minor point of difference is that the penalty is available on indictments for obscene libel as well as under the Act, whereas in New South Wales both obscene and blasphemous libel are included.[28] Also, as a matter of evidence, the fact that a publication is marked with a distributor's name and address as required by the Act, throws upon him the onus of proof that he was not in fact the distributor.[29] This is expressly stated to be the case in proceedings under the Acts of both States and it is assumed that on indictment for obscene, or for obcene and blasphemous libels, the onus of proof will lie upon the prosecution.

J. A. ILIFFE *

EVIDENCE (AMENDMENT) ACT, 1954

In 1931 a Committee of Judges was formed to consider the law of evidence and a report published recommending changes in the law. In 1938, in England, Lord Maugham, a former member of the Committee and the Lord Chancellor, secured the passing of a bill[1] adopting the changes recommended by the Committee. In 1954, the Parliament of New South Wales passed an Act[2] closely following the pattern of the English Act and constituting several exceptions to the general rule regarding hearsay evidence. Some delay no doubt was desirable with a view to seeing the legislation in action, and observing the judicial interpretation thereof, but it is submitted that the delay of sixteen years in adopting the English legislation in New South Wales is mainly due to the slowness of operation of the law-reform machinery in this instance.

The Evidence (Amendment) Act of 1954[3] changes the law by making admissible evidence which was not previously so, but nothing in the Act "prejudices the admissibility of any evidence which would apart from those amendments be admissible".[4] Hence the Act is to be viewed as facilitating rather than hampering the reception of evidence, and is in line with the modern trend of making all reliable forms of proof admissible in an age where the congestion of court lists and the convenience of recording information by modern methods make many of the older rules of exclusion of evidence work unnecessary hardship in the proof of facts.

Part III of the Evidence Act[5] is amended by the insertion of several sections affecting the admissibility of documentary evidence. This part of the amending Act has the heading "Admissibility of Documentary Evidence as to Facts in Issue", but it is submitted that the Act is not restricted to proof of *facts in issue*, but extends to *facts relevant to the issue* and that the heading is not designed to distinguish between the two; and, indeed, no suggestion has been made in any of the authorities that the Act is so restricted.

The new section 14 (B)[6] is limited in its application to civil proceedings without a jury, and so another factor is added for consideration by counsel when deciding whether to proceed with or without a jury in those jurisdictions where there is a choice.[7] The section provides that "In any civil[8] proceedings . . . where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall . . . be

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[28] N.S.W. s. 24; Vic. s. 8.
[29] N.S.W. s. 26; Vic. s. 9.
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[1] 1 & 2 Geo. 5, c. 28.
[2] Act No. 35, 1954 (N.S.W.).
[3] *Ibid.*
[4] *Id.*, s. 2 (a) (ii).
[5] Evidence Act, 1898 (N.S.W.).
[6] Modelled on ss. 1 & 2 Geo. 5, c. 28.
[7] In the Matrimonial Causes jurisdiction where "any party to a suit of marriage may required the contested issues to be tried by a jury" (s. 61 (2) Matrimonial Causes Act, 1899 (N.S.W.).
[8] See *Lilley* v. *Pettit* (1946) K.B. 401; *Andrews* v. *Cordiner* (1947) K.B. 655, where similar evidence was rejected in the former (criminal) and admitted in the latter (civil) case.

admissible as evidence of that fact"[9] provided that certain conditions are satisfied, that is to say

(1) If the maker of the statement either—
  (a) had personal knowledge of the matters dealt with by the statement, or
  (b) where the document in question is, or forms part of a record purporting to be a continuous record, made the statement (insofar as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of these matters.[10]

The Act states that the word "statement" includes any representation of fact whether made in words or otherwise,[11] but this cannot properly be called a definition, and it has been held to include (a) a statement in writing made to a police officer by an eye-witness since checked and signed by him,[12] (b) depositions prepared by a Commissioner containing evidence given to him,[13] (c) evidence given by a person since deceased but not signed or initialled by the deceased,[14] but it does not include the transcript of the evidence of a person made by a reporter in previous proceedings.[15]

It is submitted that the first case clearly satisfies the requirements of the Act for the person who made the statement "had personal knowledge of the matter dealt with"[16] and was "recognised by him in writing as one for the accuracy of which he is responsible".[17] The second case, it is submitted, falls within the clear words of the Act, being made "in the performance of the duty to record information supplied to"[18] the person making the document.

