LEGISLATIVE COUNCIL

Thursday, September 21, 1967

The PRESIDENT (Hon. Sir Lyell McEwin) took the Chair at 2.15 p.m. and read prayers.

QUESTIONS

INFIRMARIES

The Hon. C. M. HILL: I ask leave to make a short explanation prior to asking a question of the Chief Secretary.

Leave granted.

The Hon. C. M. HILL: I have received a letter which was written under the letterhead of the Associated Senior Citizens' Clubs of South Australia and signed by the Honorary Secretary of the Edwardstown Senior Citizens' Club.

The Hon. A. J. Shard: And from others, too.

The Hon. C. M. HILL: As honourable members apparently know, it deals with the evergrowing problems confronting the Commonwealth and State Governments in respect of the care of the aged. Part of the letter is as follows:

> It is only the State Government, with the aid of the Commonwealth subsidies, that can provide and maintain sufficient infirmaries to care for the infirm aged. Until the Government builds these infirmaries our aged will never be free from that awful foreboding that if they can no longer look after themselves, they will die in some squalid home, uncared for and neglected. We consider these establishments are an urgent necessity and we would be pleased if you, as the member for Central No. 2, would bring this matter to the attention of Parliament for immediate action.

In view of the receipt of this letter, I ask the Chief Secretary: first, what provision has the Government made towards infirmaries for dealing with aged, sick persons; secondly, does the Government consider that there is a need in excess of assistance already provided; thirdly, are any immediate plans in existence for alleviating the present position?

The Hon. A. J. SHARD: I do not want to go into this matter in detail at present; it is easy to play politics in respect of such a question. However, this matter is above politics. I have never attempted to play politics, and I defy anyone to say that I have done so in respect of hospitals and aged people. I have travelled throughout the State and I have treated everybody on an equal basis and I have never at any time attempted to play politics in the matter of the unfortunate circumstances of aged people. I challenge anybody—

The PRESIDENT: Order! I draw the Council's attention to the fact that questions may be asked and answered, but Question Time is not a time for opinions or debate. The Minister may answer the question.

The Hon. A. J. SHARD: Yes, but when I am challenged about playing politics—

The PRESIDENT: Order! I heard no such accusation.

The Hon. A. J. SHARD: Well stop honourable members when they say it.

The PRESIDENT: The Minister is out of order at this moment. I draw his attention to Standing Orders. It is necessary in the interests of the decorum of the Council that Standing Orders be observed.

The Hon. A. J. SHARD: In reply, and to meet your wishes, Mr. President, I say that the questions are under consideration.

NURSES

The Hon. V. G. SPRINGETT: I ask leave to make a statement prior to asking a question of the Chief Secretary.

Leave granted.

The Hon. V. G. SPRINGETT: In reply to my question of September 19, the Chief Secretary stated that in the nine hospitals administered by his department and the 50 Government-subsidized hospitals in country districts there are some 130 vacancies for trained nurses and 75 vacancies for trainee nurses. Plans are afoot for a new hospital of some 240 beds, to begin with, at Modbury and another hospital in the vicinity of Flinders University in due course. Since it takes at least three to four years to train a nurse, can the Chief Secretary indicate what steps are being taken to increase recruitment into the nursing profession?

The Hon. A. J. SHARD: I would not like to embark on a reply to that question. I know that certain steps are to be taken. So that I can give a correct reply to the question, I shall obtain the information from the Nurses Board as soon as possible.

DOCTORS

The Hon. R. A. GEDDES: Can the Chief Secretary say how many students are studying under the cadet doctors' scheme, to which the the Chief Secretary made reference last year, I think, with the idea of assisting doctors in going out into country hospitals?

The Hon. A. J. SHARD: Speaking purely from memory I think there are four at the moment, and I know that there are another eight under consideration.

COMPANY PROSECUTIONS

The Hon. C. D. ROWE: Has the Chief Secretary a reply to my question of September 19, regarding company prosecutions?

The Hon. A. J. SHARD: The Attorney-General reports as follows:

Because the staff has been used extensively on the Davco case it has not been possible to proceed with other prosecutions. Additional staff is to be appointed and it is considered that a number of prosecutions will immediately ensue.

WATER SUPPLY

The Hon. C. M. HILL: I direct my questions to the Minister of Labour and Industry, representing the Minister of Works. Having received representations concerning the extremely bad mains water pressure in Beulah Park, does the Minister agree that the water pressure in the Beulah Park area is not good; if that is so, can the Minister give the reasons for this, and also state what plans, if any, are in hand to provide the residents of that locality with a better water service?

The Hon. A. F. KNEEBONE: I shall be pleased to convey the honourable member's questions to my colleague and bring back a reply as soon as possible.

MENTAL HEALTH ACT AMENDMENT BILL

The Hon. A. J. SHARD (Minister of Health) obtained leave and introduced a Bill for an Act to amend the Mental Health Act, 1935-1966. Read a first time.

The Hon. A. J. SHARD: I move:

That this Bill be now read a second time.

Honourable members will recall that by leave of this House on July 18, 1967, I made a lengthy statement in reply to the criticism made by the Hon. Jessie Cooper regarding some unsatisfactory aspects of the conduct of establishments providing accommodation for former mental patients, and in this reply I indicated that it was the intention of the Government to take such legislative action as appeared necessary to meet this situation.

