argued that under s. 17 some of their evidence was privileged. McCarthy J. held referring to *R.* v. *Benyon* (*supra*) that s. 17 did not give rise to any privilege and that the officers were therefore competent and compellable witnesses.

In *R.* v. *Taylor* [1968] N.Z.L.R. 981 the Court of Appeal was called to consider a direction by the trial judge to the jury regarding the defence of alibi. The defence submitted that alibi is a defence of a special character and that the jury should have been told that they must reject the alibi before they could convict. It was held that the defence of alibi is not different in character from defences such as provocation and self defence and therefore a direction that the burden of proof was on the prosecution and that all evidence should be taken into consideration in deciding as to whether reasonable doubts may arise was sufficient.

In *R.* v. *Burgess* [1968] 2 Q.B. 112, 117-8, Lord Parker C.J. summarised the procedure relating to confessions succinctly thus:

> The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matters to the jury; but that the jury should be told that the weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit.

The evidence of children given in non sexual cases was discussed in *R.* v. *Parker* [1968] N.Z.L.R. 325. In this case the appellant appealed against his convictions and sentence on two counts that he was deemed to be a rogue and a vagabond. He was convicted on both counts largely on the evidence of two girls aged 7 and 9. The judge in his summing up stressed the importance of examining with care the evidence of these two girls but gave no full formal warning. It was held in the Court of Appeal that in non sexual cases it is not necessary for a judge to give specific warnings that it is dangerous to convict on children's uncorroborated evidence. It is sufficient that he advises the jury to pay particular care to their evidence and to explain the tendency of children to invent or distort.

S. Stamers-Smith.

FAMILY LAW

The last year has seen several important changes take place in New Zealand Family Law. Chief among these has been the Matrimonial Proceedings Amendment Act 1968. This Act reduces the period of waiting for a divorce from three to two years in the cases of desertion, of failure to comply with a decree for Restitution of Conjugal Rights, of habitual drunkenness or drug addiction, of agreements to separate and of decrees of separation, separation orders, or other decrees. As well, where the parties are living apart and are not likely to be reconciled, the waiting period for a divorce is reduced from seven years to four years. Although a divorce is available now more quickly, the period of time granted to the parties in order to effect a reconciliation has been extended from two months to three months, amending ss. 26, 29 (5) and 34 (2) of the Matrimonial Proceedings Act 1963.

Although the Matrimonial Property Amendment Act 1968 did not make any important changes to the law, it did clear up one very

important matter which had become uncertain. This was the question of whether the court should take into consideration the guilty behaviour causing the breakup of the marriage, when it was assessing how the matrimonial property should be distributed. In *Burgess* v. *Burgess* [1968] N.Z.L.R. 65 it was stressed that though the wife was guilty of desertion, this was irrelevant in determining whether she was entitled to an order under s. 5 of the Matrimonial Property Act 1963 in respect of assets to which she had made a contribution. But in *Keswick* v. *Keswick* [1968] N.Z.L.R. 6 at 8 Tompkins J. had said:

> In considering what order it is just to make, I think I should take into account all the circumstances, *including the fact* that the wife has left the home and refuses to return. (Emphasis added.)

The position has been clarified now however by s. 6A of the Amendment Act, which provides that the court is not to take into consideration any "wrongful conduct of the husband or the wife which is not related to the acquisition of the property in dispute or to its extent or value".

In another case concerning the distribution of matrimonial property in 1968 the New Zealand Court of Appeal reinforced the liberal interpretations recently given to the Matrimonial Property Act 1963. The cases of *Hofman* v. *Hofman* [1967] N.Z.L.R. 9, *West* v. *West* [1966] N.Z.L.R. 247 and *Robinson* v. *Public Trustee* [1966] N.Z.L.R. 748 had all agreed that on the breakup of a marriage, the distribution of the matrimonial property should be based not on a legalistic assessment of the couple's rights, but according to the justice of the case. In *Pay* v. *Pay* [1968] N.Z.L.R. 140, the Court of Appeal held that the distribution of property should be "untrammelled by legalistic considerations stemming from the law of property".

Since s. 36 of the Matrimonial Proceedings Act was passed in 1963, the petitioning wife has had the same rights as the husband to claim damages from the co-respondent in a divorce action. *Tsazoglou* v. *Tsazoglou* [1968] N.Z.L.R. 1009 is one of the few cases in which the wife has availed herself of this opportunity. In an action such as this it was held that damages are awarded under two heads:

(1) Loss of the value of the spouse (a) from a pecuniary point of view and (b) from the consortium point of view (generally small).

(2) Injury to feelings, and matrimonial and social life.

All the circumstances of the case and the prevailing social outlook have a bearing on the appropriate amount.

One rather disturbing development in family law at least in some overseas jurisdictions, has been in the custody area. In cases where the question of custody arises, the rule has usually been that young girls go with their mother, even if she is the guilty spouse: *Miller* v. *Law* [1952] N.Z.L.R. 575 and *Connett* v. *Connett* [1952] N.Z.L.R. 304. In *Melillo* v. *Melillo* [1968] N.S.W.R. 637, however, the court refused custody of the child to the wife who was living openly in a *de facto* relationship with the co-respondent, a married man, on the grounds that the respondent and co-respondent were living openly in adultery without any immediate prospects of re-marriage, and that the husband was the innocent party in the breakup of the marriage. With all due respect, and in spite of the fact that the husband possibly was a fit and proper person to look after the child, this case is one of a number of cases (cf: *In Re L* [1962] 1 W.L.R. 886 and *Mitchell* v. *Mitchell* (1964)

N.Z.U.L.R. 310) in which the courts are taking increasing notice of the respective degrees of guilt of the spouses in determining questions of custody. They are ignoring what it is submitted should be the paramount consideration—that of the child's welfare—as directed by s. 2 of Guardianship of Infants Act 1926.

