minister aware that during the past two weeks there have been upward of 150 carloads of potatoes dumped into the British Columbia market, thereby virtually wiping out the grading and price stabilization controls of the British Columbia marketing board?

**Hon. J. J. McCann (Minister of National Revenue):** Mr. Speaker, I received a copy of the hon. member's question since coming to the chamber. The answer is no, that I am not aware of the condition he has stated. However, I shall look into the matter and ascertain the facts.

## BUSINESS OF THE HOUSE

### EASTER ADJOURNMENT

On the orders of the day:

**Right Hon. C. D. Howe (Acting Prime Minister):** Mr. Speaker, inquiries have been made about the timing of the Easter recess. I wish to advise hon. members that I propose shortly to place a motion before the house suggesting that this year the house stand adjourned from six o'clock p.m. on Wednesday, April 14 next, to 2.30 p.m. on Monday, April 26 next.

As a fair amount of business may yet remain to be dealt with when the house reconvenes after the Easter recess, we have been given to understand that most hon. members, more particularly those whose homes are a considerable distance from Ottawa, would prefer the longer adjournment.

## CRIMINAL CODE

### REVISION AND AMENDMENT OF EXISTING STATUTE

The house resumed, from Tuesday, March 9, consideration in committee of Bill No. 7, respecting the criminal law—Mr. Garson—Mr. Robinson (Simcoe East) in the chair.

**The Chairman:** When the committee rose last night we were considering clause 466. Shall the clause carry?

On clause 466—*Interpretation.*

**Mr. Fulton:** I wonder if the minister would be good enough to say a word to the committee respecting the position of magistrates under this part of the bill. I do not have reference to the problems involved in clauses 467 and 468 which, I understand, are to be allowed to stand, or to any controversy there may be in connection with enlarging the absolute jurisdiction of magistrates. In my inquiry I am referring to the position of magistrates generally, and I have in mind particularly the matter of stipendiary magistrates.

[Mr. Hahn.]

**The Chairman:** Order. I am sure the minister will be utterly unable to hear what is being said unless hon. members will observe silence.

**Mr. Fulton:** I have a pretty loud voice but I doubt if it could compete with the conversation going on in the chamber.

I notice that in the definition section of this part there is no reference to stipendiary magistrates. I also note that in many provinces a former practice, under which the remuneration of magistrates was dependent upon the imposition and collection of fines, has been eliminated. I understand however that there are still some jurisdictions in which that practice prevails.

I realize that this is a matter for the determination of the provinces, because they appoint the magistrates. Where the practice has been abolished, it has been done by provincial statute. But as the federal parliament has an interest in the administration of criminal justice, although no responsibility for it, I wonder if the minister would tell us to what extent the practice of remunerating magistrates through the imposition and collection of fines has been eliminated, and what steps are being taken toward the complete elimination of that practice.

**Mr. Garson:** As my hon. friend has correctly stated, the appointment of magistrates is entirely a provincial function, with which we have to be careful not to interfere. I think we have gone as far as we can go in meeting the point he has now raised, through the definition of "magistrate" as it appears in this part under clause 466 (b). In this clause a magistrate means—

> A person appointed under the law of a province, by whatever title he may be designated—

That is, whether it be a stipendiary magistrate, or whatever title he may have.

> —who is specially authorized by the terms of his appointment to exercise the jurisdiction conferred upon a magistrate by this part but does not include two or more justices of the peace sitting together.

I think my hon. friend would agree that that is about as far as we can go in our law in directing a province as to the kind of magistrate it should appoint to discharge the jurisdiction under this part. There is a very clear intimation in the clause that he has to be specially authorized, under the terms of his provincial appointment, to exercise the jurisdiction conferred by this part.

**Mr. Fulton:** I appreciate the effect of the provision, and I am sure it is one everyone welcomes. But would the minister indicate whether there are any conditions, conversations or representations being made, or that

have been held, which might encourage the hope that it will have the effect it is hoped it will have.

**Mr. Garson:** Mr. Chairman, as my hon. friend is aware, all the provisions in the code now before the committee, which in any way involve provincial jurisdiction, were submitted to and approved by the provinces. By implication, I believe they undertook to appoint persons who would be competent to discharge these responsibilities.

**Mr. Fulton:** That might be called a leading answer. Then, it will be no longer necessary to make a division between cities of 25,000 population and those having less than 25,000, and towns with 5,000 population, and so on? It will be up to the provinces to appoint magistrates as rapidly as they can, no matter what the population of a city or territory might be, for the purpose of exercising the jurisdiction set out here?

**Mr. Garson:** That is right. And some provinces have already done this.

Clause agreed to.

On clause 467—*Absolute jurisdiction.*

**Mr. Knowles:** I realize that while this government has been in power there has been a quite marked degree of inflation. I suppose inevitably that would reflect itself even in the Criminal Code. I still wonder whether it was really expedient to raise the ceiling from $25 as it was before to $50 as it is set out in line 11 on page 162. Would the minister care to comment?

**Mr. Garson:** I think it is entirely reasonable that that should be done. After all, we are here dealing with a code which applied a limit of $25 for many years past, and I should think that upon a test of purchasing value the draftsmen of this code should have gone much higher than the $50 from the $25 level at which this figure formerly stood.

**Mr. Diefenbaker:** Will the minister give us an estimate of what would be the proper amount?

**Mr. Knowles:** What is the significance of the monetary value referred to in this clause?

**Mr. Garson:** If my hon. friend will look at clause 467 paragraph (a) on page 162 of the bill he will see the answer to that question.

**Mr. Fulton:** I understood that clauses 467 and 468 were to be allowed to stand in the light of the fact that a number of members have some comments and some criticisms to make on these clauses.

**Mr. Garson:** I have no objection to their standing, but will my hon. friend give us some clue as to why they are being stood in order that we may be able to deal with his points when he makes them on another occasion. There is really not a great deal of difference between these clauses 467 and 468 in the new code, Bill No. 7, and their counterparts in the present code.

**Mr. Diefenbaker:** Will the minister say what the difference is?

**Mr. Garson:** Yes.

**Mr. Diefenbaker:** That might clear up the trouble.

**Mr. Garson:** The following are the changes. A magistrate, as has been indicated by the exchange which has just taken place between the hon. member for Kamloops, the hon. member for Winnipeg North Centre and myself, will under Bill No. 7 have jurisdiction in all cases of theft where the value of the property is $50 instead of $25; in obtaining or attempting to obtain by false pretences and receiving or retaining property where the value does not exceed $50 instead of $25; and in all cases of receiving or retaining any property obtained by the commission of an indictable offence, instead of only stolen property.

Another change is that the magistrate is given jurisdiction under this present bill in lottery cases. It was considered warranted that this jurisdiction should be given to him because he now has jurisdiction and will continue to have it over gaming and betting houses, bookmaking and pool selling.

Another change is that the magistrate is given jurisdiction over the offence of cheating at play.

Another change in the opposite direction is that the following offences have been excluded from the absolute jurisdiction of magistrates: Indecent assault of males under 14 years; indecent assault on females.

Another change is that the special provisions relating to punishment have been dropped in cases over which a magistrate exercises absolute jurisdiction. This will remove the anomaly of different sentences being imposed for the same offence.

These are changes brought about by clause 467 and I am a bit nonplussed to know why the request is being made to have the clause stand. It would be helpful if my hon. friend could give me some clue as to what the basis for the request is.

**Mr. Fulton:** If the minister had asked the question when we had the conference on it

two nights ago I could have indicated it and saved the time of the committee at this time.

**Mr. Garson:** That is all right, if my hon. friend does not want to state it now.

**Mr. Fulton:** I will tell him. Obviously it is the fact that it was being doubled with respect to the monetary value of the articles referred to in subparagraph (a) of clause 467. The other enlargements are very seriously questioned by some of our members who have had considerable experience with proceedings in magistrates' courts. Then, technical questions are to be asked under 468 as to the adequacy of the wording, which I need not enlarge upon here.

**Mr. Garson:** That is all right.

**The Chairman:** Clauses 467 and 468 stand.

Clauses 469 to 473 inclusive agreed to.

On clause 474—*Duty of judge.*

**Mr. Knowles:** I believe there has been a change in line 33 of this clause. Formerly the time of the trial was to be as soon as possible; whereas now it is changed to read that the judge shall fix the time and place of the trial of the accused. Can the minister state the effective result of that change?

**Mr. Garson:** There would not be very much difference in effect at all. I would think that the judge to whom application was made to fix the time of the trial would, as they always do, fix it as soon as possible, taking all circumstances in account.

Clause agreed to.

Clauses 475 to 480 inclusive agreed to.

On clause 481—*Continuance of proceedings when judge or magistrate unable to act.*

**Mr. Garson:** In line 31 of clause 481 there is a typographical error. "Jurisdiction" is spelled improperly. I would ask my colleague, the Minister of Public Works, to move that it be changed to the correct spelling. Then, in line 47 the word "respect" should be "respects", plural. I would ask my hon. colleague to move that that change be made.

**Mr. Winters:** I so move, Mr. Chairman.

Amendments agreed to.

Clause as amended agreed to.

Clauses 482 to 485 inclusive agreed to.

On clause 486—*Prosecutor may prefer indictment.*

**Mr. Knowles:** It has been suggested to me that British Columbia and some other provinces have no grand jury. If that is correct, what happens?



**Mr. Garson:** If my hon. friend will look at clause 489, at the bottom of the page, he will see that Quebec, Manitoba, Saskatchewan, Alberta, British Columbia, the Yukon Territory and the Northwest Territories do not have the grand jury.

Clause agreed to.

Clauses 487 to 493 inclusive agreed to.

On clause 499—*Count for murder to stand alone.*

**Mr. Fulton:** May I ask that this clause stand, Mr. Chairman? What I have here is a quite technical legal point, which the minister might dispose of quite rapidly if it were raised, but it seems to me this is not the appropriate time. It will take some time to advance it and it is entirely technical. It might be disposed of very shortly, and I shall try to see the minister between now and the time we come back to it.

**Mr. Garson:** Agreed.

Clause stands.

Clauses 500 to 507 inclusive agreed to.

On clause 508—*Application, how made.*

**Mr. Nesbitt:** This clause is a combination of a number of clauses in the present code. It says in part:

> —order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried.

In these modern days with the press, radio and that sort of thing, it very often may happen that in a province with a small area, such as Prince Edward Island, a situation may arise similar to that which arose recently in Cornwall where there was a lot of publicity in the magazines and one thing and another in connection with a trial. I refer to Prince Edward Island as being a province with a small area, and that area is shortened even more by the advent of radio, press and modern communications, and it is quite conceivable that if there was a lot of adverse publicity before the trial a person would not be able to receive a fair trial in any part of the territorial jurisdiction.

It is quite different in a large province such as Ontario where the venue could be changed from Toronto to Port Arthur or Fort William, but in a place such as Prince Edward Island or even New Brunswick it would not be possible to change the venue by such a distance that a person would obtain a fairer trial than he would in his own locality. Would the minister care to comment on that?

**Mr. Garson:** Do I gather from my hon. friend that he is suggesting that the clause

should be amended to provide for a change of venue from one province to another?