This matter has been the subject of some detailed consideration by the Government and its advisers, and this measure arises from that consideration. However, I feel it is necessary to direct the attention of this Council to what appears to be a very proper limitation on the general powers in the principal Act relating to control over the actions of patients within the meaning of that Act. Briefly, the Act vests in the Minister, the Director of Mental Health and his officers very considerable powers over persons so long as those persons are patients within the meaning of the Act. As a corollary, once those persons are discharged they are no more subject to controls under the Mental Health Act than are the ordinary citizens of this State.

Accordingly, this Act cannot directly control the care of persons who are, in the strict sense of the word, former mental patients, that is, persons who have been discharged from an institution, but what it can do is to create a situation where there will be satisfactory and well-run establishments able to receive people of this sort and give them any necessary care. Nowadays it is common for persons who are patients in an institution to be permitted to reside outside that institution under a system of trial leave under powers already conferred by section 76 of the Act. This system of trial leave is now a recognized and valuable part of modern psychiatric treatment. Persons on trial leave remain patients within the meaning of the Act and are accordingly subject to the controls imposed by the Act; for instance, they can at any time be recalled to the institution from whence they were granted leave.

Ideally, patients on trial leave should enter an ordinary home environment; that is, they should live with their relatives or friends. However, in many cases, for a variety of reasons, it is impossible for this ideal situation to come about, so as an alternative it is necessary and desirable that these people should reside in an establishment designed to assist in their rehabilitation. In the proposed Bill these establishments are referred to as "psychiatric rehabilitation hostels". The purpose of this Bill, therefore, is to ensure that these establishments conform to an acceptable standard and properly provide for the care of their inmates.

I will now deal with the Bill in some detail. Clauses 1, 2, 3 and 4 are formal. Clause 5 amends the definition section in the principal Act by striking out from the definition of "patient" a reference to an archaic and disused procedure of "boarding out" and by inserting a definition of "psychiatric rehabilitation hostel".

Clause 6 inserts a new Division in lieu of the Division relating to "boarding out" of patients; this Division is, as has already been mentioned, archaic and no longer used. The

proposed new Division deals with the licensing and operation of psychiatric rehabilitation hostels. New section 86 provides that patients on trial leave may be permitted to reside in a psychiatric rehabilitation hostel, which is now defined in section 4 of the principal Act as premises for the time being the subject of a licence under proposed new section 87. New section 87 deals with the licensing of persons to operate a psychiatric hostel and sets out the conditions that may be inserted in the licence. These conditions are generally self-explanatory and adherence to them should result in a proper standard of accommodation being provided. The attention of honourable members is drawn to the wide powers vested in the Minister to impose conditions. The justification for these powers is evidenced by the need for flexibility in the administration of this provision. It is envisaged that a private home in which is accommodated, for a fee, a patient on trial leave would require a licence as would an establishment catering for a substantial number of patients, but it is appreciated that the conditions imposed on the holder of a licence in respect of a private home would be considerably less demanding than those imposed on the holder of a licence in respect of a comparatively large establishment. Proposed subsection (3) of this section provides for the revocation of the licence when, after due inquiry, the Minister is satisfied that any condition of the licence has not been complied with.

New section 88 makes it an offence for a person not being the holder of a licence under this Division for or in the expectation of a fee or reward to offer to or undertake the accommodation of patients permitted as a condition of their trial leave to reside in a psychiatric rehabilitation hostel and provides a penalty of $500 for the commission of that offence. Provision is made in subsection (2) for the giving of a certificate by the Director of Mental Health that at the material time the person named in the certificate was not the holder of a licence. This certificate is then *prima facie* evidence of that fact. This evidence is, of course, subject to rebuttal by the person charged. Clause 7 amends section 153a of the principal Act, which makes it an offence in certain circumstances to treat or offer to treat mental defectives, by striking out subsection (2) and re-enacting the provisions of that subsection in a revised form. As a consequence of the repeal of the provisions relating to the boarding out of patients, references to boarding out have been omitted and at the same time the references to trial leave have been clarified.

Clause 8 repeals the Twenty-third Schedule to the principal Act and is again consequential on the repeal of the provisions relating to "boarding out".

In conclusion, I remind honourable members that the policy of this Government is to encourage those persons who are no longer subject to the provisions of the Mental Health Act and who still possess a degree of social dependence to continue to accept the accommodation provided by those psychiatric rehabilitation hostels which are licensed, subject to supervision, and properly conducted.

The Hon. JESSIE COOPER secured the adjournment of the debate.

LAND TAX ACT AMENDMENT BILL

Read a third time and passed.

ROAD TRAFFIC ACT AMENDMENT BILL (No. 2)

In Committee.

(Continued from September 20. Page 2041.)

Clause 6—"Enactment of subsections 47a-47h of principal Act."

The Hon. H. K. KEMP: I move:

In new section 47b (2) after "committed" to insert "and that the person alleged to have committed that offence has not consumed intoxicating liquor between the time at which it is alleged that he committed the offence and the time in relation to which it was established that there was present in his blood that prescribed concentration of alcohol".

On the advice of the Parliamentary Draftsman, the amendment is in a different form from what I foreshadowed yesterday. Under the existing provision it would be possible for a conviction to be recorded against a person who visited a hotel, imbibed seven or eight schooners of beer and thus attained a blood alcohol concentration of .08 in a period of two hours, but who had no intention of driving away from that hotel. The amendment covers this contingency.

