a contrary conclusion on this point he would have held the purported assignment invalid.[16]

However, there was no need for N and M to have been entitled to beneficial interests in payments for section 29 to apply. The section also prohibits the alienation of 'the possibility of a share' at all times prior to the actual receipt of such share. As the T company acquired all its beneficial interest in the trust property from N and M, it is difficult upon analysis to conclude but that this was an assignment of the possibility of a share. Otherwise, these words in the Act have no meaning at all where equitable interests of this kind or of the kind in *Ritchie's* case are concerned.[17]

It is to be regretted that the new series of Victorian Reports, in which *In re Wilson* is the first case reported, contain neither a summary of counsel's argument, nor a list of cases cited but not referred to in judgment. Hudson J. found it unnecessary to allude to several lines of argument by counsel which nevertheless should be considered by the practitioner or academic writer referring to the case in the future.[18]

J. D. MERRALLS

TOBIAS v. ALLEN (No. 2)[1]

Evidence Act 1946 (Vic.), ss. 3 (3) and 3 (5)—person interested—exercise of discretion to reject evidence

T and S brought an action under section 56 of the Local Government Act 1946 to recover penalties from A whom they alleged had sat as a councillor of the municipality of M while disqualified under section

[16] In *Perpetual Executors, Trustees and Agency Co. (W.A.) Ltd. v. Maslen* [1952] A.C. 215, the Privy Council held that shares in distributions under the Act in relation to wool supplied by two persons conducting a pastoral business in partnership who had assigned by deed 'all right title and interest in . . . the benefit of all contracts and engagements and book debts . . . together with all other assets of the said business', belonged to the former partners and not to the assignees under the deeds, as such payments were 'a true gift to the supplier of the wool.' See also the dissenting judgment of Fullagar J. in the High Court, accepted by the Privy Council in reversing the decision below: (1950) 82 C.L.R. 101, 117. Fullagar J. held also that a purported assignment of 'proceeds' of certain wool by a woolgrower amounted to an assignment of a share in a distribution subsequently made under the Act in relation to the wool, and that it was invalidated by s. 29: *Poulton v. The Commonwealth* (1953) 89 C.L.R. 540, 567.

[17] It may be argued that the words apply to assignments by beneficiaries after the passing of the Act only, but even this restricted interpretation is excluded by Mr Justice Hudson's holding that a beneficiary has no interest in a distribution until the payment is actually made. It is further submitted that upon construction of s. 29, no distinction can be drawn between assignments of legal and equitable interests in distributions under the Act. It would be odd if the operation of the section could be avoided by a declaration of trust, either voluntarily or for value. *Supra*, n. 3.

[18] The writer acknowledges his debt to Mr H. R. Newton and Mr J. McI. Young, of the Victorian Bar, counsel who appeared in *Wilson's* case, who kindly discussed some aspects of their arguments with him.

[1] [1957] V.R. 221. Supreme Court of Victoria; Sholl J.

46 of that Act. It would have been material to show that A and the council of M had an agreement that the council should do work benefiting A's land in exchange for the use of part of it as a tip-site. To this end T and S sought to put in evidence under section 3 of the Evidence Act 1946 a statutory declaration by H, a former engineer of the municipality. A material passage was: 'The Council agreed as consideration to construct an all-weather access road on the common boundary, and to confine the tipping to the eroded water course'. Sholl J. refused to admit the evidence on the ground that H was 'a person interested' within section 3 (3).[2]

