As my honourable friend Senator Langlois mentioned the other night, an outspoken critic of the judgment was the Right Honourable John Diefenbaker, who said that the law was wrong and should be changed. He did not criticize the Supreme Court, but others did.

I tried to have my honourable friend Senator Langlois explain the amendment last week, but he replied only with an argument based on authority—that is, the viewpoint of Mr. Diefenbaker. I respect, of course, Mr. Diefenbaker's opinion, because of his great experience before the criminal courts and in Parliament, but I must point out that Mr. Diefenbaker, as well as most defence counsel, have a tendency to support any verdict of a jury when it is a verdict of acquittal.

Senator Asselin: Because these defence counsel are and were good lawyers.

Senator Flynn: My friend Senator Asselin could not resist interjecting. I respect his view. There is no doubt but that a lawyer is always very sentimental when it comes to provisions of the law which have helped him in given circumstances to win a case. And why not? It is only natural. Also, there is certainly a popular sentimental attachment to the jury system as we know it. There is no doubt about that. The general criticism, if not of the decision, at least of the provisions of the law which brought about the decision in the *Morgentaler* case, was not entirely unanimous. However, those who oppose, generally speaking, receive better press than those who sustain. Although I may not be able to convince honourable senators, I feel it is my duty to argue the other side. I think it is the duty of the Senate to consider both sides of a question.

In reading the debate in the other place and the committee proceedings of the other place, I was unable to find any dissenting view, notwithstanding that the amendment which is before us was only very reluctantly introduced by the Honourable Mr. Lang, the then Minister of Justice. It was only under the pressure of public opinion that this amendment was finally submitted to Parliament.

I repeat, the criticism of the judgment, or of the provisions of the law on which the judgment was based, was never unanimous. One individual who sustained the decision was none other than the Immediate Past President of the Canadian Bar Association, Mr. M. L. N. Somerville. He did not seek to support the provisions of the law, but he did support the decision. In a letter he wrote to the *Globe and Mail,* he made reference to a previous speech of his, and I quote:

> It is a perfectly tenable position that the only remedy available to the Crown from an improper acquittal by a jury should be a new trial.

This is what is proposed under this amendment. Continuing:

> But that is not now the law... Those people who espouse this proposition risk a profound disservice to the stability and security of this society for all members of it by mounting a furious propaganda war against a result in a specific case not to their liking, by directing a campaign of abuse and ridicule against those members of our judiciary who, in good faith and upon reasonable grounds, are attempting to uphold the rule of law in an unpopular instance.

That is, to support the decision of the court and not the provisions of the law. Dealing more particularly with what has become an amendment suggested in this legislation, Bill C-71, he went on to say:

> The province of a jury does not extend to the repeal or amendment of an Act of Parliament... Were we to admit the justification of some higher morality which operates to dispense with compliance with the laws of our land, we would be on the short, steep, slippery slope of chaos.

That comment, I believe, directs itself to the problem at hand and not to the decision of the court.

● (1420)

I think I had better explain the present system. When there is a verdict of guilty by a jury, if there is an appeal the appeal court can decide that the jury was wrong in fact and enter a verdict of not guilty. As far as the facts are concerned, the accused has all the chances in the world. There is no doubt about that. However, if the verdict is one of acquittal, the appeal court cannot intervene except on a question of law, because the general principles are simply that the jury is master of the facts but the courts are masters of the law.

Generally, when there is a conviction, the appeal court, if it finds that the verdict was not reasonable, can acquit the accused. This it can do where the jury has made an obvious mistake in fact or in law. Also, it can order a new trial. If there is a verdict of acquittal by a jury, the court of appeal will not intervene unless there was misdirection of the jury by the judge.

There presently exists this provision, and we are here invited to change it, which says that the court of appeal may in cases where a jury acquits:

> (i) enter a verdict of guilty—

Instead of a verdict of acquittal; this is the case of Morgentaler.

> —with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or
>
> (ii) order a new trial.

It has a choice between the two.

In the present instance, the finding of the majority of the Supreme Court was that they should apply the provision enabling them to change the verdict of acquittal to a verdict of guilty. I should like to quote the comment of the majority on the present provision of the law which we are invited to change. This is a résumé of the decision. I will not quote all the notes of the majority because it would take too long. However, I think this gives the clear opinion of the majority on the appreciation of the present legislation. They say:

> This power, of course, should be used with great circumspection, but it is particularly appropriate in this case, since the accused admitted the facts but denied his guilt only on the basis of defences in law held unavailable by the appeal courts.

In other words, in this particular case the problem was only a question of law and not one of fact.