SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT: LAW OR PALM TREE JUSTICE?

Section 17 of the Married Women's Property Act 1882 (U.K.) reads:

> In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit.

Over the course of years considerable controversy has arisen as to how much discretion this section does in fact confer upon the judge. The section has been adopted by all the Australian legislatures, but the Australian courts have interpreted, or at any rate have purported to interpret, the provisions of the section in a different way from the courts in England. It is the purpose of this paper to consider what difference there is, if any, between the law on this matter in Australia and in England, and it is proposed first of all to consider the authorities in each country in turn.

ENGLAND

In *Rimmer v. Rimmer*[1] a married couple had purchased a house in 1935 for £460, the wife paying £29, and the husband providing the balance by means of a mortgage of the house to a building society. In 1942 the husband joined the merchant service and made his wife weekly allotments, out of which the wife made payments on behalf of the husband to the building society. Between 1944 and 1946 the wife, who was also earning, paid to the building society £280 out of her own earnings, thus paying off the mortgage. In 1951 the husband deserted the wife, and in 1952 he sold the house for £2,117. The wife then applied under section 17 of the Married Women's Property Act for a share of this sum, and the Court of Appeal held that the money should be divided between the husband and wife equally. In the course of his judgment Evershed M.R. said:

> I venture to take as my guide or test the observations of a wise judge, Bucknill L.J., in a case which I think is not reported (of *Newgrosh v. Newgrosh,* decided on June 28, 1950). Bucknill L.J.

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1 [1953] 1 Q.B. 63.

> said: '[Section 17] gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principles of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as "palm tree justice". I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case'.[2]

At first sight it might seem from this passage that the Court of Appeal has taken the view that section 17 confers upon the judge a very wide discretion indeed, and the High Court of Australia, as will be seen, has taken exception to the use of the words "palm tree justice". However, it should be borne in mind that Bucknill L.J. qualified himself when he said, 'I do not think it entitles him to make an order which is contrary to any well-established principle of law', and the principles of law applicable in cases under section 17, had already, it is submitted, been laid down by the Court of Appeal in *In re Rogers' Question,*[3] where Evershed M.R. said:

> What the judge must try to do in all such cases is, after seeing and hearing the witnesses, to try to conclude what at the time was in the parties' minds and then to make an order which, in the changed conditions, now fairly gives effect in law to what the parties, in the judge's finding, must be taken to have intended at the time of the transaction itself.[4]

Support for this view can be found in another passage from a judgment of Evershed M.R., in *Rimmer v. Rimmer,* where he said:

> If it be possible to formulate the principle to be applied in a sentence, I think that in each case the question is, on all the facts of the case, what is the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also having regard to the light which the conduct of the husband and the wife throws on their relationship as contributors to the acquisition of the property which was their joint matrimonial home?[5]

Denning L.J. prefaced his judgment in *Rimmer v. Rimmer* with these words:

> In 1882, when Parliament declared that a wife was entitled to

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2 Id. at 68.
3 [1948] 1 All E.R. 328.
4 Id. at 328.
5 [1953] 1 Q.B. 63, 71.

> have property of her own, it enacted that, in any question between husband and wife as to the title or possession of property, the court was to decide the matter as it thought fit. Parliament laid down no principles for the guidance of the courts, but left them to work out the principles themselves. That is being done. In cases where it is clear that they intended to hold it in definite shares, the court will give effect to their intention; but when it is not clear to whom the beneficial interest belongs, or in what proportions, then in this matter, as in others, equality is equity.[6]

In the same case Romer L.J. said:

> It seems to me . . . that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes between husband and wife, where the facts, as a whole, permit of its application.[7]

Despite these passages, however, it is submitted that the true test for the courts to apply in a case arising under section 17 is "what did the parties intend at the time?", and that "equality is equity" is at best a rough guide when all else fails. This submission is supported by the cases of *Jones v. Maynard*[8] and *Re Cohen*.[9]

