Clauses 115 to 120 present, for the most part, a continuation of existing rules. However, one change of considerable significance is that a previous statement of a witness may be received in evidence for all purposes where it was made under oath or under solemn affirmation and was subject to cross-examination. At the present time a previous statement can only be admitted to test the credibility of the witness.

Clauses 121 to 125, dealing with credibility of witnesses, contain some important changes. First, evidence of reputation will no longer be admissible for the purpose of challenging or supporting the credibility of a witness. Secondly, the accused will no longer be open to unlimited cross-examination with respect to his criminal record. There are exceptions to this where the accused has dropped his shield by giving evidence against a co-accused or by putting his own character in issue, but if these exceptions are not applicable, the bill provides that the accused may be cross-examined only with respect to his record for offences having a direct bearing upon truthfulness, namely, perjury, giving contradictory evidence, or any offence that includes fraud as an essential element.

Having given the accused this measure of protection against the use of his previous criminal record, the Uniform Evidence Act allows the judge and the prosecutor to comment upon failure of the accused to enter the witness box. The Department of Justice believes that this provision may well be inconsistent with the accused's right of silence which is guaranteed by the Charter of Rights and Freedoms.

This has been the interpretation given by the American courts to their fifth amendment privilege. Therefore, the bill has rejected the comment provision in the Uniform Evidence Act and has adopted a mandatory direction provision that was recommended by the majority of the federal-provincial task force on evidence.

This mandatory direction, which is found in clause 95 of the bill, requires the judge to advise the jury that the burden of proof is on the prosecution throughout the case, that the accused is presumed innocent until he is proven guilty, that the accused has a right to testify on his own behalf—although the law imposes no obligation on him to do so—and that the accused is free to remain silent if he so chooses, and in this case he has chosen not to testify.

The third significant change is that clause 125 abolishes all rules that either require corroboration of certain evidence or require a warning concerning the danger of acting on uncorroborated evidence. In its place the court is required to instruct the trier of the fact of the special need for caution in certain circumstances, namely, with respect to first, the evidence of a witness who has testified without taking an oath or making a solemn affirmation; secondly, the evidence of a witness who, in the opinion of the court, would be an accomplice of the accused if the accused were guilty of the offence charged; thirdly, the evidence of a witness who is proved to have been convicted of perjury; or, finally, a charge of treason, high treason or perjury where the incriminating evidence is that of only one witness.

Clauses 126 to 129 make only modest additions to the present law with respect to the evidence of interpreters and translators.

Clauses 130 to 159 deal with recorded evidence. The law relating to documentary evidence in Canada is in a sorry state. On the one hand, there is no adequate modern statement of the law on documentary evidence generally, while, on the other hand, there is an abundance of conflicting statutory provisions in relation to public, government and business documents. The result is that nobody is entirely sure what the rules are. This poses a serious problem for the business community in particular because it does not know whether it has to retain original documents or whether it can rely upon copies made by photographic, mechanical, chemical or electronic means.

This bill sets out a code in relation to documentary evidence and, in the process, streamlines the means of proof. It reduces the difficulty of proving authenticity by broadening the list of documents presumed authentic. It expands the use of copies by a broad definition of "duplicate," and by making a duplicate receivable to the same extent as an original, thus making it easier to satisfy the best evidence rule. Finally, it spells out an important exception to the hearsay rule for documents made in the usual and ordinary course of business.

The definition of "business" is very broad so that the same rules can be made to apply to financial institutions and government as apply to businesses generally. This standardization eliminates the apparent duplication of provisions that exist in the current Canada Evidence Act.

The provisions make only passing reference to the computer, but it was thought that most computerized records would be encompassed by the broad definition of business and government records. This may need to be re-examined in the near future with the rapid growth of the use of the computer by private individuals.

Clauses 161 to 174 deal with statutory privileges. Section 5 of the Canada Evidence Act, and comparable sections of the Provincial Evidence Acts, affords protection to witnesses with respect to the subsequent use of incriminating answers. The task force had identified a number of problems in connection with the section, ranging from its meaning through to its effectiveness in accomplishing its objective.

To address these problems, the bill extends protection against subsequent use to all statements—not just those that are incriminating in nature—made by the witness at the hearing. The reason for this is that it is often difficult to tell whether or not an answer is incriminating, and, in any case, a witness is not being called upon to give compulsory discovery against himself. The bill also includes provisions designed to reduce the possibility of a witness using the protection as a cloak for perjury. Finally, to comply with section 13 of the Charter of Rights and Freedoms, the protection will apply automatically, and the witness will not have to ask for the protection, as he now has to do, under section 5 of the Canada Evidence Act.