The Hon. S. C. BEVAN (Minister of Roads): I oppose the amendment, which would defeat the purpose of the new subclause. In a hit-and-run accident, by the time the police reached the scene of the accident and were able to trace the person concerned (if somebody had taken the number of his car) some time would have elapsed. That is why the Bill provides for the two-hour period. If that time is exceeded, the test would not be carried out. The driver concerned might

have gone home and it might be about two hours before he could be traced and brought to the police station. In addition, a further 20 minutes must elapse to ensure that alcohol is not present in the driver's mouth. All that person would have to say would be, "I have had five or six schooners of beer since then; I was all right at the time this happened, but I might be above the alcohol level now." Who could then prove that he had not taken that quantity of drink at the time he stated? The onus of proof is on the police to prove that the individual had not had anything further to drink.

The Hon. Sir Norman Jude: The Minister said yesterday that there would be no difficulty in a person's establishing that he had had liquor after returning home.

The Hon. S. C. BEVAN: There is a clause in the Bill to the contrary. Surely it would not be very hard under the provision as drafted for any person to prove that he had had further liquor after the alleged offence occurred. I think it would be very foolish of a person to have further liquor in these circumstances, and I doubt whether anyone would do it.

The Hon. Sir Arthur Rymill: The Minister is assuming that the person has not been taken into custody in the meantime.

The Hon. S. C. BEVAN: This provision does not say anything about his being taken into custody.

The Hon. Sir Arthur Rymill: That is the normal thing.

The Hon. S. C. BEVAN: The period between the alleged offence (I am assuming it was a hit-and-run accident) and the taking of the test could be about two hours, in accordance with this provision.

The Hon. C. M. Hill: What if we assume that the person was innocent?

The Hon. S. C. BEVAN: In that case he would not have any blood alcohol content.

The Hon. Jessie Cooper: He might have had a drink after arriving home.

The Hon. S. C. BEVAN: If he had gone home and had a nobbler of whisky because he was upset, his blood alcohol content would be nowhere near the prescribed level. He would need several nobblers of whisky before reaching this level.

The Hon. C. R. Story: He might have been so upset that he needed six nobblers of whisky.

The Hon. S. C. BEVAN: The point I am making is that the amendment would kill this clause altogether. If a person were apprehended and tested, all he would need to say is, "I had a certain amount of liquor after this accident happened. I was all right when it happened, but perhaps I am not all right now." Who is going to prove the contrary?

The Hon. R. C. DeGaris: Could he not do that now, under the new subsection as it stands?

The Hon. S. C. BEVAN: Under the new subsection as it stands it is open to him to prove that he had more liquor after the alleged offence, but he must prove it.

The Hon. R. C. DeGaris: In other words, the onus is on the accused.

The Hon. S. C. BEVAN: Yes, but under the amendment there is no onus on him. Under this provision, if a person was apprehended at the time of the accident and taken to a testing unit, it is a different matter altogether: he remains in custody until the test is taken.

The Hon. Sir Norman Jude: He is apprehended only if there is a fairly good suspicion.

The Hon. S. C. BEVAN: That may be so. The situation that the amendment is designed to cover is provided for in the Bill in its present form. It is quite open for a person to produce evidence of his consumption of intoxicating liquor after the commission of the alleged offence and before he took the breathalyser test, to rebut the presumption provided for in the new subsection. The new subsection does nothing more than set up a presumption. It is clear that the presumption may always be rebutted by contrary evidence. If the amendment is carried the operation of the presumption will be restricted to the extremely rare case where a person suspected of committing an alleged offence is under the direct observation of a police officer or other person for every second of the time from the moment he commits the alleged offence until the moment he actually exhales into the breathalyser. Any break in that period of continuous observation will make it almost impossible to establish that the person did not consume intoxicating liquor during the break.

The effect of the amendment is to nullify the operation of the new subsection. Since the presumption provided for in the new subsection is the basis of the prosecution for the proposed statutory offence, the passage of the amendment would amount to a substantial rejection by this Council of the whole concept of the proposals contained in the Bill relating to the statutory offence. How could a police officer prove that a person had not consumed alcoholic liquor between the time of the accident and the time of the test? The purpose of the clause is not to back date.

The Hon. V. G. Springett: Back calculate.

The Hon. S. C. BEVAN: I was going to use another term that means the same. The two-hour period mentioned in the clause is there so that the court or anybody else will not be called on to back calculate. It would be reasonable to assume that if this was the required content up to a period of two hours after the offence, then that would have been the content at the time of the offence. I know that in other parts of the world there has been controversy regarding the matter of back calculating. There is a sharp drop in the alcohol content after a period of two hours. This could occur much sooner, depending on the individual. It has been assumed as a general principle that a two-hour period is the maximum, and after that the drop occurs. Because of this it is generally accepted that the two-hour period is a fair and equitable thing. After the two-hour period the alcohol content would be in the blood and it would be reasonable to assume that the content was in the blood prior to the test. I said by interjection yesterday that this could be in favour of a particular person in such a situation because his alcohol content had reached the peak and was on the way down.

The Hon. Sir Norman Jude: What about the man who had reached home 10 minutes after having had too many drinks and who might reach .08 per cent but when he reached home would register, say, .05 per cent? He has not committed an offence under the Bill but he could be held until his blood content reached .08 per cent. You can't have it both ways.