However, it seems difficult to reconcile the case of *Bullock* v. *Borett*[19] with the words of the Act, for the document containing the statement was not made by a person who had personal knowledge of the matters dealt with nor made by a person in the performance of a duty to record information supplied to him, that is, unless information "supplied to" a court can properly have been said to have been supplied to the clerk or the presiding Magistrate. It should be pointed out that Lindley, L.J.,[20] while conceding that there was some difficulty involved, admitted the document without argument on the point and the Court of Appeal in *Barkway* v. *South Wales Transport Co.*[21] cast grave doubt upon the decision by holding that the transcript of evidence given in former proceedings and taken down by the court reporter was not admissible in the later case. Indeed, Asquith, L.J. in considering the case said that "though commanding the respect due to the learned Lord Justice who decided it sitting in the King's Bench Division (it) is not binding on this Court."[22] Thus it is submitted that *Bullock* v. *Borett*[23] would not be followed and that the test to be applied to cases where documentary evidence of former proceedings is sought to be put in evidence in later cases is, was the information supplied to and recorded by the court (if so the document is admissible), or was it merely information given in court and copied by someone not being the court.[24]

When the document has been prepared by a person under a duty to record information supplied to him, the Act prescribes[25] that that document must be

[9] Evidence Amendment Act, 1954, s. 2 (b).
[10] *Ibid.*
[11] *Ibid.*
[12] *Bullock* v. *Borett* (1939) 1 All E.R. 505.
[13] *Edmonds* v. *Edmonds* (1947) P. 67.
[14] *Bullock* v. *Borett* (1939) 1 All E.R. 505.
[15] *Barkway* v. *South Wales Transport Co.* (1948) 2 All E.R. 460.
[16] Evidence Amendment Act, 1954 (N.S.W.) s. 2 (b) (1) (i) (a).
[17] *Id.* s. 2 (b) (2).
[18] *Id.* s. 2 (b) (1) (i) (b).
[19] (1939) 1 All E.R. 505.
[20] *Bullock* v. *Borett* (1939) 1 All E.R. 505, 507.
[21] (1948) 2 All E.R. 460.
[22] *Id.* at 474.
[23] (1939) 1 All E.R. 505.
[24] *Barkway* v. *South Wales Transport Co.* (1948) 2 All E.R. 460, 473, *per Asquith*, L.J.
[25] Evidence Amendment Act, 1954 (N.S.W.), s. 2 (b) (1) (i) (b).

part of what purports to be a continuous record. The meaning of this phrase is not given in the Act, but it has been held that regimental records come within the provision.[26] On the other hand, the Judicial Committee of the Privy Council has said

> that without attempting to give a definition of "continuous record" it is sufficient to state that the mere existence of a file containing one or more documents of a similar nature dealing with same or similar subject-matter does not necessarily make the contents of the file a "continuous record" within the meaning of the section.[27]

The Privy Council did not, however, take the opportunity of positively defining the term, and each case is therefore left to be decided on its individual facts.[28]

These provisions enable the written statements to which they apply to be put in as evidence in their own right, and will be invaluable where lengthy technical or medical reports have been prepared, for all the person who prepared the document need do is identify it, and so the task of the expert who has forgotten or almost forgotten the detailed facts about which the report was prepared, will be made much easier.

The maker of the statement must be called as a witness in the proceedings, but this is not necessary if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness or if he is beyond the seas, and it is not reaonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.[29] In deciding whether or not a person is fit to attend a judge may act on the certificate of a legally qualified medical practitioner.[30] Before this Act a medical certificate not verified by affidavit was not in strictness admissible at all, though it was often received without objection where there were no grounds for suspecting the good faith of the party producing it. The Act now changes this in civil cases without a jury and while the word "may' gives the Judge a discretion to refuse to act on the certificate, the authorities[31] on this provision seem to support the view that a judge "*ought* to accept medical certificates . . . without affidavits",[32] if the good faith of the party producing it is not doubted.

