in the meanwhile, of course, the ladies, if they had been in Canada, or doubtless even in the United States, could only have been convicted of rape if their pointing of a gun was sufficient to convince the man in the case that the benefit of sexual intercourse was the lesser of two evils; and it would not be until the intercourse itself had taken place that the offence of rape would have been committed. If it were committed and the male victim, who under the circumstances could be forgiven for not being too gallant in the matter, went and informed the police, I should think there are other sections under our code which could be invoked. For instance, the use of firearms to intimidate in that way would be an aggravated assault; and I would think that if not rape, some other offence could be charged and could be proven and that probably after the charge had been proven the court would have considerable latitude with regard to punishment for that offence. Thus if the court took quite a dark view of what had happened—and I must say that I would not blame it if it did—it could impose a fairly stiff penalty upon the accused ladies.

Mr. Knowles: Ladies?

Mr. Cameron (Nanaimo): Mr. Chairman, I would suggest that, biologically, it is possible for the male to be seduced but not for him to be raped. However, to deal with the question raised by the hon. member for Oxford, I should like to quote from a book that I happened to be reading just now and which

bears on this particular point. I might say to the minister that its main thesis is the deplorable tendency of centralized government to attract potential delinquents to positions of power. This is the paragraph that I think has a bearing on this suggestion:

> Since the advent of penal psychiatry, punishment as a means of dealing with delinquents has come to exist at two levels. On one hand we have the attempt to rationalize existing legal and administrative penal methods: on the other, the prisons and the courts as they are. The attempts to apply science to the prevention and cure of delinquency, so long as they are institutional and official attempts, have to be ingrafted on a system which assumes that social misconduct is the outcome of deliberate and malicious choice, and that such choice is best deterred or altered by confinement in the company of other delinquents, under conditions of squalor and idleness, and under a discipline designed to undermine self-respect and sociality.

I suggest that this broad criticism of our method of handling criminals is particularly applicable to these cases now under discussion and that we might well consider the suggestion of the hon. member for Oxford and refer the matter to the royal commission which is to deal with insanity and psychological imbalance.

Clause agreed to.

On clause 136—*Punishment for rape.*

Mr. Shaw: Is it proper for us to proceed with these sections that involve whipping? Was that not to be the subject of special consideration?

Mr. Garson: Yes, it is proper. With respect to all those matters that are to be considered by the joint committee of the house and the other place on the one hand, including corporal punishment, and, on the other hand, with respect to insanity as a defence to a charge involving criminal responsibility which is to be considered by the royal commission, the understanding was that we would pass the sections in the present code in order that we might have laws in effect regarding these offences. When the reports of these other bodies become available the government will take the responsibility of introducing legislation to reflect those reports or, if it does not think fit to do so, it will be open to members of the opposition to do so.

Mr. Knowles: I believe this point has been answered before but I am not too sure. Is it clear that these punishments are maximum punishments and that it is not necessary for the court to impose the full punishment in all cases?

Mr. Garson: That is quite right. That is quite an important point. They are all maximum punishments and there is no minimum so that the court has very wide discretion in all these cases.

Mr. Knowles: And where two punishments are named, for example, imprisonment for life and whipping, it is within the competence of the court to impose one without the other? The word "and" does not require that the punishment shall include both?

Mr. Garson: They are liable to either or both.

Mr. Johnston (Bow River): Should the word "and" not be "or"? I can see that the word "liable" leaves it to the discretion of the court, but from the way the clause is worded it does seem to me that once a life sentence is imposed it automatically carries whipping with it. The conjunction "and" certainly indicates that the court has no option.

Mr. Garson: No, I think this is the proper interpretation. They are liable to life imprisonment and they are liable to be whipped, but that liability is governed by the discretion of the court and the court can impose either life imprisonment or whipping or both.

Mr. Knowles: To come back to the other point raised a moment ago, it is understood that the committee in agreeing to these sections involving whipping is not really enacting these provisions in the normal sense. We are just carrying forward what is now the case subject to the report of the committee. Perhaps I might qualify that to some extent. Imprisonment and whipping actually represent a reduction in the punishment from what previously was in the code.

Mr. Garson: Yes. I spelled it all out very carefully when I moved second reading of the bill, and it is all on the record. I said that we would pass these sections, and then I outlined the responsibility that the government was taking in relation to the reports of the joint committee and the royal commission. My hon. friend will see the whole thing set out there *in extenso.*

Mr. Ellis: Would it not be more convenient to allow these sections to stand?

Mr. Garson: No. I explained that before but probably I had better do so again. When we are bringing in a consolidated code we have to repeal the existing code in order to put the new one into effect. We cannot have them both in effect and—

Mr. Knowles: You do not like leaving a vacuum.

Mr. Garson: No—if we do not continue these sections involving corporal punishment,

capital punishment, lotteries and insanity in the new code after we shall have repealed the old, we shall have a lacuna. There will be a gap there. The understanding on this point was all spelled out very carefully on second reading of the bill. It was understood that we would pass Bill No. 7, including the sections dealing with these subject matters, upon the understanding that the government would bring in amending legislation based upon the reports of the royal commission and the joint committee in accordance with their recommendations and if those recommendations carry the judgment of the government. It was also understood that if we did not we would expedite consideration by the House of Commons of any legislation which members of the opposition might wish to introduce to carry these recommendations into effect.

Mr. Fulton: Or private members on the government side.

Mr. Hansell: May I ask the minister whether any particular consideration has been given under this section to the age of the person against whom the offence is committed. This section simply lumps together all those who commit the offence and says that anyone who commits rape is guilty of an indictable offence and is liable to be whipped. What I have in mind is that there have been cases of the offence having been committed against children three or four years old.

An hon. Member: Clause 138.

Mr. Hansell: My point is that if the offence is committed against a child up to five or six years of age, an age where the child cannot be said to be in any way accountable, the offence to my mind is serious enough to involve hanging. Has the minister any comment to make? Would he care to increase the penalty for that particular crime?

Mr. Garson: Under the present code, rape as an offence carries the penalty of death. I believe I am right in saying that in the whole history of this country there has been only one case in which a sentence of death was imposed, and in that case the sentence was commuted.

Mr. Knowles: When was that?

Mr. Garson: Oh, it is many years ago.

Mr. Knowles: In the last century?

Mr. Garson: I think it was before the turn of the century. The sentence of death for rape has never been imposed and carried out at any time in the past no matter how grievous the circumstances were. For that reason we thought it would be better, when that sentence was not being imposed and carried out, to reflect the actual facts in the code by simply making the penalty imprisonment for life.

I offer this only as the opinion of one quite unqualified to speak, but I would think that where the offence of rape had been committed on a child of five years of age, that very fact in itself would be evidence of serious abnormality or aberration in the accused.

Mr. MacInnis: I am in agreement with the hon. member for Macleod that crimes such as he has mentioned, committed against a young person, are heinous crimes; but I believe that the purpose of all our laws is to try to prevent crime and provide a just punishment for certain crimes. My reading on matters of this kind leads me to understand that if you impose the death penalty, it is really an incitement to murder as well as rape. A person would say, "I have gone this far, and if the child lives she can inform on me." The thing to do, then, is to see that she does not live. While I agree wholeheartedly with the hon. member for Macleod as to the heinous nature of the offence, I think we should be careful we do not do something which would incite a still worse offence.

Clause agreed to.

Clause 137 agreed to.

On clause 138—*Sexual intercourse with female under fourteen.*

Mr. Fulton: I should like to raise a point which is involved also in the consideration of clauses 143 and 145. When one reads the new clause 138, and compares it with the old section 301; when one reads the new clause 143 and compares it with the old section 211, and when one reads the new clause 145 and compares it with the old section 213, it will be seen that in all three clauses there is what I think is called the equality of blame provision. I am reading from section 301, which is now clause 138:

> On the trial of any offence against subsection 2 of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

In other words, when the female party to the act which is the subject matter of the charge may be equally to blame with the male party to the act, then that provision covers it. I notice the provision is carried forward in clauses 138, 145 and 143. If the minister feels strongly about the matter I am prepared to wait until we get to clause 143, but in order to avoid further questions I wonder if he would say why it was kept here and dropped in the subsequent clauses. Was

there some feeling that the girl was less likely to be equally blameworthy in the latter case than she is in this one?

Mr. Garson: I think if the hon. member will raise the point as we get to it, it will be better. He has no objection to clause 138 in its present form, has he?

Mr. Fulton: I shall wait until we come to that particular point, until we get to clause 143.

Mr. Garson: Is the hon. member in agreement about clause 138?

Mr. Fulton: No, I have a question about it. In subclause 2 of clause 138 the age limit is 14 years or more, but under the age of 16, whereas in clause 143 the age limit is 16 but less than 18. The question might be put in this way. Why is it considered that the girl between 14 and 16 mentioned in clause 138 (2) is no more likely to be the prime mover in the performance of the act complained of than the girl between 16 and 18 mentioned in clause 143? In other words, why is not the age limit uniform?

Mr. Garson: Well, the explanation as given by the commission when the report came along to us from it was that a subclause 3 to clause 143, corresponding to subclause 3 of clause 138—

Mr. Fulton: I am speaking of subclause 2 of clause 138.

Mr. Garson: Subclause 3, that is the portion my hon. friend is speaking about, was dropped as being inconsistent with the offence of seduction since the essence of seduction is persuasion.

Mr. Fulton: I am sorry, but the minister has gone back to my first point, which I had agreed would stand until we came to clause 143. I am now on the point involved in clause 138, subclause 2. It will be seen that clause 138 (2) (c) makes the age in question between 14 and 16 years.

Mr. Garson: That is right.

Mr. Fulton: I am pointing out that in clause 143 the age is 16 to 18 years. Why is there a lower age for this offence than for the other one, because it seems to me that the girl is just as likely to be the prime mover in one as in the other. I do not see why the age limit should not be the same.

Mr. Garson: I am afraid I do not understand the point the hon. member is attempting to make. Clause 138 (2) mentions the age of the girl as 14 years, from 14 to 16, whereas clause 143 deals with female persons who are from 16 to 18. There are two different age groups.

Mr. Fulton: The female person is the same in both.

Mr. Garson: No. If the hon. member will look at clause 138 (2) he will see that in paragraph (c) it mentions a female person who is 14 years of age and more but under 16; that is she is in the age bracket 14 to 16. If you look at clause 143, you will see the female there involved is from 16 to 18, which is a different age bracket.

Mr. Fulton: I see that, but why is it not the same age bracket in both cases?

Mr. Garson: Well, because it is regarded, rightly or wrongly, by the authorities as being a worse offence to seduce a girl between 14 and 16 than a girl between 16 and 18. In the one case it is punishable by five years, and in the other case it is punishable by two years.

Mr. Nowlan: You do not get seduction until you get in the higher age brackets.

Mr. Garson: I think it is self-evident. It is a very different thing to seduce a youngster of say 14 years than it is to seduce a young lady of 18. There presumably is more sales resistance in the latter case.

Mr. Fulton: My point is that under clause 143 the age resistance limit is 16.

Mr. Garson: No, it is 16 years or more, but less than 18. It is 14 to 16 in one case, and 16 to 18 in the other.

Clause agreed to.

Clause 139 agreed to.

On clause 140—*Sexual intercourse with feeble-minded, etc.*

Mr. Hansell: I do not want to appear to be advocating increases in penalties, but the offence under this section to my mind is a very serious one. This section deals with offences against feeble-minded persons, and I am concerned not only with the person herself but with what might conceivably be the result of an offence of this kind, namely the bringing into existence of an imbecile child. I am just wondering whether the penalty is high enough. Has the minister given much consideration to that?

Mr. Garson: Well, I think my hon. friend has a point there. Of course these are cases that fall short of rape, but even they are serious offences. The present penalty is four years. We have increased the penalty. In doing so we had to decide whether we should increase it to the five-year bracket or move it up to ten. Rightly or wrongly—maybe we made a mistake—we thought five was enough.

if there is a strong opinion in the house that we should make it ten I would not oppose it, I must say.

Mr. Hansell: Make it ten; it would not be too long.

Mr. Garson: As the hon. member for Winnipeg North Centre said, these are all maximum penalties. Only once in a long while is the maximum penalty imposed, as a matter of fact. If you provided the ten-year penalty it would not necessarily follow that it would be imposed unless circumstances warranted it. If there is a general feeling that it should be ten years, I would not raise any objection at all.

Mr. Shaw: I have very much the same feeling as that expressed by the hon. member for Macleod. This is a most serious thing. Even though it falls short of rape, there is not much difference between the two, and the difference in those maximum penalties which are imposed under sections 136, 137 and 138 is too great. I for one would certainly urge the minister and the committee to give favourable consideration to the imposition of a ten-year maximum under this clause.

Mr. Garson: If either of the hon. members for Macleod or Red Deer would like to move that the penalty be increased I would certainly raise no objection; as a matter of fact I will support it. I think it is a point well taken.

Mr. Shaw: I shall gladly move that clause 140 be amended by deletion of the word "five" in line 26 and the substitution of the word "ten" therefor.

Mr. Enfield: Before this amendment passes I should like to say a word. First, under the old act the maximum penalty was four years. Do we know how often judges have imposed the maximum penalty under the old code? It might be helpful to know that. Second, does the making of the penalty longer or heavier create in the mind of a judge the implication that the crime is more serious? In other words, suppose we do make it ten; will we get any heavier sentences than those we have been getting in the past? It would be some help to know that.

Mr. Garson: I am afraid I could not give my hon. friend any reliable information. These cases are not reported in the law reports, unless some point of law is raised in connection with them. The prosecutions are all conducted by the provincial authorities. They would have the information within their possession and I could not pretend to give any accurate information.

[Mr. Garson.]

With deference, I do not think this is a case where we would need to be too much concerned with the point the hon. member has raised. I think that is a matter of opinion. My opinion is that the maximum penalty which is imposed by parliament is some indication to the judge as to how seriously parliament views the matter, and does influence him to some extent. But judges, being human beings, are affected in different ways by these provisions, and I cannot see that the increase of the penalty to ten years would do any great amount of harm in its effect upon the judge's discretion as to the seriousness of the crime. But it would give the judge a greater discretion in those cases where the crime committed was particularly heinous.