In *Jones v. Maynard* a husband and wife had each had a separate banking account, but when the husband was about to go abroad on war service it was decided to pay both their incomes into the husband's account, on which the wife was given power to draw. From time to time money was withdrawn from this account in order to make investments in the husband's name. When the marriage was dissolved it was held that the wife was entitled to one-half of the balance of the account and one-half of the investments. The judge, Vaisey J., reached this conclusion not on the grounds that equality is equity, but on the grounds that when the joint account was formed it was the intention of the parties that it should form a common pool of their resources, and that both it and the investments made from it should belong to the parties equally. This case should be contrasted with *Re Cohen*. In that case a husband and wife had lived together in a flat which was the freehold property of the wife. The husband died first, and the wife died four months later. After the wife's death some £6,000 in banknotes was found secreted in various parts of the flat. The same judge, Vaisey J., held that this sum belonged entirely to the wife's estate, and reached this conclusion on two grounds:

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6 Id. at 73.
7 Id. at 76.
8 [1951] Ch. 572.
9 [1953] Ch. 88.

first, applying *South Staffordshire Water Co. v. Sharman,*[10] because the freehold of the property on which the notes were found was vested in the wife; second, because the most likely intention of the parties was that the money should be a nest egg for the survivor. Equality, it would seem, is by no means always equity in cases arising under section 17 of the Married Women's Property Act.[11] It is submitted, therefore, that *Rimmer v. Rimmer* is authority for the proposition that section 17 of the Married Women's Property Act confers a wide discretion upon the judge, but that the discretion must be exercised judicially according to the principles laid down by the Court of Appeal in *In re Rogers' Question.*

Support for the view that the discretion conferred upon the judge by section 17 must be exercised judicially and is not as wide as the words "palm tree justice" might suggest can be found in the judgments in *Cobb v. Cobb*[12] and *Silver v. Silver.*[13] In *Cobb v. Cobb* Romer L.J. said:

> Counsel . . . submitted that the court had power under section 17 of the Married Women's Property Act 1882 to establish a title to property contrary to the intention of the parties. . . . I know of no power that the court has under section 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under section 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair.[14]

And in *Silver v. Silver* Parker L.J. said:

> Section 17 of the Act of 1882 leaves a very wide discretion in the court; but . . . it does not entitle the court to make an order which is contrary to any well-established principle of law.[15]

It would seem, therefore, that the discretion conferred by section 17 is far removed from "palm tree justice".

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10 [1896] 2 Q.B. 44.

11 It is true that neither Jones v. Maynard nor Re Cohen were cases arising out of applications under section 17 of the Married Women's Property Act, but it is submitted that the problems and principles involved in those cases are identical with those involved in cases arising under section 17 of the Married Women's Property Act.

12 [1955] 2 All E.R. 696.

13 [1958] 1 All E.R. 523.

14 [1955] 2 All E.R. 696, 700.

15 [1958] 1 All E.R. 523, 527.

A contrary view might appear to have been taken by the Court of Appeal in *Hine v. Hine*.[16] In that case the parties, who were a married couple, bought a house which was conveyed to them jointly. The purchase price was £3,100, of which the wife provided £2,000 out of her own money, the remainder being borrowed on mortgage. The husband paid the mortgage instalments and the rates and provided the housekeeping money. When the marriage broke up, the wife made an application under section 17 of the Married Women's Property Act, and the county court judge ordered that the house be sold and the net proceeds be divided equally between the parties. On appeal the Court of Appeal ordered that the £2,000 provided by the wife should first be restored to her and that the balance of the proceeds of the sale should then be divided equally between the husband and wife, and Lord Denning M.R. said:

> It seems to me that the jurisdiction of the court over family assets under s. 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means, as I understand it, that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case.[17]

However, it should be borne in mind that the Court of Appeal attached great importance to the fact that the reason for the house being in the joint names of the husband and wife was to avoid death duties, this fact showing that the parties intended that the £2,000 should at all times remain the property of the wife. It can be argued, therefore, that the Court of Appeal in *Hine v. Hine* was exercising its discretion under section 17 judicially, according to the principles laid down in *In re Rogers' Question*. Moreover, in the same case, Lord Denning himself qualified his statements on the width of the discretion conferred on the courts by section 17 when he said:

> Two principles have, however, emerged in exercising this discretion. The first is that, when it can clearly be seen that the parties intended that one piece of property or one amount of money should belong to one or the other in any event, that intention should prevail. The second principle only arises where no such intention appears. I venture to state the principle in the words which I used in *Rimmer v. Rimmer*.[18]

Shortly afterwards, in the case of *Wilson v. Wilson*,[19] the Court of

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16 [1962] 3 All E.R. 345.
17 Id. at 347.
18 Ibid., and see the text to n. 6, above.
19 [1963] 2 All E.R. 447.