His Honour said it was 'sufficient to constitute a disqualifying interest within the meaning of the subsection if a person's conduct is likely to be called in question in the pending or anticipated litigation, or his reputation, or if a person's financial interest is likely to be affected – if, in short, anything is shown which is reasonably calculated to affect the impartiality of the person making the statement'.[3] Here the litigation could not have been unexpected to H, and, as H had had a good deal to do with the commencement of the work, it would have been to H's interest, if any litigation ensued, to refer the expenditure which had been made – especially any that had been made on A's land – to an agreement between A and the council, and to refer any actions of his own to an authority given him by the council.[4] His Honour thought it was desirable to refer to two other matters. Section 3 (1) provides for the admission of certain documentary evidence (subject to conditions) 'where direct oral evidence of a fact would be admissible'. His Honour interpreted this to mean where direct oral evidence of a fact *given in the actual words of the document* would be admissible and held that H could not have given evidence in the form of the passage cited because this passage stated two conclusions of law – that there was an agreement and the consideration for it – and not the facts on which these conclusions were based. He went on to intimate that he would also have rejected the document in the exercise of his discretion pursuant to section 3 (5),[5] it being inexpedient in the interests of justice that the statement should be admitted. Sholl J. said: 'the reasons for that view are these. The deponent is not available for cross examination' and '[the passage

[2] Evidence Act 1946, (Vic.), s. 3 (3) provides: 'Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.'

[3] [1957] V.R. 221, 223. His Honour held that the interest had to be present at the time the statement was made. *Cf. Cartwright v. W. Richardson & Co. Ld.* [1955] 1 W.L.R. 340.

[4] [1957] V.R. 221, 224.

[5] '. . . and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.'

cited] is an ambiguous passage'.[6] He went on to say that it was not clear from the document whether the agreement was oral or written, whether H had concluded the agreement as agent for the council or not, or whether the whole of the vital passage was an inference to be drawn from undisclosed facts. His Honour added that H could not have given evidence in the words of the document, that H had had a mental breakdown in 1953 and there was no means of knowing what his mental state was at the material time and that the action was a penal action.

It has been truly stated that the English Evidence Act 1938 is not free from difficulty.[7] The Victorian Act is substantially a copy of the English one and, although a few minor matters are made clearer,[8] many of the substantial difficulties remain.[9]

One oft-quoted canon of statutory interpretation is that an Act should be read as a whole. It is submitted that neither the English nor the Australian cases have paid sufficient regard to the interrelation of sections 3 (3), 3 (5) and 4 (1) of the Evidence Act 1946 (sections 1 (3), 1 (5), and 2 (1) of the English Evidence Act 1938). Section 4 (1)[10] has received little judicial consideration.[11] This is surprising as it would seem a reasonable construction that the matters expressed to go to weight should not also be used in the employment of a discretion to reject evidence altogether (section 3 (5)) or in determining whether the maker of the statement is interested (section 3 (3)), so that section 4 (1) would be relevant in determining the content of section 3 (3) and 3 (5). If this construction were wrong, one would expect the cases to say why. To grant the conditions as to weight priority over the exclusionary sub-sections of section 3 would seem to accord with the modern theory that the rules of evidence

[6] [1957] V.R. 221, 225.

[7] Cowen and Carter, *Essays on the Law of Evidence* (1956), 7.

[8] *E.g.* the maker of the statement must have personal knowledge of the matters dealt with *at the time the statement was made*—s. 3 (1) (a) (i). So far as is material to this case the Bill adopted in Victoria was drafted in 1940 on the recommendation of a Committee of Counsel, and, shortly before its passage into law in 1946, it was approved by a committee of the Chief Justice's Law Revision Committee headed by O'Bryan J. As most of the problems in England have arisen after 1940 they remain in the Victorian Act. The alteration made in s. 3 (5) will be the subject of comment later but no reason for such alteration appears to have survived.

[9] See generally Cowen and Carter *op. cit.*, chap. I; the Final Report of the committee on Supreme Court Practice and Procedure, Cmd. 8878. *Cf.* the explanation of the Evidence Act 1938 given by its chief architect Lord Maugham entitled 'Observations on the Law of Evidence with Special Reference to Documentary Evidence'(1939) 17 *Canadian Bar Review*, 469.

[10] S. 4 (1): 'In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to the fact if the person making the statement is not called as a witness that there has been no opportunity to cross-examine him and to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.'