The court may, "having regard to all the circumstances", order that the statements mentioned in subsection one above be admissible[33] without the attendance of the maker as a witness. This gives an exceedingly wide power to the court and has been used to get in documentary evidence where persons making the document would probably be overseas or where, if the document were not admitted in evidence, it would entail bringing a witness from another State or country, thus involving increased expense.[34]

Nothing in the Act renders admissible as evidence any statement made by a "person interested" at the time when proceedings were "pending" or "anticipated" involving a dispute as to any fact which the statement might tend to establish.[35]

Who is a "person interested"? In *Barkway* v. *South Wales Transport Co.*[36] Asquith, L.J. held that a person was interested whose reputation in his

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[26] *Andrews* v. *Cordiner* (1947) K.B. 655.

[27] *Thrasyvoules Ioannou* v. *Papa Christoforos Dimetriou* (1952) A.C. 84, 92 (P.C.), *per* Lord Tucker.

[28] However, it is submitted that logbooks of all kinds, meteorological records, memoranda by a solicitor or physician, are all *prima facie* included. (Phipson, on *Evidence* (9 ed.) 281).

[29] Evidence Amendment Act, 1954 (N.S.W.), s. 2 (b) (1) (ii); *Andrews* v. *Cordiner* (1947) K.B. 655, 658, *per* Oliver, J.

[30] Evidence Amendment Act, 1954 (N.S.W.), s. 2 (b) (2).

[31] *Dick* v. *Piller* (1943) K.B. 497; *Grenishaw* v. *Dunbar* (1953) 1 Q.B. 408.

[32] *Dick* v. *Piller, supra* at 500, *per* Scott, L.J.

[33] Evidence Amendment Act, 1954 (N.S.W.), s. s (b (2).

[34] *Andrews* v. *Cordiner* (1947) K.B. 655, 658.

[35] Evidence Amendment Act, 1954 (N.S.W.), s. 2 (b) (3).

[36] (1948) 2 All E.R. 460.

occupation was at stake, while in an earlier case,[37] it was said that "in the case of a limited company it would seem clear that every shareholder is a person interested in the success of the proceedings brought by the company, but so . . . is every director."[38] In this case the question as to whether a person was in every case interested in his master's proceeding was left open, although Morton, J.[39] suggested that there were circumstances in which he may not be a person interested. However, the Court of Appeal in *Barkway's Case*[40] seem more inclined to the view that the mere fact of a person being a servant makes him interested in the outcome of his employer's proceedings.

Financial advantage or disadvantage is a test but not the *sole* test.[41] Mere relationship or emotional, spiritual or sympathetic interest is not enough[42] to render a person's evidence inadmissible, the section being aimed at admitting evidence only from a person "who has no temptation to defect from the truth on one side or the other—a person not swayed by personal interest, but completely detached, judicial and impartial."[43]

This subsection also gives rise to difficulties as to when proceedings are "anticipated". Clearly once the action is commenced it is pending, but when is it "anticipated"? In *Robinson* v. *Stern*, Scott, L.J. was of opinion "that the word 'anticipated' should be construed as including 'likely'."[44] And this was supported by Hodson, L.J. in *Jarman* v. *Lambert & Cook*.[45] In the same case Evershed, M.R. accepted the authority of *Robinson* v. *Stern*,[46] but said that the test was whether the proceedings were regarded as "likely" or even "reasonably probable".[47] Denning, L.J. pointed out that "the mere vague apprehension of litigation is not generally sufficient",[48] and indicated that the likelihood or reasonable probability of proceedings must be apparent to the mind of the person making the statement. This latter proviso supports the view of Clauson, L.J.[49] but Evershed, M.R. doubts that this is correct.[50]

It seems clear from the subsection that a statement made by a person who is not interested, even though made for evidentiary purposes may be admitted provided that the other requirements of the section are satisfied.

The Amending Act next deals with quite a different topic. It abolishes a rule of exclusion which in the past has prevented many a hopeful litigant from succeeding. The new section 14 (d) abolished the rule expressly recognised in the *Aylesford Peerage*,[51] *Paulet Peerage*,[52] *Deevitt's Divorce Bill*,[53] *Nottingham Guardian* v. *Tomkinson*[54] and *Lord* v. *O'Leary*,[55] and finally settled in *Russell* v. *Russell*[56] that neither the testimony nor declarations out of court of parents were admissible to prove their access or non-access during the marriage with the object or possible result of bastardising a child born in wedlock.