**Mr. Nesbitt:** Yes.

**Mr. Garson:** I must say that it was not thought by the men who had to do with the preparation of the present bill, some of whom had had long experience in criminal work, that there was any necessity for a change of venue from one province to another. I cannot recall myself any such necessity ever having arisen in a single case. I would think that at least one case should arise where a change of that sort seemed desirable before the existing law should be amended. As I think my hon. friend knows, applications for a change of venue from even one territorial division to another are infrequent. It might be better to let the law stand as it is.

**Mr. Nesbitt:** I quite realize what the minister has said, that the commission went into this matter very carefully, but it is just possible that this might not have occurred to them. I was just making the suggestion because I know there have been several trials in Ontario which received a great deal of notoriety. While it may not have been felt at the time on behalf of the accused that a change of venue was necessary, there have been cases in Ontario where the venue has been changed from one part of the province to another. I am not familiar of course with Prince Edward Island, and I was using that province as an example of a small territorial division where news would travel around by word of mouth and it would be quite conceivable that the public could get worked up and the accused might conceivably not receive a fair trial in the area. I just suggested that possibly the commission which went into this matter did not examine that one little point. It may not have occurred to them and I think it might be well if the minister took that into consideration.

**Mr. Garson:** I would be glad to take it under consideration. Perhaps I could write to the attorney general of Prince Edward Island. I think my hon. friend will agree that most of the other provinces are sufficiently large and therefore that question would not arise. So if I may, I shall take the course of writing to the attorney general of Prince Edward Island to get his views upon the matter.

**Mr. MacNaught:** I did not hear all that the hon. member said but I must go on record as opposing any suggestion that a person does not get a fair trial in Prince Edward Island.

**Mr. Nesbitt:** On a question of privilege, I can assure my hon. friend that any such implication was far from my mind. I was merely saying that in a small territorial area it would be possible for the public to get worked up. For instance, the whole southern end of Ontario, which is many times the area of Prince Edward Island, was worked up over a case recently tried in Cornwall. I think in that case counsel for the accused could very well have asked the court to ask a change in venue because the public was emotionally disturbed. I made no reference to any personalities in Prince Edward Island, I assure you.

**Mr. Diefenbaker:** There is no appeal from the discretionary rights or authority exercised by a judge, either on application at the trial or to a judge who could sit in the court in question prior to the trial. Am I right in that regard?

**Mr. Garson:** I think my hon. friend is right.

**Mr. Diefenbaker:** I am not going to go into the details of this case in Cornwall, but I use it as an illustration of what I have in mind. In that case a number of articles were published which would lead to the conclusion on the part of any person reading them that the accused was guilty. No application was made prior to the trial for a change of venue or, as far as I remember, at any time at all. I am not criticizing in any way what was done there, but certainly no one could complain about the penalties that were imposed upon those who actually and detrimentally affected the free trial of an individual charged with a capital offence. I have raised this question on a number of occasions and perhaps the minister will allow me to make one reference.

I do feel that the local dealer in that case received a penalty which stigmatizes him. Having regard to the circumstances, I feel that too great an onus was placed on that local dealer. Without having communicated with him either directly or indirectly, I believe that it would be in the interests of dealers across Canada and in the interests of that person if consideration were given by the minister to granting a pardon under the circumstances.

Having said that, and returning once more to the question of venue, I had occasion once to be counsel for the prosecution in a jury case where references were made in the press which were most detrimental to the prosecution. There was no possibility, if the people as a whole followed the suggestions in the press, of a verdict other than not guilty being returned. A change of venue was not granted on the application which, as I remember it, was made before the trial.

**Mr. Garson:** By the crown counsel?

**Mr. Diefenbaker:** Yes.

**Mr. Garson:** Which was my hon. friend?

**Mr. Diefenbaker:** I had something to do with it. I have always felt that consideration should be given to allowing an appeal from a decision made before trial denying a change of venue. I am not asking that an appeal be allowed to an accused or crown counsel asking for a change of venue at the trial, where they have waited until the last moment. If such an appeal were allowed it would simply be an invitation to an accused who wished to postpone the date of trial to secure a postponement by an indirect method. But I believe that justice would be done if consideration were given by the minister to granting the right of appeal where an application for change of venue is made before a trial.

That appeal could be heard almost immediately. It would assure that no case of injustice would arise because of incidents prejudicial to a fair trial, from the point of view either of the crown or of the accused. Certainly—and again I am making no mention of the case at Cornwall—there is nothing more detrimental to the course of justice than articles with regard to a case written before trial which can only have the effect of poisoning the minds of the jury, however desirous the members of the jury may be to disabuse their minds or to free them from the effect of the articles they have read. Human nature being what it is, and all of us being subject to extraneous influences, there is a necessity for the strictest application of the laws against the publication of injurious matter before trial. But at the same time, in the case to which I have alluded, I feel that the local distributor or dealer should not have imposed upon him the onus of reading everything that comes into his place of business in order to determine whether there is in it anything that might be detrimental to the course of justice. I make this suggestion to the minister and I would think it would be favourably received. This gentleman with a fine reputation, having innocently, as he said, and unwittingly committed an offence and having offered an apology for whatever wrong was inadvertently caused by him, I suggest that consideration should be given by the crown and by the Minister of Justice (Mr. Garson) to a pardon that would remove from him any suggestion of his being a criminal, a stigma that now remains upon him.

**Mr. Garson:** My hon. friend's suggestion that there might be an appeal from an application for change of venue which has been refused is one that I think possesses distinct merit. I would make a counter-suggestion to my hon. friend, namely that I should send to the commissioners on uniformity of legislation, criminal section, the *Hansard* of today's debate containing my hon. friend's suggestion in order that they might take the matter up at their next meeting. I make that suggestion for this reason. While in the course of enacting criminal law here our primary aim of course is to draft a law which is as just as possible, we must also bear in mind the fact that no law is any better than its enforcement. As far as possible therefore we must pass laws which the provincial authorities, whose responsibility it is to enforce our criminal law, will do so without reluctance and with zeal. On that account, in a matter of this kind, I think it would be the better course to submit my hon. friend's suggestion to the commissioners on uniformity of legislation, criminal section, for their consideration.

With regard to the matter of a pardon which my hon. friend has raised, while I would not wish to contradict or to gainsay any remarks made by him concerning the merits of the order for commitment on contempt which was made by Chief Justice McRuer, I myself would hesitate to put an opinion which I had reached on the basis of a perusal of newspaper accounts against the judgment of the judge who was presiding at the trial. But if any application for such a pardon were made, I am sure that it would be disposed of on its merits in the ordinary course by the Solicitor General of Canada.

Clause agreed to.

Clauses 509 to 522 inclusive agreed to.

On clause 523—*Defence of insanity.*

**Mr. Fulton:** The subject matter of insanity has been referred to the royal commission. I therefore do not intend to discuss from the point of view of the law the defence of insanity, because the commission is to make recommendations to us in that matter. However, there is a point that has been brought to my attention. I admit that it is not in the old code in this section, but I think it would be appropriate to suggest that the form of oath to be administered to the jury for the trial of an issue of insanity might be included here or that some reference might be made to it. In my limited experience it so happens that in one case with which I was connected this defence was raised and it seemed probable that the trial of the issue would be directed before arraignment. We scratched our heads a little bit as to where we were going to get the form of oath to administer to the jury for the trial of that issue. Would it not be appropriate to have in this section a reference to that special form of oath?

**Mr. Garson:** My impression is that the departments of the various attorneys general of

the provinces have a form of oath that has been established by practice, and I think it might be better to leave out of the code any references to a form that we might prescribe. The probabilities are that the result of our prescribing a form of oath would mean that the provincial authorities in seven or eight different provinces would have to change the form which they had been using for a long period of time.

**Mr. Fulton:** I did not appreciate the fact that that is the case. Then the form of oath would be in the possession of the clerks of the various courts?

**Mr. Garson:** Yes.

**Mr. Fulton:** Under instruction from the attorneys general?

**Mr. Garson:** That is right. These forms of oath are probably not exactly the same, and it might mean that some of the provinces would have to make a change.

Clause agreed to.

On clause 524—*Insanity at time of trial.*

**Mr. Fulton:** There is a small point I wish to make with regard to this clause. I notice that in the section of the present code which this clause replaces, namely section 967, subsection 2 reads as follows:

> If such issue is directed before the accused is given in charge to a jury for trial on the indictment, such issue shall be tried by any twelve jurors, or in the provinces of Saskatchewan or Manitoba by any six jurors—

—whereas in subsection 2 (a) (1) it reads as follows:

> If such issue is directed before the accused is given in charge to a jury for trial on the indictment, such issue shall be tried by any twelve jurors, or in the province of Alberta, by any six jurors.

What is the reason for the change?

**Mr. Garson:** There is no change. In the present code there is a reference to the six-man jury in Alberta.

**Mr. Diefenbaker:** In section 541.

**Mr. Garson:** The only changes which have been made in sections 523, 524 and 525 of this Bill No. 7 are that these clauses have been worded so as to make them applicable to all trials of indictable offences whether with or without a jury.

**Mr. Fulton:** I apologize to the minister and to the committee. I was looking at my Tremeear and had not consulted the supplement.

Clause agreed to.

Clauses 525 and 526 agreed to.

On clause 527—*Prisoner mentally ill.*

**Mr. Nesbitt:** I wish to raise a point in connection with the third line of this clause which refers to "a person who is insane, mentally ill, mentally deficient or feeble-minded". I wonder whether the minister would care to comment on why the four words are used there. It has always been my understanding that the terms "insane" and "mentally ill" were synonymous, although "insane" is a more archaic word. I have also assumed that "mentally deficient" and "feeble-minded" are equally synonymous except that "feeble-minded" is also somewhat of an archaic expression.

**Mr. Garson:** The immediate point my hon. friend makes is correct. Some of this language is a bit archaic, but the problem with which a draftsman is confronted when he is trying to simplify the law is to get rid of as many archaic terms and as much surplusage as he can, without by so doing making inapplicable case law which has been decided on these phrases which he is thinking to discard.

**Mr. Knowles:** In this case you add a phrase.

**Mr. Garson:** In this case the language which is used, and which my hon. friend sees here, has been deliberately left there for that purpose. It is a case of two evils and choosing the lesser.

**Mr. Nesbitt:** I take it from the minister's remarks that the reason the word "insane" is retained is in order to make reference to decisions on the subject in the past.

**Mr. Garson:** Yes.

**Mr. Knowles:** This is a small point, but perhaps it might be pointed out that in the old section 970 there were only three phrases, "insane", "mentally ill" or "mentally deficient". In the new clause 527 we have four, "insane", "mentally ill", "mentally deficient" or "feeble-minded". The minister says that he is retaining the wording because of the case law but I submit that he is extending the wording.

**Mr. Garson:** I said that sometimes archaic phrases are retained in order to retain the case law. I did not say that that fact was a reason why the coverage of the language could not be somewhat extended, as it is extended here, by adding the word "feeble-minded" to the phrase in the present section.

Clause agreed to.