[11] Cowen and Carter, *op. cit.*, 24.

should be interpreted to favour admissibility and questions affecting credibility should be treated as going to weight.[12] This theory seems to have been as much behind the original enactment of the legislation as the realization that the existing common law rules excluded evidence of obvious credibility.[13] The author of the Act, Lord Maugham, has said: 'In effect the Act only makes the document admissible for what it is worth, and there is a specific paragraph to say that where there is a jury the court in its discretion may wholly reject the document[14] and where there is no jury the judge is not bound to give more weight to the statements contained in the document than he thinks proper'.[15] The very *raison d'être* for the Act seems to call for liberality in its interpretation. In the case of *Jarman v. Lambert & Cooke Contractors Ld.*[16] Denning L.J. said '[counsel] urged that we should give a restricted interpretation to this Act. I agree with [Evershed M.R.] that that would be a wrong approach. I think that it should be given a liberal interpretation. The admission of signed statements can effect a great saving of costs, especially in cases where . . . there is no need for cross-examination.'[17]

The Court of Appeal does seem to have laid down in *Jarman's* case that the Act is to receive a liberal interpretation. In *Shepherd v. Shepherd*,[18] Sholl J. said of the passage cited from Lord Justice Denning's judgment, that it was more in accord with the apparent policy of the legislation than the view of Goddard L.J. in *Robinson v. Stern.*[19]

It is respectfully submitted that the learned judge in this case has not gone far enough in the direction of liberality. Section 3 (5) of the Victorian Act differs from section 1 (5) of the English Act in that in Victoria the discretion to reject evidence is not restricted to jury trials. In England the *raison d'être* of the discretion would seem to be that the jury might be unduly prejudiced by evidence of little weight.[20] Plainly this consideration cannot apply in trials without a jury because the judge must read the document to decide its admissibility – indeed section 3 (5) expressly says so. The reason for this alteration is not apparent,[21] but if it were only to enable a judge to reject evidence he thinks is of little weight without too much

[12] *Sinclair v. The King* (1946) 73 C.L.R. 316, 337, *per* Dixon J., approved by the Full High Court *e.g. The King v. Lee* (1950) 82 C.L.R. 133, 149-150.

[13] Lord Maugham, *op. cit.*, (n. 9), 476.

[14] In Victoria this discretion exists even where there is no jury. *Infra*, n. 20.

[15] Lord Maugham, *op. cit.*, (n. 9), 480.

[16] [1951] 2 K.B. 937.

[17] *Ibid.*, 947. See also *ibid.*, 940, *per* Evershed M.R.; the Final Report of the Committee on Supreme Court Practice and Procedure, Cmd. 8878, para. 253, of which Lord Evershed was chairman; *Cockle's Cases and Statutes on Evidence* (8th ed., 1952), 488. It is to be noted that s. 2 (1) of the English Act, which corresponds to s. 4 (1), does not include the words relating to cross-examination which are present in the Victorian Act.

[18] [1954] V.L.R. 514, 519.

[19] [1939] 2 K.B. 260, 269.

[20] Cowen and Carter, *op. cit.*, 17; *Ozzard-Low v. Ozzard-Low* [1953] P. 272, 276, *per* Davies J.

[21] *Supra*, n. 8.

recourse to technicality, then the subsection would not seem to cover those matters directed to be treated as going to weight in section 4 (1). Hence it is submitted that the fact that H could not be cross-examined was not a valid ground for the exercise of His Honour's discretion.[22] Furthermore it is submitted that the other grounds His Honour gave are more properly referable to weight under the heading of 'circumstances from which inferences could be drawn as to accuracy'.[23] It would of course have been possible for His Honour to have given the same reasons and to have concluded that the document should be given no weight.