The Hon. S. C. BEVAN: I cannot follow the honourable member's reasoning. He is using a short period as an illustration. What would cause the police to go to his home? They would not stay outside every hotel.

The Hon. Sir Norman Jude: He might swerve on the road and draw attention to himself.

The Hon. S. C. BEVAN: That could be because of his road behaviour. By the time he had reached home his content could be low; it does not reach its peak for about two hours. He would be accused of consuming alcohol.

The Hon. Sir Norman Jude: He would be asked to take a test.

The Hon. S. C. BEVAN: Yes, which would be taken within a period of 20 minutes.

The Hon. Sir Norman Jude: It might be, but you said that he could be waiting two hours under the Bill.

The Hon. S. C. BEVAN: I never stated that he would be held for two hours. The point is that an offence may occur and a period elapse between the apprehension of the person and the time the test is taken.

The Hon. Sir Norman Jude: Suppose it is at Port Noarlunga and there is no breathalyser there?

The Hon. S. C. BEVAN: There is no question of back calculation, which should be avoided. In other States the two-hour period is in the Bill and the content stipulated is lower than in this State. There are two reasons for the two-hour period: the first is that medically two hours is the limit in which the blood alcohol rise can take place and beyond which a fall is most probable; outside the two-hour period the term is that one is in "unknown territory" because of the fall. There is a reasonable assumption that if a test is taken within two hours it fairly closely approximates what a person's condition was at the time of driving, unless the drinking circumstances were outlandish. The British Medical Association publication "*The Drinking Driver*" states that some agreement has to be reached on the figure which is to be given to courts, and it recommends .08 per cent, obviously taking into account the practical situations of police often having to deal with persons some time after the actual driving offence. The section of the report dealing with "back calculation" reads as follows:

> It is inevitable that some delay will occur between the time when the alleged offence was committed and the time when a sample is obtained for analysis. It takes between 15 and 90 minutes for the peak concentration in blood to be reached following a drink of alcohol, and in most cases little more than 30 minutes. If, as must generally be the case, the motorist is detained by the police after the peak concentration has been reached, the delay in obtaining a sample will be in his favour, as the sample will yield a lower concentration than when the offence was alleged to have been committed. In this connection we advise strongly against the court permitting any "back calculation" to determine how much higher the blood alcohol concentration must have been at the material time. In fact, the rate of elimination of alcohol, both between different individuals and in the same individual at different times, varies to some extent and an exercise of this kind cannot, in our opinion, be justified, although we are aware that it is the accepted practice in some other countries. Conversely, if the suspect is known to have taken alcohol just prior to being detained, the possibility must be borne in mind that the blood alcohol concentration was still rising at the time the sample was taken.

That is the opinion expressed in the British Medical Association's report in relation to this

matter. The practical experience of the Police Department over a period of years in dealing with persons driving under the influence indicates that, regarding the metropolitan area, it takes about 40 minutes on the average to present a suspect for medical or breath test. This is taking into account factors such as stopping and questioning at the scene, proceeding to headquarters for test, and 20 minutes' waiting time before the instrument is used to eliminate any suggestion of alcohol in the mouth.

It goes without saying that most hit-and-run cases where the driver either fails to report or deliberately abandons his vehicle or speeds from the scene go beyond one hour, and it would not be unreasonable to predict that with the one-hour limitation in which to test there might be a temptation for persons driving under the influence and fearful of the consequences to avoid their responsibilities and disappear for an appropriate time.

This supports the period of two hours we have suggested here. The other aspect is that drinking and driving are seldom contemporaneous, and there would be a considerable lapse of time in normal circumstances before any person commenced driving after drinking. The draft Bill, parallel with the Victorian legislation, requires a member of the Police Force to first suspect on reasonable grounds that a person has behaved, whilst driving, in a manner which indicates that his ability to drive a motor car was impaired at the time when he was so driving.

This means that a person must first attract attention by his driving behaviour before any policeman is going to exercise the requirement for him to submit to a compulsory test. In practice at present the average blood alcohol content of an individual who, first having attracted attention, is tested, is .22 per cent. It is obviously the individual involved in an accident indicating some breach of the law or inattention on his part with evidence of alcohol that will result in compulsory breath tests beyond the present situation, and it is this class of individual in which the hit-and-run risk is attached.

As I say, two hours seems to be practicable and reasonable. If the proposed amendment is put in the Bill, all those reasons I have given for the two-hour period will go by the board, and so will the entire Bill. I hope the Committee does not accept the amendment.

The Hon. V. G. SPRINGETT: I think the essence of this problem is that a breathalyser test is definitely accurate at the time at which the test is taken. But, like all physiological tests, it is surrounded by and bogged down by variables. Any physiological test has the same problem. In my opinion, this test has to be thought of and discussed in relation to the philosophy of drinking and driving. The same document from which the Minister quoted emphasizes that the ability to drive safely depends primarily upon the concentration of alcohol in the body, not upon the amount of alcohol taken; it can be said that if a man weighing 11st. has a blood alcohol concentration of .05 per cent (which is the Victorian figure) he could not possibly have taken less than 1½ pints of ordinary beer or three single whiskies each of five-sixths of an ounce. Our figure is .08 per cent.

I cannot see what is to prevent any driver, if this amendment is passed, carrying a little flask around in his hip pocket and, if he has an accident, having a quick nip. He would then be able to show that he had had a drink since the accident, and the whole test would be completely vitiated. Because of that fact, and because the two-hour gap, which is available but not obligatory, has been found to work in most parts of the world, and taking this whole problem into the context of the philosophy of drinking and driving safely, it is reasonable to have a two-hour period.