On clause 528—*Appearance by attorney.*

**Mr. Knowles:** Will the minister comment on any significance there is in the change of

wording here? It is really quite enjoyable to us on this side of the house to hear the minister tell us sometimes that the words in a new clause are good because they represent no change and at other times that they are good because they have been changed. In the old section 916 the reference was to "attorney". Now the reference is to "counsel or agent". Does that mean that from now on a corporation can be represented by some agent who is not an attorney?

**Mr. Garson:** Yes, the corporation for the purpose of appearing before the court can be represented by an agent. The clause reads:

> Every corporation against which an indictment is found shall appear and plead by counsel or agent.

A corporation, not being a human being, has to appear by a human being. The purpose of this clause is to establish what relationship shall exist between the corporation and the human being who appears for the corporation. That human being may be an agent or counsel.

**Mr. Knowles:** It is not restricted to an attorney? In other words, it is not restricted to a practising lawyer?

**Mr. Garson:** If my hon. friend will look at page 2 of the bill he will see the definition of "counsel" in subclause 7 of clause 2. It reads:

> "Counsel" means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of the province to do or perform in relation to legal proceedings.

**Mr. Knowles:** But what is the definition of agent?

**Mr. Garson:** "Agent" would be an agent in the ordinary sense. But it would not follow, because an agent appears and does that for the accused corporation which an accused human being would do for himself, namely make an appearance and plead, that the agent would also act as counsel in the case. If the agent were wise he would have counsel there acting for the accused corporation.

Clause agreed to.

Clauses 529 to 533 inclusive agreed to.

On clause 534—*Qualification of juror.*

**Mr. Barnett:** I rise more for the purpose of obtaining information than anything else. Am I correct from a reading of this clause that all laws with reference to qualification as a juror, compelling attendance as a juror and so on are provincial in scope and that there is no place in this legislation where such matters are defined?

[Mr. Knowles.]

**Mr. Garson:** That is right. Speaking generally, provincial legislation provides the machinery whereby jurymen, as a class of court officials, are made available. Once they have been made available the code states the manner in which they perform their duties in the trial of cases arising under the code.

**Mr. Barnett:** What about the matter of penalties for non-attendance when an individual has been summoned to attend as a juror?

**Mr. Garson:** Penalties for the breach of any duty imposed upon jurymen by the code are provided in the code. The penalty for the failure of a citizen to comply with any of the provisions of the provincial statutes relating to jurymen will be the penalty provided by the provincial statute.

**Mr. Barnett:** I really would like to get this point clear. I have in the back of my mind an incident that occurred a number of years ago. As I understand it, a number of people were summoned as part of a panel of jurors under circumstances which would have forced them to travel over fifty miles at their own expense and to provide their own accommodation at the place. A number of them did not go because they just did not have the money to travel or the money to maintain themselves away from home. Is there a provision in the code under which they would be liable, and under what circumstances would they be liable for non-compliance of that kind? I have not noted any provision, and I thought this clause would be a good place to raise the question.

**Mr. Garson:** I am afraid I could not possibly express an opinion on the case my hon. friend from Comox-Alberni speaks of without having a full and correct statement of the facts of the case. In addition, it would be necessary to examine the law of the province concerned, relevant to those facts. One cannot give legal opinions when one has neither the facts nor the law. That is the position in which I find myself in relation to the question at the present time. The old section 921 has been held to adopt the provincial laws to the extent that it is necessary for our purposes under the code in order to provide jurymen to try offences under the code. I might cite the case of Rex *v.* O'Rourke, 32 Upper Canada Common Pleas, 388. The citation reads as follows:

> Provincial legislation also fixes the number of jurors to be summoned as the panel from which the petit juries are selected.

I think that was the point my hon. friend was making.

What parliament has done, by what is now section 921, is not to delegate to the provinces its powers in this respect, but to adopt provincial laws as its own, and this is clearly within its powers.

**Mr. Barnett:** In other words, there is no place within the Criminal Code itself which provides that non-compliance with an order of attendance would be an offence. It is purely a matter of a proceeding within the province; is that the conclusion I am to draw?

**Mr. Garson:** No, the conclusion my hon. friend is to draw is this. Whatever a juryman does which is contrary to law will be an offence against that law to which it is contrary, whether that law be provincial or federal.

**Mr. Stick:** Is not the jury the law in this case?

**Mr. Garson:** No, not in the sense the hon. member for Comox-Alberni was referring to it. What he was referring to was the manner in which citizens are called up, and by following certain procedures, are made into jurymen. Then, when these jurymen attend to perform their functions in a court of criminal law, they are still not the law, but are the sole judges of the facts. The presiding judge is the judge on all points of law.

**Mr. Stick:** The reason I asked that question was that some time ago the grand jury had a contentious case. We did not know what to do with it. We consulted the chief justice, and he gave us an indifferent answer. Then, we consulted one of the other judges of the supreme court, and the reply we got from him was, "Gentlemen, you are the law, and you decide." We decided it.

**Mr. Knowles:** What does the minister say to that?

**Mr. Deschatelets:** If a change were contemplated in the qualifications of jurors in order to permit women to sit as jurors, would that be decided by the provincial or the federal government?

**Mr. Garson:** It would be decided by the provincial government. I might say to my hon. friend from Maisonneuve-Rosemont that in a number of provinces they now have lady jurors.

**Mr. Ellis:** Do I understand, then, that this parliament has no control over determining the qualifications of jurors who sit on cases covering offences committed in contravention of this code?

**Mr. Garson:** My hon. friend from Regina City said to me, if I understood him correctly, do I understand that this parliament has not the jurisdiction to determine the qualification of jurors? Answering my hon. friend in the terms of his question, I should say parliament has the jurisdiction to do this. But parliament, I think wisely, has thought it preferable to leave to the provincial legislatures the enactment of legislation to determine those persons whom the provincial authorities regard as qualified to be jurors. In that way varying provincial views upon the subject are met.

Clause agreed to.

Clauses 535 to 540 inclusive agreed to.

On clause 541—*Challenges by accused in Alberta and territories.*

**Mr. Diefenbaker:** We had a six-man jury in Saskatchewan for a number of years, and found that we wanted to return to the twelve-man jury, because counsel on each side, however the case turned out, felt that the judge was able to exercise a greater degree of control over the jury when there were only six than when there were twelve. Has any request been made at any time by Alberta to return to the twelve-man jury?

**Mr. Garson:** No, Mr. Chairman; the government of Alberta has not made any such request.

Clause agreed to.

Clause 542 agreed to.

On clause 543—*Challenge by prosecutor.*

**Mr. Knowles:** This is perhaps a minor point, or a point of language. Can the minister say whether there is any significance in the fact that the words "the crown" have been changed to the words "the prosecutor"? I notice in the code as it now stands the crown, the prosecutor and the prosecution run through the comparable sections.

**Mr. Garson:** There is not any change in effect. As between the two terms, I believe "the prosecutor", which my hon. friend will see defined in clause 2, subclause 33 of the bill, is the more precise. It is the representative of the crown or the personal prosecutor in the court who actually does the challenging. Perhaps I had better read into the record subclause 33 of clause 2:

"prosecutor" means the attorney general or, where the attorney general does not intervene, means the person who institutes proceedings to which this act applies, and includes counsel acting on behalf of either of them;

**Mr. Stick:** I notice that the prosecutor is entitled to challenge four jurors. How many is the defence allowed to challenge?

**Mr. Garson:** In capital cases they may challenge 20, and in lesser indictable offences

12. If my hon. friend will look at the preceding clause, 542—perhaps I had better read that clause into the record:

An accused who is charged with an offence punishable with death is entitled to challenge twenty jurors peremptorily.

(2) An accused who is charged with an offence other than an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

Then, in addition to that, in the case of a capital offence the defence counsel has an unlimited number of challenges for cause.

**Mr. Stick:** If there is an unlimited number of challenges—what is a panel, 48?

**Mr. Garson:** The panels may vary from province to province, but it may be somewhere in that neighbourhood.

**Mr. Stick:** If defence counsel challenges an unlimited number and the panel is exhausted, what happens then? Do you call a new jury panel?

**Mr. Garson:** No, the first thing that happens is they go out into the courtroom or wherever they can find citizens and call up some additional jurymen in that way. But it is not very often that the jury panel is exhausted in that way; for while defence counsel can challenge any number of jurymen for cause there will not be a large number of jurymen on the panel in relation to whom defence counsel will be able to show cause. For that reason it is most infrequent that a panel is exhausted by challenges for cause.

**Mr. Stick:** I do not like this idea of going out and bringing in this man or that man to serve unless he has been properly served with a notice. I do not think you should go into the highways and byways to bring them in to serve on this jury. I may have the wrong impression, but if that is done I think it is entirely wrong and they should be served with a proper notice.

Clause agreed to.

Clauses 544 to 556 inclusive agreed to.

On clause 557—*Accused to be present.*

**Mr. Knowles:** I notice that clause 557 is slightly changed from section 943. As a matter of fact there may be several sections involved. The main change is that formerly the wording was that every accused person "shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting proceedings as to render their continuance in his presence impracticable." The words "shall be entitled to be present" have been altered to read "shall be present".

[Mr. Garson.]

Then another change has been made in that, if I understand section 943 correctly, it refers only to individuals, whereas there is a reference in clause 557 which says, "an accused other than a corporation". My question is this. If an accused individual is required to be present during the whole of his trial, why should not a corporation, through the agent or counsel we were speaking about a while ago, also be required to be present?

**Mr. Garson:** If there were any doubt on the score, perhaps it should be resolved. I am referring now to the second point made by my hon. friend. The intention here was that a corporation should appear to the same extent as an individual accused. But that cannot be stated quite so simply as that; for a corporation makes its appearance by counsel or agent. If it were thought necessary to make such a provision—and I myself do not think it is—it would have to read that—

An accused, other than a corporation, and the agent or counsel of an accused corporation shall be present in court during the whole of the trial.

But I do not think that is really necessary.

**Mr. Knowles:** Perhaps the minister would let it stand and take a look at it.

**Mr. Garson:** All right; there is no objection to that.

Clause stands.

On clause 558—*Summing up by prosecutor.*

**Mr. Diefenbaker:** Mr. Chairman, in what I say I shall refer particularly to subsections 3 and 4. Subsection 4 entitles the attorney general, or counsel acting on behalf of the attorney general, to reply, even though an accused does not offer evidence in his own defence. I know of only one or two cases in which this power has been used by counsel acting on behalf of an attorney general. It is a survival of the English common law, and is based upon the legal fiction of the supremacy of the crown. I am wondering where it has any application today.

Certainly those in the commission who redrafted or reshuffled the sections of the Criminal Code did away with common law offences. I feel that subsection 4 is a survival of the common law and is no longer applicable, having regard to present-day conditions. It was a power exercised by the crown, chiefly in treason and analogous cases. I think it is unfair to the accused. Today under our law the crown and the individual are equal, as a result of the changes brought about two years ago in connection with proceedings in the courts. In view of the fact that today the crown and the citizen are equal I can see

no justification for continuing this principle under which the crown, in our courts, occupies a superior position.

This provision has been in effect throughout the years. As I say, I know of only one or two cases in which it has been used. This was not in my own province but rather, I believe, in Manitoba in the year 1912, at a time when certain prosecutions were taking place in that province in connection with contracting work on the legislative buildings. The crown in that instance demanded the right of reply. I believe, too, the right was exercised in one case in British Columbia. I suggest this right should now be abrogated.