It is also submitted that His Honour could properly have taken a more liberal view in the interpretation of section 3 (3). In England where the corresponding section, section 1 (3), has been given most consideration, there is a difference of opinion. A strong line of cases takes a view which seems to amount in substance to a holding that the mere possession of 'an incentive to conceal or misrepresent facts' can be considered in deciding if a person is interested within section 3 (3).[24]

The most liberal cases are *Holton v. Holton*[25] and *Galler v. Galler,*[26] both decisions of Barnard J., in which it was held that the interest referred to in section 3 (3) must be in the nature of a financial or proprietary interest. In the former, a statement by the mother of the petitioner in divorce proceedings was admitted, Barnard J. stating that: 'If the statute had meant to exclude the statements of relatives or near relatives of the parties it would have said so.'[27] In the latter, Barnard J. appears to have approved a passage quoted by J. E. S. Simon Q.C., *arguendo,* from *Phipson on Evidence*: 'Section 2 (1) makes it quite clear that "an incentive to conceal or misrepresent facts" goes to the weight of evidence only'.[28] Here the evidence admitted was a statement of a nursemaid tendered by a husband petitioner in a contested divorce suit. In a counter petition the wife had based a charge of impropriety (though not of adultery) on the husband's association with the nursemaid. Barnard J. said that as the nursemaid was not available for cross-examination a great deal of importance could not be attached to her statement. In *Jarman v. Lambert & Cooke Contractors Ld.*,[29] Evershed M.R. referred to the

[22] The problem of the discretion to reject does not arise in the same way in England, but despite the fact that the English s. 2 (1) does not *expressly* treat unavailability for cross-examination as going to weight (this ground being peculiar to the Victorian Act), Barnard J. so treated it in *Galler v. Galler* [1955] 1 W.L.R. 400, 404.

[23] *Supra,* pp. 255-256 as to the grounds given by Sholl J.; [1957] V.R. 221, 225.

[24] *Robinson v. Stern* [1939] 2 K.B. 260, 269-270, *per* Goddard L.J., *Plomien Fuel Economiser Co. Ltd. v. National Marketing Co.* [1941] Ch. 248, 250, *per* Morton J., *Bain v. Moss Hutchinson Line, Ltd.* [1948] 2 All E.R. 294 and *Evon v. Noble* [1949] 1 K.B. 222, 225, *per* Birkett J.; Cowen and Carter, *op. cit.,* 24-32.

[25] [1946] 2 All E.R. 534. [26] [1955] 1 W.L.R. 400. [27] [1946] 2 All E.R. 534, 536.

[28] [1955] 1 W.L.R. 400, 404. *Phipson on Evidence* (9th ed., 1952), 287.

[29] [1951] 2 K.B. 937, 940.

words of Goddard L.J. in *Robinson v. Stern*,[30] which were relied on by counsel who sought a narrow interpretation of the Act, and said that section 2[31] clearly showed that documents might be admissible which were not made by perfectly impartial people – though the impartiality might go to weight under section 2 (1). Both in the instant case[32] and in *Shepherd v. Shepherd*.[33] Sholl J. approves the words of Birkett J. in *Evon v. Noble* where that learned judge says that a disinterested person 'means a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest, but completely detached, judicial, impartial, independent'.[34] In *Tobias v. Allen* (No. 2) in fact the substance of this view appears as the head note to the case.[35] It is submitted that the passage from *Evon v. Noble* is possibly the most extreme in the illiberal line of cases. While *Holton v. Holton*[36] and *Galler v. Galler*[37] may be against the weight of authority[38] so that an incentive to conceal or misrepresent facts *can* be taken into account in deciding the question of interest, it is submitted that there has to be *at least* an element of substantiality of interest contrary to the view of Birkett J.[39] This submission would at least give some operation to section 4 (1) in cases where litigation is pending, and would accord with the strong *dicta* of the Court of Appeal in *Jarman's* case.[40] Furthermore it is noteworthy that the interrelation of section 3 (3) and section 4 (1) has only been mentioned in the liberal line of cases. It may well be that H's statutory declaration would have been inadmissible even on the most liberal view, H being interested in establishing that his part in the work done was authorized by the council.[41] However it is urged that the actual decision on the facts is not the importance of the case. The Lord Evershed Committee expresses an attitude to the Evidence Act which should be followed in Victoria when it says: 'Generally we express the hope that the judges, if possible by concerted action, will bring their influence to bear on the side of the fullest use of the facilities given by the