The Hon. F. J. POTTER: I have a good deal of sympathy with the Hon. Mr. Kemp's amendment, for I think I can see what he is trying to do. However, my legal instincts come to the fore and I must say that I am entirely on the side of the Minister in this respect. If this amendment is accepted, we might as well tear up the whole Bill; that is, speaking from a legal point of view. The interesting part of the discussion arises from a mortal fear in the minds of many people (and this is quite typical of anyone who has not a complete idea of the law of evidence) that a person must somehow have to prove that he is innocent. This, of course, is not really the position at all in practice.

In the case of a person charged with an offence under this clause, the prosecution has to prove against a man, first, that at a certain time and at a certain place he drove a motor vehicle or attempted to put a motor vehicle in motion. For all practical purposes we do not have to worry about the latter case, because in that instance a person would be seen; his behaviour would take place at the time, and he would not be involved in being tested at a later time. The second thing the prosecution would have to prove is that within

two hours of that driving a test by the breathalyser was administered. The third thing it would have to prove is that the breathalyser test recorded a reading in excess of .08 per cent.

Those three averments in the prosecution are all what we could call positive averments. The matter that the Hon. Mr. Kemp wishes to introduce would have to be a negative averment. I am not saying that in certain circumstances prosecutors are not called upon to prove negative averments, but the kind of negative averment a prosecutor may have to prove is a minor one, such as that a person was not licensed or something of that kind at a certain time and that that was an ingredient in an offence. But this is not a negative averment of that kind: this is a wide negative averment that no prosecutor could ever prove. One cannot prove a negative averment of this kind as part of the ingredients of a prosecution. So, from that point of view, I say that this is hopeless.

But let us take the three positive averments I have mentioned. At that stage if the prosecutor has proved those three positive facts, and proved them beyond reasonable doubt (because this is the onus of proof placed on the prosecution) the whole process then switches over to the defendant. What does the defendant under the terms of this clause (I am not dealing for the moment with the amendment) have to do? As a part of his defence, he can prove two things: first, that he did not drive the car or attempt to put it in motion, that he was not the person involved, that it was somebody else, or that there is no positive means of identifying him as the driver of the car.

He has to prove that—but not "beyond reasonable doubt", because the whole point is that, when the onus is on the defendant, the onus of proof shifts and the standard of proof shifts; he has only to satisfy the court "on the balance of probabilities" that what he is saying is correct. The first thing he can say is, "It wasn't me; I wasn't the driver at the time"; secondly, under the provisions of this clause he can say, "Well, a set of circumstances happened after the driving which was likely to cause the breathalyser machine to read as it did." Of course, he will not have any answer (or is hardly likely to have one) to the second positive averment, that the test was administered within a period of two hours.

The Hon. R. C. DeGaris: Does he have to prove that?

The Hon. F. J. POTTER: No; he has merely to satisfy the court. He does not have to prove in the way that the prosecution has to.

The Hon. R. C. DeGaris: It says "prove".

The Hon. F. J. POTTER: Yes, but the law of evidence takes care of that, because the onus of proof upon the defendant is not the same as it is upon the prosecutor.

The Hon. Sir Arthur Rymill: But does not a presumption of this nature mean he has to prove "beyond reasonable doubt"?

The Hon. F. J. POTTER: No.

The Hon. Sir Arthur Rymill: He has to prove only beyond a reasonable probability?

The Hon. F. J. POTTER: Yes.

The Hon. Sir Arthur Rymill: Even in a case of a quasi-criminal nature?

The Hon. F. J. POTTER: That is my understanding of the law of evidence, it is my understanding that it is the law whether or not any presumption arises. I do not profess to be a complete expert on this but I should have thought that this was fairly well known; it would certainly be my understanding of the onus of proof. That is the whole point about this matter.

There is an aspect of this discussion that is somewhat unreal. We have had much talk about the person who has already got home and is about to be hauled off for a test, but I think something that the Minister said was to the effect (although I cannot recall the exact words) that "this rarely happens". I agree with him: 99 per cent of such people will be taken at and from the scene of the accident. If this amendment was accepted, this offence would never be proved. It is a negative averment. If we insert it, we make it an ingredient of the charge which must be proved. We cannot prove a negative averment of this kind.

The three positive averments are the normal that will have to be satisfied here; the onus will then shift to the defendant, who must satisfy the court (and not prove beyond reasonable doubt) that either he was not driving, that it was a case of mistaken identity, or that something had happened in the meantime to make it likely that the reading would be as high as it was. This is not as hard as most people seem to think. In this rather unusual case of the man who somehow gets home and then pours three whiskies down his throat, he can say, "All right; I had the whiskies. This is the bottle I drank from. My wife was there; she saw me drink." This presents no difficulty.

The Hon. R. C. DeGaris: But supposing he is on his own?

The Hon. F. J. POTTER: Then he can tell his story to the court and, if the court believes him, that is the end of it. If he was not apprehended at the accident, who will ever see him?—because, according to this provision, there must be some reasonable grounds for administering the test.

The Hon. R. C. DeGaris: He may have been weaving about on the road, and not known a thing.

The Hon. S. C. Bevan: If a man was weaving about on the road he would not get home; he would be apprehended before he got home.