Subsection 5 is a new subsection which states:

> Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

I believe this is a necessary change in the law, where there is a joint trial. Otherwise such trial becomes all mixed up, with counsel addressing the jury with respect to one charge, and waiting for other counsel to address the jury on another charge. I believe subsection 5 will go a long way toward meeting the difficulty in those cases in which there are two or more accused. It will remove the anomalous situation that does prevail when there are two accused, one of whom gives evidence on his own behalf and the other who fails to do so.

However, in connection with subsection 4, I would ask the Minister of Justice whether he does not consider the time has come to remove from the criminal law this survival of the old decision that the crown occupied a position superior to the individual, and where the citizen was second to the crown in the courts of the land.

**Mr. Garson:** This is another case in which, in all candour, I must admit that the point raised by the hon. member for Prince Albert has some merit. It does, however, seem a bit extraordinary that this bill should have been in course of preparation and consideration for some five years now, and that during all this time, in its progress through the commission and through my own department, during its consideration by the commissioners on the uniformity of legislation, criminal division, and by the attorneys general of the provinces, as well as the special committee of the House of Commons and of the other place, this is the first occasion upon which representations to the effect of those just advanced by the hon. member for Prince Albert have been made by anyone.

I agree that this present provision merely continues in effect the substance of section 944, subsection 3 of the present code which has been the law of Canada for a great many years. It has not been necessary on very many occasions to invoke this provision, yet I think it would be wise, before discarding it, to examine those occasions on which it has been invoked to see whether it would not be a good provision to retain to cover these exceptional cases when they arise. I would accordingly suggest that my hon. friend's suggestion might be submitted, like the one he made previously this afternoon, to the commissioners on uniformity, criminal section, for consideration at their next meeting. In that way we would get the views of those who will have some connection with the administration of the amendment proposed by my hon. friend from Prince Albert, if it were passed.

**Mr. Diefenbaker:** I have no objection to that. What I was trying to do was assure some degree of consistency, for I remember two years ago, when the crown and the citizen were given equal standing in the courts, the Minister of Justice as Attorney General of Canada saying that now we had arrived at a point where no longer does the crown occupy a superior position. It was because of that statement that I raise this point.

**Mr. Stick:** I am just seeking information, since I am a layman. In most criminal cases the crown opens the case and closes it by means of the crown prosecutor addressing the jury last. I do not understand why the crown prosecutor should have the last word to the jury before the judge sums up the case. Why is the sequence not maintained, so that if the crown prosecutor opens he should address the jury first and counsel for the defence last? Is there any special reason for that? I was always curious about it.

**Mr. Garson:** The explanation of the point which my hon. friend has raised arises out of the necessities of the trial. Because the accused is innocent until he is proven guilty, the prosecutor opens the case, and he has to adduce evidence to prove the accused's guilt before there is any case for the accused to answer at all. The accused's counsel then puts in his evidence to establish the best defence he can. When the accused's counsel has got all his evidence in, he gets up and explains to the jury what a wonderful defence it is that he has made. Next the crown prosecutor attempts by argument to show that the defence has not answered the crown's case. When, however, defence counsel puts in no evidence it is the crown prosecutor who first has to argue that the crown's case is well proven, and defence counsel then closes the argument.

The question we are now discussing is as to whether in exceptional cases the crown

would have a further right of reply. Now, as I understand it, this reply to which the hon. member for Prince Albert strongly objects will be strictly confined by the judge to the answering of any new points that were brought out in the defence counsel's address. The crown prosecutor would not be permitted to go over his case again; his closing argument would have to be a reply in the strict sense.

**Mr. Stick:** It has always struck me as unfair. If the accused is innocent until he is proven guilty, then it has always struck me that this procedure gave the crown an advantage in that it had the last word with the jury. I grant you that the judge is there to sum up the case, but I could never understand it from that standpoint.

**Mr. Gillis:** I have heard some young lawyers make exactly the same criticism, that the crown attorney, who is usually an old, experienced lawyer, will come in and make his case. After all, it is a debate as to who is right or wrong. After he finishes his case the defence lawyer gets up and puts in his evidence. Then the crown attorney has the right of rebuttal. He has the right to get up and tear the defence to pieces and close the case. That is the last impression that is left in the minds of the jury. During that time the defence lawyer sits there. The crown attorney may have left himself wide open, but the defence lawyer is prevented from answering at all. Most young lawyers at least consider it very unfair and say that it places them at a great disadvantage.

**Mr. Garson:** There is just one footnote that I should add to the remarks made by my hon. friend. The last thing that happens in a case is the judge's charge to the jury. The jury does not retire with the words of counsel ringing in their ears; they retire reflecting upon the words of the presiding judge.

**Mr. Diefenbaker:** And the court of appeal has the last say.

**Mr. Garson:** Yes.

Clause agreed to.

Clauses 559 to 561 inclusive agreed to.

On clause 562—*Admissions at trial.*

**Mr. Diefenbaker:** This section has to do with evidence on trial. I should be very much interested in learning from the Minister of Justice whether or not the commissioners gave consideration to the promulgation under law of rules respecting the admission of so-called confessions on the part of accused persons. Clause 562 says:

> Where an accused is on trial for an indictable offence he or his counsel may admit any fact—

That is of course at the trial. As the minister knows, the whole subject of admissibility of confessions is one of the most difficult that the courts have to deal with. All want to see a guilty man punished, but all who confess are not guilty. Everyone in the active practice of law in the courts knows of cases in which the accused for one reason or another have signed very complete and all-embracing confessions. Later on those confessions have been established to have no relationship to the facts. I think of one case in the province of Saskatchewan. Back in 1933 a little girl was murdered at Naicam, in that province. I think the minister knows of the case, because the prosecution of the alleged murderer took place about three years ago; incidentally, he was acquitted. This little girl had been ravished and murdered. A man was picked up in Portage la Prairie, Manitoba, and he made a complete confession in detail. As he was examined by the police officers more and more facts came to his mind. He was finally brought back to Naicam and there he re-enacted the offence.

Some months later, when all hope of his acquittal had disappeared so far as his relatives were concerned, although believing in his innocence, a farmer living some 300 miles from Naicam read of this man's confession of having committed this murder on a certain day. He realized that this was the man who had worked for him throughout the summer, and that he could not have been at Naicam on the date in question. This farmer communicated with the attorney general's department. When the accused was faced with the fact that he could not have committed the offence he still clung stubbornly to his confession, because apparently he had stolen some money from his employer before he left for Manitoba. Under ordinary circumstances that confession would have been admitted, if the circumstances between the time he was committed for trial and the actual trial had not come to light.

I ask the minister whether he does not believe the time has come when there should be a declaration similar to that made in Great Britain in 1911 by a commission of judges relative to the safeguards that must be built up against the possibility of a false confession being made or being exacted, or whether he believes that the present rather

haphazard system, in which the whole question is in a doubtful state, is sufficient to assure justice.

I should like to see him give consideration not to having an amendment made to the Criminal Code but to a declaration by representative judges which could be delivered to officers of the mounted police bringing the law up to date, so that the whole field of confessions would be generally similar in interpretation in every part of this country. I think it would be a worth-while undertaking, and one that would add lustre to the tenure of the Minister of Justice.

**Mr. Garson:** Mr. Chairman, I do not think that there has been a great demand for the reform to which my hon. friend from Prince Albert refers. I would be inclined to think there are quite a number of judges and counsel who are of the view that our laws of evidence relative to the admissibility of confessions are in good condition as they now stand. I think, moreover, my hon. friend will agree that no amendment to our existing laws of evidence could be devised for practical application to the great majority of cases, which would exclude such a confession as the one he has just described.

Would my hon. friend not agree that the difficulty in connection with this confession which he described arose from the fact that the confessor, quite inexplicably and irrationally but also quite voluntarily, without any inducement being held out to him by persons in authority, made his confession?

**Mr. Diefenbaker:** Without any illegal inducement.

**Mr. Garson:** Yes; as I understand my hon. friend's recitation of the facts, without any inducement, but prompted by some irrational impulse of his own he constructed a completely false confession that perhaps would have resulted in his being found guilty of a crime which he did not actually commit. I do suggest to my hon. friend that such a confession is not an example of a defect in our existing laws of evidence with regard to the admissibility of confessions. I suggest further to him that there is no law of general application regarding the admissibility of confessions in criminal trials that the human mind could devise that could exclude the explicit, voluntary false confession to which he referred.

However, that is not to say that my hon. friend's suggestion does not have merit. We are always anxious to consider any improvement in the law that can be made. We never cease to be anxious to do so. I shall be glad to take my hon. friend's suggestion into account. I think he will agree, as he has properly said himself, that the amendment which he suggests would not be to the Criminal Code. If made at all it should probably be made to the Canada Evidence Act.

**Mr. Diefenbaker:** As a matter of fact I did not intend that it should be an amendment to anything. What I suggested was a declaration similar to that which the judges of the court of king's bench in Great Britain made in 1911. The minister knows that the mounted police often use that declaration as a guide by which to determine the admissibility of confessions, and also to determine the course they should follow in securing admissions of guilt.

I feel that we should not be relying so much on a declaration made in Great Britain in 1911, but that we should have for our police officers a declaration of principles indicative of the course to be followed in order to be sure that confessions shall indeed be admissions of guilt rather than statements containing admissions that are not truthful. That is the reason I make the suggestion.

**Mr. Fulton:** I do not think that there is much to add to what the hon. member for Prince Albert has said, except to say that I agree with him that it might be worth while to ask the judges of the respective provinces if they could either appoint representatives or perhaps meet together for such a purpose. I recall comments being made on the matter by one of the judges of our own court in British Columbia, who made a suggestion in the course of the trial which received some attention.

This judge had had experience in police court work, as he had been a police court magistrate before his appointment to the supreme court bench. He referred to admissions of guilt given to the police without due distinction being made—what he was saying was applicable to his own court, and another judge might not require the same distinction—as to whether the statement was voluntary or volunteered. He said that in order to satisfy him on its admissibility a statement not only must be voluntary, but it should be volunteered. He said, "I have heard of too many voluntary statements, that is to say where no illegal inducements or promises of advantage were held out, which I know were not volunteered. After all," he said, "if I keep on asking you if you would not care to say such and such, finally you may build up the idea in your mind that it would be a good idea to say such and such

a thing. The statement you make is voluntary, but you certainly have not volunteered it."

There is a distinction to be drawn between the two types of confessions or admissions which I think is of importance, and which has in it elements which should be carefully considered. I think the suggestion made by the hon. member for Prince Albert is a good one.