Mr. Nesbitt: I may be of a little assistance in this matter. Several years ago I had occasion to be prosecuting an offence of this nature and had to look up and try to find out what the usual penalties were. As I recall it, the average penalty handed out for this type of offence was between eighteen months and two years.

The Chairman: Is the committee ready for the question?

Mr. MacInnis: I believe that those who were charged with revising and consolidating the Criminal Code did give some considerable thought to the matter of penalties. Perhaps the Minister of Justice would not agree with me on this, but I believe the consensus is that they did revise many of the penalties upward. Where there was a change I believe more were revised upward than downward. After they have given their considered, and perhaps expert, opinion to this matter, I do not think we would be wise in changing it.

I do not believe that we can lessen crimes of this kind by increasing the sentences. The person who would be guilty of a crime of this kind would not be one who would be very likely to consider the law and decide just how far he could go without incurring a penalty. I would imagine that in cases of this kind the imbecility or the lack of normal mental equipment would not differ very much as between the two parties concerned, and that we would be merely punishing a person because nature had not given him the ability to understand right from wrong. I am very much opposed to increasing this penalty.

Mr. Shaw: May I point out two points that arise from the statement of the hon. member for Vancouver-Kingsway. In the first place, I recall that as members of the committee of this house reconsidering this

bill last spring, despite the fact that the bill had been in the hands of a royal commission and the other place we did make alterations in penalties. If that committee reflected any wisdom whatsoever in doing that, certainly the same wisdom would be reflected by this committee in doing the same thing.

Second, while I agree with my hon. friend that a person guilty of an offence of this kind would not likely give heed to the law prior to committing the offence, and it is also true that such a person may be suffering from a mental condition, yet this would be the best possible guarantee we could have of taking that person out of circulation for an extended period of time. I think we would thus be protecting the public from a recurrence of this kind of thing. I intend to bring this up later, but I want to say now that I am not too happy or satisfied with the facilities we have today for taking care of persons who have pronounced mental conditions and who indulge in crimes such as are referred to in these sections.

Mr. Winch: I think there should be some clarification as to what the minister intends by way of procedure. If the minister is going to take under consideration perhaps recommending that either the special committee or the royal commission make a study of this entire matter, then I do not think we should go ahead with any amendment because it may be changed after the report is received.

Mr. Garson: This is an important point which has been raised by the hon. member for Vancouver East. I do not think a matter of this kind would go to the royal commission. It is not the insanity of the accused that is involved, it is the insanity of the woman with whom he has had this sexual intercourse. He may be quite a prudent offender who feels that it is much easier to gain the consent of an imbecile than it is to take a chance by committing rape. He may do this as a matter of worldly wisdom, if that term in its worse sense may be applied. But any disposition we make of this clause will not be in any way affected by the deliberations of the royal commission, since it will be concerned with the insanity of the female victim whereas the commission will be considering the insanity of the accused.

Mr. Nowlan: I want to say that I agree entirely with what the hon. member for Vancouver-Kingsway has said. There are certain punishments outlined here, and I referred to some of them the other evening. Later on I hope to express my own opinion that they have been increased too severely. Under those circumstances I do not think I can vote for an increase in the penalty here.

I realize that when you read the section it sounds like a heinous offence, but these things do happen in rural communities and throughout Canada as a whole. I know this is not a new section, but who is going to determine whether there is feeble-mindedness, insanity or imbecility? I dare say there are some people who think that some of us here are feeble-minded, but we would hate to have that question determined by a stipendiary magistrate. In the older rural sections of this country there are communities where perhaps you might go in and look at the people and think possibly they were not too bright, but they probably think they are intellectual giants. Certainly there would be some who might be convicted under this section.

I think this is a pretty dangerous thing to apply. As the hon. member for Oxford has said, the usual sentence is apparently eighteen months to two years. After all, there are certain types of people who may be a little off mentally but who otherwise are physically normal. As I say, while this sounds like a very heinous offence I still think that five years is heavy enough as a maximum.

Mr. Ellis: How would you define feeble-minded, insane, idiot or imbecile? From a psychological standpoint we can measure the I.Q. of an individual and describe him as feeble-minded, insane, an idiot or an imbecile. Such designations are based on I.Q. tests. What is the legal standard? What is the measuring stick that is to be used to determine whether a person is feeble-minded, is insane, is an idiot or is an imbecile? What protection would an accused have with respect to being charged with this crime?

Mr. Garson: The hon. member for Oxford has had experience as a prosecutor and he might be able to answer that question better than I. I think he will agree with me that the accused does not need to worry too much about the points raised by the hon. member for Regina City, because in order to succeed on this charge the crown not only must prove that the accused has had sexual intercourse but that also the female was not his wife and was either feeble-minded, insane, an idiot or an imbecile. The court must be completely satisfied on this last point.

Not only must the court be satisfied, but if a conviction is registered against the accused and his counsel takes the case to the court of appeal the crown must satisfy the court of appeal that there was evidence before the

court on which the court could find that the lady in question was feeble-minded, insane, an idiot or an imbecile. The whole burden is upon the crown. Even where the lady in question was in fact an imbecile the crown may have a difficult time proving it.

Mr. Nesbitt: I can recall only one case where we were able to prove that the crown's chief witness was an imbecile. That was a case where the girl was 22 years old but was still playing with three-year-old girls.

Mr. Hansell: Those who have spoken in opposition to the amendment appear to believe that an increased penalty would necessarily be imposed, but that is not so. This would be just a maximum penalty, and its imposition would be the responsibility of the presiding judge. I do not think their argument holds good in that respect, but this would impress upon the judge that parliament considers the crime to be a serious one.

I am not allowed to discuss clause 142, but I would point out that the penalty in the case of incest between a brother and sister is a maximum of 14 years. In the case of a male being responsible for the crime he is also subject to whipping. The crime covered by clause 142 is very serious because it is realized that the offspring of blood relatives may be imbecilic.

The same thing could be said in connection with clause 140 which we are now discussing. It might be argued that a man who would take advantage of an imbecilic woman was himself not altogether sane, but that just does not follow. I knew of one case in my previous work where the man was perfectly sane, he knew exactly what he was doing, but it was advantageous for him to proceed because the woman was mentally deficient. I do not feel we are doing the accused any harm, and we would be strengthening the hands of the judge and strengthening the law by providing for a maximum penalty of ten years, even though it is not imposed.

Clause stands.

Progress reported.

PRIVATE BILLS

SECOND READINGS—SENATE BILLS

Mr. Deputy Speaker: Is it agreed that these divorce bills be taken in one motion?

Mr. Knowles: How many are there, Mr. Speaker?

Mr. Deputy Speaker: Nos. 199 to 249 inclusive. Fifty bills.

Mr. Knowles: Fifty-one, I believe.

Mr. Deputy Speaker: Is it agreed these bills be taken in one motion?

[Mr. Garson.]

Some hon. Members: Agreed.

Mr. John Hunter (Parkdale) moved that the following bills be read the second time:

Bill No. 199, for the relief of Lois Helen Kutzman Caplan.—Mr. Hunter.

Bill No. 200, for the relief of Fernand Constant Daemen.—Mr. Hunter.

Bill No. 201, for the relief of Mary Kazymerchyk Senyck.—Mr. Hunter.

Bill No. 202, for the relief of Rosalie Hetty Arbess Sofin.—Mr. Hunter.

Bill No. 203, for the relief of Lucille Lafortune Wilson.—Mr. Hunter.

Bill No. 204, for the relief of Wilfrid Cote. —Mr. Hunter.

Bill No. 205, for the relief of Janca Fani Pollak Schlesinger.—Mr. Hunter.

Bill No. 206, for the relief of Sadie Marie Ansingh Grosheintz.—Mr. Hunter.

Bill No. 207, for the relief of Douglas Morrison Meldrum.—Mr. Hunter.

Bill No. 208, for the relief of Alec Lenetsky.—Mr. Hunter.

Bill No. 209, for the relief of Dorothy Lilian Asbury Davies.—Mr. Hunter.

Bill No. 210, for the relief of Nicholas Krauchuke.—Mr. Hunter.

Bill No. 211, for the relief of Esther Kohn Rosner.—Mr. Hunter.

Bill No. 212, for the relief of Marguerite Jazzar Nassar.—Mr. Hunter.

Bill No. 213, for the relief of Leona Bobby Denberg Wiseman, otherwise known as Leona Bobby Denberg White.—Mr. Hunter.

Bill No. 214, for the relief of Marianne Roos Axelrad.—Mr. Hunter.

Bill No. 215, for the relief of Margaret Jaunzen Dishler.—Mr. Hunter.

Bill No. 216, for the relief of Pearl Witzling Socolow.—Mr. Hunter.

Bill No. 217, for the relief of Jennie Chun Readman.—Mr. Hunter.

Bill No. 218, for the relief of Gizella Szabo Herczeg.—Mr. Hunter.

Bill No. 219, for the relief of Lilija Hedviga Treimane Jursevskis.—Mr. Hunter.

Bill No. 220, for the relief of John Richard Maher.—Mr. Hunter.

Bill No. 221, for the relief of Elizabeth McDonald Jones Roy.—Mr. Hunter.

Bill No. 222, for the relief of Claire Viola Frechette Ainsworth.—Mr. Hunter.

Bill No. 223, for the relief of Margaret Reta Dodge Parsons.—Mr. Hunter.

Bill No. 224, for the relief of Estella Cluett Jensen.—Mr. Hunter.

Bill No. 225, for the relief of Angelina Natale Beaucaire.—Mr. Hunter.

Bill No. 226, for the relief of Dorothy Miller Osborough Davidson.—Mr. Hunter.

Bill No. 227, for the relief of Marie Rose Gisele Houde Dionne.—Mr. Hunter.

Bill No. 228, for the relief of Olga Pscheidt Arsenault.—Mr. Hunter.

Bill No. 229, for the relief of Edward Robinson Harris.—Mr. Hunter.

Bill No. 230, for the relief of Cathrine Pieternelle Wytenbroek Knight.—Mr. Hunter.

Bill No. 231, for the relief of Anton Bliziffer. —Mr. Hunter.

Bill No. 232, for the relief of Theodore Rolfsmeyer von Berzeviczy.—Mr. Hunter.

Bill No. 233, for the relief of Agnes Broo Hammond Bailey.—Mr. Hunter.

Bill No. 234, for the relief of Emma Antoinette Rachel Lauzon McDuff.—Mr. Hunter.

Bill No. 235, for the relief of Idella Adeline Sharpe Cutler.—Mr. Hunter.

Bill No. 236, for the relief of Walter Leonard Woodward.—Mr. Hunter.

Bill No. 237, for the relief of Marion Shirley Barsky Burg.—Mr. Hunter.

Bill No. 238, for the relief of Florence Elene Thom Ward.—Mr. Hunter.

Bill No. 239, for the relief of William Jean Paul Powroz.—Mr. Hunter.

Bill No. 240, for the relief of Lewis Swailes. —Mr. Hunter.

Bill No. 241, for the relief of Shirley Goodlin Myrovitch.—Mr. Hunter.

Bill No. 242, for the relief of Germaine Lafond Joyal.—Mr. Hunter.

Bill No. 243, for the relief of Kenneth Charles Overbury.—Mr. Hunter.

Bill No. 244, for the relief of Hazel Emily Louise Hunter Naud.—Mr. Hunter.

Bill No. 245, for the relief of Pearl Agnes Harding Potvin.—Mr. Hunter.

Bill No. 246, for the relief of Samuel Goldberg.—Mr. Hunter.

Bill No. 247, for the relief of Nancy Elizabeth Borden Sise.—Mr. Hunter.

Bill No. 248, for the relief of Audrey Madeline Crothers Walklate.—Mr. Hunter.

Bill No. 249, for the relief of Joyce Gowrie Kimber Kendler.—Mr. Hunter.

Motion agreed to on division and bills read the second time.

Mr. Deputy Speaker: Public and private bills having been disposed of, the house will resume the business interrupted at five o'clock.

CRIMINAL CODE

REVISION AND AMENDMENT OF EXISTING STATUTE

The house resumed consideration in committee of Bill No. 7, respecting the criminal law—Mr. Garson—Mr. Robinson (Simcoe East) in the chair.

On clause 140—*Sexual intercourse with feeble-minded, etc.*

The Chairman: The committee was considering clause 140. Shall the clause as amended carry?

Some hon. Members: Carried.

Some hon. Members: No.

The Chairman: Those in favour of the amendment will please rise.

Mr. Fulton: Why is the minister rising?

Mr. Garson: I said I would accept the amendment, and I am keeping my promise.

Mr. Shaw: Mr. Chairman, I would ask that the question be put again. There seems to be a great deal of confusion.

The Chairman: On clause 140 the hon. member for Red Deer moved that the word "five" in this clause be deleted and the word "ten" be substituted therefor.

Amendment negatived: Yeas, 25; nays, 31.

The Chairman: I declare the amendment lost. Shall the clause carry?

Some hon. Members: Carried.

Clause agreed to.

On clause 138—*Sexual intercourse with female under fourteen.*

Mr. Fulton: Mr. Chairman, may I with your permission and that of the committee ask leave to revert to section 138. On an earlier occasion the minister said if there was any point not covered he would have no objection to our reverting to any particular clause. What I omitted to cover is the change in the wording of subsection 3 which also applies to clause 145. The code as it at present stands, and I am reading now from subsection 3 of section 301, which is the section corresponding to this one, reads as follows:

> 3. On the trial of any offence against subsection two of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

That provision is to some extent relatively the same in the new subsection, except that it reads:

> (2) Where an accused is charged with an offence under paragraph (b) of subsection (1), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is wholly or chiefly to blame.

Under the present provisions of the code the trial judge instructs the jury that they may acquit if they are of the opinion that there is an equality of blame, whereas under

the proposed new section the court may find the accused not guilty if he is of that opinion. Why is discretion taken away from the jury and made a matter exclusively to be determined by the judge?