The corresponding English provision[57] has a subsection by which a husband or wife is not compellable to give evidence on such matters. This was inserted to overcome the effect of the decision of the Court of Appeal in *Tilby* v. *Tilby*[58]

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[37] *Plomien Fuel Economiser Co. Ltd.* v. *National Marketing Co.* (1941) Ch. 248.
[38] *Id.* at 251, *per* Morton, J.
[39] *Ibid.*; and *Estate of Hill (Dec'd) Braham* v. *Haslewood* (1948) P. 341.
[40] (1948) 2 All E.R. 460.
[41] *Estate of Hill (Dec'd) Braham* v. *Haslewood* (1948) P. 341, 345-46, *per* Wellington, J.
[42] *Holton* v. *Holton* (1946) W.N. 208 (Eng.).
[43] *Aron* v. *Noble* (1948) 2 All E.R. 987.
[44] (1939) 2 K.B. 260, 261.
[45] *Jarman* v. *Lambers & Cook, Contractors Ltd.* (1951) 2 K.B. 937.
[46] (1939) 2 K.B. 260.
[47] (1951) 2 K.B. 937, 948.
[48] *Id.* at 946.
[49] *Robinson* v. *Stern* (1939) 2 K.B. 260, 266.
[50] *Jarman* v. *Lambert & Cook, Contractors Ltd.* (1951) 2 K.B. 937.
[51] (1885) 11 A.C. 1, 9-11.
[52] (1903) A.C. 395, 399.
[53] (1887) 12 A.C. 312.
[54] (1878) 4 C.P.D. 343.
[55] 40 Ir. L.T.R. 166.
[56] (1924) A.C. 687.
[57] The rule was abolished by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 7 (1) and (2), and is now contained in the Matrimonial Causes Act, 1950, s. 32 (1) and (2).
[58] (1949) P. 240.

in which it was held that in proceedings instituted in consequence of adultery the parties and their spouses were not only competent but compellable to give evidence in the proceedings, subject to the proviso of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925,[59] that neither the parties nor their spouses were liable to be asked or bound to answer any question tending to show that he or she had been guilty of adultery unless he or she had already given evidence in the same proceedings in disproof of the alleged adultery.

Section 79 of our Matrimonial Causes Act[60] is couched in terms similar to those of s. 198 of the Supreme Court of Judicature (Consolidation) Act, 1925,[61] except that it does not expressly confine the prohibition to proceedings in consequence of adultery. The position in New South Wales is affected also by a new subsection to s. 79 of the Matrimonial Causes Act[62] inserted by the Evidence Amendment Act.[63] This provides that "notwithstanding the foregoing provisions of this section (i.e. s. 79) a party to any proceedings under this Act may be asked and shall be bound to answer any question tending to show that he has been guilty of adultery, if he is asked that question for the purpose of determining his fitness to be given custody of, or access to, children." It is submitted that, in view of s. 79 of the Matrimonial Causes Act,[64] and the rule of interpretation that *expressio unius est exclusio alterius,*[65] the circumstances set out in the new subsection to s. 79 are the *only* circumstances in which a person is bound to show that he has been guilty of adultery.[66]

Thus it is submitted that the law in New South Wales on this point can be formulated in the following way: all persons are liable to be asked and bound to answer questions regarding access or non-access, even though they have the object or possible result of bastardising a child born in wedlock provided that no person shall be bound to answer any question tending to show that he has been guilty of adultery unless in proceedings under the Matrimonial Causes Act 1899,[67]

(a) he has given evidence in disproof of the alleged adultery in the same proceeding, or

(b) he is a party and the question is asked for the purpose of determining his fitness to be given custody of, or access to, children.

B. S. O'KEEFE, Case Editor—Fourth Year Student.

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[59] 15 & 16 Geo. 5, c. 49.
[60] Act No. 14 of 1899.
[61] 15 & 16 Geo. 5, c. 49.
[62] Act No. 14 of 1899.
[63] Evidence Amendment Act, 1954 (N.S.W.), s. 3.
[64] Act No. 14 of 1899.
[65] *Hare* v. *Horton* (1833) B. & Ad. 715.
[66] For "It is a principle of English law that a party cannot be compelled to discover that which if answered, would tend to subject him to any punishment forfeiture or ecclesiastical censure" (*Redfern* v. *Redfern* (1891) P. 139, 147, *per* Brown, L.J.; approved in *Cavendish* v. *Cavendish* (1926) 10, 13, *per* Lord Merrivale, P., and since adultery is an offence of such gravity the doctrine has been applied to it.
[67] Act No. 14 of 1899.