The Hon. F. J. POTTER: I have had some experience in the courts defending people charged with "driving under the influence", as the old charge was. I have had mixed success: I have got some people off and perhaps more frequently I have not got people off, because that is not an easy charge to disprove. But, in every case in my experience, there has been an apprehension at or near the scene of the accident or the car was being driven through the traffic lights or was weaving across the road and the driver has been stopped by the police.

The suggestion is being made here that some person, not a police officer, would see a car weaving across the road and take some action: the vehicle would have to be reported to the police, because only the police can take action in these circumstances; the police would then have to follow the thing through. But I cannot see this happening often. I am not saying it could not happen but I still maintain that under the provision in the clause, that the presumption is there unless the contrary is proved, the defendant would have the onus of satisfying the court on the balance of probabilities that in fact he had not been there or that a certain set of circumstances, such as the drinking of liquor after the occurrence of the accident, had caused the breathalyser reading to be as high as it was. That seems to be the situation in a nutshell but, if this amendment is inserted, however sympathetic I may be with what it tries to do, it will wreck the whole clause.

The Hon. R. C. DeGARIS: I cannot support the amendment, although I understand some of the problems the Hon. Mr. Kemp is trying to solve by it. One thing about this clause is not perfectly clear to me. That has been raised by the Hon. Mr. Potter, who referred to the words "unless the contrary is proved". Those words seem to place the onus of proof on the defendant and, although the circumstances may not occur often, somebody who has consumed liquor after an alleged offence may not be able to prove that he has consumed that liquor at that time. I suggest that the Minister examine this matter with a view to inserting after "contrary" the words "or a reasonable doubt". This would be more reasonable, as the onus of proof would not be entirely on a defendant. Such an amendment would satisfy me. The Hon. Mr. Potter has said that proving to the contrary means "on the balance of probability", but I ask the Minister to consider the amendment I have suggested.

The Hon. Sir ARTHUR RYMILL: I support the amendment suggested by the Leader. As the new subsection stands, the legal position is that once it is established the onus of proof is changed and transferred to the defendant. The Leader's suggestion would ensure that a defendant would not have to disprove the allegations. It would place him in the position that he is in already: that is, if he can show reasonable doubt he will be acquitted. In other words, he would not have to prove, on any standard of proof, that a certain thing happened or that a certain position obtained. To put it another way, if a defendant could prove a 50-50 basis that it may or may not be so, then he would be acquitted, and that is the position as it now stands. Once the onus of proof has been changed a defendant would have to establish some sort of balance in his favour. If it is a 50-50 proposition he would not discharge the presumption that has been thrown upon him.

I am averse to the ordinary standards of legal presumption being changed. Normally, the prosecution has to prove beyond reasonable doubt that an offence has occurred. When the presumption is changed, a defendant would be at least placed in the position of having to prove, on the balance of probabilities (I emphasize "balance") that he was not guilty. If a defendant is unable to prove or disprove a point, and the prosecution can do no better, the defendant should not be convicted. That, as I understand it, is the suggestion of the Hon. Mr. DeGaris: if the matter is even, then the balance should be in the defendant's favour.

The Hon. G. J. GILFILLAN: I think the amendment suggested by the Leader has merit, but the amendment moved by the Hon. Mr. Kemp is the one now before the Committee. After listening to various speakers in opposition, I am even more in sympathy with the amendment before the Committee. The Minister quoted some extreme cases in opposing the

amendment, and mentioned a person who might have been involved in an accident and was arrested up to two hours later. I think that would be an unusual circumstance and that in the normal course of events such a person would be taken into custody at the scene of an accident. That person would then be under the supervision of the police and in full view of any bystanders until the breathalyser could be used.

In such circumstances Mr. Kemp's amendment contains nothing that would make it difficult for the police to prove a case. Argument against the amendment revolves around a position where a person may be arrested some time after an alleged offence. It has been said that in some instances this could react in favour of the arrested person. That may be true, but in other cases it could react against that person. Even if it only reacts against a person occasionally it is still a bad provision, and I do not think it should be written into the Bill. It would open the way for what is virtually false evidence to be used and accepted in a court of law. It could well become a custom wherever an accident occurred and any suspicion existed for a person to be tested with a breathalyser.

The Hon. Mr. Potter made an interesting comment when he referred to cases that he had defended under the provisions of the existing Act where persons were accused of driving under the influence of intoxicating liquor. He said that those charges were not easy to disprove; surely with the added weight of a breathalyser it would be even harder to disprove such a charge, especially with a retrospectivity of two hours?

As the provision now stands I think it is most undesirable. I believe it is a bad principle to insert any provision that would make it possible for false evidence to be accepted in court. I foresee no difficulty in administering the Act, should this proposed amendment be included, where a person is apprehended at the time of committing an offence.

The Hon. S. C. Bevan: There is nothing in the Bill that says anything about the time a person is apprehended. That word is not mentioned anywhere.

The Hon. G. J. GILFILLAN: I am speaking of a man arrested at the time of committing an offence, and I object to retrospectivity, where that person may be apprehended after an interval of time in which he is unable to prove his movements. I believe the onus of proof in such circumstances (probably not ordinary circumstances, because I think the illustrations were extreme instances) is misplaced. In any case, provision still exists under the Road Traffic Act to prosecute such people. I believe that evidence of the breathalyser test should not be admissible unless there is no reasonable cause for doubt.