Mr. Garson: Mr. Chairman, I think the short answer to my hon. friend's question is that if the case is tried before a jury, in effect the court is the jury. My hon. friend is familiar with the principle that where the case is being tried before a jury, the jury are the judges of all questions of fact. This is a question of fact.

Mr. Fulton: But even so, why is the change in the wording necessary? In the present code it states explicitly that the trial judge may instruct the jury. That is the only way in which it can arise, and that leaves it clearly to the jury.

Mr. Garson: I am sure my hon. friend would agree that in cases of this kind the trial judge would certainly instruct as to the provisions of section 138 (3). He would instruct the jury in all points of law.

Mr. Fulton: The minister states that the court is the jury in this case. I would be a little bit worried about that. I would have thought that "court" would clearly refer to the judge and that the jury were not specifically concerned.

Mr. Garson: If the case is being tried by a jury then it is the jury that brings in the verdict, not the judge.

Mr. Montgomery: I feel doubtful about that. Is it not the case that the court passes sentence after the jury reaches a verdict? It seems to me that raises a bit of a question as to who is the court.

Mr. Fulton: Would it not be clearer if the word "jury" were inserted instead of "court"?

Mr. Garson: No, I do not think so. Depending upon the options which the accused may have taken during the course of the case against him, he may appear before a judge without a jury. Then the term in the section applies to the judge without a jury. Alternatively he may elect a trial by jury. In this case the term applies to the court in a jury trial. In such a case, upon all matters of fact the jury are supreme, but the judge would certainly instruct them, I would think, as to the bearing of this clause 138(3).

Mr. Fulton: I wonder whether I can make one more effort to suggest a change to the minister. Why not make it "the jury or in the case of trial without a jury, the judge, may find the accused not guilty"? I think that would make it perfectly clear.

[Mr. Fulton.]

Mr. Garson: I really do not think it is necessary. This has run a pretty long gauntlet—

Mr. Fulton: I beg the minister's pardon?

Mr. Garson: This legislation has been considered at great length by a number of very capable and experienced criminal lawyers including the members of the royal commission and the members of the committee of the other place, to say nothing of the members of the House of Commons committee. This is the first time this point has been raised. I think it is fairly well taken care of.

Mr. Fulton: I am sure one can find a number of points which are first-time ones, even after the very careful consideration I know the matter has been given. After very careful consideration in two other places, the house committee found a number of points. I am not setting myself up against any of those who have already considered this matter, but I am quite sure there are a number of points which could be raised for the first time and to which it is no answer to say that the matter has been considered by previous committees, and so on. If the minister can say the point was considered and was rejected as not having any validity, then I think possibly I would be disposed to say, "All right, I accept the previous opinion". But the mere answer that the point was never raised before does not seem to me to be a valid answer to what I think is an objection of some substance.

Mr. Diefenbaker: As you know, Mr. Chairman, this provision is applied within the terms of the statute which is in effect today. The judge, after charging the jury generally with regard to the component elements of the offence, concludes by directing them that even if they come to the conclusion that the physical act itself has been committed, the jury may then, even in that event, find the accused not guilty if the evidence does not show that the accused was wholly or chiefly to blame. I find it difficult to understand the reasons that impelled the commissioners to change that section, because no definition has been given for "court". If you look up the section dealing with definitions, you will find that there is no definition for "court".

Mr. Fulton: The jury is not the court. It is not part of the court at all.

Mr. Diefenbaker: It might be argued that the court consists of the judge and the jury but I think that would be going rather far because, in the ordinary usage of the language, the court refers to the presiding judge and the jury is always referred to as the jury. I would also point out this fact. This

clause would seem to indicate that the judge would have to make the finding. It reads:

> Where an accused is charged with an offence . . . the court may find the accused not guilty if it is of opinion that . . .

If you argue that the court means both the judge and the jury, then before the person could be acquitted the judge would have to say, "In my opinion the accused was not wholly or chiefly to blame" but you would also have to have the jury join with him in that finding if after having listened to all the evidence they were doubtful as to whether or not the accused was wholly or mainly to blame. I am afraid that the change in the wording of this clause is going to bring about a number of appeals. Certainly it was clear before. The section has withstood the test of years of experience and there is no doubt whatever as to its meaning:

> On the trial of any offence against paragraph (b) of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

While the section was permissive, actually in the course of years the matter became one of mandatory direction on the part of the judge. The question had to be left to the jury. Now we change all that. Although we say that the section, as far as its import is concerned, is not to be changed, we substitute a section that is subject to ambiguity.

I suggest that the minister might allow this section to stand because certainly, if you read the subsection literally, you must come to the conclusion that both elements of the court must come to the conclusion that the evidence does not show that the accused is wholly or chiefly to blame. It is difficult enough, on occasion, to get judges to properly charge the jury under the section as it now exists. If, in addition to the difficulties of today, you impose the necessity for the judge to be in agreement, you will raise difficulties that will cause many appeals.

As a matter of fact, it would almost seem that those who drafted this section had in mind the type of conclusion to which the judge must come before he makes his charge in connection with civil actions for malicious prosecution, for instance. Here the judge must come to certain conclusions, and having come to those conclusions he leaves questions for the jury to answer, after first having himself decided the absence of malice, the absence of reasonable and probable cause, or whatever the other considerations are that he must first decide have affirmatively been established.

On the face of the section as it now stands I think a serious ambiguity has been created. In my opinion it is a type of hurdle which we need not build by new draftsmanship when the old section has stood up throughout the years.

Mr. Garson: Mr. Chairman, I do not want to prolong the discussion upon this section. Out of the abundance of caution I have no objection to holding it for the purpose of checking on this point. But with respect, I must say that I cannot agree with my hon. friend, for this reason. If the court is one of a judge without a jury, I think they will agree with me that no difficulty arises. If the court is made up of a judge with a jury, then I do not know how any person could interpret this section as saying that any person other than the jury could find the accused guilty because, in a court with a jury, it is only the jury that can find an accused guilty.

Mr. Fulton: Wait a minute. Surely under certain circumstances a judge might withdraw a case from a jury and make a finding.

Mr. Garson: Oh, yes.

Mr. Fulton: So the judge does have the right to enter a verdict one way or the other in certain circumstances.

Mr. Diefenbaker: He has the right only to direct a verdict. He has no right to withdraw a case from the jury once it is in their custody.

Mr. Fulton: That may be so.

Mr. Garson: I would submit that what we have here is a carefully and intelligently drawn clause which applies both to courts composed of a judge and a jury and courts consisting of only a judge. The clause clearly covers both these cases. I think it is quite clear, but we want to get the very best code we can, and we are quite willing to consider any worth-while suggestion. The suggestion is that we should reopen the section now; but would my hon. friend accept our undertaking that we will give this suggestion the most careful consideration, and if it appears to have merit we will open the section and incorporate what he has suggested.

Mr. Fulton: I will take the minister's assurance on that point, but I should like to make this further observation. Although "court" is not defined in the bill, I do not see how a jury can be held to be part of a court. It seems to me it is the court and the jury, with the court being the judge and perhaps certain executive or administrative officers, but a jury is not a part of a court.

Mr. Garson: May I ask my hon. friend this question? How can a court in a jury trial find an accused guilty except by the verdict of the jury?

Mr. Fulton: The answer is obvious. If there is a jury the court has no right to make any such finding expect by the verdict of the jury.

Mr. Garson: Then may I ask a second question?

Mr. Fulton: If the minister will excuse me—

Mr. Garson: Where under the terms of this clause "a court may find the accused not guilty" how can a court find an accused not guilty without a jury's verdict to that effect?

Mr. Fulton: My point is that the court cannot find the accused not guilty. It is the jury that finds him not guilty. That is why, as the hon. member for Prince Albert said, this section is going to cause great difficulty in its application and interpretation.

Mr. Garson: I am quite willing to consider the suggestion. I think the clause is quite good the way it is, but if my hon. friend will accept my undertaking I will have our experts give the matter very careful consideration.

The Deputy Chairman: Does clause 138 stand?

Mr. Garson: No; it is carried subject to my undertaking.

Clause agreed to.

Mr. Garson: I believe that clauses 139, 140, 141 and 142 were passed, and we are at 143.

The Deputy Chairman: The record shows that clause 139 was passed.

Clause 140 agreed to.

On clause 141—*Indecent assault on female.*

Mr. Diefenbaker: This is another of those sections where the question arises as to whether the elimination of the requirement that the jury should be instructed that it is not safe to find the accused guilty in the absence of corroboration does not in fact remove the need for corroboration. Indecent assault is one of the easiest charges to lay and one of the most difficult to defend. If my recollection is correct, Lord Coke pointed out a long time ago that this type of charge is often laid through motives of malice, revenge, jealousy and so on. Therefore the process of British judicial wisdom through the ages has been to warn the jury that it should not convict on the uncorroborated evidence of the prosecutrix.

[Mr. Fulton.]

The common law has been eliminated under the Criminal Code as it is now constituted. The fact that under section 134 it is provided that this rule of evidence shall specifically apply to sections 136, 137 and 138 would appear to lead one to the conclusion that it is no longer to apply in the case of indecent assault. I am going to press this, because I believe that if it is not made necessary from now on anyone accused of this offence will be in dire jeopardy. No one wants to open the door to the extension of such offences, but on the other hand we in parliament must be very careful that we do not make the laying of such charges an easy way in which to punish one against whom the prosecutrix has feelings of revenge or has other motives for laying ill-founded charges.

I would ask the minister to give the most serious consideration to the question I now raise, for I believe that unless we state that the rule applies in such cases we will in fact be removing from the trial judge a formula and warning which through the years trial judges have found necessary to say in order to protect the innocent from the probable blackmailing activities of those who through the ages have invariably chosen this means to secure their revenge for wrongs done to them, imagined or actual.

Mr. Garson: The point raised by my hon. friend is an important one, and out of the abundance of caution I think we should hold this section in order that what he has said may be checked. I am inclined to think that the law as it is stated here is not changed in any respect from the present law, but as I understand it he is arguing—and I think his argument carries a good deal of force—that when we provide in clause 134 for a certain course of procedure relating to certain sections we impliedly exclude other sections from that course of procedure.

Mr. Diefenbaker: Yes, that is a summary of it.

Clause stands.

On clause 142—*Incest.*

Mr. Nowlan: I take it that this clause will stand on the same basis, because I raised the same argument earlier this afternoon with respect to it.

Mr. Garson: Right.

Clause stands.

On clause 143—*Seduction of female between sixteen and eighteen.*

Mr. Fulton: Why was the equality of blame provision dropped from this clause, when it

is retained in clauses 138 and 145? It was previously in the code with respect to the offence of seduction, that is to say, the clause we were just discussing, subsection 3 of 138. Why was it dropped from this clause?

Mr. Garson: Well, I have already indicated that what would correspond to subsection 3 of section 138 was dropped as being inconsistent with the offence of seduction, since the essence of seduction is persuasion. In clause 143 the age is 18 years. I think in modern philosophy girls of that age are supposed to be able to take care of themselves.

Mr. Fulton: This applies to girls between 16 and 18. Previously, as the minister knows, even although the girl may have to some extent consented, there may still be seduction. It was for that reason the equality of blame provision was inserted. If the jury felt that the conduct of this girl was such that she was equally blameworthy, then they might render a verdict of not guilty. It was felt proper to put that in the original code for the same offence of seduction that is now covered by clause 143. It was there up until now. I can see no change that has taken place in the offence of seduction between the time that clause was put in and now that would clearly justify its removal.

Mr. Garson: Is this not the way in which a case of this sort would work out in real life? In clause 138 the female in the case is of a tender age; in clause 145 the female may be a stepdaughter, foster daughter, female ward or woman in his employment. All these people could be influenced by the relationship of the accused to them. You make the accused liable; then you give him this protection, that the jury could find him not guilty, even if the girl's consent was obtained and intercourse took place, if it appeared from the evidence that he was not wholly or chiefly to blame.

But where you are dealing with the case of a female of 18 years and it appears from the evidence that the accused is not wholly or chiefly to blame, it is hard to see how a court these days would find beyond all reasonable doubt that there had been that persuasion on the part of the accused which constitutes seduction. In such a case there would be just a general verdict of not guilty. The saving clause is inserted in those cases in which the court would normally bear down rather heavily on the accused because of either the tender years of the female or the fact she is an employee or some person under his control.

Mr. Fulton: I agree with the minister that there is some slight difference between the two cases. Still, without going into a long argument on seduction—and I have Tremeear in front of me—I think it can fairly be said that there is a fine borderline between what is seduction and what is not. It was probably a realization of that which induced the draftsman of the original code to put in the protection of this saving clause. There might be a case in which, although the accused had gone through all the motions which would, in the case of a completely innocent girl, amount to seduction, and although technically the girl had been seduced, the jury might come to the inescapable conclusion that her own conduct, while not being such as to involve full consent, had nevertheless led on the accused to the point where he seduced her. It was for that reason the saving clause was inserted.

I cannot get over the fact that this provision has been in the code ever since 1892 in connection with the same offence of seduction as here defined in clause 143, yet the equality of blame provision is now dropped. I do not see any compelling reason for doing so.

Mr. Diefenbaker: As a matter of fact, this creates a strange result. If the female is between 16 and 18 the court may find the accused not guilty if she were wholly or chiefly to blame, whereas if she is between 14 and 16, no matter whether she was wholly or mainly to blame, if she is seduced there is an offence created.

Mr. Garson: Would not the hon. member agree that where the circumstances indicate the accused was not chiefly or wholly to blame, and the lady in question was 18 years of age, no court is ever going to find there was seduction. Is this saving clause not inserted in the other clauses because the court has a strong predisposition in the case of a girl of tender years to take a dark view of the fact that intercourse was had at all? This is an indication to the courts that in a case of that sort, if it can be established that the girl was chiefly to blame, then they should let the accused off.

Although I must say I have not had anything like the experience in the practice of criminal law that the hon. member for Prince Albert has had, it does seem to me extremely unlikely, if the accused were in a position to bring himself within a saving clause like this, that the court would find him guilty of seduction in the first place in relation to a girl of 18.

