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.

Under s.6 the judge or magistrate must give effect to any common intention which he is satisfied was expressed by the husband and wife (subs. (2)); and (where the application relates to a matrimonial home or the division of the proceeds of the sale thereof) must

> have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever). (subs. (1).)

1. THE APPLICATION OF THE ACT

Wilson J. in *Robinson v. Public Trustee* [1966] N.Z.L.R.748 at 751, in considering these two sections, adopted the following approach. The first inquiry should be to ascertain whether a common intention existed and if so, whether it was expressed by the parties; secondly, and especially if the property in question is the matrimonial home, there must be an enquiry into the respective contributions of the spouses to its acquisition and upkeep, including contribution of a non-monetary kind as indicated by s.6(1), and thirdly there should be consideration of all other circumstances relevant to the justice of the case.

(a) *Was there an expressed common intention.* It is usually of little moment to ask what the parties intended to do if the marriage broke down for as a rule they do not contemplate any such thing. Rarely are all their rights carefully set out in a deed as occurred in *Gurney* v. *Gurney* [1967] N.Z.L.R.388, but in such a case it can at least be said that s.6(2) forbids the courts to make any provision which is contrary to the expressed common intention of the parties.

What amounts to an expressed common intention, and the time at which such intention is to be ascertained, has provided some difficulty for the courts. The creation of a joint family home or a joint tenancy is not necessarily an adequate expression and the court is bound to consider later expressions of intention. In *Walker* v. *Walker* [1966] N.Z.L.R.754, a husband by separation agreement undertook to pay half the rates and insurance and undertook responsibility for all repairs of property owned by him as a joint tenant with his wife. The wife applied to be declared beneficial owner but it was held by Hardie Boys J. that the intention implicit in the later (separation) agreement by the husband to retain his right of survivorship amounted to the expression of a clear common intention. But in *West* v. *West* [1966] N.Z.L.R.247, the court considered a situation which is bound to be typical of many; although the spouses prior to their separation had by conduct, if not by words, expressed the intention of acquiring and conducting property as a joint enterprise, their attitude had considerably altered when the marriage broke down. The finding, however, that the later negotiation fell short of complete agreement enabled Richmond J. to avoid deciding whether he was bound by a disposition of property "made as part of a separation agreement perhaps hastily and ill-advisedly under the pressures of matrimonial discord." It can at least be said that to become relevant, the common intention expressed by husband and wife must be applicable to the circumstances existing when the court is required to exercise its discretion. e.g. Herring C.J. in *Hogben* v. *Hogben* [1964] V.R.468 at 473 stated:

> evidence given . . . as to an intention had twelve years ago must always be viewed with caution and critically.

Such a supervening period is obviously important and in this case the alleged intentions, as affected by the subsequent period, were insufficient to rebut the Victorian presumption of joint tenancy. In New Zealand it is not difficult to realise the possible results contrary to the spirit of the Act if a court was to give much weight to a common expression of intention made many years before a subsequent period of prudent management and common effort.

(b) *What were the respective contributions of the spouses.* The recognition in s.6 of contributions in the form of "money payments, services, prudent management or otherwise howsoever" at last gave statutory recognition

> to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. (per Woodhouse J. in *Hofman* v. *Hofman* [1965] N.Z.L.R.795 at 800.)

This aspect of "contribution" is similarly defined in s.58(1) of the Matrimonial Proceedings Act 1963 in relation to the court's authority to direct the sale of the house in divorce proceedings.

It is fruitful to compare *Hofman's* case with *Sutton* v. *Sutton* [1965] N.Z.L.R.781. Both cases involved a claim by a wife to share in the matrimonial home and its contents but in the former case, apart from the wife's substantial monetary contributions to the sale and purchase of several matrimonial homes, "by sheer hard work and careful providence she had in every way matched the activities of her husband". Woodhouse J. made an order according to his finding that in their respective ways the parties had contributed equally to the acquisition of the property in dispute and that any common intention which may have been expressed was that their resources should be pooled. His decision was upheld in the only Court of Appeal decision to date on the statutory provisions in question and the court considered that on the facts it was impossible to say the judge had exercised his discretion wrongly. (see [1967] N.Z.L.R.9 at 17.) In *Sutton's* case the wife made no contributions in money or services to the matrimonial home (in which the couple had lived for only four months) and had made only a small financial loan towards another property venture which her husband was otherwise entirely responsible for. Tompkins J. held that the wife under such circumstances could not succeed merely because of her status as a wife.

Although such a result will be rare, because occupation of the matrimonial home usually must result in some form of contribution, this case serves as a warning to the slothful or extravagant husband or wife who must remember that the discretion of the judge or magistrate allows him to consider the extent of a spouse's contributions.