The Hon. F. J. POTTER: I agree with the Hon. Mr. Gilfillan that there would be no real objection to the amendment as a sort of averment that the police had to prove in the case of a person who was apprehended and charged with this offence. However, this would mean that the clause would be confined to cases where there was an immediate apprehension of a person after he had been driving a motor vehicle. Even then there might be some doubt, because presumably a police officer would have to be able to say he had kept his eyes on the defendant for the whole of the time between the offence and the test. Otherwise, it might be possible for the defendant to have a quick nip when the policeman was not looking.

The Hon. C. R. Story: Will you define "averment"?

The Hon. F. J. POTTER: An averment is a fact that must be proved in a prosecution. The Hon. Mr. DeGaris and the Hon. Sir Arthur Rymill mentioned the wording of the clause, particularly the words "unless the contrary is proved". This has caused me to think that the wording is unusual. When I was a student I learned the maxims that the prosecutor has to prove beyond reasonable doubt and that the defendant has to satisfy on the balance of probabilities. I wonder why the word "satisfy" was not used here; it is the normal thing. If the clause read "it shall be presumed, unless the defendant is able to satisfy to the contrary . . ." it might fall into line with the accepted wording that appears in other Statutes. I stick firmly to what I said a moment ago, but this wording would put the matter beyond doubt.

The Hon. H. K. KEMP: One thing that has been clearly established is that any consumption of alcohol between the time of the offence and the time of the test will invalidate the test.

The Hon. F. J. Potter: It does not invalidate the test but it provides an answer to the prosecution.

The Hon. H. K. KEMP: A little while ago the honourable members who comprise the present Ministry were fighting bitterly the introduction of radar to detect speeding offences, and I remember a dramatic statement from one of them along these lines, "If there is any chance of one innocent man being convicted we are completely against the Bill." We are now seeing a complete reversal of form. It

must be admitted that under this clause there is a very reasonable chance of an innocent man being convicted. It has been shown in the great majority of cases that there is no difficulty for the police. Where a man is apprehended as incapable of driving he is kept under close surveillance while being taken to a police station for a test. The possibility has been raised that, whilst in custody, he might be able to have a quick nip and thereby invalidate the test. I think this is laughable. What I have heard only makes me more convinced that the amendment is desirable.

The Hon. S. C. BEVAN: Apparently the Hon. Mr. Gilfillan believes that the amendment will have the effect that once a person is apprehended the police will have to prove that he had not consumed any liquor between the time of the alleged offence and the time of the test. However, the period of two hours is the time between the committing of the alleged offence and the time of the test, and anything can happen during that period. Nobody may have been watching the man who allegedly committed the offence. He may have met with an accident and know perfectly well that he had been drinking. So, he may want to get out of the way so that he cannot be charged with being a drunken driver and causing an accident. The man must be traced. Perhaps somebody has taken the number of his car, or he may have abandoned his car. A fair amount of time may elapse, during which he is under nobody's supervision. Evidently some honourable members propose saying to this person, "You know you have had more liquor than you should have had; you know you are responsible for an accident. However, since you have come in and submitted to a test, as long as you say that you consumed six whiskies between the time of the accident and the time of the test, this will be sufficient evidence." This new subsection deals with the person who gets out of the way and some time elapses before he is apprehended and brought in to be tested. We should all be concerned with this person. I hope that the amendment will not be carried.

The Hon. G. J. GILFILLAN: There is nothing in the amendment to prevent the breathalyser test from being admissible in court. It is only the two-hour retrospectivity that is in question. The breathalyser result would be admissible as showing the alcohol content at the time the test was made.

The Hon. S. C. Bevan: What happens to the individual when he gets away? You can't explain that.

Amendment negatived.

Progress reported; Committee to sit again.

CONTROL OF WATERS ACT

Adjourned debate on the resolution of the House of Assembly.

(For wording of resolution, see page 2041.)

(Continued from September 20. Page 2042.)

The Hon. C. R. STORY (Midland): I do not oppose this resolution, although I may appear at times to do so. I do not oppose in principle the control of the waters of the Murray River, although I have lived under the Control of Waters Act for many years in the Upper Murray. The provisions the Minister has brought before the Council are merely an extension of the Act to the lower regions of the Murray River between Mannum and the sea. It is a wonder to me that this was not done in years gone by, because the Upper Murray has been controlled as a result of a proclamation of 1919, but South Australia in the past has not had the problem with which it is now faced. In 1914, when the lowest recorded flow of the river took place, the river had to be sandbagged to allow the pumps in the Upper Murray to function in order to keep a trickle in them. Since then the river has been locked and head-water storages have been established on the Murray and its tributaries. For many years this was a boon to South Australia but in more recent times, as a result of the population increase, with Australia becoming a much more important nation as a feeder of the population in the Near East, it has meant an increase in production in the Eastern States but a smaller increase in South Australia.

We should consider ourselves fortunate that there is an agreement (although it took a long while to obtain it) between the Victorian, New South Wales, South Australian and Commonwealth Governments to control the amount of water usage in those States. The Control of Waters Act is particularly stringent. I do not know whether any honourable member has taken the trouble to read the Act, but I can assure members that if every section were put into operation the legislators of today would be frightened. In 1919 people must have put more trust in the people administering the Act than perhaps this Parliament would do. What I cannot quite visualize is the actual position of the people in the Lake Alexandrina and Lake Albert areas who have gone ahead

with rather large development. The barrages have been built at the mouth of the Murray River since the passing of the Act and since the last amendment was made to it. Had those reaches been brought under the provisions of the Act when the barrages were built, I consider we would not be faced with quite the problem we are faced with today in wondering what the effect this resolution will have on landholders who, as a result of the barrages being built to keep the sea water out, have had certain lands inundated by the increased height in the lake.