Mr. Diefenbaker: Why was this provision deleted? It has been in effect, as the hon. member for Kamloops says, for 60 years. When it was brought into effect originally it represented the viewpoint of the courts at the time, and the common law, and had been followed from about the year 1866. During the last

25 years it has been the instrument on a number of occasions whereby the jury has been in a position to bring in a verdict of not guilty. After all, on the basis of equality there cannot be any loaded dice as against an accused on a charge such as this.

We go back to Lord Coke's definition that these are the easiest charges to lay and the most difficult to answer. Anyone charged with them, whether he is acquitted or not, leaves the court with a stigma that does not leave him with the years. This clause was based on the experience of many years, and remains in the British common law and the criminal law as well. The provision should not be deleted from our code without the utmost frankness, on the part of those who would remove it, as to the reasons for its removal. The removal of the provision will make possible the conviction of those who should be found not guilty.

Certainly, we should not widen the scope so those who are morally innocent, though physically guilty, will thereby be convicted. If we wanted to widen the scope, then there was no justification for the addition to clause 138. If there was any justification for subsection 3 of section 138, there is every justification for the same type of subsection in section 143.

It occurred to me, Mr. Chairman, that these commissioners might have kept records when they made the examination of the sections in question, giving their reasons for the changes. I have seen nothing to indicate the reasons for these changes. I feel that the committee of this house should be fully advised; for certainly on the basis of practice in the courts changes such as these, while they may appear to be advantageous at the moment, usually have one result, namely numberless appeals in order to once more re-establish what the law is. That law, having been established over a period of 60 years, and having been dealt with by various courts, ought not seriously to be changed unless there is good reason for it.

Mr. Fulton: May I say a further word in favour of the reinsertion of this paragraph? I refer the minister to the authority of Tremeear, fifth edition, at page 206, where it is said:

> Without consent there can be no seduction.

So you do lay a charge of seduction if there has been consent; otherwise it is rape. Therefore it is obvious that there must be the possibility of blame attaching to the female party to the act. I should think it very possible that consent might be freely given, and then a change of heart take place and a charge of seduction laid. It is not easy for judges and juries to decide in these cases, because this sort of offence is not committed in public and we do not have the opportunity of knowing exactly what went on except what the parties say.

That, it seems to me, is the reason this provision was put in, that if the accused could bring outside evidence of other actions or any other evidence which would indicate that the girl was not seduced, that in fact she herself was largely responsible for the position she subsequently found herself in, that evidence would exonerate the man. That was a sensible provision in the code before, and it would be sensible to continue it in the present revision.

Mr. Barnett: I rather hesitate to interject any remarks into this discussion but on listening to it I fail to see why the protection for the accused which my learned friends are apparently seeking is not provided in section 131. I personally would like to have their views as to whether section 131 does not in fact provide the protection they are seeking.

Mr. Fulton: The explanation is very simple.

Mr. Garson: The suggestion which has been made by the last speaker is a good one. Section 131 provides:

> No person shall be convicted of an offence under section 140, 143—

That is the one we are discussing here.

> . . . upon the evidence of only one witness unless the evidence of the witness is corroborated in a material particular by evidence that implicates the accused.

What I put to the hon. member for Kamloops and the hon. member for Prince Albert is this. Where you must have the lady in the case in court testifying, and you must have corroboration; and the court is of the opinion that the evidence does not show that as between the accused and the female person the accused is wholly or chiefly to blame, the court by applying ordinary common sense will not find the accused guilty at all in those cases where the female person is of the age of 18 years.

Mr. Fulton: That is between 16 and 18.

Mr. Garson: At between 16 and 18 they have reached that age of intelligence and sophistication that it is not necessary to retain this saving clause, subparagraph 3 in relation to them, but we should retain it in these other cases under clause 138 where the female person is of more tender age and where therefore the court does not know but that she may have been imposed upon. And we also should retain it in clause 145, where the female person is in a position in which the accused might influence her

because she is a stepdaughter or a foster daughter, or a female ward, or an employee, and so on.

In the other case, where the female person is not in a position to be influenced by the accused and she is of the age 16 to 18 years, and her case cannot be proven unless her evidence is corroborated, and if it appears that on evidence she is chiefly to blame for having given her consent to the intercourse which took place, why then the court would hold and should hold that it had not been proven that the accused seduced her at all, and it would acquit him. I would think that the application to such a case of clause 143 is pretty nearly self-evident.

Mr. Fulton: On the basis of the minister's argument the gentlemen who drafted the code in 1892 were pretty stupid, because they put in a saving clause for exactly the same purpose. As far as the minister's argument is concerned, section 131 is completely inapplicable. While the evidence of one witness must be corroborated in some material particular, that material particular need not relate to the question of whether or not the informant was to blame. The material particular might relate to the fact that the accused actually committed a sexual act. That is corroboration in a material particular, but that type of corroboration does not go in any sense to the question of the blame or otherwise of the informant. And it is that question that we are concerned with here.

Every argument used in justification of keeping it in sections 138 and 145 applies, it seems to me, equally strongly with respect to section 143, because the very nature of seduction, as I have already pointed out on the authority of Tremcear, requires consent. If there is no consent, then it is rape; yet even though the girl consented there still may be seduction.

Mr. Garson: May I ask my hon. friend a question. We all know that the woman's consent has to be secured or the intercourse is rape, and that where consent has been secured to the intercourse by reason of the blandishments of the accused, then the case is seduction; but surely, where the female person involved is of the age of 16 to 18 years in this present day and she does give consent, and it appears that the female person is sufficiently to blame that the court would apply subclause 3 of clause 138 or subclause 3 of clause 145, if the case were being tried under those clauses, the court in these circumstances is not going to find the accused guilty of seduction at all.

Mr. Fulton: The minister is misapplying the clause. The clause does not say the court has to be satisfied that the informant is chiefly to blame. The clause only says that if they feel the accused is not wholly or partly to blame—

Mr. Garson: No, wholly or chiefly to blame.

Mr. Fulton: If they feel that the accused is not wholly or chiefly to blame; that does not mean they have to be satisfied that the informant was wholly or chiefly to blame. What the court is asked to consider or what the jury is asked to consider is whether the whole or part of the blame lies exclusively upon the accused.

Mr. Garson: Not part of the blame. The statute says whether the accused is wholly or chiefly to blame. As a matter of ordinary common sense, I suggest to my hon. friend that where in these present days the lady in the case is from 16 to 18 years of age, if it appears from the evidence that the accused was not wholly or chiefly to blame, the court will find that the case has not been proven beyond all reasonable doubt and will acquit the accused without having to apply such a subsection at all.

But those same considerations do not apply where the female is of more tender years, nor do they apply where the female is employed by the accused or is a stepdaughter or foster daughter and therefore in a position to be influenced by him. In those cases they require this saving clause.

With all due respect to my hon. friend I cannot imagine any court which was of the opinion on the evidence that the accused was not wholly or chiefly to blame not acquitting him, whether this clause was in or not.

Mr. Fulton: That is all very well. We are each entitled to our thoughts as to what the jury would be willing to do. But we are dealing here not with the probability or possibility of what a jury might do under any given circumstances; we are trying to see under what circumstances a man will not be found guilty of seduction.

Mr. Garson: My hon. friend has not stated that correctly. It is not a case of what the court will find. The section reads, "the court may find the accused not guilty." I suggest to my hon. friend that in relation to a female person of the age 16 to 18 years they probably would find him not guilty if the accused was not chiefly or wholly to blame.

Mr. Fulton: That is what they may probably do, but the fact that there was a direction by the judge to the jury that if they considered the accused was not wholly or chiefly to blame they might find a verdict of not guilty would be a most powerful influence on the jury. It would indicate to

the jury that the man who was not wholly or chiefly to blame was not necessarily guilty of seduction, and the jury would act accordingly.

If we in parliament feel that a man is guilty of seduction of a girl between the ages of 16 and 18 even though he may not be wholly to blame, then I think we should put that provision in. If of course we decide that in the case of a girl from 16 to 18 the element of tender years enters in and therefore he would not be guilty or not wholly to blame provided other elements were present, we leave it out. We have to make up our minds what we think should be present in order to constitute the offence of seduction, and whether partial absolution from blame should or should not be a consideration in the minds a jury in reaching their verdict. If we think it should, then I believe we should put in a saving clause. Personally I think we should put it in.

Mr. Barnett: I was listening to this discussion from the point of view of my learned friends although I am not in that category in any sense of the word. It does appear to me that under the ordinary usage of language the word "seduction" means that a person is wholly or chiefly to blame, and that is the offence which is set forth in this section. Unless the blame is proved, there is no offence. With the saving clause in 131 I feel that the accused is adequately protected in the situation that is described.

Mr. Montgomery: I think we should decide what we are trying to do. A minute ago an hon. member brought up this point. If you are a judge holding court, what must the prosecution prove in order to make out a case? Where the male accused is 18 years of age or over—that is point one—and seduces a female of previous chaste character between the ages of 16 and 18 years, the jury could bring in a verdict of guilty when they were satisfied that those elements had been proved. Has the court any other alternative than to find the accused guilty?

Mr. Fulton: Has the jury any other alternative?

Mr. Montgomery: I am thinking of the court as the judge and the jury. Have they any other alternative?

Mr. Garson: Having regard to the fact that the essence of seduction is persuasion by the accused of the female person to have sexual intercourse with him, and that if she is willing to have it without persuasion he is not guilty, will my hon. friend tell us that in a case in which the evidence showed that the accused was not wholly or chiefly to blame there would be any likelihood of the jury finding him guilty of seduction?

At six o'clock the committee took recess.

AFTER RECESS

The committee resumed at eight o'clock.

The Deputy Chairman: Clause 143.

Mr. Fulton: Mr. Chairman, I do not want to delay the committee unduly, nor indeed to depart from the principle on which we agreed when we first started consideration of this matter, which was to the effect that if any section was controversial we would ask to have it stand. However, I want to make one more effort to try to persuade the minister and the committee that there is validity in the point I am making in connection with clause 143, and that the provision regarding the equality of blame should be maintained in this section as it has been in clauses 138 and 145.

I am not going to rehearse all the arguments we went over before dinner regarding the necessity of retaining that provision on its merits, but I want to put this point to the minister now. He has said it is felt that it is not necessary to retain this provision because one of the elements of seduction is persuasion, and therefore it is advanced as a defence to a charge of seduction that the informant or seducee, if that is the right word, was partly to blame, having led the accused on, and therefore the jury would not convict the accused.

I want to put this before him, that at the present time there are three sections of the Criminal Code in which it is specifically provided that the judge may direct the jury that if they feel the accused was not wholly or chiefly to blame, then the jury may bring in an acquittal. But what happens if you take that provision out of the section dealing with seduction between the ages of 16 and 18? It is left in with respect to the girl under 14. It is left in with respect to a ward, foster child or employee; and I believe a judge could very properly tell a jury that parliament had decided, in regard to the question of the guilt or innocence of an accused on a charge of seduction, that it is no longer to be up to them to consider whether the seducee had been co-operative, or whether the seducee, informant or accusant was in any way responsible, or whether any element of blame attached to her, because parliament has taken that out of this section.

In other words, parliament has decided it will not be relevant for a jury to consider, in arriving at their verdict, whether there is any element of blame or co-operation on the part of the informing person whose seduction is alleged. I believe a judge might very properly say that to the jury, and therefore the jury would not be allowed to consider whether there was any element of responsibility attaching to the girl between the ages of 16 and 18 who was said to have been seduced, by the very fact that we removed this equality of blame provision from this section while leaving it in two other sections. We are in effect enacting a law which will make it incumbent upon judges to tell juries they do not have to consider that aspect of the matter in deciding whether an accused is innocent or guilty.

Mr. Garson: Mr. Chairman, I have tried hard to see the point of view which has been expressed by the hon. member for Kamloops, but what I cannot understand is this. Where the charge is seduction, in that the accused by blandishments has secured the consent of the lady to intercourse; where the lady is between 16 and 18 years of age, and the crown is unable to prove by the evidence that the accused is wholly or chiefly to blame it cannot prove the charge of seduction and the insertion of a saving clause of this kind would therefore be of little use to the accused in such a case.

Mr. Fulton: They are not going to have to prove that in the absence of a saving clause. All they have to prove is that seduction has taken place.

Mr. Garson: One thing my hon. friend must remember is that quite apart from this saving clause he is discussing, whether a charge of seduction or any other criminal charge is laid against the accused, it is an elementary point that the crown has to prove the guilt of the accused beyond all reasonable doubt. The hon. member knows that. That is the A,B,C of criminal law.

If the crown is able to prove the accused's guilt in seducing a girl 16 to 18 years of age, then I, for my own part, cannot see of what use it would be to the accused to have in the clause of the code relating to him a subsection which provides that where the accused is charged with an offence under this heading the court may find the accused not guilty if it is of the opinion that the evidence does not show, as between the accused and the female person, that the accused is wholly or chiefly to blame.

I would point out to the hon. member that this clause is of no help to him, because if the crown cannot show that he is wholly or chiefly to blame they will not get a conviction in the first place; they will not be able to prove an offence of seduction against him beyond all reasonable doubt.

I am sorry, Mr. Chairman, to belabour this point at such great length and I would be more than glad to agree with my hon. friend if I conscientiously could, but it seems to me the commission is drawing a distinction between a case on the one hand such as we have been discussing, of a man who is charged with seducing a girl between the ages of 16 and 18, and on the other hand the case of a man charged with seducing a girl from 14 to 16 years of age, that is of more tender years, or seducing an employee, a foster child, or a ward who is under his influence. In the second case, where the accused is in a position to influence the girl because of her tender years, or because she is dependent upon him in some fashion, then the natural disposition of the court, I believe, and the natural reaction of any of us, were we on the jury, would be to deal pretty severely with an accused person. We would say, "You had no business having to do with this young girl," and we would be inclined to be unduly severe with him unless there was some saving clause in the law such as clause 138 (3) or 145 (2).

For my own part, if I were on a jury my attitude would be very different in relation to a girl between 16 and 18 years of age, if it appeared from the evidence that to use the language of these subclauses 138 (3) and 145 (2), "the accused was not wholly or chiefly to blame" and, as there are only two parties to this intercourse, if he is not chiefly or wholly to blame, then she is the one who is chiefly or wholly to blame. In that case I, for one juryman, would not convict him in the first place. My hon. friend says that he wants this clause put in to protect the accused.