Appeal, when faced with a similar situation to *Hine v. Hine,* found no difficulty in arriving at an opposite result, holding that section 17 gives the courts no power to override the intentions of the parties at the time a conveyance of property was made, if it is clear what those intentions were and that the rights conferred under the conveyance were intended to continue whatever might happen in the future. Donovan L.J., who was also a member of the Court of Appeal in *Hine v. Hine,* expressed the view that the decision in *Hine v. Hine* was not really in conflict with the passage from the judgment of Romer L.J. in *Cobb v. Cobb* which has already been cited,[20] and Russell L.J. said:

> For my part I venture to think that some of the observations which were made in the judgments in *Hine v. Hine* require to be read with careful regard to their context. I do not think that it would be correct to say that the court has power under section 17 to transcend all rights, legal or equitable, without at least excepting a case such as this where beneficial trusts (whether joint tenancy or undivided shares) are clearly and precisely expressly declared and defined in a form which does not (it seems to me) permit of any qualification by reference to a breakdown in the marriage.[21]

Despite, therefore, the language used by Lord Denning, it is submitted that *Hine v. Hine* is not authority against the proposition that the discretion conferred by section 17 must be exercised judicially in accordance with the principles laid down in *In re Rogers' Question.*

A move towards a wider interpretation of section 17 was made by the Court of Appeal, or at any rate by Lord Denning, in *Appleton v. Appleton.*[22] In that case the parties were married in 1951, and in 1958 the wife bought a house in London out of her own money. The husband, who was a woodcarver by trade, did a great deal of work by way of renovating the house, and in 1961 the wife sold the house and bought a cottage which was in a bad condition, in the country. The husband did about one half of the work of renovation, and there was a shed in the garden in which he did the work by which he earned his living. In 1962 the wife left the husband, and in 1965 she started divorce proceedings. Pending the divorce proceedings, the wife applied under section 17 of the Married Women's Property Act, asking that the cottage be sold. The district registrar ordered that the

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20 See above, at p. 51.
21 [1963] 2 All E.R. 447, 453.
22 [1965] 1 All E.R. 44.

cottage be sold forthwith, and that the whole of the proceeds be paid to the wife. On appeal, the Court of Appeal held that no order for sale should be made, at least not before the divorce proceedings had been heard and determined, and that if and when the cottage was sold the husband should be entitled to so much of the enhanced value of both of the properties as was due to his work and the material he supplied. In the course of a judgment with which the other two members of the Court of Appeal (Pearson and Davies L.JJ.) agreed, Lord Denning M.R. said:

> I prefer to take the simple test: What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?[23]

This case incurred the disapproval of the House of Lords in *National Provincial Bank v. Ainsworth*,[24] when Lord Upjohn declared obiter that it was wrongly decided, and said:

> With all respect to Lord Denning M.R., I am of opinion that he has put a far too wide construction on this section. . . . Depending as they do on a too wide construction of section 17, I would not myself regard the recent cases of *Hine v. Hine* and *Appleton v. Appleton* as correctly decided.[25]

And in the same case Lord Hodson said:

> Questions have arisen in considering the extent of the discretion of the court under section 17 of the Act of 1882, but, broadly speaking, the view is accepted that the court has a discretion to be exercised in the interest of the parties to restrain or postpone the enforcement of legal rights but not to vary agreed or established rights to property in an endeavour to achieve a kind of "palm tree justice".[26]