In line with this trend was another recent case, *D.* v. *D.* [1968] W.A.R. 177 in which the court granted custody of a seven year old girl and her five year old brother to their father. The court held that in assessing where the best interests of the children lay, an important factor was the mother's immorality. Wolff C.J. was not influenced by the submissions that the adulterous wife and co-respondent H wished to marry, that "the trial judge was impressed with the wife and H, that the wife had a good house to live in and an income of her own, that the co-respondent H had steady employment and that the wife was also in receipt of maintenance for the children from the petitioner to the extent of $20 per week and that all in all they could set up a happy household in which the children could be well looked after" (*ibid.* 180). Instead the learned Chief Justice stated that the wife's "degrading sexual lapses with T [the petitioner's brother] and the easy way in which she fell into adultery with H, her submission of the children to the corrupting effect of her blatant associations with him and her act of sexual perversion stamp her as a woman unworthy to have custody" (*ibid.* 180-181). It is respectfully submitted that too great wieght was placed on the respondent's sexual mores and not sufficient on the welfare of the children.

In *Z.* v. *Z.* [1968] N.Z.L.R. 996, the question arose of where the onus of proof lay in proving desertion once it was suggested that the respondent had "just cause" for leaving the petitioner. Moller J., after dealing with a long line of authorities, stated that the final question must always be whether the petitioner has discharged the onus upon him of proving the absence of just cause on the part of the respondent. In other words, the onus lies upon the petitioner throughout and the statement in *Sim's Divorce Law and Practice in New Zealand,* 7th ed. 67, that "once a prima facie case of desertion has been made out, the burden of proving reasonable cause for separation shifts to the other party", did not meet with judicial approval. Moller J. went on to say that the agreement of the petitioner to his wife's desertion would, if proved, constitute "just cause" for the wife's desertion. But as J. M. Priestly states in his article, "The Problem of Just Cause" [1968] N.Z.L.J. 496, this reasoning that consent is a form of "just cause" is confusing. For if the petitioner agrees to his wife's departure, then this negatives the whole idea of desertion. He is no longer a deserted party but one who has formed a consensual separation with his spouse. An agreement to separate has been formed.

S. v. *S.* [1968] N.Z.L.R. 512 raised the question of the *degree* of separation required before a separation agreement takes effect. In this case the wife remained in the same house as her husband and continued to do the housework and cooking. Even though she refrained from marital relations the court held that on the facts there was no termination of the marital state. The parties were in effect sill running one home. This case should be contrasted with *Leslie* v. *Leslie* [1954] N.Z.L.R. 414 wherein the separation agreement was held to continue even though the husband returned to the family home and lived there. As no contact was made between the parties except through and

because of the children, the marital state could not really be said to have been resumed. It is respectfully submitted that the two cases are not in conflict but were both decided correctly on their own particular facts.

M. G. Appleby.

LAND LAW

In 1968 the outstanding developments pertaining to land law have arisen out of legislation rather than case law. The principal new statute law is found in the Water and Soil Conservation Act 1967, Maori Affairs Amendment Act 1967 and Maori Purposes Act 1967, all of which came into effect on 1 April 1968.

The Water and Soil Conservation Act aims at combining the existing laws relating to water rights. It also has a far reaching effect on rights concerning the use of natural water, found in the common law, and is examined in detail elsewhere in this *Review*.

The Maori Purposes Act 1967 has two sections which are of particular interest. Section 4 refers to meetings of owners under the Maori Affairs Act 1953; it amends by opening the class of proxy to include any person not disqualified by age and it reaffirms the principle that three persons with voting capacity should always attend a meeting. Section 4 also permits courts to fix a quorum.

Section 5 adds a further section to the Maori Trustee Act 1955 so that money held by solicitors, public accountants or landagents for payment to Maori owners is permitted within six years to be paid to the Maori Trustee. If the person entitled to the money is not found the money will go to the Maori Education Foundation. However, this section does not apply to money held as a trust.

The Maori Affairs Amendment Act 1967 touches most areas of Maori property law. The following points indicate the principal effects of the legislation:

Part One requires the Registrar of the Maori Land Court to issue a status declaration for land owned by up to four owners. Upon its registration at the Land Transfer Office, the land is no longer in the legal position of Maori land. This means it can be dealt with without the Maori Land Court supervision. This aims at Europeanising Maori land which will then be liable for debt and to other general law, which was not so previously. However, if one owner holds his land under a trust or is a person under disability this part does not apply.

Part Two gives statutory authority to the Department of Maori Affairs to carry on "title improvement" operations.

Part Three provides that when partitioning, issuing and consolidating orders, or laying off roads the Maori Land Court is now to be bound by the general law as to planning.

Part Four (which became effective 1 April 1969) repeals and replaces Part twenty-two of the Maori Affairs Act 1953. This change relates to bodies corporate which are owners of Maori land. Instead of the equitable interest in land which is, as it is now, possessed by members of an incorporated owner, any shareholder will have, under the new system, shares such as those of a company in the incorporation.