Mr. Fulton: Not to protect an accused, but to protect an accused who is not wholly to blame.

Mr. Garson: All right; to protect an accused who is not wholly to blame. Let us suppose that the accused comes into court, and that it is a very doubtful case in which there is a grave question as to whether it can be proven. If I were acting for him I would rather battle it out upon the ground that the crown had not proven his guilt beyond a reasonable doubt, apart altogether from this clause. But if this clause or this section is in, and if this is what my hon. friend is going to rely upon to protect the accused, then in order to bring himself within this clause, since it is in the law, he must show the court that the evidence before the court does not indicate that the accused is wholly to blame or chiefly to blame.

Suppose you start submitting such a direction to a jury whose members already are having a hard time to decide on the main issue as to whether the accused is guilty beyond a reasonable doubt. Then while they are weighing this evidence you come along and say, "In addition to this problem of having to decide whether he is guilty beyond a reasonable doubt, there is another clause which you must take into account. In the main case you have to decide whether he is guilty beyond a reasonable doubt, but under this clause you must decide whether or not the evidence shows that the accused is chiefly or wholly to blame."

In a case in which adult people are participants in this sexual intercourse, it seems to me that the addition of a clause of that kind does not clarify the issue at all. It obscures it. That was the view of the commission, and this is the clause which came from the commission. None of the committees and legislative bodies that have considered it up to the present time have seen fit to change it. For my part, I do not think it should be changed, notwithstanding the strong pleas that have been made by the hon. member for Kamloops and the hon. member for Prince Albert.

Mr. Fulton: I will have one more go at it and that is all. What would the minister say with respect to the propriety of a judge saying this to a jury: "Seduction has been established. The age of the accused has been established as over 18. The age of the seduced person, a female of between 16 and 18, has been established. Gentlemen, it is no part of your responsibility to consider whether or not the conduct of the female person was in any way blameworthy, because parliament has taken that clause out of that section. Therefore do not direct your attention at all to what her conduct was. That is no longer relevant to the question of whether or not the offence has been committed"?

Mr. Garson: On the point that has been raised, may I say this. If my hon. friend has the volume with the Criminal Code there he will find in it the Interpretation Act, chapter 1, section 21, subsections 2 and 3:

> 2. The amendment of any act shall not be deemed to be or to involve a declaration that the law under such act was, or was considered by parliament to have been, different from the law as it has become under such act as so amended.
>
> 3. The repeal or amendment of any act shall not be deemed to be or to involve any declaration whatsoever as to the previous state of the law.

Mr. Diefenbaker: That does not apply there, I submit with due respect.

Mr. Garson: I suggest that it does apply.

[Mr. Garson.]

Mr. Diefenbaker: With due respect, I submit that it does not apply.

Mr. Garson: The only difficulty that might arise is not with regard to what was done to the law as it previously was. My hon. friend, in relation to the law as established by Bill No. 7, might perhaps be able to emphasize that because there was a saving clause of this sort in clause 138 and in clause 145 but not in clause 143, there was no saving clause in clause 143. But what of it? The crown still has to prove the accused guilty. Moreover, I do not think the hypothetical case which he has posed has any reality. My hon. friend says that if seduction has been proven the judge will say so-and-so. My hon. friend knows that when the judge charges the jury in a case of this sort, he does not wait until they have brought in a verdict of guilty of seduction as charged. The judge charges the jury on the evidence which has been adduced and which is before the jury, and he charges them before they retire to consider their verdict.

Mr. Fulton: All right; I will change my words and say, "In considering whether or not there has been seduction, do not address your minds to whether or not the conduct of the female party was blameworthy".

Mr. Garson: I do not see how he could possibly take that attitude. As I said a moment ago, apart from this section altogether it is the responsibility of the crown—and this is the A, B, C of criminal law—to bring home to the accused his guilt as charged beyond a reasonable doubt. If there is any substantial amount of joint guilt upon the part of the lady in question, then the judge has to charge the jury in respect of that evidence.

In any case where the accused was not wholly or chiefly to blame, within the language of this clause my hon. friend is advocating, there is in my view a very small probability indeed that in these modern times the jury would ever hold the accused guilty; because they would say, "This young lady got exactly what she was looking for and we are not going to hold that, beyond a reasonable doubt, the accused is guilty of the offence of seduction".

Mr. Fulton: I think the minister is resting his case upon a hope rather than anything else.

Mr. MacInnis: Mr. Chairman, I wonder whether a lay person might express his opinion on this matter. It seems to me that, under this section, the previous character of the female is taken into consideration. The section says "of previously chaste character".

The assumption then is that there is no assistance to the other party in the act. If the judge and jury do not find the person wholly guilty of seduction, then they have to begin to weigh to what extent the other party is guilty. It seems to me that under such circumstances—if it was a matter of percentage and they said she was only 15 per cent guilty and he was 85 per cent guilty —they would not say, "We will have to find that he is guilty". What they would say is that she assisted in the act, however little, and consequently they would not find the male person guilty in that case. With my little knowledge of the law I think the character of the woman concerned must be considered; and if she was of previously good character, we cannot assume now that she was anything else.

Mr. Fulton: What about sudden impulse?

Mr. MacInnis: I do not know as much about that as the hon. member.

The Chairman: Shall the clause carry?

Mr. Fulton: On division.

Clause agreed to.

Clauses 144 to 149 inclusive agreed to.

On clause 150—*Obscene matter.*

Mr. Knight: Mr. Chairman—

Mr. Fulton: Clause 150 is to stand.

Mr. Garson: I might say to the hon. member for Saskatoon that there was an understanding that certain sections in which certain members were strongly and deeply interested would be set over, and I think there was general agreement that this was one of them. I know the hon. member for Kamloops gave me notice some months ago that he wished this clause to stand.

Clause stands.

Clauses 151 to 153 inclusive stand.

Clauses 154 to 157 inclusive agreed to.

On clause 158—*Indecent acts.*

Mr. Cameron (Nanaimo): Mr. Chairman, I do not know if I am going to be exactly in order, but on this clause I want to speak with regard to something which took place in British Columbia, and in which either this section or the next one apparently was invoked. I am referring to the charges that were laid and the trials and convictions that took place involving the Doukhobors in British Columbia. I have here the charge as read to the accused in Jubilee labour hall on September 10, 1953:

> You are charged that on Wednesday, September 9, at Perry's Siding you unlawfully and individually did knowingly do an act likely to make a juvenile delinquent, to wit did expose your naked body in the presence of a child or children contrary to the form of statute in such case made and provided.

I gather that particular charge was laid under section 33 of the act relating to juvenile delinquents, but at the same time the prosecutor announced that a further charge was going to be laid under section 205 of the Criminal Code, which is the section we are now dealing with. I gather that it must have been laid because the penalty for an infraction of section 33 of the act relating to juvenile delinquents is only two years, and these people were given three years.

I am not even sure exactly how the presiding magistrate arrived at his authority to impose such a savage sentence because, unless the penalty has been increased, the section of the Criminal Code with which we are now dealing only entails a maximum punishment of six months on summary conviction. My legal friends can correct me if I am wrong.

Mr. Garson: I think I can clear up my hon. friend's point. I think he would find, if it were possible to examine the charge sheets, that the charges were under section 205A of the present Criminal Code, which covers parading while nude. It reads as follows:

> Every one is guilty of an offence and liable upon summary conviction to three years imprisonment who, while nude,
>
> (a) is found in any public place whether alone or in company with one or more other persons who are parading or have assembled with intent to parade or have paraded in such public place while nude . . .

Mr. Knowles: That would be clause 159 of the bill now before us.

Mr. Cameron (Nanaimo): I must admit that I have not seen the charge sheet, but the charge I quoted is as it was reported at the trials in Jubilee labour hall. It is quoted here as being the charge that was laid against them, and it does not indicate that it was section 205A alone that was invoked because it says quite distinctly that they unlawfully and individually did knowingly do an act likely to make a juvenile delinquent. Obviously it must have been the provisions of the act relating to juvenile delinquents that were invoked at least in part, and it is that to which I wish to draw attention.

I know quite well, of course, that it is no responsibility of the Minister of Justice, but I do think some attention should be called to what is really a distortion of the intent of an act; because I think everyone will agree that to twist the sort of nude parading

that the Doukhobors have done into an act likely to contribute to juvenile delinquency is a very grave distortion of the actual intent of the legislation and certainly a distortion of the actual possible effects of that parade. I think it shows a very cavalier attitude toward legislation that such a far-fetched charge should have been laid.

I also think the magistrate who imposed these savage sentences should be subject to some rebuke from some authority. I do not know what authority is the appropriate one, but certainly it was a savage sentence to impose for a nude parade which, after all, was more or less a nuisance. That was all it was; and the very fact that the authorities have repeatedly drawn attention to these nude parades and given them a nuisance value has, I think, created this situation.

On that occasion the magistrate termed these people whom he was sentencing to three years in prison vicious enemies of society. They may be on some other count, but I submit that to call these poor, misguided and obviously psychologically unbalanced creatures vicious enemies of society because they offend against our sense—our aesthetic sense, I suppose; that is probably their greatest offence from what I have heard—is something that I think the government should take some notice of, particularly in view of the fact that there are a number of other circumstances in connection with these cases which indicate that there has been quite widespread disapproval of these court actions.

I have, for instance, a news report from Castlegar dated September 18, indicating that the Castlegar and district chamber of commerce has strongly backed the action of Mr. D. W. Waldie, member of the Doukhobor consultative committee, who resigned as a protest against what he considers this misguided action on the part of the authorities in British Columbia.

The Deputy Chairman: Order. I do not want to interrupt the hon. member's argument. In so far as he is discussing the penalties and the crimes covered by the sections under discussion I would not want to restrain him in any way, but there is a rule of procedure in the house which makes it out of order to make adverse criticism of judges and persons in such positions. I think the hon. member can most likely make his point without either reading other people's criticisms or himself offering criticism of a member of the bench.

Mr. Cameron (Nanaimo): What is the rule that prohibits adverse criticism of judges and magistrates?

[Mr. Cameron (Nanaimo).]

The Deputy Chairman: Citation 305 of Beauchesne's second edition, which reads:

> All references to judges and courts of justice and to personages of high official station, of the nature of personal attack and censure have always been considered unparliamentary, and the Speakers of the British and Canadian houses have always treated them as breaches of order.

Mr. Cameron (Nanaimo): I was making no personal attack on this magistrate. I do not know him from a bale of hay. But I am making a very determined and, I hope, vigorous attack upon his actions on the bench in this particular case.

The Deputy Chairman: That is what I am afraid the hon. member cannot do. With respect to the powers given to a magistrate or judge under this act, the hon. member certainly has full right to say that the permissible penalties are too high; but the way in which a judge exercises his discretion can, as I understand it, only be discussed in the house upon a substantive motion leading to his removal, or something of that nature.

Clause agreed to.

Clause 159 agreed to.

On clause 160—*Causing disturbance.*

Mr. Winch: There is a question I should like to ask in connection with this clause, Mr. Chairman. I hope the minister does not mind, but since I am not a lawyer I have to ask questions in order to understand this act. This clause says that everyone who, not being in a dwelling house, causes a disturbance in or near a public place by being drunk is guilty of an offence that is punishable on summary conviction. The fact that this provision is in the bill, I take it, means the federal government has jurisdiction in that connection.

I have seen the Ontario liquor permits, although I have not one myself, and on the opening page it is stated that it is an offence to permit drunkenness in your own home, or your room in a hotel. That rather intrigued me, so I checked up with the Ontario act, which I now have in front of me, and I find under section 88 of the liquor control act the following:

> No person shall,
> (a) permit drunkenness to take place in any house or on any premises of which he is the owner, . . .
> (b) permit or suffer any person apparently under the influence of liquor to consume any liquor in any house . . .
> (c) give any liquor to any person apparently under the influence of liquor.

I believe the minister understands my point. I should like to know where the actual jurisdiction lies, or is there a dual jurisdiction? How does it happen that there is one section in the Criminal Code creating a

federal offence, and apparently the province of Ontario can deal with drunkenness in a person's own home?

Mr. Garson: The hon. member has asked a rather difficult question, not in connection with criminal law but constitutional law. I hope he will forgive me if my reply is not too comprehensive.

In our federal system the powers of government are divided between the federal government at Ottawa and the provincial governments. The British North America Act, in section 91, sets out those subject matters of legislation which are assigned to the jurisdiction of the federal parliament. In section 92, and in other sections with regard to agriculture and education, those powers which are assigned to the provincial legislatures are set forth. One of the powers assigned to the federal parliament is that of passing laws in relation to crime, and it is pursuant to that power that the federal Criminal Code, which we are now considering, is passed.

Amongst the other powers which provincial legislatures have is that of passing laws in relation to property and civil rights. Since the liquor traffic of a province has to do with property and civil rights, especially when it is under government control, the provincial legislatures have exercised that power to pass laws relating to the sale by provincial governments of spirituous liquors. The rule is that where, as sometimes happens, a conflict develops between a law passed by the federal parliament clearly pursuant to its powers on the one hand, and a law passed by a provincial legislature clearly pursuant to its powers on the other, the federal law takes precedence.

If the hon. member will examine the section he has been quoting, where the provincial liquor law says that a man shall not consume certain liquor in his own dwelling, he will see that it is liquor sold by that provincial government—

Mr. Winch: The section does not say he shall not consume liquor, but that he shall not be drunk in his own home.

Mr. Garson: I was going to deal with that. The hon. member said that he should not consume liquor under certain circumstances; and the only kind of liquor that most provincial liquor systems are interested in a man not consuming, because their business is selling liquor, is liquor which they do not sell. That would be home brew, or liquor imported from another province.

These provisions creating crimes or quasi-crimes are passed lawfully by the provincial legislatures as being ancillary to the administration of the liquor laws of the province. Where a conflict does develop of a nature which has not previously come before the courts, no person is really sure—although lawyers may have opinions—as to which of the two conflicting laws will take precedence until that particular question has been decided by the courts.