I am sure that many of them believed they had riparian rights. Many thousands of acres of the inundated land has had no usage since the barrages were built, although the private landholder in fee simple has still paid the land tax and the council rating on much of the land in the same way as in the Upper Murray, where the land was inundated as a result of the locks being built. Certain people were compensated for loss of enjoyment of their land but some, I understand, were not compensated. In the case of leasehold land belonging to the Crown, there is some doubt whether the land reverts to the Crown because of the inundation or whether it is still technically the property of the landholder.

Many questions must be exercising the minds of members, particularly those who represent that area. I said at the outset that I was in favour of some control. If the landholders in the lower reaches of the river are allowed to go on developing at the rate they have developed since January of this year (it was in that month that the Government froze the issuing of water licences in the Upper Murray), it will simply mean that we shall have to continue to send ever-increasing amounts of water into the lakes area to keep those lakes reasonably fresh and to service those people who have and who must have riparian rights because they are not under the control of this Act. Therefore, they must be under the control of another Act which provides this State with its authority over water.

The Hon. C. D. Rowe: It is this development that has led to this proclamation.

The Hon. C. R. STORY: Yes, it is the uncontrolled development of the lower reaches over the last few years, particularly over the last few months, that has led to it. The people in that area have been unrestricted, whereas people in the Upper Murray have been pegged entirely in respect of new plantings since January of this year, when it was found necessary to impose a restriction greater than ever imposed before.

At the moment I am not competent (and I do not think anyone in this Chamber is competent) to say what effect this proclamation will have on the people in those lower reaches of the Murray River. Legal problems are involved, and there are moral obligations that must be closely looked at. If we do not do something about controlling this water but merely allow it to go merrily on, we are morally obliged as a State to continue sending water into that area, and the people there will continue to develop at an even faster rate than now. If the people cannot get development in the upper reaches they will certainly go where they are unrestricted.

One of the great problems South Australia has with water is evaporation. We are told that one of the definite reasons for the hold-up of Chowilla concerns the evaporation over the 150 miles of waterway and the 5,000,000 acre-feet storage of the dam. We are faced equally with a tremendous evaporation problem in Lakes Alexandrina and Albert. This has not worried us unduly in the past. I would think the attitude of the landholders in that area would be, "Well, the water is running to waste because it is only going to the sea if we do not use it." However, it is not quite as simple as that. It is running to waste at present, but I visualize that before the turn of the century it will be necessary to have a number of dams on the river, and for us to have to continue sending water down to the lakes area just to evaporate or to mix with salt water would be criminal.

Therefore, there must be some control of plantings there. I believe that in time some alternative must be provided for the irrigators in those areas. For instance, it may become necessary to have pipelines feeding them. It may be necessary in 20, 30 or 40 years' time to completely dry out these lakes, because we cannot afford the luxury of having that terrific expanse of water in that area just evaporating and with only a few people irrigating from it.

The Hon. Sir Norman Jude: It would be 650,000 acre feet in evaporation.

The Hon. C. R. STORY: Yes. Therefore, it may be necessary in time to re-think the whole of the area of Lakes Alexandrina and Albert. It may be necessary to dry Lake Albert out but still use it as a major swamp irrigation area. This is the sort of thing that Holland has done so well. That country has drained some areas and built polders and dykes, draining them

successfully with underground drains. After leaching the salt out of the land by perforated pipes, Holland has got such land quickly into production.

However, it would be necessary to have a controlled irrigation scheme. At present we have this huge expanse of water with only the frill around the edge now being irrigated. At a low lift we could say that three miles was the economic pumping limit, although in my own area, where there are high cliffs, two miles is about the distance a private irrigator should consider from an economic point of view. Therefore, we only have the frill around these lakes being utilized.

If in the future one of those lakes was dried out there would be a very large area on which we could put many families. This would be reasonably high-production country. When we approach this subject we are not just thinking of something that will bring a few licences to the people now there: this is a State-wide project of major importance. It is certainly very important to the people not only in that area but in the whole of the South Australian Murray Valley.

I am not as well acquainted with the various streams mentioned in the proclamation as I am with the streams, anabranches, effluents and billabongs in my own section of the river. Before I can do justice to this resolution before the Council, I should like the Minister, with the permission of the President, to have a large map pinned on the notice board. The Council should have all the details of this project. Honourable members would be well advised to go away and study this resolution, because there is much more to it than meets the eye at first glance. I suggest that honourable members read the Control of Waters Act and assemble as much material as possible about the Chowilla dam because this resolution will accentuate its need more forcibly than anything I have seen since we first talked about water storages on the Murray River. I ask leave to conclude my remarks later.

Leave granted.

The Hon. A. F. KNEEBONE (Minister of Labour and Industry): We shall make this an Order of the Day for next Tuesday. In the meantime I shall endeavour to obtain a map for the honourable member.

Debate adjourned.

ADJOURNMENT

At 4.22 p.m. the Council adjourned until Tuesday, September 26, at 2.15 p.m.