(c) *What other circumstances are relative to the "justice of the case".*

(i) The conduct of the parties: It will now be apparent that ss.5 and 6 allow an order to be made even in favour of a spouse who had 'caused' the breakdown of the marriage. In fact the conduct and behaviour of the parties is a major consideration only in so far as it bears upon the acquisition of family assets. The Court of Appeal in *Hofman's* case supported the view that the wife's adultery *simpliciter* should not in the particular instance of that case prejudice the application. There was a resumption of married life after the forgiving of

the wife by the husband and the later investment by the wife of further moneys of her own in the property. Similarly in *A.* v. *A.* [1966] N.Z.L.R.731, the court did not take into account the wife's desertion or adultery in considering the application. By comparison, the Victorian statute precludes the judge from taking into account "any conduct of the husband and wife which is not directly related to the acquisition of the property in dispute or to its extent or value" (Marriage Act 1958 (Vict.) s.161(4)(a) as substituted by the 1962 Act, *supra*).

(ii) The children of the marriage: Section 58(5) of the Matrimonial Proceedings Act 1963 allows the court to direct that the whole or any part of the proceeds of the sale of the matrimonial home, instead of being divided between the parties to the marriage, be paid or applied for the benefit of the children of the marriage or any of them. This is one of several provisions of that Act applicable to orders made under s.5 in so far as matrimonial homes are concerned (s.7(5)), but *Hofman's* case appears to be the only instance to date where this section was applied. So it is to be noted that once the children have been provided for in accordance with these provisions they are then only a minor consideration in the division of the remaining moneys by the court.

II. THE LIMITS OF THE ACT.

Primarily the Act is for determining a dispute between parties and "is not designed to supplement husband and wife applications which arise under other legislation" (per McCarthy J. in *Hofman's* case) [1967] N.Z.L.R.9 at 14).

However at least one judge has speculated that the provisions may be availed of where an application under the Family Protection Act 1955 would fail. (Woodhouse J. in *Hofman's* case [1965] N.Z.L.R.795 at 801.) But the two 1963 Acts have not introduced into the Family Protection Act the notion that capital can be given to a widow as a reward for dutiful conduct as distinct from any part she played in building up the estate (*Re Edkins (deceased)* [1965] N.Z.L.R.916). Nor does it alter the provisions of the Bankruptcy Act 1908 as to the title or possession of a matrimonial home which has vested in the Official Assignee, for the term "legal personal representative" as in the extended meaning of "husband" and "wife" (s.5(7)) — does not include the Official Assignee who is in substance as much a trustee for the creditors as for the person whose property he holds" (Wild C.J. in *Donnelly* v. *Official Assignee* [1967] N.Z.L.R.83 at 85).

Section 5(2) specifies that the orders that can be made include orders for the sale, partition or division of property or the vesting in both spouses of property owned by one or the conversion of joint tenancy into tenancy in common. But s.5(2) is not exhaustive and merely gives examples of dispositions which might be the subject of doubt had they not been included (*Robinson* v. *Public Trustee* [1966] N.Z.L.R.748.)

III. CONCLUSION.

It appears that any judicial conflict over the Act has been of a relatively minor nature. It is true that Dr B. D. Inglis (see (1966) N.Z.L.J.38) in considering the extent of the discretion of the judge or magistrate issued this forewarning: (p.40)

> . . . there is certainly no warrant under the new Act for treating property of the husband and wife generally as a type of community property, to be considered as part of a pool which may be divided up according to whatever may strike the tribunal as 'fair'. It is therefore important to realise just how far the new Act goes: and it is rather more limited in its effects than many might suppose.

At that stage the learned writer had only two reported decisions before him but it seems that the courts have adopted a somewhat less conservative approach in subsequent cases, e.g. as pointed out by Wilson J. in *Robinson's* case (*supra*) at 750, the judge or magistrate is probably justified in the "community property" approach if he is satisfied there was an expressed common intention within the terms of s.6(2).

It is submitted that such limiting factors are clearly defined by the Act (especially s.6) and the courts have not trespassed beyond these limits. At any rate a wide discretion has been given to the court and has, within its stated limits, enabled equitable and commonsense law to be applied, where strict principles had previously bound the court.

R. G. McElrea, B.A.

JURISPRUDENCE

On 26 July 1966 Lord Gardiner, L.C., (see Note, [1966] 1 W.L.R. 1234), on behalf of himself and the Lords of Appeal in Ordinary stated that while their Lordships regarded the use of precedent as indispensable in providing some degree of certainty and a basis for orderly development of legal rules:

> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
>
> In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The statement, qualified though it is, clearly puts an end to the rule in *London Street Tramways Company Ltd.* v. *London County Council* [1898] A.C.375, and reiterated recently in *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C.446, that a decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. The way is now clear for the House to develop the law in view of changing circumstances without passing all responsibility for law reform on to the shoulders of the Legislature. Decisions such as that in *Searle* v. *Wallbank* [1947] A.C.341, need no longer be binding on the House and in a similar situation today a decision could be made which would be more compatible with common sense and modern conditions on the highways.

Although the Lord Chancellor made it clear that the change of approach by the House of Lords was not intended to affect the use of precedent in other courts, the question must arise as to whether the New Zealand courts, and in particular the Court of Appeal, will now revise their attitude to the binding authority of a House of Lords