Although the following decisions of the English courts related to claims brought under the Inheritance (Family Provision) Act 1938 (U.K.) their principles are applicable in New Zealand. In *Re Clayton* [1966] 1 W.L.R.969, Ungoed-Thomas J. held that there was no greater onus of proof on a surviving husband than on a surviving wife in a claim under the Act. In this case although the testatrix's husband was able to maintain himself at the time of the hearing, the prospect of his ceasing to be employed in the near future entitled him to some provision from his wife's estate. The claim of the testator's wife from whom he had been separated for over twenty years was dismissed by Stamp J. in *Re E.* [1966] 1 W.L.R.709. It was not unreasonable for the deceased to have made no provision for the plaintiff out of his very small estate, most of which arose from a grant earned by the deceased during his cohabitation with the defendant (his *de facto* wife). Further he was entitled to regard his estate as something he could freely give to the defendant who had shared his life for over twenty years.

The claimant in *Re Ducksbury* [1966] 1 W.L.R.1226, was the deceased's estranged daughter who had vainly attempted to bring about a reconciliation with him. Although the daughter did contribute to the quarrel, this did not justify the testator's refusal to be reconciled, nor his failure to make any provision for her. However it was held by Buckley J. that the fact that the daughter had of her own volition chosen part-time employment only and was thus in a worse financial position than necessary did not increase her claim. Finally, the Court of Appeal in *Re Gale* [1966] Ch.236, upheld an order of the High Court varying the amount of periodical payments to be made to a successful claimant on the ground that the income of the estate had doubled. It was also stated that an order awarding periodical payments under the Act should be in the form of a definite sum and not a fraction of the income of the estate.

J. G. French.

EVIDENCE

The Evidence Amendment Act 1966 inserts in the Evidence Act 1908, s.25 A, which relates to the admissibility of documentary evidence in criminal proceedings. The section provides:

> In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the original document be admissible as evidence of that fact if—
>
> (a) The document is, or forms part of, a record relating to any business and compiled in the course of that business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed by the Court to have personal knowledge of the matters dealt with in the information they supply; and
>
> (b) The person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to recollect the matters dealt with in the information he supplied.

The amendment goes on to state that if the original document is not produced, a copy certified to be a true copy will be admissible under

this section. It also states that the court in deciding whether or not the statement is admissible, may draw any reasonable inference from the form and content of the document containing the statement. Subsection (4) allows the court, in estimating the weight to be attached to a statement admissible under this section, to look at all the circumstances from which inferences can be drawn as to the accuracy of the statement, such as, whether the person making the statement did so contemporaneously with the happening of the facts stated, or whether the person keeping the record containing the statement had any incentive to conceal or misrepresent the facts.

A clarification of the law relating to hearsay had been required for years, but nothing had been done as the courts had just kept adding exceptions to the general rule, that evidence of a statement which is made other than by a witness testifying at the hearing and proving the truth of the matter so stated is inadmissible. However, matters came to a head in the case of *Myers* v. *Director of Public Prosecutions* [1965] A.C.1001. Here the hearsay evidence which was sought to be admitted was the manufacturer's records of engine, chassis and cylinder block numbers. The witnesses called were persons charged with the keeping of those details and not with their actual compilation. It was held by Lords Reid, Morris of Borth-y-Gest and Hodson, with Lords Pearce and Donovan dissenting, that it was established law that as a general rule hearsay evidence was not admissible, but that it was admissible when authority could be found that the evidence fell within some existing and established exceptions, for to countenance new exceptions thereto would amount to judicial legislation. The majority went on to say that these records could not be brought in under any of the existing common law exceptions.

However the general tenor of the judgments was that it was high time the Legislature altered the law. Thus in 1965 in England, an Act was passed amending the law as explained in *Myers'* case. The Act used substantially the same words as were used in the 1938 Evidence Amendment Act dealing with admissibility of documents in civil proceedings. Rupert Cross in (1965) 28 M.L.R.571, points out several distinctions between these similarly worded Acts: the categories of documents are wider in the later enactment, and the 1965 Act is more liberal than the 1938 one as to the requirements of authentication of documents. Cross also suggests that the 1965 Act reflects modern business methods in a more satisfactory way than does the 1938 Act.

In Tasmania there is no difference between the admissibility of certain business records in civil and in criminal cases as the Legislature has combined them in one section. However in New Zealand the Evidence Amendment Act 1945 (relating to civil proceedings) and the recent amendment abrogating *Myers'* case do have their differences. In the Evidence Amendment Act 1945, s.3(5) which stated the factors the Court can take into consideration for the purpose of deciding whether or not a document is admissible, is similar to the provision contained in the recent Act up until the last clauses. The Evidence Amendment Act 1945 gives the court a discretion to reject a statement even though it complies with the provisions of the section, if for any reason it appears to the court to be inexpedient in the interests of justice that the statement should be admitted. But it must be noted that this discretion only applies where proceedings are before a judge and jury. Such provision does not appear in the Evidence Amendment Act 1966,

hence it seems that a statement may be admitted even though it appears to be inexpedient in the interests of justice in a jury trial.

The 1945 Act is narrower in application than the 1966 Amendment in that "business" in the latter Act means,

> any business, profession, trade, manufacture, occupation, or calling of any kind; and includes the activities of any Department of State, local authority, public body, body corporate, organisation or society;

This definition covers most fields, hence this limitation as to the value of documentary evidence in criminal proceedings is not as restrictive as it first appears.

Another difference in interpretation of a word appearing in both sections is that of the definition of "document". With regard to civil proceedings the definition of document is not as wide as that in criminal proceedings as it only includes "books, maps, plans, drawings and photographs" and not the additional words, "any device by means of which information is recorded or stored", which appear in the criminal proceedings amendment. The 1966 Evidence Amendment Act is also wider than the 1945 Evidence Amendment Act in that the earlier enactment refers to a document purporting to form part of a continuous record, in the performance of a duty to record information, whereas in the later Act the document only has to be "a record relating to any business and compiled in the course of that business" and need not be compiled in the performance of a duty to record that information. Hence in criminal proceedings the person compiling the record does not have to be under a duty to record, but merely to satisfy the requirements as to personal knowledge by himself or others reasonably supposed to have such knowledge.

Thus there are several differences between the two Acts, but it must be remembered that the Evidence Amendment Act 1966 was introduced mainly to remedy the anomaly pointed out in *Myers'* case, and that the whole of the law of evidence relating to hearsay is under revision at the present time.

J. Eagles.

FAMILY LAW

There are now some ten reported decisions based upon ss.5 and 6 of the Matrimonial Property Act 1963 which abandoned the restrictive view previously adopted by our courts that questions of title to property were to be decided in accordance with the strict legal and equitable rights of the parties. "The bleak and inflexible rules of property law" rigidly applied to the marriage relationship were loosened in favour of a more liberal approach as stated in the English Court of Appeal in *Hine v. Hine* [1962] 1 W.L.R.1124, and more recently adopted in the Marriage (Property) Act 1962 (Vict.). Under the English, Victorian and New Zealand systems a virtually unfettered discretion is given to the court provided any expressed intentions of the parties are given effect. Section 5 of the Matrimonial Property Act 1963 accordingly allows a judge or magistrate, in any question between husband and wife as to the title to or possession or disposition of property, to

> make such order as he thinks fit . . . notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property.