As *National Provincial Bank v. Ainsworth* was not a case arising out of an application under section 17 of the Married Women's Property Act, the remarks of Lord Hodson and Lord Upjohn which have just been quoted are, although of the greatest persuasive value, obiter dicta, and shortly afterwards Lord Denning chose to ignore them in *Jansen v. Jansen*.[27] In that case the husband was a student with a small income from rents from a leasehold house, and the wife was a social worker earning between £600 and £900 per annum. Out of her own money the wife bought a house which was converted into flats,

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23 Id. at 46.
24 [1965] 2 All E.R. 472.
25 Id. at 486.
26 Id. at 477.
27 [1965] 3 All E.R. 363.

the husband doing the work of the conversion. The parties lived in the ground floor and later the basement of this house, and the husband did not contribute to the housekeeping expenses. The flats were sold at a considerable profit. The parties having split up and divorce proceedings having been started, the wife applied under section 17 of the Married Women's Property Act for a declaration that she was the sole beneficial owner of the house. The registrar found that it would be equitable that the husband should have some interest in the proceeds of the house in return for his work, and awarded him £1,000. The Court of Appeal upheld his decision on appeal by a majority of two to one, and Lord Denning M.R. said:

> I hold that *Appleton v. Appleton* still stands and is authority here. . . . Section 17 is not merely procedural. It gives rights where none before existed, and gives a remedy where before there was none. Where the existing rights can clearly be ascertained, effect must be given to them; but where it is not possible to ascertain them, the court can only do what the statute says that it should do, that is, make such order 'as it thinks fit'.[28]

Of the other two judges in the Court of Appeal, Davies L.J. held that the case before him was distinguishable from *Appleton v. Appleton* on the grounds that in the case before him there had been an agreement between the parties that they should engage in a joint commercial enterprise for the conversion of the house into flats, and that the husband should share in the profits in return for the work he did in converting the house into flats, whereas in *Appleton v. Appleton* there was no such agreement, while Russell L.J. dissented. It is submitted that if the decision in *Jansen v. Jansen* is to be considered as correct, it must be so on the grounds given by Davies L.J., that it is distinguishable on the facts from *Appleton v. Appleton,* and that the words of Lord Denning run contrary not only to the obiter dicta of the House of Lords, but also to a long line of decisions of the Court of Appeal, and do not represent the law.

AUSTRALIA

In *Miller v. Miller*[29] a husband and wife had deposited money from their joint earnings in a joint bank account with the object of eventually purchasing a house as the matrimonial home. The husband also paid into this account some previous savings of his own.

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[28] Id. at 366.
[29] [1946] Q.W.N. 28.

When they separated and became irreconcilable, the wife made an application under section 21 of the Married Women's Property Act 1890 (Queensland)[30] in order to determine the title to the monies in the joint account. Philp J. held that the husband was entitled to the money which he had paid into the account from his previous savings and that the rest of the money should be divided equally between the parties, and said:

> Section 21 of the Married Women's Property Act empowers me to divide the whole fund as I think fit. In my view these words empower me to decide only according to such legal principles as would apply between persons other than spouses and do not empower me to do what I think is "rough justice" between the parties.[31]

Philp J. adhered to this view in the later case of *Buchanan v. Buchanan*,[32] when he said:

> I am unable to hold that the modern authorities justify me in exercising jurisdiction under section 21 to deal with questions of title on any basis other than that which would be accepted in a suit of equity brought by a wife against her husband for a declaration of right. I adhere to what I said in *Miller v. Miller* that section 21 does 'not empower me to do what I may think is "rough justice" between the parties'.
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> There are dicta in *Rimmer v. Rimmer* which suggest that section 21 endows the judge with the unfettered powers of a Cadi, but I think that the decision is no different from what would have been arrived at had the actual question involved fallen for determination in a suit in equity. While I feel that my decision in the instant case will not do "palm tree justice", I get some comfort from the fact that I recognise that a Cadi's foot is no better standard of length than is a Chancellor's, so that adherence to the certain rules of equity will in the long run be best for the community.[33]

A contrary view was taken in Tasmania by Burbury C.J. in *Blair v. Blair*,[34] when he said that *Rimmer v. Rimmer* should be followed in preference to the Queensland decisions. However, he indicated that he was not in favour of true "palm tree justice" when he said:

> Were I exercising a complete and unfettered discretion of the kind that has been suggested in some cases . . . I might well take

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30 This section is the Queensland equivalent of s. 17 of the Married Women's Property Act (U.K.).

