his accusers. Changes to the hearsay rule in criminal proceedings, therefore, have been limited to bringing together the exceptions and rationalizing their conditions of applicability.

One of the most important exceptions to the hearsay rule is the special category comprising statements of the accused to persons in authority. As a condition of the admissibility, the law requires that the prosecution satisfy the court in a *voir dire*—that is, a trial within a trial in the absence of the jury, if there is one—that the statement was voluntary. But, simple as this may sound, this exception has generated scores, if not hundreds, of precedents interpreting every aspect of it.

This bill retains the basic structure of the exception, but it defines the terms "persons in authority" and "voluntary". It also eliminates three anomalies. First of all, it prohibits questioning the accused during the *voir dire* as to whether the statement was actually true. This prohibition has a particular importance where the trial is before a judge alone, for recollection of the accused's in-court admission may persist in the mind of the judge even though he has excluded the statement itself.

Secondly, the quantum of proof of voluntariness has been changed from proof beyond reasonable doubt to proof on the balance of probabilities, which is the test applied to other issues of admissibility.

Thirdly, the current rule permitting the reception of such parts of an inadmissible confession as are confirmed by the subsequent finding of objective fact—evidence such as the murder weapon—is repealed. The bill will allow evidence of the accused's knowledge of the whereabouts or conditions of the objective fact evidence but not of any part of the inadmissible statement.

Another important provision deals with evidence given in previous court proceedings. This is covered in clauses 74 to 79. These clauses essentially overrule the famous decision in *Hollington v. Hewthorn*, an English case, reported at (1943) King's Bench Division, 587, which precludes the plaintiff in a civil case from proving that the defendant had been convicted in a criminal proceeding of doing the very act that forms the substance of the civil action. That rule has long been the object of criticism and has been abrogated by a number of jurisdictions already.

The bill goes one step further, and allows evidence of convictions to be used in subsequent criminal cases in two instances. The first of these is where the accused is charged with the possession of property obtained by the commission of an offence, in which case the bill would permit evidence of the conviction of another person or theft of that property as *prima facie* proof that the property was stolen.

Secondly, where an accused is charged with being an accessory after the fact of the commission of an offence, evidence of the conviction of another person for the principal offence is admissible as *prima facie* proof that the offence was committed. Under the current law, the principal offence would have to be proven all over again even though another court had already found someone guilty of the offence beyond a reasonable doubt.

[Senator Lewis.]

Turning now to the provisions of the bill dealing with alibi evidence, clauses 80 to 85 of the bill. These provisions basically codify the current practice which permits the judge to comment unfavourably upon the failure of the accused to adduce an alibi at the first reasonable opportunity. In addition, however, with respect to proceedings by way of indictment, the bill provides that the accused may not adduce evidence of an alibi at his trial unless he has given notice of it not later than seven days after being committed for trial. This is to avoid trial delays that otherwise would be necessary to allow investigation of the alibi by the prosecution. This requirement can be waived by the prosecution or by the trial court for cause shown.

There are also provisions dealing with competence and compellability, clauses 86 to 95. The main change here is in relation to the competence and compellability of the spouse of the accused. The bill makes the spouse of the accused generally compellable as a witness for the accused, and generally competent, though not compellable, as a witness for the prosecution.

The list of instances in which the spouse is both competent and compellable for the prosecution has been expanded beyond the limits of section 4(2) of the current Canada Evidence Act to include offences such as treason, murder or attempt to commit murder, infanticide, manslaughter, crimes against children under the age of 14 years, and dangerous offender proceedings. In each of these cases, the interest of the state in obtaining the evidence is considered to be superior to the interest in preserving marital harmony.

● (2110)

Closely tied to the spousal competency is the matrimonial communication privilege. At present this privilege applies to all communications made during the marriage, and it entitles the receiver of the communication to refuse to reveal its content in court so long as the marriage persists.

The bill modifies this privilege in clauses 166 to 173 by restricting it to "confidential" communications, by making it the privilege of the utterer rather than the hearer, and by continuing the privilege during the lifetime of the utterer regardless of whether the marriage continues to exist. I understand this has received the approval of organizations concerned with the status of women.

Clauses 96 to 99 deal with oaths or solemn affirmations. These clauses make some minor changes with respect to evidence of children and persons who are mentally infirm. They also eliminate the present anomaly whereby the accused can give evidence at his preliminary inquiry without being sworn.

Clauses 100 to 114 deal with the calling and questioning of witnesses. To a large extent these clauses set out what heretofore have been assorted rules of law and practice. They provide a handy compendium of the rules, none of which represents a major change.