In this clause to which the hon. member is referring we have prohibited drunkenness in a public place or outside of the home. We have not prohibited drunkenness in the home, not I think because we have no power to say that drunkenness in the home would be a crime but because we have not thought it appropriate to say that a man may not be drunk in his own home. The fact that we have not so legislated is not an indication that we have not the power. It is an indication of the way in which we have exercised the power we have.

Mr. Winch: That is the very point I wanted to raise. I believe the minister has explained it, because provinces do legislate with regard to liquor and drunkenness. In view of the fact that under clause 160 of this bill we are also legislating on this subject, I was interested in knowing where the precedence lies. Under which legislation, provincial or federal, would any charges be laid?

As the minister noted, I was interested in the Ontario act. Section 88 is not particularly related to the consumption of liquor, but says that no person shall permit drunkenness to take place. There are three subsections to it. I know there is a great deal of interest in royal commissions and investigations of changes in the liquor acts of the various provinces. As we are now amending the Criminal Code I was interested in knowing just where the jurisdiction lies; and when both federal and provincial laws relate to the same thing, under which act are the charges laid.

Mr. Garson: The laws we pass in this parliament in relation to crime—that is, the Criminal Code—are all administered by the provincial authorities, because one of the subject matters of legislation which falls within their jurisdiction is that of the administration of justice, which includes the enforcement of law.

Now, while I am not very well acquainted with criminal law enforcement I would assume that when a given set of facts comes before the crown prosecutor for prosecution he would examine these points and reach an opinion as to whether it would be more appropriate to charge the accused under the Criminal Code or under some provincial statute. If he is charged under a provincial statute which is beyond the powers of, or as we say in law, is ultra vires of the provincial legislature to pass, then the accused

coming into court can say in reply to the charge against him, "Apart from the question of whether my actions fall within this section of the provincial law under which you are charging me, I say that the law itself is beyond the powers of the provincial legislature to enact. It is unconstitutional and void, and therefore you cannot charge me or any man under it".

I cannot be more detailed than that because I think it would be most inappropriate for me, as the Minister of Justice for Canada, to be expressing opinions in this house with regard to any statutes of any of the provinces of Canada.

Mr. McIvor: Is there any place where it is lawful for a man to get drunk?

Mr. Nesbitt: The House of Commons.

Mr. Fulton: The House of Commons is absolutely privileged in that regard.

Mr. Winch: I have an idea that is a civil right.

Mr. Johnston (Bow River): Is clause 160 an old section or a new one?

Mr. Garson: No, it is not new.

Mr. Johnston (Bow River): Is it new in any part?

Mr. Garson: No, I do not think so.

Mr. Johnston (Bow River): Clause 160 reads in part:

> Everyone who
> (a) not being in a dwelling house causes a disturbance in or near a public place,
> (i) by fighting, screaming, shouting, swearing, singing, or using insulting or obscene language,
> is guilty of an offence punishable on summary conviction.

I can understand how fighting, screaming, shouting, swearing and so on might cause a public disturbance. Let us take the Salvation Army. They may be singing on the street corner which may be near a public place, and in the opinion of some people that might be a disturbance. Could that come under this clause?

Mr. Garson: In reply to my hon. friend's question may I say this. First of all he wants to know the derivation of this clause, how much of it is new and so on. This present clause that we are considering combines section 222 (b) of the present code and certain provisions of the vagrancy section, 238, which properly relate to disorderly conduct. The addition of the word "fighting" has made it possible to drop the present section 100 which deals with an affray; and in view of the new definition of public place, the enumeration of the places in which the conduct covered by the section is prohibited has become unnecessary, so that this is a combination and condensation of a number of sections in the present code.

Now, with regard to the second part of my hon. friend's question, as to whether and under what circumstances singing would constitute a disturbance within the meaning of this clause, I would say that in real life the way these prosecutions start is that some person gets quite displeased and angry over a commotion of this sort. If he is angry enough he goes to the police station and says, "Does a peaceful man like myself have to put up with this sort of thing"? The police officer takes down the particulars; and if it were, as my hon. friend suggests, the Salvation Army I think probably the charge would not be laid. If on the other hand it were a party of ten or twelve gentlemen, each of whom had drunk about half a bottle of whisky, and they were singing obscene songs outside, I should imagine they probably would lay a charge.

Mr. Johnston (Bow River): Would that much do it?

Mr. Garson: I do not know whether it would, I am sure. The question as to whether a man has committed an offence has to be proven by the facts in each case adduced in evidence before the court.

Mr. Nesbitt: I have a question with regard to clause 160 (a) (iii) which reads:

> Every one who
> (a) Not being in a dwelling house causes a disturbance in or near a public place,
> (iii) by impeding or molesting other persons;

Then (c):

> loiters in a public place and in any way obstructs persons who are there;

Since molesting other persons seems to be very well covered by paragraph (a) (iii), which deals with impeding or molesting other persons, I am not clear with respect to paragraph (c), which deals with two types of offences. It speaks of "loiters in a public place and in any way obstructs persons who are there." In other words, is loitering in a public place an offence by itself, or do you have to loiter and obstruct persons who are there before you are guilty of an offence?

Mr. Garson: I think a careful reading of this paragraph would lead one to the view that clause 160 (c) covers loitering and obstructing. It is a different offence, really, from 160 (a) (iii).

Mr. Nesbitt: I wonder what the actual difference is between (a) (iii), impeding and molesting and (c) which is obstructing, and whether loitering by itself would be an offence as the old vagrancy charge used to be.

Mr. Garson: No, it is something more than mere loitering. A very slow window-shopping expedition is in itself just loitering, but the offence under 160 (a) is loitering and obstructing at the same time, and I would judge a more continuous offence than impeding or molesting, which could be just a single act of impeding or molesting.

Mr. Nesbitt: It is a continuing offence.

Clause agreed to.

On clause 161 — *Obstructing officiating clergyman.*

Mr. Knowles: Some of the wording of this clause is rather wide. I refer particularly to 161 (2) which reads:

> Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

I read that in association with some of the other parts of the clause, and to me it leaves it rather wide open as to what disturbs such an assemblage. The reference is not merely to a religious gathering where one may expect a certain amount of solemnity, quiet and so on. What about a political meeting or a session of the House of Commons, and so on? Does it not go rather far?

Mr. Garson: I would not say so. There is no change in this law. This clause is a combination of sections 199, 200 and 201 of the present code, and there is no change in the law. It has been on the statute books for many years, and as a matter of fact I think it is seldom invoked.

Mr. Knowles: The fact that it has been on the statute books for many years does not necessarily make it good. The minister says that it is seldom invoked. Should we retain legislation which does not seem to have any usefulness?

Mr. Garson: I would not agree that a clause that may not be invoked very often but which would be needed badly when it did have to be invoked should be done away with. We are fortunate that we do not have to invoke it, but I would think any person who disturbs or obstructs a religious meeting should be considered as doing an improper act.

Mr. Knowles: I think there is a distinction that can be drawn between religious and other meetings. This clause goes far beyond religious meetings. Subsection 3 refers to everyone who, at or near a meeting referred to in subsection 2, wilfully does anything that disturbs the order or solemnity of the meeting. It might be a political meeting held in the constituency of Marquette at which the Minister of Justice was speaking.

Mr. Garson: I thank my hon. friend for the compliment in regarding that as a moral or benevolent meeting.

Mr. Knowles: I cannot quite determine whether it would be moral, social or benevolent. In any case I hope it would not be immoral, anti-social or malevolent. If anyone at Shoal Lake or somewhere up in that part of Manitoba wilfully did anything that disturbed the order or solemnity of a meeting being addressed by the minister, he would be guilty of an offence punishable on summary conviction. I confess that if I happened to be at a meeting at Shoal Lake at which the minister was speaking it would be very hard for me not to do something which would disturb the order or solemnity of the meeting, and I am sure the minister would not want to crack down on me. He would probably be glad I was there to brighten up the meeting for him.

Mr. Abbott: I am not sure that that would do it.

Clause agreed to.

On clause 162—*Trespassing at night.*

Mr. Fulton: I do not propose to be an expert in this particular matter, but it has been represented to me that this section, whether deliberately or by accident, does embody to some extent the old common law offence committed by peeping Toms. I have a note here to the effect that up to 1949 the offence of peeping was generally considered to be a common law offence; but then in the case of Frey *v.* Frederuk—I am sorry I do not have the reference—its status as a common law offence was denied.

I am told that the commission's draft, amended by the special committee of the house last year and now incorporated in this bill, just covers the common law offence of trespassing. Clause 162 created an offence very similar to trespass. It reads:

> Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

The point which my informant makes is that we should no longer just try to codify the old common law offence of peeping on the basis of trespassing, when it has been decided that peeping is not actually a common law offence and does not have any status under our Criminal Code. In other words, if I read this note correctly what is suggested is that if the offence of peeping is intended to be covered, it must be covered far more specifically than is done by this section.

Merely to introduce a section which makes it an offence to loiter or prowl does not by inference or in any other way make it an offence to carry on the act of peeping while you may be loitering or prowling. It seems to me that if it is intended to cover the offence of peeping we must be far more specific than we are in this section, particularly since the peeper may not stand on the lot on which the dwelling house into which he is peeping is situated. He may stand on a back street or another lot from which he can obtain a view, or he may stand even further off than that and use a pair of glasses or binoculars.

As I have said, I am not an expert either in the technique of committing the offence or in the law regarding it. That is the note which I have received and it seems to me to have some substance. I shall be glad if the minister will say whether it is considered that this section effectively covers the offence of peeping.

Mr. Garson: It was intended that it should, upon the view that in most cases it would not be possible for the peeping Tom to look into a window or that sort of thing unless he had come on the ground of another and was loitering or prowling there near a dwelling house. In the special committee of the House of Commons the majority, which were concerned that they should not create a new offence that would make a criminal out of every petty trespasser, said that the man had to be loitering or prowling near the dwelling house. If he simply crossed the edge of a man's farm or the corner of his lot it would not be an offence under this section.

We gave a good deal of thought to this section. I think it will cover most of the offences at which it is directed; and in those cases where it does not, one wonders whether the offence could be covered without creating more injustice than would result from the offence not being covered. The difficulty in framing a clause of this sort is that of making it apply to the man who is guilty without running the danger of implicating people who are innocent.

Mr. Fulton: What would be the difficulty in defining the offence of peeping and making it an offence rather than the act of loitering or prowling? It is the peeping, the looking in which is offensive. Trespass is something that is punishable quite separately. Surely it is the peeping that is the offence.

Mr. Garson: I am told that one practical difficulty that came up in the committee was that you cannot always get the peeping Tom in the act of peeping. One may suspect he is there for that purpose, but when one goes out to apprehend him and he hears one coming, he is just loitering when one comes up to him. If possible we want a clause that is effective and that can be administered. We have tried to draft it to apply to the likely facts, which are that one comes up to this chap and he hears a rustle or a noise of the person coming to apprehend him, and he is suddenly just there looking around, smelling the chrysanthemums.

Mr. Knowles: I wonder if the minister would comment on clause 162 on another basis. Do I interpret it correctly, that this is another case where contrary to the usual practice the onus is on the accused? The section reads:

> Every one who, without lawful excuse, the proof of which lies upon him—

Mr. Garson: That was put in to protect the accused. The committee spent an amount of time upon this short clause which was really out of proportion to its importance, in some respects, in order to cover this question of peeping Toms. We did not want to adopt a law that would be very unjust to innocent people, and we agreed we would limit its application to those lurking or prowling near a dwelling house, and that it would not even apply if the man found there had a lawful excuse.

Of course, when it comes to giving a lawful excuse the evidence of that is entirely in his possession. If we were to say that the crown had to prove what this lawful excuse was you might as well wipe out the section entirely, because the crown would have no means of proving it. All that would happen in a case of this sort, if a person were found loitering or prowling near a dwelling, he could clear himself by showing that he had a lawful excuse for being where he was.

Mr. Knowles: He would have to produce the chrysanthemums?

Mr. Garson: Yes.

Mr. Hahn: I was wondering if that would not be covered in clause 159, which reads as follows:

> (1) Every one who, without lawful excuse,
> (a) is nude in a public place, or
> (b) is nude and exposed to public view while on private property, . . .

That deals with the main purpose of peeping Toms.

Mr. Garson: I believe my hon. friend has got the wrong end of the equation. It is not the peeping Tom who is nude whom he is looking for on private property.

Mr. Knowles: Apparently clause 162 is directed against the peeping Tom and clause 159 is directed against Lady Godiva herself. However, before we leave this clause I wonder if I may be permitted to ask one more question with regard to clause 161, subsection (2) which reads:

> Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

Is there not likely to be a conflict between that and the circumstances covered by what I believe is known as Bill No. 38, which was passed this year by the Quebec legislature? If a peace officer in the province of Quebec, under the authority of that legislation, wilfully disturbed or interrupted an assemblage of persons met for religious worship, what would happen? For example, supposing such an officer disturbed or interrupted an assemblage of Jehovah's witnesses. What would happen then?

Mr. Garson: Why would an officer be interrupting or disturbing them?

Mr. Knowles: He might be interrupting or disturbing them in pursuance of his duty under that Quebec law, and at the same time he might run foul of this clause in the Criminal Code.

Mr. Garson: I am not too familiar with the provisions of the Quebec law, but I must say that offhand I cannot think of any circumstances under which, in carrying out the Quebec law, he would find such action necessary.

Mr. Ferguson: Does this law distinctly say that an officer has no right to interfere? Is that a federal law?

Mr. Garson: Yes, this is the law we are discussing.

Mr. Ferguson: Is it a fact, if this clause is passed, that under the federal law a peace officer will not have the right to interfere with a religious organization? According to the minister's interpretation, is that right or wrong? Let me have your interpretation of the laws you are drawing up. You are making them.

Mr. Garson: I am not.

Mr. Ferguson: I am asking the Minister of Justice for an interpretation.

Mr. Garson: It is very clear from the provisions we are considering here that the application of this subsection is confined to those who wilfully disturb or interrupt. Whether I would apply that to a peace officer engaged in the discharge of his duty is another question entirely. I do not think—

Mr. Ferguson: It is this question. It is not another question.