I should like to make another comment at this stage, and I do so with due respect for the commissioners who have redrafted this code and for the actual draftsmen who put it into legal language. I have not been able to avoid making a mental note, and here I am making an oral note, of the apparent temptation presented to the commissioners to change the wording for the sake of changing it. If you compare this clause with section 978, which it replaces, you will see what I mean. Section 978 reads as follows:

Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

Then we find clause 562 reads as follows:

Where an accused is on trial for an indictable offence he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

That is practically the same wording with just two or three words changed, as though the commissioners or the draftsmen had said to themselves, "Well, I can do it better, and I am just going to show that I can by changing a word here or a word there." I cannot see the purpose of such a change. It occurs over and over again. In some cases obviously the change does not alter the meaning of the section in such a way as to raise even a question that the case law might no longer be applicable. But I suggest that in some cases this change for the sake of change has the effect of raising the question whether the case law under the previous section will continue to be applicable. I am not going to repeat that comment. I hope I can resist the temptation to repeat it. But I think it is one that should be made, and this is a place where it seems to me to be particularly appropriate to make it.

There is one change which I think I should ask the minister about. While making the slight changes in wording they have dropped the word "solicitor". Previously it provided that an accused or his counsel or solicitor could make an admission. Now, however, it is to be confined to the accused or his counsel. Is there not possibly some result of that change which goes beyond a mere change of words?

[Mr. Fulton.]

**Mr. Garson:** No, there is not. If my hon. friend will look at clause 2, subsection 7 of the bill he will see that "counsel" is defined as including solicitor.

Clause agreed to.

Clauses 563 to 565 inclusive agreed to.

On clause 566—*Unsworn evidence of child.*

**Mr. Knowles:** I wonder whether the minister would make a few comments on clause 566. I note that the reference on the right-hand page tells us that this clause is drawn from section 1003, subsection 2, of the present code. When I look up section 1003 of the present code, which has three subsections, I find that it seems to be related exclusively to offences having to do with carnal knowledge. As I read clause 566 in the new bill, it seems to have a wider import. I have no objection to that. In fact, if that is the case it seems to me that it is all to the good. However, I should like to have the minister's comment on it.

At the same time, when I look back to section 1003 of the present code in order to make this comparison, I find that the preceding section, namely section 1002, deals with certain other offences for which a person cannot be sentenced on the evidence of only one witness. I should like to know whether all the cases referred to in parts (a), (b), (c), (d) and (e) of section 1002 are covered.

I realize that I am introducing two or perhaps three questions here. Clause 566 refers to the unsworn evidence of a child, which has to be corroborated. To me it looks as if that is going farther than section 1003 went. In the other case I am talking about the necessity for corroboration of the evidence of one person in respect of certain specific charges.

**Mr. Garson:** I think my hon. friend can certainly be forgiven for being a bit confused here. The clause we are considering is the analogue of the present section 1003, subsection 2. Subsection 1 of section 1003 was dropped as being covered by section 16, subsection 1 of the Canada Evidence Act. In view of the difference between section 1003 (2) of the present code, which relates to certain sexual offences, and section 16, subsection 2 of the Canada Evidence Act, which is of general application, this section 1003 (2) was retained as clause 566 of this bill, although it could perhaps be argued that it was not absolutely necessary. If my hon. friend has the Criminal Code volume there, he will find the Canada Evidence Act at the back. He will see section 16, subsection 2 at page 436. If my hon. friend wants section

566 to stand, I have no objection to allowing it to do so. Then he can examine it at his leisure. He will find that it takes quite a bit of checking to reconcile these various provisions.

**Mr. Knowles:** Before the minister suggests that it stand—in fact that might not be necessary—I wonder if this is the situation. I take it that my statement was correct, namely that subsection 2 of section 1003 was, in the context of section 1003, related only to the offence set out in section 1003. The minister tells me now, however, that the new clause 566 is not really new because it is simply carrying forward what is in the Canada Evidence Act.

**Mr. Garson:** Oh, no. What I said was that it was carrying forward what is in section 1003, subsection 2, of the existing code.

**Mr. Knowles:** Section 1003, subsection 2, of the existing code relates to only one offence. It reads as follows:

> No person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

**Mr. Garson:** Yes.

**Mr. Knowles:** This section is section 1003, which had to do with carnal knowledge.

**Mr. Garson:** Yes.

**Mr. Knowles:** I am pointing out that clause 566 of the new bill is much wider than that. As I said earlier, I have no objection. I just wanted to get that point straight. The new clause 566 says:

> No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

I am suggesting that that is carrying the necessity for the corroboration of a child's evidence much further than was the case with section 1003, subsection 2. I take it the minister now tells me that this is in order to put it in line with the Canada Evidence Act.

**Mr. Garson:** The purpose of the provision which my hon. friend now sees before him, the one we are discussing in the bill itself, is to eliminate, as related to the analogous sections of the existing code, any overlapping and at the same time bring the provision in Bill No. 7 into harmony with the existing sections of the Canada Evidence Act. If my hon. friend has his Canada Evidence Act before him I would ask him to look at section 16 on page 436 which reads as follows:

> 16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

That is not confined to carnal knowledge but is of general application. If my hon. friend will look at subsection 2 he will see that it reads:

> No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

As I indicated to my hon. friend a few moments ago, in view of this section in the Canada Evidence Act it might perhaps be argued that clause 566 of Bill No. 7 is unnecessary, but it gives one reading the code notice that no person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence which implicates the accused.

If my hon. friend wanted to argue that we do not need this provision because of the Canada Evidence Act I would not contest that view too strongly, but it does give a person reading the whole code notice that no person can be convicted upon the uncorroborated evidence of a child.

**Mr. Knowles:** I think the picture is fairly clear as far as this aspect of the matter is concerned. If I may say so, the confusion arises from the note on the righthand page. Clause 566 of the bill does not really carry forward subsection 2 of section 1003 of the code. It is putting into the Criminal Code what is in section 16, subsections 1 and 2, of the Canada Evidence Act. I see the minister moving his head up and down.

**Mr. Garson:** Yes, I was moving my head up and down in agreement with my hon. friend. He is quite right.

**Mr. Knowles:** What about the other question I asked the minister? I confess that it may not be strictly related to this clause, but I will put the blame on the note on the righthand page which made me look at section 1003 (2), whereupon I looked at section 1002 and discovered there were five different charges in connection with which one could not be found guilty on the evidence of only one witness. Can the minister assure us that all those cases are covered somewhere in the new bill?

**Mr. Garson:** Yes.

**Mr. Knowles:** Well, I shall take the minister's word for it. I meant that with respect.

Clause agreed to.

Clauses 567 to 569 inclusive agreed to.

On clause 570—*No acquittal unless act or omission not wilful.*

**Mr. Knowles:** The minister will recall that I raised some questions about infanticide when we were discussing an earlier clause, namely 208. When these clauses are written in double negatives it takes quite a while to sort them out, and this one is not without its double negatives. I ask the minister to bear in mind that under clause 204 infanticide is defined as an offence in connection with which there may be special circumstances. As I read clause 570 it looks to me as though the necessity of proving innocence is on the accused. As I say, double negatives are confusing, but when one reads the clause through one finds at the end that a person may be convicted unless the evidence establishes that the act or omission was not wilful. In other words, it appears that the prosecution does not have to establish that the act was wilful. The defence has to establish that it was not wilful.

I ask the minister to note that special circumstances are suggested in the clause itself, but even after allowance is made for the fact that such a person might not be fully recovered or that the balance of her mind might be disturbed, the clause ends up by saying that she may be convicted unless the evidence establishes that the act or omission was not wilful. If we refer to the note on the righthand page we see that it is just the one word "new". In other words we have a new clause, and it does seem to me to be a case where the burden of proof of innocence is put upon the accused.

As a matter of fact, the marginal note at the left seems to support my analysis of the clause. It says "No acquittal unless act or omission not wilful". What has the minister to say about that?

**Mr. Garson:** If I have the hon. member's point correctly, it is that the double negative in this clause has the effect of casting upon the accused an onus which she should not have to discharge. Let us examine the language. The clause reads:

> Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,
>
> (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and
>
> (b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child, she may be convicted unless the evidence establishes that the act or omission was not wilful.

**Mr. Knowles:** Take it slowly.

**Mr. Garson:** The problem that is bothering my hon. friend—

**Mr. Knowles:** And my hon. friend too.

**Mr. Garson:** Yes, quite right—that is bothering both of us, to which we mutually wish the answer, is assisted in some degree, I think, by the sidenote. It states in language that is more brief, more lucid than the provisions of the section itself that there is no acquittal unless the act or omission is not wilful.

**Mr. Knowles:** That says the same thing.

**Mr. Garson:** Does that assist my hon. friend at all?

**Mr. Knowles:** No. I think it underlines what I was saying. When you read the marginal note and try to resolve the double negative I suggest that "no acquittal" would have to be interpreted as conviction. A conviction will be registered unless the act or omission is not wilful. The more one goes through this the clearer it becomes that the necessity for proving innocence has been placed upon the accused. The only thing that can be said in favour of the clause is a remark made by my good friend and my legal counsel, the hon. member for Digby-Annapolis-Kings. I hope it was not intended to be kept off the record, but perhaps I may take the liberty of quoting him in any event. He says this language is so balled up that no jury would ever understand it anyway. That being the case, there would never be a conviction under it. Seriously, I do not think the minister, the hon. member for Digby-Annapolis-Kings or I want to leave obscure language like that on the statute books.

**Mr. Garson:** In fairness to those who are responsible for the language of this clause, which should be read in conjunction with clause 204, defining infanticide, it should be said that they are faced with considerable difficulty in most cases of this kind. This difficulty arises from the fact that under a given set of circumstances the question may be whether the accused should be convicted of infanticide or murder, or should be acquitted. Perhaps it might be helpful if I were to read from the judgment by Chief Justice McRuer in a decided case, Rex *v.* Marchello, 1951 Ontario Weekly Notes, 316.

**Mr. Knowles:** Under what section of the code was this?

**Mr. Garson:** This was the corresponding section.

**Mr. Knowles:** But we are told this is a new clause.

**Mr. Garson:** This case deals with the question whether an accused, under a given set of circumstances, is guilty of murder or infanticide. In that connection I should say that one of the first questions the crown has to decide is whether the charge laid against the lady in the case is a charge of murder or a charge of infanticide. Bearing upon that, the language of Chief Justice McRuer I think is relevant. He said:

> The onus resting on the crown to prove all these combined elements in the crime would appear to be so heavy as to make it almost impossible to convict an accused person on a charge of infanticide if laid as single count in the indictment.

That is to say, if the indictment just had the single charge of infanticide in it.

> On the one hand, the crown must prove a negative—

We get into this difficulty my hon. friend from Winnipeg North Centre was describing.

> —by showing that the accused "had not fully recovered from the effects of giving birth to the child", and an affirmative that by reason of giving birth to the child the balance of her mind was at the time of the offence disturbed—

The crown has to prove that as well.

> —while, on the other hand, on such a charge it would be a good defence to show that the accused had, at the time of causing the death of the child by wilful act or omission, fully recovered from giving birth to the child or that the balance of her mind was not then disturbed. In such case, even if a reasonable doubt was raised in the mind of the jury she would be entitled to be acquitted on the charge of infanticide, and thereafter she could not be charged with murder or manslaughter as an accused person cannot be put in jeopardy twice for the same homicide.

There is a principle in law that if one commits an act, and if a charge is laid in respect of the commission of that act, and the accused is tried on that charge and is acquitted, then no further charge could be laid based upon that act. Under all such circumstances the accused is "home free".

