

*Criminal Code*

capital punishment, lotteries and insanity in the new code after we shall have repealed the old, we shall have a lacuna.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

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

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

**An hon. Member:** Clause 138.

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

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

**Mr. Knowles:** When was that?

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

**Mr. Knowles:** In the last century?

**Mr. Garson:** I think it was before the turn of the century. The sentence of death for rape has never been imposed and carried out at any time in the past no matter how grievous the circumstances were. For that reason we thought it would be better, when

[Mr. Garson.]

that sentence was not being imposed and carried out, to reflect the actual facts in the code by simply making the penalty imprisonment for life.

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

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

Clause agreed to.

Clause 137 agreed to.

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

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

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

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