31 [1946] Q.W.N. 28.

32 [1954] St.R.Qd. 246.

33 Id. at 248.

34 [1956] Tas. S.R. 146.

into account the years of household drudgery performed by the wife for the benefit of her husband and children, her rearing of the children and the fact that with three children and herself she needs more furniture than the husband does. Were I to approach the problem by taking all these factors into account I would be disposed to give the wife the equivalent of two-thirds of the furniture. But . . . in the case of an unfettered discretion where the judge truly dispenses "palm tree justice", no two Cadis would decide the same way and it would be a case of "quot palmae tot sententiae".[35]

A similar view was taken in Victoria by Smith J. in *Wood v. Wood,*[36] where he said:

> The section . . . confers a real discretion. . . . That discretion has been said to be exercisable in accordance with the principle of "palm tree justice": but that expression may be misleading. As yet the problems involved have only been dealt with in broad outline in the cases, but the views expressed by the members of the Court of Appeal in *Rimmer v. Rimmer* appear to me to indicate that the Judge, in exercising the discretion, should be guided by the following general principles:
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> (a) In so far as an actual intention as to ownership is disclosed effect should be given to it.
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> (b) In so far as no actual intention is disclosed the judge should make such order as is 'fair and just in the special circumstances of the case'.
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> (c) For the purpose of deciding what is fair and just in relation to property acquired during the marriage as the result of payments or efforts by both spouses:
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> (i) The Judge is not bound to apply the presumptions and technical rules by which ownership is ascertained at law or in equity;
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> (ii) he should lean towards equality, particularly in relation to property which the spouses have been using in common, and also in cases in which the contribution by each has been substantial and the proportion appears to have been due to chance circumstances rather than design.
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> I may add that in my view the expression 'fair and just in the special circumstances of the case' has reference primarily, if not exclusively, to circumstances specifically connected with the property in question, and, in particular, to the way in which it was acquired and paid for and the actual or contemplated use of it. The power under the section must be exercised for the purpose for which it was conferred, namely the just settlement of disputed questions as to the title to property. And the section does

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35 Id. at 152.

36 [1956] V.R. 478.

> not, in my view, empower the Judge to vest an interest in property in one spouse merely because it seems fair and just to do so in order to compensate him or her for ill-treatment or misfortune, or to punish the other spouse for misconduct.[37]

The matter was considered by the High Court of Australia in *Wirth v. Wirth*.[38] In that case, a husband and wife, whilst engaged to be married, purchased as joint tenants land on which to build their future matrimonial home. Before their marriage the husband transferred his joint interest to the wife. After many years of married life the husband applied to a judge under section 21 of the Married Women's Property Act 1890 (Queensland) and obtained an order declaring that the wife held the land as trustee for the two of them. On appeal the High Court (Dixon C.J. and McTiernan J., Taylor J. dissenting) held that a resulting trust did not arise from the transfer by the husband to the wife of his half interest in the land. In the course of his judgment Dixon C.J. said:

> In any question between husband and wife as to the title to or possession of property, either party may apply by summons in a summary way to a judge and the judge may make such order with respect to the property and to costs as he thinks fit. The discretion conferred on the judge by the last words doubtless enables him, in granting, withholding or moulding an order, to take into account considerations which may go beyond the strict enforcement of proprietary or possessory rights, but the notion should wholly be rejected that the discretion affects anything more than the summary remedy. The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who do not. It has in the past contained special rules governing the title to property in the case of husband and wife, and the relation is such that it has not been found possible to discard all the rules of the law of property which are founded upon its existence. But the title to property and proprietary rights in the case of married persons rests upon the law and not upon judicial discretion.[39]

And Taylor J. said:

> The foregoing conclusions do not require for their support any assistance from the so-called principle of "palm tree justice" referred to in *Rimmer v. Rimmer* and *Newgrosh v. Newgrosh*. That expression appears to suggest the existence of some special judicial discretion for the determination of matters of this character, but I agree with Dixon C.J. that they must be determined

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37 Id. at 488.
38 (1956) 98 C.L.R. 228.
39 Id. at 231.