I believe my hon. friend can see from this carefully considered language of Chief Justice McRuer that the subject matter we are discussing here bristles with great difficulties. The problem which arises in every one of these cases from the very beginning is as to whether, upon the set of facts, the charge should be infanticide or murder. Then, as Chief Justice McRuer makes very clear, when you get into the actual case the crown is up against a very difficult position because it has to prove a negative of one proposition and a positive of another in order to secure a conviction for infanticide.

I think my hon. friend can see from this inadequate, and perhaps from his standpoint unsatisfactory discussion of the subject that the drafting of the clause he criticizes is a task of no inconsiderable difficulty.

**Mr. Knowles:** With great respect, I submit the minister has proved my point. I listened with interest to the case he cited from Chief Justice McRuer, and I think it is fair to say the minister gave that citation to show that the law as it now stands affords considerable protection to the accused. But, Mr. Chairman, this clause that is now before us, clause 570, is a new clause which puts an additional barrier in front of the accused, or conversely makes it easier for the prosecution. My whole point is that this clause 570 is new. When the minister stands up and gives us the case law I think he is making a good case for the proposition that the law should stay as it is. This addition changes the situation, and as I have already said makes it just that much easier for the prosecution to win or just that much more difficult for the accused to be declared innocent.

**Mr. Stick:** Lately we have seen some interesting newspaper reports stating that changes of sex have taken place. I wonder how Chief Justice McRuer would handle the case if such a person were charged with infanticide.

**Mr. Nowlan:** Without digressing to the interesting subject which has been raised by my hon. friend to the right, I do not think it is a matter that occurs so frequently that the code has to deal with it at the moment. I think the minister will admit that the saving clause at the bottom of clause 570 is really superfluous, and does not affect the situation in any way. It says:

> . . . she may be convicted unless the evidence establishes that the act or omission was not wilful.

That is elementary, because if it was not wilful it would not be a crime. I do not think that is really of much help to us in analysing what the hon. member for Winnipeg North Centre has elaborated upon. He has presented it much more cogently than I could, so I am not going to repeat what he has said. According to the explanatory note, this is a new section and certainly it is going to shift the burden of this thing so far as the defence is concerned. It is not relieved at all by the last part of the clause, because if it is not wilful it is not a crime; it is not homicide. If a mother rolls over on her baby at night and the baby smothers, that would not be a wilful act and she could not be prosecuted for infanticide.

Frankly I am not too much concerned about it, as I told my hon. friend a little while ago in an aside, because those of us who have had any experience in these matters know how difficult it is to get a jury to convict in a case of infanticide. So often there is sympathy for the mother, and often the mother is unmarried in such cases. Ordinarily the jury will lean over backward to avoid a conviction for this offence, and very often properly so. With this other factor in there, when you charge a jury very learnedly on the law they are going to throw up their hands and say, "I did not know what he was talking about, I do not believe the judge understood it, so I will go out and acquit her".

**The Chairman:** Is the clause agreed to?

**Mr. Knowles:** On division.

Clause agreed to.

Clause 571 agreed to.

On clause 572—*Previous conviction.*

**Mr. Nowlan:** I should like to ask the minister if he would comment briefly. I note that clause 571 is new, and I think it is a good thing to have it in here. To me this new clause represents an advance. Heretofore, when an indictment has gone to a jury, and when a second indictment has set forth in detail that an accused was being charged with a second offence, such accused was obviously prejudiced.

We now come to clause 572 (1). Frankly I do not like this one. Possibly the minister can explain it. We see that it refers to sections 851 and 963, and I do not think it helps at all. The explanatory note goes on to say that section 572 is new, in part. Section 572 (1) says, in effect, that where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions—that is, when he is convicted of a second offence and has a previous conviction—no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the court that the accused, before making his plea, was notified that a greater punishment would be sought by reason thereof.

As I read the clause it would seem to open up a dangerous situation. An accused person may have a perfectly good defence to a crime with which he is about to be charged. This accused person has committed a previous offence. If he pleads guilty the crown prosecutor, or the prosecuting officer, can say that he will treat it as a first offence. But then he may say, "If you plead not guilty, we are going to treat it as a second offence."



I think a situation is being created here where, with all due respect for the many competent prosecution officers throughout the country, accused persons are going to be laid open to blackmail. For the life of me I do not know why we should have this clause in there. What good does it do a man, before he is convicted, to be told, "If you are convicted you will get more than you would get if you plead guilty."

As I read the section this is an invitation to police officers to hold a club over a man's head and to say, "Plead guilty, or else. And here is a law which says so. Here is a law which says that the judge can convict you of a second offence, and you will get a lot more. I am warning you that if you plead not guilty to this you are going to get the works." Without the knowledge of the minister, or without the knowledge of a responsible prosecuting officer, I can see that sort of thing happening. I am sure the minister will know instinctively that it will happen. I am wondering just what value the clause might have. The minister may say that the commissioners recommended it, or there may have been a recommendation from somewhere else. I have not gone into the history of it. But when I read it, it does seem to me to give too great opportunity for blackmail, and I suggest the minister should consider it carefully.

**Mr. Garson:** I am afraid I am in complete disagreement with my hon. friend in what I consider is his misconstruction of the purpose of this clause. Let us suppose that an accused is convicted of a certain offence, and has served his penalty. Then he commits the offence a second time, and is again charged. Let us suppose further that it is one of those offences for which, upon being convicted a second time, he can receive a heavier penalty. Now, once we grant that our prosecutors are blackmailers, which I do not admit—

**Mr. Nowlan:** I said they were not.

**Mr. Garson:** The suggestion is that this offers a temptation to them to indulge in blackmail. I suggest that once a man has been convicted of an offence and has committed that same offence a second time, he thereby exposes himself to the possibility of being found guilty a second time and receiving a heavier penalty. I would say that if anyone wants to blackmail him in respect of that situation, all the ingredients of blackmail are there without this clause at all. For, in the terms of my hon. friend's approach to the matter—and I see him nodding his head in assent—all that would be necessary would be for the prosecuting counsel to say to the

accused's counsel, "If your client pleads guilty to this charge we will charge it only as a first offence, and not as a second offence." In those circumstances what my hon. friend calls the act of blackmail would be complete whether or not the clause now under discussion is passed.

Now, I share with my hon. friend the very greatest distaste for any such tactics as that, but it is not this clause that makes such tactics possible. Indeed, the purpose of the clause is the very opposite. If a man has been convicted once of an offence and commits the same offence a second time, for which second offence he can receive a heavier penalty, does it not seem the most elementary justice that someone should let him know before proceeding with the second case, and before he decides to plead either guilty or not guilty, that it is going to be charged as a second offence? And that is just what this clause says.

It seems to me that, instead of being prejudicial to the accused, it is all in his favour. Under this clause he knows what he is up against. On the other hand if he is given no such notice at all and pleads guilty, or does not make an effort to defend himself and is found guilty, and if in those circumstances the crown comes along and says to the court, "Now, this is a second offence and we are going to ask for the increased penalty"—I say in those circumstances my hon. friend would have a right to say that such an accused was being unfairly treated.

The reason for this clause is that it was felt that, where the crown intended to seek higher punishment because of a previous conviction, an accused person should have notice, before pleading either guilty or not guilty, that greater punishment would be sought. This change received the support of the provinces at a joint meeting with the commissioners. The departments of the provincial attorneys general thought this was just a matter of elementary fairness, and that if the crown were making a charge of a second offence an accused should be told before his case was tried, not after.

**Mr. Nowlan:** In the first place I thought I made it clear, in any suggestion I made with respect to blackmail, that I was not referring to prosecuting officers. I said I did not think any responsible prosecuting officer would indulge in such practice. But I did say that some police officers would, and I say that without any hesitation. It would not arise through the action of any responsible prosecuting officer who was carrying out instructions either of the attorney general or of the minister of justice.

**Mr. Garson:** May I ask the hon. member a question?

**Mr. Nowlan:** Yes.

**Mr. Garson:** Is it the crown prosecutor or the peace officer who decides as to what charge should be laid?

**Mr. Nowlan:** That is just where the beautiful theory advanced by the Minister of Justice comes in. It does not stand up in practice, because I suggest the police officer knows very well what charge will be laid, although he may not know the technical phrasing of it in all cases. But if he picks up a man who has been convicted before, the police officer may know there has been a former conviction, while the prosecuting officer may not even know that he had been arrested.

What I am objecting to is the fact that you now have it spelled out in black and white right in this Criminal Code, this massive document. Mind you, when I say "a police officer" I am not saying all police officers; but human nature being what it is, it is a fair statement to make that many of these police officers feel that they should get convictions. They probably feel that the man is guilty. They do not want to waste too much time in court. I am sure the Minister of Justice has to admit the logic of that. Although he cannot admit it officially, the minister knows it. I have seen scores and scores and hundreds of cases where police officers have urged, encouraged and sometimes threatened men with what would happen to them if they wasted time fighting the case. "Go and plead guilty, and we shall see that you get off easy".

That is the usual approach. Perhaps I should not say "usual", but it is an all too frequent one; I shall put it that way. Here you have spelled it out in black and white, so that any prisoner who can read can have it pointed out to him. Can you not hear—

**Mr. Garson:** Not "imposed upon him"; "would be sought".

**Mr. Nowlan:** I know, "would be sought"; but you know the effect these words would have in a cell at night. The prisoner is not going to get the fine nuances of that phrase which the Minister of Justice can put before us this afternoon in this chamber. The Minister of Justice of course quite properly cannot envisage himself in a cell at half-past two or three o'clock in the morning, because that would not happen to him, but it would happen and does happen to lots of people in this country.

My hon. friend says that in fairness to the accused it should be set forth. After all,

Mr. Chairman, there will be the odd individual, the odd accused, who through poverty and desperation will not have a lawyer to advise him; but in 99 per cent of the cases, in 999 out of 1,000 major crimes or major punishments—and that is the only thing with which we are concerned; we are not concerned with trifling things here—the accused will have retained a lawyer.

I say to you, sir, with all due respect to the superficial—and I am not saying this unkindly—or the apparent logic presented by the Minister of Justice, that it falls down under the harsh realities of the circumstances in which this section will be applied and that it is unnecessary, if you simply anticipate the fact that the accused will have a lawyer. If he cannot afford one, and it is a serious offence, the court will appoint a lawyer for him anyway. It is much better for his lawyer to advise him privately as to his rights and liabilities in making a plea than to have it printed and set forth here in the Criminal Code where I have no doubt, Mr. Chairman, it will be used as I have suggested today.

Clause agreed to.

Clauses 573 to 591 inclusive agreed to.

On clause 592—*Allowance of appeal against conviction.*

**Mr. Nesbitt:** I should like to say a word on paragraph (d), and I should also like to go back to the remarks the minister made earlier this afternoon. Paragraph (d) says:

—may quash a sentence and order the appellant to be kept in safe custody to await the pleasure of the lieutenant-governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made—

I wonder whether the minister would comment on whether it might be a good idea to use the same terms throughout the code with respect to mental illness, or insanity, or whatever it is called. I notice that the word "insane" is used further back, and the words "mentally ill" are also used. Then a little later on the word "insane" is used again. I was wondering whether the words "mentally ill" should not be added, because it is a more up-to-date term than "insane". The minister said earlier that the word "insane" should be retained to keep up with previous case law.