[30] [1939] 2 K.B. 260, 268.
[31] S. 4 of the Evidence Act 1946, (Vic.).
[32] [1957] V.R. 221, 223.
[33] [1954] V.L.R. 514, 523. In this case in divorce proceedings a report by a policeman who arrested the husband for an assault on his wife was 'not interested'. Here the proceedings anticipated were criminal but did not materialize. The policeman was not the informant.
[34] [1949] 1 K.B. 222, 225.
[35] [1957] V.R. 221.
[36] [1946] 2 All E.R. 534.
[37] [1955] 1 W.L.R. 400.
[38] Cowen and Carter, *op. cit.*, 32; *cf. Cockle's Cases and Statutes on Evidence* (8th ed., 1952), 488.
[39] Cowen and Carter, *op. cit.*, 32 *Re Hill, deceased* ([1948] P. 341) may be so explained. In *Shepherd v. Shepherd* ([1954] V.L.R. 514) Sholl J. quotes extensive passages from the judgment of Wallington J.
[40] [1951] 2 K.B. 937, 940, 947, *per* Evershed M.R. and Denning L.J. respectively.
[41] Cmd. 8878, para. 274: where The Lord Evershed Committee recommends the abolition of s. 1 (3) (s. 3 (3) of the Victorian Act) on the grounds *inter alia*, of the ambiguity of the phrase 'person interested'.

Evidence Act 1938'.[42] The importance of the case lies in its failure, as it is submitted, to give full effect to this attitude.

S. W. BEGG

O'SULLIVAN v. TRUTH AND SPORTSMAN LTD.[1]

Criminal Law—S.A. Police Offences Act s. 35 (1) (b)—Prosecution of Interstate Newspaper—'Cause to be offered for sale'

The respondent company was convicted before a magistrate of an offence under section 35 (1) (b) of the Police Offences Act 1953 (S.A.), in that it had caused to be offered for sale in Adelaide a newspaper containing matter allegedly prohibited by the Act. The magistrate's finding that the impugned issue contained matter which fell within the prohibition of section 35 was not thereafter disputed, but on appeal to the Supreme Court of South Australia the respondent's conviction was quashed by Reed J. on a proper interpretation of the words 'cause to be offered for sale'. This decision was upheld by a majority of the Full Court.[2] The High Court held, on appeal, that the respondent company had not caused copies of the offending issue to be offered for sale, or to be sold.

The respondent had printed the offending newspaper in Melbourne, and despatched several parcels of copies of it to carriers in Adelaide. Two of these parcels were marked with the names of Adelaide newsagents, to whom they were delivered by the carriers. A copy from each of these parcels was sold to a policeman, who in each case asked for a copy before the parcel was opened. No direct proof of an offering for sale was produced, but the court proceeded upon the assumption that such an offering could be inferred from common knowledge, and upon the probabilities. There was no proof of any '*de facto* influence or control that the respondent company did, or might, exercise to secure the sale of its paper,'[3] and their Honours dealt with the sales of the newspaper as sales of 'an article of commerce, made by independent retailers, all parties alike being animated by every business motive to promote the sales of the article'.[4]

Two judgments were delivered, the first by Dixon C.J., Williams, Webb and Fullagar JJ., and the other by Kitto J. In the joint judgment, their Honours observed that, before something can be said to have been 'caused' within the meaning of section 35, it must have been contemplated or desired. However, they continued, it is not

[42] Cmd. 8878, para. 253.

[1] [1957] Argus L.R. 180. High Court of Australia; Dixon C.J., Williams, Webb, Fullagar and Kitto, JJ.

[2] Napier C.J. and Ligertwood J., Mayo J. dissenting.

[3] [1957] Argus L.R. 180, 182.

[4] *Ibid.*, 183.