> according to ordinary legal principles. It may well be that in cases between husband and wife, where one does not expect to find formal contracts or solemn declarations of trust, the question of beneficial ownership of property used by both in the course of the matrimonial relationship will, almost invariably, fall to be decided by consideration of casual and informal incidents rather than of studied and deliberate pronouncements. But to say this is to say no more than that the circumstances calling for investigation in such cases are special and require to be considered in the light of that fact. This may mean that in such cases it will frequently be difficult to ascertain the facts, but once they are judicially ascertained, either by the acceptance of express evidence, or by inference, or by presumption, the position will be that the rights of the parties must be determined according to ordinary legal principles.[40]

As *Wirth v. Wirth* was decided on the question of whether or not there was a resulting trust, these statements are obiter dicta, but, as Smith J. pointed out in *Ward v. Ward,*[41] very great weight attaches to them. Similar views were expressed obiter by the High Court (Dixon C.J., McTiernan, Fullagar and Windeyer JJ.) in *Martin v. Martin*[42] and by Windeyer J. in *Hepworth v. Hepworth,*[43] and were followed in Western Australia by Hale J. in *Robinson v. Robinson.*[44] In that case the parties, who were husband and wife, lived in a house which was owned by the husband and which had been built by him before the marriage. From time to time the wife went out to work as a waitress, and when she did so she gave all her wages to her husband, much of that money being used to improve the house; when she was not earning she did a considerable amount of manual work to improve the house. When the wife applied under section 17 of the Married Women's Property Act, 1892 (W.A.)[45] for a declaration that she was entitled to an equal halfshare in the land, or alternatively for a declaration that she was entitled to a charge on that land for contribution to its improvement, Hale J. declined to make either declaration. His Honour indicated that he was sympathetic towards the wife, and that had he felt free to do what he thought was fair in the circumstances he would have at any rate granted the second

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40 Id. at 247.
41 [1958] V.L. 68.
42 (1959) 33 A.L.J.R. 362, 366.
43 (1963) 37 A.L.J.R. 222, 225.
44 [1961] W.A.R. 56.
45 This section is the Western Australian equivalent of s. 17 of the Married Women's Property Act (U.K.).

declaration asked for; however, he held that section 17 did not give him such power, and said:

> In these proceedings the Court has no jurisdiction to do more than declare existing proprietary rights; the discretion given by section 17 extends only to the form of relief to be granted once the proprietary rights have been ascertained.[46]

It is clear from these cases that the discretion given by the Australian equivalents of section 17 of the English Act is far removed from "palm tree justice". However, it is submitted that there is little, if any, real difference between the law on this point in England and Australia, and that some of the Australian judges have given too much importance to the use of the words "palm tree justice" in *Newgrosh v. Newgrosh.* The true state of the law it is submitted is as stated by Smith J. in *Wood v. Wood,* a statement which is in no way at variance with the view taken by the English judges, other than Lord Denning, with the dicta of the High Court of Australia, or with the result arrived at by Hale J. in *Robinson v. Robinson.*

CONCLUSION

It is submitted that the dichotomy between the attitudes of the courts of England and Australia is more apparent than real, and it is attributable to the excessive importance which some Australian judges have attached to the use of the words "palm tree justice" in *Newgrosh v. Newgrosh.* The correct interpretation of section 17, it is submitted, is that the section confers a very wide discretion upon the judge, but a discretion which must be exercised judicially in accordance with the principles laid down in *In re Rogers' Question;* i.e., the judge may, for example, decree that property which is in the name of one spouse shall be divided equally between them both, if he thinks that such was the intention of the parties at the time that the property was purchased, but not merely because he considers one spouse to be more deserving than the other or because it would be "unfair" to one spouse not to do so, for such would in truth be "palm tree justice". This, it is submitted, is the law both in Australia and, *pace* Lord Denning, in England.

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46 [1961] W.A.R. 56, 58.

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