**Mr. Garson:** The decision as to the words that should be used in drafting a given clause of a bill obviously has to be based in part upon the cases or appeals to which it is to apply. And here clause 592 (1) (d) of the bill provides that the court of appeal upon hearing a criminal appeal may, amongst other things:

—quash a sentence and order the appellant to be kept in safe custody to await the pleasure of the lieutenant-governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane—

The condition that is being described here is not the kind of condition that my hon. friend has in mind in those other sections that we are dealing with. The insanity which is referred to here is insanity of that degree which constitutes a defence to a charge of criminal responsibility. I think myself that "insane" is the proper term to apply to the appellant in such a case. His is legal insanity.

In any event, this is one of the provisions that will come before the royal commission which is being set up. If the royal commission were to come to the view that there should be some change in this clause, then we can receive and consider its recommendations.

**Mr. Nesbitt:** One further question in that regard. I take it from the minister's remarks that at the present time he considers the terms "insane" and "mentally ill" are not synonymous.

**Mr. Garson:** I would think that would all depend upon what meaning was attached to "synonymous". If my hon. friend means that they are precisely synonymous I would say no, I do not think that they are precisely synonymous; but we shall have a better understanding when we get the royal commission's report as to whether the terms "mentally ill" and "insane" could be applied to that degree of insanity which should be recognized as a proper defence to a charge of criminal responsibility.

**Mr. Ellis:** When the royal commission brings in its reports may it be necessary to go back over some of these sections and make changes in view of the fact that we may get some new definition of the terms "insane" and "mentally ill"? In other words, is it not possible that the commission may give us an entirely different interpretation of the definition of the word "insane"?

**Mr. Garson:** We have set up this royal commission in order that it may examine insanity as a defence to a charge of criminal liability, and say whether the law relating to that subject should be amended and if so, to what extent and in what manner. In other words, we may expect from the report of the royal commission either an affirmation that the present law is satisfactory and sufficient, or a quite definite recommendation

that the law should be changed; and the respects in which it should be changed will be indicated in the report.

As I have indicated on previous occasions in the discussion on Bill No. 7, we of the government have undertaken that when that report becomes available, we shall implement it if it commends itself to our judgment. If it does not commend itself to our judgment, then if any members of the opposition parties would like to bring in a bill implementing any portion of the report that we of the government might not see fit to implement, we shall expedite the consideration of the legislation which they bring in. In that way the House of Commons will have full opportunity to consider whether any amendment should be made to the criminal law arising out of the report of the royal commission.

**Mr. Nesbitt:** I do not like to labour this point, but there is just one thing more. In the event of nothing further happening as a result of the report of this commission, and no changes being made, I wonder if the minister would consider putting in the interpretation section of the act a definition of, first, insanity and, second, mental illness, since apparently they are not synonymous. I think it might save a lot of trouble at a later date.

**Mr. Garson:** If when the report has been received and perused by my hon. friend he finds that it recommends no change and he wants to press this suggestion, we will receive it with the same careful consideration we have always given all suggestions by the opposition.

Clause agreed to.

Clauses 593 to 598 inclusive agreed to.

On clause 599—*Notice of appeal.*

**Mr. Garson:** I would like to suggest that this section be amended by adding after the word "unless" in the twelfth line the words "before or after the expiration of that period."

**Mr. Sinclair:** I move accordingly.

Amendment agreed to.

Clause as amended agreed to.

Clauses 600 to 622 inclusive agreed to.

On clause 623—*Fines on corporations.*

**Mr. Knowles:** Mr. Chairman, perhaps we should stop once in a while so you can write your initials beside the clauses. Clause 623 is rewritten from certain sections of the old code in such a way as to put a limit upon the fine that may be imposed on a corporation where the offence is a summary conviction offence. Under the present section 1035 of the code the fine was in the discretion of the court, whether it was a summary conviction or indictable offence. The two types of offences seem now to have been separated. While it is still in the discretion of the court where it is an indictable offence, a limit of $1,000 has been provided where the offence is on summary conviction. Will the minister state why that limit was imposed. Does he think it is wise?

**Mr. Garson:** Yes, I think so. It hardly seems reasonable or fair in respect of a summary conviction matter, which may be a relatively trivial offence, the monetary penalty which can be imposed upon a corporation should be more than $1,000. It would not seem to me fair that on a summary conviction charge the judge or magistrate could impose a fine in the discretion of the court in excess of $1,000. That would be out of all proportion. It is only in those cases where a corporation is charged with an indictable offence that there is no limit upon the amount of fine which a court can impose when an accused corporation is found guilty.

**Mr. Knowles:** Have there been any instances in the past under the code as it now stands where a court has imposed an unreasonable fine on a corporation? It seems to me there have been cases the other way, particularly under the Combines Investigation Act, where some of the fines imposed have been little more than licence fees to carry on, although there may have been some changes made recently with respect to that act.

**Mr. Garson:** When my hon. friend refers to the fines imposed upon corporations in the combines cases he is illustrating the case in point. The reason the fines were, as he puts it, little more than licence fees was that at that time the limit which the court had jurisdiction to impose was the amount which was imposed. They imposed the largest amount they could.

As my hon. friend will remember, apart from the clause we are considering now we took the limit off the penalties under the combines act and provided that they should be in the discretion of the court. The clause we are considering here is the same sort of provision in respect to indictable offences against corporations under the code. When this bill is passed a corporation convicted of an indictable offence can be fined any amount, without restriction, which the court sees fit.

**Mr. Knowles:** The point I tried to make before was that under section 1035, subsection 3, of the code as it now stands there was no limit as to the fine to be imposed in respect of either summary conviction or indictable offences. The minister says that in respect of the Combines Investigation Act the limit which was there before has by amendment been taken off. In other words, it has been established that fines imposed in connection with monopolistic practices shall be in the discretion of the court. So far as the Criminal Code is concerned it has been in the discretion of the court until now. Section 1035 of the code reads:

> Any corporation, convicted of an indictable or other offence punishable with imprisonment, may in lieu of the prescribed punishment be fined in the discretion of the court before which it is convicted.

I do not see a limitation anywhere else in section 1035 or section 1035A. As the minister says, since he has been Minister of Justice a change has been made in the Combines Investigation Act moving in the other direction and taking off the limit. I ask again why in this instance a move is made in this direction, namely putting on a limit. The minister says that a matter dealt with on summary conviction may be trifling. He pointed out to me when I complained about the severity of certain sentences that had been imposed on individuals that those were maximum sentences and the court could have imposed a lesser sentence. Surely the same point applies here, except that here we have a maximum of $1,000.

**Mr. Garson:** I am sure my hon. friend will agree at once that if in relation to summary conviction offences the ceiling of $1,000 was removed, which is what he seems to advocate, it would still be open to the court to impose the most trifling of penalties. The $1,000 is the maximum fine for summary conviction offences. The $1,000 he sees in this clause now is the maximum. The court can impose less than that, and it could impose less than that if there were no limit on the maximum. But the basis for setting a maximum of $1,000 is that this is a proper penalty for a summary conviction offence. The limit for a person under that heading is $500. We believe that a corporation should be charged more, that it should be charged double, but that there should be some limit to it.

**Mr. Knowles:** May I ask this question. Have there been any instances under the code as it now stands where, for summary conviction offences, fines have been imposed which were thought to be excessive?

**Mr. Garson:** Which were thought to be . . . ?

[Mr. Garson.]

**Mr. Knowles:** Which were thought to be excessive; that is, were thought by the minister to be excessive, not by the corporation.

**Mr. Garson:** I must say, Mr. Chairman, that I do not know of any fines imposed for summary conviction offences upon corporations. None have come to my attention. This present provision I think justifies itself in these terms. As I am sure my hon. friends of the opposition would agree, there is a great difference indeed between summary conviction offences on the one hand and indictable offences upon the other, and there should be a correspondingly wide difference in penalty. There is and there always has been a wide difference in the penalty imposed upon individual citizens for summary conviction offences on the one hand and indictable offences on the other. All that is being done in this clause is to continue that same distinction in the case of penalties upon convicted corporations. When one looks at many of the summary conviction offences he will find that $1,000 is quite a lot of money to pay for them. If there is any offence that is of a really serious character that can be charged as an indictable offence against a corporation, and is so charged, the corporation can be fined without any limit at all.

**Mr. Ellis:** The minister pointed out that the maximum fine for individuals, I believe, was $500 and for corporations $1,000.

**Mr. Garson:** Yes.

**Mr. Ellis:** Does the minister feel that is a fair relationship, having regard to an offence committed by an individual on the one hand and an offence committed by a corporation on the other? Does he feel that twice the maximum would be a fair difference between the maximum fine on an individual and the maximum fine on a corporation?

**Mr. Garson:** Yes, Mr. Chairman. I certainly think that is a fair basis in respect of summary conviction offences; and it applies only to summary conviction offences. Not only that, but the magistrate or judge who is imposing the fine, in fixing the amount, can take into account the resources of the corporation on the one hand or the resources of the individual upon the other. The only question is as to whether, for a relatively trifling or summary conviction offence, there should be a fine of more than $1,000. This clause affirms that there should not be. The real point under this penalty section, so far as corporations are concerned, is the penalty that should be imposed upon them for serious offences, indictable offences; and as far as that is concerned, there is no limit whatever.

**Mr. Knowles:** And there was before.

**Mr. Ellis:** What is the purpose of a fine, Mr. Chairman? The purpose of fining an individual or corporation is in order to impose some measure of punishment for an offence which has been committed, irrespective of the type of offence. The fine levied against a corporation, which might be a multimillion-dollar corporation, if it is set at $1,000, does not constitute any appreciable measure of punishment, no matter what the offence is. What I am trying to get at is the principle behind a fine. For an individual, a maximum of $500 might be something quite serious; but I do not think the minister would suggest that even for a summary conviction a maximum fine of $1,000 is going to make much difference to a large corporation.

**Mr. Nesbitt:** I have just one further comment to make on this matter of a maximum fine of $1,000. It would seem to me that it is a little bit low, for this reason. In the first place, while the minister said the more serious offences in the code were indictable offences—and I go along with that statement—nevertheless there is in the code one section at least as to which I can certainly envisage a situation arising where a corporation could commit an offence which could be most serious. I refer to clause 163, which states 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 . . .

—and so on. Situations arise where large factories—and I am not referring again to the Saskatchewan river—make products which give off extremely volatile substances causing unpleasant odours. There has been complaint about them and nothing is done. They may be fined. I see that clause 163 deals with an offence that is punishable on summary conviction. It is quite possible that a corporation could cause a terrific amount of damage. Some large chemical plant or feed manufacturing plant could cause a great deal of damage and discomfort to a community; and a fine such as $1,000 would be, to use the vernacular, just peanuts.

I was just wondering whether the minister had considered that possibility. It is also a fact that many acts other than the Criminal Code say that if certain offences are committed, they are punishable on summary conviction. I cannot think of an appropriate example at the moment, not having them before me, but there are dozens of other statutes and acts which provide penalties on summary conviction which, when applied to a corporation, might be relatively small but when applied to a person might be very serious indeed. I cite this clause 163 merely as an example of what could happen.