Mr. Garson: I think I have the floor at the moment.

The Chairman: Order.

Mr. Garson: As I was saying, clause 161 (2) is confined in its application to those who wilfully—

The Chairman: May I remind the minister that we are discussing clause 162, not clause 161.

Mr. Garson: The question—

Mr. Knowles: Since I was allowed to go back the minister should also be allowed to do so, Mr. Chairman.

Mr. Garson: The essence of this present subsection is very clear. It is a case where a person comes in and wilfully, and in a sense maliciously, tries to break up a meeting.

Mr. Knowles: There is no reference to malice here, and I would suggest that the wilful breaking up of such an assembly might very well be the result of following the Quebec law. I am wondering if there is not a conflict between the two.

Mr. Ferguson: If an officer goes into a meeting to carry out his duties under the Quebec law and he thereby wilfully disturbs a religious assembly, is it against the federal law of Canada, or will it be against the law if this clause is passed? Yes or no?

Mr. Garson: I have already expressed the view—

Mr. Ferguson: You gave your views but you did not say whether he could be prosecuted. Can he be prosecuted, according to your interpretation of this law?

Mr. Garson: I think you would have to get legal advice on that.

Mr. Ferguson: We would have to go further than the Minister of Justice in order to get it, I am sure.

Mr. Ellis: Am I correct in understanding that there is nothing new in clause 161?

Mr. Garson: That is right. Clause 161, as I indicated previously, is a re-enactment of the substance of the present sections 199, 200, and 201. If the hon. member will look at the existing Criminal Code he will see that sections 199, 200 and 201 were in the Revised Statutes of 1927, so they have been the law

of this country for at least that length of time and they probably go back further than that.

Mr. Ellis: Can the minister tell us—

Mr. Garson: My assistant tells me the law in that connection goes back to 1892.

Mr. Ellis: —if there have been any prosecutions or convictions under any of these three sections, 199, 200 and 201, since the law has been in effect in Canada.

Mr. Garson: I do not suppose my hon. friend wishes to detain the committee long enough for me to recite these cases, but if he will look at Tremeear's Criminal Code he will find various cases listed there where these sections have been invoked, with full particulars in each case.

Clause agreed to.

On clause 163—*Offensive volatile substance.*

Mr. Diefenbaker: Mr. Chairman, I am not going to apologize for bringing up a matter which has been up before this house on a number of occasions lately, for it is one which I believe deserves the immediate attention of this house. I am referring to the situation created in consequence of the pollution of the waters of the North Saskatchewan river by what is generally believed to be the actions of Canadian Celanese corporation in dumping certain products into the river. On a number of occasions this matter has been before the house—

Mr. Garson: Mr. Chairman, might I rise on a point of order?

Mr. Diefenbaker: Oh, yes.

Mr. Garson: I am sure we are all most sympathetic with my hon. friend in his concern about the condition of the North Saskatchewan river. However, I believe the rule of order is that when we are discussing in committee the clauses of a bill, remarks must be confined to the clause which is before the committee.

Mr. Diefenbaker: That is what I am going to do.

Mr. Garson: I would suggest that there is no apparent connection or relevancy between the condition of the North Saskatchewan river and the clause we are discussing at the present time.

Mr. Ferguson: Premature opinion.

Mr. Diefenbaker: It will not take long, Mr. Chairman, to bring these remarks into direct line with this particular clause and also one which I am asking leave to discuss at the same time, namely clause 165. Clause 163 reads as follows:

> Every one other than a peace officer engaged in the discharge of his duty who has in his possession in a public place or who deposits, throws or injects or causes to be deposited, thrown or injected in, into or near any place,
>
> (a) an offensive volatile substance that is likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property. . . . is guilty of an offence . . .

That is the first portion of the clause in question. Then the other general clause with reference to nuisances is clause 165, which reads as follows:

> (1) Every one who commits a common nuisance and thereby
>
> (a) endangers the lives, safety or health of the public . . . is guilty of an indictable offence—

I am reading only the pertinent subsection.

> —and is liable to imprisonment for two years.
>
> (2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
>
> (a) endangers the lives, safety, health, property or comfort of the public. . . .

Those are the only sections of the Criminal Code, as it now stands, which in any way can be enlarged, expanded or amended to cover the situation that prevails today along the North Saskatchewan river.

My preliminary words are directed to asking the minister to permit amendments to these sections to cover the situation that has resulted from the contamination of the Saskatchewan river, as well as the contaminations that are taking place by pollution elsewhere in this country, and in order to protect human beings against the continuance of a situation that is detrimental to their comfort if not to their health.

The government has expressed every desire to be of assistance in this matter. I therefore do not expect that my hon. friend will raise questions of order on a matter that is particularly pertinent to the section, for I am sure he would like to have any assistance that can be given in order to meet the problem which in their anxiety various ministers of the government have stated they would like to meet but which as yet, after 86 days, they have not met.

Someone might say that it is a civil matter, and that it could be met by injunction. That is not in any way an answer to the question, because the problem arises in Alberta but the effect is in Saskatchewan. There are several intervening cities and urban municipalities, a fact which denies that direct causal conclusion which is necessary before an injunction can be secured.

One does not want to inject into the discussion anything in the nature of humorous remarks, but there is no description I know of for the odour of that water; it is one which no chemical treatment has been able to obliterate. A few moments ago I sent out for Coleridge and his description, in a few words, of what 50,000 people have had to put up with in recent weeks. I submit that a slight amendment to one or two of these sections would go a long way toward meeting that condition. Coleridge's words are:

I counted two-and-seventy stenches,
All well defined, and several stinks.

That is the kind of situation with which we are met. We are met too with the argument of divided responsibility. There is no divided responsibility under the criminal law. When the sections in question—and they are unaltered—were passed, the present problems of pollution had not been felt in other parts of Canada as they are being felt today. I have only to refer hon. gentlemen to an issue of *Rod and Gun* of September, 1953, in which appears an article by Reg. R. Fife, who sets forth the need for the Criminal Code being made applicable to the situation created by modern industrial pollution of our streams.

He is dealing with the matter, of course, from the point of view of fishing and, in particular, sport fishing. He goes on to point out that the laws as they are now have no application to present-day conditions. The Fisheries Act does not help us. It provides for a fine of $20 and costs for the first offence and for the second offence a fine of $40 and costs. What great corporation worries about fines like that?

The Criminal Code is one instrument under which proceedings could be taken where the offence is committed, namely near the city of Edmonton. It is one of the means whereby justice can be done on behalf of the people as a whole. As a matter of fact Dr. Lowe Connell, a dentist of Prince Albert, in describing the situation says this:

Prince Albert has taken to liquor,
Our water has all gone to pot
While Edmonton pours in her garbage
And tells us it's all bally rot . . .
In the bathtub, it smells to high heaven
From the taps it's a terrible stink.
The washtub is coated with plastic
And the coffee exactly like ink.

That describes the situation we are in. We say, "Well, something is going to turn up". Mr. Chairman, I say that the only way anything will turn up is by action being taken by parliament. Action can be taken by means of a few amendments to the sections in question.

I am not going to go into a great deal of detail. I say that today, not only in Canada but in the United States, we are at a point where more and more the procedure of criminal law must be appealed to in order to place great and powerful corporations in a position where they cannot detrimentally affect the health, the comfort or the welfare of the people as a whole.

It seems to me passing strange that, after almost three months, we are still in the position we were in at the beginning, with the exception that my friend the Minister of National Health and Welfare has provided highly trained chemical technicians who have met with other, equally highly trained, technicians, but who have as yet found it impossible by analysis to determine what is wrong.

We are not asking for analyses. What we are asking for is some action. The Fisheries Act provides no deterrent that would be effective in any way with great corporations. Fish are dying on every hand, but under that act there is only a penalty of $20 for a first offence; and corporations, even individuals, do not mind that. In so far as this section is concerned, it provides for a maximum penalty of $500 or six months. In so far as section 165 is concerned I think it provides for the same penalty.

Mr. Garson: Two years' imprisonment.

Mr. Diefenbaker: My hon. friend says two years' imprisonment. In no case is there a suitable penalty to meet the situation of a corporation that is offending. I would be only too happy to make suggestions, though I do not want to go into details as to suggestions for amendments unless asked. But I would submit that the law officers of the crown should immediately review these two sections and incorporate therein, without in any way interfering with the legitimate purposes of big business, such penalties as will indeed protect and preserve the rights of the individuals who live along these rivers, who are entitled to purity of water and who would have reason to expect pure water to be available to them but for the contemptuous attitude of these corporations.

I suggest that either of these sections could have words added to it to this effect: "And, without restricting the foregoing, any substances which, although not deleterious or harmful to human health, cause discomfort or annoyance to users of water."

Some say this is a provincial matter. What can the province of Saskatchewan do to protect its people with respect to water that comes from the neighbouring province of Alberta? What can the people of The Pas,

Manitoba, do to meet the situation when the water comes from a neighbouring province? Surely when a river runs through more than one province the criminal law can be utilized and should be utilized, and is the only means whereby the health and comfort of the people may be maintained. In the circumstances here the best legal opinion is that injunctions will not be effective, that the only recourse is the Fisheries Act, and I am concerned as to whether or not it can be made totally applicable.

Certainly when an offence is committed to the detriment of thousands and thousands of people, and people in urban centres are in the position that they have to travel all over the country in order to get well water, while the river that nature gave us flows by with water that was pure until its purity was destroyed as a result of the actions of a corporation, then I say we have the right to ask that the minister and the law officers of the crown should give immediate attention to the necessary amendment of one or other of these sections. I suggest that the minister allow these sections to stand and give consideration to this matter, as it is the only opportunity we will have to meet this situation.

Someone may say, why not introduce a private bill? We know how far private bills go unless they receive the support of the government. This is the one time, with the amendment of the Criminal Code before the house, that we can meet not only the situation ad hoc on the North Saskatchewan river but can also go a considerable distance toward meeting a situation that is becoming prevalent in many other parts of the country. Certainly there is no more important element in the health of the people than good water.

I want to keep my remarks within the realm of propriety, therefore I would not want to repeat some of the words that are being used daily in the cities of Prince Albert and The Battlefords with respect to the prevailing situation. It would not be parliamentary, though their clarity could be understood by all. As I see it, these sections are the only ones in the code that provide a degree of hope, which up to now has been denied the people for whom I speak on this occasion.

Mr. Garson: The statement that has just been made by the hon. member for Prince Albert has left out of consideration—I do not know whether wittingly or unwittingly—one or two points concerning the matter he discussed which I think are not without importance. As he points out, we have in clause 163, but more particularly in clause 165, provisions which could have some application to the problems of which he speaks provided, and this is a very important proviso, those whose responsibility it is to enforce the Criminal Code are in a position to prove that the condition of the water of the North Saskatchewan river is attributable to certain effluents coming into that river, and provided they can prove that these effluents are put there by certain persons or corporations.

Mr. Diefenbaker: That is obvious.

Mr. Garson: I am glad my hon. friend—

Mr. Diefenbaker: It is obvious you cannot convict anybody unless they are guilty.

Mr. Garson: But it is that obvious little point that my hon. friend, not only in his remarks tonight but in every other oration he has made upon the subject since he began some several days ago, has consistently ignored. My colleague the Minister of National Health and Welfare has pointed out not once but several times that the provincial authorities in Alberta and Saskatchewan, who are deeply concerned in this matter—I am sure they are deeply concerned—

Mr. Diefenbaker: Oh, yes, they are concerned.

Mr. Garson: If my hon. friend would let me finish my sentence he would not need to interrupt me. They are deeply concerned. Once it has been established that the condition in Prince Albert of which he complains is due to substances which are being placed in the same river, allegedly in Edmonton, and that the phenomenon resulting comes from this cause, the cause being the effluents—once they can establish that the effluent is being placed in the river and identify who is placing it there, then they will be in a position to invoke the existing laws to protect the public.

I would state, Mr. Chairman, that there is no dearth of laws in this regard. I am not familiar, certainly not when speaking extemporaneously upon this subject which my hon. friend from Prince Albert has raised, with the statute law of Alberta or Saskatchewan in relation to it. I have some knowledge of the statute law of Manitoba, although it is some time since I have had to do with it. But I would be very much surprised indeed if there were not a provision in the statute law of Alberta and Saskatchewan which, in the clearest terms, prohibits the pollution of rivers, the waters of which are used for public drinking purposes.

Mr. Diefenbaker: Will the minister allow a question?

Mr. Garson: Yes.

Mr. Diefenbaker: What help would it be for a law to be on the statute books of Saskatchewan when the pollution takes place in Alberta?

Mr. Low: Does the hon. member know that pollution takes place in Alberta? He has not the slightest idea, nor has anyone else.

Mr. Diefenbaker: That indicates the type of help we are getting from Alberta.

Mr. Low: I just want to deal with the interjection. There are a good many authorities today who consider that the pollution does not result from anything that is being poured into the water in Alberta, any effluent from a factory or plant, but that it results from escaping gas from certain gas wells along the border between Alberta and Saskatchewan.

The Deputy Chairman: May I suggest that we are discussing the application of the Criminal Code to all situations, and not one particular situation in Canada.

Mr. Garson: If I may cover one or two other points that have been raised by the hon. member, Mr. Chairman, I would not want the record to indicate there has been, upon the part of any government concerned, any neglect as has been alleged; for such a charge of neglect could not be founded on facts. Surely I do not need to make this point clear to the hon. member for Prince Albert, because he is too good a criminal lawyer not to know it. You cannot prosecute anyone for causing pollution until you are able to prove that the accused person is introducing the material which causes the pollution into the river.

As I understand it, my colleague the Minister of National Health and Welfare is supplying the best technical personnel he has available for the purpose of investigating and establishing, if that be the fact, that the conditions in the Saskatchewan river are the result of effluent which is being introduced into the Saskatchewan river in Alberta. No matter what law he was invoking—whether it was the public health act of either of these two provinces or these sections of the Canadian Criminal Code—I would think if the hon. member for Prince Albert were crown prosecutor he would look rather silly if he rushed into court and discovered when he got there that he did not have the evidence to make his charges stick.

