

Criminal Code

law of this country. One of the leading cases is the case of the *King v. Britnell*, where it was held that the owner of a bookstore containing thousands of books could not be convicted of knowingly exposing for sale any obscene books under section 207 of the Criminal Code, and that in order to warrant a conviction under that section for selling and exposing for sale an obscene book it must be proved that the accused was aware of its obscene character and that it was sold or exposed for sale with his knowledge.

Mr. Fulton: Was that the Ontario case of 1925?

Mr. Garson: Yes, the Ontario court of appeal.

To come to the question asked by the hon. member for Lake Centre (Mr. Diefenbaker). He said, does it mean without—

Mr. Diefenbaker: What is lawful justification?

Mr. Garson: I think I have a case here exactly on that point. It is *Rex v. Wooland*, decided in the province of Manitoba by county court Judge Armstrong. The head-note reads:

On a charge of keeping without lawful excuse goods unlawfully imported into Canada contrary to section 217 (2) of the Customs Act it may not be necessary for the prosecution to prove knowledge on the part of the accused.

That is, the word "knowingly" was not in that section. Therefore it was not necessary for the crown to prove that it was done knowingly. But proof offered by the defence of no knowledge, and the absence of any suspicious circumstances to place one on inquiry takes him out of the class of "one without lawful excuse," the onus on the accused being merely to show lawful excuse and not lawful importation or payment of duty.

And in this connection—and this, I think, will answer my hon. friend's question—the county court judge said:

I cannot conceive of any more lawful excuse than the absence of any criminal intent and the carrying on of a legitimate business in the ordinary way.

It would seem that the removal of these words "knowingly, without lawful justification or excuse" would result in an absolute prohibition so that the bookseller could not plead as an excuse ignorance of the contents of the books upon his shelves. This undoubtedly would place a very heavy burden upon him. It would mean that he would have to satisfy himself as to the contents of all the books upon his shelves, or depend upon some system of censorship by his distributor or publisher, or take a chance. And the question this house has to decide—and this is where the unpleasant dilemma comes in—is whether or not the abuse of the sale

[Mr. Garson.]

of these books has grown to the point where it is most unfair to the children and to their parents, and to the taxpayers of this country who have to put up the money to take care of the crime which is caused by the sale of these books.

It may well be that upon a balance between these two groups, the booksellers and publisher on the one hand, and the children and their parents, and the taxpayers, on the other, there is less injustice in being unfair to the honest man who unwittingly publishes or distributes or sells obscene books and crime comics than in being unfair to the children, parents and taxpayers.

Mr. Smith (Calgary West): What about the distributor of a newspaper libel? He takes all those chances, does he not?

Mr. Garson: Yes, but knowledge has to be brought home to him.

Mr. Smith (Calgary West): Every news-stand in a hotel.

Mr. Garson: Yes, that is right. But heretofore in the carrying out of the ideas we have had as to freedom of literary expression, freedom of artistic expression and freedom of the press, we have not seen fit to have this definition in any form other than the form in which it now appears.

My reason for labouring that point is that I do not think it is going to be much of a solution, at all, to pass Bill No. 10. We have only to look at statistics to see that that is so. If we are really going to grapple with this and produce an enforceable section, we have to face up to the hard decision I have been trying to outline.

If we do this, there is another difficulty we must face as time goes on—one which we have not yet faced. That is the problem which arises under an enforceable prohibition of obscene literature in drawing a line between what is obscene and what is not—because there is a great variety of opinion on that score. One will find a crank who will regard as obscene some books which by others are regarded as the greatest gems of literature. The reason, borne out by statistics, why we have not encountered this problem to any great extent so far is that section 207 has not been sufficiently enforceable. But to the extent that we make this section enforceable, we shall, as time goes on, meet this other problem. And in that regard I do not think we could do better than to leave the section as it is, that is leave the obscenity content of the offending publication to be judged as a matter of fact by the court, upon the basis of the evidence presented to it.