**Mr. Fulton:** Does the minister not consider that possibly such clauses as 163 might be exempted? Surely it is possible that a corporation might be guilty of a very serious offence under clause 163. As is pointed out, the maximum fine of $1,000 does not seem to be appropriate in that case.

**Mr. Garson:** The point which has been raised by the hon. member for Oxford is one with a great deal of merit. But I would think that the better way of dealing with it would be to provide in clause 163, "is guilty of an offence punishable on summary conviction or by indictment"—

**Mr. Nesbitt:** Yes.

**Mr. Garson:** —leaving it to the prosecutor to decide, upon the facts of the case, whether it was serious enough to proceed by indictment. I do not think it is a wise policy to have a serious offence punishable on summary conviction and then by setting a heavy penalty for that serious offence thereby, on the basis of that one serious offence, establish an exorbitant maximum penalty for all summary conviction offences committed by corporations. If one examines carefully either the present code or this new bill for those summary conviction offences which a corporation can commit, and which are a great deal more limited than those which an individual can commit, I think he will see that, in relation to those offences, the maximum fine of $1,000 is not out of line. It certainly would be out of line with regard to the nuisance although, as I think my hon. friend would agree from his experience as a crown prosecutor, every time that act was committed, it would be a new offence; and $1,000 an offence would run into quite a bit of money.

**Mr. Nesbitt:** In answer to the remarks of the minister may I say that I had a plant in mind whose name I hesitate to give for various reasons. But I can well envisage a plant producing such a product that only when they were using certain substances, which substances might only be used for a day or so at a time, would something like this be produced. If the plant is sufficiently large it might be well worth paying $1,000 each time that took place. Therefore I think the minister's suggestion of an indictable as well as a summary conviction offence under 163 is excellent.

**Mr. Fulton:** They might save up all their noxious materials and discharge them once a year.

Clause agreed to.

Clauses 624 and 625 agreed to.

On clause 626—*Fines and penalties go to provincial treasury.*

**Mr. Herridge:** I should like to ask the minister a question under this section. I think it is the correct one. I was informed by a person I consider to be quite responsible that when the R.C.M.P. lay a charge for an offence involving the operation of sweepstakes, particularly the Irish sweepstakes, the case is heard in Ottawa and the fine or any moneys seized are paid to the city of Ottawa rather than to the municipality in which the offence occurred.

**Mr. Knowles:** No wonder Ottawa's taxes are going down.

**Mr. Garson:** I am afraid, in all candour, that I cannot explain that. I would have to make inquiries, find out if that is the case and raise the matter when we next meet.

**Mr. Fulton:** Is that not under some postal regulation?

Clause agreed to.

Clauses 627 to 629 inclusive agreed to.

On clause 630—*Order for restitution of property.*

**Mr. Fulton:** I am not very happy about subsection 2 of 630. It reads as follows:

> Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed, the court may order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court . . .

What bothers me here is that an accused may be convicted of an offence for which he is indicted and charged, yet the court may order that property obtained by the commission of some other indictable offence, which it can only imagine has been committed because the accused has not been found guilty of it, be restored to some other person. The section seems to me to be full of difficulties. I think it is a new provision. I have been comparing it with the section noted on the righthand page, section 1050. It seems to me that the relevant part of 1050 is subsection 3 which provides in part:

> . . . if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness . . .

—then the property may be restored to such prosecutor or witness. In other words, under section 1050 you have to prove before the court in which the accused is actually tried that the property belongs to a specific person before it may be restored. On the other hand, under clause 630 you do not have to prove that it belongs to anybody. It just depends upon whether the court is of opinion that some offence has been committed, even although the accused has not been convicted of that offence. The court may then order restitution of the property to the person entitled to it. There is no necessity for that degree of proof which is necessary under section 1050.

In view of the fact that under the new clause the accused will have been charged and found not guilty of the offence for which he was charged, I think it opens up too wide and too vague a possibility that incorrect orders may be made with regard to the ownership of property. The mind of the court may somehow or other be prejudiced against the accused, perhaps by his conduct in court or some such thing, and I am sure the minister will agree that there is a very wide possibility there of making unfair orders with regard to property found in the possession of an accused who has nevertheless been found not guilty of the offence with which he was charged.

**Mr. Garson:** I do not think I can agree with my hon. friend. I do not think we can apply ourselves to the problem of providing a criminal law for Canada upon the assumption that all the courts are incompetent and not fit to exercise discretion. Once that reasonable degree of judgment and wisdom is conceded to the courts, then surely it is not unreasonable, where there has been an indictable offence involving property that belongs, from the clear evidence before the court, to Mr. John Doe, for the court to make an order restoring that property to its rightful owner. Even though the accused, who has taken this property, may get off because the crown cannot prove the case against him beyond a reasonable doubt; yet if the court is satisfied that the property belongs to Mr. John Doe and that he is lawfully entitled to it then the court can, by order at that time in summary manner, give him his property and not leave him in the position where,

when some person has committed an offence in respect of property belonging to him, he is going to be put to considerable legal costs to get his own property back.

**Mr. Fulton:** I quite agree with the minister that it is not fair that a person unlawfully deprived of property should have to go to unnecessary expense to get it back. We could not be more closely in agreement there. But I do think the wording of subsection 3 of section 1050 is safer than the wording of the new clause. Let us read the whole section. It reads:

The court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness . . .

There it is very definite and very closely tied down to the person whose property it was. It has to be proved to the satisfaction of the court that such property belongs to such prosecutor or witness. I think that is an excellent provision, and I do not believe any such person should be put to the necessity of bringing a civil action to recover his property. But I think the principle should be preserved in the former words rather than in the new words. Perhaps it is just another case where I quarrel with the draftsmanship. I am sorry, but I cannot help doing it.

**Mr. Garson:** I am glad to hear my hon. friend say that he agrees with the idea that a man who has already been prejudiced by the fact that his property has been stolen should not be put to the expense of taking civil action to get it back.

**Mr. Fulton:** There is no question about that.

**Mr. Garson:** I thought my hon. friend was perhaps questioning the propriety of that idea.

**Mr. Fulton:** No, not the principle.

**Mr. Garson:** If my hon. friend agrees with that point, then the only objection he is taking to the clause is that it does not provide a proper means of accomplishing that end.

**Mr. Fulton:** I question whether it requires the proper degree of proof which it seems to me the old section clearly requires.

**Mr. Garson:** All right. Let us see the degree of proof it does require. It says:

Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed—

They may have got the wrong man, but the property has been stolen. They are not sure of the man, but they are sure of the property.

—the court may order that any property obtained by the commission of the offence—

—without identifying any accused with that offence—

—shall be restored to the person—

To what person?

—to the person entitled to it—

To whom should it be restored except the person who is entitled to it? How will the court decide whether a man is entitled to it except on the evidence that the owner has brought before them? How could the court decide under the old section as to the proper possession of property except by evidence? And if the owner can show he is entitled to it, then why should he not have an order from the court saying he can take it away without any more formalities or expense?

Clause agreed to.

On clause 631—*Costs to defendant in case of libel.*

**Mr. Fulton:** I have a question to ask here. I notice that under this clause the accused or the defendant in a prosecution for defamatory libel, if judgment is given for him, may recover his costs. I have no quarrel with that at all, but it raises a question with regard to the right of a prosecutor or informant under certain cases to recover costs by having an order made by the court for the payment of those costs by the accused. This right was given under section 1044 of the code, and I notice on consulting the concordance that section 1044 has been dropped. Would the minister say why it was dropped and why the prosecutor or informant, previously entitled to have an order made for the payment of his costs in certain cases, appears no longer to have that right? I might say I have consulted one of my colleagues who was a member of the house committee last year, and he cannot recall that there was any discussion on that point.

**Mr. Garson:** In dropping the section the commission considered first the difficulty in arriving at a proper amount without turning

a criminal prosecution into a trial of an issue of damages, second the existence of a civil remedy, and third the duty of citizens to assist in the prosecution of offenders. As the result of such changes, costs in criminal cases will not be awarded, except on summary conviction matters and to a successful defendant in a prosecution for libel.

**Mr. Fulton:** It seems to me the minister has made an argument just exactly the opposite of the argument he made on the previous section. I fully agree that a person deprived of his property by a criminal offence should be entitled to have it restored to him by the court without being put to the further expense of a civil case. I agree with that. Now the minister is using the reverse argument and stating because of the existence of a civil remedy in many cases, there should be no order in criminal proceedings for the payment of costs to an aggrieved person. The argument does not seem to me to apply, as I pointed out, under section 1044 which, it is true, is for limited cases.

**Mr. Garson:** Section 1044; what subsection?

**Mr. Fulton:** I shall read subsection 1:

> Any court by which and any judge under part XVIII, or magistrate under part XVI, by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do.
>
> 2. Such court or judge may include in the amount to be paid such moderate allowance for a loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable.
>
> 2A. Such magistrate may also include in the amount to be paid the fees, for the appropriate items, as mentioned in the tariff set out in section seven hundred and seventy of this act.

Expenses and allowances for loss of time and so on could have been ordered to be paid by convicted persons under section 1044. That right appears to have been discontinued. I bring it up here because the clause now under consideration, 631, gives an accused person in certain cases, where judgment is given for him, a right to his costs. Yet as I point out the right to recover expenses which was previously there for an informant or prosecutor for whom judgment was given or on whose information or prosecution judgment was given is taken away.

[Mr. Garson.]

**Mr. Garson:** Is this not the distinction that can properly be drawn between the two cases to which my hon. friend referred, namely the act of our not carrying forward clause 1044 allowing costs against the accused in criminal proceedings, on the one hand, and yet allowing the successful defendant in prosecution for defamatory libel to get costs against the prosecutor? I have already stated the commission's reasons for dropping section 1044 of the present code.

I suggest that the distinction between these two cases is this. Where A libels B, B has the choice of two courses of action. One is to take a civil suit for damages against A. The other is to lay an information against A for defamatory libel. If the proceedings which ensue are a civil action the defendant A, if he succeeds, will get costs. If the proceedings are a prosecution for defamatory libel he would not get costs against the unsuccessful plaintiff but for the clause we are discussing. Thus it will be seen that the basis for the present clause is that where a person has been libelled and chooses the method of laying an information for defamatory libel, if he does not succeed in proving his case, he should reimburse the accused for the expense to which this prosecution for defamatory libel has put the accused. I think this is a proper provision.

**Mr. Fulton:** So do I. I am sorry that I have not made myself clear. I agree with this provision, but why should a successful prosecutor not get his costs as he used to be able to do under section 1044? A successful accused may recover costs under clause 631, but a successful prosecutor may not recover costs because section 1044 has been dropped.

**Mr. Knowles:** Six o'clock.

Clause stands.

Progress reported.

## BUSINESS OF THE HOUSE

**Mr. Harris:** Mr. Speaker, we shall continue with this bill tomorrow in the hope that we can complete it.

**Mr. Knowles:** On that point, Mr. Speaker, does the minister mean complete the entire consideration of the code, or complete the first run through it?

**Mr. Harris:** I was not quite as optimistic as my hon. friend, but if he will co-operate we can do it all in one day.