I suggest to him that the sensible and proper approach to this matter is that which has been taken by the Minister of National Health and Welfare, in establishing these facts first. I would suggest to the hon. member for Prince Albert, who has had such a long experience as a criminal lawyer, that the wise prosecutor is one who finds out what his facts are before he considers the charge he is going to lay. If he does not know what his facts are and lays the wrong charge, it may be that the accused will get off even although he is guilty.

Mr. Diefenbaker: You found that out by experience with the combines act. It is experience from which you are speaking.

Mr. Garson: Once the facts were established, in the present case I would be very much surprised indeed if the parties concerned would not be prepared, upon the same kind of evidence that would produce a conviction in the event of a prosecution, voluntarily to co-operate in removing this nuisance without any of the difficulty, commotion and uproar we have heard from the hon. member for Prince Albert.

He says or implies that we are derelict in some way in this matter. I suggest to him that our job in this parliament is to enact the criminal law. I suggest to him that if he reads section 92 of the British North America Act, if I remember correctly subsection 14, he will see that the administration of justice is entirely in the hands of the provinces. The task of taking whatever legal steps may be necessary in Saskatchewan or Alberta is the responsibility of the attorneys general of these provinces. In fairness I must say that I would be the last to blame these attorneys general—I am amazed that a man with my hon. friend's experience would blame them—for not rushing into court with any kind of prosecution until they know what the facts are upon which they have to rely to secure a conviction.

My information, which is up to date until the last 24 hours or so, is that it has not been established that the effluent of this concern or that concern or the next concern is the cause of the condition in the Saskatchewan river. I am not suggesting that it is escaping gas or anything of that sort. All I am suggesting is that the cause of the pollution in the Saskatchewan river has not been established. I am sure the hon. member for Prince Albert, as a lawyer, will agree that you cannot—thank goodness—in this country convict people upon hypotheses or guesses; you have to prove a case against them and here you have to show that the effluent being discharged into the river is the cause of the trouble which is being experienced in Prince Albert.

I believe we have gone about this thing in the right way. We are trying to establish these necessary facts. When they are established I think we will be able to get the

matter cleared up without any necessity for a prosecution. The hon. member says there is a defect in our law because the penalty is not severe enough. If he looks at clause 165 of Bill No. 7 he will see the penalty is imprisonment for two years. If he looks at section 1035 of the present code he will see that it reads:

> Any person convicted by any magistrate under part XVI or by any court of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.

There is no limit to that fine.

Mr. Diefenbaker: What about corporations?

Mr. Garson: There is no limit; so all these fulminations the hon. member has inflicted upon us tonight about the inadequacy of our law and so forth are somewhat inappropriate until the facts are established and we can tell whether the existing law can be invoked to support a charge that would clear this matter up. Until these facts are established I must say that it is going to be most difficult to frame an amendment that will cover them.

Mr. Low: Is it not true that if you were seeking to convict under one of these clauses that we are speaking about at the present time you would first have to establish that some plant or some industry is pouring something into the river that does pollute the water?

Mr. Garson: Yes.

Mr. Low: Is it not true that that is exactly what the provinces are trying to do now, with the assistance of the Department of National Health and Welfare? It seems to me that hon. member for Prince Albert, whose legal wisdom we admire in this house, is now using this for political purposes. I have great admiration for my hon. friend, and he has established a reputation here for wisdom in the legal field. I do not blame him for one moment for putting forward the case of his city, and perhaps other cities in the province of Saskatchewan; certainly, as he said a few moments ago, one of the most important things to people in any section of the country is a good water supply. We admit that; but my hon. friend knows full well that before he can start any type of prosecution under the Criminal Code he has to get evidence, as the minister said, and it has to be pretty well established.

Mr. Montgomery: The hon. member misses the point altogether.

Mr. Low: No, I have the point. I think the minister is quite right. If I remember correctly the statute law in Alberta does give the authorities there ample opportunity to take action to stop the pollution of the water. If it can be discovered, let us say, that one of the big industries in or around the city of Edmonton is pouring substances into the Saskatchewan river which results in the condition one finds in Prince Albert, there is enough power in the statute law of Alberta to make it possible for the authorities there to stop it. That being so—

Mr. Martin: The public health act.

Mr. Low: —I do not see why it is necessary to talk about this particular criminal law in order to get a conviction for something we do not know a thing about. I suggested a moment ago that there is an outside possibility that escaping gas from gas wells may be causing it. I do not know if that is a fact, but there is a suggestion.

Mr. Coldwell: I understand that people are drinking water from the Battle river, and the Battle river flows right through the gas fields. If it is escaping gas that is causing the trouble, why is the Battle river water all right?

Mr. Low: I do not know; all I can say is that there are certain people, some of them from Saskatchewan, who suggest that the taste and smell of the samples of water they have had from the river in Prince Albert and other places in Saskatchewan indicates escaping gas.

Mr. Coldwell: Why is the Battle river water not polluted, then?

Mr. Low: That would not necessarily follow.

The Deputy Chairman: May I suggest to the committee that the Chair would like this discussion to be as wide open as possible and keep within the rules, but I should like the committee to keep away from a technical argument as to whether a condition in a certain river is caused by gas or by some other product and stay with the shortcomings, if you like, of the Criminal Code and its application.

Mr. Low: What I was trying to do was relate the question to the Criminal Code. Before we could take anything like specific action under the Criminal Code we would have to know whether it was escaping gas which was responsible, or we would have to know if it were effluent being poured into the river deliberately, and whether upon

warning from the provincial health people and those responsible the guilty party refuses to stop it or do something to divert it.

Mr. Martin: I think I should say a word or two in view of the earlier remarks of the hon. member for Prince Albert. The situation now is, as I said this afternoon, that no one can positively say what is the cause of this pollution. When the matter was first raised, the government of Alberta thought it knew the source; and after the technical officers from the Department of National Health and Welfare and the public health department in Alberta conferred with the particular corporation—and there was full co-operation given by that corporation—it later became clear from certain other evidence that there could be no certainty as to the cause. I would not rule out what my hon. friend has suggested as a possible cause, nor would I affirm that that was the cause.

Mr. Low: No one would.

Mr. Martin: The fact is that the technical people in both federal and provincial governments are co-operatively engaged in trying to ascertain the cause of this pollution, the seriousness of which no one in this house will deny, from the point of view of odour and from the point of view of taste in particular. In addition to that, co-operation has been enlisted of the public health engineering division of the United States public service, from their industrial hygiene laboratory in Cincinnati.

The Minister of Justice has indicated that the Criminal Code as it is constituted at the present time provides remedies; but in addition to that, so our perspective will be clear, I shall call the attention of the committee to the fact that in the province of Alberta, as in other provinces, legislation exists to meet this very kind of situation. The public health act, as amended by chapter 53 of 1944, in the province of Alberta provides in section 12 (1) the following:

> The provincial board shall have the general supervision of all springs, wells, ponds, lakes, streams or rivers used as a source of a public water supply, or for agricultural, domestic or industrial purposes with reference to their purity, together with the waters feeding the same, and shall examine the same from time to time when the necessity for such examination arises, and inquire what, if any, pollution exists and the causes thereof.

In subsection 2, without reading it *in extenso*, authority is given to the provincial board:

> . . . to inquire into and determine any complaint made by or on behalf of a riparian proprietor entitled to the use of water, that any industrial waste or any other polluting material of any kind whatsoever, which either by itself or in connection with other matter may corrupt or impair the quality of the water or may render such water unfit for accustomed or ordinary use . . .

And so on. Then in subsection 3 we find the following:

> The provincial board may make a report to the minister upon such complaint and as to what remedial measures, if any, are required in respect to any alleged injury or invasion of right as it may deem just.

Subsection 4 reads in part:

> Where the report of the provincial board recommends the removal or degree of treatment of any such polluting material, any riparian proprietor interested or the minister may apply to a judge of the supreme court or to a district court judge by way of originating notice . . .

—to deal with the situation; and this judge is empowered in subsection 5 to make:

> . . . such order upon the report of the provincial board, or upon such further evidence as he may deem meet, and on such terms and conditions as may be deemed proper.

I am satisfied from the conversations I have had over the telephone and by telegram with the responsible provincial authorities that once the facts are properly ascertained there will be no reluctance on their part to deal with this measure as effectively as this law provides.

Mr. Diefenbaker: Mr. Chairman, first I wish to say in answer to the Minister of Justice that, to use his own words in reference to myself in regard to another matter, he either deliberately or unwittingly misconceived what I placed before this committee this evening. I in no way gave him grounds for the argument that after all before you can convict you have to have a case. That would be rudimentary even to the Minister of Justice.

What I did say was that the criminal law as it is now constituted, the sections in question, do not cover a situation such as prevails in consequence of the pollution of the North Saskatchewan river. I came before this committee for the purpose of appealing to the minister to give consideration to amending the Criminal Code, the sections in question, in order to cover a situation which more and more is affecting various parts of our country and which inevitably must be met by the Criminal Code.

I suggest changes in these two sections in order to permit prosecution once it has been established—it is so obvious that it does not need to be mentioned at all—that responsibility has been placed with the individual or corporation responsible for the condition. The Minister of National Health and Welfare says the legislature of Alberta has the power to act, and he referred to certain sections. Now,

after all, is there that sense of urgency that is necessary under the circumstances that have been disclosed?

One would think to listen to the Minister of Justice that this was a trivial matter. After all, the people of northern Saskatchewan and northern Manitoba may wait and hope that some day the facts will be ascertained. What I am asking for and what they are asking for is some power to act when they are established. My hon. friend says that under legislation the province of Alberta provides controls that may be exercised. True enough; but are the people of Alberta affected by this? Not at all, not one of them. They have the large industries, but we in Saskatchewan and the people in Manitoba receive the water after it has been polluted.

No one in Alberta is affected by this. The first pollution is below the city of Edmonton. There is no sense of urgency there, however desirable the government is of action being taken. As far as Manitoba is concerned, the Minister of Justice says that there are laws there. They too are in the same position; they can do nothing. What can they do by legislative action in Manitoba to protect their people against the pollution of the streams that bring water to them in the ordinary course of nature?

There is only one thing that can meet the situation, and that is federal action in co-operation, if you will, with the provinces. There is only one means of federal action as I see it outside of the Fisheries Act, which is not too applicable to the situation here, and that is through the medium of criminal law which would make it a public nuisance when the comfort, health and welfare of the people in general are interfered with and disturbed as a result of the conduct of any group of individuals, a corporation or anyone else.

What I was asking for was simply evidence of some change being made in the criminal law to cover a situation such as this. My hon. friend surprisingly enough says that I speak for political purposes. Let me tell him—

An hon. Member: Oh, no.

An hon. Member: Never.

Mr. Diefenbaker: I wish the people in northern Saskatchewan could hear my hon. friends opposite jeering on a matter that affects every one of them. Jeering is their answer to the cry of the people in Saskatchewan.

Mr. Chevrier: There is no jeering.

Mr. Diefenbaker: Quite apart—

[Mr. Diefenbaker.]

An hon. Member: We are protesting against you—

Mr. Diefenbaker: I say this—

Mr. Martin: I am sure the hon. gentleman, who is very fair in this matter, would not want to give the impression that hon. members of this house, from members of the government down, do not share with him and others their concern over this situation. I am sure he would want to state that unequivocally.

Mr. Diefenbaker: I will state immediately that my hon. friend is in the position in which he has just placed himself as a result of his statement, but there were others behind him who jeered at this situation.

Mr. Garson: On a question of privilege—

Mr. Diefenbaker: I wanted—

Mr. Garson: On a question of privilege, there was no jeering on this side of the house.

Mr. Diefenbaker: What was it?

Mr. Garson: Any person who states there was jeering is not being accurate in his statement. There was some explanation—

Mr. Diefenbaker: That is not privilege.

Mr. Garson: There was—

The Deputy Chairman: Will the Minister of Justice please state his question of privilege, after which the hon. member for Prince Albert will have an opportunity to reply.

Mr. Fulton: There is no question of privilege; he is just using—

Some hon. Members: Order.

Mr. Fulton: I submit to you, sir, it is quite obvious that the minister is seeking to use a question of privilege to raise—

Some hon. Members: Order.

Mr. Fulton: —something which is not a question of privilege at all.

The Deputy Chairman: It is quite impossible for the chairman to decide whether or not it is a question of privilege before he hears it. I would ask the Minister of Justice to state his question of privilege.

Mr. Fulton: He has already said something that—

Some hon. Members: Order.

Mr. Garson: The hon. member for Prince Albert was pointing his outstretched arm at the members on this side of the chamber and accusing them of jeering at him. I say

that is an inaccurate statement and that his reference is to expressions of protest by us at his unwarranted remarks.

Mr. Fulton: That is not privilege.

Mr. Garson: What we were doing was expressing our disapproval of the inappropriate remarks he was making concerning the hon. member for Peace River.

An hon. Member: Ten o'clock.

Mr. Diefenbaker: Now.

The Deputy Chairman: In view of the statement that has just been made by the Minister of Justice I am sure the committee would wish to hear anything the hon. member for Prince Albert has to say, as long as it does not take us much beyond ten o'clock.

Mr. Diefenbaker: If it was not jeers, it was sneers. I still repeat that to my inexperienced ears—

Some hon. Members: Hear, hear.

Mr. Diefenbaker: —the noise that emanated from over there consisted of jeers.

Mr. Chevrier: Will the hon. member repeat what he said earlier?

Clause stands.

Progress reported.

BUSINESS OF THE HOUSE

Mr. Chevrier: On Monday we shall move third reading of three bills: Bill No. 79, respecting the boundary between the provinces of Ontario and Manitoba; Bill No. 177, to amend the Patent Act; Bill No. 80, respecting the Canadian forces. We shall then move to go into supply and if that motion is carried we will call two departments, public works and veterans affairs, when the items called will stand. Finally, if we reach the stage of legislation, we shall take it up in the following order: first, the War Service Grants Act; next the Telegraphs Act; and third, the fisheries convention.

At ten o'clock the house adjourned, without question put, pursuant to standing order.